

(2024) 02 NCLAT CK 0026

National Company Law Appellate Tribunal New Delhi

Case No: Company Appeal (AT) (Insolvency) No. 654 Of 2022

Capri Gloal Capital Limited

APPELLANT

Vs

Value Infracon Buyers Association
& Anr

RESPONDENT

Date of Decision: Feb. 9, 2024

Acts Referred:

- Insolvency and Bankruptcy Code, 2016 - Section 7, 30(2), 30(2)(b), 53, 53(1), 61, 62

Hon'ble Judges: Ashok Bhushan, Chairperson; Barun Mitra, Member (T)

Bench: Division Bench

Advocate: Abhishek Anand, Kunal Godhwani, Karan Kohli, Neeraj Kr. Gupta, Sanjay Kumar Singh

Final Decision: Dismissed

Judgement

Ashok Bhushan, J

1. This Appeal has been filed against the order dated 28.04.2022 passed by National Company Law Tribunal, Principal Bench at New Delhi, by which order, Application filed by Resolution Professional ("RP") for approval of Resolution Plan submitted by Value Infra Buyers Association has been approved, aggrieved by which the Appellant - Financial Creditor of the Corporate Debtor has come up in this Appeal challenging the order of the Adjudicating Authority.

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

(i) On 17.09.2014, the Appellant extended loan to the Corporate Debtor and executed a Memorandum of Equitable Mortgage dated 17.09.2024, creating first and exclusive mortgage over the properties of Corporate Debtor. The Corporate Debtor created all rights, title, and interest of 30 unsold units in favour of the Appellant.

(ii) By order dated 04.05.2018 of the Adjudicating Authority, Corporate Insolvency Resolution Process ("CIRP") commenced against the Corporate Debtor on an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC") by Daimler Financial Services India Private Limited.

(iii) The Appellant filed a claim in the CIRP. The RP admitted the claim of Appellant of Rs.1,86,00,000/-. The Form-G was issued by the RP on 20.11.2018, against which one M/s. Pacificia (India) Projects Private Limited filed an Expression of Interest ("EoI"), but no Resolution Plan was submitted.

(iv) The 180 days of CIRP expired on 31.10.2018 and 270 days expired on 29.01.2019. An Application was filed by the RP for exclusion of time. The Adjudicating Authority vide order dated 03.07.2019, directed exclusion of 117 days for providing the CIRP to come to an end on 10.08.2019. The Adjudicating Authority in the order noticed the statement of RP that Association of Flat Buyers has roped in one developer for the resolution of the Corporate Debtor to complete unfinished project. The Adjudicating Authority noted the submission of the RP and directed that in event a Resolution Plan is submitted, the same shall be placed before the Committee of Creditors ("CoC").

(v) After order dated 03.07.2019, Resolution Plan submitted by Value Infra Buyers Association on 29.07.2019, which was placed before the CoC in its Meeting scheduled to be held on 01.08.2019. The CoC considered the Plan and approved the Resolution Plan submitted by Respondent No.1.

(vi) As per the Resolution Plan, value was proposed to be paid to the Appellant was Rs.1,00,00,000/-. An Application was filed by the RP before the Adjudicating Authority for approval of the Plan, which came to be approved by the impugned order dated 28.04.2022. Aggrieved by which order this Appeal has been filed.

3. We have heard Shri Abhishek Anand, learned Counsel appearing for Appellant; Shri Neeraj Kr. Gupta, learned Counsel appearing for Respondent No.1 and Shri Sanjay Kumar Singh, RP has appeared in person.

4. Shri Abhishek Anand, learned Counsel for the Appellant challenging the order contends that Adjudicating Authority committed error in approving the Resolution Plan. The amount proposed to the Appellant under the Resolution Plan is not in accordance with law. The Appellant is not being paid the amount as per the liquidation value of the Appellant. The Appellant being a dissenting Financial Creditor is entitled for payment of amount as per liquidation value. It is submitted that approval of Resolution Plan was also not in accordance with CIRP Regulations, 2016. No performance guarantee was taken from Respondent No.1 and further Respondent No.1 was not in the list of Prospective Resolution Applicant in response to Form-G issued by the RP. Respondent No.1 was not eligible to submit the Resolution Plan. The

learned Counsel for the Appellant submitted that there is discrimination in payment in Resolution between secured Financial Creditors.

