

Damodar Valley Corporation vs Vsp Udyog Pvt. Ltd on 12 April, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL
BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 78 of 2021

IN THE MATTER OF:

Damodar Valley Corporation
(A corporation constituted under the Damodar
Valley Corporation Act, being at No. XIV of 1948
having its registered office at THE DVC Towers,
VIP Road, Kolkata-700054, (West Bengal) ...Appellant

VERSUS

1. VSP Udyog Pvt. Ltd.
A Private Limited Company incorporated
under the provisions of the Companies Act,
1956 and having its registered office at Centre
Point, 21, Hemanta Basu Sarani, 4th Floor,
Suite No. 437, Kolkata-700001,
(West Bengal) ... Respondent No. 1

2. Mr. Raj Singhania
An Insolvency professional registered with the
Indian Institute of Insolvency Professionals of
ICAI having Registration No. IBBI/IPA -
001/IP-00051/2016-17/1442 having office at
Central Plaza, 5th Floor, Room No. 5A, 41,
B.B. Ganguly Street, Kolkata-700012
(West Bengal) ... Respondent No. 2

3. Amit Metaliks Limited
A Public Limited Company registered under
Companies Act, 1956 and having its registered
office at Raturia Angadpur Industrial Area
P.O. Angadpur, Durgapur ... Respondent No. 3

Present:

For Appellant:	Ms. Maninder Acharya, Sr. Advocate with Ms. Madhumita Bhattacharjee, Viplov Acharya, Mr. Anant, Advocates
For Respondents:	Mr. Ratnanko Banerji, Sr. Advocate with Mr. Kumarjit Banerjee, Mr. Gaurav Gupta, Mr. Samyak Gangwal, Advocates for R1 and R3

JUDGMENT

(Date: 12.04.2022) [Per.: Dr. Alok Srivastava, Member (Technical)] This Appeal has been preferred by the Appellant/Damodar Valley Corporation (hereafter called 'DVC') under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereafter called 'IBC') against the order dated 20.10.2020, which was revised on 21.10.2020 (called 'impugned order' in short), passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) in IA (IB) No. 805 / KB/ 2020 in CP (IB) No. 1221 /KB/ 2018.

2. The Appellant/DVC is aggrieved by the impugned order on the ground that the approved resolution plan of the Successful Resolution Applicant contravenes laws in force and therefore, is liable to be quashed and set aside.

3. In brief, the factual matrix of the case is that the Appellant/DVC and the Respondent No. 1/VSP Udyog Pvt. Ltd. (in Company Appeal (AT) (Insolvency) No. 78 of 2021 short 'VSP Udyog'), who is the Corporate Debtor, entered into a Power Purchase Agreement for sale and purchase of electricity on 12.04.2005. In the course of supply of electricity, a large amount of dues amounting to Rs. 8,42,93,534/- became outstanding for payment by the Corporate Debtor for which a demand letter was served upon the Corporate Debtor/VSP Udyog by the Appellant/DVC. In accordance with the extant West Bengal Electricity Regulatory Commission (in short 'WBERC Regulations') formulated under the Electricity Act, resulting in deemed termination of the electricity connection given by the Appellant/DVC to the Corporate Debtor/VSP Udyog. The Appellant has further stated that Corporate Insolvency Resolution Process (in short 'CIRP') was initiated against the Corporate Debtor on an application by the Operational Creditor/S. Sen & Sons under Section 9 of the IBC and a public announcement with request for submission of claims was made on 10.08.2019. The Appellant filed its claim totalling to Rs. 56.34 Crores in response to the public announcement. After the completion of CIRP, a resolution plan submitted by the Respondent No. 3 /M/s Amit Metaliks Limited was approved by the Committee of Creditors (in short 'CoC') and thereafter by the Adjudicating Authority vide the impugned order.

4. The Appellant/DVC has submitted in the Appeal that a total amount of Rs. 950.919 Crores was admitted as claims of operational creditors by the Resolution Professional (in short 'RP') against which a meagre amount of Rs. 0.24 Crores was approved for payment to the operational creditors in the approved resolution plan and the Appellant/DVC received an amount of Rs. 1,42,195/- against an admitted claim of Rs. 56.34 Crores.

