NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 553 of 2019

IN THE MATTER OF:

IDBI BANK
Through its authorized signatory
IDBI Tower, WTC Complex,
Cuffe Parade, Mumbai – 400 005
cr.anil@idbi.co.in **...Appellant**

Versus

1. MS. MAMTA BINANI

Resolution Professional,
Deccan Chronicle Holdings Ltd.
2A, Ganesh Chandra Avenue, Commerce House,
4th Floor, Room No. 6
Kolkaa – 700013
deccanip@gmail.com
mamtabinani@gmail.com **...Respondent No. 1**

2. VISION INDIA FUND-SREI MULTIPLE

ASSET INVESTMENT TRUST

Vishwakara, 86C, Topsia Road (South)
Kolkata 700046
avash.jain@srei.com **... Respondent No. 2**

3. COMMITTEE OF CREDITORS

Through Canara Bank
3-5-879, Old MLA Quarters Road,

Narayanguda Andhra Pradesh,
Hyderabad Telangana 500029
shivaramam@canarabank.co **... Respondent No. 3**

Present:

For Appellant: Mr. Anugrah Robin Frey, Advocate

For Respondent: Mr. Abhijeet Sinha, Mr. Siddharth Sharma and Mr. Arjun Asthana, Mr. Saikat Sarkar, Ms. Mamta Binani (In person), Advocates
Mr. Rishav Banerjee, Mr. Saptarshi Mandal, Advocates for Respondent No. 2.
Mr. PBA Srinivasan, Mr. Parth D Tandon, Miss P.S. Chandralekha, Miss. Sneha R Iyer, Advocates for Respondent No. 3.

J U D G M E N T

Jarat Kumar Jain: J.

The Ld. Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) vide order dated 09.05.2019 dismissed the Application I.A. No. 24 of 2019 filed by IDBI Bank and I.A. No. 121 of 2019 filed by the Indian Overseas Bank filed in CP (IB) No. 41/07/HDB/2017 against that order the IDBI Bank has filed the Appeal.

2. The Applications are filed by IDBI Bank and Indian Overseas Bank who are members of Committee of Creditors (CoC) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) for seeking main reliefs:-

> "(a) Declare that the Resolution Professional was not eligible to place the Resolution Plan before the CoC for voting and that CoC

is not eligible to vote on such plan in the absence of ascertaining compliance with the mandatory provisions of the Code.

(b) Declare that the Resolution Plan dated 11.12.2018 is discriminatory and contrary to the Code and applicable law."

3. These Applications preferred challenging approval of Resolution Plan by the CoC. As common question of law are involved and are based on the same set-of facts, there were heard together and disposed of by the impugned order by the Adjudicating Authority.

4. The brief and relevant facts made in I.A. No. 24 of 2019. The Adjudicating Authority admitted the Application filed by Canara Bank under Section 7 of the IBC, initiating the Corporate Insolvency Resolution Process (CIRP) in respect of Deccan Chronicle Holdings Limited (Corporate Debtor), declared moratorium under Section 14 of the IBC and appointed Mr. Koteshwara Rao Karuchola as Interim Resolution Professional (IRP). Subsequently, Mrs. Mamta Binani was appointed as Resolution Professional (RP) by the CoC.

5. In the 12th CoC meeting held on 14.06.2018 the Resolution Applicant i.e. Vision India Fund-SREI Multiple Asset Investment Trust was declared as the highest bidder. The Applicant (Appellant herein) had objected to the resolution plan inter alia on the grounds that the settlement offered to the Applicant against its claims was unacceptable being less than its pro-rata entitlement and that the Applicant should be treated at par with other Financial Creditors. The Applicant objected that the resolution plan does not provide the basis of inter-se allocation between the category A lenders and

category B lenders. The Applicant also objected that the waterfall mechanism of liquidation is irrelevant at this stage and cannot be a basis for classifying the Financial Creditors. The said objections raised by the Applicant in the 12th CoC meeting had not been recorded in the minutes of the meeting. The Applicant objected in 13th CoC meeting and sought amendment of the minutes. The objections were later added to the relevant minutes by way of an amendment to the minutes in the 13th CoC meeting held on 22.06.2018.

6. First resolution plan submitted by the Resolution Applicant was rejected by the CoC, thereafter, the Resolution Applicant by the amendment made in its earlier resolution plan on 10.07.2018, modified the settlement offered to the selected Financial Creditors against their respective admitted claims and pro-rata entitlement.

7. The resolution plan of the Resolution Applicant dated 12.05.2018 clearly shows that the Applicant was offered an upfront cash settlement of Rs. 50 Crores, however, the same was thereafter, reduced to Rs. 13.4 Crores in the subsequent resolution plan dated 11.12.2018. The issue of resolution plan being discriminatory inter-se Financial Creditors and being contrary to the provision of the Code was again raised by the Applicant vide its letter dated 27.11.2018 and 06.12.2018 addressed to the RP.

8. Without ascertaining compliances with the mandatory provisions of the Code, and without even attempting to discharge their statutory obligations under the Code, RP and other members of CoC proceeded to illegally vote on the resolution plan.

9. In the resolution plan the Financial Creditors are classified as FC category A and FC category B based on the Security held by the Creditors. The resolution plan described FC category B as those Financial Creditors who have exclusive security interest on the assets of the Corporate Debtor which are not critical to its operations as a going concern. The resolution plan envisages that these assets will be transferred to a newly incorporated wholly owned subsidiary of the Corporate Debtor which will later handed over the possession and control of the relevant assets to these FC category B lenders, a power of attorney authorising them to deal with their respective assets on which they have exclusive charge in such a manner as they deemed fit and appropriate the proceeds thereof in entirety.

10. The said classification is based on the criticality of the security provided by the Corporate Debtor. The Security on assets considered non-critical being classified as FC category B. It is further averred that the Code does not provide for any classification or priority or differential treatment among secured Financial Creditors and unsecured Financial Creditors at the stage of the CIRP. The total amount of claims admitted by the RP for all the Financial Creditors is Rs. 8,180.65 Crores. The Applicant has a share of 6.71% of the total admitted claims of all the Financial Creditors.

11. In the resolution plan, the upfront cash amount offered to the Financial Creditors is Rs. 350.00 Crores. Whereas the upfront amount offered to the Applicant is Rs. 13,49,75,670 which comprises merely 4.11 % of the total upfront cash resolution amount offered by the Resolution Applicant. As a corollary to certain Financial Creditors such as the Applicant receiving an

amount lower than their pro-rata entitlement in the upfront cash resolution amount, certain Financial Creditors under the Resolution Plan have been provided with disproportionate higher amounts against their admitted pro-rata entitlement.

