NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.971 of 2020

[Arising out of Order dated 21.09.2020 passed by National Company Law Tribunal, Mumbai Bench Court – I in C.P. (IB) No.2851/MB/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Indian Renewable Energy Development Agency Ltd. India Habitat Centre, East Court, Core – 4 A, First Floor, Lodhi Road, New Delhi – 110003 Also at: Corporate Office Address: August Kranti Bhavan, 3rd Floor, Bhikhaji Cama Place, New Delhi 110066	Financial Creditor	Appellant
Vs.		
1. Bhuvesh Maheshwari, Resolution Professional, Shree Kedarnath Sugar and Agro Products Ltd. K.G. Somani & Co., Chartered Accountants, Delite Cinema Building, Gate No.2, 3rd Floor, Asif Ali Road, New Delhi – 110002 Also at: Plot No.14-A, Rachnakar Housing Soc, Near Tapowan Kalamba Kolhapur, Maharashtra – 416012	RP	Respondent No.1

2. Committee of Creditors of Shree Kedarnath Sugar and Agro Products Ltd. Through lead member Syndicate Bank Plot No.14-A, Rachnakar Housing Soc, Near Tapowan Kalamba Kolhapur, Maharashtra – 416012 Also at: CS No.1446. C-Ward, near Shahu Maharaj Statue, Dasara Chowk, Laxmipuri, Kolhapur, Maharashtra – 416012	…	Respondent No.2
3. Shri Sai Priya Sugars Ltd. Gopal Chambers, Opposite Bus Stand, Jamkandi, Bagalkot, Karnataka – 587301	SRA	Respondent No.3
4. Shree Kedarnath Sugar and Agro Products Ltd. Through its Resolution Professional Bhuvesh Maheshwari, K.G. Somani & Co., Chartered Accountants, Delite Cinema Building, Gate No.2, 3rd Floor, Asif Ali Road, New Delhi – 110002 Also at: Plot No.14-A, Rachnakar Housing Soc, Near Tapowan Kalamba Kolhapur, Maharashtra – 416012	Corporate Debtor	Respondent No.4

For Appellant: **Mr. Pawan Sharma and Mr. Anuj Shah, Advocates**

For Respondents: **Mr. Akshay Goel, Advocate and Mr. Bhuvesh Maheshwari (in person) (R-1& 4)**
Mr. Deep Roy and Mr. Rony O John, Advocates (R-2)
Mr. P. Nagesh, Mr. Nipun Gautam and Mr. Kanishk Khetan (R-3)

J U D G E M E N T

(12th February, 2021)

A.I.S. Cheema, J. :

1. This Appeal has been filed by the Appellant – Indian Renewable Energy Development Agency Ltd. (IREDA – in short) against Impugned Order dated 21st September, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench Court – I) in C.P. (IB) No.2851/MB/2018. The Impugned Order approved the Resolution Plan submitted by Respondent No.3 – Successful Resolution Applicant (SRA – in short) which was approved by Committee of Creditors (COC – in short).

2. The Appellant claims that it had sanctioned term loan to the Respondent No.4 – Corporate Debtor and when there was default of the financial debt, the Appellant filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC - in short). The Application under Section 7 was admitted on 21st August, 2019 and CIRP (Corporate Insolvency Resolution Process) was initiated. The Appeal gives particulars with regard to the manner in which CIRP proceeded and Respondent No.3 – Shri Sai Priya Sugars Ltd. had filed Resolution Plan. It is claimed that

the Resolution Plan contemplated payment of Rs.60 Crores out of which Rs.54.25 Crores were proposed to be paid to all Secured Creditors on the basis of all Secured Financial Creditors relinquishing their respective securities. The amount of Rs.54.25 Crores was to be distributed between Secured Financial Creditors based on their voting share in COC. The Appellant was proposed to be paid only Rs.6.61 Crores as against admitted amount of Rs.69.48 Crores. Appellant claims that such distribution between Financial Creditors was fraud as it did not take into consideration that Appellant's dues were secured by means of equitable first charge with co-lenders, by way of mortgage over properties of Respondent No.4. The Resolution Plan treated all lenders equally ignoring the fact that the Appellant along with Syndicate Bank, Andhra Bank and Edelweiss Asset Reconstruction Company held first and prior pari passu charge over the assets of Respondent No.4. Thus, the Appellant is finding fault with the Resolution Plan proposing:

distribution on the basis of voting share held in COC rather than;

distribution in the ratio of first pari passu charge held by the Appellant along with other co-lenders.

