

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 809 of 2023

[Arising out of Order dated 25.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Special Bench, Court-1 in IA/222(AHM)2023]

IN THE MATTER OF:

RAVINDRA KUMAR GOYAL,

RP of Yashasvi Yarns Limited,

Eden I-807, Godrej Farden City,

Jagat Pura, SG Highway, Ahemdabad, Gujarat-382470

Email: ravi1960goyal@gmail.com

...Appellant

Versus

**1. COMMITTEE OF CREDITORS OF YASHASVI
YARNS LIMITED,**

Through its Lead Bank, State Bank of India,

Stressed Assets Management Branch-1,

2nd Floor, "The Arcade", World Trade Centre,

Cuffee Parade, Colaba, Mumbai, Maharashtra-

400005

Email: sbi.04107@sbi.co.in

**2. INSOLVENCY AND BANKRUTCY BOARD OF
INDIA,**

7TH Floor, Mayur Bhawan, Shankar Market,

Cannaught Circus, New Delhi – 110001

Email: vinay.pandey90@ibbi.gov.in

...Respondents

Present:

For Appellant: Mr. Smaksh Goyal, Advocate

For Respondents:

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

1. This Appeal by the Appellant, Resolution Professional of Yashasvi Yarns Limited has been filed challenging the Order dated 25th April, 2023 rejecting I.A. No. 222/AHM/2023 filed by Appellant for grant of Incentive Fee.

2. The Adjudicating Authority vide Order dated 26th April, 2022 admitted Section 7 Application of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **“The Code”**) against the Corporate Debtor Yashasvi Yarns Limited. The Appellant was appointed as Interim Resolution Professional and thereafter confirmed the Resolution Professional. An I.A. No. 985 of 2022 was filed by the Resolution Professional seeking extension of CIRP period by 90 days from 24.10.2022. The Adjudicating Authority on 21/11/2022 allowed extension of 90 days. On 01.12.2022, Resolution Plan was approved by the Committee of Creditors (CoC in short). Appellant has also claimed incentive fee which came to be considered by the Committee of Creditors on 01.12.2022 the claim of the Appellant to incentive fee for value maximization as per Clause 4 of Schedule II under Regulation 34B of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. I.A. No. 222/2023 was filed by the Appellant dated 2nd February, 2023 where the Appellant prayed for following reliefs:

- “a) Pass appropriate order for payment of performance linked payment incentive fees to the Applicant as per Regulation 34B of the CIRP Regulations, 2016, inter alia, for successfully completing CIRP and approval of resolution plan by CoC in 247 days (i.e., 26.04.2022 (admission order) to 29.12.2022 (voting on resolution plan completed), and for achieving value maximization; and/or*
- b) Such other and further reliefs(s) as may deem fit in the interest of justice.”*

3. The Resolution which was placed before the Committee of Creditors for payment of performance linked payment incentive fee was not approved by 91.55 % vote. I.A. No. 222/2023 was filed questioning the said decision of CoC and seeking a direction to make the payment of performance linked incentive fee which came to be rejected.

4. Learned Counsel for the Appellant challenging the Order of the Adjudicating Authority contends that Adjudicating Authority failed to consider the decision of the CoC rejecting the claim which was not based on any reasonable basis. Power given in the Regulation to the CoC to take a decision to pay performance linked incentive fee has to be on the basis of relevant criteria and material and cannot be arbitrarily taken. It is submitted that when the Resolution Professional was able to maximize the value of Corporate Debtor he was entitled to performance linked incentive fee. It is submitted that decision of the CoC refusing to accept the claim of the Appellant for performance linked incentive fee is not in accordance with the Regulation 34B.

5. We have considered the submissions of Learned Counsel for the Appellant and have perused the record.

6. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provided for payment of Resolution Professional cost which included fee to be paid to the Resolution Professional. Regulation 34B inserted in the Regulation by notification dated 13th September, 2022 with effect from 13.09.2022 is as follows:

“34B. Fee to be paid to interim resolution professional and resolution professional.

(1) The fee of interim resolution professional or resolution professional, under regulation 33 and 34, shall be decided by the applicant or committee in accordance with this regulation.

(2) The fee of the interim resolution professional or the resolution professional, appointed on or after 1st October 2022, shall not be less than the fee specified in clause 1 for the period specified in clause 2 of Schedule-II:

Provided that the applicant or the committee may decide to fix higher amount of fee for the reasons to be recorded, taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.

(3) After the expiry of period mentioned in clause 2 of Schedule-II, the fee of the interim resolution professional or resolution professional shall be as decided by the applicant or committee, as the case may be.

(4) For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide, in its discretion, to pay performance-linked incentive fee, not exceeding five crore rupees, in accordance with clause 3 and clause 4 of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary.

