

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

**Company Appeal (AT) (Insolvency) No. 745 of 2018**

(Arising out of Order dated 17<sup>th</sup> October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in (IB)-01(PB)/2017)

**IN THE MATTER OF:**

**Hero Fincorp Ltd.**

**...Appellant**

**Vs.**

**Rave Scans Pvt. Ltd. & Ors.**

**...Respondents**

**Present: For Appellant: - Dr. U.K. Choudhary, Senior Advocate with Mr. Pulkit Deora, Mr. Dhruv Gupta and Ms. Sylvine Sarmah, Advocates.**

**For Respondents: - Mr. Rakesh Kumar and Mr. Aashish Khattar, Advocates for R-1.**

**Mr. Kunal Tandon, Ms. Niti Jain and Ms. Richa, Advocates for R-4 & 5.**

**Mr. Shah Usman and Ms. Apoorv Sarvaria, Advocates for PNB.**

**Mr. Krishnendu Datta and Mr. Shivankar, Advocate for Resolution Professional.**

**Mr. Sanjeev Singh, Mr. Sampanus Pani, Mr. Shivam Ram, Advocates for Religare Finvest.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In the 'Corporate Insolvency Resolution Process' initiated against 'M/s. Rave Scans Private Limited'- ('Corporate Debtor') under Section 10

of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short), the revised ‘Resolution Plan’ submitted by Mr. Rahul Jain has been approved by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 17<sup>th</sup> October, 2018. The Appellant- ‘Hero Fincorp Limited’- (‘Financial Creditor’) has challenged the approved plan as discriminatory.

2. According to the learned counsel for the Appellant, ‘Hero Fincorp Limited’ is a ‘Secured Financial Creditor’, but it has been discriminated with similarly situated ‘Financial Creditors’.

3. It was submitted that other ‘Secured Financial Creditors’ have been provided with higher percentage of their claim amount, whereas the Appellant- ‘Hero Fincorp Limited’ has been allowed lesser percentage of its admitted claim.

4. Learned counsel appearing on behalf of the ‘Successful Resolution Applicant’ (now ‘Corporate Debtor’) submitted that the ‘Committee of Creditors’ in its meeting held on 13<sup>th</sup> March, 2018 with the majority of 78.55% of their voting shares approved the ‘Revised Resolution Plan’. In terms of the ‘Resolution Plan’, the ‘Successful Resolution Applicant’ has offered upfront payment of Rs. 54 Crores as against the asset value (Liquidation Value) of Rs. 36 Crores. The ‘Successful Resolution Applicant’ has given a ‘Statement of Settlement of Dues with Stakeholders till 29<sup>th</sup> November, 2018’, as referred to in the next page:

**“Statement of Settlement of Dues with Stakeholders till 29.11.2018**

Sr. No.	Description of Secured FC	Claim filed by FCs	Liquidation Value	Settlement offered to FCs in CoC			% offered in final approved plan	Remarks
				Dated 13.10.2017	Dated 12.01.2018 & 16.02.2018	Dated 13.03.2018		
	Status of Resolution Plan in COC			Disapproved	Disapproved	Approved more than 78% voting		
<b>A.</b>	<b>Secured Public Sector Banks-</b>							
	IOB	4297.28		1589.56	1804.86	1933.78	45.00	
	BOB	2593.21		959.23	1089.15	1166.94	45.00	
	PNB	1616.97		598.12	679.13	727.64	45.00	
	<b>Total in Consortium led by IOB</b>	<b>8507.45</b>	<b>2209.51</b>	<b>3146.91</b>	<b>3573.14</b>	<b>3828.36</b>	<b>45.00</b>	
	<b>% of claim in total FCs claim (D)</b>	<b>71.43%</b>						
<b>B.</b>	<b>Secured NBFCs-</b>							
	Tata Capital Financial Services Ltd.	407.23	307.99	150.63	308.00	308.00	75.63	Maintained LV under Reg. 38
	<b>Hero FinCorp Ltd. (Dissented)</b>	<b>2306.68</b>	<b>745.29</b>	<b>853.74</b>	<b>746.00</b>	<b>746.00</b>	<b>32.34</b>	<b>Maintained LV under Reg 38</b>
	Religare Finvest Ltd.	654.03	335.17	241.06	336.00	336.00	51.37	Maintained LV under Reg. 38
	<b>Total Term Loan</b>	<b>3367.94</b>	<b>1388.45</b>	<b>1245.43</b>	<b>1390.00</b>	<b>1390.00</b>	<b>41.27</b>	Maintained LV under Reg. 38
	<b>% of claim in total FCs claim (D)</b>	<b>28.28%</b>						
<b>C.</b>	<b>Secured Car Loan</b>							
	HDFC Bank Ltd.	9.86	2.46	2.46	2.46	2.46	24.95	
	ICICI Bank Ltd.	2.80	0.70	0.70	0.70	0.70	25.00	
	Axis Bank	1.79	0.44	0.44	0.44	0.44	24.58	
	Kotak Mahindra Prime Ltd.	11.43	2.85	2.85	2.85	2.85	24.93	

