SL No.4

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Special Bench (PHYSICAL HEARING)

CORAM: DR.VENKATA RAMAKRISHNA BADARINATH NANDULA – HON'BLE MEMBER (J)
CORAM: SHRI SATYA RANJAN PRASAD- HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 13.03.2023 AT 04:00 PM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**IA (IBC)/520/2021 & IA (IBC)/663/2021 in Company Petition (IB) No.384/7/HDB/2018**
NAME OF THE COMPANY	**Galada Power and Telecommunication Ltd**
NAME OF THE PETITIONER(S)	**Stressed Assets Stabilisation Fund**
NAME OF THE RESPONDENT(S)	**Galada Power and Telecommunication Ltd**
UNDER SECTION	**7 of IBC**

ORDER

Learned Counsels for both sides appeared.

Order in **IA 663/2021** pronounced, recorded vide separate sheets. In the result, this application is rejected.

IA 520/2021 – Issue involved in this application squarely covered by Canara Bank. Therefore, we find no merit in this application. Therefore, **IA 520/2021 is hereby rejected.**

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Syamala

SL No.7

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Special Bench (PHYSICAL HEARING)

CORAM: DR.VENKATA RAMAKRISHNA BADARINATH NANDULA – HON'BLE MEMBER (J)
CORAM: SHRI SATYA RANJAN PRASAD- HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 13.03.2023 AT 04:00 PM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**IA (IBC)/248/2023 & IA (IBC)/583/2021 in Company Petition IB/384/7/HDB/2018**
NAME OF THE COMPANY	**Galada Power and Telecommunication Ltd**
NAME OF THE PETITIONER(S)	**Stressed Assets Stabilisation Fund**
NAME OF THE RESPONDENT(S)	**Galada Power and Telecommunication Ltd**
UNDER SECTION	**7 of IBC**

ORDER

Mr. Rohit Gupta and Mr. Galada, Learned RP appeared via video conference.

Rejection of claim is pending for orders. Hence, call on 29.03.2023.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Syamala

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II

I.A. No.520/2021 in
CP(IB) No.384/7/HDB/2018
U/s. 60 (5) of IB Code, 2016

In the matter of:
Stressed Assets Stabilisation Fund, Mumbai vs. M/s. Galada Power And Telecommunications Ltd.

In the matter of:

Canara Bank,
Erstwhile Syndicate Bank,
Stressed Asset Management Branch,
112, JC Road,
Bengaluru – 560 002 &

Prime Corporate Branch at
TSR Complex, 2nd Floor,
1-7-1, S.P. Road,
Secunderabad – 500 003
Rep. by its Senior Manager-Law, Shri Yadav P Das

…Applicant

Vs.

1. Sri. Nitin Vishwanath Panchal
   Resolution Professional of
   M/s. Galada Power and Telecommunication Ltd.,
   Admn. Office: Galada Towers, 301, Begumpet
   Hyderabad – 500 016

2. The Committee of Creditors
   M/s.Galada Power and Telecommunication Limited
   3rd Floor, IDBI Tower
   WTC Complex, Cuffe Parade
   Mumbai – 400 005

3. M/s.Amrutha Constructions Pvt. Ltd.
   Resolution Applicant of
   M/s.Galada Power and Telecommunication Limited
   H.No.6/3/1090/1/A, Flat No.21, Somajiguda
   Rajbhavan road, Hyderabad – 500 038

4. M/s. Jiva Internet Solutions Pvt. Ltd.
   Resolution Applicant of
   M/s. Galada Power and Telecommunication Limited
   710, 7th Floor, Swapnalok Complex, S.D.Road
   Secunderabad – 500 029

5. M/s. Radha Smelters Pvt. Ltd.
   Resolution Applicant of
   M/s. Galada Power and Telecommunication Limited
   Registered Office: 8-2-296/S, Plot No.75 & 76
   Sagar Co-operative Society, Road No.2
   Near by Banchpan School Lane
   Banjara Hills
   Hyderabad – 500 034

6. Stressed Assets Stabilisation Fund
   3rd Floor, IDBI Towers, WTC Complex, Cuffe Parade
   Mumbai – 400 005

7. Edelweiss Assets Reconstruction Company
   Edelweiss House
   Off CST Road, Kolivery Village, MMRDA Area
   Kalina, Santacruz East, Mumbai – 400 098

8. UTI Trustee Company Pvt. Ltd. (UTI Mutal Fund)
   UTI Towers, GN Block, Bandra – Kurla Complex
   Bandra (East), Mumbai – 400 051

...Respondents

Date of order:13.03.2023

CORAM:

Hon'ble Dr. Venkata Ramakrishna Badarinath Nandula,Member(Judicial)
Hon'ble Sri Satya Ranjan Prasad, Member (Technical)

Counsels present:

For the Applicant	: Mr. Dishit Bhattacharjee, Advocate
For the RP/R.1	: Mr. V.V.S.N. Raju, Advocate
For the R2 to R5	: None
For the R6 & R7	: Mr. Raja Shekar Rao Salvaji, Advocate
For the R8	: None

[PER: BENCH]

ORDER

1. Being aggrieved by the decision of CoC in not treating the secured financial creditors equitably, the Applicant filed this application seeking;

   a. to stay the procedure of voting of CoC on the agenda as decided in the 25th CoC meeting dated 17.09.2021 and stay all further proceedings, pending further orders in the present Application.

   b. to direct the Respondent No.3 (being the Resolution Applicant) to provide 28.63% of the amount to be paid to the Applicant (in accordance to its voting shares), instead of 12% as was decided in the JLM dated 19.08.2021 & 27.08.2021 and to set aside the resolutions passed by the Respondent No.2 in 24th & 25th CoC meetings dated 31.08.2021 and 07.09.2021.

2. Briefly, the facts as mentioned in the application are as follows:

a. The Applicant submitted that the Respondent No.1 was appointed as the Resolution Professional of M/s. Galada Power and Telecommunications Ltd. and the Applicant had submitted their proof of Claims dated 01.10.2019 in Form C to the

Respondent No.1 for consideration and the same was admitted by Respondent No.1.

b. Submitted that with respect to the distribution of amount/assets amongst the Financial Creditors of the Company, as was decided in the Joint Lenders Meeting (JLM) dated 19.08.2021 & 27.08.2021, an inter se sharing ratio for Secured Financial Creditors of the Company was decided as 88:12 with 88% being shared between the Financial Creditors who were 1st Charge holder against the fixed assets of the Corporate Debtor (i.e. M/s. SASF and M/s. Edelweiss Arc) and 12% being shared between the second charge holder against the fixed assets of the Corporate Debtor (i.e. Applicant herein and UTI Mutual Fund) for which, the Applicant raised an objection before the JLM and in the 24th CoC Meeting dated 31.08.2021. But, it was asserted by them that inter se sharing should be in ratio of voting share of the CoC members, in order to insure their equitable treatment and the Hon'ble Chairman of CoC failed to consider the representation, citing that the decision on inter se sharing was already taken in the JLM.

c. Submitted that the Applicant again raised the same issue in 25th CoC meeting dated 07.09.2021 in Item A-6 on the ground that distribution pattern is to be adopted in the resolution plan, must be as per voting share only and was finally decided that

the said matter shall be put to voting to the CoC members which is to be held on 17.09.2021.

d. Submitted that Section 30(4) & 53(1) of IBC clearly implies that Secured Creditors are to be treated equitably and the same principle of equality in IBC has also been uphold by the Hon'ble Supreme Court in the case of ***Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta and Others (2020) 8 SCC 531,*** wherein the Hon'ble Bench had referred to the Bankruptcy Law Reforms Committee Report of 2015 (formed the basis of enactment of the Code) and it was held that creditors are to be treated equitably, i.e. creditors of same class are to be treated equally.

