

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.405 of 2023

(Arising out of Order dated 01.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-II, Kolkata in I.A. (IB) No.471/KB/2022 in C.P. (IB) No.2078/KB/2029)

IN THE MATTER OF:

ICICI Bank Limited
Through its Authorized Signatory
Mr. Shashank Raj
Address: ICICI Bank Tower
Near Chakli Circle, Old Padra Road Vadodara
Gujarat 390007

Also at: ICICI Bank Tower, NBCC Place
Bisham Pitamah Marg
Pragati Vihar, New Delhi 110003

... Appellant

Vs

1. BKM Industries Limited
Through its Resolution Professional
Mr. Pratim Bayal
Address: 18/1 Tarapukur Main Road
Ghosh Para, Agarpara
Kolkata, West Bengal - 700109

2. Committee of Creditors of
BKM Industries Limited
Led by State Bank of India
Address: Samriddhi Bhawan,
1 Strand Road
Kolkata, West Bengal - 700 001.

... Respondents

Present:

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Udit Mendiratta, Ms. Niharika Sharma, Mr. Shivkrit Rai, Mr. Rajat Sinha, Mr. Tejas D. Jha, Advocates

For Respondents: Mr. Avrojoyoti Chatterjee, Mr. Rajiv S. Roy, Mr. Siddharth Dhingra, Mr. Zoyeb Khan, Ms. Jayasree Saha, Mr. Shankar Mali, Advocates for R-2/CoC

Mr. Rishav Banerjee, Mr. Rajarshi Banerjee, Mr. Shambo Nandy, Advocates for R-1/RP

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by ICICI Bank Ltd., a Financial Creditor of the Corporate Debtor – BKM Industries Limited has been filed challenging the order dated 01.03.2023 in IA (IB) No.471/KB/2022. In the said IA, the Applicant has sought direction to the Resolution Professional (“**RP**”) to take into account the priority of distribution of the Plan realizations and taking into account the priority assigned to the dissenting Financial Creditor, who are also secured creditors. The Adjudicating Authority rejected the IA by the impugned order. Aggrieved by the order of rejection, this Appeal has been filed.

2. Brief facts of the case necessary for deciding this Appeal are:
- (i) The Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor was initiated by order dated 30.12.2020 in Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**IBC**”) filed by M/s Trimurti Associates Private Limited.
 - (ii) The Appellant submitted its claim in Form-C for an amount of Rs.15,52,73,428/- (comprising of Rs.13.04 crores under the rupee term loan and Rs.2.48 crores under the working capital loan). The amount claimed by the Appellant in Form-C was

admitted by the RP. The Appellant was also given a seat in the Committee of Creditors (“**CoC**”).

- (iii) A Resolution Plan was submitted by the Resolution Applicant. In the Resolution Plan submitted by Uniglobal Papers Private Limited, the Resolution Applicant had proposed that amount proposed for payment towards secured creditors shall be distributed amongst them based on proportion of their admitted claim.
- (iv) In the 14th CoC Meeting held on 02.05.2022, Members of the CoC had discussion on distribution of proceeds under the received Resolution Plan, wherein the Appellant mentioned that any distribution to be made to secured creditors must be done keeping in mind the security interest. The Members of the CoC requested the RP to assist the CoC with a proposed distribution amount as per security interest and provide the information with disclaimer that such calculation would be suggestive only. The RP on 06.05.2022 addressed an email to all the Financial Creditors of the Corporate Debtor, providing the calculation methodology and the lender-wise proportional share in the liquidation value of the Corporate Debtor for the purposes of distribution as well as proportionate share as per security interest. The Appellant raised objection to the distribution methodology circulated by RP and claimed

distribution as per security interest. The Appellant had security interest in immovable and movable property of the Corporate Debtor situated at two places.

