NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.887 of 2019

[Arising out of Order dated 21.08.2019 passed by National Company Law Tribunal, Division Bench, Chennai in MA/872/2019 in IBA/92/2019]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Edelweiss Asset Reconstruction Company Limited, Edelweiss House, Off CST Road, Kalina, Santacruz (East), Mumbai – 400098	---	Appellant
Versus		
1. Sai Regency Power Corporation Pvt. Ltd. Represented through Resolution Professional Mr. G. Ramachandran, 8-2-293/82/A/431/A, Road No.22, Jubilee Hills, Hyderabad, Telangana 500 033 Also at: 2nd Floor, Crown Court, No.128, Cathedral Road, Chennai – 600086	Applicant	Respondent No.1
2. Committee of Creditors of M/s. Sai Regency Power Corporation Private Limited C/o Sai Regency Power Corporation Limited 8-2-293/82/A/431/A, Road No. 22,	Respondent	Respondent No.2

Jubilee Hills,
Hyderabad,
Telangana 500 033

For Appellant: **Shri Sanjeev Sen, Sr. Advocate with Shri Arjun Krishnan, Shri Sumit Srivastava, Ms. Khushboo Mittal, Shri Soumo Palit and Shri Sayan Ray, Advocates**

For Respondent: **Counsel for Respondent present but did not mark appearance**

J U D G E M E N T

(20th December, 2019)

A.I.S. Cheema, J. :

1. The Insolvency Resolution Process has been filed against M/s. Sai Regency Power Corporation Pvt. Ltd. (Corporate Debtor) which is pending. In the CIRP process, Committee of Creditors (COC – in short) has been constituted in which the Appellant - Edelweiss Asset Reconstruction Company Limited (EARC – in short) is having 25% voting share. In the 6th meeting of COC dated 2nd August, 2019 (Annexure A-3), the Appellant - "EARC" participated in the meeting. COC took decision regarding interim finance with regard to:-

> "**Agenda B2 – To approve interim finance**
>
> In furtherance to the discussion in Agenda A6, the RP requested the members of the CoC to vote on the following resolution through e-voting facility as per the instructions provided

E-Voting Agenda – B2	**To approve interim finance**

RESOLVED THAT pursuant to the provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made thereunder, the members of the CoC hereby approve interim finance as defined under section 5(15) of the Insolvency and Bankruptcy Code, 2016, amounting to INR 35,25,80,379 for the non-fund based requirement towards GAIL and ONGC.

FURTHER RESOLVED that Mr. G. Ramachandran, RP, be and is hereby authorized to do all such acts and deeds as maybe required for giving effect to the above said resolution.

"

The Appellant – EARC objected to the resolution but it is stated that the resolution was passed by COC with 75% voting.

2. The Resolution Professional filed MA/872/2019 (Annexure A-10) in the Insolvency Proceedings IBA/92/2019 before the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) under Section 60(5)(c) read with Section 25(1), 25(2)(c) and 28(1)(a) of the Insolvency and Bankruptcy Code, 2016 (IBC – in short). It was mentioned that the CIRP process has been initiated vide Order dated 27.03.2019 on the basis of Application under Section 10 of IBC. The RP mentioned that the Corporate Debtor is engaged in the business of generation and sale of electricity from its Gas based Combined Cycle Power Plant. In order to generate electricity from the project, Corporate Debtor requires approximately 2,74,000 SCMD gas per day and, inter alia, was procuring its major requirement of gas from Oil and Natural Gas Corporation (ONGC – in short) in terms of Gas Supply Agreement dated 19th April, 2017 and balance quantity of gas was being procured from GAIL India Ltd. in terms

