NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 644 of 2021
& I.A. No. 2940 of 2021 & I.A. No. 193 of 2022

[Arising out of Order dated 19.05.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No.1, in IA No. 19 of 2021 in CP (IB) No. 1399/MB/2017]

IN THE MATTER OF:

Indian Bank **...Appellant**

Versus

Charu Desai,
Erstwhile Resolution Professional & Chairman of Monitoring Committee of GB Global Ltd. & Anr. **...Respondents**

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. SoviBipneet Singh, Ms. Honey Satpal, Advocates.

For Respondent: Ms. Pooja Mahajan, Ms. Mahima Singh, Ms. Srishti Kapoor, Advocates for R-1.
Mr. Ramji Srinivasan, Senior Advocate with Mr. Piyush Swami, Mr. Dhaval Savla, Mr. Rony O John, Mr. Deep Roy, Advocates for R-2.
Mr. Gopal Jain, Sr. Advocate with Mr. Bishwajit Dubey, Mr. Madhav Kanoria, Mr. Prafful Goyal, Mr. Ashutosh Singh, Ms. Surabhi Khattar, Advocates for R-3.

JUDGMENT
(06th May, 2022)

Ashok Bhushan, J.

1. This Appeal has been filed by Dissenting Financial Creditor challenging the order dated 19.05.2021 passed by the Adjudicating Authority (National

Company Law Tribunal), Mumbai Bench, Court No.-1, whereby the Adjudicating Authority approved the Resolution Plan submitted by the Resolution Applicant- 'Dev Land & Housing Private Limited' (Respondent No.2). The brief facts of the case and sequence of the events necessary to be noticed for deciding this Appeal are:-

Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor- 'GB Global Limited' (formerly Mandhana Industries Limited) was initiated by order dated 29.09.2017. Liquidation value on date of CIRP was found to be INR 307/08 Crores. On 30.11.2018, the Resolution Plan of one 'Formation Textiles LLC' ("FTL") in respect of the Corporate Debtor was approved. FTL took over the management and control of the affairs of the Corporate Debtor on 31.01.2019. However, after running the affairs of the Corporate Debtor for several months, it could not implement the Resolution Plan. On 05.12.2019, the Adjudicating Authority passed an order directing handing over of possession of the Corporate Debtor to the Committee of Creditors (CoC) which in turn will be handed over to the Resolution Professional of the Corporate Debtor. On 08.01.2020, FTL handed over the possession of the Corporate Debtor to the CoC and the Respondent No.1. On 05.02.2020, the Adjudicating Authority allowed the Respondent No.1 to invite fresh Resolution Plans from Prospective Resolution Applicants. During 32nd CoC meeting held on 27.08.2020, CoC members unanimously agreed that a more recent valuation report should be obtained by the Resolution Professional and would be used for all purposes in connection with the CIRP of the

Corporate Debtor. The Resolution Professional obtained a fresh valuation report as on 31.07.2020 which liquidation valuation came as INR 184.93 Crores. The Resolution Plan dated 10.09.2020 was received from the Respondent No.2. In the 38th CoC meeting held on 07.12.2020, discussion on the revised Resolution Plan was held and decided that final revised plan and distribution mechanism shall be put for the voting. Pursuant to the above Resolution Plan of Respondent No.2 was put to e-voting from 09.12.2022 to 31.12.2020 and was approved by 67.01% voting share of the CoC. The Appellant- Indian Bank having 11.11% voting share in the CoC had cast a dissenting vote on the Resolution Plan of Respondent No.2. Pursuant to the CoC's approval, the Resolution Plan was placed before the Adjudicating Authority by the Resolution Professional by I.A No. 19 of 2021. On 04.01.2021, the Appellant raised certain queries regarding the plan value calculated by the Respondent No.1 in the 39th CoC meeting held on 01.01.2021. The Respondent No.1 by e-mail dated 08.01.2021 informed the Appellant that the value payable to the Dissenting Financial Creditors will be calculated on the assumption of the liquidation cost and the same will be in accordance to Section 53(1) of the Code. On 19.05.2021, the Adjudicating Authority approved the Resolution Plan. Aggrieved by the value assigned to the Appellant in the Resolution Plan, this Appeal has been filed. In the Appeal, following are reliefs sought:-