(5) The fee under this regulation may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and shall be included in the insolvency resolution process cost.”

7. Regulation 34B refers to schedule II which is to the following effect:

“Schedule-II

(Under Regulation 34B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

Minimum Fixed Fee.

1. Minimum fixed fee as per the table -1 below shall be paid to the interim resolution professional or the resolution professional, as the case may be, for the period mentioned in clause 2:

Table-1: Minimum Fixed Fee Structure

Quantum of Claims Admitted	Minimum Fee Per Month (Rs. lakh)
<i>(i) Less than or equal to Rs. 50 crore</i>	1.00
<i>(ii) More than Rs.50 crore but less than or equal to Rs.500 crore</i>	2.00
<i>(iii) More than Rs.500 crore but less than or equal to Rs.2,500 crore</i>	3.00
<i>(iv) More than Rs.2,500 crore but less than or equal to Rs.10,000 crore</i>	4.00
<i>(v) More than Rs.10,000 crore</i>	5.00

Period for minimum fixed fee.

2. The minimum fixed fee shall be applicable for the period, from appointment as interim resolution professional or resolution professional, till the time of –

(a) submission of application for approval of resolution plan under section 30;

(b) submission of application to liquidate the corporate debtor under section 33;

(c) submission of application for withdrawal under section 12A; or

(d) order for closure of corporate insolvency resolution process; whichever is earlier.

Performance-linked incentive fee for timely resolution.

3. In cases where resolution plan is submitted to the Adjudicating Authority within the time period given in table-2 from the insolvency commencement date, performance-linked incentive fee as per table-2 may be paid to the resolution professional, after approval of such resolution plan by the Adjudicating Authority on commencement of payment to creditors by the resolution applicant.

Table-2: Performance-linked incentive fee for timely resolution

Time period from insolvency commencement date	Fee as % of Realisable Value
(i) Less than or equal to 165 days	1.00
(ii) More than 165 days but less than or equal to 270 days	0.75
(iii) More than 270 days but less than or equal to 330 days	0.50
(iv) More than 330 days	0.00

Performance-linked incentive fee for value maximisation.

4. The performance-linked incentive fee for value maximisation may be paid to the resolution professional at the rate of one per cent of the amount by which the realisable value is higher than the liquidation value, after approval of the resolution plan by Adjudicating Authority on commencement of payment to creditors by the resolution applicant.

Explanation: For the purposes of clause 3 and clause 4, “realisable value” means the amount payable to creditors in the resolution plan approved under section 31.

Illustration –

A corporate debtor having liquidation value of twenty crore rupees was resolved and the realisable value to creditors was one hundred crore rupees. The resolution plan was submitted to the Adjudicating Authority on 170th day from the insolvency commencement date. The committee has decided to pay the performance-linked incentive fees under clause 3 and 4.

In this case, fee payable to the resolution professional shall be as under:

(i) Performance-linked incentive fee for timely resolution: 0.75% of Rs. 100 crore = Rs.75 lakh, and

(ii) Performance-linked incentive fee for value maximisation: 1.00% of Rs. 80 crore (Rs.100 crore – Rs.20 crore) = Rs.80 lakh.”

8. The Appellant in the Application has claimed incentive fee of Rs. 21,33,000/- as performance linked incentive fee for timely resolution and Rs. 11,64,256/- as performance linked incentive fee for value maximization.

9. From the facts which have been brought on record and the Order of the Adjudicating Authority it is clear that the claim of incentive fee of the Appellant came to be considered by the CoC in its meeting dated 01.12.2022 and was not approved with 91.55% voting.

10. What is the nature of power and jurisdiction of the Committee of Creditors to grant performance linked incentive fee and whether the Resolution Professional is entitled to receive the performance linked incentive fee on timely resolution and value maximization is the question which needs to be answered in the present case?

11. The Resolution which was placed before the Committee of Creditors on 01.12.2022 for approval of performance linked incentive fee for value maximization and its result has been extracted in the impugned order which is to the following effect:

“RESOLVED THAT, the committee of creditor is be and hereby decided to approve performance linked incentive fee for value maximization as per Clause 4 of Schedule II, under Regulation 34B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016”

<i>Name of the Stake Holder</i>	<i>SHARE %</i>	<i>SHARE AMONGST THOSE PRESENT</i>	<i>FOR</i>	<i>AGAINST</i>	<i>ABSTAINED</i>
<i>State Bank of India</i>	63.73%	63.73%		✓	
<i>Pegasus Assets Reconstruction</i>	19.94%	19.94%		✓	

<i>Ltd.</i>					
<i>Phoenix ARC Pvt. Ltd.</i>	7.88%	7.88%		✓	
<i>Canara Bank</i>	8.45%	8.45%	✓		
<i>Total</i>	100.00%	100.00%	8.45%	91.55%	.00%
Result: Resolution not approved with 91.55% voting in against.					