3. Parties have filed their pleadings. We have also heard Counsel for both the sides. The claim of the Appellant is and it has been argued that the Resolution Professional could not have put up before COC the Resolution Plan tendered by Respondent No.3 as the same violated Section 48 of the Transfer of Property Act, 1882 where it proposed to pay the

Secured Financial Creditors Rs.54.25 Crores and that the distribution would be pro rata in terms of the voting percentage of each Secured Financial Creditor. The learned Counsel for the Appellant referred to para – 4 of the Impugned Order which referred to the salient features of the Resolution Plan, while accepting the same.

4. The learned Counsel for the Appellant referred to Section 48 of the Transfer of Property Act which reads as under:-

> "**48. Priority of rights created by transfer**.—Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

It is argued that the Resolution Plan was in contravention of above law as it treated all Secured Financial Creditors equally though all Financial Creditors did not hold first charge on the properties of Respondent No.4. The learned Counsel referred to Judgement in the matter of **"ICICI Bank Ltd. Versus Sidco Leathers Ltd. and others"** reported in (2006) 10 SCC 452 and observations of the Hon'ble Supreme Court in paragraphs – 40 to 42 which read as under:-

> "**40.** The Punjab National Bank granted loan to the first respondent herein knowing fully well that, over the assets of the mortgagor, the appellant held the first charge. It in no uncertain terms stated that the charges created by reason of the loan agreement entered into by and between itself and the first respondent was subservient to the charges of the appellant as also the Respondent 3 and 4. The admission of the PNB in this

behalf is absolutely clear and explicit. Even in the suit filed by it for recovery of the mortgage money as against the first respondent, it not only in no uncertain terms stated that the appellant and Respondents 3 and 4 herein were the first charge-holders in respect of movable and immovable properties of the first respondent, but its prayers in regard thereto were also limited, as would appear from prayer (f) made in the suit.

41. While enacting a statute, Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act claim of the first charge-holder shall prevail over the claim of the second charge-holder and in a given case where the debts due to both, the first-charge holder and the second-charge holder, are to be realised from the property belonging to the mortgagor, the first charge-holder will have to be repaid first. There is no dispute as regards the said legal position.

42. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to Parliament. Thus, while enacting the Companies Act, Parliament cannot be held to have intended to deprive the first charge-holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [*See Workmen v. Firestone Tyre and Rubber Co. of India (P) Ltd.*]"

5. The Appellant referred to Annexure A-20 (Page – 371) – extract of Information Memorandum at Page – 377 "Annexure E-4" to submit that it was part of the record that the Appellant had a first charge on the property of the Corporate Debtor which was mortgaged. According to the learned Counsel under Section 30(2) Explanation 2(iii)(e) of IBC, the Resolution

Professional was required to check that the Resolution Plan which was being put up did not contravene any of the provisions of the law for the time being in force. Thus, according to the Appellant, the Resolution Plan itself should not have been put up before the COC.

6. It is argued by the learned Counsel for the Appellant that the Resolution Plan should be stayed as the distribution of proceeds as provided in the Resolution Plan is not on first pari passu charge basis.

7. The learned Counsel for Respondent No.1 – Resolution Professional referred to Reply (Diary No.23847) which is filed on behalf of Respondent No.1 and Respondent No.4 and submitted that the Appellant was part of COC and throughout participated in the proceedings and till passing of the Resolution Plan, never objected to the distribution as was proposed in the Resolution Plan. The learned Counsel referred to Annexure -5 – Page 49 of his Reply where there are minutes of the 9th COC meeting dated 26.02.2020. The Appellant was present through its Chief Manager – Shri Darpan Garg (Sl. No.8) in the deliberations with regard to the Resolution Plan. The learned Counsel specifically referred to the following from the Minutes:-

> "With respect to the following points, the COC after detailed deliberations unanimously agreed and decided the following:-
>
> (i) Distribution of the proceeds under the resolution plan to the financial creditors, shall be in proportion to the share of the voting rights of the relevant financial creditor in the COC; ……."

Thus, it was submitted that the COC had specifically deliberated portions of the Resolution Plan dealing with distribution of the proceeds and decided that distribution of the proceeds to the Financial Creditors shall be in proportion to the share of the voting rights of the relevant Financial Creditor in COC. The learned Counsel then referred to Page – 59 of the Reply (Diary No.23847) where in the same minutes, the COC decided to vote on approval of the Resolution Plan tendered by the Respondent No.3 (SRA). The learned Counsel for Respondent No.1 pointed out Annexure -1 – Page 19 and the summary of the e-voting done on the Resolution Plan (copy of which has been filed at Page – 22 of the Reply) and pointed out portion showing Appellant approving the Resolution Plan which was put up by the Respondent No.3. Thus, it is argued that the Appellant was party to all the proceedings and the Resolution Plan was approved with consent of the Appellant and thus, now the Appellant cannot take a contrary stand.