12. The Application is contested by the Resolution Applicant, members of the CoC represented by Canara Bank and the RP.

13. After hearing Ld. Counsels for the parties. Ld. Adjudicating Authority held that the grouping of Financial Creditors does not amount to any discrimination. The creditors who are having valuable assets are to be given higher percentage from out of the Resolution Fund than those who are holding less value of the assets. Though, Canara Bank was allotted higher amount then the applicant, it cannot be said there is discrimination in the allocation of share from the Resolution Fund and the same is done basing on the value of security. With the aforesaid findings, Ld. Adjudicating Authority has dismissed the Applications.

14. Being aggrieved with the order, the Applicant (IDBI) has filed this Appeal.

Submissions of Appellant: -

15. Ld. Counsel for the Appellant submitted that the Corporate Debtor and its promoters created exclusive security over the trademarks in favour of the Appellant by way of deed of hypothecation. Clause 2.8 of the resolution plan provides that the security interest created by third party (including ex-promoter) shall not extinguish under the plan. However, clause 4.3 seeks to

extinguish the security created over the trademark by the Corporate Debtor and the ex-promoters in favour of the Appellant. A resolution plan can only contain provisions in relation to the assets and liabilities of the Corporate Debtor and not other third persons. Therefore, the clause 4.3 is illegal and needs to be severed.

16. It is submitted that without prejudice, in so far the plan seeks to extinguish the rights of Appellant over the security created by the ex-promoter over the trademark in favour of the Appellant, while not interfering with the security created by third parties over the benefit of other Financial Creditors, is evidently discriminatory inter se the Financial Creditors. The Respondents in their reply have failed to rebut this ground.

17. It is also submitted that plan has arbitrarily categorise Financial Creditors into category A and B. The plan classifies certain category A Financial Creditors and also being category B, being those who have charged on assets which are admittedly considered as a not being critical for running the Corporate Debtor as a going concern. Contrary to all logic and reasons, in addition to what they are entitled to as Financial Creditors category A i.e. participation in cash payment to be made to the Financial Creditors in the amount prescribed and the entitlement to receive certain equity as prescribed in the plan, all such Financial Creditors who are category B and have security on admittedly non-critical assets have been provided with benefit over and above that proposed for category A. In addition to their entitlement as category A and B Financial Creditors also get to retain the benefits of assets exclusively secured in their favour.

18. Ld. Counsel for the Appellant also submitted that Canara Bank has admitted in its reply dated 18.10.2019 that the segregation of the Financial Creditor is made on the basis of security held by them on core-assets and non-core assets, whereas the RP in its reply dated 25.10.2019 has not addressed the core issue, whether the plan is discriminatory or not? Whereas he stated that the distribution of the monies under the plan is commercial aspect of the plan and therefore, it is unable to comment on the same. Thus, the Respondents have failed to justify the basis on which the Financial Creditors mentioned in category B had been given additional benefits. Even though they have admittedly security over inferior and non-core assets. It is settled law that the plan is required to be non-discriminatory between similar situated creditors, therefore, plan cannot give better treatment to Financial Creditors who have inferior security, since, the plan does not comply with this requirements of law is not in a compliance with Section 30 (2) (e) of the IBC.

19. The Resolution Applicant has wrongly submitted in its reply dated 04.11.2019 that the Appellant has been put under category A, since it does not have exclusive security on the assets of the Corporate Debtor. The averment is in incorrect on two counts firstly the Appellant hold exclusive security over the trademark and secondly it has been admitted by Canara Bank that the basis of classification of Financial Creditors is the criticality of security held by the Financial Creditors and not whether the Financial Creditors have exclusive security or not. Further, in so far as the Resolution Applicant has submitted that it had to come up with its own mechanism of distribution of monies in absence of any suggestions made by the CoC. The

same cannot be justification for an arbitrary and discriminatory, distribution of the resolution amounts.

20. The Hon'ble Supreme Court in the case of Committee of Creditors, ESSAR Steel India Limited Vs. Satish Kumar Gupta & Ors. 2019 SCC Online SC 1478 held that "equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational. (Para 57) Reliance is further placed upon Swiss Ribbons Pvt. Ltd. Vs. Union of India 2019 SCC Online SC 73 (Para 45). Binani Industries Ltd. Vs. Bank of Baroda and Ors. CA (AT) (Ins) No. 82 of 2018 decided by this Appellate Tribunal and affirmed by the Hon'ble Supreme Court vide its order dated 19.11.2018 in Rajputana Properties Pvt. Ltd. Vs. Ultratech Cement &Ors. Civil Appeal No. 10998 of 2018. Therefore, while there can be classification of Financial Creditors between different classes-there has to be intelligible differentia for such classification and then treatment of such creditor has to be equitable. The categorization sought to have been done by the Resolution Applicant does not satisfy the requirement of intelligible differentia and therefore, the Financial Creditor category B who are granting to retain the security created in their favour should receive less in distribution in category B to the extent value of securities they are entitled to retain.

21. Ld. Counsel for the further submitted that without prejudice to the aforesaid submissions the resolution amount offered to the Appellant under the plan against its claims is less than its pro-rate entitlement inter se the FC category A.

22. As per the table, Canara Bank having 10.11% pro rata share in the total admitted claims whereas offered 34.96% pro-rata share in total resolution amount. On the other hand, the Appellant which has 6.71% of the admitted of FCs is being paid only 3.92% of the total resolution amounts. Canara Bank has stated that the amounts have been distributed in the plan, not on pro rata basis but on priority of charge. However, the plan while distributing the amounts inter-se category A FCs is entirely silent on the purported justification offered by Canara Bank. Therefore, the Resolution Applicant should settle the claims of the Appellant in a manner pro rata to its admitted claims, without any discrimination inter se the FCs forming part of the same category. Even otherwise, if value of charge had been the basis of distribution of monies, the Appellant ought to have received a higher amount since it holds exclusive security over the trademarks.