of Gas Supply Agreement dated 24th December, 2015. On 30th April, 2019, the Agreement between Corporate Debtor and ONGC completed its term. On mutual understanding, ONGC continued to supply gas to the Corporate Debtor till 10th May, 2019 but now had stopped supply of gas under the erstwhile Agreement. The RP entered into fresh negotiations with ONGC but it was informed that RP would have to participate in fresh tender/bid for gas supply. Inter alia, it was mentioned in the Application to the Adjudicating Authority that the Agreement with GAIL was due to expire on 6th August, 2019 and GAIL had asked the Corporate Debtor to open/renew and submit Standby Irrevocable Resolving Letter of Credit with Face Value as mentioned. That, GAIL further clarified that aggregate liability of issuing bank under the Letter of Credit should also be for the amount as mentioned. The RP then referred to the 6th meeting of COC and the decision taken. RP stated that in spite of decision of COC, Financial Creditor – M/s. Edelweiss Asset Reconstruction Company Limited (the Appellant) and Axis Bank were reluctant to release Letter of Comfort to the lead bank – M/s. Punjab National Bank which was willing to disburse interim finance since the resolution has been passed with the approval of 75% voting share of COC.

It is now stated at the time of Appeal that Axis Bank has also issued Letter of Comfort and only the Appellant has not done so. In the MA filed before the Adjudicating Authority, the relief sought was:-

> "Issue a certification that approved Interim Finance and any costs related to Interim Finance,

since it forms part of the insolvency resolution process cost, has to be shared between all the members of the Committee of Creditors, in the proportion of their voting rights".

The Adjudicating Authority passed the following Order for reasons recorded and allowed the Application, which reads as under:-

"4. It is obvious that all the members of the CoC are bound by the resolution approved by the CoC with requisite majority as mentioned under the code. That being so, all the members of the CoC including M/s. Edelweiss Asset Reconstruction Company Limited and Axis Bank shall release the Letter of Comfort in favour of the lead bank M/s. Punjab National Bank within 24 hours from thereof or on or before by 5.00 p.m. on 22.08.2019. The reason for passing this order even without waiting for the appearance of the Financial Creditors, who are not inclined to release the Letter of Comfort is in the event if this interim finance is not released, the Corporate Debtor will not be in a position to participate in the Tender for fuel for the Power Plant for which the last date is 23.08.2019.

5. The Resolution Professional having further stated that, to participate in the Tender, the Corporate Debtor is required to pay Security Deposit of ₹16,61,77,689 to ONGC through the Bank Guarantee, we are constrained to pass this order on the mentioning made by the Resolution Professional. Another reason for passing this order on mentioning is, since the CoC has decided and approved the same for approving interim finance on proportionate basis, it has to be presumed that all the CoC members are aware of the Resolution passed by the CoC on 02.08.2019 for granting interim finance of ₹35,25,80,329.

6. In view of the same, this application is hereby **allowed** with a direction to the CoC members

including M/s. Edelweiss Asset Reconstruction Company Limited and Axis Bank to release the Letter of Comfort within 24 hours from hereof or else by 5.00 p.m. on or before 22.08.2019.

7. It is a going concern running with 100 employees, in case this interim finance has not been released, the Corporate Debtor will come to a grinding halt, therefore, this application is fit for the relief sought, therefore, we held that this application is fit for granting the reliefs as sought by the Resolution Professional."

3. Against developments as above, the Appellant – EARC has filed this Appeal and it is claimed that in view of amendment to Section 30(4) of IBC read with Section 52(8) of IBC, Insolvency Resolution Process costs which includes interim finance can only be recovered from secured creditors and not from unsecured creditors like Appellant. It is also claimed that the Appellant is unsecured creditor and commercially it is injudicious in precarious condition for the Appellant to incur additional liabilities in the form of interim finance/Letter of Comfort and the Appellant cannot be compelled to do so. According to the Appellant, the COC is free to raise CIRP cost/interim finance from external sources or willing Financial Creditors which may be repaid in priority as per Section 53 of IBC. The other ground raised is that the RP moved the Adjudicating Authority just two days before the last date of the gas supply tender and the Impugned Order was passed without giving opportunity of being heard to the Appellant and thereby principles of natural justice were violated. The RP in the COC meeting wanted that each of the COC member should provide Letter of Comfort to provide guarantee in proportion to their voting share

