NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 340 of 2020

[Arising out of Impugned Order dated 30th January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Cuttak Bench, Cuttak in Company Petition (IB) No.157/C.T.B./2019]

IN THE MATTER OF:

1. **Facor Alloys Limited**
   Shreeramnagar P.O. Garividi Vizianagaram
   Andhra Pradesh – 535101
   Through Mr Piyush Agarwal
   Joint Company Secretary — **Appellant No.1**

2. **Vineet Infin Private Limited B-42,**
   Ground Floor, Maharani Bagh
   New Delhi – 110065
   Through Ms Gyan Mathur, Director — **Appellant No.2**

Versus

1. **Mr Bhuvan Madan**
   Resolution Professional of
   Ferro Alloys Corporation Limited
   Registration No. IBBI/IPA-001/
   IP-P01004/2017-2018/11655
   Price Waterhouse Coopers
   Professional Services LLP, Building No.10
   17th Floor, Tower – C, DLF Cyber City
   Gurugram – 122002
   Email: IP.B.FERRO@IN.PWC.COM

   Also at:

   A-103 Ashok Vihar, Phase – 3
   (Behind Laxmi Bai College), Delhi – 110052
   Email: madan.bhuvan@gmail.com — **Respondent No.1**

2. **REC Ltd**
   Having its Registered Office at:
   Core 4, Scope Complex
   7 Lodi Road, New Delhi – 110003 — **Respondent No.2**

3. **Sterlite Power Transmission Ltd**
   Having its Registered Office at:
   4th Floor, Godrej Millennium
   9 Koregaon Road, Pune
   Maharashtra – 411001 — **Respondent No.3**

4. Ferro Alloys Corporation Ltd
Having its Registered Office at:
D P Nagar, Randia, Bhadrak,
Odisha – 756135
Through: Resolution Professional **Respondent No.4**

Present:

For Appellant : Mr Abhijeet Sinha, Mr Adhish Sharma, Mr Kumar Anurag Singh, Mr Navpreet Ahluwalia and Ms Shriya Raychaudhuri, Advocates

For Respondent : Mr Abhinav Vasisht, Sr. Advocate with Ms Priya Singh, Mr Saurav Panda, Ms Charu Bansal, Advocates for R-1. Ms Varsha Banerjee, Advocate for R-2. Mr Amit Singh Chadha, Sr. Advocate Mr Diwakar Maheshwari, Ms Pratiksha Mishra, Advocates for R-3.

With

Company Appeal (AT) (Ins.) No. 462 of 2020

IN THE MATTER OF:

Toplight Corporate Management Private Limited
Regd Office: A-10, Street No.2
North Chhajupur, Shahdara, Delhi – 110093
Corp Office: 60-D, Street No. C-5
Sainik Farms, New Delhi – 110062 **Appellant**

Versus

1. Mr Bhuvan Madan Resolution Professional of Ferro Alloys Corporation Limited Registration No. IBBI/IPA-001/ IP-P01004/2017-2018/11655 Price Waterhouse Coopers Professional Services LLP, Building No.10 17th Floor, Tower – C, DLF Cyber City Gurugram – 122002

Email: IP.B.FERRO@IN.PWC.COM

Also at:

A-103 Ashok Vihar, Phase – 3
(Behind Laxmi Bai College), Delhi – 110052
Email: madan.bhuvan@gmail.com

Respondent No.1

2. REC Ltd
Having its Registered Office at:
Core 4, Scope Complex
7 Lodi Road, New Delhi – 110003 **Respondent No.2**

3. Sterlite Power Transmission Ltd
Having its Registered Office at:
4th Floor, Godrej Millennium
9 Koregaon Road, Pune
Maharashtra – 411001 **Respondent No.3**

4. Ferro Alloys Corporation Ltd
Having its Registered Office at:
D P Nagar, Randia, Bhadrak,
Odisha – 756135
Through: Resolution Professional **Respondent No.4**

Present:

For Appellant : Mr Gaurav Mitra, Mr Arjun Dhingra, Ms Shriya Raychaudhuri and Mr Abhijeet Sinha, Advocates

For Respondent : Mr Abhinav Vasisht, Sr Advocate with Mr Saurav Panda, Ms Charu Bansal and Ms Priya Singh, Advocates for R-1. Ms Varsha Banerjee, Advocate for R-2. Mr Amit Singh Chadha, Sr Advocate Mr Diwakar Maheshwari, Ms Pratiksha Mishra, Advocates for R-3