23. The Resolution Applicant has attempted to justify the discrimination inter se the FCs by drawing vague references to the memorandum of understanding dated 30.05.2014. At the outset, it is stated that the Resolution Applicant has made bald averments with respect to the MOU, without interpreting specific provisions of the same. The intent of the MOU is to ensure that there is coordinated enforcement of respective lender's rights. Such private understanding amongst the lenders was necessitated due to the cross injunction taken by the lenders before the DRT for the sale of the assets of the Corporate Debtor. It is evident from a perusal of the MOU that it was the Appellant which had to effect the sale of the trademark, which evidences that the trademarks were solely charged with the Appellant. The MOU

stipulates that "the parties hereby agree for sale of trademarks namely Deccan Chronicle", "Andhra Bhoomi", "the Asian Age" and "Financial Chronicle" without recourse to the legal process i.e. either a fresh tendering process in exercise of the powers conferred on IDBI bank under a power of attorney executed in favour or through such other process/procedure as may be mutually decided by the parties." In para 5 (iii) of the MOU states that "nothing contained in this MOU is intended or meant to alter, modify and impair an of the right, claims, interests of the parties against the Company or guarantors under the Financial Documents or to that extent between the creditors inter se" therefore, the MOU does not change inter-se priorities of the lender and does not in any manner make any security of lenders better or worse. It is thus, denied that the Appellant has pari passu charge over the trademarks. It is denied that the Appellant suppressed the existence of MOU in the Appeal since the MOU has been specifically dealt with in the Appeal.

24. It is submitted that the impugned order has been based proceeding on incorrect presumption that "Financial Creditor holding security interest over the assets of Corporate Debtor were given higher amount from out of the resolution fund than those who are not holding the security interest or holding security interest which is lower in value, when in fact, a plain reading of the plan reflect a position to the contrary.

25. The aforesaid reasoning applied to purportedly justify the two-fold discrimination sought to be done under the plan. In so far as such findings of the impugned order seek to address the issue of discrimination between category A FCs and category B FCs, it is stated that it is not even the case of

the Respondents that category B FCs have superior security. In fact, category B FCs have security on admittedly non-critical asses. In so far as such findings of the impugned order seek to address discrimination inter se the category A FCs, it is stated that the Adjudicating Authority has proceeded on the basis that the security interest held by the Appellant is of lower value, without making a determination in that regard. The impugned order without interpreting or dealing with the MOU dated 30.05.2014 referred to by the Resolution Applicant, proceeds on the presumption that the purported reasoning applied by the Resolution Applicant is correct.

26. The Adjudicating Authority ought to have considered that the conclusion arrived in the impugned order that "the creditors who are having valuable assets are to be given higher percentage" if applied correctly to the facts of the present matter would have resulted in an order in favour of the Appellant. The security interest held by the Appellant is much superior than the security interest held by category B FCs. The Appellant held exclusive security over the trademarks, jointly owned by the Corporate Debtor and two ex-promoters which are the brand names used by the Corporate Debtor and are admittedly valuable and a critical asset of the Corporate Debtor. therefore, it is submitted that the Ld. Adjudicating Authority has erred in dismissing the Application.

Submissions of Respondent No. 1

27. Ld. Counsel for the Respondent No. 1(Erstwhile RP now Chairperson of Monitoring Committee of the Corporate Debtor) submitted that the Appeal has been filed by dissenting Financial Creditor challenging the order dated

09.05.2019. After passing of the impugned order, Ld. Adjudicating Authority on 03.06.2019 approved the resolution plan, no objection has been filed either before the Ld. Adjudicating Authority or before this Appellant Tribunal in regard to the approval of resolution plan. The Appellant without challenging the approved resolution plan yet purports to question legality and validity of the approved resolution plan indirectly. An indirect challenge of the approved resolution plan is not permissible under the IBC. This Appellate Tribunal has clarified in its order dated 01.06.2021 that there is no stay as on date of the approved resolution plan. Therefore, the approved resolution plan is binding on all stakeholders of the Corporate Debtor including the Appellant. Moreover, the statutory limitation under the IBC has long expired and accordingly at a belated indirect attempt to challenge the approved resolution plan cannot be permitted by this Appellate Tribunal.

28. The Counsel for the Appellant has urged that the Appellant is a secured creditor of the Corporate Debtor by placing reliance on a deed of hypothecation dated 03.09.2012 in regard to trademark. However, in the Application filed before the Ld. Adjudicating Authority and in the Appeal there is no averment with regard to trademark issue. The trademark issue raised by the Appellant during the course of the argument before this Appellate Tribunal. It is well settled principle of law that there can be no case beyond pleading which has been reiterated in catena of Judgments, for this preposition of law he cited the Judgments of Hon'ble Supreme Court in the case of Trojan & Co. Ltd. Vs. N. Nagappa Chettiar, 1953 SC 235 (Para 32), Bachhaj Nahar Vs. Nilima Mandal & Ors. (2008) 17 SCC 491 (Para 17), Kalyan

Singh Chouhan Vs. C.P. Joshi (2011) SC 706 (Para 19) and Arkala Narasa Reddy Vs. Venkataram Reddy Reddygari & Anr. (2014) 5 SCC 312 (Para 15).

29. Ld. Counsel for the Respondent No. 1 further submitted that the Appellant has suppressed the execution of MOU dated 30.05.2014 between Canara Bank, Axis Bank, ICICI Bank, IDFC Bank, Kotak Mahindra Bank and the Appellant Bank. On perusal of the MOU it emerges that the sale of trademark assets were decided to be jointly proceeded with and accordingly it was decided that the sale proceeds so realised shall be deposited into escrow account. The amount realised from the sale of trademark assets were then shared amongst all the aforementioned Financial Creditors based on a mutually agreed sharing ratio.

30. Ld. Counsel for the Respondent No. 1 also submitted that the resolution plan of SRA was approved by 81.39% majority of CoC. It is well settled principle of law that neither the Adjudicating Authority nor the Appellate Authority can enter into the commercial wisdom underlying the approval granted by the CoC to the resolution plan. Commercial wisdom of the CoC in its collegial capacity is hence, not justiciable. For this purpose, he cited the Judgment of Hon'ble Supreme Court in the case of Pratap Technocrat (P) Ltd. Vs. Monitoring Committee of Reliance Infratel Limited & Anr. 2021 SCC Online SC 569. Similar approach has been adopted by the Hon'ble Supreme Court in the matters relating to approval of resolution plan in the matter of Japypee Kensington Boulevard Apartments Welfare Association &Ors. VS. NBCC (India) Ltd. & Ors. 2021 SCC Online SC 253 (Para 30)

31. Ld. Counsel for the Respondent No. 1 submitted that the Appellant has contended that it is entitled to a higher value based on an alleged exclusive security created in its favour by the Corporate Debtor. However, it has been categorically held by the Hon'ble Supreme Court that the amount to be paid to different classes or sub-classes of the creditors in accordance with the Code and the related Regulations, is essentially the commercial wisdom of the CoC and a dissenting secured creditor cannot suggest a higher amount to be paid to it with reference to the value of security interest. For this purpose, reference may be made to India Resergence Arc Pvt. Vs. M/s Amit Metaliks Limited, 2021 SCC Online SC 409.

