

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

**Company Appeal (AT) (Insolvency) No. 1072 of 2022**

[Arising out of Order dated 10.05.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench in I.A. No. 3954 of 2021 in CP No. 1504(PB)/2019]

**IN THE MATTER OF:**

**GAMMON ENGINEERS & CONTRACTORS PVT. LTD.,**

3<sup>rd</sup> Floor, 3/8 Hamilton House,

J.N. Heredia Marg, Ballard Estate, Mumbai - 400038

**...Appellant**

**Versus**

**1. SUTANU SINHA,**

Resolution Professional, Patna Highway Projects Ltd.,

41, Shakespeare Sarani, Kolkata – 700017

**2. COMMITTEE OF CREDITOR**

Patna Highway Projects Ltd.

Floor No. 4 Duck Back House,

41, Shakespeare Sarani, Kolkata – 700017

**3. SILVER POINT LUXEMBOURG**

Platform S.A.R.I.

11-13 Boulevard De La Foire

Luxembourg L-1582

**...Respondents**

**Present:**

**For Appellant:** Mr. Rajshekhar Rao, Sr. Advocate with Mr. Raghavendra M. Bajaj, Mr. Agnish Aditya, Mr. Kumar Karan, Mr. Shivansh Dwivedi, Advocates.

**For Respondents:** Mr. Krishnendu Datta, Sr. Advocate with Ms. Pooja Mahajan, Ms. Mahima Singh, Mr. Karanvir Khosla, Mr. Rahul Gupta, Advocates for RP/R-1.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Abhijeet Sinha, Mr. Samar Bansal, Mr. Vedant Kapur, Advocates for CoC.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Prateek Kumar, Ms. Raveena Rai, Mr. Rohit Ghosh, Advocates for SRA.

*Cont'd.../*

## **J U D G M E N T**

### **ASHOK BHUSHAN, J.**

1. This Appeal has been filed challenging the Order dated 10<sup>th</sup> May, 2022 passed by National Company Law Tribunal, Principal Bench, New Delhi in I.A. 3954 of 2021 in CP(IB) No. 1504(PB)2019. By the impugned Order, the Application filed by the Appellant praying for rejection of the Resolution Plan submitted by Respondent No. 3 has been rejected.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

- i. National Highway Authority invited proposals for upgradation of Hajipur Muzajfarpur Section of Existing NH-77. A concession agreement was executed between NHAI and Patna Highway Project Limited-Corporate Debtor on 24.02.2010. EPC Agreement was executed between the Corporate Debtor and Gammon India Limited for upgradation of Hajipur Muzaffarpur Section on 22.02.2011. A scheme of arrangement was entered between the Appellant and Gammon India Limited which was approved by National Company Law Tribunal by order dated 22<sup>nd</sup> March, 2017. After approval of scheme of arrangement, the EPC Contract for execution of the project stood transferred to the Appellant.
- ii. There were issues between the Appellant, the Corporate Debtor and NHAI resulting in non-completion of the project. There being dispute and difference between the Appellant and Corporate

- Debtor, Appellant issued notice of invocation and arbitration on 04.11.2019 in terms of EPC Contract.
- iii. Arbitral Tribunal was constituted. Appellant filed its statement of claim claiming an amount of Rs. 428,22,98,000/- along with interest, cost of arbitration and applicable GST. Arbitral Tribunal passed an order on 05.12.2019 to maintain status quo on EPC Contract. While aforesaid Arbitral Tribunal were underway, the Adjudicating Authority vide Order dated 03.01.2020 admitted an application under Section 7 filed against the Corporate Debtor by Corporation Bank.
  - iv. Before the Arbitral Tribunal, Resolution Professional appeared and intimated about the Insolvency Proceeding against the Corporate Debtor. On 22/01/2021 Resolution Professional wrote an email to the Appellant that an amount of Rs. 24,57,78,609/- is outstanding from the Appellant to the Corporate Debtor with respect to the work done/services provided by the Corporate Debtor. Appellant vide email dated 10.02.2021 informed the Resolution Professional that no amount was outstanding and in fact amount of Rs. 428,22,98,000/- is due and payable by the Corporate Debtor to Appellant which is subject matter of arbitration. Appellant submitted a claim of Rs. 481,57,58,500/- to the Resolution Professional in Form-B. The Resolution Professional vide email dated 04<sup>th</sup> March, 2021 informed the Appellant that their claim has

been kept under the disputed category in view of the ongoing arbitration between the parties.