> *"a. That this Hon'ble Tribunal be pleased to consider the legality and validity of the impugned order dated 19th May, 2021 providing wrong Liquidation Value to the dissenting financial creditors;*

b. That this Hon'ble Tribunal be pleased to declare that computation and disbursal of liquidation value to Appellant pursuant to the order dated 19th May, 2021 contrary to the provision of Section 30(2) of the Code;
c. Pending the hearing and final disposal of the present Appeal, the effect and implementation and execution of the impugned order dated 19th May 2021 passed by the Hon'ble Adjudicating Authority, Mumbai Bench in I.A. No. 19/2021 filed in the Company Petition No. 1399/2017 kindly be stayed;
d. Declare the second valuation of the Corporate Debtor as untenable in the eyes of law;
e. Any other just and equitable order in the interest of justice may kindly be passed."

2. We have heard Shri Abhijeet Sinha, Learned Counsel for the Appellant, Ms. Pooja Mahajan, Learned Counsel for Respondent No.1, Shri Ramji Srinivasan, Learned Senior Counsel for Respondent No.2 and Shri Gopal Jain, Learned Senior Counsel for Respondent No.3.

3. Shri Abhijeet Sinha, Learned Counsel for the Appellant submits that there is no provision in the Code which empowers the Respondent No.1 to carry out a fresh valuation process on the basis of which the fair value and liquidation value can be determined. It is submitted that in terms of the valuation of the Corporate Debtor as on 29.09.2017, liquidation value came to be INR 307.08 Crores and on 31.07.2020, the liquidation value of the Corporate Debtor was computed at INR 184.92 Crores, thereby liquidation value of the Corporate Debtor has been considerably reduced. The liquidation value attributable to the Appellant was reduced from INR 87.6 Crores to 50.51 Crores. The liquidation value is defined in the Code. The determination of fair value and liquidation value is provided under Regulation 35 of the Insolvency

and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in pursuance of Regulation 35, the liquidation value was obtained as on 29.09.2017, there was no occasion for embarking upon fresh liquidation valuation which is not in accordance with law. It is further submitted that in the liquidation value assigned to the Appellant, the CIRP costs, liquidation cost and estimated liquidation costs have been illegally deducted which has further reduced liquidation value of the Appellant. The Appellant's entitlement being a Dissenting Financial Creditor is as per Section 30(2) (b) (ii). The Appellant in the Resolution Plan has not been given the amount to which he was entitled by virtue of Section 30(2)(b)(ii). The Adjudicating Authority failed to appreciate that when Resolution Plan provides for priority payment of CIRP costs in full from the funds infused by Respondent No.2, then the liquidation value attributable to Dissenting Financial Creditor could not be arrived by deducting the CIRP costs once again from the liquidation value to be distributed to the Dissenting Financial Creditors. The Resolution Professional does not have any authority to alter the liquidation value as on Insolvency Commencement Date by reducing it further with the CIRP costs and liquidation cost. The distribution of the amount is neither fair nor equitable to the Dissenting Financial Creditors. The Dissenting Financial Creditors are entitled to liquidation value as arrived by valuers and shared to CoC in terms of Regulation 35 of CIRP Regulations, 2016.

