2019 INSC 1228

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7940 OF 2019

RAHUL JAIN ...APPELLANT

VERSUS

RAVE SCANS PVT. LTD. & ORS. ...RESPONDENTS

J U D G M E N T

S. RAVINDRA BHAT, J.

1. The resolution applicant (hereafter "the appellant") is aggrieved by the decision of the National Company Law Appellate Board (hereafter "NCLAT") in regard to its directions modifying a resolution plan accepted by the adjudicating authority (i.e. National Company Law Tribunal, hereafter "NCLT" or "the adjudicating authority"). The Corporate Insolvency Resolution Process (CIRP) was initiated against M/s. Rave Scans Private Limited (hereafter the "Corporate Debtor")

under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or “the Code” for short). The revised resolution plan submitted by the appellant was approved by the NCLT on 17th October, 2018. The second respondent, M/s Hero Fincorp Ltd. (hereafter the “Financial Creditor” or “Hero”) appealed against the NCLT’s order on grounds of discrimination between financial creditors, which resulted in the NCLAT modifying the NCLT’s final order. The question urged by the appellant is whether the finding that the financial creditor was discriminated against, leading the NCLAT to modify the adjudicating authority’s directions, and consequently imposing greater financial burdens on the resolution applicant, is justified in the circumstances.

2. The facts of the case are as follows. The CIRP was initiated on 25th January, 2017 against the Corporate Debtor under Section 10 of the IBC. The appellant was the resolution applicant of the Corporate Debtor, whose liquidation value was ascertained as ₹36 crores. Against the said amount, the appellant offered ₹54 crores to revive the Corporate Debtor in terms of the resolution plan. The resolution plan was then revised and the revised resolution plan submitted by the appellant was approved by the adjudicating authority, i.e., the Principal Bench of the NCLT. This resolution plan was challenged before the NCLAT by the second respondent in the present appeal, Hero Fincorp Ltd. as being discriminatory. Discrimination was alleged on the ground that the secured

financial creditors were provided with a higher percentage of their claim amounts; however, Hero had been allowed a lesser percentage of its admitted claim. Hero, who had dissented with the resolution plan, had been provided with 32.34% of its admitted claim, whereas other financial creditors had been provided with 45% of their admitted claims. The remarks column in the resolution plan showed that the plan was based on 'Maintained liquidation value (LV) under Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The reference herein was to the unamended Regulation 38, pertaining to the mandatory contents of a resolution plan.

3. The NCLAT in its impugned order which set aside the NCLT's directions and required the appellant to increase the liquidation value of the offer to Hero, relied on *Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors.,* Company Appeal (AT) (Insolvency) No. 526 of 2018 and *Binani Industries Ltd. v. Bank of Baroda & Anr.,* Company Appeal (AT) (Insolvency) No. 82 of 2018, and noticed that Regulation 38 had been held to be discriminatory in these cases. Accordingly, an amendment was made on 5th October, 2018, and the provision in Regulation 38(1)(c) on liquidation value payable to financial creditors was deleted. The amended regulation was also considered by the Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India,* 2019 SCC Online SC 73, which noticed that the amendment strengthens the rights of

operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors. *Swiss Ribbons* (*supra*) also observed that the NCLAT, while looking into the viability and feasibility of resolution plans approved by the committee of creditors, has always gone into the question of whether operational creditors are given roughly the same treatment as financial creditors, and if not, such plans have been rejected or modified so that the rights of operational creditors are safeguarded.

4. The order approving the resolution plan, which was impugned before the NCLAT was passed by the adjudicating authority on 17th October, 2018. The NCLAT held that this order failed to notice that no resolution plan could be approved discriminating against the dissenting financial creditor, in terms of the amended Regulation 38. The NCLAT further held that the adjudicating authority failed to notice that the NCLAT had declared the unamended Regulation 38(1)(c), which stipulated the liquidation value for dissenting financial creditors as illegal. It was held that the resolution plan in this instance, which had been approved by the impugned order of the NCLT, did not conform to the test in Section 30(2)(e) of the IBC, and was discriminatory against similarly situated 'Secured Creditors'.

5. The NCLAT further observed that under Section 30(2)(b)(ii), such differential treatment must only be made in such a manner as may be specified by the Board, which shall not be less than the amount to be paid to these creditors in accordance with Section 53(1) in the event of liquidation of the corporate debtor. The NCLAT held that the amended Regulation 38 would still be applicable, and the Corporate Debtor could not take advantage of the repealed provision. In light of this reasoning, the NCLAT held the resolution plan to be discriminatory and violative of Section 30(2)(e) of the IBC, and directed that the successful resolution applicant remove the discrimination by providing similar treatment to the appellant before the NCLAT, as other similarly situated financial creditors.