JUDGMENT

[Per; V. P. Singh, Member (T)]

These two Appeals emanate from the common Impugned Order dated 30th January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Cuttak Bench, Cuttak in Company Petition (IB) No. 157/C.T.B./2019, whereby the Adjudicating Authority has approved the Resolution Plan filed by Respondent No.3. The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. The brief facts of the case are as follows:

The Company Appeal (AT)(Insolvency) No.340 of 2020 is filed against the Impugned Order, dated 30th January 2020, whereby the Adjudicating Authority has approved the Resolution Plan filed by Respondent No.3 Sterlite Power Transmission Limited (in short 'SPTL'), mainly on the ground that the Resolution Plan encompasses with assets of third parties (including the Appellant herein) and not just of the Corporate Debtor which is contrary to Law, thus violative I&B Code, 2016.

3. In addition to the above, it is submitted that the Resolution Plan of Respondent No.3 does not factor the value of shares of Facor Power Limited (in short 'FPL'),i.e. the subsidiary and principle borrower, wherein the Respondent No.4 along with its associate companies, have invested a sum of Rs.230 Crores in equity capital and Rs.11 Crores in preference shares. The above investments, which are assets as recorded in the books of Respondent No.4 Ferro Alloys Corporation Limited (in short 'FACL') and its associate company have not been valued, thus defeating the very object of the Code, i.e. maximisation of the value of assets.

4. The Appellant contends that the approved Resolution Plan extinguishes the bonafide claims of the Appellants from Facor Power Limited (in short 'FPL'); the Resolution Plan also deals with the shareholding of Appellants in a third party company i.e. Facor Power Limited ('FPL'), which is not under the rigours of the Code; the Adjudicating Authority has failed to consider that the Resolution Plan also provides for the transfer of shares held by existing promoters and the relatives controlled entities and Affiliates in FACOR Power Limited ('FPL').

5. Appellant contends that the possession of the third party, i.e. Facor Power Limited is already taken by Respondent No.2 under SARFAESI, after initiation of Corporate Insolvency Resolution Process (in short 'CIRP') against Corporate Debtor /Respondent No.2. Respondent No.2 was in possession of Facor Power Limited at the time of submission of Resolution Plan by Respondent No.3. The Resolution Plan, among other things, provided for the transfer of assets and extinguishment of liabilities of Facor Power Limited towards third parties. However, Respondent No.2 has approved the Resolution Plan of the Corporate Debtor overlooking the discrepancy regarding the transfer of assets and extinguishment of the liabilities of Facor Power Limited.

6. It is contended that Appellants are part of the promoter group 'FPL', as well as its minority shareholders constituting more than 12% of the total shareholding. Appellant No. 1, Facor Alloys Limited (FAL) holds 8.69% shares in Facor Power Limited (FPL), is directly affected by the Resolution Plan. Appellant No.2, Vineet Infin Private Limited holds 3.91% shares in Facor Power Limited (FPL).

7. Appellant further contended that the Adjudicating Authority has failed to notice that the approved Resolution Plan is dealing with the assets as well as liabilities of subsidiary companies of Corporate Debtor. Adjudicating Authority has been unable to appreciate that the provisioning of transfer of the existing promoters shares in 'FPL' in the Resolution Plan, is in itself a transgression of power and Authority of Respondent No.1 and 2. In the circumstances, the Appellant has filed this Appeal to set aside the Impugned

Order dated 30th January 2020 whereby the Adjudicating Authority has approved resolution Plan of the Respondent No.3.

8. In Company Appeal (AT)(Insolvency) No.462 of 2020, the Appellant/ Toplight Corporate Management Private Limited has challenged the approved Resolution Plan on the ground that the Adjudicating Authority has approved the Resolution Plan which is contrary to Law as it violates Section 30(2) of the Code and is against the objectives of the Code, as it gives unequal treatment to the same category of Financial Creditors (including the Appellants herein) purely on the basis that the Appellant dissented/abstained from voting to the said Resolution Plan.

9. The Appellant contends that Financial Creditors belonging to the same category, even if they dissent to the Resolution Plan, have to be treated in parity with the same Class of Financial Creditors and are entitled to equitable treatment under the provisions of the Code. In contrast, the approved Resolution Plan discriminates between the same Class of Creditors.