- (v) On 10.05.2022, the 15th CoC Meeting was held where RP proposed the Agenda for distribution of the amount offered to secured creditors either on the basis of outstanding debt or on the basis of security interest available with the respective secured lenders. The Appellant objected to the methodology of the calculation. The Agenda Item was put to vote. The CoC with 78.79% vote share voted in favour of distribution as per outstanding debt/ voting share. The Appellant vide email dated 10.05.2022 again objected to it.
- (vi) On 17.05.2022, in the 16th CoC Meeting, the CoC approved the Resolution Plan of Uniglobal Papers Private Limited, which was approved with vote share of 78.79%. The Resolution Professional filed an Application for approval of the Resolution Plan.
- (vii) The Appellant filed an IA No.471 of 2022 before the Adjudicating Authority on 21.05.2022 wherein the Applicant prayed for following reliefs:

“(a) this Learned Adjudicating Authority be pleased to pass an order directing the Resolution Professional to take into account the priority on security interest of the financial

creditors while determining the calculation methodology of the Creditors' proportional share in the liquidation value of the Corporate Debtor for the purpose of distribution under Section 53(1) of the Code;

b) stay of a further proceedings in the instant corporate insolvency resolution process, pending disposal of the instant application;

c) Ad-interim orders in terms of prayer (b) hereinabove;

d) Any further order or orders and/ or direction or directions as may deem fit and proper”

(viii) The Application filed by the Appellant was opposed by the RP as well as Successful Resolution Applicant. The Adjudicating Authority after hearing the parties, by the impugned order has rejected the Application. The Adjudicating Authority placed reliance on the judgment of the Hon'ble Supreme Court in ***India Resurgence ARC Private v. Amit Metaliks Limited and Anr. (2021) SCC OnLine SC 409***. Aggrieved by the said order, this Appeal has been filed.

3. We have heard Shri Krishnendu Datta, learned Senior Counsel appearing for the Appellant. Shri Rishav Banerjee, learned Counsel appearing for Respondent No.1/RP and Shri Avrojyoti Chatterjee, learned Counsel appearing for CoC.

4. Shri Krishnendu Datta, learned Senior Counsel for the Appellant submits that Appellant has first charge on the assets of the Corporate

Debtor and as per liquidation value of the assets, on which the Appellant has first charge, the Appellant was entitled to receive the liquidation value as per security interest. It is submitted that the Appellant being dissenting Financial Creditor is entitled to receive liquidation value by virtue of Section 30, sub-section (2) (b) of the IBC. The Appellant's entire claim of Rs.15.52 crores having been admitted, the proposal of RP to make payment of Rs.4.54 crores to the Appellant is not as per liquidation value attributable to the Appellant. The Appellant having first charge holder in respect of the secured assets, and the liquidation value of such assets being Rs.24.5 crores, the Appellant is entitled to receive an amount of Rs.13.52 crores. The RP has failed to correctly and appropriately calculate the Appellant's proportionate share of the Corporate Debtor's liquidation value. The Adjudicating Authority did not take into consideration the Appellant's priority of charge in the security interest or the value of such security interest. The Appellant's entitlement as a dissenting Financial Creditor cannot be curtailed by exercise of commercial wisdom by the CoC.

5. The learned Counsel for the RP, Shri Rishav Banerjee refuting the submissions of learned Counsel for the Appellant submits that distribution methodology has been approved by the CoC in its 15th Meeting held on 10.05.2022. The distribution methodology having been approved, which is as per Resolution Plan submitted by Uniglobal Papers Private Limited, Appellant has no right to challenge the decision of the CoC approving the distribution methodology. The statutory entitlement of the dissenting Financial Creditor is regulated by Section 30, sub-section (2)(b) and the

Appellant is only entitled for an amount which it could have received in event the Corporate Debtor was liquidated. The learned Counsel submits that judgment of the Hon'ble Supreme Court of India in **India Resurgence ARC Pvt. Ltd.**, fully covers the issue. The Appellant being dissenting Financial Creditor cannot suggest that a higher amount to be paid to it with reference to the value of the security interest. The learned Counsel has also relied on the judgment of this Tribunal in **Small Industries Development Bank of India (SIDBI) vs. Vivek Raheja – Company Appeal (AT) (Insolvency) No.570 of 2022** and stated that accepting the submission advanced by the Appellant will ignite perverse incentives for secured creditors to vote for liquidation and shall be impeding the resolution of a Corporate Debtor, which is against the primary objective of the IBC.