5. The Appellant has assailed the approval of the resolution plan on the ground that it is based on the disparity in treatment accorded to operational creditors and financial creditors without assigning any concrete reason and the treatment so meted out is Company Appeal (AT) (Insolvency) No. 78 of 2021 arbitrary and done to benefit the financial creditors at the cost of operational creditors. Furthermore, the Adjudicating Authority, while approving the resolution plan, has to be satisfied that the resolution plan as approved by the CoC meets the requirement as laid down in

Section 30(2) of the IBC and this 'satisfaction' of the Adjudicating Authority has to be based upon a detailed examination of the terms of the resolution plan which is not so in the present case.

6. We heard and considered the arguments presented by the Ld. Sr. Counsels for the Appellants and the Respondents and also perused the record.

7. The Ld. Sr. Counsel for Appellant has submitted that the impugned order in paragraph 8 (attached at pp. 42-53 of the Appeal Paper Book) has accepted the erroneous proposition contained in the resolution plan that it did not contravene any provisions of law and therefore, deserved to be approved. She has referred to paragraph 13 of the impugned order wherein the Adjudicating Authority has held that 'no waiver or extinguishments in contravention of the provisions of the Code or in violation of existing laws is seen not brought out and therefore, there is nothing in the plan, so as to disapprove it. Accordingly, we hereby approve the resolution plan of M/s Amit Metaliks Limited....' She has further contended that the extant laws in respect of supply of electricity has been contravened in that future dues have also been waived in the resolution plan (clause 9.3.4 of the approved resolution plan). She has further submitted that the total claim of all the operational creditors is Rs. 950.919 Crores and that of the workmen is Rs. 4.16 Crores and these claims have not been approved for payment in accordance with the provisions of IBC. Furthermore, Regulation 38(1)(a) the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down that the resolution plan shall include a statement as to how it has dealt with the interest of the all Company Appeal (AT) (Insolvency) No. 78 of 2021 stakeholders, including the financial creditors and operational creditors which was not done.

8. The Ld. Senior Counsel for Appellant has further argued that paragraph 12.1.29 of the resolution plan which provides that 'Licenses, registrations, permits, clearances, exemptions rights, incentives, lease and approvals held by the CD which was invoked, rescinded or expired prior to the Effective Date or which will expire within a period of 12 (twelve) months thereafter shall be deemed to have been renewed extended by the relevant Governmental Authorities or vendors/creditors and the CD shall continue its business as a going concern....' is not in accordance with legal provisions as the plan cannot give any renewal/restoration of any supply for any time after the Effective Date. Similarly, paragraph 12.1.40 which contains direction for giving fresh power connection to the Successful Resolution Applicant by DVC and Durgapur Projects Limited is also not legally valid as such a direction cannot be given in the approved resolution plan under provisions of IBC as a new connection can only be given under WBERC Regulations formulated under the Electricity Act. In the same way, the provision made in paragraph 12.1.41 that directs restoration of all essential services to the SRA after the approval of resolution plan without any act/deed of the on the part of SRA is also not in consonance with legal provisions under which such supplies are provided. Her argument is that such blanket renewals and reconnection/restoration are not legally tenable and cannot be given through the resolution plan.

9. The Ld. Sr. Counsel for the Appellant has cited the judgment of Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others, [(2020) 8 SCC 531] Paragraph 64 to argue that the feasibility and viability of the resolution plan is dependent on the manner of distribution of funds between various class of creditors.

Company Appeal (AT) (Insolvency) No. 78 of 2021 She has also referred to the judgment of Hon'ble Supreme Court in the case of Embassy Property Developments Private Limited Vs. State of Karnataka and Others, [(2020) 13 SCC 308] to contend that once disconnection of the electricity connection took place on 12.09.2016, almost three years before the initiation of CIRP of the corporate debtor, leading to 'deemed termination' of the electricity connection, jurisdiction was not available under IBC to give direction for fresh connection in the resolution plan.

10. The Ld. Senior Counsel for Appellant finally claimed that the resolution plan can be considered to be feasible and viable only if it satisfies sub-section (b) and (e) of Section 30 (2) of the IBC which approved the resolution plan does not, and therefore, it deserves to be quashed and set aside and the impugned order also deserves to be set aside.

11. 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 relating to the pre-CIRP period. He has also pointed out that the liquidation value of the corporate debtor is Rs. 50.29 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.