4. Ms. Pooja Mahajan, Learned Counsel appearing for Respondent No.1 refuting the submission of Learned Counsel for the Appellant contends that

there is no error in obtaining the fresh liquidation value consequent to CoC's 32nd meeting held on 27.08.2020. The CoC deliberated the issue and unanimously resolved to obtain a more recent valuation report. The Appellant-Indian Bank was present in the 32nd CoC meeting and did not object to fresh valuation which was decided to be taken. In the 36th CoC meeting held on 20.10.2020, a query was raised on distribution to Dissenting Financial Creditors, to which Resolution Professional had clarified that in such an event, the lender would be entitled to their share of the net liquidation value which shall be arrived after providing adjustment for CIRP and estimated liquidation cost. The minutes of the said meeting were circulated but no objection or concerns were raised by the Appellant. The Resolution Plan fully complies with the provisions of Section 30(2)(b). In 39th CoC meeting held on 01.01.2021, revised plan value lender wise distribution was placed. The CoC had approved the Resolution Plan as well as the distribution of lenders of the amount proposed by the Resolution Applicant which was approved by 67.01% voting share. The Appellant cannot be allowed to question the commercial wisdom of the CoC which approved the plan with requisite voting percentage.

5. The submission of the Counsel for the Appellant that in the liquidation value as per Section 53 of the Code, there should be no deduction of the CIRP costs and estimated liquidation cost, is without any substance. The aforesaid was clarified in the CoC meeting held on 07.12.2020 to which no objection was raised by the Appellant. It is a commercial wisdom of the CoC as to what amount is to be distributed to different category of lenders. The amount

allocated to the Appellant under the plan is in conformity with provisions of Section 30(2)(b). The amount offered to the Appellant is not less than what he is entitled under Section 53 of the Code.

6. Objection regarding fresh valuation is agitated for the first time in this Appeal. There was rationale for second valuation since the earlier CIRP initiated on 29.09.2017 came to an end after approval of the Resolution Plan but due to non-implementation of the plan by FTL, the CIRP was again revived. The FTL ran the Corporate Debtor for almost a year. Due to the above fact, a more recent liquidation valuation was necessary for which CoC resolved. Even in the joint lender's meeting held on 07.12.2020, the Appellant has stated that recovery available to lenders should not be less than estimated value of the liquidation value. Thus, the fresh valuation was fully agreed by all and Appellant cannot be heard in objecting the fresh valuation.

7. Shri Ramji Srinivasan, Learned Senior Counsel appearing for the Respondent No.2 submitted that the issue of conducting a fresh valuation of the Corporate Debtor was discussed and deliberated in the CoC meeting held on 27.08.2020 as well as on 34th CoC meeting held on 22.09.2020. In 36th CoC meeting held on 20.10.2020, Resolution Professional provided lender wise indicative distribution of the proceeds in case of liquidation and mentioned that net liquidation value shall be arrived at after providing adjustment of for CIRP costs and liquidation cost. The CoC having approved the Resolution Plan with requisite majority vote, Appellant cannot be allowed to question the Resolution

Plan or the commercial wisdom of the CoC. The amount payable to the Dissenting Financial Creditors is more of an issue of distribution which is determined by the CoC in exercise of its commercial wisdom. Distribution mechanism having been approved by the requisite majority of the CoC that cannot be allowed to be questioned by the Appellant.

8. Shri Gopal Jain, Learned Senior Counsel appearing for Respondent No.3 submits that the Appellant having unequivocally agreed to conduct a fresh valuation and to the liquidation value, it cannot be heard in objecting the fresh valuation obtained as on 31.07.2020. The issue of distribution mechanism was discussed in 36th CoC meeting and the meetings of the joint lenders committee. During the CoC meeting, there is no objection of any kind raised by the Appellant. It is for the first time by e-mail dated 04.01.2021, the Appellant raised concern before the Resolution Professional in relation to value payable to it. Fresh valuation was conducted to enable revival of the Corporate Debtor. The Dissenting Financial Creditor is only entitled to liquidation value minus CIRP costs and estimated liquidation costs. In any case, on monetary terms, Appellant is making the highest recovery under the Resolution Plan.

9. We have considered the submissions of the parties and perused the record.

10. From the submission of the counsel for the parties and materials on record, following are the questions which arise for consideration in this Appeal:

(i) Whether the decision of the CoC taken in 32nd CoC meeting held on 27.08.2020 to obtain a more recent valuation report and reliance on such valuation report as on 31.07.2020 is contrary to the provisions of the Code and Regulations framed thereunder?