e. Submitted that Section 30(4), IBC read with 53(1) envisages that Financial Creditors who are placed similarly are to be treated equally and this principle was cemented by the Hon'ble Supreme Court in the case of ***India Resurgence Arc Private Limited Vs. M/s. Amit Metaliks Limited And Anr in Civil Appeal No.1700/2021.***

f. Submitted that since the Applicant herein has a voting share of 28.63%, the distribution ratio of 88.12 as adopted in JLM is discriminatory against the Applicant and hence in violation of the sole basis of IBC and therefore, cannot be finalized in the

Resolution Plan. Though, the Applicant herein has first charge on current assets and second charge over the fixed assets, this solely cannot be a ground to bring the distribution ratio to 88.12.

g. Submitted that in case the Resolution Plan does not observe equality and fails to treat financial creditors equally, intervention of Courts, even in CoCs wisdom becomes necessary, since it would otherwise defeat the spirit of IBC, as was held in ***India Resurgence Arc Private Ltd Vs. M/s. Amit Metaliks Limited And Anor in Civil Appeal No.1700/2021.***

COUNTER FILED BY RESPONDENT NO.1

3. The Respondent No.1 herein is the Resolution Professional filed a reply stating that;

a. The Applicant herein, namely, Canara Bank has second charge on the fixed assets of the Corporate Debtor and first charge on the current assets of the Corporate Debtor and there are other creditors who have first charge over the fixed assets and second charge on the current assets. In addition to the above two categories, there is a third category of creditors called as unsecured creditors and the said three categories together

constituted CoC and they are collectively called as Financial Creditors.

b. Submitted that the three categories of Creditors do not enjoy equal rights over the assets of the Corporate Debtor. Hence, the contention of the Applicant that it should be treated equally with the first charge holders is liable to be rejected.

c. Submitted that the voting share of the CoC members is decided basing on the outstanding dues payable to the said creditors. The said voting share has nothing to do with the distribution of payments among the stakeholders as per the provisions of the IBC.

d. Submitted that the Applicant has wrongly interpreted Section 30(4) and failed to appreciate the dictum of the Apex Court in cases cited by them. The Section 30(4) of the Code envisages that the CoC has to take into account the order of priority among its creditors as laid down in Section 53 of the Code including the priority and value of security interest of a secured creditor and such other requirements as may be specified by the Board, while examining the Resolution Plan, for taking a decision. As of now, only fixed assets of the Corporate Debtor are valuable and the value of the current assets available is merely pittance and hence the consideration offered in the

Resolution Plans mainly/substantially constitutes vale placed on the existing Fixed Assets.

e. Submitted that the Fixed Assets of the Corporate Debtor were created by funding from the Term Lenders who are having first charge on the said assets and it is also necessary for the CoC to consider the feasibility and viability of the plan before arriving at a decision. The legal position settled is that equals should be treated equally and unequals should not be treated equally.

f. Submitted that in reply to the contentions of the Applicant in Paras 5 & 6, the Applicant acted on the directions given by the majority of CoC members at 24th CoC meeting held on 31.08.2021 based on the decision taken by JLM. In the instant case, the Applicant has only second charge on the fixed assets and first charge on the current assets, the CoC while taking a decision on the Resolution Plan, obviously takes into account availability and value of current assets as well as value of fixed assets. While it is so, the claim of the Applicant for equal treatment and distribution of amounts as per the voting share of the members is totally untenable and bad in law.

g. Submitted that in reply to Paras 12 & 13, the Applicant has incorrectly interpreted Section 30(4) and failed to appreciate the dictum of the Apex Court in the cases cited by them in the I.A.

It is clearly envisaged in Section 30(4) that the CoC has to take into account the order of priority among its creditors as laid down in Section 53 of the code including the priority and security interest of a secured creditor and such other requirements as may be specified by the board while examining the Resolution Plan submitted to it, for taking a decision. It is also necessary for the CoC to consider the feasibility and viability of the plan before arriving at a decision. The distribution of proceeds as envisaged in JLM is based on settled legal position and prior existing inter se arrangements and charges, thus it does not require intervention by this Hon'ble Tribunal.

h. Submitted that equity law has no place as far as CIRP proceedings under the Code are concerned. Since IBC in itself is a self-contained Code, Equity Law cannot be applied. Therefore, NCLT have no powers to exercise equity jurisdiction as was iterated by the ***Apex Court in Pratap Technocrats (P) Ltd. & Ors. Vs. Monitoring Committee of Reliance Infratel Limited & Anrs. (Civil Appeal No.676 of 2021).*** Hence, the Applicant's prayer for such equitable treatment with respect to the first charge holders is untenable. Hence, pleased to dismiss this application

4. The Respondents No.6 & 7 submitted their reply on the same lines of, the submissions made by the Respondent No.1.

MEMO FILED BY THE RESOLUTION PROFESSIONAL

5. The Resolution Professional filed a Memo dated 12.01.2023 stating that;

a. The Applicant placed reliance on the judgment dated 21.01.2022 passed by the ***Hon'ble NCLAT, New Delhi in the matter of IDBI Bank Vs. Mamta Binani and Others, 2022 SCC Online NCLAT 541*** to buttress the argument that all secured financial creditors irrespective of the kind of charge, first or second are equally placed and therefore ought to be treated equally in the Resolution Plan.

b. Submitted that as the Applicant's Hyderabad Branch was aggrieved by the aforesaid judgement of the Hon'ble NCLAT, filed a Civil Appeal No.2094 of 2022 before the Hon'ble Supreme Court whereby the Hon'ble Supreme Court on 10.05.2022 set aside the judgement of the Hon'ble NCLAT and restored the Company Appeal No.553 of 2019 to the file of the Hon'ble NCLAT. Thereafter, the Hon'ble NCLAT reheard the Company Appeal No.553 of 2019 and passed the final Order dated 02.09.2022 whereby it was held that the Hon'ble Tribunal does not have power of judicial review, when the decision taken by

CoC in compliance of Section 30(2) and Regulations 37 and 38. Hence, the judgement on which reliance was placed by the Applicant (Canara Bank) is no longer good law. This judgment was set aside by the Hon'ble Supreme Court and was remanded to the Hon'ble NCLAT such that the Hon'ble NCLAT in no uncertain terms dismissed the Appeal of IDBI and upheld the Order approving the Resolution Plan. The Hon'ble NCLAT has categorically held that this issue is not open for judicial review.

c. Submitted that the Hon'ble Supreme Court in the matter of SIDCO Leathers has already held that there is a difference between first charge holder and second charge holder. Section 529 of the Companies Act which is pari material to Section 53 of the Code will not override the inter se priority of the creditors. Section 30 of the Code also takes into account inter se priority of the creditors. The distribution per se is within the jurisdiction of CoC and it is within the commercial wisdom of CoC and hence cannot be interfered. Hence, this Application deserves to be dismissed.

6. **Point:**

Whether the resolutions of the COC dated 31.08.2021 and 07.09.2021 can be interfered with and the 3rd Respondent be directed to provide for payment of the sum claimed by the Applicant in the Resolution Plan?

7. We have heard the Learned Counsel for the Applicant, Mr. Dishit Bhattacharjee, Learned Counsel for the 1st Respondent, Mr. VVSN Raju and Learned Counsel for the Respondents 6 & 7, Mr. Raja Shekar Rao Salvaji, perused the record and case laws.

