

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 550 of 2018

IN THE MATTER OF:

Bharat Petroresources Ltd.

...Appellant

Vs

Monnet Ispat & Energy Ltd. & Anr.

....Respondents

Present:

**For Appellant: Mr. Manish K. Jha and Ms. Pallavi Kumar,
Advocates.**

**For Respondents: Mr. Kapil Sibal, Sr. Advocate with
Mr. Krishnendu Datta with Ms. Misha, Mr.
Siddhant Kant, Advocates for Successful
Resolution Applicant.**

**Mr. Arshit Anand, Mr. Divyang C., Mr. Himanshu
Satija and Mr. Ajitesh Soni, Advocates for RP.**

**Mr. Ramji Srinivasan, Senior Advocate with Mr.
Spandan Biswas, Mr. Srideepa Bhatt Acharya and
Ms. Ruchi Choudhary, Advocates for SBI.**

With

Company Appeal (AT) (Insolvency) No. 562 of 2018

IN THE MATTER OF:

Gail (India) Ltd.

...Appellant

Vs

State Bank of India & Ors.

....Respondents

Present:

For Appellant: Mr. Sudhir Makkar, Sr. Advocate with Mr. Ankit Chaturvedi, Ms. Saumya Gupta, Mr. Azmat H. Amanullah and Mr. Abhishek Choudhary Advocates.

For Respondents: Mr. Krishnendu Datta with Ms. Misha, Mr. Siddhant Kant, Advocates for Successful Resolution Applicant.

Mr. Arshit Anand, Mr. Divyang C., Mr. Himanshu Satija and Mr. Ajitesh Soni, Advocates for RP.

Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswas, Mr. Srideepa Bhatt Acharya and Ms. Ruchi Choudhary, Advocates for SBI.

With

Company Appeal (AT) (Insolvency) No. 555 of 2018

IN THE MATTER OF:

IFCI Limited

...Appellant

Vs

R. P. for Monnet Ispat & Energy Ltd.

....Respondent

Present:

For Appellants: Mr. N P S Chawla, Mr. Aaryan Sharma and Mr. Sujoy Datta, Advocates.

For Respondents: Mr. Kapil Sibal, Sr. Advocate with Mr. Krishnendu Datta with Ms. Misha, Mr. Siddhant Kant, Advocates for Successful Resolution Applicant.

Mr. Arshit Anand, Mr. Divyang C., Mr. Himanshu Satija and Mr. Ajitesh Soni, Advocates for RP.

Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswas, Mr. Srideepa Bhatt Acharya and Ms. Ruchi Choudhary, Advocates for SBI.

With

Company Appeal (AT) (Insolvency) No. 802 of 2018 & 38 of 2019

IN THE MATTER OF:

Bharat Heavy Electricals Ltd.

...Appellant

Vs

Sumit Binani, R. P. of Monnet Ispat & Energy Ltd.

....Respondent

Present:

For Appellant: Mr. Anand Varma, Mr. Shwetank Singh and Mr. Dhairya Madan, Advocates.

Mr. Sumesh Dhawan and Ms. Vatsala Kak, Advocates.

For Respondents: Mr. Kapil Sibal, Sr. Advocate with Mr. Krishnendu Datta with Ms. Misha, Mr. Siddhant Kant, Advocates for Successful Resolution Applicant.

Mr. Arshit Anand, Mr. Divyang C., Mr. Himanshu Satija and Mr. Ajitesh Soni, Advocates for RP.

Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswas, Mr. Srideepa Bhatt Acharya and Ms. Ruchi Choudhary, Advocates for SBI.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process’ initiated against ‘Monnet Ispat & Energy Limited’- (‘Corporate Debtor’), the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai,

by impugned order dated 24th July, 2018 approved the 'Resolution Plan' submitted by 'Consortium of Aion Investment II Private Limited & JSW Steel Limited' ('Successful Resolution Applicant') which is under challenge in all these appeals.

2. The Appellant- 'Bharat Heavy Electricals Limited' just prior to approval of the 'Resolution Plan', filed an Interim Application challenging the decision of the 'Interim Resolution Professional' collating its claim. The Adjudicating Authority, by order dated 19th June, 2018, having rejected the application which has been challenged by the 'Bharat Heavy Electricals Limited'.

