

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT)(Ins) No. 405 of 2019**

**IN THE MATTER OF:**

**Jagmeet Singh Sabharwal & Ors.**

**...Appellants**

**Versus**

**Rubber Products Ltd. & Ors.**

**...Respondents**

**Present :**

**For Appellants: Ms. Varsha Banerjee, Advocate**

**For Respondents: Mr. Sachindra Moh and Ms. Megna Rao, Advocates  
For Respondent No. 2**

**Mr. Dhaval Deshpande, Advocate for Intervenor**

**ORDER**

**11.06.2019** This appeal has been preferred by Mr. Jagmeet Singh Sabharwal & Ors. (Successful Resolution Applicant) against part of the order dated 19<sup>th</sup> February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in M.A. No. 1039/2018 in C.P. (I.B.) – 1686(MB)/2017 whereby the ‘resolution plan’ submitted by the Appellant has been approved with the following modifications :

*“17.0 Although this Resolution Applicant is seeking waiver in respect of number of liabilities, however, the same should be restricted to those government liabilities which are ascertained and crystalized as on the date when the CIRP commenced. On commencement of CIRP due to pronouncement of moratorium if any tax is levied, the same requires waiver. For rest of the tax demand a reliance is*

*placed on a decision of NCLT, Chandigarh Bench in the case of “State Bank of India vs. Mor Farms Pvt. Ltd.” dated 15.06.2018 in CA Nos. 71/2018 & 171/2018 in CP(IB) – 51/Chd/Hry/2017 wherein waiver is granted in respect of tax dues. Although the question of waiver has been dealt with in this order by the respected Coordinate Bench, NCLT, Chandigarh. However, an important aspect is to be kept in mind that the petition in this case has moved u/s 10 of the Insolvency Code to declare itself insolvent. In other words, the petitioner is seeking waiver in respect of all the statutory taxes & liabilities for the period during which the same management was at the helm of the affairs and liable for statutory compliances. The important point which requires due consideration is that the Resolution Plan is also now submitted by the entity/ resolution applicant who has nexus with the Corporate Debtor. Therefore, while placing reliance on the decision of respected Coordinate Bench, this aspect requires due consideration.”*

2. The learned counsel appearing on behalf of the Appellant has grievance against the aforesaid part of the modified order on the ground that the claim with regard to the additional Government Dues of Rs. 14 Crores were added by

the Adjudicating Authority, the claim which was not before the 'Resolution Professional' nor shown in the 'Information-Memorandum'. It is submitted that whatever claim was made towards the statutory dues, i.e. dues arising out of existing law, were taken into consideration and the 'Resolution Applicant' made suitable provision for such dues. Therefore, according to the Appellant, additional burden of Rs. 14 Crores has been levied on the 'Resolution Applicant' without any basis. Learned counsel for the Appellant further submits that the Adjudicating Authority wrongly held that the resolution applicant has nexus with the 'Corporate Debtor'.

3. On earlier date, on hearing the learned counsel for the Appellant and the learned counsel appearing on behalf of the 'Resolution Professional', we expressed our view that the 'Resolution Applicant' can prepare a chart of re-distribution amount to all the stakeholders including the debt payable to the Central Government, State Government or local authorities. It was also agreed on behalf of the Appellant that they may increase some amount for re-distribution of the assets to stakeholders such as 'Financial Creditors', 'Operational Creditors' and 'Others'. Pursuant to such observations, the revised re-distribution chart has been furnished by the 'Resolution Applicant'.

4. Mr. Dhaval Deshpande, Advocate filed an Interlocutory application on behalf of the 'Fouress Engineering (India) Pvt. Ltd.'. He submits that 'Fouress Engineering (India) Pvt. Ltd.' has also filed a claim as 'Financial Creditor' for a sum of Rs. 74,68,798/- ; another claim was also filed as 'Operational Creditor' of Rs.3,64,653/- and another claim was filed as 'other creditor' for a sum of Rs.74,80,492/-. He further submits that Intervenor - "Fouress Engineering (India) Pvt. Ltd." is also a shareholder of the 'Corporate Debtor'. In the case of

the **‘Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors.’** – in ‘Company Appeal (AT) (Insolvency) No. 205 of 2017’, this Appellate Tribunal held that the debt payable to Central Government, State Government or Local Authority is ‘Operational Debt’, relevant of which reads as follows:

“28. *From the plain reading of sub-section (21) of Section 5, we find that there is no ambiguity in the said provision and the legislature has not used the word ‘and’ but chose the word ‘or’ between ‘goods or services’ including employment and before ‘a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, and State Government or any local authority’.*

29. *‘Operational Debt’ in normal course means a debt arising during the operation of the Company (‘Corporate Debtor’). The ‘goods’ and ‘services’ including employment are required to keep the Company (‘Corporate Debtor’) operational as a going concern. If the Company (‘Corporate Debtor’) is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises*

*when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.*

30. *For the said very reason, we also hold that 'Income Tax Department of the Central Government' and the 'Sales Tax Department(s) of the State Government' and 'local authority', who are entitled for dues arising out of the existing law are 'Operational Creditor' within the meaning of Section 5(20) of the 'I&B Code'."*

5. In view of the aforesaid position of law, we are of the view that the 'Resolution Applicant' is required to provide the same treatment to all the 'Operational Creditors', who are equally situated.