6. The learned Counsel for the CoC has supported the submissions advanced on behalf of the RP. It is submitted that the Resolution Plan having been approved with 78.79% vote of CoC and the distribution to the Appellant is as per the Resolution Plan, the Appellant cannot be allowed to raise any grievance to the distribution, which has approval of the CoC. The Appellant being dissenting Financial Creditor, is entitled to only amount which it could have received in event the Corporate Debtor was liquidated. The Resolution Plan having already been approved by the Adjudicating Authority vide order dated 19.09.2023, no further grievance of the Appellant can be entertained. The Resolution Plan itself contemplate that amount proposed for payments towards Financial Creditors, shall be

distributed among them based on the proportion of their admitted claims. It is submitted that commercial wisdom of the CoC in approving the distribution methodology as well as Resolution Plan cannot be allowed to be challenged at the instance of dissenting Financial Creditor. The dispute raised in the Appeal is fully covered by the judgment of the Hon'ble Supreme Court in ***India Resurgence ARC Pvt. Ltd.***

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. Before we enter into respective submission of learned Counsel for the parties, it is relevant to notice the Minutes of the CoC Meeting dated 02.05.2022 and 10.05.2022, i.e., 14th and 15th CoC Meeting respectively. In 14th CoC Meeting, discussion was made on the Resolution Plan received by Uniglobal Papers Private Limited. One of the matters, which was discussed was regarding the distribution as per the Resolution Plan. In Agenda Item No.3, following was noted:

“3. Any other matter that CoC members like to discuss.

- *The members of CoC requested the RP to prepare and share with the distribution ratio if the amount offered for secured creditors under the Resolution Plan be distributed as per the security interest available with the lenders. The RP mentioned that while he can share the proposed distribution keeping in view the amount of claims admitted by him, the lenders must among themselves arrive at the proposed distribution*

on the basis of security interest. The members of CoC requested the RP that in view of limited time at disposal and as the RP already have information of all the secured lenders based on the submitted documents along with the claim of the respective lenders, he could assist them with a proposed distribution amount as per security interest and he could provide the same with disclaimer that the same would be suggestive one only and the secured creditor would have discretion to modify and accept the same based on the actual position and understanding among themselves. RP agreed to the same but requested to arrive at a decision on distribution at the earliest.

- *It was discussed in the meeting that another CoC meeting might be called around on 5th or 7th May 2022 so that revised Resolution Plans could be put for voting on or before 8th May 2022.”*

9. After the decision of the CoC taken in the 14th CoC Meeting, the RP circulated email dated 06.05.2022 to all Financial Creditors incorporating the proposed distribution as per lender wise. Along with email dated 06.05.2022 the RP has annexed a Chart, annexing the distribution matrix among secured creditors in the Resolution Plan. It is useful to extract the distribution matrix as circulated by RP is to the following effect:

"Distribution matrix secured creditors in Resolution Plan for BKM Industries Ltd

Amount offered to SFC in the resolution plan in Cr.	32	
	Assumption 1	Assumption 2