Company Appeal (AT) (Insolvency) No. 550 of 2018 (Appellant- 'Bharat Petroresources Limited')

3. According to Appellant, it is a wholly-owned subsidiary of 'Bharat Petroleum Corporation Limited' and engaged in 'exploration and production of oil' and is the lead operator in an Indian on-land block in the Cambay Basin in India. On 30th August 2012, a 'Production Sharing Contract' was executed between the Appellant-'Bharat Petroresources Limited', 'GAIL (India) Ltd.', 'Engineers India Ltd.', 'BF Infrastructure Limited', the Government of India, and 'Monnet Ispat & Energy Limited'- ('Corporate Debtor') ("**Consortium Partner**" for short). Pursuant to the 'Production Sharing Contract', a 'Joint Operating Agreement' dated 5th April, 2013 was executed by the Consortium Partners with following Interest:

Consortium Partner	Participating Interest
Bharat PetroResources Ltd.	25%
Gail (India) Ltd.	25%
Engineers India Ltd.	20%
BF Infrastructure Ltd.	20%
Monnet Ispat & Energy Ltd.	10%

The Appellant-‘Bharat Petroresources Limited’ was designated as the Lead Operator to carry out Joint Operations pursuant to the Joint Operating Agreement’.

4. Further, case of the Appellant is that as per ‘Joint Operating Agreement’, an Operator may issue cash call notices to the Consortium Partners to finance the operations for the applicable calendar month and the consortium partners were liable to contribute in accordance with their participating interest. As per Articles 7.6 and 7.7 of the ‘Joint Operating Agreement’, if any Consortium Partner fail to pay in part or full of its share other consortium partners are required to contribute to the amount of default, in accordance with their respective participating interest.

5. According to the Appellant, the ‘Corporate Debtor’ time to time, defaulted in paying its share against calls raised by the Appellant during the period March 2016 to February 2017. For the said reason, the Appellant issued default notices notifying the ‘Corporate Debtor’ as a defaulting partner under Article 7.6.1 of the ‘Joint Operating Agreement’.

6. In the meantime, the 'Corporate Insolvency Resolution Process' had been initiated against the 'Corporate Debtor' on 18th July, 2017 and 2nd Respondent was appointed as the 'Resolution Professional'.

7. Further case of the Appellant is that the Appellant filed its claim on 5th January, 2018, as an 'Operational Creditor' of Rs. 9,58,88,886 as on the Insolvency Commencement Date. It was admitted by the 'Resolution Professional'. The Appellant subsequently claimed further amount of Rs. 9,92,86,892 towards future claims accrued after the Insolvency Commencement Date, which has not been accepted by the 'Resolution Professional'.

8. The Adjudicating Authority, in the meantime, by impugned order dated 24th July, 2018 approved the 'Resolution Plan' submitted by the 'Consortium of Aion Investment II Private Limited & JEW Steel Limited' ('Successful Resolution Applicant') under Section 31(1) of the 'I&B Code' without deciding the future claim of the Appellant.

9. It was further submitted that the Impugned Order is contrary to Section 30(2)(e) of the 'I&B Code', as it seeks to extinguish all rights and obligations of the Appellant in respect of the claim, not provided for in the 'Resolution Plan' prior to the Insolvency Commencement Date. Thus, the Appellant is left remediless in so far as its claim which is not provided for in the 'Resolution Plan' is concerned.

10. Reliance has been placed on the decision of this Appellate Tribunal dated 4th July, 2019 in “**Standard Chartered Bank vs Satish Kumar Gupta, R. P. of Essar Steel Ltd. & Ors. (Company Appeal (AT) (Insolvency) No. 242/2019) & connected appeals**”, and submitted that the cases where the claim has not been decided at all, parties can raise the issue before an appropriate forum in terms of Section 60(6) of the ‘I&B Code’.

11. It is submitted that Para 10 of the Impugned Judgment which provides for the amount of Rs. 25 crores to be distributed among ‘Operational Creditors’ within one year from the date of the Impugned Order is in contravention of Regulation 38(1)(b) of the CIRP Regulations, which provides that the ‘Operational Creditors’ ought to be paid in priority to ‘Financial Creditors’ and in no event later than 30 days after approval of the ‘Resolution Plan’.