6. The 'Operational Creditor' is defined in Section 5(20) which read with 'Operational Debt' as defined in Section 5(21), read as follows:

*"(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*

*(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central*

*Government, any State Government or any local authority;”*

7. From the definition of the ‘Operational Debt’ it is clear that there are 3 types of ‘Operational Creditors’, namely:-

- (i) Those who supplied goods and/or rendering services to the ‘Corporate Debtor’;
- (ii) Employees of the ‘Corporate Debtor’; and
- (iii) The debt payable under the existing law to the Central Government or State Government or local authority.

The ‘Operational Creditors’ who were supplying goods or rendered services including employees are investing money for keeping the company operational. Employees are also working to keep the company operational, therefore, they are class in themselves.

8. On the other hand, the Central Government or State Government, they do not invest any money nor render any services but derive advantage of operation by claiming of the debt on the basis of the existing law (statutory debt). Therefore, classification is made between – (i) those ‘Operational Creditors’ who were employees; (ii) those who were suppliers of goods or rendering services by investing money and (iii) the Central Government or State Government or local authority, who only claim the statutory debt. Resolution plan cannot be arbitrary or discriminatory amongst class of such ‘Operational Creditors’. Only the same treatment is to be made.

9. The original ‘distribution chart’ of the ‘Resolution Applicant’ showing the distribution is as under:

**TABLE-1****(a) Distribution Chart of the Resolution Applicant as proposed in the Resolution Plan**

Sr. No.	Particulars	Amount Admitted by RP	Amount Proposed by RA	% to the Admitted dues	
1.	CIRP Cost	62.00	62.00	100	
2.	Workmen dues				
	Admitted claim	221.76	221.76	100	
	Workmen dues as mentioned by RP from Books of accounts in IM	12.43	12.43	100	
		234.19	234.19		
3.	Employee dues				
	Admitted claim	56.42	56.42	100	
	Employee dues as mentioned by RP from Books of accounts in IM	9.25	9.25	100	
		65.67	65.67		
4.	Secured Financial Creditor - SBI	465.26	465.26	100	
5.	Unsecured Financial Creditor – Promoter Group	505.85	505.85	100	
6.	Operational Creditors – Trade Payables	233.56	233.56	100	
7.	Operational Creditors and Other Creditors- Promoter Group	78.46	78.46	100	
8.	Operational Creditor – Government dues				
	Admitted claim	88.09	88.09	100	
	Government dues as mentioned by RP from Books of accounts in IM	99.42	99.42	100	
		187.51	187.51		
9.	Equity Shareholder@ 7.15 Rs per share	0.00	292.50		
10.	Grade Total	1832.50	2125.00		

**b) Detailed breakup of Operational Creditors-Statutory dues as Mentioned in Sr. No. 8 in**

<b>Sr. No.</b>	<b>Particulars</b>	<b>Amount Earlier Claimed/ Due</b>	<b>Amount proposed To be paid</b>	<b>% of amount claimed /due</b>
<b>A</b>	<b>Statutory Dues related to workmen and Employee Dues</b>			
1.	Provident Fund	44.77	44.77	100
2.	Projected Interest and damages on PF Liability	0	0	100
3.	Maharashtra Labour Welfare Fund	0.24	0.24	100
4.	Employee State Insurance Corporation	9.33	9.33	100
5.	Profession Tax	21.53	21.53	100
	<b>Subtotal</b>	<b>75.87</b>	<b>75.87</b>	
<b>B</b>	<b>Other Statutory Dues</b>			
1.	Tax deducted at Source	10.94	10.94	100
2.	Value added Tax & Central State Tax	12.19	12.19	100
3.	Excise	78.84	78.84	100
4.	The Rubber Board	0.61	0.61	100
5.	Good & Service Tax	3.10	3.10	100
6.	Service Tax	5.01	5.01	100
7.	Tax Collected at Source	0.29	0.29	100
8.	TNGST	0.73	0.73	
	<b>Sub total</b>	<b>111.73</b>	<b>111.71</b>	
	<b>Total</b>	<b>187.6</b>	<b>187.58</b>	-

Now in view of aforesaid position of law, the 'resolution applicant' has filed the 'Revised Redistribution Chart', as follows:

**TABLE-2**

**a) Revised New Redistribution chart as proposed by the RA after approval of the Resolution Plan**

<b>Sr. No.</b>	<b>Particulars</b>	<b>Amount as due and payable as on date</b>	<b>Amount Proposed By RA</b>	<b>%</b>
1.	CIRP Cost	62.43	62.43	100.00
2.	Workmen dues	234.19	234.19	100.00



3.	Employee dues	65.67	65.67	100.00
4.	Secured Financial Creditor -SBI	465.26	465.26	100.00
5.	Unsecured Financial Creditor –Promoter Group	505.85	505.85	100.00
6.	Operational Creditors – Trade Payables	233.56	165.39	70.81
7.	Operational Creditors and Other Creditors- Promoter Group	78.46	55.29	70.47
8.	Operational Creditor – Government dues	1643.87	596.92	36.31
9.	Equity Shareholder @ 7.15 Rs per share	292.5	0.00	0.00
10	Grand Total (1to 9)	2125.00	2151.00	