10. It is contended that the consenting Financial Creditors were given Non-Convertible Secured Debentures as well as the Cash Balance of Respondent No.4. However, on the contrary, the Financial Creditors who had dissented/abstained from voting for the approval of Resolution Plan were only entitled to the issuance of Non-Convertible Secured Debentures, but not the Cash Balance.

11. It is further contended that the approved Resolution Plan is wholly arbitrary, illegal, and just to benefit and accommodate the Respondent No.2,

i.e. REC Ltd., which happens to be the majority Financial Creditor. The said approval is solely for its own unlawful personal gains, thereby defeating the main objective of the Code, i.e. maximisation of the assets of the Corporate Debtor.

12. It is contended that the approved Resolution Plan suffers from legal infirmity. It discriminates amongst the Financial Creditors of same Class. It is further contended that the approved Resolution Plan does not in any manner protect the interest all stakeholders, specifically the dissenting Financial Creditors. The primary purpose of classifying the claims is to satisfy the requirements to provide fair and equitable treatment to creditors, treating similarly situated claims in the same manner and ensuring that all creditors in a particular class are offered the same treatment. However, the Resolution Plan of Respondent No.3 miserably fails to do so. The table depicting the differential treatment of the same Class of creditors is reproduced hereinbelow:

PROVISION FOR ASSENTING FINANCIAL CREDITOR	**PROVISION FOR DISSENTING FINANCIAL CREDITOR**
An amount of INR 270 Crores ("Total Consideration") (less amount of NCDs issued to Dissenting Financial Creditors under Clause 3(d) below), forming part of the Admitted Financial Debt of the	An amount equal to the amount to be paid to Dissenting Financial Creditors in accordance with sub-section (I) of Section 53 of the I&B Code in the event of a liquidation of the Company.

Consenting Financial Creditors, will be converted into zero coupons, secured and unlisted Non-Convertible Debentures of the Company will be issued to the Consenting Financial Creditors in a proportionally. The Upfront Payment, Cash Balance as per Clause 3(c)(xiii) and the Total Consideration together will be the Sustainable Debt of the consenting Creditor.	Sustainable Debt of Dissenting Creditors forming part of the Admitted Financial Debt of the Dissenting Financial Creditors would be converted into zero coupons, secured and unlisted Non-Convertible Debentures of the Company and will be issued to the Dissenting Financial Creditors proportionally.

It is alleged that the Adjudicating Authority has failed to consider that the Resolution Plan of the Respondent No.3 is approved without giving any reasons qua the unequal treatment being given to the same Class of creditors, which is contrary to the intent and objective of the Code.

13. It is further contended that the approved Resolution Plan does not in any manner protect the interest of all the stakeholders, especially the Financial Creditors who have dissented to the said Resolution Plan. It is submitted that the said Resolution Plan, on the face of it is contrary to the basic purpose of the Code and ought to be rejected. Thus, it is amply clear that the said Resolution Plan does not protect the rights of all its stakeholders, thereby defeating the very objective of the Code, i.e. maximisation of the assets of the Corporate Debtor.

14. In Reply to the above, in Appeal No.340 of 2020, the Learned Counsel for the Respondent No.3, i.e. Sterlite Power Transmission Limited, which is the Successful Resolution Applicant submitted preliminary objections on maintainability of the Appeal.

15. The Respondent No.3 contends that the Appellants have incorrectly stated (at paragraph 4, Page No.30 of Appeal) that they were constrained to approach this Hon'ble Tribunal directly (without approaching NCLT) because they became aware of the present CIR process after coming across public notice dated 02nd February 2020.

16. Indisputably, it is clear that the Corporate Debtor/ Appellant No.1 Facor Alloys Ltd (FAL) is a subsidiary of principal borrower, Facor Power Limited ('FPL', and is part of the same group of companies, known as the Facor Group.

17. The Appellants have concealed the fact that the majority shareholder of Appellant No.1, i.e. Rai Bahadur Shree Ram and Company Pvt Limited and a director of Appellant No.1, i.e. Mr Ram Kishan Saraf, had raised similar issues (as raised in this Appeal), before NCLT and also before this Appellate Tribunal in CA (AT)(Insolvency) No.207-208 of 2020. The Appeal which was filed by the majority shareholder and the director of Appellant No.1 was dismissed by this Appellate Tribunal vide its Judgment dated 12th March 2020.