12. It is also submitted that Para 6 of the Impugned Judgment notes that “*the liquidation value due to the unsecured financial creditors, operational creditors and other creditors of the Corporate Debtor as per the waterfall mechanism mentioned under Section 53 of the Code is NIL.*” Pertinently, even though the difference between fair value and liquidation value is more than Rs. 2000 crores, the Adjudicating Authority has approved the ‘Resolution Plan’, on the

basis of the upfront payment of Rs. 25 crores in favour of 'Operational Creditors'.

13. The counsel for the Appellant submitted that the 'Resolution Plan' is unfair and discriminatory against the 'Operational Creditors'.

Company Appeal (AT) (Insolvency) No. 562 of 2018 (Appellant- 'GAIL (India) Ltd.')

14. Learned counsel for the Appellant- 'Gail (India) Ltd.' submitted that the 'Gail (India) Ltd.' is also member of the 'Consortium of Aion Investment II Private Limited & JSW Steel Limited' ('Successful Resolution Applicant') and similarly placed like 'Bharat Petroresources Limited'.

15. It was submitted that vide the Impugned Order, 'Bharat Petroresources Ltd.' identically situated to the Appellant has been treated as 'Operational Creditor' whereas the Appellant (which had filed its claim against the 'Corporate Debtor' believing itself to be a creditor other than an 'Operational or Financial Creditor') has not been treated as 'Operational Creditor' and has not been allowed any amount.

16. It was submitted that for the operations of Block CB-ONN-2010/08 ("Block 2" for short), each of the five Partners entered into a 'Production Sharing Contract' on 30th August, 2012 and a 'Joint Operating Agreement' on 5th April, 2013. As per 'Joint Operating Agreement', for

operations of Block 2, the 'Bharat Petro Resources Ltd.' was designated as the Lead Operator.

17. It was further contended that the Appellant and 'Bharat Petroresources Ltd.' both being the Lead Operators under the 'Joint Operating Agreements' for Block 1 and Block 2, respectively, had been raising cash calls on the other four respective Partners in terms of the 'Joint Operating Agreements', including the 'Corporate Debtor'. One of the 'Joint Operating Partner' namely— 'Monnet Ispat & Energy Limited'- ('Corporate Debtor') defaulted in payment of its cash calls and it ceased to pay its share of the cash calls from 8th April, 2016 and 6th April, 2016 for Block 1 and Block 2, respectively.

18. According to the Appellant- 'Gail (India) Ltd.', as on the date of the commencement of the 'Corporate Insolvency Resolution Process' i.e., 18th July, 2017, 'Monnet Ispat & Energy Limited'- ('Corporate Debtor') defaulted in paying its cash calls amounting to Rs.19,13,51,015/- for operations carried out under Block 1 and Rs.9,58,88,886/- for operations carried out under Block 2 in favour of the Appellant. Accordingly, both the Appellant and the 'Bharat Petro Resources Ltd.' submitted their respective proofs of claim to the 'Insolvency Resolution Professional'/ 'Resolution Professional'.

19. However, the Appellant on bonafide belief filed its claim in FORM-F which is for creditors other than 'Financial Creditors' and 'Operational

Creditors', before the 'Resolution Professional', whereas 'Bharat Petro Resources Ltd.' filed its claim in Form-B before the 'Resolution Professional', which is for 'Operational Creditor'.

20. It was submitted that after an alleged verification of the claims submitted by various parties including the Appellant and the 'Bharat Petro Resources Ltd.', the 'Resolution Professional' ultimately categorized the Appellant and 'Bharat Petro Resources Ltd.' in different categories of creditors. The 'Bharat Petro Resources Ltd.' treated as an 'Operational Creditor' whereas the Appellant- 'Gail (India) Ltd.' as an 'other creditor', despite the fact that the debts owed by the 'Corporate Debtor' to the Appellant and the 'Bharat Petro Resources Ltd.' arise out of identical, facts, circumstances and contractual obligations, stemming from the default in payment of cash calls under the 'Joint Operating Agreement'.

21. It was submitted that the 'Resolution Professional' had categorized 'Bharat Petro Resources Ltd.' as an 'Operational Creditor', the said 'Bharat Petro Resources Ltd.' is now entitled to receive 21% of its claim, whereas the Appellant- 'Gail (India) Ltd.' having categorised as a creditor other than a 'Financial Creditor' or 'Operational Creditor' by the 'Resolution Professional', it has not been provided with any amount.