5. The learned Counsel for the RP refuting the submissions of learned Counsel for the Appellant submits that in response to the Form-G issued on 20.11.2018, although an EoI was received by one M/s. Pacificia (India) Projects Private Limited, but no Resolution Plan was submitted. It is submitted that Application was filed for extension of CRIP period before the Adjudicating Authority wherein it was pleaded that Flat Buyers Association, i.e., Respondent No.1, homebuyers of the project has requested to submit a Plan for completion of the unfinished project. Noticing the aforesaid fact, the Adjudicating Authority vide order dated 03.07.2019, extended the period till 10.08.2019. The Resolution Plan submitted by Respondent No.1 was placed before the CoC, which was approved by 90.45% vote share by the CoC. The Appellant dissented the Resolution Plan. It is submitted that the Appellant is being paid not less than the amount, which would have been payable to the Appellant in event the Corporate Debtor was liquidated. It is submitted that homebuyers itself being Resolution Applicant, no direction was issued for taking performance guarantee from the Resolution Applicant. In the facts of the present case, no ground have been made out to interfere with the approval of the Resolution Plan. The Promoters of the Corporate Debtor having abandoned the project, homebuyers themselves have come up to complete the project.

6. learned Counsel for Successful Resolution Applicant also supported the submissions advanced by learned Counsel for the RP. It is submitted that there is no discrimination in the payment in Resolution Plan with regard to security interest. The Appellant is not entitled for any payment under the Resolution Plan as per security interest. Only entitlement is the that Appellant, who is a dissenting Financial Creditor, shall not be paid less than what would have been payable to him in case the Corporate Debtor was liquidated. It is submitted that the units for which mortgage was made were non-existent units. There was no title document with regard to 30 flats, which have been mortgaged by the Corporate Debtor. It is submitted that insofar as performance security is concerned, this was the discretion of the CoC. The CoC never took a decision to ask for performance security. The Resolution Plan submitted by Respondent No.1 was accepted and was first considered as per the liberty granted by Adjudicating Authority vide order dated 03.07.2019. The Resolution Plan was submitted and accepted by the CoC and approved by more than 90.45% vote share. The Appellant, is being paid the amount, which is what would have been payable in the event of Corporate Debtor is liquidated. There is no ground to interfere with the impugned order passed by the Adjudicating Authority.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. From the facts, which have been brought on record, it is clear that in pursuance of Form-G issued on 20.11.2018, no Resolution Plan was received. The 180 days of CIRP period had come to an end. The RP filed an Application before the Adjudicating Authority for exclusion of period. The RP also in the Application stated before the Adjudicating Authority that now the Flat Buyers Association is desirous to complete the project with the help of a developer. The Adjudicating Authority, noticing the fact that Flat Buyers themselves are desirous to complete the project, extended the period of CIRP. In the order dated 03.07.2019, the extension of CIRP was granted by the Adjudicating Authority, taking the note of the fact that now Flat Buyers Association is desirous to complete the unfinished project. Following observation of the order dated 03.07.2019, which is relevant is as follows:

“Accordingly, we direct that the period of 117 days be excluded from the period of 270 days and if that is done then the process would come to an end on 19.08.2019. The aforesaid course is also necessary to adopt in view of the averments made in para 15 of the application wherein it is asserted that the association of flat buyers has roped in one developer for the purpose of the resolution of the Corporate Debtor company by agreeing to take further monetary hit and pooling in additional funds for the purpose of construction/ completion of the unfinished project.

Mr. Sanjay Singh, the resolution professional states that if the applicant bring the resolution applicant before him within next three days then further proceedings before the CoC shall be taken up.

The application stands disposed of.”

9. It was after the order dated 03.07.2019 that a Resolution Plan was submitted by Resolution Applicant to RP, which has been approved by the CoC in the Meeting dated 01.08.2019 with vote share of 90.45%. The Appellant dissented with the Resolution Plan. As per Section 30, sub-section (2) of the IBC, a dissenting Financial Creditor is entitled for the amount, which shall not be less than the amount, which the dissenting Financial Creditor is entitled in event of liquidation of the Corporate Debtor. The amount is to be distributed in accordance with order of priority provided in sub-section (1) of Section 53. Section 30, sub-section (2) is as follows:

“30(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the 3[payment] of other debts of the corporate debtor;

(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 to be 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.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) The implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force

(f) confirms to such other requirements as may be specified by the Board.

Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time

being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.”

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.”

