

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

Comp. App. (AT) (Ins) No. 1347 of 2022

&

I.A. No. 4180 of 2022

IN THE MATTER OF:

Merina Commotrade Pvt. Ltd.

...Appellant(s)

Versus

Anand Sonbhadra

Resolution Professional

for Shubhkamna Buildtech Pvt. Ltd. & Ors. ...Respondent(s)

Present:

For Appellant : Mr. Shashank Agarwal, Mr. Abhishek Taneja, Advocates

For Respondents : Mr. Abhishek Anand, Mr. Nipun Gautam, Advocate for RP.

J U D G M E N T

Per: Justice Rakesh Kumar Jain

The Appellant is a secured financial creditor who dissented with the resolution plan of Sunil Kumar Agarwal and Surendra Kumar Singhal, is aggrieved against the order dated 12.09.2022 passed in I.A. No. 485 of 2019, filed by the Resolution Professional of Shubhkamna Buildtech Pvt. Ltd. (Corporate Debtor) for approval of the resolution plan, which has been

approved by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court No. IV).

2. In brief, M/s Concord Infrastructure Pvt. Ltd. filed an application under Section 9 as an Operational Creditor against M/s Shubhkamna Buildtech Pvt. Ltd. (Corporate Debtor) bearing C.P. No. IB-1059/ND/2018 before the Adjudicating Authority which was admitted on 26.11.2018.

3. Shorn of unnecessary details, the appellant was the part of the CoC having 1.67 % voting share. The table depicting the voting percentage alongwith the claim of the creditors admitted in each class/entity of the CD is as under:-

Name of the Class/Entity	Voting Share	Claim Admitted (INR)
Homebuyers/Allottees	87.6%	536,70,62,437
Merina Commotrade Pvt. Ltd.	1.67%	102,125,000
Canara Bank	0.11%	6,815,374
DHFL	3.51%	215,039,400
Rishi Kapoor	1.82%	111,221,500
UCO Bank	5.16%	316,377,832

Corporation Bank	0.13%	7,920,250
Total	100%	612,65,61,793/-

4. The resolution plan submitted by the SRA was approved by the CoC with an affirmative voting percentage of 87.60%. The detail of the dissenting financial creditors alongwith liquidation value is as under:-

Liquidation Value for Dissenting Financial Creditors				
Particulars of Dissenting Creditor	Voting Status	Admitted Claim	Provided in Plan	Liquidation Value
Secured Financial Creditors				
Dewan Finance Limited	Abstained	21.5	1.5	0
Canara Bank	Abstained	0.68	0.2	0.1820000
Merina Commotrade	Dissent	10.21	1	0.7955513

Pvt. Ltd.				
Unsecured Financial Creditors				
UCO	Dissent	31.64		Delivery of Units Against borrower's allotment & BBA
Corp. Bank	Abstained	0.79		Delivery of Units against Borrower's allotment & BBA
Rishi Kapoor	Dissent	11.12	0.9	1.5231208

6. In the application bearing CA No. 485 of 2019 filed by the RP for approval of the resolution plan, the Appellant filed the objection as dissenting financial creditor on 04.12.2019. The

grounds taken by the Appellant are noticed by the Adjudicating Authority in the impugned order which read as under:-

“a. The objector no. 2 submits that the liquidation value of Rs. 82.66 Cr. of the CD as reported by the RP is wrong, baseless, misconceived, erroneous and should be rejected. The objector no. 2 adds that the calculation of the liquidation value is not in accordance with the provisions of the Code, 2016.

b. The objector no. 2 further submits that the amount of Rs. 0.7955513 Cr. that has been offered to the objector no. 2 being the dissenting financial creditor is wrong and baseless. The objector no. 2 further submits that the liquidation value which the objector no. 2 is entitled is way beyond Rs. 1.38 Cr.”