8. The principal grievance of the Applicant appears to be that, allocation of Resolution Fund among the financial creditors is discriminatory among the same class of financial creditors, hence unsustainable. According to the Learned Counsel for Applicant, the decision as to distribution of amount/assets amongst the Financial Creditors of the Corporate Debtors, taken in the Joint Lenders Meeting (JLM) dated 19.08.2021 & 27.08.2021 fixing the inter se, sharing ratio for Secured Financial Creditors as 88:12 with 88% being shared between the Financial Creditors who were 1st Charge holders against the fixed assets of the Corporate Debtor (i.e. M/s. SASF and M/s. Edelweiss Arc) and 12% between the second charge holders against the fixed assets of the Corporate Debtors (i.e. Applicant herein and UTI Mutual Fund) has been objected to by the Applicant before the JLM and also in the 24th CoC Meeting dated 31.08.2021. However, it was asserted by the COC, that inter se, sharing should be in ratio of voting share of the CoC members and the Chairman of CoC failed to consider the

objection of the Applicant citing that the decision on inter se, sharing has been already taken in the JLM.

9. It is further contended that the Applicant once again raised the same issue in 25th meeting of the COC dated 07.09.2021 contending that the distribution pattern is to be adopted in the resolution plan, must be as per voting share only and hence, it was finally decided that the said matter shall be put to voting to the CoC members which is to be held on 17.09.2021 and the following resolution has been passed on 07.09.2021 by the COC, which is the subject matter of challenge in the application:

"Item No.A-6

To take note email received from Canara Bank and discuss on the future course of action.

The Chairperson informed the COC Members that he had received an email on 02.09.2021 after the conclusion of the Adjourned 24th COC Meeting from the representative of Canara Bank (erstwhile Syndicate Bank) requesting him to include an agenda item for discussion on distribution matrix. A copy of the said email was circulated with the notice of this meeting.

Accordingly, the Chairperson requested the COC Members to discuss and decide on the future course of action.

The representation of Canara Bank stated that the distribution pattern should be as per the voting share only. The representative further added that Section 53(2) of the Insolvency and Bankruptcy Code, 2016 (IBC) disregards any contractual agreements between creditors of equal ranking and under CIRP there ought not to be a

differentiation among the first and second charge holders. The representative of SASF referring to the discussions held in Joint Lenders Meeting (JLMs) held on 19.08.2021 & 27.08.2021 stated the provisions of Section 30(4) of IBC as under:

"The Committee of Creditors may approve a Resolution Plan by a note of not less than sixty six percent of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board:.

Therefore, Section 30(4) enables the COC members to decide on the inter se manner of distribution taking into account the order of priority amongst the creditors including the priority and value of the security interest of secured creditors. The representative further stated that the COC Members at the said JLMs had discussed and agreed on an inter se sharing ratio among the Secured Financial Creditors. The ratio of 88:12 was decided, with 88% being shared between SASF & Edelweiss ARC, the first charge holders on fixed assets and 12% being shared between UTI Mutual Fund and Canara Bank (erstwhile Syndicate Bank), the second charge holders, which received an in-principle approval from SASF, Edelweiss ARC and UTI Mutual Fund comprising 72% of the total voting share in the COC and which was also discussed in the 24th Meeting. The representative of Edelweiss ARC placing reliance on the decisions of the Courts in the matters of Amit Metalics and Essar Steel stated that the judiciary had time and again confirmed that a decision taken by the majority of COC members will prevail and courts cannot adjudicate or interfere with the commercial wisdom of the COC members in case the same is challenged. The representative of UTI Mutual Fund seconded the views expressed by the representative of SASF and Edelweiss ARC.

The representative of Canara Bank inquired with the Chairperson whether the Resolution Applicants (RAs) have incorporated the above mentioned distribution pattern in their Resolution Plans. The Chairperson informed that vide their email dated 31.08.2021, the COC members had directed the Chairperson to communicate the

distribution pattern to the RAs as per the decision taken in the 24th COC Meeting held on 31.08.2021. Accordingly, the distribution pattern was informed to the RAs via email dated 01.09.2021 alongwith the procedure to be followed for the final bidding. The Chairperson thereafter confirmed that all the RAs had incorporated the said distribution pattern in the revised resolution plans submitted post 24th COC Meeting.

After discussion it was decided to put this matter for voting as per Agenda Item C-1".

10. Therefore, it is required to see whether the decision of the COC as to payment to different classes or sub-classes of creditors under the Resolution Plan can be interfered with, especially on the ground of alleged discrimination among the purportedly same class of financial creditors.

11. At the outset, we must say that the legal perspective, in so far as the order of priority amongst creditors, including the priority and value of the security interest of a secured creditor in distribution of the cash and receivables of the Corporate Debtor undergoing CIRP, post 2019 amendment to Section 30 of the IB Code, 2016, is as clear as crystal, as can be traced not only from Section 30 of the IB Code, 2016, but also from several rulings of Hon'ble Supreme Court, as such, the same is no longer res integra.

12. Hon'ble Supreme Court of India, in Essar Steel, supra, having reiterated that "existence of certain intrinsic assumptions

relating to the COC on which the principle of "commercial wisdom" has been recognised, the assumptions are that the COC has the requisite expertise to assess the viability of the Corporate Debtor and verify the commercial feasibility of the proposed resolution plan, that their actions are a consequence of a thorough examination and assessment of the proposed Resolution Plan, and that their decisions are a result of deliberations and voting in the COC meetings", further, held that "subject to Section 30(2), the mechanism of distributing payments to the creditors falls within the exclusive commercial realm of the COC'.

13. In the very same ruling, Hon'ble Supreme Court of India, upheld the constitutional validity of the amendment made in the year 2019, to Section 30 of the IB Code, 2016, and the said reads as under:

30(4) The Committee of Creditors may approve a Resolution Plan by a vote of note less than sixty six percent of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53, including the priority and value of the security interest of a secured creditors, and such other requirements as may be specified by the Board.

14. A bare perusal of the language used by the Legislature in the amended Section 30(4), with respect to considering the security interest, shows that the word used being "may", the same is directory and not mandatory. That apart, the said provisions is only an enabling provision and does not impose any mandate on the COC to distribute payments to creditors based on the value of security held by them. Section 30(4) of the IB Code only says that the COC may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53 of the IB Code, including priority and value of security interest of secured creditors, while approving the resolution plan, so much so, the argument that, as the COC failed to take into the account the pre-CIRP preferential financial bargains made by the Applicants with the Corporate Debtor, as such, the impugned decisions are liable to be set aside, is untenable.

15. An identical issue had cropped up in the matter of **India Resurgence ARC Private Limited vs. Amit Metalika Limited and Another [2021 SCC OnLine SC 409]**, supra, wherein it was similarly contended by the Appellant therein that the COC could not have approved the Resolution Plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor even though the legislature in its wisdom has amended

Section 30(4) of the IB Code, 2016, requiring the COC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the IB Code, 2016, including the priority and value of the security interest of a secured creditor, and Hon'ble Supreme Court, held that "it needs hardly any elaboration that financial proposal in the Resolution Plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and take care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction'. Thus, it is noteworthy from the ruling above, that in the Scheme of the IB Code, 2016, every dissatisfaction like that of the Applicants herein, does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

16. The Hon'ble Supreme Court of India in the matter of **Essar Steel India Limited vs. Satish Kumar Gupta & Ors. [(2020) 8 SCC 531],** went on record that the submissions on behalf of the Appellant therein with reference to the value of its security interest neither carry any meaning nor any substance, and held that 'what amount is to be paid to different cases or sub-classes of creditors in accordance with the provisions of the IB Code, 2016 and the related Regulations, is essentially the

commercial wisdom of the Committee of Creditors, and a dissenting secured creditor like the Appellant therein cannot suggest a higher amount to be paid to it with reference to the value of the Security Interest – a finding which is squarely applicable to the facts of the case at hand.

17. Therefore, the well settled legal position in so far as the priority in payment amongst different classes of creditors, essentially being the commercial wisdom of the Committee of Creditors, and a dissenting secured creditor like the Applicants herein cannot seek a higher amount to be paid to them on the basis of the value of their security interest by pleading dissatisfaction.

