

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No.1477 of 2022
& I.A. No.4658, 4610 of 2022**

IN THE MATTER OF:

Dharmindra Constructions Pvt. Ltd. & Anr.

...Appellant

Versus

**Rajendra Kumar Jain
Resolution Professional of
Kudos Chemie Ltd. & Ors.**

...Respondents

Present:

For Appellant: Present but appearance not marked.

For Respondents: Mr. Abhishek Anand, Mr. Nipun Gautam, Mr. Viren Sharma and Mr. Sajal Jain, Advocates for R-1 (RP).

ORDER

18.01.2023: I.A. No.4658 of 2022: This is an application praying for condonation of delay of 13 days in filing the Appeal. The ground taken in the application is that due to scare of COVID being spread in the premises of the firm, the premises of the firm remained restricted and hence, the appeal could not be filed within time. Cause shown sufficient delay in filing the Appeal is condoned. Delay condonation application allowed. I.A. No. 4658 of 2022 stands disposed of.

2. Heard learned counsel for the parties. This Appeal has been filed against the order dated 17.03.2022 by which order the Adjudicating Authority has allowed application filed by the Resolution Professional for approval of the Resolution Plan. The Appellant – Operational Creditor has come up in this Appeal challenging the order impugned.

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3. Learned counsel for the Appellant submits that the Operational Creditor in the plan has not been allocated any amount, hence, the plan is not in accordance with the provisions of I&B Code. It is submitted that the Resolution Plan require statement that claims of all the stakeholders have been dealt with, however, there is no consideration in the plan about the claim of the Appellant – Operational Creditor. Learned counsel for the Appellant has placed reliance on judgment of this Tribunal in **“Company Appeal (AT) (Ins.) No. 606 of 2019, Hammond Power Solutions Pvt. Ltd. vs. Mr. Sanjit Kumar Nayak, Resolution Professional & Ors., decided on 14.02.2020”**.

4. Learned counsel for the Resolution Professional refuting the submissions of learned counsel for the Appellant contends that the liquidation value of the Appellant was Nil, hence, no amount was allocated to it in the Resolution Plan. It is submitted that the claims of all the stakeholders have been dealt with in the Resolution Plan. It is further submitted that the judgment relied by the Appellant has already been noticed by this Tribunal in judgment in **“Company Appeal (AT) (Ins.) No. 22 of 2022, S. Chandriah vs. Sunil Kumar Agarwal, decided on 22.07.2022”**, where the judgment in *“Hammond Power Solutions Pvt. Ltd”* has been specially dealt with and considered.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. The Appellant was Operational Creditor whose claim was admitted by the Resolution Professional. The Resolution Plan does not allocate any

amount to the Appellant. Para 30(ii) of the impugned order deals with the claim of the Operational Creditor, which is to the following effect:

ii.) Section 30(2)(b): The resolution plan (Page 61 of the application and Clause 4.3C iv of the Resolution Plan) states that according to the Information Memorandum issued by the RP to the resolution applicant, the operational creditors have been segregated into three categories. The first category being operational creditors being workmen and employees. That the amount verified by the Resolution Professional is Rs.18.88 crores to which an amount of Rs. 20 lakhs is being given Annexure 2, page 74 of the Resolution Plan/ 673 of the Application. The Next category being, operational creditors relating to Government dues. The amount verified by the Resolution Professional is Rs.295.18 crores to which payment of NIL is being made by the Resolution Applicant. The third category being operational creditors (other than workmen & employees and government dues). The amount verified Resolution Professional is Rs.295.18 crores to which payment of NIL is being made by the Resolution Applicant. Further, it has been stated by the Resolution Applicant in Clause 3.4 to 3.7 (Page 22 of the Resolution Plan/ Page 622 of the Application) and Annexure 1 of the Resolution Plan that the amount due to the Operational Creditors shall be paid in compliance with provisions of Section 30(2)(b) of the Code and Regulation 38(1) of the CIRP Regulations, that the Operational creditors are being paid. Annexure 1 provides that in the event there are any dissenting financial shall be paid proportionately from

the Upfront cash in priority to the assenting secured financial creditors. In case, resolution applicant is required to make payment higher than the proportionate amount, the payment to the assenting financial creditors shall be reduced to that extent on proportionate basis. In the event, the amount of the upfront cash is not sufficient to discharge the said liability towards the dissenting financial creditors, the remaining deficit amount will be paid from the deferred cash.”

7. The aforesaid Para 30(ii) extracts Form H submitted by the Resolution Professional which clearly indicate that the Liquidation value of the Appellant is Nil. Even the Operational Creditors that is Government whose verified claim is Rs.295.18 Crores were paid Nil. We do not find any error in the order by which no amount was allocated to the Appellant. The requirement for the obligation for payment of amount to the Operational Creditor is under Section 30(2)(b). It is not shown that there is any breach of provisions of the Section 30(2)(b).