Stand of the 'Successful Resolution Applicant'

22. In so far as the claims of 'Gail (India) Limited' and 'Bharat Petro Resources Limited' are concerned, learned counsel for the 'Successful

Resolution Applicant' submitted that the appeals have been filed by 'Gail (India) Limited' and 'Bharat Petro Resources Limited' being aggrieved by the treatment of their respective claims by the 'Resolution Professional' as "other stakeholder" and "operational creditor" respectively. While 'Gail (India) Limited' submitted its claim as a creditor other than an 'Operational Creditor' and / or 'Financial Creditor' (i.e. Form F prescribed under the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016') and was classified accordingly by the 'Resolution Professional' in the Information Memorandum prepared under Section 29 of the 'I&B Code', 'Bharat Petro Resources Limited' submitted its claim as an 'Operational Creditor' in Form B and was classified as an 'Operational Creditor' in the Information Memorandum. Now it is seeking to be treated with highest priority for having purportedly provided services of national importance.

23. It is accepted that the claim of 'Gail (India) Limited' and 'Bharat Petro Resources Limited' arises on account of non-payment of cash calls (request in the nature of re-imbusement) by the 'Corporate Debtor' for its contribution under a 'Joint Operating Agreement' and a 'Production Sharing Agreement' for exploration and exploitation of petroleum resources.

24. Learned counsel for the 'Successful Resolution Applicant' has relied upon the Information Memorandum prepared and updated by the 'Resolution Professional' under Section 29 of the 'I&B Code' for preparation and submission of the 'Resolution Plan' in accordance with Section 30(1) of the 'I&B Code'. It was submitted that it is the function and duty of the 'Interim Resolution Professional' to invite, verify and collate the claims and the 'Successful Resolution Applicant' has to rely upon the same.

25. It was contended that the Appellants- 'Gail (India) Limited' and 'Bharat Petro Resources Limited' are now estopped from challenging the classification at this belated stage.

26. It was submitted that subsequent to the approval of the 'Resolution Plan' by the Adjudicating Authority, the 'Successful Resolution Applicant' has *inter alia* taken the following steps in compliance with the 'Resolution Plan':

- (a) Allotment of equity shares to the 'Financial Creditors' of 'Corporate Debtor' pursuant to the conversion of debt amount to Rs. 215,19,82,190/-;
- (b) Reduction of the equity share capital of the company and extinguishment of the equity share capital held by the promoters of 'Corporate Debtor' and consolidation of the reduced equity share capital of 'Corporate Debtor';

- (c) Completion of the deemed issuance of optionally convertible preference shares to the 'Financial Creditors' of 'Corporate Debtor';
- (d) Completion of payment of the cash equivalent to Rs. 2677,92,38,864/- to the 'Financial Creditors' of the 'Corporate Debtor'; and
- (e) Infusion of the working capital and taking over of the 'Corporate Debtor' for running the business by the 'Successful Resolution Applicant'.

Accordingly, the approved 'Resolution Plan', has been duly implemented in entirety in terms of the 'Resolution Plan' by 31st August 2018 including payments to its creditors.

27. Further, according to counsel for the Successful Resolution Applicant', the 'Resolution Plan' is compliant with provisions of the 'I&B Code', and not discriminatory.

28. Referring to the decision of this Appellate Tribunal in "***Binani Industries Limited vs. Bank of Baroda & Anr.— Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.***" and the Hon'ble Supreme Court decision in "***Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— Writ Petition (Civil) No. 99 of 2018***", it is submitted that the 'Resolution Plan' of the 'Successful Resolution Applicant' (as approved by the Adjudicating Authority) ensures that roughly the same treatment

is given to the 'Financial Creditors' and the 'Operational Creditors' with 'Financial Creditors' receiving 26.26% recovery and 'Operational Creditors' receiving 21.77% recovery. Therefore, the 'Resolution Plan' being compliant along with ensuring that the interests of all stakeholders are balanced in addition to the fact that the 'Resolution Plan' of the 'Successful Resolution Applicant' has been completely implemented and the 'Successful Resolution Applicant' now has a vested right in its successful implementation, no adverse consequence can be visited upon the 'Successful Resolution Applicant' and the 'Successful Resolution Applicant' cannot now be made to redistribute payments under its 'Resolution Plan'.