32. It is also submitted that on one hand the Appellant has contended that the resolution plan is discriminatory and therefore illegal. While on the other hand the Appellants indicates that upon payment of a higher amount under the resolution plan, the is so called illegality can be removed.

33. It is submitted that one of the contentions raised by the Appellant is that RP has not taken proper legal advice and certified the resolution plan submitted by the SRA. The email dated 12.12.2018 issued by the RP falsified the said contention as the resolution plan has legal clearance from AZB Partners (Law Firm Advising the CoC). It is also submitted that in the 20th CoC meeting several discussions were held in relation to the matters of distribution or categorization of assets of the Corporate Debtor into core-assets and non-core assets. Therefore, it is requested that the Appeal deserves to be dismissed.

Submissions of Respondent No. 2

34. Ld. Counsel for the Respondent No. 2 submitted that after passing of the impugned order, Ld. Adjudicating Authority vide order dated 03.06.2019 approved the resolution plan and the Appellant has not challenged that order. Hence, that order has attained finality and is binding on all stakeholders including the IDBI Bank.

35. It is further submitted that on account of complexity incurred over the security interest available with the various Financial Creditors of the Corporate Debtor distribution of the resolution fund proposed in the resolution plan submitted by the Resolution Applicant was very challenging task and even the CoC was unable to form any consensus on distribution of the resolution fund so proposed in the resolution plan. The Resolution plan submitted by the Respondent No. 2, the majority of the CoC of the Corporate Debtor found the resolution plan to be absolutely fair, just, feasible and viable and the CoC did not find the resolution plan to be discriminatory and approved the resolution plan by voting share of 81.39% of vote share.

36. The Resolution Applicant to the best of its Judgment/Assessment and on the basis of information available with them in the Information Memorandum and virtual data room, proposed an upfront resolution fund of Rs. 408.06 Crores which was the total cash component to be distributed in terms of the Resolution plan. The Resolution Applicant had carried out valuation of individual assets of the Corporate Debtor and the enterprise valuation of the Corporate Debtor. The Resolution Applicant then identify the core and non-core assets of the Corporate Debtor in order to come up with a viable resolution plan. The Core assets constituted such assets which were

pursued by the Resolution Applicant as essential and /or integral for running of the Corporate Debtor as going concern and for running day to day activities of the Corporate Debtor. Non-core assets were the assets which in the opinion of Resolution Applicant were not required for running and/or managing the day to day activities and of affairs of the Corporate Debtor. Accordingly, the Resolution Applicant identifies those Financial Creditors having exclusive charge on the non-core assets and assigned them the status of FC category B. It has been proposed in the resolution plan that FC category B Financial Creditors shall get ownership interest on their respective non-core assets in terms of the resolution plan. All the Financial Creditors of the Corporate Debtor were assigned the status of FC category A, it has been proposed in the resolution plan that FC category A Financial Creditors shall get cash component of Rs. 350 Crores out of the total resolution fund. For the purpose of equitable distribution of the funds among the Financial Creditors. A. Financial Creditors, the Resolution Application identify three kinds of Financial Creditors under FC category A on the basis of charge and/or security interest. Which the respective Financial Creditors were holding on the core-assets of the Corporate Debtor. The FC category A Financial Creditors were accordingly paid cash out of Rs. 350 Crores basis the value of the charge and /or security interest which the respective Financial Creditors were holding on that core-assets of the Corporate Debtor.

37. It is also submitted that the CoC failed to decide the distribution mythology even till 20th CoC meeting and accordingly the CoC left it to the discretion of the resolution plan but distribute the resolution fund in the

manner which is reasonable according to Resolution Applicant. The CoC could not arrive at a consensus as record to the distribution of the resolution fund. In such circumstances, the Resolution Applicant was called upon to distribute the resolution fund as per its own assessment. The Resolution Applicant will like to emphasis on the fact that FC category A Financial Creditors and FC category B Financial Creditors are not categories receiving differential treatment. The Resolution Applicant reiterates that the arrangement between the Financial Creditors and the Corporate Debtor was of multiple banking and non-consortium lending.

38. The IDBI Bank is not similarly placed as other Financial Creditors of the Corporate Debtor. As IDBI Bank does not have exclusive charge over any of the assets of the Corporate Debtor as would be evident from the MOU dated 30.05.2014 that IDBI Bank agreed to share the proceeds from the sale of trademarks with five other lenders including the Kotak Mahindra Bank, Canara Bank, Axis Bank, ICICI Bank and IDFC Bank which itself shows that IDBI does not have exclusive charge over the trademarks of the Corporate Debtor. Thus, the IDBI bank falls under the second kind of Financial Creditor who has pari passu and / or over lapping and /or distributed charge and / or security interest over the assets of the Corporate Debtor. If the IDBI Bank would have had exclusive charge over the trademarks of the Corporate Debtor, the IDBI would not have agreed to share proceeds from the sale of the trademarks with five other lenders.

39. The CoC in the minutes of 12th CoC meeting of the Corporate Debtor has themselves stated that the IDBI Bank is not the only charge holder of the

trademarks. The charge of trademarks will be shared among the lenders. The IDBI Bank has never challenged this instant recording in the 12th CoC meeting, thus, the IDBI is stopped from contending that IDBI Bank is the sole charge holder of the trademarks. Thus, IDBI is not similarly placed as Canara Bank or any other Financial Creditor who has exclusive charge over the core-assets of the Corporate Debtor. Since, the IDBI Bank is not similarly placed with the other Financial Creditors, the IDBI Bank cannot contain that the resolution plan has discriminated between the different sets of Financial Creditors just because certain Financial Creditors have got some more money than IDBI Bank under the Resolution Plan.

40. Admittedly, the value of the securities held by the Canara Bank is way higher than the value of securities held by IDBI Bank. It is not the IDBI Bank's case that the value of securities held by the IDBI Bank is higher than that of the value of the securities held by Canara Bank or some other Financial Creditors like U.V Asset Reconstruction Company Ltd. Thus, IDBI Bank cannot contain that IDBI is similarly placed alongwith other Financial Creditors and thereby claim that the resolution plan is discriminatory. No discrimination has been made by the Resolution Applicant in the distribution of resolution fund among the Financial Creditors.

41. It is also submitted that the table prepared by the IDBI Bank is denied and disputed since such table has been unilaterally prepared by IDBI Bank without any basis whatsoever and such table is not made in accordance with the facts and circumstances in respect of the Corporate Debtor.

42. It is also submitted that the Appeal is not maintainable in the light of the Judgment of Hon'ble Supreme Court in the case of K Sashidhar Vs. Indian Overseas Bank & Ors. wherein Paragraph 3 Hon'ble Supreme Court has held that the legislature has not endowed the adjudicating authority with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting Financial Creditors. The Hon'ble Supreme Court has further held that 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. This is made nonjusticiable.

