NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 62 of 2022

(Arising out of Order dated 08.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in I.A. (IB) No.479/KB/2021 in C.P.(IB) No.832/KB/2019)

IN THE MATTER OF:

Damodar Valley Corporation
The DVC Towers, VIP Road,
Kolkata-700054, West Bengal .... Appellant

Vs

1. Dimension Steel and Alloys
Private Limited, 25/B, Camac Street,
Camac Court, Flat No.6/B, Kolkata-700016.

2. Bijoy Murmuria, Resolution Professional
of the Corporate Debtor,
C/o Sumedha Management Solution
Private Limited, 8B, Middleton Street,
6A Gitanjali, Kolkata – 700071.

3. C.P. Ispat Private limited
37, Shakespeare Sarani, S.B. Towers,
3rd Floor, Kolkata – 700017. ... Respondents

Present:

For Appellant: **Ms. Maninder Acharya, Sr. Advocate with Ms. Madhumita Bhattacharje and Mr. Viplav Acharya, Advocates.**

For Respondent: **Mr. Joy Saha, Sr. Advocate with Mr. Aishwarya Kumar Awasthi and Mr. Tanish Ganeriwala, Advocates for R-1 & 3.**

Mr. Gaurav H. Sethi, Mr. Parikshit Poddar, Mr. Anuj Singh and Mr. Bijay Marmuria, Advocates for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 08.10.2021 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata allowing

I.A. No.479/KB/2021 filed by Resolution Professional for approval of Resolution Plan, by which order, Resolution Plan submitted by Respondent No.3 - C.P. Ispat Private Limited has been approved.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

(i) The Corporate Debtor – Dimension Steel and Alloys Private Limited had obtained and entered into Power Purchase Agreement with the Appellant for supply of electricity in the premises of Corporate Debtor on 30.11.2012.

(ii) The Corporate Debtor committed default in making payment of electricity dues. Hence, disconnection notices were issued by the Appellant to the Corporate Debtor and on 07.06.2019 the power supply was disconnected.

(iii) On Application filed by M/s Carbon Resources Pvt. Ltd. under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**"), Corporate Insolvency Resolution Process ("**CIRP**") was initiated against the Corporate Debtor by the Adjudicating Authority vide order 18.10.2019.

(iv) The Interim Resolution Professional (IRP) issued a public announcement on 19.10.2019, in pursuance of which, the Appellant submitted its claim of Rs.36,35,64,214/- as pre-CIRP electricity dues. After extension of date for submission of Resolution Plan by Committee of Creditor ("**CoC**"), as no

Resolution Plans were received till 04.01.2021, the CoC decided to go for liquidation.

(v) Respondent No.3 filed an I.A. No.197/KB/2021 before the Adjudicating Authority seeking direction to the Resolution Professional to accept the Resolution Plan filed by Respondent No.3. Another I.A. No.274/KB/2021 was filed by Resolution Professional for liquidation. On 16.03.20221 Adjudicating Authority allowed the I.A. No.197/KB/2021 filed by Respondent No.3 and fixed 22.03.2021 for placing the Resolution Plan before the CoC. One of the Financial Creditor – West Bengal Financial Corporation ("**WBFC**") filed I.A. No.426/KB/2021, by which it sought injunction against the actions of the CoC and Resolution Professional. The I.A. No.426/KB/2021 was dismissed by the Adjudicating Authority on 30.04.2021, which was also challenged by the WBFC in Company Appeal (AT) (INS.) No.536 of 2021, which too was dismissed by this Tribunal on 02.08.2021.

(vi) The Resolution Plan submitted by Respondent No.3 was approved by CoC on 22.04.2021 with 80.93% voting shares. An I.A. No.479/KB/2021 filed by Resolution Professional before the Adjudicating Authority for approval of the Resolution Plan. Another I.A. No.775/KB/2021 was filed by WBFC before the Adjudicating Authority for dismissal of I.A. No.479/KB/2021 for the approval of Resolution Plan. The

Adjudicating Authority vide order dated 08.10.2021 approved the Resolution Plan and by an order of the same date allowed I.A. No.479/KB/2021 for approval of the Resolution Plan. After approval of the Resolution Plan an amount of Rs.7,45,608/- was transferred under the Resolution Plan to the Appellant as Operational Creditor. The Appellant aggrieved by the order of the Adjudicating Authority dated 08.10.2021 approving the Resolution Plan has come up in this Appeal.