	M&M Financial Services Ltd.	7.45	1.86	1.86	1.86	1.86	24.97	
	<b>Total Car Loan</b>	<b>33.33</b>	<b>8.31</b>	<b>8.31</b>	<b>8.31</b>	<b>8.31</b>	<b>24.93</b>	
	<b>% of claim in total FCs claim (D)</b>	<b>0.29</b>						
<b>D.</b>	<b>Total Secured Financial Creditors</b>	<b>11908.73</b>	<b>3606.27</b>	<b>4400.65</b>	<b>4971.45</b>	<b>5226.67</b>		
<b>E.</b>	<b>Unsecured Loan from NBFC</b>	429.68	0	21.49	21.49	21.49	5.00	
<b>F.</b>	<b>Unsecured Loan other than NBFC</b>	775.54	0	38.77	38.77	38.77	5.00	
<b>G.</b>	<b>Total Financial Creditors: (A+B+C)</b>	<b>13112.16</b>		<b>4460.91</b>	<b>5031.71</b>	<b>5286.93</b>		
<b>H.</b>	<b>Operational Creditors &amp; WC</b>		<b>0</b>	<b>93.09</b>	68.29	113.07		
<b>I.</b>	<b>Total Fund offered to be infused</b>			<b>4554.00</b>	<b>5100.00</b>	<b>5400.00</b>		

5. From the tabulated chart given by the ‘Successful Resolution Applicant’/ ‘Corporate Debtor’, we find that the Appellant- ‘Hero Fincorp Limited’ has been provided with 32.34% of its admitted claim as it has dissented with the plan. On the other hand, ‘Tata Capital Financial Services Ltd.’ has been provided with 75.63% of its admitted claim and other ‘Financial Creditors’ i.e. ‘Indian Overseas Bank’ has been provided with 45% of its admitted claim; the ‘Bank of Baroda’ has been provided with 45% of its admitted claim and the ‘Punjab National Bank’ has been provided with 45% of its admitted claim.

6. In the Chart, ‘Secured Public Sector Banks’ have been placed in Category-A, whereas ‘Tata Capital Financial Services Ltd.’ and ‘Hero Fincorp Limited’ (Appellant) have been shown as ‘Secured NBFCs’ in Category-B. From the aforesaid chart, it is clear that the ‘Successful Resolution Applicant’ has accepted that the Appellant is a ‘Secured Financial Creditor’.

7. From the description of ‘Secured Financial Creditors’, it shows that the Appellant has dissented with the plan. On the other hand, in the ‘Remarks Column’, it is shown that it is based on ‘Maintained LV under Regulation 38 (old Regulation)’ of the ‘Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016’.

8. The old (un-amended) Regulation 38 fell for consideration before this Appellate Tribunal in **“Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors.— Company Appeal (AT) (Insolvency) No. 526 of 2018”**, wherein this Appellate Tribunal while noticed the provisions of the (un-amended) Regulation 38 of the ‘Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016’ observed and held as follows:

“8. From the aforesaid provisions of I&B Code it is clear that the Board may make regulation but it

*should be consistent with the I&B Code and rules made therein (by Central Government) to carry out the provisions of the Code. therefore, we hold that the provisions made by the Board cannot override the provisions of I&B Code nor it can be inconsistent with the Code.*

9. *Clause (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such as 'Financial Creditor' or 'Operational Creditor', Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the 'Operational Creditors' (clause (b) of regulation 38(1)) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)). Such regulation being against Section 240 (1) cannot be taken into consideration and any Resolution Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' of the*