(ii) Whether the liquidation value ascribed by Resolution Professional and CoC to the Appellant as per Section 53 of the Code violates any provisions of the Code or Regulations?

(iii) Whether the allocation of the amount to the Appellant, a Dissenting Financial Creditor is not in accordance with Section 30(2)(b) of the Code?

11. The questions which have arisen in the present Appeal being inter-connected are taken together.

12. Regulation 35 of the CIRP Regulations, 2016 provides for 'fair value and liquidation value'. Regulation 35 is as follows:-

> *"**35. Fair value and Liquidation value.***
> *(1) Fair value and liquidation value shall be determined in the following manner:-*
> *(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;*
> *(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another*

registered valuer who shall submit an estimate of the value computed in the same manner; and
(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29:

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value."

13. On initiation of the CIRP on 29.09.2017, the liquidation value was obtained as per Regulation 35 estimated INR 307.08 Crores as on 29.09.2017. The second valuation report was obtained as on 31.07.2020 which has given the liquidation value INR 184.93 Crores. The emphatic attack by Learned Counsel for the Appellant is on the second valuation exercise. It is submitted that the liquidation value is on the date of initiation of CIRP and there can be no liquidation value in between. The facts of the present case, as noticed above, indicate that CIRP which commenced on 29.09.2017 came to an end by approval of the Resolution Plan by FTL on 30.11.2018, after that FTL had took over the management and control of the affairs of the Corporate Debtor and it ran the Corporate Debtor for almost a year. The Resolution Plan could not be implemented by FTL and the Adjudicating Authority by an order dated 05.12.2019 directed the FTL to hand over the possession of the Corporate

Debtor to the CoC and the Resolution Professional which ultimately was handed over on 08.01.2020. The present is a case where the CIRP which was initiated on 29.09.2017, a Resolution Plan came to be approved and after approving of the Resolution Plan under Section 31(3), the Moratorium came to an end and Resolution Professional to forward all records relating to conduct of CIRP and the plan to Board. It was due to failure of the implementation of the Resolution Plan, the Adjudicating Authority directed the Resolution Applicant to handover back the possession to the CoC and then the Adjudicating Authority directed to invite fresh Resolution Plans from Prospective Resolution Applicants. In the above circumstances, in 32nd CoC meeting held on 27.08.2020 considered above inviting fresh valuation. It is useful to notice the relevant discussion.

14. In the 35th meeting of the CoC held on 07.10.2020, the fresh valuation report as on 31.07.2020 was noticed and following was recorded in Agenda Item No.6:-

> *"**Agenda item No.6***
> ***To take note of the Fair Value and Liquidation Value of the Corporate Debtor complied by the appointed valuers:***
> *As was unanimously decided, after a detailed discussion and deliberation, by the members of the CoC in the 32nd CoC meeting, a more recent valuation report as obtained by the RP from the registered valuers would be used and referred to for all purposes in connection with the corporate insolvency resolution process of the Corporate Debtor as the same shall be more representative of the current fair and liquidation value of the Corporate Debtor.*

RP team informed the forum that pursuant to the receipt of confidentiality undertakings from CoC members, recent valuation reports received from the valuers have already been emailed to the members alongwith summary of fair value and liquidation value of the Corporate Debtor as on 31st July 2020. The summary is given below:

Particulars	Kakode & Associates	Garg & Associates	Average Value
Liquidation Value	179.77	190.88	184.92
Fair Value	394.48	364.82	379.65

15. It is further relevant to note that in the 34th meeting of the CoC held on 22.09.2020 with regard to fair and liquidation values, Application filed by Resolution Professional was noticed. In Agenda Item No.7, following was recorded:-