3. We heard Ms. Maninder Acharya, learned Senior Counsel appearing for the Appellant. Shri Joy Saha, learned Senior Counsel for Respondent Nos.1 and 3 and Shri Gaurav H. Sethi, learned Counsel appearing for Respondent No.2.

4. The learned Senior Counsel for the Appellant challenging the impugned order contended that whole process for entertaining the Resolution Plan as well as its approval is vitiated, since the Plan was received much after expiry of 330 days' time, which is the maximum time allowed under Section 12 of the Code. It is submitted that 330 days' time came to an end on 12.09.2020 and the extensions granted by CoC also came to an end in December, 2020, after which, the Plan of Respondent No.3 could not have been entertained. It is submitted that Adjudicating Authority committed error in passing order on 16.03.2021 directing for consideration of Plan of Respondent No.3, which could not have been done after expiry of the time-line prescribed in the Code. It is further submitted that in the Resolution Plan, dues of the Appellant had not been reflected.

The Appellant's electricity dues of Rs.36,35,64,214/- were of pre-CIRP period against which the Appellant was given a meagre amount of Rs.7,45,608/-. It is further submitted that the Plan does not comply with the provisions of Section 30, sub-section (2), insofar as the Operational Creditor is concerned, as neither fair nor equitable amount has been allowed.

5. Learned Senior Counsel for the Appellant further submitted that the Adjudicating Authority by the impugned order had directed the Appellant for restoring the electricity connection to the premises of Corporate Debtor immediately upon receipt of the amount under the Resolution Plan. She submits that under the statutory regulation namely West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 (hereinafter referred to as "**Statutory Regulations**"), the Appellant cannot provide any fresh connection to Respondent No.3 unless entire dues against the previous electricity connection, which was in the same premises are paid. It is submitted that Resolution Plan cannot be approved as it is in contravention of the Statutory Regulations. It is submitted that the Plan does not comply with requirement as provided under Section 30, sub-section (2)(e) of the Code.

6. Shri Joy Saha, learned Senior Counsel appearing for Respondent Nos.1 and 3 while refuting the submission of learned Senior Counsel for the Appellant submits that the Appellant is only an Operational Creditor and on approval of Resolution Plan, all claims of the Appellant has extinguished and no CIRP dues can be claimed or insisted by the Appellant.

There is no illegality in considering the Resolution Plan of Respondent No.3, which was permitted to be considered under the order of the Adjudicating Authority dated 16th March, 2021. With regard to Plan having not been received within the time-line prescribed under the Code, the issue was raised by the WBFC before the Adjudicating Authority by filing two Applications being I.A. No.274/KB/2021 as well as I.A. No.775/KB/2021. Both the Applications were dismissed by the Adjudicating Authority on 30.04.2021 and 08.10.2021 respectively. Against the order dated 08.10.2021, rejecting the I.A. No.775/KB/2021, Company Appeal (AT) (Ins.) No.1012 of 2021 was also filed by WBFC, which too was dismissed by this Tribunal on 07.01.2022, hence, it is not open for the Appellant to raise the said issue again. Insofar as dues of pre-CIRP of the Appellant are concerned, on approval of Resolution Plan, the entire claim of the Appellant stand extinguished on payment of the amount as allocated in the Resolution Plan. The submission of the Appellant that distribution to the Appellant is not fair and equitable is incorrect. The distribution does not violate any provisions of Section 30 of the Code. The Appellant is under obligation to re-connect the electricity as directed by the Adjudicating Authority.

7. The learned Counsel appearing for Respondent No.2 has also supported the submissions of Shri Joy Saha.

8. We have heard submission of learned Counsel for the parties and have perused the record.

9. From the submission of learned Counsel for the parties and material on record, following are the questions, which arose for consideration in this Appeal:

(1) Whether the consideration of Resolution Plan of Respondent No.3 by the CoC after expiry of 330 days, vitiate the approval of the Resolution Plan?

(2) Whether the Appellant is entitled to claim its unpaid CIRP dues as per West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 even after approval of the Plan by order dated 08.10.2021?