*‘Operational Creditors’ cannot be approved being illegal.”*

9. The aforesaid Regulation 38 also fell for consideration before this Appellate Tribunal in **“Binani Industries Limited v. Bank of Baroda & Anr.— Company Appeal(AT) (Insolvency) No. 82 of 2018 etc.”** wherein this Appellate Tribunal held:

*“28. Therefore, the Appellant- ‘Rajputana Properties Private Limited’ cannot take plea that dissenting ‘Financial Creditors’ can be discriminated on the basis of Regulation 38. At this stage, it is desirable to notice that after the decision of this Appellate Tribunal in **“Central Bank of India (Supra)”** the Insolvency and Bankruptcy Board of India also amended/repealed the Regulation 38 aforesaid having found it discriminatory.”*

10. (Un-amended/ old) Regulation 38 having held to be discriminatory was substituted on 5<sup>th</sup> October, 2018 by new Regulation 38. Sub-clause (c) of clause (1) of Regulation 38 shows that the liquidation value payable to dissenting financial Creditors has been deleted.

11. The un-amended (old) Regulation 38 and post amended Regulation 38 (amended on 5<sup>th</sup> October, 2018) fell for consideration before the Hon'ble Supreme Court in "**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— 2019 SCC OnLine SC 73**", wherein the Hon'ble Supreme Court observed:

*"71. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:*

**"38. Mandatory contents of the resolution plan.— (1) A resolution plan**



*shall identify specific sources of funds that will be used to pay the—*

*(a) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;*

*(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and*

*(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.”*

*Post amendment, Regulation 38 reads as follows:*

**“38. Mandatory contents of the resolution plan.—** (1) *The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.*

*(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.*

72. *The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors’ rights, together with priority in payment over financial creditors.”*

12. The impugned order approving the ‘Resolution Plan’ has been passed by the Adjudicating Authority on 17<sup>th</sup> October, 2018, but the Adjudicating Authority failed to notice that no ‘Resolution Plan’ can be approved discriminating the dissenting ‘Financial Creditor’ in terms with

the post amended Regulation 38. It also failed to notice that this Appellate Tribunal much prior to the same, declared the un-amended (old) Regulation 38(1) (c), which stipulated liquidation value for the dissenting 'Financial Creditor', as illegal which resulted in amendment of Regulation 38.

13. In ***"Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors."*** (Supra), the Hon'ble Supreme Court observed that "the NCLAT while looking into viability and feasibility of resolution plans as approved by the committee of creditors, always gone into whether the operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded".

14. In the present case, the 'Resolution Plan' approved by the 'Committee of Creditors' do not confirm the test of Section 30(2) (e), being discriminatory, as having discriminated the similarly situated 'Secured Creditors'.

15. Learned counsel appearing on behalf of the 'Successful Resolution Applicant' has shown in its grounds that it has been discriminated on the basis of (old) Regulation 38(1) (c), though the Regulation 38 (1) (c) was deleted have been held discriminatory by this Appellate Tribunal prior to the impugned order dated 17<sup>th</sup> October, 2018 giving approval of the 'Resolution Plan'.

16. Similar plea has been taken by learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

17. The ‘important points’ as pointed out by the ‘Successful Resolution Applicant’ below the Chart in its written submissions shows that the ‘Successful Resolution Applicant’ had noticed that Regulation 38 has been amended on 5<sup>th</sup> October, 2018, but has failed to bring the said fact to the notice of the Adjudicating Authority while matter was taken up for approval nor took liberty to amend the distribution as per amended Regulation 38. The grounds for discrimination has been highlighted by the ‘Successful Resolution Applicant’ (now ‘Corporate Debtor’) as follows:

“Important Points:

1.	Reg. 37(1) of CIRP requires a plan to offer- <b>“maximization of value of its assets”</b> which is fulfilled by offering Rs. 54.00 Cr. against liquidated value of Rs. 36.06 Cr. only.
2.	Reg. 38 (1) (c) mandatory provides to maintain liquidated value of dissenting Financial Creditors before the amendment dt. 05.10.2018- Resolution Applicant offered LV.
3.	COC in its meeting directed RP to seek legal opinion on differential value of FCs. COC accepted opinion obtained by RP stating that LV has to be maintained for dissenting creditors. Accordingly in the next Revised Resolution Plan dt. 12.01.2018, 16.02.2018 and 13.03.2018, Resolution Applicant offered minimum LV (not % of claim).
4.	PSU banks had higher stake in total claim value and liquidated value of assets. Having security of fixed assets, plant & machinery, debtors, inventory & personal guarantee etc.
5.	NBFCs were having only security against specific Plant & Machinery & personal guarantee of promoters.
6.	Resolution Plan has been fully implemented and financial creditors (except Hero Fincorp) have released the security to the Corporate Debtor.