18. Based on the above fact, it is evident that the Appellant No.1 was well aware of the present CIR process. The Respondent No.3 further contends that

Appellant cannot be allowed to re-agitate the same issues that have already been raised by its majority shareholder and director of Appellant No.1 in CA (AT) (Insolvency) No.207-208 of 2020. The same grounds are now being re-agitated before this Appellate Tribunal by using the identity of Appellant No.1.

19. We have heard the arguments of the Learned Counsel for the parties and perused the records.

20. Following questions arise for our consideration:

i) Whether a third party company, i.e. Facor Power Limited (FPL) can be dealt with in a Resolution Plan under corporate insolvency resolution process against the Corporate Debtor 'Ferro Alloys Corporation Limited' (FACL)?

ii) Whether the Adjudicating Authority can approve a Resolution Plan which is discriminatory and gives differential treatment amongst the same Class of the Financial Creditors, merely based on assenting or dissenting Financial Creditors?

iii) Whether approved Resolution Plan filed by Sterlite Power Transmission Limited is violative of Section 30(2) of the I&B Code, 2016?

Issue No.1

21. Learned Counsel for the Appellant submits that after initiation of Corporate Insolvency Resolution Process under Section 7 of the Code, IRP/RP is entitled to take over the management and assets of the Corporate Debtor,

i.e. Ferro Alloys Corporation Limited, which is the corporate guarantor of the principal borrower.

22. It is submitted that the REC/Respondent No.2 has initiated CIRP qua Corporate Debtor. However, under the Resolution Plan, a third party company Facor Power Limited (FPL) is being given away at a throwaway price without ascribing any value to the shares of FPL, whereas the valuation of 'FPL' is more than Rs.538 crores. The clandestine manner in which 'FPL' has been included in the CIRP of the Corporate Debtor, is ex-facie illegal and is in violation of Section 60(5) of the Code. It is evident from a perusal of the Resolution Plan that on multiple occasions, it encompasses the CIR process for both the Corporate Debtor as well as a third party company 'FPL'. Initially Respondent No.2 issued SARFAESI Notice in the year 2016 against FPL (for the same default, qua which the present CIRP has been initiated, against Corporate Debtor. Subsequently, Respondent No.2 took over the management/assets of FPL, but no steps were ever taken by Respondent No.2 to sell the assets of 'FPL' to recover the dues. Per contra, it was a mechanism devised to give 'FPL' to Respondent No.3 along with the Corporate Debtor. Initially under the CIRP, FPL was deliberately shown as a mere subsidiary. However, the real intention is evident from the Resolution Plan, wherein Respondent No.3 wants to turn FPL into a 100 MW Power Plant after acquiring the same. It is an admitted position under the Resolution Plan that the consideration which has been paid under the Resolution Plan by Respondent No.3 is for both Corporate Debtor as well as FPL.

23. In Reply to the above, the Learned Counsel for the Respondent No 3 submits that there is no automatic transfer of shareholding as part of the Approved Resolution Plan. Clauses 3(c)(iv) & 3 (g)(iv) of the Resolution Plan merely stipulate that instead of the guarantees given by the promoters and their controlled entities for the debt of 'FPL' an agreement may be reached between the guarantors and beneficiaries of securities, i.e. the relevant Financial Creditor, to transfer the residual shares of FPL held by promoter entities to the Company.

24. However, it is made adequately clear that such an event requires the consent of the relevant shareholders of FPL and achieving the same is not a mandatory condition for the implementation of the Resolution Plan. It is thus, merely an option for transfer of the said shareholding, that too, with the consent of the parties concerned.

25. Further with respect to the shareholding of Appellant No. 2, i.e. Vineet Infin Pvt Ltd in FPL, which is pledged with Rural Electrification Corporation Limited ("REC"), the Approved Resolution Plan provides for the invocation and transfer of individual pledged shares by REC, which is undoubtedly the prerogative of REC, being the sole pledgee of such shares. Accordingly, the Resolution Plan merely provides for the exercise of contractual rights by REC.