Bank	Voting Shares	Admitted claim	Ratio of SFC admitted claim only	Amounts per outstanding	As per security interest - see working below	Lender wise distribution of liquidation value as per Sec 53(1)
SBI	30.11%	46.29	33.88%	10.84	8.76	11.76
Indian Bank	18.77%	28.86	21.12%	6.76	5.46	7.33
ACRE	15.79%	24.27	17.76%	5.68	0.15	6.17
ICICI Term loan		13.04	9.55%			
ICICI WCDL	10.10%	2.48	1.82%	3.64	13.51	3.95
IDBI	9.21%	14.15	10.36%	3.31	2.68	3.60
BOB	4.91%	7.55	5.52%	1.77	1.43	1.92
JP Fin	4.93%	7.58				
Trimurty	4.91%	7.55				
Manaksia Steel	0.12%	0.19				
Manaksia Ltd.	0.65%	1.00				
Vajra	0.48%	0.74				
Total	99.99%	153.71	100.00%	32.00	32.00	34.72"

10. The Appellant immediately objected to the distribution matrix vide email dated 10.05.2022. However, the distribution mechanism as circulated by RP came for consideration in the 15th CoC Meeting held on 10.05.2022. The discussion and voting as captured in the Minutes are as follows:

“2. Discussion and voting on the distribution of the amount offered in the resolution plan to the secured creditors of BKM Industries Ltd.

- *Representatives of ICICI Bank, together with their legal representative raised their objection on the calculation of distribution of liquidation value terms of section 53(1) of the IBC 2016 done by RP. Representatives of ICICI Bank highlighted that interpretation of the explanation to Sec 53 of the IBC 2016 by the RP is inaccurate and a complete*

reading of the statutory provision indicates that payment in equal proportion can only be made in respect of a class of recipients ranking equally. Similarly, the ambit of sub-section (2) of Section 53 is limited to recipients who enjoy equal ranking whereas ICICI Bank enjoys a priority/ first charge over the assets located at Medak and Silvassa. In the event of failure by the RP to re-calculate the liquidation value due to secured financial creditor, ICICI Bank shall be constrained to initiate legal proceedings to safeguard their rights. To this RP replied that the calculation was as per his understanding of the particular section and further the distribution under sec 53(1) of IBC, 2016 does not have any relevance unless the resolution plan is voted upon by the CoC members. To which other CoC members mainly representatives of SBI and Indian Bank replied that since the legal counsel/ team of other CoC members and that of RP are not and, this legal interpretations should not be discussed in today's CoC meeting. They requested RP to stick to the agenda as circulated by the RP in the notice and the voting item. RP took note of the same.

- *Keeping the paucity of time involved, the RP suggested for a voting on the agenda during the meeting itself. Some CoC members mainly Mr. Saurav Sharma from SBI and Mr. AK Jha from Indian bank informed the RP that they are ready to vote in the meeting itself. However, Mr. Rahul Saraff of ICICI Bank raised his concern that they would be requiring the approval from their higher*

authority for voting in this matter. After considering the CoC members requests RP announced in the meeting that he would initiate an e-voting for voting by the CoC members on the voting agenda and requested all the members to cast their votes as soon as possible.

- RP informed the CoC members that the e-voting platform would be opened from today late afternoon for the minimum hours as prescribed in IBC, 2016, in the context of time constrained.

3) Discussion on the voting of the final resolution plans submitted by the two prospective resolution applicants

- RP informed the CoC members that once the voting on the distribution mechanism of amount offered for secured creditors in the resolution plan had been voted & decided by a majority of 66% of the CoC members, then both the resolution applicants would be requested to incorporate the same in their resolution plans and the same would be put for final voting by the CoC members subsequently even if there is no separate CoC meeting for the voting on the resolution plan. That voting would be considered as final voting for approval of resolution plan by the CoC members with at least 66% voting in favour of a particular plan.
- CoC members informed the RP that both the plans submitted by both the resolution applicants were feasible and viable in terms of their implementation.