**b) Detailed breakup of Operational Creditors – Government Dues as mentioned in Sr. No. 8**

Sr. No.	Particulars	Amount claimed/ Demanded (Post NCLT Approval)	Amount earlier proposed to be paid by RA	Redistributed Amount now proposed to be paid	% of redistributed Payment
<b>A</b>	<b>Government Dues related to Workmen and Employee Dues</b>				
1	Provident Fund	62.43	44.77	62.43	100
2	Projected Interest and Damages on PF Liability	50.00	0	50.00	100
3	Maharashtra Labour Welfare Fund	0.24	0.24	0.24	100
4	Employee State Insurance Corporation	9.33	9.33	9.33	100
5	Profession Tax	21.53	21.53	21.53	100
	<b>Subtotal</b>	<b>143.54</b>	<b>75.87</b>	<b>143.54</b>	
<b>B</b>	<b>Other Government Dues</b>				
1	Customs	384.84	0	116.29	30.22
2	Tax deducted at Source	15.85	10.94	4.79	30.22
3	Value added Tax & Central State Tax	736.29	12.19	222.5	30.22

4	Excise	353.4	78.84	106.79	30.22
5	The Rubber Board	0.82	0.61	0.25	30.22
6	Goods & Service Tax	3.1	3.1	0.94	30.22
7	Service Tax	5.01	5.01	1.51	30.22
8	Tax Collected at Source	0.29	0.29	0.09	30.22
9.	TNGST	0.73	0.73	0.22	30.22
	<b>Sub total</b>	<b>1,500.34</b>	<b>111.73</b>	<b>453.38</b>	
	<b>Total</b>	<b>1,643.88</b>	<b>187.6</b>	<b>596.92</b>	-

10. From the Re-distribution Chart, we find the workmen dues, employee dues paid 100% and others like 'Secured Financial Creditor' and 'Unsecured Financial Creditor (Promoter)' paid 100%. The other 'Operational Creditors' like 'supplier of goods' or 'rendered services' have been paid 70.81 %. The 'Operational Creditor' and 'other creditors' – 'Promoter Group' like 'Fouress Engineering (India) Pvt. Ltd.' allocated 70.47% of dues. On the other hand, the debt payable to the Central Government or State Government etc. they have been paid 36.31%. We are of the view that the aforesaid classification between the 'employees', 'Operational Creditors' who have supplied goods or rendered services and the 'Operational Creditors' like Government dues i.e. debt payable to the Central Government or State Government etc. is rational and correct. We have noticed that those employees who have rendered services to keep the company a going concern even during the 'Corporate Insolvency Resolution Process', the supplier of the goods and those who rendered services have also invested money for keeping the company operational. On the other hand, the Central Government or State

Government, only derive the advantage of the existing law, claiming without supplying any goods or rendering any services. So far as the inventory of 'Fouress Engineering (India) Pvt. Ltd.' is concerned, it is equated with all the similar placed 'Operational Creditors' therefore it cannot allege discrimination. So far as the 'Shareholders' or 'Promoters' are concerned because of their failure the 'Corporate Insolvency Resolution Process' got initiated against the 'Corporate Debtor' and 'Successful Resolution Applicant' pays the dues to all the creditors on behalf of the 'Corporate Debtor'/'Promoters'/'Shareholders'. In lieu of such payment, it is always open to the 'Successful Resolution Applicant' to claim transfer of shares of 'Shareholders'/'Promoters' in its favour.

11. Section 29A is the ineligibility clause which deals with question as to who are ineligible to file 'resolution plan'. As per said provision any persons who act jointly or in concert with such person if fall within any of the clause as mentioned therein (Clause (a) and (j) ) are ineligible to file 'resolution plan'. It is not the case that the 'Resolution Professional' or the 'Committee of Creditors' or that the Adjudicating Authority found the 'Resolution Applicant' to be ineligible under Section 29A. In absence of any such evidence, it was not open to the Adjudicating Authority to observe that the Appellant has a nexus with the 'Corporate Debtor'.

12. For the reasons aforesaid, we set aside the aforesaid part of the observation as made by the Adjudicating Authority at Paragraph 17 of the impugned order dated 19<sup>th</sup> February, 2019 and modify the impugned order by substituting the revised manner of distribution as quoted above. However,

the other terms & conditions of the related plan will remain same including the period for upfront payment etc.

13. For the reasons aforesaid, we modify the impugned order dated 19<sup>th</sup> February, 2019 and substitute the manner of distribution as shown in the 'Resolution Plan' with the 'Revised distribution' as noted above. All the stakeholders will be bound by the 'Revised distribution' and other terms and condition of the 'Resolution plan'.

The appeal is allowed with aforesaid observations and directions.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice A.I.S. Cheema]  
Member (Judicial)

[Kanthi Narahari]  
Member (Technical)

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