11. Now, coming to the submission of the Appellant that performance security has not been asked from the Successful Resolution Applicant, it is clear from the facts as noted above that the Resolution Plan was permitted to be filed by the Flat Buyers Association, in view of the liberty granted by the Adjudicating Authority on 03.07.2019. The CoC has not directed the Flat Buyers Association to submit performance security, as the Flat Buyers themselves constitute 97% of voting share of the CoC, have chosen not to take any performance security, we are of the view that on this ground, the Resolution Plan cannot be faulted with. As noted above, no Resolution Plan was submitted in pursuance to Form-G and Resolution Plan by the Flat Buyers Association submitted only after liberty granted by the Adjudicating Authority on 03.07.2019. The submission that the name of the Successful Resolution Applicant was not included in the Prospective Resolution Applicant, which was prepared after issuance of Form-G, has no merit in the facts of the present case. The facts as noted above indicates that although an EoI was submitted by one M/s. Pacificia (India) Projects Private Limited, but no Resolution Plan was submitted by it. The Resolution Plan submitted by Flat Buyers Association, was in pursuance of the liberty granted by Adjudicating Authority on 03.07.2019. The project in question as abandoned by the Promoters and Flat Buyers themselves came forward to complete the project and the Adjudicating Authority in the best interest of resolution of the CIRP decided to permit Flat Buyers to submit a Plan.

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 sub-clauses (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 sub-clause (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, pre-amendment, 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.”

13. This Tribunal in **Company Appeal (AT) (Insolvency) No.405 of 2023 – ICICI Bank Limited vs. BKM Industries Limited**, has held that there is no scope of distribution of assets among Financial Creditor as per security interest. In paragraphs 15 and 16 of the judgment, following have been held:

“15. When we look into Section 53, sub-section (1) (b), debt owed to a secured creditor has to be distributed equally between and amongst workmen’s dues and debts owed to a secured creditors. The debt owed to the secured creditor is a debt as admitted in the CIRP. Admittedly, the claim as submitted by the Appellant was admitted in the CIRP and debt owed to Appellant is as per admitted claim. The distribution of the debt has to be as per the debt of the Financial Creditors. The ‘debt’ is defined in Section 3(11) of the IBC, which is as follows:

“3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

16. Section 3, sub-section (6) defines the ‘claim’, which claim is to be filed by a Financial Creditor as per Regulation 8, sub-section (1) of the CIRP Regulations, 2016. Thus, the scheme of Section 53, sub-section (1), clearly indicates distribution as per the debt and in the legislative scheme there is no scope of distribution of assets among the Financial Creditors as per security interest. The issue which has been raised by the Appellant, came for consideration before this Tribunal in **Small Industries Development Bank of India vs. Vivek Raheja and Ors.** where also the Appellant had claimed distribution of assets as per security interest. An IA was filed by the Appellant (SIDBI), seeking a direction to distribute as per security interest. In paragraph 2, following case of the SIDBI has been noticed:

“2. Brief facts of the case giving rise to this Appeal are:-

- Oriental Bank of Commerce had filed a Section 7 Application under the Insolvency and Bankruptcy Code, 2016 (IBC in short) against the Corporate Debtor

- M/s. Gupta Exim (India) Pvt. Ltd. which was admitted by the Adjudicating Authority vide Order dated 29th October, 2019. In the 'Corporate Insolvency Resolution Process' in 16th Meeting of 'Committee of Creditors', Resolution Plans were discussed. Revised Resolution Plans were submitted by the prospective Resolution Applicants. Resolution Plan was put to e-Vote between 07th August, 2021 and 16th August, 2021 and by majority of 97.97%, the Resolution Plan of 'Lotus Textiles' and Mr. Vijayant Mittal was approved. Appellant sent an Objection dated 16th August, 2021 to the distribution to the Appellant under the Resolution Plan.

• An I.A. No. 581 of 2021 was filed by the Appellant for direction to the Resolution Professional to distribute the proceeds of the Resolution Plan where following prayers were made:

1. The present application may kindly be allowed and the directions be issued to the Respondent No.1 modify/clarify the distribution to dissenting members as per the Resolution Plan and distribute the proceeds of the resolution plan to Applicant SIDBI for an amount of Rs. 5,64,97,893/- in priority in accordance with provisions of IBC 2016 in the interest of justice and equity.

2. Interim stay be granted on distribution of the resolution plan amount by the Resolution Professional to the CoC members till the present application is decided."

• The case of the Appellant in the Application was that as per security interest of the Appellant, the Appellant is entitled to 6.93 % i.e. the amount of Rs. 5,64,97,893/- and as per voting share as approved by the CoC, the Appellant is entitled to 2.03% i.e. Rs. 1,65,47,078/-. The case of the Appellant set up in the Application is that he is entitled for his distribution of plan amount as per value of the security interest of the Appellant. The Application was objected by the Resolution Professional. The Adjudicating Authority by the Impugned Order dated 17th March, 2022 rejected the I.A. No. 581 of 2021 upholding the decision of the CoC for distribution of proceeds of the Resolution Plan as per the voting share. Appellant aggrieved by the said Order, has come up in this Appeal."

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.