26. Concerning the specific averments on non-compliance of Section 176 of the Indian Contract Act, it is submitted that the Approved Resolution Plan does not stipulate that the invocation and transfer shall be made without regard to the underlying pledge Agreement. Further, the Approved Resolution

Plan does not restrict the Appellants in any manner from redeeming the pledge created. Neither the Appellants have denied the existence of the pledge, nor have they denied the existence of defaults which makes the pledge enforceable. The Approved Resolution Plan is thus, in accordance with the Law of contracts and other applicable laws and therefore, fully compliant with the requirement of Section 30(2)(e) of the Code.

27. Counsel for the Respondent No. 3 submits that the Corporate Debtor holds 86.09% shares in FPL. In terms of Section 18(f) (v) of the Code, any shares held by the Corporate Debtor in a subsidiary Company form part of assets of the Corporate Debtor. Therefore, it is an obvious consequence that a Resolution Applicant, while taking over the Corporate Debtor, will also be vested with the shares held by the Corporate Debtor in its subsidiary company.

28. In terms of Section 18(f) (v) of the Code, 86.09% shares of FPL are owned by the Corporate Debtor and hence, is an asset of the Corporate Debtor. These assets of the Corporate Debtor are being taken over by Respondent No. 3 by way of the present CIR process. Thus, the Appellant cannot object to the inclusion of shares which are legitimately owned by the Corporate Debtor.

29. This Appellate Tribunal in JSW Steel vs Ashok Kumar Gulla, CA (AT) (Insolvency) No. 467 of 2019 has observed ;

> "*If the 'Corporate debtor' has any right over 'subsidiaries companies', 'associates companies', 'joint venture companies' of the 'Corporate Debtor', once successful resolution applicant (JSW*

Steel Ltd.) take over the 'Corporate Debtor', it will open to the 'Corporate Debtor' to decide whether it will continue with such right of 'subsidiaries companies', 'associates companies', 'joint venture companies' or any other companies in which 'Corporate Debtor' has share."

30. The Appellant has argued that shares of Facor Power Ltd. i.e. 86% shares held by the Corporate Debtor had not been valued during the Insolvency process. In this regard, it is submitted that valuation of assets of the Corporate Debtor was the responsibility of the Resolution Professional, who has clarified that valuation of shareholding of the Corporate Debtor was undertaken. The shares were valued at INR 95 Crores.

31. The Resolution Professional submits that in accordance with Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulation 2016, (in short CIRP Regulation), two independent valuers were appointed to conduct a valuation of the assets of the Corporate Debtor (including the shares held by the Corporate Debtor in FPL), in order to arrive at the fair value and liquidation value of the Corporate Debtor. Further, a detailed presentation on the Valuation Report was duly discussed with the Members of the erstwhile COC of the Corporate Debtor on 11th November 2019, i.e. before voting on the Resolution Plan took place. It is also important to observe that out of the average liquidation value of Rs. 305 Crores, approximately one-third value i.e. Rs. 95 Crores is attributable to the shareholding of the Corporate Debtor in FPL.

32. Based on the above, it is clear that objection regarding the valuation of shares of Facor Power Ltd (FPL) is also not sustainable.

33. It is pertinent to mention that the shareholding pattern in any company demonstrates the extent of control that a shareholder has and can exercise over the said Company. Hence, even in the absence of such an express provision in Resolution Plan, the Resolution Applicant after taking over the Corporate Debtor is entitled to exercise its right over its subsidiary company. Based on the above, we are of the considered view that the Appellant's objection regarding the inclusion of the subsidiary company of the Corporate Debtor in the Resolution Plan is not sustainable**.**

Issue No 2 & 3;

34. In Appeal No. 462 of 2020, the Appellant has raised an issue that the approved Resolution Plan of Respondent No. 3 is entirely against the provisions of the Insolvency and Bankruptcy Code, 2016. The said Resolution Plan provides differential treatment among the same Class of Creditors which is discriminatory and impermissible in Law.

35. It is contended that Financial Creditors who consented to the approved Resolution Plan are entitled to the issuance of Non-Convertible Secured Debenture as well as the upfront cash payment of the Respondent No. 4, i.e. FACL. On the other hand, the dissenting Financial Creditors (including the Appellant herein) are entitled to Non-Convertible Secured Debentures only.