(3) Whether Resolution Plan violates Section 30, sub-section (2), sub-clause (e) in view of West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 since it contravenes Regulation 4.6.4 as well as Regulation 4.6.1 of the Statutory Regulations?

(4) Whether the Resolution Plan is in accordance with Section 30, sub-section (2), sub-clause (b) and the distribution to the Appellant – Operational Creditor is fair and equitable?

Question No.(1)

10. The CIRP against the Corporate Debtor was initiated vide order dated 18.10.2019. From the materials on record, it does appear that Form-G was published on 21.06.2020 and Respondent has communicated its Expression of Interest to the Resolution Professional in February 2020.

The Resolution Professional has informed Respondent No.3 that time for Resolution Plan has been extended till 22.12.2020. Respondent No.3 had filed an Application being I.A. No.197/KB/2021 before the Adjudicating Authority seeking a direction to Resolution Professional to accept the Resolution Plan submitted by Respondent No.3 and place the same before the CoC. It is relevant to notice that one of the Financial Creditor of the Corporate Debtor, i.e. WBFC has filed an IA No.426/KB/2021 for restraining the Resolution Professional from considering the Resolution Plan of Respondent No.3, which I.A. was rejected on 30.04.2021 by the Adjudicating Authority. Subsequently, against the order dated 30.04.2021, WBFC filed an Appeal before this Tribunal, which too was dismissed on 02.08.2021. The subsequent Application filed by WBFC for similar relief praying for dismissal of the Application filed by Resolution Professional for approval of the Plan also came to be dismissed on 08.10.2021 by the Adjudicating Authority, against which order Company Appeal (AT) (Ins.) No.1012 of 2021 was also filed by WBFC, which too was rejected by this Tribunal on 07.01.2022. This Tribunal has considered the submissions regarding extension of time-line. It is useful to notice paragraphs 6, 19 and 20 of this Appellate Tribunal judgment:

> *"6. The Appellant has challenged the order before this Appellate Tribunal, in CA (AT) (INS) 536 of 2021, however, vide order dated 02.08.2021 the Appeal was dismissed. The operative portion of the Order is as under:-*
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> > *"7. Having heard the Learned Counsel for the Appellant and keeping in view the main objective*

of Insolvency and Bankruptcy Code that all efforts should be made for resolution of the Corporate Debtor in the present matter when we have a Resolution Plan approved by the CoC, we do not think that orders of liquidation should be passed without considering the Resolution Plan already approved by the CoC. We do not find any reason to admit the Appeal in the facts of the matter. Although the CoC did not strictly follow the time frame given by the Adjudicating Authority and displeasure was expressed, when Adjudicating Authority exercised discretion not to pass order of liquidation and wait, we will not interfere in the discretion. When the Resolution Plan is on the verge of being accepted or rejected by the CoC it would not make much difference if little time is extended."

19. In the present case, the Adjudicating Authority vide Order dated 16.03.2021 condoned the delay of 43 days in submitting the Resolution Plan by the CP Ispat Pvt. Ltd. (R2) and RP was directed that the Resolution Plan be placed before the COC for consideration on or before 22.03.2021 and the COC shall be deliberate on the Resolution Plan in its feasibility and viability and take a decision on or before 25th March, 2021. This Order was not challenged by the Appellant. It is true that the COC has not strictly adhered to the timeline fixed by the Adjudicating Authority and on 08.04.2021, the COC approved the Resolution Plan of R2. The Appellant has challenged this action and filed an Application I.A. No.426 of 2021 praying an injunction restraining the COC from considering the Resolution Plan.