43. Ld. Counsel for the Respondent No. 2 also cited the Judgment of Hon'ble Supreme Court in the case of CoC Essar Steel India Ltd. through Authorised Signatory Vs. Satish Kumar Gupta Civil Appeal No. 8766-67 of 2019. The Hon'ble Supreme Court has observed that the NCT and NCLAT cannot interfere with the distribution made by the CoC which is based on commercial wisdom and is not covered by any ground under sub-section 3 of Section 61 of the IBC and also cited the Para 46 of the CoC Essar Steel India Ltd. Judgment.

44. Ld. Counsel for the Respondent No. 2 also submitted that the amended Regulation 38 does not lead to the conclusion that FCs and OCs or secured and unsecured creditors must be paid the same amounts, percentage wise under the resolution plan it can pass master, fair and equitable dealing of OCs right under the Regulation 38 involves the resolution plan stating as to

how it was dealt with the interest of OCs, which is not the same thing as saying that they must be paid the same amount of other debt proportionately.

45. Lastly, it is submitted that the Hon'ble Supreme Court in the case of CoC Essar Steel India Ltd. through Authorised Signatory Judgment held that "ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution of assets. It is therefore not possible that the Adjudicating Authority and consequently the NCLAT would be vested with the discretion i.e. vested in the CoC. The IDBI Bank is a dissenting Financial Creditor and hence, simply challenged the plan being aggrieved by the facts that the majority of the CoC has approved the resolution plan of the Resolution Applicant by a vote of 81.39%, in the facts and circumstances of the aforesaid, the Resolution Applicant prays that the resolution plan is in conformity with the applicable laws of the country as well as the resolution plan is reasonable feasible and viable and the resolution plan does not violate the conditions prescribed under Section 30(2) of IBC and / or is within the ambit of IBC, 2016. Therefore, it is prayed that the Appeal be dismissed.

Submissions of Respondent No. 3

46. Ld. Counsel for the Respondent No. 3 submitted that the Adjudicating Authority vide its order dated 03.06.2019 in I.A. No. 66 of 2019 had approved the resolution plan which was subsequent to filing of the present Appeal. The said order dated 03.06.2019 was not impugned in this proceedings and was never challenged by the Appellant and hence, the same is attained finality. Thus, the instant Appeal is not maintainable in view of the provisions of IBC

since allowing the said Appeal shall defeat the provisions of Section 31 of the IBC which makes the resolution plan binding on all stakeholders. It is settled law of the land that commercial wisdom of the CoC shall prevail as was held by the Hon'ble Supreme Court in the matter of K. Shashidhar Vs. Indian Overseas Bank (2019) 12 SCC 150.

47. The Appellant did not place any objections before the Adjudicating Authority while considering the Application for approval of resolution plan. Therefore, the present Appeal is rendered infructuous as the resolution plan has already been approved vide order dated 03.06.2019 and has not been challenged by the Appellant for the reasons best known to the Appellant.

48. It is also submitted that the Respondent No. 3 cannot represent the CoC and is merely one of the Financial Creditor. The Appellant has failed to implead all the other Financial Creditors, who were part of the CoC or had duly participated in the CoC, as parties of the instant Appeal.

49. It is also submitted that the relief sought in the prayer of the Appeal that CoC has not eligible to vote on resolution plan in the absence of ascertaining compliances, is totally misleading since the resolution plan is compliant with all the compliances mandated the IBC. Further as per the minutes of 20th CoC meeting the resolution plan had already been voted upon previously and there has been no fundamental change since then as stated by the CoC's counsel. Prayer clause of the Appellant are contradictory in nature as in one aspect, the Appellant has sought relief of setting aside the order dated 09.05.2019. On the other hand, the Appellant sought relief pertaining to modification in distribution of resolution fund/proceeds and the

part of resolution plan pertaining to enforcement of security to be severed from the rest of the resolution plan. The contradictory nature of relief sought by the Appellant in the Appeal whereby the Appellant has sought alternate prayer for modification of resolution plan while at the same time seeking declaration that the resolution plan is illegal, clearly shows the Appellant misconception and malafide in preferring the Appeal. Thereby it is liable for dismissal.

50. Ld. Counsel for the Respondent No. 3 further submitted that as per the Memorandum of Understanding (MOU) dated 30.05.2014 which was executed between 6 Financial Creditors (who are the members of CoC) including the Respondent No. 3 and the Appellant. It is further submitted that, a pari passu charge was created upon the trademarks (As the Corporate Debtor had availed lending under in multiplicity banking facility as opposed to a consortium lending) however, the claim of the Appellant that the Appellant has a exclusive security over the trademarks is misleading and the Appellant has conceded material details pertaining to the MOU of the Appeal, also the contentions of the Appellant in the ground to their Appeal that they are similarly situated Financial Creditors is wrong. It is pertinent to mention here that all the five CoC members (Canara Bank, Axis Bank, ICICI Bank, IDFC Bank and Kotak Mahindra Bank) out of six members, who have instituted MOU dated 30.05.2014 voted in favour of the resolution plan.

51. It was in the 20th meeting when the resolution plan was considered for voting that the Appellant raised an objection pertaining to distribution of the funds/proceeds under the resolution plan despite effect with the same was

discussed at length in many meetings prior to that. However, the Appellant failed to propose any methodology for distribution of funds and as such the approval of resolution plan is a commercial decision of the CoC, the Appellant does not have any locus standi to interfere with the commercial wisdom of the CoC. For the reasons, it is prayed that the Appeal be dismissed with costs.

52. After hearing Ld. Counsels for the parties, we have gone through the record and written submissions filed by the parties.

53. The following issues arose for our consideration:-

(i) Whether the Appellant has an exclusive security/charge over the trademarks?

(ii) Whether the criteria for FCs category A and B is based on sound principle?

(iii) Whether the Resolution Plan is discriminatory and in violation of the IBC?

(iv)Whether once the Resolution Plan is approved by the CoC, it cannot be questioned even if it discriminates between two sets of creditors who are similarly situated?

(v) Whether the Appellant was required to challenge the subsequent order dated 03.06.2019 whereby the Resolution Plan has been approved by the Adjudicating Authority?

