

Damodar Valley Corporation vs Kharkia Steels Pvt Ltd & Ors on 15 March, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

Company Appeal (AT) (Insolvency) No. 1111 of 2020

IN THE MATTER OF:

Damodar Valley Corporation,
Having its registered office at
The DVC Towers,VIP Road,
Kolkatta-700001.

...Appellant

Versus

Kharkia Steels Pvt. Ltd.
Having its registered office at
3A, Hare Street, Kolkata-700001
West Bengal

...Respondent No.1

Mr. Uday Narayan Mitra
LSI Resolution Private Limited,
SP Mukherjee Road,
Sagar Trade Cube, Second Floor,
Kolkata-700026.
West Bengal

... Respondent No. 2

Amritvani Exim Private Limited
Having its registered office at
21B, Gurusaday Road, Kolkata-700019 ... Respondent No. 3

Present

For Appellant:- Ms. Maninder Acharya, Sr. Advocate with Ms.
Madhumita Bhattacharjee, Mr. Viplav
Acharya, Ms. Srija Choudhury, and Mr. Sai
Shashank, Advocates

For Respondents:-Mr. Ratnanko Banerjee, Sr. Advocate, Mr.
Shashwat Anand, Mr. Dhruv Vig, Mr. Shashwat

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Parihar, Mr. Adya Singh Advocates for R-1 and
R-3.

Mr. Utsav Mukherjee, Ms. Megha Tyagi and
Ms. Deepti Babel, Advocates for R-2 (IRP)

JUDGMENT

(Date: 15.03.2022) (VIRTUAL MODE) [Per.: Dr. Alok Srivastava, Member (Technical)] The present appeal has been preferred by the Appellant under Section 61 of the Insolvency & Bankruptcy Code (hereafter called „IBC) assailing the order dated 21.9.2020 passed by the Adjudicating Authority (NCLT, Kolkata) in IA (IB) No. 680/KB/2020 in CP IB No.1440/KB/2018, by which the Adjudicating Authority has approved the resolution plan of the Corporate Debtor Kharkia Steels Private Limited.

2. The Appellant is aggrieved by the Impugned Order as the Resolution Plan approved by the said order has not considered the claims of the operational creditors adequately and only around 0.16% of the admitted claims of the operational creditors have been taken care of in the approved resolution plan.

3. The facts of the case, as stated and argued by the Appellant, are that the Corporate Debtor/Kharkia Steels Private Limited entered into a Power Purchase Agreement (hereafter called „PPA) with Respondent No. 1 Kharkia Steels Pvt. Ltd. for supply of power to operate their manufacturing units. Thereafter Kharkia Steels started drawing power from the Discom Damodar Valley Corporation (in short called „DVC) and not piled up a huge amount Company Appeal (AT) (Insolvency) No. 1111 of 2020 of electricity dues. Since the Corporate Debtor was unable to pay the overdue amount, a notice for disconnection of power supply for non-payment of dues was issued by the Appellant on 12.8.2015. It is further stated by the Appellant that Dena Bank, a financial creditor, filed an application under section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (in short „CIRP) of the corporate debtor which was admitted by the Adjudicating Authority vide order dated 26.9.2019 with the appointment of an Interim Resolution Professional. Further, on request for submission of claims by financial and operational creditors, a claim amounting to Rs. 18,71,29,760/- was submitted by the Appellant to Respondent No. 2/Resolution Professional of the Corporate Debtor.