- v. The CoC of the Corporate Debtor approved the Resolution Plan submitted by Respondent No. 3 on 12<sup>th</sup> March, 2021. Resolution Professional filed an I.A. No. 1538 of 2021 before the Adjudicating Authority seeking approval of the Resolution Plan. Appellant on 28<sup>th</sup> June, 2021 requested the Resolution Professional to provide copy of the approved Resolution Plan. Appellant filed an I.A. No. 3954 of 2021 praying for rejection of the Resolution Plan submitted by Respondent No. 3 with some other prayers. The Adjudicating Authority heard the parties and passed an order on 10<sup>th</sup> May, 2022 rejecting I.A. No. 3954 of 2021 filed by the Appellant. By an order of same date i.e. 10<sup>th</sup> May, 2022, I.A. No. 1538 of 2021 filed by the Resolution Professional was allowed and the plan submitted by Respondent No. 3 was approved by the Adjudicating Authority.
- vi. Appellant aggrieved by the order dated 10<sup>th</sup> May, 2022 rejecting I.A. No. 3954 of 2021 has come up in this Appeal.

3. We have heard Mr. Rajshekhar Rao, Learned Sr. Counsel for the Appellant and Mr. Krishnendu Datta, Learned Sr. Counsel for Respondent No. 1 and Mr. Ramji Srinivasan, Learned Sr. Counsel for CoC and Mr. Arun Kathpalia, Learned Sr. Counsel for SRA.

4. Mr. Rajshekar Rao, Learned Sr. Counsel appearing for the Appellant submitted that the claim filed by the Appellant before the Resolution Professional was kept under disputed category and in the

Resolution plan, the SRA has provided for receiving of the same amount from the NHAI. It is submitted that on the one hand the claim of the Appellant is kept under disputed category and on the other hand, same amount is being claimed from NHAI which is to be received by the SRA. It is submitted that Resolution Plan containing such clause could not have been approved and the Adjudicating Authority committed error in rejecting I.A. No. 3954 of 2021 by which the Appellant has prayed for rejection of the Resolution Plan. It is submitted that in the Resolution Plan the same amount of Rs. 428,22,98,000/- is referred to as a claim raised by contractor i.e. the Appellant and which amount was to be reimbursed from the NHAI to the Corporate Debtor whereas in the Insolvency Process of the Corporate Debtor neither the said claim is admitted nor any provision has been made for payment of any amount to the Appellant which is arbitrary and it was due to actions of NHAI, Appellant had to incur huge losses. It is submitted that due to initiation of insolvency process the Arbitration proceeding initiated by the Appellant has also not proceeded any further and the Resolution Plan approved by the Adjudicating Authority is prejudicial to the interest.

5. Learned Sr. Counsel appearing for the Respondents refuting the submissions of the Appellant submits that Resolution Plan approved by the Adjudicating Authority by the Order dated 10<sup>th</sup> May, 2022 has already been upheld by this Tribunal vide its Judgment dated 25<sup>th</sup> May, 2023 in C.A.(AT) Ins. No. 920 of 2022 hence nothing survives in this Appeal to be decided. The Application filed by the Appellant was to reject the