36. It is further argued that the Impugned Order dated 30th January 2020 records the differential treatment given to the same Class of Creditors, i.e. the

Financial Creditors. However, the Adjudicating Authority failed to appreciate that the equitable treatment is to be accorded to each Creditor depending upon the Class to which it belongs, i.e. secured or unsecured, financial or operational. The Counsel for the Appellant placed reliance on Para 72 of the Judgment of the Hon'ble Supreme Court in Case of Committee of Creditors ESSAR Steels Vs. Satish Kumar Gupta, 2019 SCC Online SC 1479 wherein it held:

> ***72.*** *Quite clearly, secured and unsecured financial creditors are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors are separately viewed from these secured and unsecured financial creditors in S. No. 5 of paragraph 7 of statutory Form H. Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's Judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code - to resolve stressed assets. Equitable treatment is to be accorded to each Creditor depending upon the Class to which it belongs: secured or unsecured, financial or operational.*
>
> *(emphasis supplied)*

37. It is further contended that from the bare perusal of Section 30 (2) of the Code and Regulation 38 of CIRP Regulations it is apparent that the said provisions give four protections to the dissenting/ abstained Creditors :

> "…..
>
> *a) Section 30(2) (b) of the Code provides for a minimum of liquidation value to be provided to dissenting creditors,*

this is a safety net, which does not mean that the dissenting Financial Creditors will be discriminated and paid only liquidation value even if the other consenting Financial Creditors are paid more.

b) *Explanation 1 to Section 30 (2) (b) of the Code provides that the dissenting creditors will get fair and equitable treatment which means that they will be treated at par with the consenting creditors.*

c) *Regulation 38(1) (b) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ensures priority in payment to non-consenting creditors, therefore, it would be contrary to the Code to give priority in payment to non-consenting Financial Creditors, however, on the other side give lower quantum of payment.*

d) *Regulation 38(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that interest of all the stakeholder will be consider, again bringing on the notion of fairness and equality in treatment of the same Class..."*

(emphasis supplied)

38. It is further contended that Hon'ble Supreme Court in Case of Rahul Jain vs Rave Scans Pvt. Ltd. has held that prior to the amendment in CIRP Regulations under Insolvency and Bankruptcy Code on 5th October, 2018, it was possible to differentiate between consenting and non-consenting Creditors. However, post 5th October, 2018 when the regulations have been amended, the older provision had been stepped down, so it is not possible to

differentiate between the consenting and non-consenting Creditors any further.

39. Hon'ble Supreme Court in Case of Rahul Jain vs Rave Scan Pvt. Ltd. 2019 (10 S.C.C. Page 548) has held that Regulation 38 of CIRP Regulations provides for differential treatment of dissenting Financial Creditor, i.e. differential liquidation value to Dissenting Financial Creditors was permissible under the unamended Regulation. In the above Case, dissenting Financial Creditor had been provided with 32.34% of its admitted claim. In contrast, other Financial Creditors had been provided with 45% of their admitted claims, and one had been provided 75% of its admitted claim. When it was challenged on the ground of discrimination, Hon'ble Supreme Court held that given the facts of the Case that Resolution process began in January 2017, i.e. before amended Regulation takes into force w.e.f. 5th October 2018 and Resolution Plan was prepared and approved, i.e. well before that event, and considering that the liquidation value of Corporate Debtor was ascertained at Rs. 36 Crores against which the Appellant had offered Rs. 54 Crores, the Hon'ble Supreme Court held that NCLAT Order to match the payout (offer to other Financial Creditor) is not justified.

40. Learned Counsel representing the Resolution Professional placed reliance on the decision of Hon'ble Supreme Court in Case of 2019 SCC Online SC 1478 Committee of Creditors of ESSAR Steel India Ltd. Vs. Satish Kumar Gupta, whereby it is held that Section 30(2)(b) is only a beneficial provision ensuring protection in terms of payment of a certain minimum amount to the dissenting Financial Creditors. However, it does not prevent the Committee of

Creditors to provide for distinct treatment to different Class and Sub-class of the Financial Creditors. The relevant portion is as under:

> *"**109.** When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of **operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the Case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the Case of dissentient financial Creditor being a minimum amount that was not earlier payable**. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.*
>
> ***110.** As has been held in this Judgment, it is clear that Explanation 1 has only been inserted in order that the*

Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this Judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this Judgment."