54. It is an admitted fact that the distribution of resolution fund between the creditors was very challenging task and even CoC was unable to form any consensus on distribution of the resolution fund. Therefore, the Resolution Applicant was directed to distribute the resolution fund among the creditors

of the Corporate Debtor. According to the Resolution Applicant, it had carried out valuation of individual assets of the Corporate Debtor and the enterprise valuation of the Corporate Debtor. The Resolution Applicant then identifies the core-assets and non-core assets of the Corporate Debtor in order to come up with viable resolution plan. The core assets constituted such assets which were pursued by the Resolution Applicant as essential and are integral for running of the Corporate Debtor as going concern and for running day to day activities of the Corporate Debtor. The non-core assets were the assets which in the opinion of Resolution Applicant were not required for running and / or managing day to day activities of the affairs of the Corporate Debtor. Accordingly, the Resolution Applicant identifies those Financial Creditors having exclusive charge on the non-core assets and assigned them the status of FCs category B. It has been proposed in the resolution plan that FCs category B shall get ownership interest on their respective non-core assets in terms of the resolution plan. All the other Financial Creditors of the Corporate Debtor were assigned category A. There are 37 Financial Creditors which fall under the Financial Creditors category A and 8 Financial Creditors which fall under the category B. The Appellant (IDBI) falls under the category A. The resolution plan was put up before the CoC and the CoC in the 20th CoC meeting held on 10.12.2018 exercising its discretion approved the resolution plan by 81.39% majority of CoC.

Issue No. (i)

Whether the Appellant has an exclusive security/charge over the trademarks?

55. As per the Appellant, the deed of hypothecation was executed on 03.09.2012 by the Corporate Debtor and T.V.Vinayakravi Reddy and T Venkatram Reddy i.e. the Corporate Debtor and the ex-promoters of the Company in favour of the Appellant (IDBI Bank) and since the borrower was not in a position to create charge on its fixed assets, the borrower agreed to create charge on its trademarks of Deccan Chronicle, the Asian Age, Andhra Bhoomi and Financial Chronicle owned by Hypothecators.

56. Ld. Counsel for the Appellant raised an objection that the Hypothecation deed is executed by the Corporate Debtor and the ex-promoters of the Corporate Debtor Company jointly. The Corporate Debtor and its promoters had created exclusive security over the trademarks viz Deccan Chronicle, the Asian Age, Andhra Bhoomi and Financial Chronicle (together trademarks) in favour of the Appellant, pursuant to the deed of hypothecation dated 03.09.2012. The Respondents have unconditionally accepted the contains of the hypothecation deed. A perusal of clause 3 of hypothecation deed conclusively established that the trademarks are a joint property of the Corporate Debtor and its promoters and not sole property of the Corporate Debtor. The resolution plan, therefore, cannot extinguish the Appellant's security rights over the said trademarks as such rights have been created by persons other than the Corporate Debtor as well. For this purpose, Ld. Counsel for the Appellant has drew our attention towards the clause 2.8 of the plan which provides that security interest created by a third party shall not extinguish under the plan, however, the same is made subject to clause 4.3. The Clause 4.3 provides to extinguish the security created over the

trademarks by the Corporate Debtor and the ex-promoters in favour of the Appellant. The Resolution plan can only contain provisions in relation to assets and liabilities of the Corporate Debtor and not other third persons. Ld. Counsel for the Respondent No. 2 unable to convince us that how the clause 4.3 is in consonance with the deed of hypothecation.

57. Now, we have considered the MOU dated 13.05.2014, the MOU executed subsequently inter se between the lenders, does not and indeed cannot override or nor supersede hypothecation deed or the facts of the ownership of the trademarks. The Respondents have failed to provide a single provision in the MOU which would support their main contention that MOU allegedly prevails over the hypothecation deed. Ld. Adjudicating Authority in the impugned order held that six Financial Creditors who executed the MOU in respect of the trademarks of the Corporate Debtor Company having authority to sale the trademarks and distribute the funds among them. Thus, the Appellant (IDBI) is having 1/6thcharge over the trademarks of the Corporate Debtor, we have examined this finding.

58. The MoU was executed much before the Insolvency Petition and was executed solely to record a private understanding between the lenders of the Corporate Debtor to enable the sale of the trademarks by the Appellant with the others lenders agreeing not to seek restrain on such sale in the DRT proceedings filed by them against the Corporate Debtor. The Respondents have failed to counter the averments that the MOU in clause 2(b) records that the Appellant was to affect the sale of trademarks. This is because the trademarks were charged in favour of the Appellant alone. Para 1(c) of MOU

stipulates that the MOU does not in any manner alter, modify and impair any rights claims interests of parties against the Corporate Debtor, under their respective agreements. In Clause 5 of the MOU describes, the scope of MOU "(iii) nothing contained in this MOU is intended or meant to alter, modify or impair any of the rights claims and interest of the parties against the Company or guarantors under the financing documents or to that extent between the creditors inter se (iv) No parties shall use this MOU either as a defence against any other creditors or for any purpose beyond the scope of transaction enshrined in this MOU. Clause 6 of the MOU, Effective date and Term:-

> "This MOU shall be binding on the parties from the date of this MOU and the parties agreed to adhere to the timeline for the common benefit of the parties. The validity of this MOU shall be a period of 12 months from the date of this MOU which can be extended on mutual consent of the parties."

59. With this term, the effective date of the MOU is 30.05.2014 and the validity of this MOU for 12 months means 29.05.2015. It is not pleaded by the Respondents that after 12 months the validity of MOU was extended by the parties. In the MOU there is no condition that all six parties shall share 1/6th of the sale proceeds. Whereas clause (e) provides that "Wherein it was decided that the parties can jointly proceed with the sale of trademarks and the sale proceeds so realised shall be deposited into a designated escrow account in the manner as provided in this MOU and then shared amongst the parties based on a mutually agreed sharing ratio.

60. No document on record that pursuant to the aforesaid term it was agreed between the parties that they will share the sale proceeds of trademarks equally i.e. 1/6th. In the aforesaid facts, we are unable to convince with the findings of Ld. Adjudicating Authority that the Appellant (IDBI) is having only 1/6th charge over the trademarks of the Corporate Debtor. On the other hand, we are of the view that the MOU is valid only for one year i.e. 29.05.2015 whereas the resolution plan was approved by the CoC in the 20th CoC meeting held on 10.12.2018. We hold that as per the hypothecation deed dated 03.09.2012 the Appellant has an exclusive charge over the trademarks of the Corporate Debtor.

Issue No. (ii)

Whether the criteria for FCs category A and B is based on sound principle?

61. Admittedly, the Resolution Applicant has divided the Financial Creditors into two categories i.e. category A and B, this categorization was made on the basis of core-assets and non-core assets of the Corporate Debtor over which the Financial Creditors have got some security interest. Category A are those assets which are required for the Corporate Debtor for running the business and non-core assets are those assets which are not required for running the business. There are 37 Financial Creditors of the Corporate Debtor who fall under the category A and there are 8 Financial Creditors who fall under the category B. The Appellant (IDBI) and other Financial Creditors are in category A. The Financial Creditors category B are granting to retain the security created in their favour should be given less in distribution in

category B to the extent value of securities they are entitled to retain. There is no answer to this favour for FCs of category B.