in the event of invocation of the Letter of Comfort to be furnished by Punjab National Bank. According to the Appellant, it declined to provide the Letter of Comfort because the Corporate Debtor was highly leveraged and there was no point in providing additional interim finance to the Corporate Debtor for procuring gas and overhauling. The Appellant claims that there would be little or no value maximization even if the interim finance could be provided. The Appellant claims that in view of the amendment in IBC, it is for the secured creditors who ought to contribute, if at all, for the provision of interim finance and there was little hope of realisation for the Appellant (unsecured creditor) through CIRP. According to the Appellant, only the consenting members of the COC ought to be directed to provide Letters of Comfort to raise interim finance.

4. The learned Senior Counsel for the Appellant has argued the Appeal referring to averments made in Appeal. According to him, the Appellant cannot be forced or compelled to pay. He referred to the various provisions under the IBC relating to raising of interim finance and with regard to keeping the Company as a going concern to submit that there was nothing on the basis of which dissenting unsecured Financial Creditor could be compelled to pay or part with money. At the time of hearing, we had made a query to the learned Senior Counsel as to what happens if all the Financial Creditors or majority of them were to say that they will not contribute towards CIRP costs and to keep the Company a going concern to maximise value. The learned Senior Counsel stated that the Company would go in liquidation but, however, added that the Appellant being

unsecured Financial Creditor could not be forced to infuse further capital. The learned Counsel referred to the COC Resolution and the objection which had been raised by the Appellant in the COC meeting. It is argued that Section 14(2) while dealing with Moratorium, provides that the supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interpreted during Moratorium. The learned Counsel then referred to Regulation 32 of "Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016" ('Regulations' – in short) to submit that essential supplies mean - (1) electricity, (2) water, (3) telecommunication services and (4) information technology services, to the extent they are not direct input to the output produced or supplied by the Corporate Debtor. According to the Counsel, the decision taken by the COC for entering into further arrangement with ONGC/GAIL for supply of gas was not essential service and the Appellant could not be forced to make provisions so that Company remains functional. Except for essential services, it is claimed that Appellant could not be compelled.

5. Against this, the learned Counsel for Resolution Professional referred to the resolution itself. It is stated that it was "non-fund based requirement towards GAIL and ONGC". According to him, there is nothing that the Appellant was being made to pay but only Letter of Comfort was to be executed. The learned Counsel referred to various provisions of the IBC to submit that it is the responsibility of the IRP/RP to keep the Corporate Debtor a going concern. When the RP has taken a decision that interim

finance needs to be raised so as to ensure that the Corporate Debtor remains a going concern so as to maximise the value of the Corporate Debtor, the Appellant should not have objected and cannot resist liability when it is part of the COC. The COC decision taken with requisite voting majority is binding on everybody including the Appellant. The Counsel referred to various provisions of IBC which permit raising of interim finance to keep the Corporate Debtor a going concern till resolution becomes possible. The primary object of IBC is to make efforts for resolution and not liquidation.

6. The learned Counsel for the Respondent further submitted that there was urgency for seeking orders of the Adjudicating Authority due to the approach of the Appellant which was not ready to release the Letter of Comfort as the default would have led to render the Corporate Debtor ineligible to participate in tender for power supply for which the last date was 23rd August, 2019. In any case, (it is argued by the Counsel for Respondent that) the Appellant has now been heard and according to the Counsel, even now no good reasons are shown as to how and why the Appellant would not be liable to abide by the COC decision.

7. We have heard Counsel for both sides. Under Section 5(13) of IBC "Insolvency Resolution Process Costs", inter alia, includes the amount of any interim finance and costs incurred in raising such finance. Section 5(15) says that "Interim Finance" means any financial debt raised by the Resolution Professional during the insolvency resolution process period.