8. The judgment of **“Hammond Power Solutions Pvt. Ltd” (Supra)** which is relied by learned counsel for the Appellant has been noted and distinguished by this Tribunal in the Judgment in **“S. Chandriah vs. Sunil Kumar Agarwal” (supra)**. In this context Para 25 and 26 of the judgment in **“S. Chandriah vs. Sunil Kumar Agarwal”** are to the following effect:

“25. The law thus obliges the Resolution Plan to make statement as to how it has dealt with the interest of all the stakeholders. We in the present case are

concerned with the claim of Appellant who was classified as other Creditors. The Resolution Plan envisages as noticed above that amount for other Creditors is Nil. Thus the submissions that all stakeholders have not been dealt with in the plan cannot be accepted. CoC in his commercial decision has decided not to allocate any amount to the other creditors which cannot be questioned since Appellant has not been able to prove violation of any provision of code in the Resolution Plan. We thus are of the view that the Resolution Plan which has been approved by the Adjudicating Authority on 27th May, 2020 does not require any interference. We may also refer to the Judgement of this Tribunal in 2020 SCC Online NCLAT 199 **“Hammond Power Solutions Pvt. Ltd. Vs. Sanjit Kumar Nayayk and Ors.”** where this Tribunal had set aside the Order of the Adjudicating Authority approving the Resolution Plan and remitting the matter back to the Adjudicating Authority to send back plan to CoC. This Tribunal relies on the Judgement of the Hon’ble Supreme Court in the matter of “Essar Steel” (supra). Following was reasons given in paragraph 15-16:

“15. If the above minutes are perused, it can be hardly said that there are any reasons given by the Committee to demonstrate that it has taken care of interest of all stakeholders. Para - 46 of the Judgement in the matter of "Essar Steel" requires to see "the reasons given by the Committee of Creditors while approving a resolution plan" from point of view stated in the paragraph. The reasons for giving NIL to Operational Creditors is not reflected from record. We have already reproduced portion from Part B

- Financial Proposal with regard to what the approved Resolution Plan states regarding dues to the Operational Creditors. The proposal is based on the assessment that there is no liquidation value due to Operational Creditors. Although it is not stated but there is reason to doubt that the Resolution Applicants were aware of the liquidation value. There is no dispute that so many of the Operational Creditors have been left high and dry giving them nil amount which Hon'ble Supreme Court has observed that giving NIL to Operational Creditors "would certainly not balance the interest of all stakeholders or maximise the value of assets of the Corporate Debtor if it becomes impossible to continue running its business as a going concern."

16. For these reasons, we find that the Impugned Order accepting the Resolution Plan cannot be upheld. The Resolution Plan does not appear to have taken care of interest of all stakeholders including Operational Creditors and the decision of the COC also does not reflect that it has taken into account the fact that the Corporate Debtor needs to be kept as a going concern and that there is Company Appeal (AT) (Ins) No.606 of 2019 need to maximise the value of the assets and that the interest of all the stakeholders including Operational Creditor has to be taken care of."

26. The above Judgement of this Tribunal is clearly distinguishable since present is a case where all stakeholders have been dealt with in the Plan. There is no requirement in statute that all stakeholders have to be necessarily made payment in the Resolution Plan."

9. Learned counsel for the Appellant has also referred to the judgment of Hon'ble Supreme Court in **“Essar Steel India Ltd. Committee of Creditors Bs. Satish Kumar Gupta, (2020) 8 SCC 531”**.

10. The judgment of Hon'ble Supreme Court in **“Essar Steel India Ltd.”** has also been noted and relied in the judgment of this Tribunal in **“S. Chandriah vs. Sunil Kumar Agarwal” (supra)**. In paras 22 and 23 the judgment has been dealt with, which are to the following effect:

“22. The Resolution Plan envisages Nil payment to other Creditors. Now we come to the law laid down by the Hon'ble Supreme Court in Essar Steel (supra) in paragraph 72 and 73 of the Judgement following has been laid down:

“72. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases 7420 would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off

the dues of financial and operational creditors.

73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors 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 has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

23. *The Hon'ble Supreme Court in the above judgement has laid down that judicial review by the Adjudicating Authority as well as Appellate Tribunal has to confine as to whether the requirement referred to in Section 30(2) has been met. It was clearly held that the Adjudicating Authority may not interfere with the merits of the commercial decision of the CoC. The limited judicial review available is to see that CoC has taken into account the fact that Corporate Debtor needs to be kept as a going concern, it needs to maximise the value, and interest of all the stakeholders including Operational Creditor have been taken care of. Section 30(2) provides as follows:*

*“30(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
.....*

(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 subsection (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.

.....”

11. We are of the view that as per the law as exist today, the Operational Creditors are only entitled for minimum of the liquidation value and there being no breach of any of the provisions of the Code, we are unable to interfere with the impugned order. With observations as above, Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

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

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