*"**Agenda item No.67***
Resolution Process timelines and next steps:
xxx xxx xxx
Some members were of the opinion that the fair and liquidation values should be released now and enquired whether revised fair/ liquidation valuation is to be considered or fair/liquidation valuation as on insolvency commencement dated i.e. 29th September 2017 should be considered by the CoC for reference and evaluation purposes. The RP informed the forum that while fair/liquidation values as on insolvency commencement date are available, however, given deterioration in business performance of the Corporate Debtor over a significant period of time and the additional disruptions on account of the Covid-19 pandemic, the earlier valuation reports will not reflect such value erosion. The RP further reminded the forum that considering these aspects, it was agreed in the 32nd CoC meeting that a more recent valuation report would be more representative of the current fair and liquidation value of the Corporate Debtor and such valuation reports will be used for and referred to for all purposes in connection with the corporate

insolvency resolution process of the Corporate Debtor. Representatives of legal counsel of CoC also mentioned that in their understanding, in a few cases, such as in the case of CIRP of Amtek Auto which E&Y team had confirmed earlier, the CoC had agreed to revise liquidation valuation to a more recent date which was then used as base for all CIRP processes.
The RP further stated that since confidentially undertakings for disclosing fair and liquidation value were pending from majority of CoC members and the resolution plan was still being evaluated for compliance with the provisions of the Code by the RP, the said values could not be revealed until the undertakings from all CoC members were received."

16. It is noticed that in all the aforesaid CoC meetings, the Indian Bank was present which is recorded in the minutes. However, no objection was ever raised by the Indian Bank regarding fresh valuation. The decision which has been noticed in the minutes, as extracted above, clearly gives reason for fresh valuation which has become necessary. The fresh valuation which was obtained by the CoC was for the purpose of informing it of the current fair value and liquidation value of the assets to take a prudent commercial decision on a Resolution Plan. It is true that the liquidation value and fair value as provided under Regulation 35 of the CIRP Regulations have to be obtained as per Regulations but under the provisions of the Code or the Regulations, there is no prohibition to obtain any further valuation looking to the necessity which may have arisen due to any cogent reason. For example, in the present case, earlier CIRP was completed by approval of Resolution Plan but Resolution Applicant could not implement the plan, hence, fresh process was started for inviting a fresh Resolution Plan. The earlier Resolution Applicant has run the

Corporate Debtor for almost a year. It was noted by the CoC that there has been significant fall in the book value of the Corporate Debtor in the previous years. We, thus, are of the view that the decision of CoC to obtain a fresh valuation of the Corporate Debtor as on 31.07.2020 could not be faulted nor it can be said to have contravened any provisions of the Code or Regulations. In this context, we may refer to judgment of this Tribunal in Company Appeal (AT) (Ins.) No. 422 of 2021 ***"M/s. Rana Saria Poly Pack Pvt. Ltd. vs. Uniworld Sugars Pvt. Ltd. & Anr."***, in which case, the issue of more than one valuation obtained by the CoC came for consideration. While considering the question of fresh valuation and after noticing the relevant provisions of Code and Regulations, this Appellate Tribunal observed that there is no bar in IBC provisions for CoC to call for fresh valuation. In paragraph 23, following has been observed:

> *"23. We note that under the CIRP Regulations no power has been given to CoC to call for any valuation of fair and liquidation value though we don't think there is any bar under IBC provisions for the CoC to call for a fresh valuation report".*

17. We note that under the CIRP Regulations, no power has been given to CoC to call for any valuation of fair and liquidation value though we don't think that there is any bar under IBC provisions for the CoC to call for a fresh valuation report. We, thus, do not find any substance in the submission of the Counsel for the Appellant that fresh liquidation value could not have been obtained by CoC and we further do not accept the submission of the Counsel

for the Appellant that distribution consequent to liquidation value as on 31.07.2020 is not in accordance with law.