Section 20 of IBC relates to "Management of operations of Corporate Debtor as going concern" and it is responsibility of the Interim Resolution Professional (and later the Resolution Professional) to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. The Sub-Section (2) of Section 20 gives authority to the IRP under Clause 'c' to raise interim finance provided that no security interest shall be created over any encumbered property of the Corporate Debtor without prior consent of the creditors whose debt is secured over such encumbered property. Clause (e) of Sub-Section (2) of Section 20 states that the IRP has the authority "to take all such actions as are necessary to keep the Corporate Debtor as a going concern". Section 25 of IBC which deals with "Duties of Resolution Professional" in Sub-Section (2)(c) provides that the Resolution Professional shall undertake to "raise interim finances subject to approval of the Committee of Creditors under Section 28." (Section 28(3) requires approval of vote of 66% of the voting shares.) Relevant part of Section 28(1) reads as follows:-

> 28. "(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:—
>
> (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;"

Thus IRP/RP and COC have responsibilities with regard to interim finance.

8. If a Resolution Plan comes to be considered and approved, Section 30(2)(a) shows that such Plan would require providing for the payment of the Insolvency Resolution Process costs in a manner specified by the Board "in priority" to the payment of other debts of the Corporate Debtor. Even if no Resolution Plan comes around to get approved and contingencies as provided in Section 33(1) arise and order of liquidation is to be passed, even then Section 53(1) makes it clear that in the waterfall mechanism, the first in order of priority is "the insolvency resolution process costs" and the liquidation costs paid in full.

9. Keeping in view all these provisions, it is surprising that the Appellant should be apprehensive regarding Letter of Comfort sought for by the Committee of Creditors.

10. The learned Counsel for the Appellant relied on the Judgement in the matter of **"ICICI Bank Ltd. Versus Sidco Leathers Ltd. and others"** - (2006) 10 SCC 452 and referred to para – 41 of that Judgement to submit that while enacting a statute, Parliament cannot be presumed to have taken away a right in property, and that right to property is a constitutional right. The Counsel then relied on para – 43 of the judgement which reads as follows:-

> "**43.** If Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge-holder,

> we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised."

If that Judgement in the matter of ICICI is perused, it appears to be in the context of winding up proceedings under the old Companies Act, 1956 and in the context of Section 529-A which dealt with overriding preferential payment in the winding up of a Company to workmen's dues and debts due to the secured creditors to the extent such debts ranked under Section 529(1)(c) pari passu with such dues. Hon'ble Supreme Court noted (in para – 38) that Section 529-A did not ex facie contain a position (on the aspect of priority) amongst the secured creditors. Provisions of Transfer of Property Act and terms of Contract were considered and the observations as above were made. Relying on the above Judgement of the Hon'ble Supreme Court, the learned Counsel for the Appellant is submitting that the Appellant cannot be forced to contribute or incur further liability under CIRP as it would amount to forcing the Appellant to contribute. We are not convinced that the Judgement helps the Appellant in the facts and law applicable in present matter. When COC in a meeting of the Financial Creditors by requisite majority takes a decision with regard to CIRP costs which includes execution of responsibility put by law on the IRP/RP to keep the Company a going concern, the same cannot be treated as forcing the Appellant to part with property or forcing to incur liability. Appellant has itself sought to be part of COC and joined it. Nobody is

forcing Appellant to file claim and/or to be part of COC. If the Appellant is part of COC and wants to remain part of COC, the Appellant cannot expect to only claim benefits from the process and claim that it would not take any of the liabilities and responsibilities which in the present matter, are apparently based on legal provisions for the duties to be performed by IRP/RP/COC. In COC meeting the Appellant has right of dissent but if decision is still taken by majority provided under the statute, all of COC members are duty bound to abide by the decision.