4. The Appellant has stated that later atariff order was passed by the West Bengal Electricity Regulatory Commission for the years 2009-2013, fixing the dues of arrears for this period at Rs. 8,53,71,429 and thus the total amount due by Respondent No.1 to the Appellant stood revised at Rs. 39,08,27,846. The CIRP of the Corporate Debtor culminated with the submission of a resolution plan by Respondent No. 3/Amritvani Exim Private Limited, which was approved by the Committee of Creditors and approved subsequently by the Adjudicating Authority vide the impugned order qua which the Appellant received a meager amount of 0.16% of its admitted claim in settlement of its operational debt. After the approval of its resolution plan, the Successful Resolution Applicant

- Respondent No. 3/Amritvani Exim Private Limited - sent a letter dated 12.10.2020 to the Appellant for reconnection of power supply to its manufacturing units along with relevant extracts of the resolution plan. The Appellant has, therefore, filed this appeal after obtaining a copy of the impugned order and the resolution Company Appeal (AT) (Insolvency) No. 1111 of 2020

plan wherein he has prayed for quashing and setting aside the impugned order.

5. We heard detailed arguments advanced by the learned senior counsels for both the parties and perused the record.

6. The Learned Senior Counsel for Appellant has referred to the Power Purchase Agreement dated 28.7.2009 (attached at pp. 57-72 of the Appeal paperbook) to state that a valid agreement for supply of power was entered into between the Appellant and Respondent No. 1. She has also referred to the notice issued by DVC dated 12.8.2015 for disconnection of power supply due to nonpayment of dues (attached at pp. 73 - 74 of the Appeal paperbook) to argue that the notice asked for payment of Rs. 3,62,0156/- within 15 days from the date of issuance of the notice, failing which the power supply would be disconnected without any further reference to the corporate debtor. Later, through letter dated 23.11.2015 and another letter dated 25.5.2016, the DVC communicated that a total arrear due amount for period April 2014 to May, 2015 is Rs. 4,06,85,200 and for the period April 2013 to March 2014 the arrears amount is Rs. 4,43,94,390.

7. The Ld. Senior Counsel for Appellant has further urged that after initiation of CIRP against the Corporate Debtor, the Appellant submitted its claim and also proof of claim vide letter dated 17.10.2019 (attached at pp. 77-82 of the Appeal paperbook) as an operational creditor. She has further submitted that the Appellant's claim was admitted for Rs. 18.71 crore but only an amount of Rs. 14 lakhs was approved for all the operational creditors in the approved Resolution Plan whereby the Appellant received a meager amount of Company Appeal (AT) (Insolvency) No. 1111 of 2020 Rs. 3 lakhs. She has further submitted that by the time the resolution plan was approved, Appellant's dues had increased to about Rs. 39 crores.

8. The Learned Sr. Counsel for Appellant has referred to Clause 8 of Section VI of the Resolution Plan namely „Extinguishment of Claims/Entitlements (attached at pp. 160-161 of the Appeal paperbook) to argue that the liabilities relating to DVC have been not been covered adequately in accordance with the provision in Section 30(2)(b) and the rights of Appellant which should be decided under WBERC Regulations have been adjudicated under the IBC. She has also argued that the Committee of Creditors (in short „CoC) is obliged to examine that the plan submitted by the Resolution Applicant is a viable and feasible plan which balances the claims of all the financial creditors and operational creditors and does not contravene any law in force. She has further urged that the corporate debtors' factory was not a running unit when the resolution plan was approved and the Power Purchase Agreement was between DVC and the erstwhile corporate debtor and any dispute therein could not have been adjudicated and the past dues taken into account in the resolution plan as the PPA is a contractual arrangement. It is her argument that when a new Successful Resolution Applicant gets into the shoes of the previous corporate debtor, it will have to pay a security deposit for a new connection/reconnection as well as all the past dues of electricity supplied to the previous corporate debtor.