18. That apart, in the matter between **IDBI Bank vs. Mamata Binani and Ors.** wherein the Applicant is also a party, the Applicant raised a similar plea, which was accepted by the Hon'ble NCLAT. However, the order of the NCLAT has been set aside by the Hon'ble Supreme Court with a direction for fresh enquiry and thereafter, the Hon'ble NCLAT heard afresh and dismissed the application. As the said finding has attained finality, the Applicant is bound by the said Ruling.

19. Therefore, for the aforesaid reasons, we find no merit, as such, the same deserves to be dismissed. Accordingly, we hereby dismiss the application IA 520/2022 in 384/7/HDB/2018. No costs.

Sd/-	**Sd/-**
SATYA RANJAN PRASAD **MEMBER (TECHNICAL)**	**Dr.N.V.RAMA KRISHNA BADARINATH** **MEMBER (JUDICIAL)**

VL/Syamala

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II

I.A. No.663/2021
in
CP(IB) No.384/7/HDB/2018

[U/s. 60 (5) of IB Code, 2016 r/w Rule 11 of NCLT Rules, 2016]

In the matter of:

M/s. Jiva Internet Solutions Pvt. Ltd.,
Level-I, Wing-2, Block-C, First Floor,
Cyber Gateway, Hitech City, Madhapur,
Hyderabad – 500 081.

...Applicant

Vs.

1. Mr.Nitin Panchal
   Resolution Professional of
   M/s. Galada Power and Telecommunications Ltd.,
   P/26, IDA, Block-III, Uppal,
   Hyderabad – 500 039.
2. Stressed Assets Stabilisation Fund, Mumbai
3. Edel Weiss ARC, Mumbai
4. UTI Mutual Fund, Mumbai
5. Canara Bank (Erstwhile Syndicate Bank,Hyd
6. M/s. Amrutha Constructions Pvt.Ltd, Bengaluru

...Respondents 1 to 6

Date of Order: 13.03.2023

CORAM:

Hon'ble Dr. N.V. Ramakrishna Badarinath, Member (Judicial)
Hon'ble Sri Satya Ranjan Prasad, Member (Technical)

Date of Order: 13.03.2023

Counsels present:

For the Applicant	:	Mr. S.V.Vanshi Krishna, Advocate
For the Respondent 1	:	Mr. V.V.S.N. Raju, Advocate
For the Respondents 2&3	:	Mr. Raja Shekar Rao Salvaji, Advocate

[PER: BENCH]

ORDER

I. This application is filed on behalf of the Resolution Applicant under Section 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016 seeking to –

(a) direct the Respondent Nos.1 to 5 to revoke their decision to approve the Resolution Plan submitted by the Respondent No.6/M/s. Amrutha Constructions Pvt. Ltd, and accept the Resolution Plan submitted by the Applicant herein, M/s.Jiva Internet Solutions Pvt. Ltd. forthwith; and

(b) direct the respondent No.1 (Resolution Professional) to do all acts and deeds to give effect to the prayer at (a) above.

II. Briefly, the facts as mentioned in the Application are as follows:

a. The Company Petition CP(IB) No.384/7/HDB/2018 filed by the Stressed Assets Stabilization Fund, for short 'Respondent No.2/Financial Creditor' against the Corporate Debtor/M/s. Galada Power and Telecommunication Ltd. was admitted into CIRP by this Adjudicating Authority, vide Order dated 14.08.2019 and appointed Mr. Nitin Panchal as the Interim Resolution Professional, for short 'IRP'. **A copy of the Order is filed as Annexure-A1 of the application.**

b. The IRP issued an invitation for 'Expression of Interest' for short 'EOI' dated 17.06.2021 in Form G **(Annexure-A2**) inviting the Expression of Interest from the Prospective Resolution Applicants. In response, the Applicant Company has submitted its Financial Proposal and Resolution Plan dated 04.09.2021 for an amount of Rs.39,87,26,575/-. **Copies of the same are filed as Annexures-A3 & A4 of the application.**

c. It is averred that the RP has shortlisted three (3) Resolution Applicants out of nine (9) Resolution Applicants and though the Applicant Company submitted Resolution Plan with an higher amount to be paid to CoC Members and to Workmen

and scored better in quantitative as 80.0, the CoC has selected Respondent No.6 Company, M/s. Amrutha Constructions Pvt. Ltd. through its e-voting, which concluded on 17.09.2021 and the Evaluation Matrix **(Annexure-6 & 7).**

d. The Applicant proposed to engage a veteran Mr. Gogineni Satyanarayana as Chief Technical Consultant, who has wide experience in the relevant industry, but RP/CoC ignored the same.

e. It is averred that based on the email dated 23.09.2021 received from RP stating that the Resolution Plan submitted by the Applicant Company has not been approved by the CoC members with requisite majority and the EMD will be refunded within 30 days, the Applicant Company has sent a protest email dated 24.09.2021 and reserved its right to approach this Hon'ble Tribunal in the interest of equity and justice and to ensure the value maximization of all stakeholders. **A copy of the same is filed as Annexure-A10 of the application.**

f. It is submitted that the statutory provisions contained in Section 30(2) mandates that "the Resolution Professional shall examine each Resolution Plan, so that the same shall

provide for higher payment of debts to operational creditors and financial creditors and it is clearly states that "for the removal of debts, it is hereby clarified that a distribution in accordance with the provisions of this Clause shall be fair and equitable to such creditors. Therefore, the above said provision clearly favours the Resolution Plan submitted by the Applicant Company who has offered higher amount not only to the Financial Creditors but also to other creditors and scored much higher in quantitative matrix.

g. Since the decision of the CoC in this matter is clearly opposed the statutory provisions and this Tribunal only can adjudicate the matter, this application is filed in the interest of justice and also to uphold the majesty of Rule of Law laid down in the IBC, 2016 u/s 30(2).

III. The gist of the Counter filed by the Respondent No.1 is -

a. After assessment of the Resolution Plans, based on the merits, three(3) Resolution Plans were submitted to CoC and the CoC has approved the Resolution Plan of M/s. Amrutha Constructions Private Ltd based on the highest score at the 25th CoC meeting held on 07.09.2021 through e-voting which concluded on 17.09.2021 and the same was filed before this Tribunal.

b. The Evaluation Matrix was unanimously approved by the CoC Members in its 20th Meeting held on 02.07.2021 through ballot voting and the same was shared with the Applicant along with the RFRP and Information Memorandum on 07.07.2021 after receipt of duly executed Non-Disclosure Agreement. The Evaluation Matrix clearly defined the Qualitative and Quantitative parameters with corresponding marks assigned to them.

c. Ample time was given to all the Resolution Applicants at every stage of the process to submit their offers and conducted open biddings virtually in the 24th CoC meeting held on 31.08.2021 and 02.09.2021 to ensure the entire process in a competitive, fair and transparent manner by inviting all the 3 Resolution Applicants to participate. The bidding process was concluded only after obtaining verbal confirmation from all the Resolution Applicants confirming the submissions of their final bid/offer.

d. On the above grounds, the Respondent seeks to dismiss the instant application.

IV. The Respondent Nos.2 and 3 submitted their reply on the same lines of the submissions made by the Respondent No.1.

V. The gist of the Rejoinder is -

a. The Respondent No.1 filed merely taking shelter of commercial wisdom of CoC, which is not apparent on records and only furnished evasive and vague replies. Further, the Respondent No.1 wilfully suppressed filing of crucial documents viz. trail of emails dated 2nd, 3rd & 4th September, 2021 and documents exchanged therewith and the Minutes of 25th meeting of CoC held on 07.09.2021. Copies of the same are filed as Annexure-AA1 & AA2 of the application, which clearly expose the nexus between the alleged Successful Resolution Applicant i.e. Respondent No.6.

b. The approval of CoC clearly violated the basic principles of IBC, 2016 and more so, the statutory provisions contained u/s 30(2) of IBC, 2016 and it is clear case of subjective and colluded approval for the alleged Resolution Application of Respondent No.6 on the part of CoC.

c. It is a clear case of failure on the part of the Resolution Professional and the Committee of Creditors, who failed to exercise independent commercial wisdom, unbiased and fair consideration of the best opportunity available for the resolution process. Hence, the Application filed by this Unsuccessful Resolution Applicant deserves to be

considered favourably in the interest of upholding the purpose and intent of Resolution Process under IBC, 2016.