7. The Adjudicating Authority dealt with the objection of the Appellant in para 7 of the impugned order which read as under;-

“With regard to the Objector No. 2’s objections, we find that the resolution professional on receipt of the confidentiality undertaking from the objector no. 2 had shared the fair value and liquidation value with the objector no. 2. We further find that the valuation of all the three classes of assets of the CD were conducted by the IBBI panel registered valuer in compliance with the provisions of the Code, 2016 and the Regulation 35A of the CIRP Regulations made thereunder. We are further of the view that as per Section 30(2)(b) of the Code, 2016, the liquidation value required to be paid to the financial creditor is only qua the secured interest of the financial creditor and not qua the total liquidation value of the CD”

8. The grievance of the Appellant in this appeal is the wrongful allocation of Rs. 79 lakhs as the liquidation value, being a dissenting creditor, on the basis of the security interest that the Appellant held and not in proportion and percentage in reference to Appellant's admitted claim and the liquidation value is not in accordance with CIRP Regulations as the liquidation value of the CD wrongfully diminished by the registered valuers from Rs. 166.54 Cr. to a meagre 82.66 Cr. on the instructions of the RP.

9. Counsel for the Appellant has submitted that the Appellant is a secured financial creditor of the Corporate Debtor. The appellant's financial debt is secured by charge on certain units and / or charge on total FSI (totalling to about 34,200 sq. ft.) in the project that was being developed by the CD. The Appellant submitted its claim for secured financial debt of Rs. 10,21,25,000/- which was admitted fully and he was included in the CoC with 1.67% voting share. It is further submitted that during the CIRP, the RP appointed registered valuers who reported the liquidation value of the assets of the CD at about Rs. 166.54 Cr. but thereafter, the RP instructed the registered valuers, for land and building, to revisit their respective valuations by adjusting certain dues payable to New Okhla

Industrial Development Authority (Noida) and Greater Noida Industrial Development Authority (GNIDA). The said registered valuers submitted their addendums on 09.10.2019 and reduced the liquidation value of the CD from Rs. 166.54 Cr. to a Rs.82.66 Cr. The valuation reports were shared by the RP after voting on the resolution plan commenced and after taking into consideration the valuations assigned by the registered valuers vis a vis the resolution plan value offered to the Appellant, the Appellant voted against the resolution plan. However, the resolution plan was approved by the CoC with 87.60% votes in its favour. In the plan, the RP allocated a sum of Rs. 79,55,513/- to the Appellant as the liquidation value that a dissenting financial creditor would be entitled to in accordance with Section 30(2) r/w Section 53 of the Code but the appellant filed the objection to the approval of the resolution plan filed by the RP i.e. CA No. 485 of 2019 but the said objection has been rejected and plan has been approved. It is submitted that the Adjudicating Authority has erred in holding that as per Section 30(2)(b) of the Code, the liquidation value required to be paid to a financial creditor is only qua the secured interest of the financial creditor and not qua the total liquidation value of the CD.

10. On the other hand, Counsel for the Respondent has submitted that there is no infirmity in the order of the Tribunal because the secured financial creditor cannot insist on payment of the entire dues of the security as per its security interest in the event of approval of resolution plan and in this regard, relied upon a decision of the Hon'ble Supreme Court in the case of India Resurgence ARC Pvt. Ltd. Vs. M/s Amit Metaliks Limited & Anr., Civil Appeal No. 1700 of 2021. It is also submitted that as per Section 30(2)(b) of the Code the financial creditor who do not vote in favour of the resolution plan are entitled for payment of debt, which shall not be less than the amount to be paid to such creditor in terms of Section 53(1) of the Code and in the present case, the voting share of the Appellant was 1.67% in the CoC and as per the vote share, the amount payable to the Appellant comes to Rs. 79,55,513/- which was more than the amount to be paid in the event of liquidation of the CD. He has further submitted that this Court in the case of Paridhi Finvest Pvt. Ltd. Vs. Value Infratech Buyers Association & Anr. CA (AT) (Ins) No. 654 of 2022 has held that the security holder cannot insist upon payment of amount as per security interest when there is resolution of the CD through a

resolution plan. In this regard, he has referred to Paras 10, 12 and 14 of this Judgment which are reproduced as under:-