9. The Learned Senior Counsel for Appellant has also referred to para 64 of the judgment of Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited through Company Appeal (AT) (Insolvency) No. 1111 of 2020 authorized signatory versus Satish

Kumar Gupta and Others (2019 SCC Online SC 1478) to emphasize that the feasibility and viability of a resolution plan which takes into account all aspects of the plan including the manner of distribution of funds among various classes of creditors is necessary. She has further argued that the resolution plan submitted by the Successful Resolution Applicant should, therefore, be modified as to distribution of funds to take into account the claims of operational creditor, namely the electricity distribution company DVC. She has also referred to paragraphs 71 of the Committee of Creditors of Essar Steel judgment (supra) to argue that if the corporate debtor has to be kept as a going concern during the Insolvency Resolution Process, it is incumbent upon it to make past and present payments to the DVC. She has further adverted to para 72 of the Committee of Creditors of Essar Steel judgment (supra) to argue that Regulation 38(1-A) of the IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 stipulates that the amount due to operational creditors under the resolution plan are supposed to be given priority in payment over financial creditors and when the COC exercises its commercial wisdom to finalize the resolution plan for revival of the Corporate Debtor, it must necessarily take into account this requirement before it arrives at a business decision for approving the proposed resolution plan.

10. The Learned Senior Counsel for Appellant has further argued that payment of past dues and reconnection of electricity supply after depositing security deposit are covered under the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations („WBERC Regulations in short) made under the Electricity Act, and thus the Adjudicating Authority has exceeded Company Appeal (AT) (Insolvency) No. 1111 of 2020 its jurisdiction by approving a resolution plan which, inter alia, takes away the right of the Appellant available under the Electricity Act and WBERC Regulations. She has referred to clauses 4.1.4, 4.6.3 and 4.6.4 which relate to disconnection of power supply, deemed termination and reconnection in same premises respectively to claim that the payment of past dues and reconnection of the power supply in the same premises are covered under the WBERC Regulations and this right of DVC cannot be taken away through the approved resolution plan.

11. The Learned Sr. Counsel for Appellant has also referred to the judgments of Hon ble Supreme Court in the matters of M/s. Embassy Property Developments Private Ltd. Vs. State of Karnataka and Ors. (2019 SCC OnLine SC 1542) and Gujarat Urja Vikas Nigam Limited Versus Amit Gupta & Ors [2021 SCC OnLine SC 194] to claim that the contract relating to Power Purchase Agreement ought to be adjudicated under the Electricity Act and related WBERC Regulation and the jurisdiction of NCLT is barred from considering such disputes.

12. In reply, the Learned Senior Counsel for Respondents No. 1 and 3 has argued that DVC is an operational creditor which has been treated in accordance with provisions of IBC regarding its past dues which relate to the period prior to initiation of CIRP. He has also pointed out that the liquidation value of the corporate debtor is Rs. 6.52 crore and looking to the liquidation value, the share of operational creditors has been decided in accordance with section 30(2)(b) of the IBC. He has argued that since the admitted claim of financial creditors is Rs. 411.16 crores hence the amount to be paid to operational creditors as per Section 53 in the event of liquidation Company Appeal (AT) (Insolvency) No. 1111 of 2020 of the corporate debtor would be NIL. He has referred to the judgment of Hon ble Supreme Court in the matter of the Pratap Technocrats (P) Ltd. versus

Reliance Infratel Ltd. (Monitoring Committee) [2021 10 SCC 623] to claim that the resolution plan as approved by the CoC complies with the requisite provisions of IBC and it has no legal infirmity, and the observation of Hon ble Supreme Court which is as follows supports his contention:

□40..... Whether the interest of all stakeholders, including the Operational Creditors, has been adequately balanced has to be determined within the four corners of the statutory provisions of IBC. It must be borne in mind that the jurisdiction of the Adjudicating Authority is circumscribed by the terms of the provisions conferring the jurisdiction.

13. The Ld. Senior Counsel for Respondent has further urged that there is no equity-based jurisdiction available with NCLT under the provisions of IBC which allows for the dues of DVC as an operational creditor to be treated differently from other operational creditors. He has further argued that under section 30(2)(b)(i) and (ii), the provision regarding treatment of claims of operational creditors has been laid down and Explanation 1 clearly states that if the provision of section 30(2)(b) is followed then it is supposed to meet the requirement of equity and viability. He has also referred to the principle laid down by the three-judge bench of the Hon ble Supreme Court in the matter of Committee of Creditors of Essar Steel (supra) which has held in paragraph 73 as follows:-

□73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or some-class of creditors is with the Committee of Creditors. But, the decision of such committee must reflect the fact that it has taken into account maximizing the value of the assets of the Corporate Debtor and the fact that it has adequately balanced Company Appeal (AT) (Insolvency) No. 1111 of 2020 the interests of all stake holders including Operational Creditors.....