18. The second limb of argument which has been advanced by the Counsel for the Appellant is regarding the liquidation value ascribed to the Appellant in the Resolution Plan as well as by the CoC. Submission is that the value ascribed is in accordance with Section 30(2)(b) r/w Section 23. Section 30(2)(b) which was inserted by Act 26 of 2019 w.e.f. 16.08.2019 is as follows:

> ***30. Submission of resolution plan. -.....*** *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -*
> *xxx xxx xxx*
> *(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-*
> *(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*
> *(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.*
> *Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.*
> *Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy*

Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan"

19. The provision which has been now incorporated by the Amendment Act of 2019 by sub-clause (b) was substituted is about the payment of debts of Financial Creditors who do not vote in favour of the Resolution Plan. The amendment which has been introduced by Amendment Act, 2019 came to be considered by the Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors.- (2020) 8 SCC 531"***. In paragraph 128, following has been laid down:

*"**128.** When it comes to the validity of the substitution of Section 30(2) (b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-*

clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder."

20. The Hon'ble Supreme Court had elaborately dealt with the right of secured and unsecured creditors, the equality principle enshrined in the Code. Further, in paragraph 131 of the judgment, the Hon'ble Supreme Court noticed the flexibility given to the CoC to approve or not to approve the Resolution Plan. In paragraph 131 of the judgment, following has been laid down:

*"**131.** The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC report, 2015 (see paragraph 33 of this judgment). Also, the discretion given to the*

> *Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm."*

21. Applicability of Section 53 in reference to Section 30(2)(b) also was noticed in paragraph 145 of the judgment in following words:

> *"**145.** The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(b) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself."*

22. We may also notice the judgment of the Hon'ble Supreme Court in "***K. Sashidhar v. Indian Overseas Bank*, (2019) 12 SCC 150".** In K. Sashidhar, the Hon'ble Supreme Court had occasion to consider the provisions of Section 30 of the Code. While considering the provision of Section 30(4), following was held in paragraph 68:-

> *"**68.** Suffice it to observe that the amended provision merely restates as to what the financial*

creditors are expected to bear in mind whilst expressing their choice during consideration of the proposal for approval of a resolution plan. No more and no less. Indubitably, the legislature has consciously not provided for a ground to challenge the justness of the "commercial decision" expressed by the financial creditors- be it to approve or reject the resolution plan. The opinion so expressed by voting is non-justiciable. Further, in the present cases, there is nothing to indicate as to which other requirements specified by the Board at the relevant time have not been fulfilled by the dissenting financial creditors. As noted earlier, the Board established under Section 188 of the I&B Code can perform powers and functions specified in Section 196 of the I&B code. That does not empower the Board to specify requirements for exercising commercial decisions by the financial creditors in the matters of approval of the resolution plan or liquidation process. Viewed thus, the amendment under consideration does not take the matter any further."

23. One more decision needs to be noticed which has been heavily relied by Counsel for the Respondent i.e. ***"Indian Resurgence ARC Private Limited v. M/s. Amit Metaliks Limited & Anr.- Civil Appeal No. 1700 of 2021"*** decided on 13.05.2021. The above was a case where Dissenting Financial Creditors had challenged the approved Resolution Plan by the Adjudicating Authority. One of the submissions was that the Financial Creditor has emphasised on the value of its security and contended that allocation in the Resolution Plan to the Financial Creditors a higher amount to be paid it with reference to the value of the security interest.

24. The judgment of the Hon'ble Supreme Court in ***"Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India)***

Ltd. and Others, 2021 SCC OnLine SC 253" has been noticed in paragraph 12 of the above judgment, which is to the following effect:-

> *"**12.** As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority. In the case of Jaypee Kensington (supra), this Court, after taking note of the previous decisions in Essar Steel(supra) as also in K. Sashidhar v. Indian Overseas Bank and Ors.: (2019) 12 SCC 150 and Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.: (2020) 11 SCC 467, summarised the principles as follows:-*
>
> > *"77. In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval.*
> >
> > *77.1. Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor*

after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

77.2. The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority; or the resolution plan does not comply with any other criteria specified by the Board.