“10. The vote share of the Appellant was 2.38% in the CoC and as per the vote share, the amount payable to the Appellant comes to Rs.99,19,425/- as pleaded by RP. We, thus, are of the view that payment in the Plan proposed to the Appellant is not less than the amount, which was payable to the Appellant in event the amount is distributed as per priority under Section 53(1) of the IBC. In paragraph 13 of the reply of Successful Resolution Applicant, following has been pleaded:

“13. Compliance of Section 30(2): As already stated above, the Appellant has got the payout of Rs.1 Crore, which is above the proportionate liquidation value of Rs.99,19,425/- (being 2.38% of enterprise Liquidation value of Rs.41,67,82,554/-). Therefore, the argument that the proposed payout is below liquidation value is misplaced. The answering Respondent has also demonstrated as to how the security alleged to be existing in favour of Appellant is non-existing and Appellant is not in a position to take over the so called, secured assets as 29 of 30 flats allegedly mortgaged by Corporate Debtor have not been constructed at all in any form or upto any stage and there still exist thin air at the location of such secured flats. Therefore, the argument is bad in law as well as facts and is in argument of prejudice unsupported by facts and law.”

12. The Appellant's claim was admitted in the CIRP for Rs.1,86,00,000/- and it having vote share of 2.38%, it has been proposed an amount of Rs.1,00,00,000/-, which is more than the amount, which would have been payable to the Appellant in case the amount is paid as per priority under Section 53(1) of the IBC. The learned

Counsel for the Appellant submits that the Appellant was entitled for amount as per security value of the Appellant. It having equitable mortgage of 30 units/flats. It is well settled that the security holder cannot insist payment of amount as per security interest, when there is resolution of the Corporate Debtor through a Resolution Plan. In this context, we may refer to judgment of the Hon'ble Supreme Court in India Resurgence ARC Pvt. Ltd. V. Amit Metaliks & Anr. (2021) SCC OnLine SC 409. In paragraphs 16 and 17 of the judgment, following have been held:

“16. The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. What the dissenting financial creditor is entitled to is specified in the later part of sub-section (2)(b) of Section 30 of the Code and the same has been explained by this Court in Essar Steel [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] as under : (SCC pp. 628-29, para 128) “128. 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 the operational creditors something more than was given earlier as it is the higher of the figures mentioned in subclauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to the operational creditors. The same goes for the latter part of subclause (b) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of the operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of the 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, preamendment, 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). Ms 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.”

(emphasis supplied)

17. Thus, what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.”

14. We, thus, are of the view that the Resolution Plan, which has been approved by the CoC with 90.45% vote share and through which Resolution Plan the completion of unfinished project is helping in

resolution of the CIRP of the Corporate Debtor and in which 97% vote share are being held by the Flat Buyers themselves, the Resolution Plan cannot be set aside at the instance of Appellant, who is being paid the amount as per Section 30, sub-section (2). We, thus, do not find any ground to interfere with the impugned order. The Appeal is dismissed. Parties shall bear their own costs.”

11. It is further submitted that the decision in the case of Paridhi Finvest Pvt. Ltd. (Supra) has been upheld by the Hon’ble Supreme Court because the appeal filed against this order bearing diary no. 14065 of 2024 was dismissed by the Hon’ble Supreme Court. He has further submitted that as per the judgment of this Court in the case of ICICI Bank Limited Vs. BKM Industries Limited, CA (AT) (Ins) No. 405 of 2023 there is no scope of distribution of assets among financial creditor as per security interest. He has also argued that in the case of Union Bank of India Vs. Resolution Professional of Kudos Chemie Ltd. & ors., CA (AT) (Ins) No. 665 of 2022 this Court has held that:-

“5. The decision of the CoC regarding the distribution of amount is in its commercial wisdom which we cannot question or be questioned by the Appellant. The Adjudicating Authority has rightly referred the judgment of the Hon’ble Supreme Court in “India Resurgence Arc. Pvt. Ltd. Vs. M/s. Amit Metaliks Ltd. & Anr.- Civil Appeal No. 1700 of 2021” where in paragraph 13.1, the

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Hon'ble Supreme Court has held that what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest. Paragraph 13.1 of the judgment is as follows:-

“13.1. Thus, what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.”