Thus, while Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that a Corporate Debtor needs to keep going as a going concern during the InsolvencyResolution Process; that it needs to maximize the value of its assets; and that the interests of all stakeholders, including operational creditors has been taken care of.

14. Regarding payment of past dues, the Learned Senior Counsel for Respondent has cited the judgment of Hon ble Supreme Court in the matter of India Resurgence ARC Private Limited vs. Amit Metaliks Ltd.& Another (2021 SCC Online SC 409) to emphasize that the business decision taken in exercise of the commercial wisdom of Committee of Creditors cannot be interfered with unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. He has also referred to paragraph 20 of the India Resurgence judgment (supra) to argue that asking for past dues and security is inapt and ill conceived. Thus, the Learned Senior

Counsel for Respondents has argued that since the Resolution Plan has been finalized and approved by the Adjudicating Authority and does not suffer from any legal infirmity, there is no reason for it to be interfered with.

15. The two main issues in this appeal are (i) whether the allocation towards settlement of the claim of the operational creditor DVC has been in accordance with legal provisions of the IBC, and the resolution plan is viable and feasible, and (ii) whether Appellant's rights that disputes relating to PPA should be decided under WBERC Regulations have been infringed in adjudication of Company Appeal (AT) (Insolvency) No. 1111 of 2020 the successful resolution plan under IBC.

16. Section 30(2)(b), clauses (i) and (ii) read with section 53 of IBC stipulates how allocation for the operational creditors is to be done in a Resolution Plan. The relevant provision are as follows:-

"30. Submission of resolution plan. -

Xx xx xx xx (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

Xx xx xx xx

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than -

(i) the amount that would have been paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, Whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. -- For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Company Appeal (AT) (Insolvency) No. 1111 of 2020

17. It is noted that the liquidation value of the Corporate Debtor has been estimated as Rs. 6.52 crores. In the event of liquidation of the corporate debtor the amount to be paid to operational creditors would be NIL as the admitted claim of financial creditors is Rs. 411.16 crores. In this context the resolution plan makes a provision of Rs. 0.14 crore for operational creditors. This

resolution plan was discussed by the CoC in its seventh meeting held on 5.3.2020 (minutes attached at pp.83-94 of the Appeal Paperbook) and the following is recorded in the minutes:-

"Agenda Item(iv): To discuss regarding the resolution plan submitted by the Resolution Applicant:-

Members had a discussion with the representatives from the Resolution Applicant s end (RA) regarding the resolution plan, the financials mentioned in the Plan are as follows:-

Distribution of Financial Outlay inRs. Crore Upfront For Payment Business Particulars (within Improve Total 15 days nt within of 12 months Effective of Date) IRP Cost 0.300 0.300 Workman/Employees - -

Operational Creditors (Other Workman/ Employees)	0.140	0.140
Secured Financial Creditors	8.220	8.220
Unsecured Financial Creditors	0.004	0.004
Sub-Total	8.664	8.664
Business Improvement		25.00 25.000
Total	8.664	25.00 33.664

Company Appeal (AT) (Insolvency) No. 1111 of 2020 Funded by Equity 0.500 0.500 Own contribution of 8.164 33.164 RA (in the form of other instrument Total 8.664 25.00 33.664

18. According to the distribution matrix, operational creditors (other than workmen/employees) have been provided a total amount of Rs. 0.140crorewhich has been distributed among the operational creditors vide clause 5 of section II, namely "Detailed Financial Proposal of the Resolution Applicant" in the resolution plan. The two operational creditors have been provided settlement of their claims vide clause 6.6 of sectionII of the approved Resolution Plan (attached at page 138 of the Appeal Paperbook):-

"6.6 Operational Creditors 6.6.1 Claims -

Claim filed by	Claim Admitted	(Amount Rs. In crores) Remarks
Commissioner of commercial Taxes, Government of West	76.13	. This amount relates to Assessed Dues u/s 46 of WB VAT Act, 2003.