12. The Ld. Sr. Counsel for the Respondents has urged that a dissenting financial creditor had carried an Appeal to the Hon'ble Supreme Court regarding the approved resolution plan of this same Corporate Debtor and the Hon'ble Supreme Court vide judgment in the case of India Resurgence ARC Private Limited vs. Amit Metaliks Ltd.& Another [2021 SCC Online SC 409] has held that the resolution plan is compliant of all the legal provisions. He has argued that the Appellant cannot question the legality of resolution plan in this appeal. He has also urged that the issue of dues of pre- CIRP period has already been decided in the Judgment of this Company Appeal (AT) (Insolvency) No. 78 of 2021 tribunal in the matter of Damodar Valley Corporation Vs. Kharkia Steels Pvt. Ltd. & Anr. [CA (AT) (Ins) No. 119 of 2022] delivered on 15.03.2022 wherein it has held that since pre-CIRP dues having been considered as operational debt in the resolution plan and taken care of it cannot be claimed from the Successful Resolution Applicant. He has also pointed out that the liquidation value of the Corporate Debtor in this case is Rs. 50.29 Crores and therefore, payments in the resolution plan to various classes of creditors is in accordance with this liquidation value.

13. In rejoinder, the Ld. Sr. Counsel for the Appellant has pointed out that the compliance of the resolution plan in accordance with Section 30(2)(e) has not been considered in the judgment of NCLAT in the matter of Damodar Valley Corporation (Supra) hence, the compliance of the resolution plan to all the extant laws is an issue relevant in the present case. He has also maintained that the resolution plan cannot direct DVC to provide a fresh connection which has to be done under WBERC Regulations.

14. We note that the resolution plan presented by the resolution applicant Amit Metaliks in relation to the corporate debtor VSP Udyog was assailed before NCLAT and thereafter before Hon'ble Supreme Court, which was found compliant of the provisions under IBC, and the Hon'ble Supreme Court vide its judgment dated 13.05.2021 in the matter of India Resurgence ARC Private Limited

(Supra) held 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. The relevant portion of this judgment is as hereunder:

"10. As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Company Appeal (AT) (Insolvency) No. 78 of 2021 Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority. In the case of Jaypee Kensington (supra), this Court, after taking note of the previous decisions in Essar Steel(supra) as also in K. Sashidhar v. Indian Overseas Bank and Ors.: (2019) 12 SCC 150 and Maharashtra Seamless Limited v.

Padmanabhan Venkatesh and Ors.: (2020) 11 SCC 467, summarised the principles as follows:

"77. In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval. 77.1. Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

77.2. The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material Company Appeal (AT) (Insolvency) No. 78 of 2021 irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority; or the resolution plan does not comply with any other criteria specified by the Board.

77.3. The material propositions laid down in Essar Steel (supra) on the extent of judicial review are that the Adjudicating Authority would see if CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of.

And, if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept in view, it may send the resolution plan back to the Committee of Creditors for resubmission after satisfying the parameters. Then, as observed in Maharashtra Seamless Ltd. (supra), there is no scope for the Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors."

15. We note the statement of the Ld. Sr. Counsel for the Respondents that the Successful Resolution Applicant is not interested in seeking a fresh electricity connection from the Appellant / DVC and therefore, the provisions made in the approved resolution plan regarding waiver of charges etc. for a fresh connection from the Appellant-DVC will not be of concern to DVC. The Ld. Sr. Counsel for the Appellant has stated that the Successful Resolution Applicant is free to take a new connection from any other discom under WBERC Regulations. In light of the statements of Ld. Sr. Counsels for both the parties, we are of the view that any provision in the approved resolution plan which relates to any waiver or relief with regard to a new connection from the Appellant/DVC need not be gone into and hence, insofar as Company Appeal (AT) (Insolvency) No. 78 of 2021 the rights of the Successful Resolution Applicant about taking a new connection from the Appellant/DVC is concerned, it is not significant and the Successful Resolution Applicant is at liberty to take a new electricity connection from any discom under WBERC Regulations.

16. In view of the fact that the resolution plan of the corporate debtor VSP Udyog has been affirmed by Hon'ble Supreme Court in the matter of India Resurgence (Supra), the challenge to the approval of resolution plan cannot be sustained. Moreover, since the successful resolution applicant has not shown interest in taking a fresh connection from the Appellant/DVC we are of the view that the grievance of DVC regarding the directions with regard to giving a new connection becomes irrelevant. The appeal therefore fails and is disposed of accordingly.

17. There is no order as to costs.

[Justice Ashok Bhushan] Chairperson [Dr. Alok Srivastava] Member (Technical) [Ms. Shreesha Merla] Member (Technical) New Delhi 12th April, 2022 / SC / Company Appeal (AT) (Insolvency) No. 78 of 2021