20. In the earlier Application (I.A. No. 426/KB/2021), it was prayed that the COC be restrained from considering the Resolution Plan because at that time the Resolution Plan was pending before the COC for consideration. However, the Adjudicating Authority vide Order dated 30.04.2021 has dismissed the Application holding that voting has already been taken place on resolution plan and against that order when the Appeal came for hearing before this Appellate Tribunal at that time the resolution plan has already been approved by the CoC and the Application was pending before the Adjudicating Authority for approval of Resolution Plan. Therefore, this Appellate Tribunal declined to interfere in the order passed by the Adjudicating Authority. The subsequent Application I.A. No. 775 of 2021 filed by the Appellant praying that the Application filed by the RP for approval of plan of R-2 be dismissed and liquidation order be passed. When this Appellate Tribunal has already overruled all the objections of the Appellant and directed the Adjudicating Authority to consider the Application for approval of Resolution Plan then there is no occasion for the Appellant to file the Application praying that the Application filed by the RP for approval of plan be dismissed and liquidation order be passed. We are in agreement with the finding of Ld. Adjudicating Authority that the subject matter of this Application is similar to the prayer in earlier Application I.A. No. 426/KB/2021 and the issue was settled on 30.04.2021 which is upheld by this Appellate Tribunal on 02.08.2021."

11. Further, this Tribunal in the same very judgment while relying on judgment of the Hon'ble Supreme Court in ***(2020) 8 SCC 531 - Committee***

of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta and Ors. held that time-line provided in Section 12 is not mandatory and in certain cases, time-line can be extended. The Appeal filed by WBFC on the aforesaid ground was dismissed. The same very ground, which were raised by WBFC unsuccessfully before the Adjudicating Authority as well as before this Tribunal, are being pressed by the learned Senior Counsel for the Appellant. The judgment of this Tribunal deciding the said very issue arising in the present case itself is to be followed, as this Tribunal while rejecting the similar submissions raised in this Appeal, dismissed the Appeal of the WBFC. We thus do not find any error in extension of 330 days' time by the Adjudicating Authority, the consideration of the Resolution Plan was also approved by this Tribunal and cannot be permitted to be reagitated in the instant Appeal.

Question Nos.(2) and (3)

12. Question Nos.(2) and (3) being interconnected are taken up together.

13. The submission of learned Senior Counsel for the Appellant is that under Statutory Regulations, that is, West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013, which are law within the meaning of Section 30, sub-section (2) (e), have been contravened by the Resolution Plan. It is submitted that for giving new connection in a premises where there are pending electricity dues, only after payment of the entire electricity dues, new connection can be given, whereas in the impugned order, Adjudicating Authority has directed for restoration of the electricity without payment of pre-CIRP dues. The

Appellant has filed a claim of Rs. 36,35,64,214/-, which claim was admitted by Resolution Professional. It is also on the record that against the aforesaid claim, an amount of Rs.7,45,608/- has been paid to the Appellant. After the approval of the Resolution Plan, all claims of the Operational Creditors and other creditors are extinguished, which to the extent it has not been reflected in the Resolution Plan. Hon'ble Supreme Court in its judgment ***Ghanashyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited – (2021) 9 SCC 657*** after considering the entire law on the subject in paragraph 102.3 has laid down following:

> *"**102.3.** Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."*

14. There is no question of the claim of Appellant still existing pertaining to pre-CIRP period, which claim was filed before the Resolution Professional, after the approval of the Resolution Plan.

15. The submission, which has been much pressed by learned Senior Counsel for the Appellant that there has been contravention of Statutory Regulations, as the Plan breaches the provision of Section 30, sub-section (2) (e). Section 30, sub-section (2) (e) provides:

> *"30. Submission of resolution plan.*

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(e) does not contravene any of the provisions of the law for the time being in force."

16. We may at this stage also refer to the Statutory Regulations 4.6.1 and 4.6.4, which are to the following effect:

"4.6.1 If the power supply to any consumer remains disconnected continuously for a period of one hundred and eighty day's where the disconnection has been effected in compliance with any of the provisions of the Act or Regulations, the agreement of the licensee with the consumer for supply of electricity shall be deemed to have been terminated with consequential effect on expiry of the said period of one hundred and eighty days. This will be without prejudice to such other action or the claim that may arise from the disconnection of supply or related issues therefor. On termination of the agreement, the licensee shall have the right to remove the service line and other installations through which electricity is supplied to the consumer.

4.6.4 Notwithstanding anything contained contrary elsewhere in these Regulations were deemed termination of agreement has taken place, then on the basis of application for any consumer new service connection can only be provided in the same premises if the outstanding dues against the deemed terminated consumer is cleared along with the late payment surcharge."