Bengal			. Assessed dues comprising of Principal of Rs. 30.11 crores and Interest of Rs.46.12 crores.
Damodar Valley Corporation			. RA understands that the amount relates to non-payment of bill raised for supply of Power by the DVC.
	18.71		. The dues comprising of Principal outstanding of Rs. 10.28 crores and penalty for non-payment

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TOTAL CLAIM OF OTHER OPERATIONAL CREDITORS	94.84
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19. Thus, we see that against DVC's total claim of Rs. 18.71 crore it has been paid an amount of Rs.0.03 crore which is shown in in the approved resolution plan as follows:-

"6.6.5 Distribution of payment:

The settlement amount of Operational Creditors of Rs. 014 crore shall be paid to them in proportion to their respective admitted claim against total admitted claims under this head. The distribution & Payment timelines, thus, shall be as under:

(Rs. Crores)			
Operational Creditors	Claim admitted	Sharing %age	Settlement amount offered and to be paid upfront within a period of 13 days from the effective date
Commissioner of Commercial Taxes, Government of West Bengal	76.13	80.27%	0.11
Damodar Valley Corporation	18.71	19.73%	0.03
Total	94.84	100%	0.14

The total payout under this head shall remain unchanged at Rs. 0.14 crore, irrespective further Claims admitted by RP. In case any further claim admitted under this head, the time line for payment and the Settlement amount of rs.014 crore shall remain unchanged and shall be distributed in proportion to Company Appeal (AT) (Insolvency) No. 1111 of 2020 respective admitted claim against total admitted claims under the head..

The Operational Creditors shall be paid in priority over Financial Creditor under this plan.

Further, the Resolution Applicant confirms that the payments to Operational Creditors under this Resolution Plan is not less than:

a) The amount to be paid to such creditors in the event of a liquidation of the Corporate Debtor under Section 53; or

b) The amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan has been distributed in accordance with the order of priority in sub-section (1) of section whichever is higher.

20. The amount to be paid to the operational creditors thus satisfies the condition imposed by Section 30(2)(b) of IBC and hence the successful resolution plan satisfies the provisions of IBC.

Furthermore, this payment is in accordance with the commercial wisdom of the CoC.

21. Regarding the primacy accorded to commercial wisdom of CoC in taking a business decision in approving the resolution plan, we advert to the judgment of Hon ble Supreme Court in the matter of Ghanashyam Mishra & Sons Private Limited through the authorized signatory Vs Edelweiss Asset Reconstruction Company Ltd. through the Director and Ors. (2021 SSC Online SC 313) wherein the Hon ble Supreme Court has, referring to Para Company Appeal (AT) (Insolvency) No. 1111 of 2020 52 in the K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 observed noted as follows:

□ Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the □ commercial wisdom of

the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justifiable.

22. Again in the Ghanashyam Mishra case (supra), Hon ble Supreme Court has concluded in paragraph 95 as follows:-

"Para 95

(iii) Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of their solution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued .

23. Thus, it is clear that the commercial wisdom of the CoC in arriving at a business decision has been given primacy and finality and is not open to judicial review unless the decision carries any infirmity under law.