4) Voting agenda

Following voting agenda would be put for voting by the CoC members

<i>Sl. No.</i>	<i>Voting Items</i>	<i>Yes</i>	<i>No</i>	<i>Abstain</i>
<i>1.</i>	<i>CoC approves the distribution of the amount offered for the secured financial creditors by the successful resolution applicant (to be decided in a separate voting) based on the proportion of admitted claim of the respective secured lenders</i>			
<i>2.</i>	<i>CoC approves the distribution of the amount offered for the secured financial creditors by the successful resolution applicant (to be decided in a separate voting) based on the security interest over assets of the corporate debtor available with the respective secured lenders”</i>			

11. The voting as per Agenda Item was conducted on 11.05.2022 by e-voting, Item No.1 of the Voting Agenda was approved by 78.79% voting share and the Item No.2 of the Agenda Item was rejected by 88.63% vote share. Meaning thereby that CoC approved the Agenda for distribution of the amount offered for the secured Financial Creditors by the admitted claim of the respective secured creditors. Subsequent to the aforesaid, in 16th CoC Meeting the Plan came for consideration, which was approved in

the Meeting dated 17.05.2022 with vote share of 78.79%. After the said approval of the Plan, IA No.471 of 2022 was filed by the Appellant.

12. From the Minutes of the 14th and 15th CoC, it is clear that specific Agenda Item was placed before the CoC for consideration as to whether distribution has to be made as per the admitted claim of the secured lenders or on the basis of security interest over assets of the Corporate Debtor. When the CoC approved the voting at Agenda Item No.1, i.e., distribution based on the proportion of admitted claim of the respective secured lenders, which was also in accordance with the Resolution Plan submitted by the Resolution Applicant, no challenge by the Appellant can be entertained. It is useful to notice paragraph 2.1 (d) of the Resolution Plan, which dealt with debt owed to the Financial Creditors. Paragraph 2.1.3 (d) is as follows:

“2.1.3 (d) The amount proposed for payment towards Secured Financial Creditors shall be distributed amongst them based on the proportion of their admitted claim.”

13. The Resolution Plan was approved in the 16th CoC Meeting. Thus, distribution to the Appellant is as per the decision of the CoC. Now the submission of the Appellant that distribution is not in accordance with Section 30, sub-section (2) (b) and the Appellant has not been paid the liquidation value needs to be considered. Section 30, sub-section (2) (b) provides as follows:

“30(2)(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;”

14. As per Section 30, sub-section (2)(b), the Financial Creditor, who do not vote in favour of the Resolution Plan are entitled for payment of debt, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53, which provides as follows:

“53. Distribution of assets.- *(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely: -*

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:

(i) workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following: -

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.”

15. When we look into Section 53, sub-section (1) (b), debt owed to a secured creditor has to be distributed equally between and amongst workmen's dues and debts owed to a secured creditors. The debt owed to the secured creditor is a debt as admitted in the CIRP. Admittedly, the claim as submitted by the Appellant was admitted in the CIRP and debt owed to Appellant is as per admitted claim. The distribution of the debt has to be as per the debt of the Financial Creditors. The 'debt' is defined in Section 3(11) of the IBC, which is as follows:

“3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

16. Section 3, sub-section (6) defines the 'claim', which claim is to be filed by a Financial Creditor as per Regulation 8, sub-section (1) of the CIRP Regulations, 2016. Thus, the scheme of Section 53, sub-section (1), clearly indicates distribution as per the debt and in the legislative scheme there is no scope of distribution of assets among the Financial Creditors as per security interest. The issue which has been raised by the Appellant, came for consideration before this Tribunal in **Small Industries Development Bank of India vs. Vivek Raheja and Ors.** where also the Appellant had claimed distribution of assets as per security interest. An IA was filed by the Appellant (SIDBI), seeking a direction to distribute as per security interest. In paragraph 2, following case of the SIDBI has been noticed:

"2. Brief facts of the case giving rise to this Appeal are:-

- Oriental Bank of Commerce had filed a Section 7 Application under the Insolvency and Bankruptcy Code, 2016 (IBC in short) against the Corporate Debtor – M/s. Gupta Exim (India) Pvt. Ltd. which was admitted by the Adjudicating Authority vide Order dated 29th October, 2019. In the 'Corporate Insolvency Resolution Process' in 16th Meeting of 'Committee of Creditors', Resolution Plans were discussed. Revised Resolution Plans were submitted by the prospective Resolution Applicants. Resolution Plan was put to e-Vote between 07th August, 2021 and 16th August, 2021 and by majority of 97.97%, the Resolution Plan of 'Lotus Textiles' and Mr. Vijayant Mittal was approved. Appellant sent an Objection dated 16th*

August, 2021 to the distribution to the Appellant under the Resolution Plan.

- *An I.A. No. 581 of 2021 was filed by the Appellant for direction to the Resolution Professional to distribute the proceeds of the Resolution Plan where following prayers were made:*

1. *The present application may kindly be allowed and the directions be issued to the Respondent No. 1 modify/clarify the distribution to dissenting members as per the Resolution Plan and distribute the proceeds of the resolution plan to Applicant SIDBI for an amount of Rs. 5,64,97,893/- in priority in accordance with provisions of IBC 2016 in the interest of justice and equity.*

2. *Interim stay be granted on distribution of the resolution plan amount by the Resolution Professional to the CoC members till the present application is decided.”*

- *The case of the Appellant in the Application was that as per security interest of the Appellant, the Appellant is entitled to 6.93 % i.e. the amount of Rs. 5,64,97,893/- and as per voting share as approved by the CoC, the Appellant is entitled to 2.03% i.e. Rs. 1,65,47,078/-. The case of the Appellant set up in the Application is that he is entitled for his distribution of plan amount as per value of the security interest of the Appellant. The Application was objected by the Resolution Professional. The Adjudicating Authority by the Impugned Order dated 17th March, 2022 rejected the I.A. No. 581 of 2021 upholding the decision of*

the CoC for distribution of proceeds of the Resolution Plan as per the voting share. Appellant aggrieved by the said Order, has come up in this Appeal.”

17. This Tribunal after taking into consideration the judgment in **India Resurgence Arc Private Limited Vs. M/s. Amit Metaliks Limited & Anr.**, upheld the judgment of the Adjudicating Authority, who rejected the IA, which was filed by SIDBI for distribution as per security interest. In paragraphs 20 and 25 of the judgment, following was held:

“20. When we look into above statement of objects and reasons, it is made clear that financial creditors who do not vote in favour of the resolution plan shall receive an amount that is not less than the liquidation value of their debt. The above statement of objects and reasons also makes it clear that the entitlement of dissenting financial creditor is to receive liquidation value of their debt and not the distribution as per their security value as is sought to be contended by the Learned Counsel for the Appellant before us. The statement of objects and reasons by which amendments in Section 30(2)(b) has been made, makes it clear that entitlement of dissenting financial creditor is the liquidation value of their debt which also clearly negate the submissions raised by the Learned Counsel for the Appellant before us.

25. In view of the foregoing discussion, we do not find any error in the Order dated 17.03.2022 of the Adjudicating Authority rejecting I.A. No. 581 of 2021 filed by the Appellant. The decision of the Committee of

Creditors and the Adjudicating Authority deciding to distribute the proceeds of the plan value as per voting share of the secured creditor in no manner contravenes the provisions of Section 30(2)(b) of the Code. None of the submissions raised by the Learned Counsel for the Appellant has any substance. In result, the Appeal is dismissed.”