62. According to the Resolution Applicant the categorization was made on the basis of the core-assets and non-core assets of the Corporate Debtor, however, the Resolution Applicant to justify the distribution has evolved an another basis of distribution i.e. exclusive prime and collateral security besides holding securities on pari passu basis. The Resolution Applicant tried to justify the distribution erroneously argued that the Appellant has no exclusive charge over the trademarks of the Corporate Debtor. therefore, the Appellant got less amount in comparison to Canara Bank.

63. Ld. Adjudicating Authority in the impugned order held that the Financial Creditors holding security interest over the assets of the Corporate Debtor were given higher amount from out of the resolution fund, then those who are not holding security interest or holding security interest which is lower in value. According to the Adjudicating Authority a Financial Creditors who has a higher amount of security, it will get more amount out of the resolution fund in comparison to a Financial Creditor who has holding security interest of lower value, he will get a lower amount out of the resolution fund. It means, the Adjudicating Authority has evolved a new basis which is not pleaded by any of the parties.

64. The Resolution Applicant unable to justify the basis of categorization of the Financial Creditors in category A and B. It is undisputed that when this resolution plan was submitted before the CoC at that time the Appellant has raised a serious objection in regard to categorization. The Resolution

Applicant is unable to convince us that the categorization is based on sound principle.

Issue No. (iii)

Whether the Resolution Plan is discriminatory and in violation of the IBC?

65. As per the plan the upfront cash revolution amount offered to the Financial Creditors is Rs. 350 Crores and the amount offered to the Appellant is 13,49,75,617 which comprises merely 4.11% of the total upfront cash resolution amount offered by the Resolution Applicant. It is lower than the pro-rata entitlement in the upfront cash resolution amount. It was contended, the claim of IDBI Bank which was admitted by the RP was Rs. 549,08,19,434 whereas Rs. 13,49,66,028 allotted to the Appellant which constitute 6.71% of the total claims admitted by RP. Whereas the amount allotted to the Appellant constituted just 3.86% of the upfront amount offered by the Resolution Applicant. Ld. Counsel for the Appellant submitted that Canara Bank whose claim was Rs. 827,13,48,319 which constitute 10.11% in the total admitted claim of the Financial Creditors and the Canara Bank was allotted Rs. 124,24,16,833 and its share in the upfront amount is 35.50% which is over and above the pro rata entitlement of the bank in the upfront amount. There is a discrimination between the Financial Creditors in the matter of allotting amount from out of the upfront amount. For the ready reference, the table setting forth the pro-rata shares of admitted claim and the total payment offered to the Financial Creditors is as under: -

A table setting forth the pro-rata shares of admitted claims of Financial Creditors as against the total payment offered to them under the Resolution Plan:

Sr. No.	Financial Creditor	Admitted claims of the Financial Creditor (in Rupees)	*pro-rata* share in the total admitted claims of all the Financial Creditors (in percentage)	Settlement amount offered as per the Resolution Plan dated 11.12.2018 (in Rupees)	*pro-rata* share in the total resolution amount offered to the Financial Creditors (in percentage)
1.	Andhra Bank	374,22,73,435	4.57	9,50,00,000	2.66
2.	Axis Bank Ltd.	808,13,64,102	9.88	45,00,00,000	12.59
3.	Canara Bank	827,13,48,319	10.11	125,00,00,000	34.96
4.	Central Bank of India	106,10,68,746	1.30	1,70,00,000	0.48
5.	Corporation Bank	192,28,01,475	2.35	3,50,00,000	0.98
6.	Ganga Properties Pvt. Ltd.	92,43,015	0.01	1,00,000	0.0028
7.	Hamilton & Company Ltd.	3,69,72,055	0.05	5,00,000	0.014
8.	HDFC Bank Ltd.	95,77,20,076	1.17	1,10,00,000	0.31
9.	Housing Development Finance Corp. Ltd.	83,52,32,877	1.02	95,00,000	0.27
10.	ICICI Bank Ltd.	954,26,19,075	11.66	50,00,00,000	13.99
11.	ICICI Securities Ltd.	72,05,00,000	0.88	50,00,000	0.14
12.	IDBI Bank Ltd.	549,08,19,434	6.71	14,00,00,000	3.92
13.	IDFC Bank Ltd.	197,95,45,586	2.42	6,00,00,000	1.68
14.	IFCI Ltd.	33,99,06,631	0.42	40,00,000	0.11
15.	IndiaBulls Housing Finance Ltd.	165,80,96,289	2.03	3,40,00,000	0.95
16.	Indian Overseas Bank	150,04,80,808	1.83	4,00,00,000	1.12
17.	Jay Shree Tea & Industries Ltd.	9,45,95,890	0.12	11,00,000	0.03
18.	The Karur Vysya Bank Ltd.	76,58,11,177	0.94	90,00,000	0.25
19.	Karvy Financial	97,61,25,457	1.19	2,00,00,000	0.56

	Services Ltd.				
20.	Kotak Mahindra Bank Ltd.	183,58,17,779	2.24	10,20,00,000	2.85
21.	L&T Finance Ltd.	48,01,01,706	0.59	50,00,000	0.14
22.	Life Insurance Corp. of India	464,73,39,462	5.68	11,40,00,000	3.19
23.	Pegasus Asset Reconstruction Pvt. Ltd.	246,90,96,892	3.02	18,20,00,000	5.09
24.	Photon Infotech Pvt. Ltd.	9,34,52,711	0.11	10,00,000	0.028
25.	Religare Finvest Ltd.	142,44,01,462	1.74	4,00,00,000	1.19
26.	Suhani Trading & Investment Consulatnts Pvt. Ltd.	320,02,65,453	3.91	3,70,00,000	1.03
27.	National Pension System Trust (NPS Trust) A/c SBI Pension Fund Scheme Central Govt. – SBI Pension Funds Pvt. Ltd. (Central Govt.)	17,09,20,548	0.21	20,00,000	0.056
28.	National Pension System Trust (NPS Trust) A/c SBI Pension Fund Scheme Central Govt. – SBI Pension Funds Pvt. Ltd. (State Govt.)	17,09,20,548	0.21	20,00,000	0.056
29.	SREI Infrastructure Finance Ltd.	296,93,73,143	3.63	13,80,00,000	3.86
30.	Softlink Merchants Pvt. Ltd.	91,18,220	0.01	1,00,000	0.0028
31.	State Bank of India SAMB	90,67,45,682	1.11	1,00,00,000	0.28
32.	Tata Capital Financial Services Ltd.	182,71,62,573	2.23	1,80,00,000	0.50
33.	The Jammu & Kashmir Bank Ltd	84,22,89,000	1.03	95,00,000	0.27