29. We have heard the parties and perused the record.

30. From 'I&B Code', it is clear that on initiation of 'Corporate Insolvency Resolution Process' (after admission), the public announcement of the 'Corporate Insolvency Resolution Process' is made under Section 15. Thereafter, the 'Interim Resolution Professional' is empowered under Section 18(1) (b) to receive and collate all the claims submitted by creditors.

31. The aforesaid claim(s) relates to the debt payable to a creditor(s) before initiation of the 'Corporate Insolvency Resolution Process' and do not relate to any amount payable during the 'Corporate Insolvency Resolution Process'.

32. 'Bharat Petroresources Limited' submitted its claim on 5th January, 2018 towards the 'operational debt' amounting to Rs.9,58,88,886/- as on the Insolvency Commencement Date, which has been admitted by the 'Resolution Professional'. Therefore, any claim of the Appellant towards future claim accrued after the Insolvency Commencement Date, cannot be considered under Section 18(1) (b) by the 'Resolution Professional'.

33. If any cost incurred during the 'Corporate Insolvency Resolution Process' that cannot be treated to be the claim of an 'Operational Creditor' and therefore, further claim amounting to Rs.9,92,86,892/- towards future claim made by 'Bharat Petroresources Limited' was rightly not collated by the 'Interim Resolution Professional'/ 'Resolution Professional'.

34. For the reason aforesaid merely on the ground that the future claim has not been collated by the 'Resolution Professional', the Appellant- 'Bharat Petroresources Limited' cannot assail the order of approval of plan (dated 25th July, 2018) passed under Section 31 of the 'I&B Code'.

35. 'Gail (India) Limited' is identically situated like Appellant- 'Bharat Petroresources Limited'. 'Gail (India) Limited' filed two claims as 'Operational Creditor'; one amounting to Rs. 19,13,51,015/- for

operations carried out under Block 1 and the other for Rs.9,58,88,886/- for operations carried out under Block 2. The claims were filed by the Appellant within time, but instead of filing the claim in Form B, on wrong presumption they were filed in Form-F.

36. According to the Appellant- 'Gail (India) Ltd.', under *bonafide* belief that it presumed that the Appellant come within the category of creditors 'other than 'Financial Creditors' and 'Operational Creditors', so it filed both the claims in Form-F. The 'Bharat Petroresources Limited' who is similarly situated, filed claim in Form B, whose claim has been accepted by the 'Resolution Professional' treating it as 'operational debt'.

37. As per Section 18(1)(b), it is the duty of the 'Interim Resolution Professional' to receive and collate all the claims submitted by creditors. The Appellant- 'Gail (India) Ltd.' having filed its claim for Rs.19,13,51,015/- for operations carried out under Block 1 and another claim of Rs.9,58,88,886/- for operations carried out under Block 2 in 'Form F', it was not accepted by the 'Interim Resolution Professional' who has not allowed any amount. As the mistake was committed by the Appellant- 'Gail (India) Limited', it cannot allege any wrong committed by the 'Resolution Professional'.

38. The 'Successful Resolution Applicant' namely— 'Consortium of Aion Investment II Private Limited & JSW Steel Limited' has made it clear that it has allocated a sum of Rs.114,81,27,623/- for payment in favour

of 'operational debt' (other than Government dues, workmen and employees) which is 21.77% of their respective dues. On the other hand, it has allocated a sum of Rs.11,01,49,15,16,88/- for payment of 'financial debt' which is 26.28% of their respective claim.

39. The 'Operational Creditors' and the 'Financial Creditors' having given almost same treatment, no interference is called for on the ground that 'Gail (India) Limited' has not been treated as 'Operational Creditor'.

Company Appeal (AT) (Insolvency) No. 555 of 2018 (Appellant- 'IFCI Limited')

40. The grievance of the Appellant is with regard to the 'Resolution Plan' are as follows:

1. The Plan does not give equal treatment to dissenting/assenting and secured/unsecured financial creditors.

- The Plan currently provides for different payments to dissenting/assenting and secured/unsecured financial creditors.
- The entitlement of these classes of creditors at present is as under:

Unsecured Financial Creditors	Dissenting	NIL
	Assenting	"Equity Amount" + "Converted Debt"

Secured Financial Creditors	Dissenting	“Priority Payment” (nominal amount equivalent to liquidation value proportionate to accepted debt)
	Assenting	“Refinanced Debt” + “Equity Amount” + “Converted Debt”

- There are no intelligible differentia or statutory basis for such discrimination based on status as secured/unsecured or dissenting/assenting creditors, and such discrimination is impermissible.