(*emphasis supplied)*

41. It is pertinent to mention that voting on approved Resolution Plan took place on 13th November 2019, on which date only the Operational Creditors were to be paid in priority. The Amendment to Regulation 38(1) of CIRP Regulations mandates priority in payment to dissenting Financial Creditors. This amendment came into effect on 27th November 2019, i.e. post the approval of Resolution Plan by the erstwhile COC of the Corporate Debtor. Therefore, as on the date of approval of the Resolution Plan by the erstwhile COC, the only requirement under the provision of the Code qua the dissenting Financial Creditors was the payment of the minimum liquidation value, which is duly complied in the present Case.

42. It is settled position in Law that provisions in a Statute would operate prospectively unless the retrospective operation is expressly provided for. There being no clarification provided to that effect, the amended Regulation 38 cannot be said to have retrospective application.

43. It is also important to mention that the approved Resolution Plan contemplates the simultaneous payment in cash and issuance of the non-convertible debenture to the dissenting Financial Creditors and thus, even

otherwise, there is no breach of the requirement under the Amended Regulation 38, which admittedly did not apply in this case.

44. Thus, we are of the considered opinion that the approved Resolution does not give differential treatment among the same Class of Financial Creditors merely based on assenting or dissenting Financial Creditors. Thus, the approved Resolution Plan is not discriminatory.

45. The Learned Counsel for the Respondent No. 3, Sterlite Power Transmission Ltd, which is the Successful Resolution Applicant submits that the Resolution Plan is approved by the COC with a majority of 95.15% of vote share and thereafter approved by the Adjudicating Authority. The Appellant contends that it became aware of the Resolution Plan on 2nd February 2020 after coming across a public notice, and hence, approached this Appellate Tribunal directly without first approaching the Adjudicating Authority.

46. It is important to mention that the Appellant duly participated in the Resolution Process, which is evident from the perusal of relevant part of the Appeal Paper Book provided as under:

> ***Para 9, Appeal Paper Book of 462 of 2020****:*
>
> *"That the Respondent No. 3 had submitted a Resolution Plan dated 13.11.2019, which was approved by 95.15% of voting share in the 31st Committee of Creditors Meeting and subsequently approved by the adjudicating Authority vide the Impugned Judgement. It is pertinent to mention herein that the Appellant herein has always been against the said Resolution Plan due to the reasons as stated below.*

Para 15:

That in the meantime, the Respondent No. 4 went into CIR Process and the Appellant being a Financial Creditor was left with no option but to file its claim before Respondent No. 1. The Appellant herein duly find its claim form before the Respondent No.1 on 20th July, 2017.

Para 16:

That after scrutinising the claim of the Appellant, the Appellant was added in the list of Financial Creditors by the erstwhile Resolution Professional Mr. K G Somani of Respondent No. 4.

Para 17:

That it is pertinent to mention herein that the Appellant herein being the Financial Creditor duly participated in the said CIR Process and has never voted in favour of the said Resolution Plan submitted by the Respondent No. 3, which has been wrongly approved by the Adjudicating Authority which on the face of it ,is against the basic provisions of the Code."

(emphasis supplied)

47. From perusal of the above stated portion of the Appeal Paper Book, it is evident that the Appellant has wrongly stated in the present Appeal that it became aware of the Resolution Plan only on 2nd February 2020 after coming across the public notice. From the admission of the Appellant, it is clear that the Appellant was aware of the process being undertaken before the approval of the Resolution Plan or at the time of the hearing of the Application for approval of Resolution Plan before the Adjudicating Authority. The Appellant did not raise any objection to the approval of the Resolution Plan by the

Adjudicating Authority and has now filed the Appeal before this Appellate Tribunal directly.

48. In addition to the above, it is also contended that the Appellant has misrepresented before this Appellate Tribunal and filed the Appeal as a dissenting Financial Creditor whereas it appears that the Appellant abstained from voting and in fact, was never present in any of the COC Meetings.