VI. The Resolution Professional filed a Memo dated 29.11.2022 stating that –

i. The Hon'ble Bench directed the Respondents/Resolution Professional to file a Memo in respect of the Evaluation Matrix parameters contained in B2 and B3 and scores awarded by the Committee of Creditors thereunder. In compliance of the directions of the Adjudicating Authority, the Respondents/Resolution Professional submitted the following details:

a) The RP prepared Evaluation Matrix on 05.07.2021 which was duly approved by CoC and the same was shared with the Prospective Resolution Applicants (PRAs) on 07.07.2021 immediately after obtaining the Non-Disclosure Agreement from PRAs. Thereafter, all the Resolution Plans submitted by the interested Resolution Applicants were evaluated, assessed and finalized in accordance with the said Evaluation Matrix.

b) The Evaluation Matrix scores were awarded to the Applicant herein on B2 & B3 parameters under the

Qualitative Criteria of the said Evaluation Matrix and are as follows:

B1 - scores will be based reasonableness of financial projections, mitigation factors related to the implementation of the proposed Resolution Plan.

B2 - score will be given based on ability to turnaround distressed companies – Managerial competence and technical abilities, key managerial personnel, track record in implementing turnaround of stressed assets etc. This parameter is further sub-divided as under:

a. Track record / Experience of the Resolution Applicant (3 marks).

b. Track record in M&A / taking over and turning around distressed assets (2 marks).

B3 - score will be given based on "core competence" in the same line of Business activity of the Corporate Debtor (5 marks). Full marks would be awarded in case the Resolution Applicant has core competence in the same line of business activity of the Corporate Debtor.

ii. In accordance with the approved Evaluation Matrix, scores were awarded to the respective Resolution Applicants including Applicant herein by the CoC.

iii. The observations laid down by the CoC while awarding scores to the respective Resolution Applicants are mentioned at Page No.2 of the Memo dated 29.11.2022 filed by the Resolution Professional, which are as below:

A. The Resolution Professional prepared Evaluation Matrix on July 5th, 2021 which was duly approved by CoC. This Evaluation Matrix was shared with the Prospective Resolution Applicants (PRAs) on July 7th, 2021 immediately after obtaining the Non-Disclosure Agreement from the PRAs. Thereafter, all the Resolution Plans submitted by the interested Resolution Applicants were evaluated, accessed and finalized in accordance with the said Evaluation Matrix.

B. In accordance with the evaluation matrix, scores were awarded to the Applicant herein on B2 & B3 parameters under the Qualitative Criteria of the said Evaluation Matrix. It is submitted that in accordance with the Evaluation Matrix parameter mentioned below:-

- B1 – Scores will be based reasonableness of financial projections, mitigation factors related to the implementation of the proposed Resolution Plan.
- B2 – Score will be given based on ability to turnaround distressed companies – Managerial competence and technical abilities, key managerial personnel, track record in implementing turnaround of stressed assets, etc. This parameter is further sub-divided as under:
  a. Track record / Experience of the Resolution Applicant (3 marks)
  b. Track record in M&A / taking over and turning around distressed assets (2 marks)
- B2 – Score will be given based on "core competence" in the same line of Business activity of the Corporate Debtor (5 marks). Full marks would be awarded in case the Resolution Applicant has core competence in the same line of business activity of the Corporate Debtor.

C. In accordance with the approved Evaluation Matrix, scores were awarded to the respective Resolution Applicants including Applicant herein by the Committee of Creditors hereinafter referred to as ***"CoC".*** It is pertinent to mention the observations laid down by the CoC while awarding scores to the respective Resolution Applicants.

Parameter Qualitative	**Total Marks**	**RA1 Score**	**M/s Amrutha Constructions Private Ltd (RA1)**	**RA2 Score**	**Consortium of M/s Jiva Internet Solutions Pvt Ltd, Mr. Vanit Kumar & Mrs. Vanisha Agarwal (RA2)**
B1	10.00	10.00	The net worth of the Successful Resolution Applicant i.e. M/s Amrutha Construction Private Limited as on 31.03.2021 is Rs.265.38 Crores. Based on the data/documents submitted by each of the Resolution Applicants, the RP/COC found that the net worth of the successful resolution applicant is almost 10 times more than the other resolution applicants. The COC was of the view that on the strength of its net worth, the successful resolution applicant will have much better access to avenues that are available for fund raising in the medium as well as in the long	8.00	The total net worth of RA2 as on 31.03.2020 as per the data submitted with the resolution Professional is Rs. 26.94 Crores. Like in the case of RA1, RA2 has also not provided its balance sheet, Financial Projections in support of the Economic Viability, External Credit Rating in support of their Financial Strength. In the absence of any such documents, the COC was no able to assess the financial position of RA2. However, it was very clear that the net worth of RA2 was very low when compared with the net worth of RA1. Basis the limited financial data made available, marks were allocated to RA2.

			run. The business from PSUs is mainly procured through Bidding / Tendering process. As the net worth is one of the essential criteria for Tendering / Bidding Qualification, the COC was of the view that the successful resolution applicant will have better standing for sourcing the future business to ensure revenue visibility in the short term as well as in long run. Copy of Rating Rationale by Brickwork is annexed herewith as **Annexure – 1.** That, the successful resolution applicant has also provided its provisional balance sheet as on 31.03.2021, Financial Projections in support of the Economic		

			Viability, External Credit Rating of Brickworks in support of their Financial Strength. The operations of the Corporate Debtor have been shut down since the year 2019. The COC was of the unanimous view that a huge investment will be required to revive the business of the Corporate Debtor and only an entity with a sound financial background and a strong balance sheet will be able to make an heavy investment into the corporate debtor. On this count, it was evident from the data presented before the COC that the net worth/financial position of the successful resolution applicant was much higher than the other resolution		

			applicants and accordingly marks were allotted by the COC.		
B2 A	3.00	2.50	The major source of demand for the conductors is with various Public Sector Undertakings and RA1, the successful Resolution Applicant has been associated with various PSU clients for many years. The COC was of the view that this association will also help them to support growth opportunities with secured revenue growth in the medium to long term growth opportunities of the Corporate Debtor. The Successful Resolution Applicant has in house talent and in the opinion of the COC, RA1 has far better capabilities to revive the business of the Corporate Debtor	0.00	On the other hand RA2, the Applicant herein has no industry/ sector specific track record which is more pertinently required for successful revival of this Corporate Debtor and without existing in-house talent on the board of the Corporate Debtor, the RA2 may face entry barriers to various prospective PSU's which will ultimately impact revenue projections of the Corporate Debtor in the long run. It is also submitted that these constraints as mentioned above are also coupled with no prior experience of Aluminium industry which may pose challenges to scale up the operations in order to revive the Corporate Debtor.