18. Now we come to the judgment of the Hon’ble Supreme Court in **India Resurgence Arc. Pvt. Ltd. Vs. M/s. Amit Metaliks Ltd. & Anr.** In paragraph 3 of the judgment, facts were noticed, which is to the following effect:

“3. When the resolution plan submitted by the respondent No. 1 was taken up for consideration by the CoC, the appellant expressed reservations on the share being proposed, particularly with reference to the value of the security interest held by it; and chose to remain a dissentient financial creditor. The dissention on the part of the appellant and response thereto by the resolution professional as also by other members of CoC was noted in the 14th meeting of CoC dated 31.07.2020 in the following words : -

“Representative from Religare Finvest/India Resurgence ARC, Mr. Shakti inquired about the lower share they are getting as per Resolution Plan whereas the security interest held by them is far more. He also raised question about the fair market value and liquidation value of the CD. On this the RP informed him that the valuation exercise has been done by registered valuers of

IBBI who were appointed by the erstwhile IRP and he do not find any inconsistency in the same. Other members also agreed on the same. Mr. Shakti then raised the point that in the present scenario it will be better for them if the company goes into Liquidation and they will realize their security interest by exercising option u/s 52(1)(b). The RP then replied that Liquidation option may be beneficial to one creditor but is definitely detrimental to other secured lenders who are having majority stake of around 96%. Further the RP also said that the objective of IBC is resolution and revival of a distressed company and is not a recovery procedure.”

19. The Hon'ble Supreme Court after hearing the parties and referring to the provisions of Section 30 of the IBC, laid down following in paragraph 13, 14, 16 and 17:

***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.¹⁵*

***14.** The provisions of amended sub-section (4) of Section 30 of the Code, on which excessive reliance is placed on behalf*

of the appellant, in our view, do not make out any case for interference with the resolution plan at the instance of the appellant. The purport and effect of the amendment to sub-section (4) of Section 30 of the Code, by way of sub-clause (b) of Section 6 of the Amending Act of 2019, was also explained by this Court in Essar Steel (supra), as duly taken note of by the Appellate Authority (vide the extraction hereinbefore). The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

16. *The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. What the dissenting financial creditor is entitled to is specified in the later part of sub-section (2)(b) of Section 30 of the Code and the same has been explained by this Court in Essar Steel as under:—*

“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. Ms. 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). Ms. 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 subclasses of creditors in accordance with the provisions of the Code and the Regulations made thereunder.”

(underlining supplied for emphasis)

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.”

20. The issue raised in the Appeal, is fully covered by the judgment of the Hon’ble Supreme Court. The Hon’ble Supreme Court in **India Resurgence ARC Private Ltd.** (supra) also referred to its earlier judgment in **Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd.** while coming to the conclusion.

21. The learned Counsel for the Appellant during his submissions has relied on the judgment of the Hon’ble Supreme Court in **Vistra ITCL (India) Ltd. and Ors. vs. Dinkar Venkatasubramanian and Anr. – (2023) 7 SCC 324.** There are several distinguishable facts in the judgment of **Vistra ITCL (India) Ltd.** and in the present case. In the case of Vistra, the claim of Financial Creditor was not admitted. Whereas in the present case the debt of the Appellant was admitted. In Vistra, the claim of Vistara to be secured creditor was rejected as has been noticed in paragraphs 2 to 10 of the judgment itself. Whereas, the Appellant in the present case has been recognized as a dissenting Financial Creditor and was part of the CoC and in the present case, the CoC by its decision has approved both the distribution mechanism as well as the Resolution Plan, which proposed distribution based on proportion of admitted claim. Vistra was never

treated as secured creditor or given its minimum entitlement as secured creditor as per Section 53(1). The judgment of *Vistra* is a judgment of the Hon'ble Supreme Court, which is referable to Article 142 of the Constitution, which jurisdiction was exercised and ultimately the Hon'ble Supreme Court has held *Vistra* to be a secured creditor. The present is a case where ICICI Bank was accepted and recognized as Financial Creditor and its full claim was accepted and distribution to the Appellant was as per Section 30, sub-section (2)(b) of the IBC.

22. In view of the forgoing discussions, we are of the view that no error has been committed by the Adjudicating Authority in rejecting IA No.471 of 2022. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Mr. Arun Baroka]
Member (Technical)**

NEW DELHI

6th November, 2023

Ashwani