Resolution Plan, Resolution Plan having been approved by the Tribunal which order has received approval by this Tribunal vide Order dated 25<sup>th</sup> May, 2023, this Appeal deserves to be rejected on this ground. It is further submitted that with regard to decision of Resolution Professional to treat the claim of the appellant in disputed category, at no point of time Appellant challenged such categorization by the Resolution Professional. The Appellant is not entitled to challenge the Resolution Plan. It is submitted that Corporate Debtor has made excess payment to the Appellant and Application being I.A. No. 1761 of 2021 seeking avoidance of certain preferential transaction against the Appellant has already been filed on the basis of transaction audit report which application is pending. The request of the Appellant for copy of the Resolution Plan could not have been acceded to. Resolution Plan being a confidential document, Appellant is not entitled to receive copy of the same. Appellant was promoter of the Corporate Debtor and related party. Resolution Professional has filed a detailed reply in I.A. No. 3954 of 2021. The commercial wisdom of the CoC in approving the Resolution plan is paramount and unjusticeable. Resolution Plan submitted by Respondent No. 3 has complied the provisions of the Code. Appellant has failed to demonstrate non-compliance of the Resolution Plan with the requirements under Section 30(2) of the Code, there is no legal infirmity in treatment of the appellant's claim, claim was received from the Appellant, collated and verified by the RP and upon such verification the claim was kept under heading "amount under dispute". Considering the

appellant's claim is subject matter of the dispute in the arbitration proceedings.

6. We have considered the submissions of Learned Sr. Counsel for the parties and have perused the record.

7. In the application which was filed by the Appellant being I.A. No. 3954 of 2021, following prayers were made:

- “a. Reject the Resolution Plan submitted by Silver Point Luxembourg S.A.R.L. on 11.03.2021; and*
- b. Pending hearing of this Application, not pass any order or direction in I.A. 1538 of 2021 in C.P.(IB) No. 1504/PB/2019; and*
- c. Direct the Resolution Professional to provide a copy of Resolution Plan submitted by Silver Point Luxembourg S.A.R.L. on 11.03.2021 to the Applicant; and*
- d. Direct the Resolution Professional to issue fresh invitation for Expression of Interest; and/or*
- e. Pass such other and further order as this Tribunal may deem fit and proper and in the facts and circumstances of the instant case.”*

8. We have noted above that plan submitted by Respondent No. 3 was approved by the CoC in its meeting dated 12<sup>th</sup> March, 2021 with 97.95% vote share. I.A. No. 1538 of 2021 was filed by the RP for approval of the Resolution Plan. By a separate order dated 10<sup>th</sup> May, 2022 passed by the Adjudicating Authority I.A. No. 1538 of 2021 the Resolution Plan was approved. The promoters of the Corporate Debtor namely AJR Infra and Tolling Limited had filed C.A.(AT) Ins. No. 920 of 2022 challenging the

order of the Adjudicating Authority dated 10<sup>th</sup> May, 2022 allowing I.A. No. 1538 of 2021. This Tribunal vide its Judgment dated 25<sup>th</sup> May, 2023 has already dismissed the Appeal upholding the Order dated 10<sup>th</sup> May, 2022. This Tribunal has held that Resolution Plan submitted by Respondent No. 3 complied all mandatory requirements under the Code and Regulation. While dismissing the Appeal, in paragraph 16-17, following has been held:

*“16. The submission of learned counsel for the Appellant that mandatory requirement under Regulation 38 is not fulfilled, is not correct and the plan gives causes of default, hence, the above mandatory requirement under the plan is fulfilled.*

*17. We, thus, do not find any substance in any of the submission of learned counsel for the Appellant to interfere with the impugned order dated 10.05.2022.*

*There is no merit in the Appeal. Appeal is dismissed.”*

9. We have noticed above I.A. No. 3954 of 2021, the prayer made was to reject the Resolution Plan submitted by Respondent No. 3 on 11.03.2021. When the plan submitted by Respondent No. 3 has been approved by the Adjudicating Authority by the Order dated 10<sup>th</sup> May, 2022 which has already received approval by this Tribunal in its judgment dated 25<sup>th</sup> May, 2023 as noted above, we are of the view that prayer made in the I.A. No. 3954 of 2021 cannot be accepted.

