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 520/2021 in 384/7/HDB/2018. No costs.

Sd/- **Sd/-**

SATYA RANJAN PRASAD
MEMBER (TECHNICAL)

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

VL/Syamala