			as compared to RA2. Mr. P.V. Rao (MD of RA1) & Mr. L. Thiyagarajan, proposed members of the Board have rich experience in the Aluminium industry.		
B2 B	2.00	0.00	Since RA1 has no experience in turning around distressed assets, no mark have been awarded for this parameter.	0.00	Since RA2 has no experience in turning around distressed assets, no marks have been awarded for this parameter
B3	5.00	3.50	RA1, the Successful Resolution Applicant has in house talent and have far better capabilities to revive Corporate Debtor as compared to RA2. That Mr. P.V. Rao the Managing Director of RA1 who immediately after graduation in the Year 1984 worked as Management Trainee for a period of one year in company called Mohan Aluminium Private Ltd Bangalore who were one of the	0.00	Whereas RA2, the Applicant herein proposes to have Mr. Vanit Kumar & Mrs. Vanisha Agarwal as proposed directors. Both of them are from IT Sector and have absolutely no industry specific knowledge & experience in the line of activity of the Corporate Debtor. ***Copy of Page 46 of IA No 663 is annexed herewith as Annexure – 4.*** Thereafter Applicant herein has stated that they are in the process of identifying the team of professionals to maintain

			leading Manufacturers of AAC & ACSR Conductors as well as of Aluminium Rods. ***Copy of Page 9 of the Resolution Plan is annexed herewith as Annexure – 2.*** That Successful Resolution Applicant has identified Mr. L. Thiyagarajan as member of the proposed Board as Directors, Head of Operations and will be in charge of day to day operations management of the Corporate Debtor. He has over 25 years of experience in the Aluminium Industry and has worked with Global MNCs in the middle east and currently associated with one of the leading Aluminium Rod & ACSR Conductor Manufacturer in India. ***Copy of Page 35 of the***		operational oversight. ***Copy of 54 of IA No 663 is annexed herewith as Annexure – 5.*** The COC requested RA2 to submit concluded Tie Up or Mandate Signed in respect of the talent acquisition in this regard. No such document was made available to CoC by the Applicant herein at the time of Evaluation. Applicant herein sought additional time for this & that was objected by RA1 (Successful Resolution Applicant) as it was made clear by CoC that no further extension is permissible as entire Second Round of EOI was conducted within exclusion period of 106 days as permitted by Hon'ble NCLT

			Resolution Plan is annexed herewith as Annexure – 3. Further RA1 has participated in a PGCIL tender for construction of 33KV and 11KV lines in the state of Arunachal Pradesh valuing around Rs. 200 crore which involved substantial procurement of aluminium conductors ***(Pg. No. 9 of the Resolution Plan).*** Acquisition of the Corporate Debtor may also be treated as backward integration for the RA.		

D. Thus, on the date of Evaluation, the COC based on the information provided, explanations given and the documents submitted before them, was of the view that M/s. Amrutha Constructions Private Limited was having stronger Financial strength as well as in house Talent required for revival of the Corporate Debtor post its acquisition under IBC whereas this essential & pertinent requirement was lacking in case of RA2, the Applicant herein as they do not have any core competence

in this line of activity of the Corporate Debtor. Therefore, the 6th Respondent is on a higher footing in comparison to the Applicant herein in accordance with the above mentioned detailed analysis and evaluations conducted by the COC on the basis of approved evaluation matric annexed herewith. It is stated that the Successful Resolution Applicant can make the operations more cost effective and the existing in house talent will help in a long way to revive the Corporate Debtor. On both counts i.e. financial strength and experience in the aluminium industry, the COC found that RA1 was on a much better footing as compared to RA2 for the reasons mentioned above. The COC was also conscious of the fact that Insolvency and Bankruptcy Code has provided a platform for turning around distressed companies by way of resolution. Thus the intent of the CIRP process is finding a resolution and it is not any other recovery mechanism. Keeping in mind the purpose of the code, the COC after taking into account all the factors mainly financial strength and experience in the aluminium industry assessed the capabilities of both RA1 and RA2 and allocated marks. On the basis of these factors alone COC has allotted marks to the respective Resolution Applicants.

VII. Both the parties have submitted their written submissions.

VIII. In the light of the contest, as afore stated, we have framed the following Point for our consideration –

Can the Adjudicating Authority direct the COC to revoke its acceptance accorded to a Resolution Plan or to accept the Resolution Plan which it has rejected?

IX. We have heard the Learned Counsel Dr.S.V.Ramakrishna for Mr.S.V.Vanshi Krishna, Advocate, for Applicant , Mr. V.V.S.N. Raju, Advocate for 1st Respondent, Mr. Raja Shekar Rao Salvaji, Advocate for the Respondents 2&3, perused the record and case law.

X. **Point.**

Can the Adjudicating Authority direct the COC to revoke its acceptance accorded to a Resolution Plan or to accept the Resolution Plan which it has rejected?

i. The decision of the COC rejecting the Resolution Plan of the Applicant and acceptance of the Resolution Plan of the 6th Respondent appears to be the genesis for filing the present application. According to the Learned Counsel for the Applicant, the COC's decision of *approving* the Resolution Plan of the 6th Respondent and *rejection* of the Resolution Plan of the Applicant, does not *reflect* the 'real commercial wisdom' of COC, besides violative of the provisions of the IBC, as such, the said decision needs to be set aside.

ii. Learned Counsel further contends that even though the Resolution Plan of the Applicant provides *larger sum* than the Plan submitted by the 6th Respondent, besides

the Applicant scored *more marks* than the 6th Respondent in the *qualitative* parameters, only by manipulating the *qualitative* parameters and playing *fraud* by RP and COC, the 6th Respondent was given the score of 16 out of 20 points whereas the Applicant was given only 8 out of 20 points and basing on the qualitative parameters thus arrived at, the Resolution Plan of the 6th Respondent has been voted favourably and the resolution Plan of the Applicant has been rejected. Therefore, according to the Learned Counsel, the above decision of the COC does not reflect the 'real commercial wisdom' of COC, as such the same needs to be substituted with the judicial wisdom, by setting aside the said decision.

iii. Thus, the process of Evaluation Matrix followed by the COC is the subject matter of challenge, in this application

iv. The law as regards *interference* in the decision of the CoC, be it *acceptance* or *rejection* of a Resolution Plan of a Prospective Resolution Applicant (PRA), or the process of *Evaluation Matrix followed by the members of the CoC,* is well settled and no longer *res integra.*

v. (i). Hon'ble NCLAT in **IMR Metallurgical Resources AG v. Ferro Alloys Corporation Limited [(Company Appeal) (AT) No. 272 of 2020]** wherein the appellant *challenged the Evaluation Matrix, held* that –

> *"12. In this Appeal, the Appellant had* ***challenged the Evaluation Matrix*** *approved by the CoC which falls within the commercial wisdom of the CoC. It is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC, which involves evaluation of the Resolution Plan based on its feasibility. Such commercial wisdom of the CoC with the requisite voting majority is non-justiciable. The powers of the Adjudicating Authority under Section 31 of the Code is limited to the matters covered under Section 30(2) of the Code when the Resolution Plan does not conform to the stated condition. Therefore, the Appellant cannot question the commercial wisdom of the CoC in rejecting the Resolution Plan, with the requisite majority and in approving the Resolution Plan of SPTL. No material irregularity in Corporate Insolvency Resolution Process before the R.P. has been demonstrated."*

(ii). A Civil Appeal No. 2720 of 2020 before the Hon'ble Supreme Court against the aforesaid Judgment was dismissed by the Hon'ble Supreme Court *vide* its Order dated 20th July 2020.

vi. Hon'ble **Supreme Court of India, in Maharashtra Seamless Limited vs Padmanabhan Venkatesh, Civil Appeal No 4242/2019** decided on 22 January, 2020, in para 28 held as follows:

> *"8. The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to*

cede ground to the commercial wisdom of the creditors rather than assess the Resolution Plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront. (Emphasis is ours).

vii. Hon'ble Supreme Court, in re., **ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors., (2019) 2 SCC 1,** *similarly* held that –

"That apart, the challenge of the Applicant being process of Evaluation Matrix which is entirely the domain of the COC cannot be interfered by this Adjudicating Authority"

Hon'ble NCLAT in the matter of ***PNC Infratech Limited v. Deepak Maini and Others, Company Appeal (AT) No. 143 of 2020*** whereunder the facts were same as the present Application, had held that

"29. From the minutes of the 9th CoC, this Tribunal is of the view that the letter of the Appellant dated 25.07.2019 regarding revision of plan, has also been considered in the said meeting and thereafter the CoC evaluated the plan and provided the score matrix at page 210 of Appeal paper book, Vol.-I.