49. This Appellate Tribunal in Case of Tata Steel Ltd. Vs Liberty House Group Pvt. Ltd. Dated 4th February 2019 Para 46. Has observed that:

> "46. *We find that the 'Resolution Plan' submitted by 'JSW Steel' has been approved by the 'Committee of Creditors' with 97.12% voting shares and voters having 2.88% voting shares remained absent. If some members of the 'Committee of Creditors' having 2.88% voting shares remained absent, it cannot be held that they have considered the feasibility and viability and other requirements as specified by the Board, therefore, their shares should not have been counted for the purpose of counting the voting shares of the 27 Company Appeal (AT) (Insolvency) No. 198 of 2018 'Committee of Creditors'. In fact, 97.12% voting shares of members being present in the meeting of the 'Committee of Creditors' and all of them have casted vote in favour of 'JSW Steel', we hold that the 'Resolution Plan' submitted by 'JSW Steel' has been approved with 100% voting shares."*
>
> *(verbatim copy)*

50. In Case of IDBI Bank Ltd. Vs Anuj Jain order dated 10th June 2019 this Tribunal has held that 'we make it clear if any of the Financial Creditors remains absent from voting, their voting percentage should not be counted for the purpose of counting the voting shares.

51. Based on the above discussion, it is clear that the Appellant abstained from voting but participated in the Resolution Process. The Appellant was fully aware of the developments from Resolution Process from up to the approval of the Resolution Plan before the Adjudicating Authority but never raised any objection. The Appellant has directly filed the Appeal before this Appellate Tribunal after withholding of material information from this Tribunal. Therefore, the Appellant of Appeal No. 462 of 2020 is not entitled for any relief in view of the Law laid down by the Hon'ble Supreme Court in (1994) 1 S.C.C. Page 1, wherein it is observed that;

> "***One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the Court process a convenient liver to retained the illegal gains indefinitely. We have no hesitation to say that a person, who's Case is based on false hood, has no right to approach the Court. He can be summarily thrown out at any stage of litigation.***"

52. It is pertinent to mention that FPL is a subsidiary of the Corporate Debtor, and Appellant belongs to the erstwhile promoter group of the Corporate Debtor. In a similar case, the shareholders of FACL/ Corporate Debtor had challenged the Approved Resolution Plan before this Appellate Tribunal in Company Appeal (AT) (Insolvency) No.207 and 208 of 2019 raising identical grounds, which was dismissed. It is not open to the Appellants to prefer a separate appeal on similar grounds being raised in Company Appeal (AT) (Ins.) No.207 & 208 of 2019. It is not open for a Party to contend that

certain points had not been urged and the effect of the Judgment can be collaterally challenged.

53. In Case of ***Anil Kumar Neotia v. Union of India*, (1988) 2 SCC 587 at page 600** Hon'ble Supreme Court has held that ;

> ***"17.*** *Furthermore, we are of the opinion that the Law as declared by this Court in Doypack Systems Pvt. Ltd. [(1988) 2 SCC 299] is binding on the petitioners and this question is no longer res integra in view of Article 141 of the Constitution. See the observations of this Court in Shenoy and Co. v. CTO [(1985) 2 SCC 512 : AIR 1985 SC 621: (1985) 3 SCR 659] where this Court observed that the Judgment of this Court in Hansa Corporation case [State of Karnataka v. Hansa Corporation, (1980) 4 SCC 697 : (1981) 1 SCR 823 : AIR 1981 SC 463] is binding on all concerned whether they were parties to the Judgment or not. This Court further observed that to contend that the conclusion therein applied only to the parties before this Court was to destroy the efficacy and integrity of the Judgment and to make the mandate of Article 141 illusory.*
>
> ***18.*** *In that view of the matter this question is no longer open for agitation by the petitioners. It is also no longer open to the petitioners to contend that certain points had not been urged and the effect of the Judgment cannot be collaterally challenged. --------*
> *Thus it is clear that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.*
>
> *(emphasis supplied)*

54. The legal position is well settled that an approved Resolution Plan can deal with the related party claim and extinguish the same which shall ensure that the Successful Resolution Applicant can take over the Corporate Debtor

on a clean slate. The related Parties are being kept out to ensure continuity of operation of both FACL and FPL following the provisions of the Code. We also do not find any substance based on which it can be inferred that the Resolution Plan is not in conformity with the provisions of Code as provided under Sec 30(2) of the Insolvency and Bankruptcy Code, 2016.

55. Based on the above discussion, we are of the considered opinion that there are no reasons for interference in the Order passed by the Adjudicating Authority and both the Appeals are without merit, hence dismissed. No order as to Costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
25TH NOVEMBER, 2020

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