8. The learned Counsel for Respondent No.1 referred to para – 83 of the Judgement in the matter of **"Committee of Creditors of Essar Steel India Limited versus Satish Kumar Gupta & Ors."** – Civil Appeal No.8766-67 of 2019, copy of the Judgement has been filed by the Respondent No.2 with its Reply (Diary No.24243) and in Annexure – E. Para – 83 of the said Judgement reads as under:-

> "83. The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to

> approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC report, 2015 (see paragraph 33 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm."

Referring to the above paragraph, it is argued that the Hon'ble Supreme Court had examined the powers of COC under the provisions of IBC and found that the COC had discretion to take into account different classes of Creditors as are mentioned in Section 53 and different priorities and values of security interest of a Secured Creditor. According to the learned Counsel, the COC has taken commercial decision and the same cannot be interfered with.

9. Learned Counsel for the Respondent No.2 – COC referred to his Reply (Diary No.24243) and argued that the Appellant was part of COC at that time. He also referred to the 9th Meeting of COC to which the learned Counsel for Respondent No.1 had referred. The learned Counsel pointed out Page – 299 of his Reply where copy of the Resolution Plan has been filed and specifically referred in it to (Page – 330) portions of para – 10.2.6 where the Resolution Plan specifically mentioned distribution and specific

amounts that would be paid to different Secured Financial Creditors. Relevant parts of the para – 10.2.6 may be reproduced:-

> "10.2.6 It is deemed that all the secured financial creditors would relinquish the security held by them, upon payment of full amount proposed to them under the Resolution Plan.
>
> The Resolution Applicant proposes to pay **Rs.54.25 Crores (Rupees Fifty four Crores and twenty Five Lakhs Only)** to all Secured Financial Creditors because in our assessment the current value of the security may not yield more than the value proposed and the individual distribution is detailed in the below sub-Paras i) to viii):- ……
>
> …….
>
> iv. Indian Renewal Energy Development Agency Limited (IREDA) - **Rs.6.61 Crore (Rupees Six Crore and sixty one lakh only)**, because in our assessment the current value of the security may not yield more than the value proposed above……"

The learned Counsel argued that such Resolution Plan was specifically deliberated before COC and was approved by a majority of 95.21 percent votes in favour of the Resolution Plan. The Appellant was consenting party to the approval of such Resolution Plan. It is argued that the Information Memorandum itself shows that all the Financial Creditors in COC were Secured Creditors of Respondent No.4 – Corporate Debtor and thus all of them belong to the same class of Creditors. The learned Counsel referred to Section 30(4) of IBC which reads as under:-

> "[(4) The committee of creditors may approve a resolution plan by a vote of not less than [sixty-six] per cent. 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:"

Referring to the above Section, the learned Counsel submitted that the amended Section gives power to the COC to decide the manner of distribution and the word used is "may" when it comes to taking into account the order of priority amongst the Creditors. It is argued that it is thus discretion of COC. When such specific provisions are there in IBC, the learned Counsel submitted that the Appellant cannot rely on Judgement in the matter of "ICICI Bank" which was under the old Companies Act read with the provisions of Transfer of Property Act and which related to liquidation and not resolution which is the issue in the present matter. The learned Counsel submitted that the Judgement in the matter of "ICICI Bank" cannot be relied on in view of the subsequent passing of Insolvency and Bankruptcy Code, 2016 and the observations of the Hon'ble Supreme Court in the matter of "Essar Steel" (supra).

10. The learned Counsel for Respondent No.2 referred to the Judgement in the matter of "Essar Steel" stating that apart from para – 83 referred by the learned Counsel for Resolution Professional, there are other portions of the Judgement which clearly bring out the law that distribution is the

matter of discretion of COC and the discretion when exercised, is a commercial decision which cannot be interfered with. The learned Counsel referred to para – 40 of the Judgement in the matter of "Essar Steel" (supra) where after referring to Section 31 of the Code, the Hon'ble Supreme Court observed:-

> "Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors."

Reference was made to paragraphs – 91 and 92 of the Judgement which read as under:-

> "91. What is important to note is that when one reads the abovementioned judgment, it is a majority of 66% of the Committee of Creditors who has exercised the discretion vested in it under the Code in this particular manner, which has then correctly not been disturbed by the NCLT and NCLAT. Far from helping Shri Sibal's client, the principle that is applied in such a case is that ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution in the manner suggested in **Orissa Manganese** (supra). It is, therefore, not possible to accept the argument that the Adjudicatory Authority and consequently the Appellate Authority would be vested with the discretion to apply what was applied by the Committee of Creditors in the **Orissa Manganese** case (supra). This submission is also devoid of merit and is, therefore, rejected.
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> 92. The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(b) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to

> operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself."