34.	UV Asset Reconstruction Co. Ltd.	1193,20,96,653	14.59	22,40,00,000	6.26
35.	Unilazer Ventures Pvt. Ltd.	36,44,38,487	0.45	40,00,000	0.11
36.	V Shankar	45,77,63,839	0.56	50,00,000	0.14
37.	Vidhi Sales Pvt. Ltd.	1,86,29,726	0.02	2,00,000	0.006
	TOTAL	**8180,64,58,331**	**100.00**	**357,50,00,000**	**100.00**

66. It is a settled law, the resolution plan cannot discriminate between two sets of creditors similarly situated, as we have already discussed. The Respondents are unable to convince us that on pro-rata basis why the Canara Bank is getting more amount in comparison to the Appellant. Therefore, we hold that the resolution plan is discriminatory between two set of creditors similarly situated and is in violation of the IBC.

Issue No. (iv)

Whether once the Resolution Plan is approved by the CoC, it cannot be questioned even if it discriminates between two sets of creditors who are similarly situated?

67. Ld. Counsel for the Respondents have emphasised that the Resolution plan is approved by the majority of shareholder i.e. 81.39% of members of CoC and then it is not open to challenge the same. We are unable to convince with this argument. When the resolution plan is discriminatory between the two secured creditors of the same class and Respondents are unable to justify the grounds of discrimination then certainly the Financial Creditors who get lower amount in comparison to other Financial Creditors of the same class

can raise the issue before the Adjudicating Authority. It is not the case when the Appellant has raised the objection first time before the Adjudicating Authority, the Appellant has raised the objection at the inception when the Resolution plan put up before CoC in 20th CoC meeting on 10.12.2018 for approval.

68. In the 20th CoC meeting, there was a detailed discussion about the resolution plan. The representative of IDBI has taken part in the discussion and raise some objections which are recorded in the minutes. Some of them as under:- (Please See Pg. 276, 280 and 281 of Appeal Paper Book)

> "IDBI raised the question that the RA has not given any basis of distribution in the resolution plan or to the CoC members, to which the PA displayed the reply given by the RA (given hereunder) dated 28.05.2018.
>
> The query of the IDBI is answered then the IDBI asked the CoC legal counsel whether it has seen that the plain is discriminatory or not and why is this question not being dealt with by the legal counsel and also mentioned to Mr. Mishra to specifically examine in terms of its legal validity, the 2 clauses namely 4.3 and 11.12 of the resolution plan dated 20.11.2018. It also mentioned that a specific opinion be taken whether the plan is discriminatory or not and that before putting the resolution plan to vote, all legal confirmation be obtained either from the RP's legal counsel or CoC's legal counsel. This particular issue has been raised to the RP and the CoC legal counsel and this needs to be looked into. If available data is not enough, the CoC needs to take an external opinion from a Sr. counsel.
>
> "The IDBI first got into discussion and mentioned that before getting into the Resolution Plan, it would like to know the basis of allocation. Is it linked to security and if so, he said that let the liquidation value that has been relied upon to arrive at the calculation by the RA, be shared.

> IDBI mentioned that a methodology can be used by the RA but the methodology cannot be discriminatory. The RA said that this is absolutely not discriminatory.
>
> IDBI said that this aspect of discrimination needs to be looked into by the CoC legal counsel, otherwise this is discriminatory."

69. With the aforesaid, it is apparent that the Appellant has raised the objection at the time of consideration of resolution plan before the CoC in 20th CoC meeting held on 10.12.2018.

70. As we have already held that the criteria of categorization of the FCs is not based on sound principal. The Appellant has an exclusive security/charge over the trademarks of the Corporate Debtor. The Resolution plan is discriminate between two Financial Creditors who are similarly situated. In such a situation the Appellant can question the Resolution plan even it is approved by the CoC.

Issue No. (v)

Whether the Appellant was required to challenge the subsequent order dated 03.06.2019 whereby the Resolution Plan has been approved by the Adjudicating Authority?

71. As we have already held that the resolution plan is discriminatory. Now, we have considered the legal aspect of the matter. We would like to reproduce the Section 30(4) of the IBC, which reads as under:

> "The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1)

> of Section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board."

72. The sub-section (4) of section 30 of IBC has been amended w.e.f. 16.08.2019 and the words "the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority of value of security interest of a secured creditor is inserted."

73. It is also useful to refer the Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016. Regulation 38 reads as under:-

> "Mandatory contents of the resolution plan
>
> (1) The amount payable under resolution plan-
>
> (a) to the operational creditors shall be paid in priority over financial creditors and
>
> (b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

74. The Regulation 38 sub-regulation (1) has been amended w.e.f. 28.11.2019 i.e. after the passing of the impugned order i.e. 09.05.2019. Now, the Regulation 38 provides that the amount payable under a resolution plan (a) to the operational creditor shall be paid in priority over financial creditors and (b) to the financial creditors who have a right to vote under sub-section 2 of Section 21 and did not vote in favour of the resolution plan shall be paid in priority over financial creditors who voted in favour of the plan.

75. In this case, the Appellant is a dissenting Financial Creditor and he did not vote in favour of the resolution plan. In the resolution plan, the resolution amount has not been distributed as per the aforesaid amended provisions i.e. the priority and value of the security interest of a secured creditor has not been considered and as per the Regulation 38, the Appellant being a dissenting Financial Creditor shall be paid in priority over the Financial Creditor who voted in favour of the resolution plan.

76. We find that the resolution plan is not in conformity with the amended section 30(4) of the IBC and Regulation 38 (1) of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016. Therefore, we are of the view that the impugned order is not sustainable in law as well as on facts as we have already discussed above.

77. We are of the view that there is discrimination in allocation of resolution fund. Thus, the approval of resolution plan by the CoC and subsequently approval of resolution plan by the Adjudicating Authority vide order dated 03.06.2019 is not sustainable in law. The Appellant was not required to challenge the subsequent order dated 03.06.2019. Thus, the impugned order as well as the order dated 03.06.2019 are hereby set aside.

78. The matter is remitted back to the CoC with the direction to distribute the resolution amount in conformity with the Section 30(4) r/w Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

With the aforesaid, the Appeal is allowed, however, no order as to costs.

The Registry is directed to send the copy of this Judgment to the concern Adjudicating Authority forthwith.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
21st January, 2022
SC