12. Counsel for the Respondent has further argued that the resolution plan has been approved by the CoC by voting percentage of 87.60% in its commercial wisdom which cannot be interfered with in view of the decision of the Hon'ble Supreme Court in the case of K. Sashidhar Vs. Indian Overseas Bank & Ors. Civil Appeal No. 10673 of 2018 that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code. He has also submitted that the Adjudicating Authority is not empowered to look into the question of valuation of the assets of the CD

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and in this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of Ramkrishna Forgings Limited Vs. Ravindra Loonkar, RP of Acil Limited & Anr., 2023 SCC Online SC 1490 where it has been observed that there is no scope for interference with the commercial aspects of the decision of the CoC, and therefore, there is no scope for substituting any commercial term of the resolution plan approved by the CoC. He has also referred to another judgment of this Court in the case of CoC Vs. Anil Tayal RP of Horizon Buildcon Pvt. Ltd., CA (AT) (Ins) No. 1633 of 2023 in which the Hon'ble Supreme Court has held that :-

“8. Learned counsel for the Appellant submits that valuation is at higher side which shall affect the homebuyers. Valuation has been obtained as per Regulations and Resolution Plan has been already approved, we, thus, are of the view that the Adjudicating Authority did not commit any error in rejecting the application filed by the Appellant.

9. Learned counsel for the Respondent has relied on judgment of Hon'ble Supreme Court in “Ramkrishna Forgings Limited vs. Ravindra Loonkar, Resolution Professional of ACIL Ltd. & Anr., Civil Appeal No.1527 of 2022” decided on 21.11.2023. In the said case, after approval of the Resolution Plan question of valuation was sought to be raised and the Adjudicating Authority has directed for valuation, which order was set aside by the Hon'ble Supreme Court. The said judgment fully

supports the submission of learned counsel for the Respondent.

10. We, thus, are of the view that no error has been committed by the Adjudicating Authority in rejecting application filed by the Appellant. Appeal is dismissed.”

13. Counsel for the Respondent has further submitted the commercial wisdom of the CoC is paramount and sacrosanct and in this regard, relied upon a decision of the Hon’ble Supreme Court in the case of CoC of Essar Steel India Ltd. Vs. Satish Kumar Gupta and Ors., (2020) 8 SCC 531 in which it has been held that the commercial wisdom of the CoC is paramount and the judicial review is prohibited.

14. The same view has been expressed in the matter of IMR Metallurgical Resources AG Vs. Ferro Alloys Corporation Limited & Ors., CA (AT) (Ins) No. 272 of 2020 .

15. We have heard Counsel for the parties and perused the record.

16. The Ld. Tribunal has relied upon a decision of the Hon’ble Supreme Court in the case of M/s Amit Metaliks Limited & Anr. (Supra). In the said case, the appeal was filed by India Resurgence ARC Pvt. Ltd., assignee of the Religare Finvest Limited as secured financial creditor of the CD, having 3.94% of

voting share in the CoC. When the resolution plan submitted by the RP in that case was taken up for consideration by the CoC, India Resurgence ARC Pvt. Ltd. expressed its reservation on the share being proposed, particularly with reference to the value of the security interest held by it and chose to remain a dissenting financial creditor. The resolution plan however was approved by the AA. The contention of the Appellant in that case was that the approved resolution plan failed the test of being feasible and viable in as much as the value of the secured asset on which security interest was created by the CD in its favour was not taken into consideration. The main plank of submission of the Appellant in that case was that, in respect of Section 30(4) of the Code, 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 Code requiring the CoC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the Code including the priority and value of the security interest of a secured creditor. The case of the Appellant in that case was that total admitted claim

was Rs. 13.38 Cr., the resolution applicant offered Rs. 2.026 Cr. without even considering the valuation of security held by the Appellant which admittedly had the valuation of more than 12 Cr. The Hon'ble Supreme Court while taking into consideration Section 30(4)(2) and Section 53 held that the NCLAT was right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the CoC while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan with fairness of distribution amongst similarly situated creditors and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. It further held that :-

“14.2. The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.