Thus the argument is that COC has discretion in this regard and thus, there is no substance in the argument by the Counsel for Appellant that the Resolution Plan could not have been put up. It is argued that he Resolution Plan was not violating provisions of Property Act as under IBC, the discretion of distribution is of COC.

11. It is argued by the learned Counsel for Respondent No.2 as well as Respondent No.3 that the Resolution Plan was already approved and has also been implemented and the Appellant has been paid its share as per the Resolution Plan. The learned Counsel for SRA (Respondent No.3) submitted that soon after the passing of the Resolution Plan in 9th COC, the Appellant had sent e-mail to the Resolution Professional which was aptly replied by the Resolution Professional vide e-mail dated 13th March, 2020 (Appeal Page – 476) and the matter was also discussed before COC in the 10th Meeting (Annexure A-26 – Page 480 at 488) in which meeting also the Chief Manager of Appellant was present and the COC expressed satisfaction to the response given by the Resolution Professional to the Appellant. The learned Counsel for SRA referred to the Judgement dated

19.12.2019 in the matter of **"Stressed Assets Stabilization Fund (SASF) Versus Bijay Murmuria, Resolution Professional & Ors."** – Company Appeal (AT) (Insolvency) No. 1187 of 2019 where it is argued that similar issues were raised and this Tribunal held:-

> "14. The Appellant has failed to show that any of the provisions of Section 30(2) has been violated or there is any material irregularity in the corporate insolvency resolution process period. The question of giving benefit to First Charge holder does not arise both on the question of facts and law. The Appellant cannot derive any benefit from Sections 40 or 48 of the Transfer of the Property Act, 1882."

12. Having heard Counsel for both sides, we have laid out as above the arguments in details and the above laying out of the details of the arguments itself makes the issue clear and it can be seen that the arguments of the learned Counsel for Respondents are well founded and based on law. The juxtapose of the arguments for Appellant, with the arguments of Respondents itself wanes the case of the Appellant. Admittedly, the Appellant was part of COC and the COC had in 9th Meeting deliberated and unanimously agreed that distribution of the proceeds under the Resolution Plan to the Financial Creditors shall be in proportion to the share of the voting rights of the relevant Financial Creditors in the COC. In the e-voting which came to be held, the Appellant had consented to the Resolution Plan which even specifically stated the specific amounts which will be given in the distribution. Having agreed to such Resolution Plan, the Appellant needs to be estopped from questioning the same. The Appellant in the Appeal has claimed that the Appellant had sent e-mail to

the Resolution Professional on 05.03.2020 asking why other lenders had been treated equally with the Appellant. Subsequently, in para – 7.16, it is stated:-

> "7.16 Moreover, because the RP failed to call a CoC meeting as requested to discuss the aforesaid issue and also refused to postpone the voting on the resolution plan, the Appellant was left with no option but to vote on 09.03.2020 in favour of Respondent No.3's resolution plan as voting against the said resolution plan would have only fetched the Appellant liquidation value by virtue of Section 30(2) of the Code."

The Appellant could see the options open to it and chose one. The Appellant took informed decision to vote in favour. Having done so, the Appellant needs to be estopped from questioning the Resolution Plan with regard to the manner of distribution.

13. Apart from this, considering decision of the COC that the distribution would be in proportion to the share of voting rights, being commercial decision of the COC to see through the CIRP proceedings so as to reach a resolution, we would not like to interfere. The learned Counsel for the Respondents have referred to portions from the Judgement in the matter of "Essar Steel" which have been reproduced above. Keeping same in view also, we do not find that there is any substance in the submission that the Resolution Plan itself was hit by Transfer of Property Act which required the same not to be placed before COC. The law as existing under IBC, elaborately discussed by the Hon'ble Supreme Court in the matter of "Essar Steel", brings out the discretions regarding distribution which the

COC has and which it exercised. IBC is subsequent law, with Section 238 giving overriding effect. When COC has the discretion as mentioned, Resolution Professional could not have relied on Section 48 of Transfer of Property Act, which is in context of contractual rights, to hold back the Resolution Plan from COC.

We thus do not find any substance in the Appeal. The Appeal deserves to be dismissed.

We pass the following Order:-

ORDER

The Appeal is dismissed. No Orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Mr. V.P. Singh]
Member (Technical)

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