41. It is also submitted that the Appellant has been wrongly categorized as ‘Unsecured Financial Creditor’ towards claim dated 7th December 2017 despite having exclusive mortgage over property of the ‘Corporate Debtor’.

42. Learned counsel for the Appellant submitted that the plan is discriminatory because it baselessly treats Appellant as ‘Unsecured Financial Creditor’ for its claim dated 7th December, 2017 for debt of Rs. 172 crores which was secured by equitable mortgage over ‘Monnet House’ property situated at Masjid Moth, New Delhi. The mortgage is admitted and recognized.

43. It was informed that the ‘Resolution Professional’ rejected the claim and thus Appellant filed application before the Adjudicating Authority which allowed the application and recognized secured claim of Appellant vide order dated 5th June, 2018.

44. It was further stated that despite objections being submitted by the Appellant, the 'Resolution Plan' treats Appellant as 'Unsecured Financial Creditor' for debt of Rs. 172 crores as unsecured.

45. The Appellant's claim for a sum of around Rs.174 crores, has only been given payment of Rs. 5.90 crores despite its holding first charge and exclusive mortgage over the property having market value of over Rs. 30 crores.

46. Learned counsel for the Appellant submitted that 'Resolution Plan' totally ignores and extinguishes exclusive mortgage without giving any benefit of it to the Appellant.

47. It is stated that the plan even specifically recognizes the exclusive mortgage of the Appellant yet treats the Appellant as 'Unsecured Financial Creditor'.

48. It is further stated that as part of the plan, the exclusive mortgage of the Appellant is being erased and the Appellant is denuded of its rights over the property on which it has exclusive mortgage, without being given any benefit of its right being treated as an 'Unsecured Financial Creditor'.

Stand of the 'Successful Resolution Applicant'

49. With regard to the claim of the 'IFCI Limited', learned counsel for 'Successful Resolution Applicant'- ('Consortium of Aion Investment II Private Limited & JSW Steel Limited') submitted that the

'IFCI Limited' is estopped from objecting to the 'Resolution Plan' on the following reasons.

50. It has been brought to our notice by the 'Successful Resolution Applicant' that pursuant to the Adjudicating Authority's order, IFCI's claim was included in the category of 'Unsecured Financial Creditor'. At no juncture 'IFCI Limited' objected to the admission of its claim as an unsecured debt despite the fact that the 'Committee of Creditors' of the 'Corporate Debtor' at its meeting on 7th April 2018, was apprised of the status of the acceptance of its claim in respect to the corporate guarantee as unsecured claim. The 'IFCI Limited' had raised no objection; on the other hand, it accepted its status as an 'Unsecured Creditor' in reference to its claim.

51. It is further stated that 'IFCI Limited' is also estopped from objecting to the 'Resolution Plan', and/or treatment of claim in reference to the corporate guarantee given by the 'Corporate Debtor' as 'Unsecured' as **(a)** 'IFCI Limited' has voted in favour of the 'Resolution Plan', without any protest or objection as to any of the terms of the 'Resolution Plan'; **(b)** no objection was raised by 'IFCI Limited' before the Adjudicating Authority, where the approval application was pending for more than three months; **(c)** 'IFCI Limited' has already accepted the full and final settlement under the 'Resolution Plan' including *inter alia* an upfront payment of Rs.83.01 Crores, equity worth Rs.11.02 Crores and optionally

convertible preference shares worth Rs.12.40 Crores (*subsequently bought out by the special purpose vehicle i.e. 'Milloret Steel Limited' set up pursuant to the resolution plan in lieu of payment of equal amount*). Notably, 'IFCI Limited' has preferred this appeal, conveniently after accepting all the payments under the 'Resolution Plan'.

52. The aforesaid plea taken by the 'Successful Resolution Applicant' has not been disputed by 'IFCI Limited'.

For the said reason, now it is not open for 'IFCI Limited' to object to treat its claim as 'Unsecured Financial Creditor' nor can object to the 'Resolution Plan'. Further, it having unconditionally voted in favour of the plan and having accepted the payments and benefits under the 'Resolution Plan', without any protest or reservation of rights, no relief can be granted.