17. There can be no quarrel with the Statutory Regulations of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013. In Regulation 4.6.4, it is contemplated that new service connection can only be provided in the same premises if the outstanding dues against the deemed terminated consumer is cleared, but the said Regulations cannot be pressed in service, when the Resolution Plan has been approved in the CIRP under the Code. The Code has been given overriding effect, on any other inconsistent law under Section 238. When any statutory provision including the provisions of West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 are overridden, the question of contravention of such provision does not arise. In event, the submission of learned Senior Counsel is accepted that all laws in force, including the Regulations in question have to be followed in the Resolution Plan and any contravention shall violate Section 30, sub-section (2) (a) & (e), the provision of Section 238 shall become redundant. From the conjoint reading of the provisions of Code, it is clear that in event any provision is not overridden by Section 238, Resolution Plan cannot contravene any existing law. In this context, we may refer to judgment of Hon'ble Supreme Court in ***State Bank of Inida vs. V. Ramakrishnan and Anr. – (2018) 17 SCC 394***. The Hon'ble Supreme Court had occasion to consider the provision of Section 133 of the Contract Act, 1872. Section 133 of Contract Act provides as follows:

> *"133. Discharge of surety by variance in terms of contract.—Any variance, made without the surety"s consent, in the terms of the contract between the*

principal [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B"s conduct as a manager in C"s bank. Afterwards, B and C contract, without A"s consent, that B"s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A"s becoming surety to C for B"s duly accounting for moneys received by him as such clerk. Afterwards, without A"s knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the

payments shall be applied to the then, existing debts between B and C. A is not liable on his guarantee for any goods supplied after: this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March."

The question which arose for consideration in the above judgment is as to whether when the Resolution Plan modifies the debt, whether guarantor shall stand released from their guarantee by virtue of Section 133. The same was answered by Hon'ble Supreme Court in paragraph 25 to the following effect:

*"**25.** Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation*

to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

18. In event, it is to be held that Section 133 of the Contract Act oblige its full compliance in the Plan in view of modification of the debt in the Resolution Plan, Section 133 has to be held to contravene. The Hon'ble Supreme Court further held that despite Section 133 of the Contract Act, the guarantor had to pay its due.

19. Hon'ble Supreme Court in ***Lalit Kumar Jain vs. Union of India and Ors. – (2021) 9 SCC 321*** had reiterated the principals laid down in ***V. Ramakrishnan's*** case. In ***Lalit Kumar Jain***, again the same was reiterated in paragraph 120, 121 and 122. Above pronouncement by Hon'ble Supreme Court makes it clear that under Section 133 of the Contract Act, guarantor/ surety/ liability is not discharged even on variance of terms of contract by Resolution Plan. Thus, the submission of learned Senior Counsel for the Appellant that if any variance in Resolution Plan is not in conformity of Section 30, sub-section (2) (e), it would be in contravention of West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 cannot be accepted. As observed above, the Statutory Regulations shall stand overridden by virtue of approval of Resolution Plan. The Adjudicating Authority by the impugned order in paragraph 36, directed as follows:

> *"36. The Resolution Plan is binding on the Corporate Debtor and other stakeholders involved so that revival of the Debtor Company shall come into force with immediate effect. The Electricity Service Provider is hereby directed to restore the electricity connection to the premises of the Corporate Debtor immediately upon receipt of the amount earmarked to it under the Resolution Plan, so that the operations of the Corporate Debtor can be restarted without any delay. The Corporate Debtor under the new management shall pay the applicable security deposit as for a new connection."*

20. Thus, under the Plan, the Appellant electricity supply provider is obliged to reconnect the electricity, which is provision of the Resolution Plan and Appellant cannot be heard in saying that since the Statutory Regulation 4.6.1 and 4.6.4 are not complied, the Appellant is not obliged to reconnect the electricity without payment of outstanding electricity dues. In view of the above, the Question Nos.(2) and (3) are answered accordingly.