6. It was observed that the successful resolution applicant had noticed that Regulation 38 was amended on 5th October, 2018; the applicant, however, failed to bring this fact to the notice of the adjudicating authority when the matter was taken up for approval, and also did not amend the resolution plan to make it in accordance with the amended Regulation 38. The grounds for discrimination alleged by the Corporate Debtor were that firstly, Regulation 37(1) requires a resolution plan to offer 'maximization of value of its assets', which is fulfilled by offering ₹54 crores against the liquidation value of ₹36 crores only; secondly, Regulation 38(1)(c) mandatorily provided for the maintenance of the liquidation value of dissenting financial

creditors before the amendment dated 5th October 2018; thirdly, the committee of creditors, in its meeting, directed the resolution professional to seek a legal opinion on differential value of financial creditors. The committee of creditors accepted the opinion obtained by the resolution professional stating that liquidation value has to be maintained for dissenting creditors. Accordingly, in the next revised resolution plans dated 12th January, 2018, 16th February, 2018, and 5th October, 2018, the resolution applicant offered minimum liquidation value (not a percentage of the claim).

7. It was urged by Mr. Ramji Srinivasan, learned senior counsel, that PSU banks had a higher stake in the total claim value and liquidated value of assets, having security of fixed assets, plant and machinery, debtors, inventory and personal guarantee, etc. On the other hand, NBFCs only had security against specific plant & machinery and the personal guarantee of the promoters. It was also argued that the resolution plan has been fully implemented and financial creditors (except Hero) have released security to the Corporate Debtor. Further, the senior counsel appearing on behalf of the Corporate Debtor argued that under Section 30(2)(b)(ii), the resolution plan allows separate treatment of financial creditors who do not vote in favour of the resolution plan.

8. Mr. Amit Sibal, learned senior counsel for the second respondent-Hero, urged that this court should not interfere

with the impugned order. He relied on the observations in *Swiss Ribbons* and Section 30 of the IBC, to say that creditors falling within one description or class cannot be discriminated against. It was pointed out that the PSU banks' dues were given primacy, inasmuch as all of them were given a settlement of 45% of their admitted claims; however, the dissenting Financial Creditor (Hero) was provided with 32.34% of its admitted claim which is plainly discriminatory and contrary to the letter and spirit of the IBC.

9. Mr. Sibal relied on the observations of this court in *Swiss Ribbons (supra)* that:

> *"72. The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors."*

10. Section 30, which is relied upon by the respondents, and which was interpreted by the NCLAT, reads as follows:

> *"30. (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.*
>
> *(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 repayment of other debts of the corporate debtor;*

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53; (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) conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy-five per cent. of voting share of the financial creditors.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority."

11. Section 30 lays out the duties of the resolution professional and the various steps that she or he has to take, as well as the considerations that are to weigh, in examining a

resolution plan. The principle of fairness engrafted in the provision is that the plan should make a provision for repayment of debts of operational creditors having regard to the value, which shall not be less than what is prescribed by the Board (i.e. the Insolvency Board), repayable in the event of liquidation, spelt out in Section 53. Section 30(3) requires the resolution professional to present the resolution plan to the committee of creditors and Section 30(4) stipulates that approval shall be by a vote not less than 75% of the voting share of the financial creditors. Regulation 38, as it stood before the amendment and its substitution, read as follows:

> *"38. Mandatory contents of the resolution plan.—*
>
> *(1) A resolution plan shall identify specific sources of funds that will be used to pay the-*
>
> *(a) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;*
>
> *(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and*
>
> *(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."*

12. After its amendment, Regulation 38 now reads as follows:

> *"38. Mandatory contents of the resolution plan.—*
>
> *(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.*
>
> *(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor."*

13. In the present case, it is noticeable that no doubt, Hero was provided with 32.34% of its admitted claim as it has dissented with the plan. On the other hand, Tata Capital Financial Services Ltd. was provided with 75.63% of its admitted claim; other financial creditors (Indian Overseas Bank, Bank of Baroda and Punjab National Bank) were provided with 45% of their admitted claims. Given that the resolution process began well before the amended regulation came into force (in fact, January, 2017) and the resolution plan was prepared and approved before that event, the wide observations of the NCLAT, requiring the appellant to match the pay-out (offered to other financial creditors) to Hero, was not justified. The court notices that the liquidation value of the corporate debtor was ascertained at ₹ 36 crores. Against the said amount, the appellant offered ₹54 crores. The plan was approved and, except the objections of the dissenting creditor (i.e Hero), the plan has attained finality. Having regard to these factors and circumstances, it is held that the NCLAT's order and directions were not justified. They are hereby set aside; the order of the NCLT is hereby restored.

14. In view of the foregoing discussion, the appeal succeeds and is allowed. In the circumstances, there shall be no order on costs.

.....J.
[ARUN MISHRA]

.....J.
[S. RAVINDRA BHAT]

New Delhi,
November 8, 2019.