Company Appeal (AT) (Insolvency) No. 802 of 2018 & 38 of 2019 (Appellant- 'Bharat Heavy Electricals Limited')

53. According to the Appellant- 'Bharat Heavy Electricals Limited', it filed total claim of Rs. 25,73,70,781 in respect of two contracts- (i) Rs. 15,76,01,904.22 with respect to Supply Contract No. MIL/BHEL/TG/2x45 MW/Supply/001 dated 4th July, 2005 along with amendment dated 22nd October, 2007; (ii) Rs. 9,97,68,877.39 with respect to Supply Contract No. MIEL/BHEL/TG/1x80

MW/SUPPLY/001 dated 14th May, 2010 along with Supervision Contract MIEL/BHEL/STG/SUPERVISION dated 15th February, 2011.

54. It was submitted that the 'Resolution Professional' vide his email's dated 4th December, 2017 illegally and arbitrarily rejected major part of the claim and reduced the claim amount to Rs. 1,33,76,135/-. Chart showing amount claimed and amounts rejected has been shown below:

Projects	Total Amount Claimed	Claim Verified	Total Claim Verified	Final Claim after Set Off from Verified Claim
1*80 MW	Rs.9,97,68,877 (Outstanding Rs.5,16,11,900 + Interest- Rs.4,81,56,977)	Rs.5,16,11,900 (Claim of interest rejected)	Rs. 5,16,11,900 +	Rs.1,33,76,135/- (Final Claim amount)
2*45 MW	Rs.15,76,01,904.22 (Outstanding Rs.6,13,72,750 + Interest- Rs.9,26,29,154)	Rs. 2,93,87,500 Claim of interest rejected and following amounts also reduced by Resolution Professional- -Rs.1,58,31,250 (Liquidated Damages) -Rs.1,55,54,000 (Overrun charges) -Rs.6,00,000 (amount to be paid by KO Gransons for work of turbine done by BHEL)	Rs. 2,93,87,500 =Rs.8,09,99,400	(Rs. 8,09,99,400 less Rs.6,76,23,265) (Rs.6,76,23,265 unilaterally reduced/setoff by Resolution Professional towards material allegedly supplied to BHEL by CD without verifying from BHEL
	Total Claimed amount- 25,73,70,781 (Twenty five crores seventy three lacs seventy thousand seven hundred and eight one rupees)			

55. Learned counsel for the Appellant submitted that the interest was payable in terms of the payment clause no. 34 of the Supply Contract dated 14th May, 2010. Despite writing several emails, the 'Resolution Professional' did not provide any reason/ documentation for deduction of Rs.6,76,23,265/- and the interest amount of Rs.14.43 Crores.

56. It was further submitted that the Appellant filed CA.67/2018 in C.P. (I.B) 1139(MB)/2017 before the Adjudicating Authority against rejection of part claim by 'Resolution Professional' and the Adjudicating Authority without going into the merits rejected the Application.

57. Learned counsel for the Appellant submitted that the impugned order dated 24th July, 2018 and 17th July, 2018 are erroneous for following reasons:

- (i) Applicability of liquidation value i.e. the principle of waterfall mechanism under Section 53 of the 'I&B Code, 2016' is not applicable at the time when the 'Resolution Plan' is being approved.
- (ii) Even if the 'Committee of Creditors' has passed the 'Resolution Plan', the Adjudicating Authority has all power to rectify the plan and amend the same.

(iii) The Adjudicating Authority itself records that the money is to be distributed on pro-rata basis, therefore, it ought to decide the rejection of claim on merit as the 'Resolution Professional' has illegally and arbitrarily reduced the amount of Appellant from Rs.25,73,70,781/- to Rs.1,33,76,135/-.

(iv) The 'Resolution Plan' is discriminatory as it provides upfront payment of Rs 2,676,92,38,864/- to the 'Financial Creditors' against the total admitted claims of Rs. 110,149,151,687/-, whereas as against the total admitted claim of 'Operational Creditors' other than workmen and employees i.e., Rs. 4,440,447,623 only amount of Rs.25 Crores is to be distributed among the 'Operational Creditors' other than workmen and employees on pro-rata basis. Even the said amount has not been received by the Appellant till date.