15. The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further

exposed in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.”

17. Ultimately, the appeal was dismissed. In the case of Paridhi Finvest Pvt. Ltd. (Supra), the case of the Appellant was that he was not paid the amount as per the liquidation value though the Appellant being a dissenting financial creditor was entitled for payment of amount as per liquidation value. In this case, the Court relied upon the decision in the case of Amit Metaliks (Supra) and the decision in the case of Paridhi Finvest Pvt. Ltd. was upheld by the Hon’ble Supreme Court and the appeal was dismissed.

18. In view of the aforesaid discussion, we also rely upon the decision of Amit Methaliks (Supra) which has rightly been considered by the Adjudicating Authority and find no merit in the present appeal but it is also pertinent to mention that the decision of the Hon’ble Supreme Court in the case of Amit Metaliks (Supra) has now been doubted by the Hon’ble

Supreme Court in the case of DBS Bank Ltd. Vs. Ruchi Soya Industries Ltd. & Anr., (2024) 242 Comp Cas 441 wherein the question for consideration of the Hon'ble Supreme Court was as to whether Section 30(2)(b)(ii) of the Code as amended in 2019, entitles the dissenting financial creditor to be paid the minimum value of its security interest. The Hon'ble Supreme Court has taken a different view from Amit Metaliks (Supra) on interpretation of Section 30(2)(b)(ii) of the Code and referred the aforesaid question to be determined by a larger bench. Para 48 and 49 of the said decision are reproduced as under:-

“48. The contention on behalf of the respondent that there is conflict between sub-section (4), as amended in 2019, and the amended clause (b) to sub-section (2) to Section 30 of the Code does not merit a different ratio and conclusion. Section 30(4) states that the CoC may approve the resolution plan by a vote not less than 66% of the voting share of the financial creditor. It states that the CoC shall consider the feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors under sub-section (1) to Section 53, including the priority and value of the security interest of the secured creditors, and other requirements as may be specified by the Board. These are the aspects that the CoC has to consider. It is not necessary for the CoC to provide each assenting party with liquidation value. However, a secured creditor not satisfied with the proposed pay-out can vote against the resolution plan or the distribution of proceeds, in which case it is entitled to full liquidation value of the security payable in terms of Section 53(1) on liquidation of the corporate debtor. The conflict

with sub-clause (ii) to clause (b) to sub-section (2) to Section 30 does not arise as it relates to the minimum payment which is to be made to an operational creditor or a dissenting financial creditor. A dissenting financial creditor does not vote in favour of the scheme. Operational creditors do not have the right to vote.

49. In view of the aforesaid discussion, and as we are taking a different view and ratio from India Resurgence ARC Private Limited (supra) on interpretation of Section 30(2)(b)(ii) of the IBC, we feel that it would be appropriate and proper if the question framed at the beginning of this judgment is referred to a larger Bench. The matter be, accordingly placed before the Hon'ble the Chief Justice for appropriate orders."

19. Although, the interpretation of Section 30(2)(b)(ii) of the Code is pending by a larger bench but at present the decision of the Hon'ble Supreme Court in the case of Amit Metaliks (Supra) is subsisting, therefore, relying upon the said decision, we hold that there is no error in the order of the Tribunal which calls for any interference by this Court and hence, the appeal is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Indever Pandey]
Member (Technical)

New Delhi
25th October, 2024

Sheetal