18. Learned counsel appearing on behalf of the ‘Successful Resolution Applicant’ as also counsel for the 4<sup>th</sup> & 5<sup>th</sup> Respondents relied on amended Section 30(2) (b) of the Insolvency and Bankruptcy Code (Amendment) Act 2019, (26 of 2019) which came into force on 16<sup>th</sup> August, 2019 and read as follows:

**“30. Submission of resolution plan.—**

xxx

xxx

xxx

(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 the 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 purposes 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. It was submitted that as per Section 30 (2) (b) (ii), the ‘Resolution Plan’ allows to treat the ‘Financial Creditors’, who do not vote in favour of the ‘Resolution Plan’ separately. However, they have failed to notice that as per amended Section 30(2) (b) (ii), ‘Resolution Applicant’ may treat the dissenting ‘Financial Creditor’, but such treatment can be given *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’.*

20. The Insolvency and Bankruptcy Board of India has not provided for separate treatment to dissenting ‘Secured Financial Creditors’ who do not vote in favour of the ‘Resolution Plan’. No such amendment has been made in Regulation 38 since amended Section 30(2) (b) came into force i.e. 16<sup>th</sup> August, 2019.

21. The Regulation 38 including clause (1A) therein as amended on 5<sup>th</sup> October, 2018 is still applicable, which reads as follows:

**“38. Mandatory contents of the resolution**

**plan.**— (1) *The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.*

*[(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.]*

(2) *A resolution plan shall provide:*

*(a) the term of the plan and its implementation schedule;*

*(b) the management and control of the business of the corporate debtor during its term; and*

*(c) adequate means for supervising its implementation.*

(3) *A resolution plan shall demonstrate that –*

*(a) it addresses the cause of default;*

*(b) it is feasible and viable;*

*(c) it has provisions for its effective implementation;*



*(d) it has provisions for approvals required and the timeline for the same; and*

*(e) the resolution applicant has the capability to implement the resolution plan.”*

22. The Regulation 38 do not discriminate between similarly situated ‘Secured Financial Creditors’ on the ground of dissenting vote, therefore, the ‘Successful Resolution Applicant’ cannot take advantage of (un-amended/ (old)) Regulation 38(1) (c), which was repealed.

23. In view of the fact that the Appellant a ‘Secured Financial Creditor’ has been discriminated with other ‘Secured Financial Creditors’, we hold that the ‘Resolution Plan’ is violative of Section 30(2) (e) of the ‘I&B Code’. However, we are not inclined to set aside the approved plan on such ground. The ‘Successful Resolution Applicant’ is given opportunity to remove the discrimination of Appellant by providing similar treatment as provided to other similarly situated ‘Financial Creditors’. We, accordingly, pass the following order:

- (i) The ‘Successful Resolution Applicant’/ Mr. Rahul Jain (‘Corporate Debtor’) is directed to provide the Appellant (a ‘Secured Financial Creditor’) 45% of its admitted claim in place of 32.34% as shown in the ‘Resolution Plan’ and thereby equate it with all other similarly situated ‘Secured Financial Creditors’ namely

‘Indian Overseas Bank’, ‘Bank of Baroda’ and ‘Punjab National Bank’. The ‘Resolution Plan’, as approved, is modified to the extent above.

(ii) Though ‘Tata Capital Financial Services Ltd.’ has been provided with higher percentage, we are not disturbing the same.

(iii) If the ‘Successful Resolution Applicant’ do not remove the discrimination by paying 45% admitted claim of the Appellant-‘Hero Fincorp Ltd.’ within one month as per modification as ordered above, the impugned order dated 17<sup>th</sup> October, 2018 approving the ‘Resolution Plan’ shall stand set aside and the Adjudicating Authority will proceed in accordance with law.

The appeal is allowed with aforesaid observations and directions.

No costs.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Justice A.I.S. Cheema)  
Member(Judicial)

(Kanthi Narahari)  
Member(Technical)

NEW DELHI  
17<sup>th</sup> September, 2019

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