Stand of the 'Successful Resolution Applicant'

58. Learned counsel for the 'Successful Resolution Applicant' submitted that the 'Resolution Applicants' relied upon the 'Information Memorandum' prepared and updated by the 'Resolution Professional' under Section 29 of the 'I&B Code' for preparation and submission of the 'Resolution Plan' in accordance with Section 30(1) of the 'I&B Code'. Statutorily, it is the function and duty of the 'Resolution Professionals' to invite, verify and accept or reject claims and as a 'Resolution Applicant',

the 'Successful Resolution Applicant' has rightfully relied upon the same and its interests cannot be prejudiced for information contained in the Information Memorandum.

59. It was contended that the Appellant- 'Bharat Heavy Electricals Limited' is estopped from challenging the classification at this belated stage.

60. It was further submitted that subsequent to the approval of the 'Resolution Plan' by the Adjudicating Authority, the 'Successful Resolution Applicant' has *inter alia* taken the following steps in compliance with the 'Resolution Plan':

- (a) Allotment of equity shares to the 'Financial Creditors' of 'Corporate Debtor' pursuant to the conversion of debt amount to Rs. 215,19,82,190/-;
- (b) Reduction of the equity share capital of the company and extinguishment of the equity share capital held by the promoters of 'Corporate Debtor' and consolidation of the reduced equity share capital of 'Corporate Debtor';
- (c) Completion of the deemed issuance of optionally convertible preference shares to the 'Financial Creditors' of 'Corporate Debtor';

- (d) Completion of payment of the cash equivalent to Rs. 2677,92,38,864/- to the 'Financial Creditors' of the 'Corporate Debtor'; and
- (e) Infusion of the working capital and taking over of the 'Corporate Debtor' for running the business by the 'Successful Resolution Applicant'.

Accordingly, the approved 'Resolution Plan', has been duly implemented in entirety in terms of the 'Resolution Plan' by 31st August 2018 including payments to its creditors. In this view of the matter, such belated appeal after the entire plan has been fully implemented, does not deserve any indulgence and ought to be dismissed on the grounds of delay and laches.

61. Further, according to counsel for the Successful Resolution Applicant, the 'Resolution Plan' is compliant with provisions of the 'I&B Code', and not discriminatory.

62. Referring to the decision of this Appellate Tribunal in "***Binani Industries Limited vs. Bank of Baroda & Anr.— Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.***" and the Hon'ble Supreme Court decision in "***Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— Writ Petition (Civil) No. 99 of 2018***", it is submitted that the 'Resolution Plan' of the 'Successful Resolution Applicant' (as approved by the Adjudicating Authority) ensures that roughly the same treatment

is given to the 'Financial Creditors' and the 'Operational Creditors' with 'Financial Creditors' receiving 26.26% recovery and 'Operational Creditors' receiving 21.77% recovery. Therefore, the 'Resolution Plan' being compliant along with ensuring that the interests of all stakeholders are balanced in addition to the fact that the 'Resolution Plan' of the 'Successful Resolution Applicant' has been completely implemented and the 'Successful Resolution Applicant' now has a vested right in its successful implementation, no consequence can be visited upon the 'Successful Resolution Applicant' and the 'Successful Resolution Applicant' cannot now be made to redistribute payments under its 'Resolution Plan'.

63. The Appellant- 'Bharat Heavy Electricals Limited' has accepted that the 'Resolution Professional' has collated its claim to the extent of Rs.1,33,76,135/- on the basis of the claim filed within time.

64. Thereafter, the Appellant- 'Bharat Heavy Electricals Limited' did not choose to prefer any application under sub-section (5) of Section 60 against the decision of the 'Resolution Professional'. We find, at much belated stage, at the time of approval of the 'Resolution Plan', an Intervention Application was filed by 'Bharat Heavy Electricals Limited' challenging the decision of the 'Interim Resolution Professional' which has been rightly rejected in absence of any evidence on record in support of further claim.

65. For the reasons aforesaid, no relief can be granted to the Appellant- 'Bharat Heavy Electricals Limited'.

66. In the result, Company Appeal (AT) (Insolvency) No. 550 of 2018 preferred by 'Bharat Petroresources Limited'; Company Appeal (AT) (Insolvency) No. 555 of 2018 preferred by 'IFCI Limited' Company Appeal (AT) (Insolvency) No. 562 of 2018 preferred by 'Gail (India) Ltd.' and Company Appeal (AT) (Insolvency) No. 802 of 2018 & 38 of 2019 preferred by 'Bharat Heavy Electricals Ltd.' are dismissed. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member(Technical)

NEW DELHI
19th August, 2019

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