Question No.4

21. The next submission of learned Senior Counsel for the Appellant is that the Plan is not in accordance with Section 30, sub-section (2), sub-clause (b) and the distribution to the Appellant, who is an Operational Creditor is neither fair nor equitable. Section 30, sub-section (2), sub-clause (b), on which reliance is placed, provides as follows:

> *"30. Submission of resolution plan.*

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(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;"

22. The present is not a case where the Appellant is contending that payment of debt to the Appellant/ Operational Creditor is not as per provisions of Section 30, sub-section (2), sub-clause (b), (i) and (ii). It is not a case that Appellant could not have been entitled to receive any higher amount in event of liquidation of the Corporate Debtor under Section 53, in event amount to be distributed under the Plan is distributed in accordance with priority of sub-section (1) of Section 53. What is contended by the learned Senior Counsel for the Appellant is that Explanation (1) which has been added by Act 26 of 2019 provides that distribution shall be fair and equitable. The Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Ltd.*** (supra) had occasion to consider the provision of Section 30, sub-section (4) of the Code and the grounds on which challenge to a Resolution Plan can be entertained by the Adjudicating Authority or by this Appellate Tribunal. The Hon'ble Supreme Court also considered the submission as to whether payment, which is not

similar to both Financial Creditors and Operational Creditors is inequitable distribution. The Hon'ble Supreme Court in the said judgment has clearly laid down that minimum value that is required to be paid to Operational Creditors is set out in Section 30(2)(b). In paragraph 70, following has been laid down:

> *"**70.** The minimum value that is required to be paid to operational creditors under a resolution plan is set out under Section 30(2)(b) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code. The Insolvency Committee Report, 2018 (hereinafter referred to as "the Committee Report, 2018"), inter alia, deliberated upon the objections to Section 30(2)(b) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:*
>
> > *"18. value guaranteed to operational creditors under a resolution plan*
> >
> > *18.1. Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by NCLT. The BLRC*

Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor. (BLRC Report, 2015).

18.2. However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors under Section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a "going concern" given that their chances of recovery are abysmally low.

18.3. The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using "fair value" as the floor to determine the value to be given to operational creditors. Fair value is defined under Regulation 2(1)(hb) of the CIRP Regulations to mean [Ed.: The matter between two asterisks has been emphasised in original.] 'the estimated realisable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion' [Ed.: The matter between two asterisks has been emphasised in original.] .

However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using "resolution value" or "bid value" as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4. It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in Synergies-Dooray Automative Ltd., In re [Synergies-Dooray Automative Ltd., In re, 2017 SCC OnLine NCLT 20883] , the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under Regulation 38 of the CIRP Regulations. However, the same was modified by NCLT and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in

Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan (P) Ltd. [Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan (P) Ltd., 2017 SCC OnLine NCLT 13223] provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

18.5. [Ed.: The matter between two asterisks has been emphasised in original.] Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code. [Ed.: The matter between two asterisks has been emphasised in original.] "

(emphasis supplied)

Ultimately, the Committee decided against any amendment to be made to the existing scheme of the Code, thereby retaining the prescription as to the minimum value that was to be paid to the operational creditors under a resolution plan."

23. It was also held by Hon'ble Supreme Court that amended Regulation 38 of CIRP does not lead to the conclusion that Financial Creditor and Operational Creditor must be paid the same amount percentage wise. In paragraph 88 following has been laid down:

> *"**88.** By reading para 77 (of Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial*

creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."

24. In the present case, the Resolution Plan indicates that Financial Creditors have been provided much higher amount as compared to the Operational Creditors. The Operational Creditors (other than workmen and employees) had an admitted claim of Rs.85.33 crores within which they have been provided only 0.17 crores whereas admitted claim of Financial Creditors was 245.55 and they have been provided 19.03 crores.

25. The payment in percentage to Financial Creditors and Operational Creditors, in the present case is as follows:

The Claim Admitted	**Creditors**	**Payment under Plan**	**Percentage**
245.55 Crores	Financial Creditors	19.03 crores	7.74%
85.33 Crores	Operational Creditors	0.17 crores	0.19%

26. Law being now settled that mere fact that Operational Creditors and Financial Creditors are not paid same amount and same percentage, cannot be said to be inequitable. It is settled that the Code and the

Regulations does not contemplates that there could be equal treatment to all creditors. Hon'ble Supreme Court has held in paragraph 77 in **Essar Steel** (supra) that equitable treatment of creditors is equitable treatment only within the same class. We, thus, do not find any substance in the submission that Resolution Plan violates Section 30, sub-section (2)(b) of the Code.