30. On the other hand, ***the Learned Counsel for the Appellant contends that the evaluation of matrix adopted by the CoC is not in accordance with the law and submitted that the***

> ***Appellant should have been declared as Successful Resolution Applicant whereas the Appellant was treated as H2 bidder***. *Before adverting to the finding, the relevant provision of law is extracted hereunder for beneficial reference.*
>
> *38. In view of the decisions of the Hon'ble Supreme Court, it is the settled proposition of law that the commercial wisdom of the Committee of Creditors in approving or rejecting a resolution plan is essentially based on a business decision which involves evaluation of resolution plan based on its feasibility besides the Committee of Creditors being fully informed about the viability of the Corporate Debtor. The Committee of Creditors invariably examine the Resolution Plan and an assessment is made through their team of experts in that regard.*
>
> *39.* ***Further, there is no such mechanism under the Code that gives the right to the Unsuccessful Resolution Applicant to challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations***. *Though, Section 61 of the Code provides Appeals against the orders of the Adjudicating Authority and Sub-section (3) thereof provides an Appeal against an order approving a Resolution Plan under Section 31 which may be filed on the following grounds namely:.."*

XI. Therefore, *when* *there is no mechanism under the Code that gives the right to the Unsuccessful Resolution Applicant to challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations*, the applicant's challenge being in respect of the *qualitative parameters* adopted by the COC, whatever may the grounds is not justiciable before this Adjudicating Authority, as this Adjudicating Authority shall cede ground to the *commercial wisdom* of the creditors rather than *venture to assess* the resolution plan of the applicant on

the basis of quantitative analysis, whatever may be the grounds urged.

XII. Even on the factual aspect of the matter, the Memo dated 29.11.2022 filed by the Resolution Professional contends which are not in dispute demolishes the plea of collusion or fraud pleaded by the Applicant.

a) As can be seen from the said Memo, the Resolution Professional prepared Evaluation Matrix on July 5th, 2021 which was duly approved by the CoC. This Evaluation Matrix was shared with the Prospective Resolution Applicants (PRAs) on July 7th, 2021 immediately after obtaining the Non-Disclosure Agreement from the PRAs. Thereafter, all the Resolution Plans submitted by the interested Resolution Applicants were evaluated, accessed and finalized in accordance with the said Evaluation Matrix.

b) In accordance with the Evaluation Matrix, scores were awarded to the Applicant herein on B2 & B3 parameters under the Qualitative Criteria of the said Evaluation Matrix. It is submitted that in accordance with the Evaluation Matrix parameter mentioned below:-

- B1 – Scores will be based reasonableness of financial projections, mitigation factors related to the implementation of the proposed Resolution Plan.
- B2 – Score will be given based on ability to turnaround distressed companies – Managerial competence and technical abilities, key managerial personnel, track record in implementing turnaround of stressed assets, etc. This parameter is further sub-divided as under:
    a. Track record / Experience of the Resolution Applicant (3 marks)
    b. Track record in M&A / taking over and turning around distressed assets (2 marks)
- B2 – Score will be given based on "core competence" in the same line of Business activity of the Corporate Debtor (5 marks). Full marks would be awarded in case the Resolution Applicant has core competence in the same line of business activity of the Corporate Debtor.

c) In accordance with the approved Evaluation Matrix, scores were awarded to the respective Resolution Applicants including Applicant herein by the Committee of Creditors hereinafter referred to as ***"CoC".*** It is pertinent to mention herein the observations laid down

by the CoC while awarding scores to the respective Resolution Applicants.

Parameter Qualitative	**Total Marks**	**RA1 Score**	**M/s Amrutha Constructions Private Ltd (RA1)**	**RA2 Score**	**Consortium of M/s Jiva Internet Solutions Pvt Ltd, Mr. Vanit Kumar & Mrs. Vanisha Agarwal (RA2)**
B1	10.00	10.00	The net worth of the Successful Resolution Applicant i.e. M/s Amrutha Construction Private Limited as on 31.03.2021 is Rs.265.38 Crores. Based on the data/documents submitted by each of the Resolution Applicants, the RP/COC found that the net worth of the successful resolution applicant is almost 10 times more than the other resolution applicants. The COC was of the view that on the strength of its net worth, the successful resolution applicant will have much better	8.00	The total net worth of RA2 as on 31.03.2020 as per the data submitted with the resolution Professional is Rs. 26.94 Crores. Like in the case of RA1, RA2 has also not provided its balance sheet, Financial Projections in support of the Economic Viability, External Credit Rating in support of their Financial Strength. In the absence of any such documents, the COC was no able to assess the financial position of RA2. However, it was very clear that the net worth of RA2 was very

			access to avenues that are available for fund raising in the medium as well as in the long run. The business from PSUs is mainly procured through Bidding / Tendering process. As the net worth is one of the essential criteria for Tendering / Bidding Qualification, the COC was of the view that the successful resolution applicant will have better standing for sourcing the future business to ensure revenue visibility in the short term as well as in long run. Copy of Rating Rationale by Brickwork is annexed herewith as **Annexure – 1.** That, the successful resolution applicant has also provided its provisional balance sheet as		low when compared with the net worth of RA1. Basis the limited financial data made available, marks were allocated to RA2.

			on 31.03.2021, Financial Projections in support of the Economic Viability, External Credit Rating of Brickworks in support of their Financial Strength. The operations of the Corporate Debtor have been shut down since the year 2019. The COC was of the unanimous view that a huge investment will be required to revive the business of the Corporate Debtor and only an entity with a sound financial background and a strong balance sheet will be able to make an heavy investment into the corporate debtor. On this count, it was evident from the data presented before the COC that the net worth/financial position of the successful		

			resolution applicant was much higher than the other resolution applicants and accordingly marks were allotted by the COC.		
B2 A	3.00	2.50	The major source of demand for the conductors is with various Public Sector Undertakings and RA1, the successful Resolution Applicant has been associated with various PSU clients for many years. The COC was of the view that this association will also help them to support growth opportunities with secured revenue growth in the medium to long term growth opportunities of the Corporate Debtor. The Successful Resolution Applicant has in house talent and in the opinion of the COC, RA1 has	0.00	On the other hand RA2, the Applicant herein has no industry/ sector specific track record which is more pertinently required for successful revival of this Corporate Debtor and without existing in-house talent on the board of the Corporate Debtor, the RA2 may face entry barriers to various prospective PSU's which will ultimately impact revenue projections of the Corporate Debtor in the long run. It is also submitted that these constraints as mentioned above are also coupled with no prior experience of Aluminium industry which may pose challenges to

			far better capabilities to revive the business of the Corporate Debtor as compared to RA2. Mr. P.V. Rao (MD of RA1) & Mr. L. Thiyagarajan, proposed members of the Board have rich experience in the Aluminium industry.		scale up the operations in order to revive the Corporate Debtor.
B2 B	2.00	0.00	Since RA1 has no experience in turning around distressed assets, no mark have been awarded for this parameter.	0.00	Since RA2 has no experience in turning around distressed assets, no marks have been awarded for this parameter
B3	5.00	3.50	RA1, the Successful Resolution Applicant has in house talent and have far better capabilities to revive Corporate Debtor as compared to RA2. That Mr. P.V. Rao the Managing Director of RA1 who immediately after graduation in the Year 1984 worked as Management Trainee for a period of one year in company	0.00	Whereas RA2, the Applicant herein proposes to have Mr. Vanit Kumar & Mrs. Vanisha Agarwal as proposed directors. Both of them are from IT Sector and have absolutely no industry specific knowledge & experience in the line of activity of the Corporate Debtor. ***Copy of Page 46 of IA No 663 is annexed herewith as Annexure – 4.*** Thereafter Applicant herein