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24. The Learned Senior Counsel for Appellant has referred to the judgment of the Hon ble Supreme Court in the matter of Embassy Property Developments Private Limited vs. State of Karnataka & Ors. (2020 13 SCC 308) to emphasize that the dispute regarding payment of past dues has to be decided in the light of Electricity Act and WBERC Regulations made there under. The said judgment of Hon ble Supreme Court in Embassy Property Developments case relates to the NCLT giving a direction to the State of Karnataka, Mining Department for extending the mining leases and executing supplemental lease deeds for an extended period using provisions under the IBC wherein Hon ble Supreme Court has held that since the direction for extension of mining leases was given under the provisions of IBC, it is not tenable and such a jurisdiction does not exist with NCLT, but with another court under the Mines and Minerals (Development and Regulations) Act, 1957. In so far as the present case is concerned, we do not think that there is any dispute to be resolved during the moratorium period. The pre-CIRP claim of DVC has been dealt with as per provisions of IBC in the successful resolution plan and and since a fresh connection has to be provided to the corporate debtor after the completion of CIRP, we have surmised that it shall be given under the WBERC Regulations. Thus there is no dissonance in the present case vis-à-vis the Embassy Property Developments Judgment.

25. We follow the judgment of Hon ble Supreme Court in the matter of India Resurgence ARC Pvt. Ltd. (supra), wherein in para 14 the Hon ble Supreme Court has held that „business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly Company Appeal (AT) (Insolvency) No. 1111 of 2020 situated are denied fair and equitable treatment.

26. Furthermore, the case of Respondents is supported by the judgment in the matter of Pratap Technocrats (P) Ltd. (supra), Hon ble Supreme Court has held as follows:-

"25. The resolution plan was approved by the CoC, in compliance with the provisions of IBC. The jurisdiction of the Adjudicating Authority under section 31(1) is to determine whether the resolution plan as approved by the CoC, complies with the requirement of section 30(2). NCLT is within its jurisdiction in approving a resolution plan which accords with IBC. There is no equity- based jurisdiction with NCLT under the provisions of IBC."

27. The approved resolution plan that DVC's liabilities have been treated under section VI - „Extinguishment of Claims/Entitlements of the approved Resolution Plan, which is as follows:-

□8. Treatment of DVC liabilities.

The DVC liabilities set out in the Information Memorandum together with all other liabilities of the Corporate Debtor towards DVC until the Effective Date (whether or not recognized or set out in the Information Memorandum), are collectively the □DVC liabilities . DVC liability is a □claim and □debt as defined under the IBC), and would consequently qualify as □operational debt (as defined under the IBC) and therefore, the full amount of such DVC liabilities shall be deemed to be owed and due as of the Effective Date, the liquidation value of which is assumed NIL and therefore, no amount is payable in relation thereto. However, the Company Appeal (AT) (Insolvency) No. 1111 of 2020 Resolution Applicant has proposed a payment towards settlement of DVC liabilities as set out in clause No. 6.6 of section 2 of part (B) (Financial Proposal) of this plan. Such DVC liabilities shall immediately after the Effective Date, irrevocably and unconditionally stand fully and finally settled at the settlement price offered by Resolution Applicant under this Plan, with there being no further claims whatsoever by DVC and all rights to invoke or enforce the same shall be waived. This will assist the RA in immediate start of production of goods.

a. All pending dues of DVC (whether claimed or not whether contingent or crystalized, whether disputed or not and which include principal, arrears, interest on arrears, delayed payment, charges, penalty, etc. till the Effective Date and charges, if any demanded for resumption of power) shall stand extinguished by virtue of the order of NCLT approving this plan and the Corporate Debtor shall not be liable to pay any amount against such demand save and except to the extent of the amount stated in section 6.6.5.

b. Immediately after the Effective Date, DVC should acknowledge that its dues from the CD is restricted to the settlement amount proposed under section 6.6.5 of section II of part B (financial plan) of this regulation plan and shall issue a certificate to the CD to that effect.

c. DVC should not raise any further demand on account of dues prior to the Effective Date.

d. DVC should restore the power connection immediately after the Effective Date and shall not withhold/disconnect the Power supply on the ground of pending old dues prior to the Effective Date.

e. DVC should withdraw all legal cases filed, if any, immediately after the Effective Date.

f. DVC to commit supply of power to the plant of CD Company Appeal (AT) (Insolvency) No. 1111 of 2020 immediately after the Effective Date.

g. DVC should ensure availability of continuous Power to the Plant at the same rate at which it is supplying power to adjoining units.