12. Sub-Regulation 4 of Regulation 34B provides for “THAT THE COMMITTEE MAY DECIDE, IN ITS DISCRETION, TO PAY PERFORMANCE LINKED INCENTIVE FEE”. The use of two expressions “MAY” and “IN ITS DISCRETION” makes it clear that the provision is enabling provision which vests discretion in the Committee of Creditors to pay performance linked incentive fee.

13. When a body is granted discretionary power it implies a freedom of choice, Hon’ble Supreme Court in (2013) 6 SCC 573, **State of Kerala & Ors. Vs. Kandath Distilleries** while examining the nature of discretionary power made following observations in Paragraph 28:

“28. Discretionary power implies freedom of choice, a competent authority may decide whether or not to act. The legal concept of discretion implies power to make a choice between alternative courses of action (Discretionary Justice Davis 1969). Statute has conferred discretionary power on the Commissioner and State Government but not discretion coupled with duty because they are dealing with a subject matter on which State has exclusive privilege. Permissive language used by the Statute in Section 14 and the rule making authority in Rule 4 gives the State Government and the Commissioner, no mandatory duty or obligation to grant

the licence except perhaps to consider the application, if the liquor policy permits so.”

14. The decision of the CoC dated 01.12.2022 as noted above is a business decision of the CoC while approving the Resolution Plan including the payments which have to be made to the various creditors, stakeholders as well as to the Insolvency Professional Cost, which have to be deliberated and voted upon by the Committee of Creditors. The payment of Performance Linked Incentive Fee in event it is paid to the Resolution Professional shall be part of the Insolvency Resolution Cost which affects the entitlement of stakeholders when the Insolvency Resolution Cost is increased by adding performance linked incentive fee it is bound to reduce the payment which is to be received by the various stakeholders under the Resolution Plan, since the amount which is proposed in the Resolution Plan is a fixed amount. The decision of the CoC dated 01.12.2022 by approving the Resolution Plan which also contains consideration of resolution regarding performance linked incentive fee is a commercial decision of the Committee of Creditors. The law is well settled that the commercial decision of the CoC has to be given due credence and the Adjudicating Authority or the Appellate Authority is not to interfere in the commercial decision of the CoC unless it does not fulfill the requirement of Section 30 of the Code.

15. Hon'ble Supreme Court in **(2020) 8 SCC 531, CoC of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors.** had occasion to examine the contours of the judicial review of decision of the CoC taken in its

commercial wisdom. In Essar Steel, Hon'ble Supreme Court in paragraph 66, 67, following was held:

“66. In K. Sashidhar this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows:

“32. Having heard learned counsel for the parties, the moot question is about the sequel of the approval of the 61 resolution plan by the CoC of the respective corporate debtor, namely KS&PIPL and IIL, by a vote of less than seventy five percent of voting share of the financial creditors; and about the correctness of the view taken by the NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor (other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be) which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?”

xxx xxx xxx

37..... The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by the CoC on the proposal for approval of the resolution plan.”

67. After advertent to the 2016 Regulations, the Court set out the jurisdiction of the Adjudicating Authority as well as the Appellate Tribunal as follows:

“55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan “as approved” by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in 62 prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The

subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.”

16. Hon'ble Supreme Court again in **(2021) 10 SCC 401, Kalpraj Dharamshi Vs. Kotak Investment Advisors Ltd.** reiterated that limited judicial review which is available to the Adjudicating Authority and Appellate Authority can in no circumstances entitle to review the business decision arrived at by the majority of the CoC. In Paragraph 165, 166, 167 and 168, following was laid down:

“165. It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

166. *The position is clarified by the following observations in paragraph 59 of the judgment in the case of K. Sashidhar (supra), which reads thus:*

“59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.”

167. *This Court in Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) after reproducing certain paragraphs in K. Sashidhar (supra) observed thus:*

“67.....Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar.”

168. *It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.”*

17. The decision taken by the CoC in not approving the payment of performance linked incentive fee to the Appellant thus cannot be faulted

and is in accord with the discretionary power vested with the CoC under Regulation 34B. Appellant at best was entitled for consideration of his claim under statutory scheme. When claim is considered and not approved, Appellant has no right to claim that he was mandatorily entitled for payment of performance linked incentive fee.

18. We thus are satisfied that Appellant had no right to claim performance linked incentive fee and his claim having been considered and rejected by the Committee of Creditors with 91.55% vote share cannot be faulted nor it can be interfered with by the Adjudicating Authority or Appellate Authority in exercise of its jurisdiction.

19. We thus do not find any merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

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

**NEW DELHI
14th July, 2023**

Basant B.