11. The argument of the RP shows that the Corporate Debtor is engaged in the business of generation and sale of electricity from its 58MW Gas based Combined Cycle Power Plant situated in Tamil Nadu. The Corporate Debtor had a turnover of Rs.200 Crores approximately in Financial Year 2018 – 2019 and was generating cash surplus of Rs.5 Crores every month. RP has argued that the Corporate Debtor was regularly paying the salaries and meeting other expenses from the revenue generated. The RP referred to the Power Purchase Agreement with consumers pursuant to which Corporate Debtor had been supplying electricity to the consumers and that to generate electricity, the Corporate Debtor requires gas. According to the RP, this was being procured mainly from ONGC and balance quantity was being procured from GAIL (India) Ltd. in terms of respective Gas Supply Agreements. On 30th April, 2019, the Gas Supply Agreement executed between Corporate Debtor and ONGC completed its entire term but on mutual understanding, ONGC continued to supply gas to the Corporate Debtor until 10th May, 2019. However, due to ongoing disputes between

Corporate Debtor and ONGC with respect to applicability of GDU charges, ONGC stopped supply of gas on 10th May, 2019.

This, inter alia, explains as to why the RP moved the COC for necessary support to keep the Company a going concern. If the Corporate Debtor has been a going concern generating cash surplus of Rs.5 Crores every month, it would be unwise to let it come to a grinding halt and to render it no more a going concern, which would be harmful to the object of maximisation of value. Value of a going concern is much more than a non-functional plant or concern. The adamant stand of the Appellant in the facts of the matter and keeping in view legal provisions, cannot be appreciated.

12. The learned counsel for the Appellant has argued that the Appellant has 25% voting share in the COC and it is unsecured Financial Creditor. It is stated that the Appellant dissented in the meeting and it is commercial wisdom of the Appellant that Corporate Debtor being highly leveraged, it would provide negligible value maximisation and loading of any additional debt on the Corporate Debtor could be detrimental to the value of its assets. The learned Senior Counsel referred to para – 39 of the Judgement in the matter of **"K. Sashidhar v. Indian Overseas Bank and Others"** – 2019 SCC OnLine SC 257 to state that the commercial wisdom of the individual Financial Creditor is non-justiciable. It would be appropriate to reproduce the portion from Judgement of the Hon'ble Supreme Court from para – 39 which reads as under:-

> "There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable."

Going through the observations of the Hon'ble Supreme Court and considering present facts what appears to us is that in the meeting of COC, the Appellant may have taken a decision to dissent and that dissent even if treated as a commercial wisdom of the dissenting Financial Creditor, cannot be questioned before Adjudicating Authority so as to see whether or not the same was justified. Commercial wisdom of individual Financial Creditor may not be justiciable. Same is the case with collective decision. However, under the law, if individual creditor's decision has not been accepted by COC in its collective decision, what is enforceable is only the collective decision. When the law provides that a decision taken by majority would be binding, the dissenting Financial Creditor, even with the dissent, would remain bound by the majority decision taken as per the requisite voting share.

The Impugned Order shows the reasons why without waiting for Appellant the Order was required to be passed. It was in interest of

resolution of Corporate Debtor. Even now, Appellant has not made out good case that if it was heard, Impugned Order could have been different. We find principles of natural justice are satisfied. We are not convinced with the argument that amended Sub-Section (4) of Section 30 requires only Secured Financial Creditors to contribute towards interim finance and not the Unsecured Financial Creditors. No such interpretation can be drawn. We will not interfere in the collective decision of COC in this regard.

13. The dissenting Financial Creditor in COC cannot be allowed to scuttle CIRP process otherwise the provision permitting COC to take decisions with regard to subjects stated in Section 28(1) by given majority of 66% under Section 28(3) would be rendered nugatory.

14. For reasons mentioned above, we do not find any substance in this Appeal. The Appeal is dismissed. No Orders as to costs.

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

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md