27. The learned Senior Counsel for the Appellant has also placed heavy reliance on paragraph 64 of the above judgment and it is submitted that Hon'ble Supreme Court has held that the Resolution Plan should provide for payment of electricity dues. Paragraph 64 of the judgment is as follows:

> "***64.*** *Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result*

in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

28. When we read paragraph 64 of the judgment along with paragraph 71, it is clear that the observations in paragraph 64 were with respect to electricity dues during the CIRP period, since the Hon'ble Supreme Court wanted to ensure that Corporate Debtor runs as a going concern.

29. It is relevant to notice that question of payment to the creditors and the manner of distribution had come up for consideration time and again. The Insolvency Law Committee Report 2018 deliberated upon the objection to Section 30, sub-section (2), sub-clause (b), insofar as it provides for minimum payment of liquidation value. It was also noticed that public comments were received by the Committee stating that the liquidation value, which is guaranteed to the Operational Creditors may be negligible as they fall under the residual category of creditors under Section 53 of the Code. In this context, paragraph 18 of the Insolvency Law Committee Report 2018 is relevant to note, which is to the following effect:

"18. VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN

18.1 Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all

operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by the NCLT. The BLRC Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor.

18.2 However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors under section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a 'going concern' given that their chances of recovery are abysmally low.

18.3 The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using 'fair value' as the floor to determine the value to be given to operational creditors. Fair value is defined under regulation 2(1)(hb) of the CIRP Regulations to mean "the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably,

prudently and without compulsion." However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4 It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in the case of Synergies-Dooray Automative Ltd.105, the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under regulation 38 of the CIRP Regulations. However, the same was modified by the NCLT and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in the case of Hotel Gaudavan Pvt. Ltd.106 provided for

payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

18.5 Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code."

30. The Committee in the 2018 Report, ultimately decided against any amendment to be made in the existing scheme of the Code and the minimum value to be paid to the Operational Creditors was retained. More than three years have elapsed from the said report. The question that Operational Creditors are getting negligible value have been raised before the Committee and other Forms from time to time.

31. The Operational Creditors normally had claims pertaining to supply made to the Corporate Debtor, which amounts normally as compared to the Financial Creditors' claim are less. Operational Creditors consist of various type of industries including MSMEs, public sector organization and

small entities. Altogether denying their claim or receiving ineligible amount in the Resolution Plan causes hardship and misery to the Operational Creditors. Even the statutory dues, which by virtue of law as it exists today are dealt in the same manner, resulting in no payment or negligible payment and some time even less than 1% of the claim. The Operational Creditors are not part of CoC like Financial Creditors and they have no control over the CIRP. It is the Financial Creditors, who control the entire process and take commercial decision regarding payment to the Financial Creditors, Operational Creditors and other creditors. Law gives complete freedom to the Committee of Creditors to take commercial decision and it is not obligatory that in the Resolution Plan, if the liquidation value of Operational Creditor is negligible/ nil to allot any higher amount to the Operational Creditors. We are consistently receiving the Plans, where Operational Creditors either not paid any amount towards their claim or paid negligible amount, sometime even less than 1%. In the present case, the Operational Creditors have been given only miniscule of their admitted claim to the extent of only 0.19%. As the law stand today, no exception can be taken to such Plans, which provide payment to Operational Creditor in accordance with Section 30(2)(b) of the Code. However, the time has come when it should be examined by the Government and the Board to find out as to whether there are any grounds for considering change in the legislative scheme towards the payment to the Operational Creditors, which also consist of Government dues and other statutory dues. We make it clear that our observation is only to facilitate the Government and other

competent Authority to consider this issue and take decision, so as to the objective of equitable and fair distribution can be fulfilled with clear parameters to guide the all concerned to arrive at the fair and equitable distribution.

32. In view of the foregoing discussion, we do not find any good ground to interfere with the impugned order approving the Resolution Plan. There is no merit in the Appeal, the Appeal is dismissed. No costs.

A copy of this order be also communicated to the Ministry of Corporate Affairs as well as Board to consider and take steps, if any, in light of observations as made above in paragraphs 29, 30 and 31 of the judgment.

[Justice Ashok Bhushan]
Chairperson

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI

23rd May, 2022

Ash/NN