77.3. The material propositions laid down in Essar Steel (supra) on the extent of judicial review are that the Adjudicating Authority would see if CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. And, if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept in view, it may send the resolution plan back to the Committee of Creditors for resubmission after satisfying the parameters. Then, as observed in Maharashtra Seamless Ltd. (supra), there is no scope for the Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors."

25. In paragraph 13, the Hon'ble Supreme Court further held that the process of judicial review cannot be stretched to carry out quantitative analysis

qua a particular creditor or any stakeholder. In paragraph 13, following was laid down:-

> *"**13.** It needs hardly any elaboration that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal."*

26. Further, the Hon'ble Supreme Court categorically held that what amount is to be paid to different classes or subclasses of creditors is essentially the commercial wisdom of the Committee of Creditors and Appellant cannot suggest a higher amount to be paid to it with reference to the value of its security interest. In paragraphs 17, 19, 20 & 21, following was laid down:-

> *"**17.** Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.*
>
> ***19.** In Jaypee Kensington(supra), this Court repeatedly made it clear that a dissenting financial creditor would be receiving the payment of the amount as per his entitlement; and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It has never been laid down that if a dissenting financial creditor is having a security available with him, he would be entitled to enforce*

the entire of security interest or to receive the entire value of the security available with him. It is but obvious that his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him.

20. *The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.*

21. *The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further exposited in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors."*

27. The Judgment of the Hon'ble Supreme Court, in the above case, is that when the extent of value received by the creditors under Section 53 is given which is in the same proportion and percentage as provided to the other Financial Creditors, the challenge is to be repelled.

28. When we look into the order of the Adjudicating Authority where the Adjudicating Authority in paragraph (D) has noted the summary of financial proposal. In paragraph D (iv), following has been noticed by the Adjudicating Authority:-

"(iv) Pay-out proposed for financial creditors as per clause 12.5.2 of the Resolution Plan is as under:-

Financial Creditor	**Category**	**Admitted Amount**	**Allotted Amount**	**%**
Secured Financial Creditors	Dissenting	389.63	72.41	19%
	Assenting	774.14	78.59	10%
Unsecured financial Creditors	Dissenting	NA	NA	0%
	Assenting	17.17	-	0%
Total		1180.95	151.00	13%

29. All dissenting creditors have been allotted amount of 19% of their admitted amount without there being any discrimination in the dissenting creditors. It is relevant to notice that the Appellant is not the only dissenting creditor. The Appellant himself has brought on the record minutes of 39th meeting of the CoC held on 01.01.2021 which indicate that apart from Indian Bank, Bank of India, Union Bank of India, Punjab National Bank, Karur Vyasa Bank and Canara Bank were also dissenting creditors. All dissenting creditors have been provided same percentage as against the admitted claim. In the 39th CoC meeting held on 01.01.2021, where the voting result of the Agenda on 38th meeting of the CoC came for consideration. The final indicative lender wise distribution presented were noticed in the minutes. The proposed plan value distribution to the Appellant was INR 40.39 Crores whereas indicative plan value distribution was INR 42 Crores.

30. The detailed calculation sheet of distribution value of the creditors has been brought on the record by the Appellant as Annexure A-13 which under

Scenario-1 (when the Corporate Debtor goes into liquidation) the estimated value INR 42 Crores has been noted as the liquidation value of the Appellant.

31. Shri Abhijeet Sinha, Learned Counsel for the Appellant has also emphasised that in the liquidation value to which the Appellant was entitled as per Section 53, there has been further deduction of the CIRP costs and estimated liquidation value. The submission is that when no liquidation costs have been incurred since liquidation has not actually taken place, there is no question of deduction of CIRP costs and estimated liquidation cost.