			called Mohan Aluminium Private Ltd Bangalore who were one of the leading Manufacturers of AAC & ACSR Conductors as well as of Aluminium Rods. ***Copy of Page 9 of the Resolution Plan is annexed herewith as Annexure – 2.*** That Successful Resolution Applicant has identified Mr. L. Thiyagarajan as member of the proposed Board as Directors, Head of Operations and will be in charge of day to day operations management of the Corporate Debtor. He has over 25 years of experience in the Aluminium Industry and has worked with Global MNCs in the middle east and currently associated with one of the leading		has stated that they are in the process of identifying the team of professionals to maintain operational oversight. ***Copy of 54 of IA No 663 is annexed herewith as Annexure – 5.*** The COC requested RA2 to submit concluded Tie Up or Mandate Signed in respect of the talent acquisition in this regard. No such document was made available to CoC by the Applicant herein at the time of Evaluation. Applicant herein sought additional time for this & that was objected by RA1 (Successful Resolution Applicant) as it was made clear by CoC that no further extension is permissible as entire Second Round of EOI was conducted within exclusion period of 106 days as permitted by Hon'ble NCLT

			Aluminium Rod & ACSR Conductor Manufacturer in India. ***Copy of Page 35 of the Resolution Plan is annexed herewith as Annexure – 3.*** Further RA1 has participated in a PGCIL tender for construction of 33KV and 11KV lines in the state of Arunachal Pradesh valuing around Rs. 200 crore which involved substantial procurement of aluminium conductors ***(Pg. No. 9 of the Resolution Plan).*** Acquisition of the Corporate Debtor may also be treated as backward integration for the RA.		

Thus, on the date of evaluation, the COC based on the information provided, explanations given and documents submitted before them, was of the view that M/s Amrutha Constructions Private Limited was having stronger Financial strength as well as in house Talent required for

revival of the Corporate Debtor post its acquisition under IBC , whereas this essential & pertinent requirement was lacking in case of RA2, the Applicant herein as they do not have any core competence in this line of activity of the Corporate Debtor. Therefore, Amrutha Constructions Private Limited is on a higher footing in comparison to the Applicant herein in accordance with the above mentioned detailed analysis and evaluations conducted by the COC on the basis of approved evaluation matric annexed herewith. The Successful Resolution Applicant can make the operations more cost effective and the existing in house talent will help in a long way to revive the Corporate Debtor. On both counts i.e. financial strength and experience in the aluminium industry, the COC found that RA1 was on a much better footing as compared to RA2 for the reasons mentioned above. The COC was also conscious of the fact that Insolvency and Bankruptcy Code has provided a platform for turning around distressed companies by way of resolution. Thus the intent of the CIRP process is finding a resolution and it is not any other recovery mechanism. Keeping in mind the purpose of the code, the COC after taking into account all the factors mainly financial strength and experience in the aluminium industry assessed the capabilities of both RA1 and RA2 and allocated marks. On

the basis of these factors alone COC has allotted marks to the respective Resolution Applicants.

XIII. Therefore, having carefully perused the record we find that the Evaluation Matrix process followed by the COC, which is under challenge in this application is in conformity with the criteria laid down in the Evaluation Matrix ,besides based on the merits of the information provided by the Applicant as well as the 6th Respondent in this regard, as such, the same does not call for our interference. Mere plea of fraud and collusion in the absence of specific details of fraud and collusion besides its proof, is of no avail to the applicant.

XIV. (i).As regards the next plea of the Applicant that its resolution plan provides *larger sum* than the Plan submitted by the 6th Respondent, as such, accepting the Resolution Plan of the 6th Respondent does not fit in the real 'commercial wisdom' of CoC, we wish to rely on the ruling in, **Rajaputana Properties Pvt. Ltd. vs. Binani Industries Ltd. and Ors., 2018 SCC Online NCLAT 521,** wherein it was held by the Hon'ble NCLAT,

"that the process of approving a 'Resolution Plan' under the Code is not an auction process whereby the highest amount ought to be accepted. It was further observed that the quality of the Resolution Plan instead depends upon the credibility and track record of the Resolution Applicant. It was therefore observed that feasibility/ viability of a 'Resolution Plan' is not a

matter of auction so that one cannot contend that the Resolution Plan with the highest amount would be the most feasible.

"3. 'Resolution Plan'

The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

It is not a sale. **No one is selling or buying the 'Corporate Debtor' through a 'Resolution Plan'. It is resolution of the 'Corporate Debtor' as a going concern. One does not need a 'Resolution Plan' for selling the 'Corporate Debtor'. If it were a sale, one can put it on a trading platform. Whosoever pays the highest price would get it. There is no need for voting or application of mind for approving a 'Resolution Plan', as it will be sold at the highest price. One would not need 'Corporate Insolvency Resolution Process', 'Interim Resolution Professional', 'Resolution Professional', interim finance, calm period, essential services, Committee of Creditors or 'Resolution Applicant' and detailed, regulated process for the purpose of sale.** It is possible that under a 'Resolution Plan', certain rights in the 'Corporate Debtor', or assets and liabilities of the 'Corporate Debtor' are exchanged, but that is incidental.

It is not an auction. Depending on the facts and circumstances of the 'Corporate Debtor', 'Resolution Applicant' may propose a 'Resolution Plan' that entails change of management, technology, product portfolio or marketing strategy; acquisition or disposal of assets, undertaking or business; modification of capital structure or leverage; infusion of additional resources in cash or kind over time; etc. **Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well."**

(ii). The said Judgment of the Hon'ble NCLAT was also confirmed by the Hon'ble Supreme Court, vide its Order dated 19th November 2018 in Civil Appeal No.10998 of 2018.

XV. In so far as the other prayer to revoke the acceptance of the Resolution Plan submitted by the 6th Respondent on the basis of the allegations levelled by the applicant is concerned, we state that the same is not maintainable since, in terms of Section 31 of the Insolvency & Bankruptcy Code, 2016, the Adjudicating Authority can reject the Resolution Plan voted by the COC only if the said plan does not meet the requirements referred to in *sub-section* 2 of Section 30 of the Code, which is as below:

Section 31: Approval of Resolution Plan:

"31(1) If the Adjudicating Authority is satisfied that the Resolution Plan as approved by the Committee of Creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the Resolution Plan which shall be binding on the Corporate Debtor and its employees, members, creditors (including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed) guarantors and other stakeholders involved in the resolution plan.

[Provided that the Adjudicating Authority shall, before passing an order for approval of Resolution Plan under this sub-section, satisfy that the Resolution Plan has provisions for its effective implementation]".

XVI. In fact, a separate application has been filed by the Resolution Professional in IA No.583/2021 seeking approval of the Resolution Plan, which is pending consideration by this Adjudicating Authority. Hence, we are not entering into any finding on the applicant's prayer for a direction to the CoC to revoke the acceptance of the Resolution Plan submitted by the 6th Respondent.

XVII. Therefore, in the light of our discussion as afore stated, and case law referred supra, we do not find any merit in the application, as such, the same is liable to be dismissed. Accordingly, the same is hereby dismissed. No costs.

XVIII. In the result, **IA 663/2021 in CP(IB) 384/7/HDB/2018** is dismissed. However, without costs.

Sd/- **Sd/-**

SATYA RANJAN PRASAD
MEMBER (TECHNICAL)

Dr.N.V.RAMA KRISHNA BADARINATH
MEMBER (JUDICIAL)

VL/Syamala