28. We thus note that the liabilities of DVC that relate to past dues prior to the Effective Date have been extinguished under the approved Resolution Plan and DVC is prohibited from raising any further demand on this account. The clause (d) in Para 6 Section VI of the Resolution Plan directs DVC to restore the power connection immediately after the Effective Date and not withhold/disconnect power supply on the ground of pending old dues whose claim has been submitted to Resolution Professional during CIRP and which have been taken care of in the resolution plan and clause (f) directs DVC to commit supply of power to the plant of CD immediately after the Effective Date. The other condition that is approved as part of resolution plan relates to withdrawal of all legal cases, if any, immediately after the Effective Date. Since the admitted claim of DVC has been paid in accordance with the provisions of IBC, DVC cannot claim any further payment of pre-CIRP dues which are now extinguished. Also as the successful resolution applicant has to apply for fresh connection, payment of security deposit and any other charges that may be admissible under WBERC Regulations will have to be paid by the successful resolution applicant.

29. We are also of the view that the commitment to supply power to the successful resolution applicant/corporate debtor should be in accordance with the WBERC Regulations made under the Electricity Act. Clause (g) above, which directs DVC to ensure availability of continuous power to the plant at the same rate at which it is Company Appeal (AT) (Insolvency) No. 1111 of 2020 supplied power to the adjoining units, will have to be modified since the conditions that are applicable for supplying power to the corporate debtor under a new agreement shall be at the tariff rate and conditions that would prevail at the time of signing of the agreement for a fresh connection by DVC with the Successful Resolution Applicant.

30. We are of the view that the Resolution Plan which has taken care of the debts of the Operational Creditors in accordance with provisions of section 30(2)(b) shall ipso facto be taken as fair and equitable to the Operational Creditors since the distribution of total operational debt amount approved in the Successful Resolution Plan is in accordance with this provision of IBC.

31. Thus we find that the treatment of past dues of the Appellant/DVC in the approved Resolution Plan is in accordance with the legal provisions of IBC and by virtue of a finality and primacy accorded to the business decision of the CoC as per its commercial wisdom cannot be considered in judicial review. Since NCLT does not hold equity based jurisdiction and any distribution which is in accordance with section 30(2)(b) of the IBC is considered fair and equitable, we do not feel that the Appellant's claim of adjudicating past dues under the Electricity Act of WBREC Regulations can be upheld. The framework of IBC and insolvency resolution provided therein provides a certain mechanism for payment of various debts and liabilities under the resolution plan. Once it is done in accordance of the provisions of IBC, we do not feel that there is any reason to interfere with the same.

32. In the light of afore mentioned discussions and keeping in Company Appeal (AT) (Insolvency) No. 1111 of 2020 view the provisions of IBC, we are of the clear view the Resolution plan as approved by the CoC using its commercial wisdom and subsequent approval by the Adjudicating Authority vide the Impugned Order does not suffer from any legal infirmity. Moreover the new connection to the successful resolution applicant/corporate debtor should be given under WBEC Regulations as the CIRP has ended and a fresh power purchase agreement is necessary which will require fresh security deposit and payment of any other charges as required under WBEC Regulations, which will be in accordance with the modifications in approved resolution plan as indicated in paragraph of 29 of this judgment. There being no need to interfere with the Impugned Order we uphold it with modifications as stated above. The appeal, therefore, fails and is disposed of accordingly.

33. In the facts of the case, there is no order as to costs.

(Justice Ashok Bhushan) Chairperson (Dr. Alok Srivastava) Member (Technical) New Delhi 15th March, 2022 /aks/ Company Appeal (AT) (Insolvency) No. 1111 of 2020