10. Learned Counsel for the Appellant however submitted that several relevant clauses of the Resolution Plan have not been pointed out to the Court while deciding the Appeal No. 920 of 2022 on 25<sup>th</sup> May, 2023.



11. In the submission Learned Counsel for the Appellant has referred to Schedule 6 of Resolution Plan and has referred to Clause 6 which deals with cost claim. Schedule 6, Clause 6 is as follows:

**“6. Cost Claims**

*Given the substantial time delays suffered by the Project Highway on account of the delayed handover of Right of Way solely on account of the NHAI's defaults, the Corporate Debtor had to endure sizeable cost overruns and additional financial implication on account of idling of resources, interest costs, among others. The quantum of these cost overruns was very substantial and was one of the main reasons that induced the insolvency of the Corporate Debtor.*

*The Concession Agreement specifically provides that, under Article 35.2 (Compensation for Breach of Agreement) of the Concession Agreement, the Corporate Debtor shall be reimbursed all direct and indirect costs resulting out of the defaults that are solely attributable to the NHAI. In this regard, the following cost claims are reimbursable to the Corporate Debtor by the NHAI:*

| S No. | Particulars   | Amounts (IN INR) | BASIS   |
|-------|---|------------------|---|
| 1.    | Claims raised by contractor(s) on the Corporate Debtor  | 4,28,23,00,000   | As filed on the Corporate Debtor                                    |
| 2.    | Increase in capital costs (including increase in interest during construction over and above that | 8,71,00,00,000   | Actual completion cost less the capital cost planned at the time of |

|  |   |                        |                   |
|--|---|------------------------|-------------------|
|  | envisaged at the time<br>of the initial financial<br>closure) |                        | financial closure |
|  | Total   | <b>12,99,23,00,000</b> |                   |

12. It is submitted that plan contemplates that corporate debtor shall be reimbursed all direct and indirect costs resulting out of the defaults that are solely attributable to NHAI. It is submitted that amount of Rs. 4,28,23,00,000/- has been referred to the claims raised by contractor i.e. Appellant in clause 6. It is submitted that on one hand the amount which is being received by the NHAI is being received by the SRA whereas no payment is proposed to the Appellant who had submitted the said claim.

13. Learned Counsel for the Respondent had submitted that claim of the Appellant which was filed in the CIRP was verified and collated and was kept in the disputed category claim which categorization was never challenged by the Appellant by filing any application before the Adjudicating Authority. When the claim of the Appellant was kept in the disputed category and there is no determination of the claim of the Appellant there could not have been any provision for payment in the Resolution Plan. The Resolution Plan submitted by Respondent No. 3 have received approval by the CoC, it is well settled that commercial wisdom of CoC is paramount. Hon'ble Supreme Court in **K. Sashidhar Vs. Indian Overseas Bank and Ors.** (2019) 12 SCC 150 in paragraph 59 of the Judgment, following has been held:

*“59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.”*

14. Same preposition has been reiterated by the Hon’ble Supreme Court in **CoC of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Ors.** (2020) 8 SCC 531.

15. The Approval of the Resolution Plan by the CoC is the commercial wisdom of the CoC challenge to which approval can be on limited ground when it is shown that Resolution Plan is not in compliance with Section

30(2) of the Code. No ground has been made out in the Appeal to show that Resolution Plan is in non-compliance of Section 30(2) of the Code. Further as noted above, this Tribunal in C.A.(AT) Ins. No. 920 of 2022 has held that the plan is in compliance of the all mandatory requirements and plan has already been upheld.

16. In view of the fore-going discussions, we are of the view that no grounds have been made out to interfere with the Order impugned passed by the Adjudicating Authority rejecting I.A. No. 3954 of 2021. There is no merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]**  
**Chairperson**

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

**NEW DELHI**  
**16<sup>th</sup> January, 2024**

*Basant*

*Company Appeal (AT) (Insolvency) No. 1072 of 2022*