

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

Company Appeal (AT) (Insolvency) No.1148 of 2022

IN THE MATTER OF:

Akashganga Processors Pvt. Ltd.

...Appellant

Versus

Shri Ravindra Kumar Goyal & Ors.

...Respondents

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Karan Valecha, Mr. Ravi Pahwa, and Mr. Saikat Sarkar, Advocates.

For Respondents: Mr. Samaksh Goyal, for R-1 (RP).

Mr. Ankit Raj, Mr. Piyush Beriwal and Mr. Shashank Shekhar, Advocates for R-2 (PNB).

Mr. Aditya Wadhwa and Mr. Yash Giri, Advocates for R-3.

ORDER

13.07.2023: Heard learned counsel for the Appellant as well as learned counsel appearing for the Respondents. This Appeal has been filed against the order dated 23.08.2022 by which order the Adjudicating Authority has rejected the application filed by the Resolution Professional being I.A. No. 680 of 2021 praying for approval of the Resolution Plan. The Adjudicating Authority in the impugned order has refused to approve the plan on the ground that it is in violation of Section 30(2)(e) and (f) of the I&B Code.

2. Learned counsel for the Appellant challenging the order contends that the Operational Creditor to whom the Resolution Plan does not allocated any amount, which was found to be in violation of Section 30(2) of the Code by the Adjudicating Authority, they are not aggrieved of the same since they have not

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filed any Appeal. They also did not file any objection before the Adjudicating Authority claiming any rights, hence, the said cannot be reason for rejecting the plan. Other two Operational Creditor were paid certain amount i.e. to Gujarat Industrial Development Corporation (GIDC) and Surat Municipal Corporation to keep the Corporate Debtor a going concern. Although there were no claims filed by them but statutory dues were noted. It is submitted that payment made to keep the Corporate Debtor going concern cannot be said to be any violation of provisions of law. It is further submitted that in the facts of the present case, the Financial Creditors' admitted claims were Rs.111,29,36,000/- whereas the Financial Creditor could be allocated only amount of Rs.7.52 Crores and as per the Section 53 of the Code none of the other creditors are entitle for any amount under the Resolution Plan.

3. Learned counsel for the Resolution Professional has supported the submission of learned counsel for the Appellant and contends that the Resolution Professional has rightly filed the application for approval of the plan. The payments made to the two entities were for the purpose of keeping the Corporate Debtor going concern and as per Section 53 waterfall mechanism, none of the other creditors were entitle for payment. In fact, the Financial Creditor from its own entitlement has agreed to give amount to two entities so that the Corporate Debtor may run.

4. Learned counsel for the Dissenting Financial Creditor i.e. Respondent No.3 has opposed the submission of the learned counsel for the Appellant as well as learned counsel for the Resolution Professional and submits that there

cannot be any discrimination between payment to Operational Creditors interse, which is a well settled law. It is submitted that the Respondent No.3 was not given any notice of 7th CoC meeting, which is also reason given by the Adjudicating Authority for rejecting the plan.

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

6. From the facts brought on the record, it is clear that before the Resolution Professional claims were received from two Operational Creditors i.e. State Tax, Government of Gujrat and Central Excise, Government of India. There were statutory dues of also Gujarat Industrial Development Corporation and Surat Municipal Corporation. Claims of the statutory dues were reflected in the Information Memorandum. Under the Resolution Plan payment to Gujarat Industrial Development Corporation and Surat Municipal Corporation to keep the Corporate Debtor as a going concern. There can be no dispute to the law as laid down by the Hon'ble Supreme Court in ***“Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531”*** where it was held that there can be differential payment in payment of debts of Financial Creditors and Operational Creditors, however, there can be no difference in interse payment within a class of creditors. In Para 88 following has been laid down:

“88. By reading paragraph 77 (of Swiss Ribbons) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 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 paragraph 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, paragraph 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 paragraph 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.”

7. Present is a case where admittedly the claims of two Operational Creditors - State Tax, Government of Gujrat and Central Excise, Government of India were filed as has been admitted by the learned counsel for the Resolution Professional. It was open for the Resolution Applicant not to allocate any amount to any of the Operational Creditor since under Section 53 no entitlement was there in accordance with the total amount available for distribution. However, when the Successful Resolution Applicant was making payment to other two Operation Creditors, there cannot be any discrimination between payment of one class of Creditors.

8. As far as the submission that payment was made to Gujarat Industrial Development Corporation and Surat Municipal Corporation to keep the Corporate Debtor as a going concern, the said payment can very well be made by the Corporate Debtor but not in the manner as adopted in the Resolution Plan. In the present case, the Resolution Plan was approved by the CoC on 06.08.2021 with 99.84% vote share, however, the Adjudicating Authority rejected the plan by the impugned order. It is also to be noticed that none of the Operational Creditors i.e. State Tax, Government of Gujrat and Central Excise, Government of India have come up in appeal.

9. The Punjab National Bank (Financial Creditor) has also filed an Additional Affidavit in pursuance of order dated 31.03.2023 indicating reason to accept the amount as allocated in the plan. We are satisfied that the said reason makes reasonable decision taken by the Bank to accept the plan. Under the Plan the Financial Creditor has conceded amount of Rs.32,78,102/- to Gujarat Industrial Development Corporation and Surat Municipal Corporation.

10. In the facts of the present case, we are of the view that ends of justice be served in disposing of this appeal in directing that the amount of Rs.32,78,102/- be distributed to all the four Operational Creditors so as to save the plan from being invalidated. We, thus, are of the view that the Adjudicating Authority having found that there is discrimination in payment of Operational Creditors could have directed for compliance of provision of the Code by distribution of Rs.32,78,102/- without affecting the other terms and conditions of the plan. By this modification the plan shall be able to sail and implemented, which is approved by CoC with 99.84% vote share. The plan need to be implemented with modification as directed above.

11. In so far as submission of learned counsel for the Respondent that they were not given notice of 7th CoC meeting, we have seen the Minutes of 7th CoC Meeting where it is indicated that they were present through video conferencing, hence, on that ground no fault can be found in the proceeding.

12. In view of the aforesaid, we modify the order of the Adjudicating Authority by approving Resolution Plan, the application filed by the Resolution Professional being I.A. No. 680 of 2022 is allowed subject to modification that amount of Rs.32,78,102/- shall be distributed on prorata basis between all Operational Creditors. No costs.

**[Justice Ashok Bhushan]
Chairperson**

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

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