32. With regard to the above submission, suffice it to note that distribution to dissenting Financial Creditors and other Financial Creditors have been discussed, deliberated and approved by the CoC, the distribution which has been approved for payment to the dissenting Financial Creditors was discussed and deliberated by CoC. What the Financial Creditors shall be paid was the query raised and discussed and in the meeting of the joint lenders held on 07.12.2020, the revised distribution after considering increase of Rs.6 Crores by Resolution Applicant was noticed. In the joint lenders' forum meeting, Indian Bank expressed its agreement to distribution as per revised scenario-1 under which the Indian Bank was proposed INR 40.39 Crores. In the CoC meeting held on same date i.e. 07.12.2020, Agenda Item No.6 which was to finalise the Resolution Plan for distribution where details of allocation as per each lenders liquidation value was placed. Following extract of the minutes of Agenda Item No.6 is to the following effect:-

*"**Agenda Item No.6***

To finalise the Resolution Plan value distribution:

The representative of Bank of Baroda ("BOB") apprised the RP that pursuant to the discussions held in the Joint Lender's Meeting ('JLM') dated 07th December 2020, pertaining to the distribution mechanism, the forum deliberated and discussed various scenarios of distribution. Based on oral discussions with the Resolution Applicant, it is understood that the Resolution Applicant has proposed to increase the financial proposal to FCs by INR 6 crores from INR 145 crores to INR 151 crores. The said incremental amount is proposed to be distributed to better the recoveries of only those members of the CoC (State Bank of India, Saraswat Bank, Bank of India, Union Bank of India and SIDBI) who were otherwise being affected in the event Scenario 1 is agreed to by the CoC and accordingly the increased amount was proposed to be distributed only among those affected CoC members as per Revised Scenario 1 which has been placed before the CoC.

Name of Bank	**Scenario 1 (Plan Value being split in the ratio of each lender's individual LV)**	**Revised Scenario 1 Payout to CoC members**
Bank of Baroda	26.77	26.77
State Bank of India	12.87	16.87
Saraswat Bank	9.50	10.20
Bank of India	8.85	9.45
Indian Bank	40.39	40.39
Union Bank of India	3.69	4.19
Axis Bank	19.57	19.57
Punjab National Bank	11.20	11.20
Indian Overseas Bank	3.51	3.51
L&T Finance	2.93	2.93
Karur Vysya Bank	2.81	2.81
Canara Bank	2.70	2.70
SIDBI	0.08	0.28
ICICI Bank	0.12	0.12
Total secured FCs	**145.00**	**151.00**
Balkrishna Industries Ltd.	-	-
Total FCs	**145.00**	**151.00**

The representatives of BOB further stated that since the distribution as per Revised Scenario 1 is

> *almost at par with respective liquidation values due to the lenders and certainly in recoveries is preferred, it is imperative that all members finalise the distribution mechanism to expedite the resolution process. While, majority of the CoC members agreed to Revised Scenario 1, subject to approval from their internal committees, representatives of State Bank of India ("SBI") and Saraswat Bank expressed their concern/ disagreement on the distribution mechanism on account of lower recoveries as per the said scenario."*

33. When the distribution is ultimately approved by e-voting by the CoC, the approved distribution value to each lender's including the dissenting Financial Creditors, is taken by the CoC in its commercial wisdom, which cannot be interfered with by the Adjudicating Authority or by this Appellate Tribunal since it has not been placed before us that the approval of the Resolution Plan by the CoC and the Adjudicating Authority violates any statutory provision. We are satisfied that the allocation to the Appellant, a dissenting Financial Creditor, is not in contravention of Section 30(2)(b) (ii) r/w Section 23. As noticed above, in ***M/s. Amit Metaliks Limited*** (supra), the Hon'ble Supreme Court has dismissed the Appeal by a dissenting Financial Creditor questioning the allocation to a dissenting Financial Creditor. We have already noticed above the law laid down by the Hon'ble Supreme Court where the Hon'ble Supreme Court has categorically held that what amount is to be paid to different classes or subclasses of creditors in accordance with the provisions of the Code and to a dissenting secured creditor is essentially the commercial wisdom of the CoC. Following law laid down by the Hon'ble Supreme Court, as noted above, we do not find any good ground to interfere with the order of the Adjudicating

Authority approving the Resolution Plan. There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Shreesha Merla]
Member (Technical)

New Delhi
Anjali