

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) Insolvency No. 22 of 2022

IN THE MATTER OF:

S. Chandriah,

Plot No. 303,
SIPCOT Housing Colony,
Near SBI Mookandapalli,
Hosur, Tamil Nadu - 653126

...Appellant

Versus

Sunil Kumar Agarwal,

Resolution Professional of Digjam Limited,

Tower 6/603, Dev Nandan Heights,
Near Poddar School,
Near CG Road

Shandkheda, Ahmedabad – 382424

Email: anil91111@hotmail.com

...Respondent

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Ravi Raghunath, Mr. Vishnu Mohan and Mr. Rajat Sinha, Advocates.

For Respondent: Mr. Pratik Thakkar, Advocate for R-1.

With

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...Appellant

Versus

1. Sunil Kumar Agarwal,

Resolution Professional of Digjam Limited,

Tower 6/603, Dev Nandan Heights,
Near Poddar School,
Near CG Road
Shandkheda, Ahmedabad – 382424

Email: anil91111@hotmail.com

...Respondent No. 1

2. Member of Committee of Creditors of Digjam Limited & Ors.

At:

UCO Bank, Zonal Office,
UCO Bhavan, Near Sanyas Ashram,
Ashram Road, Ahmedabad – 380009

Email: zo.ahmedabad@ucobank.co.in

Also at:

State Bank of India Stressed Assets Management
Branch, 605, Paldi Road, Near Bony Travels
Madalpur Gam, Paldi, Ahmedabad – 380006

Email: sbi04199@sbi.co.in

...Respondent No. 2

3. M/s. Finquest Financial Solution Pvt. Ltd.

602, Boston House, 6th Floor, Suren Road, Andheri
(East), Mumbai – 400093

Email: hppatel@finquestonline.com

...Respondent No. 3

4. Suspended Board of Directors of Digjam Ltd.

Through Sidharth Kumar Birla,
Aerodrome Road,
Jamnagar – 361006

Email: digjamcosec@gmail.com

...Respondent No. 4.

For Appellant: Mr. K. Datta, Sr. Advocate with Mr. Ravi Raghunath, Mr. Vishnu Mohan and Mr. Rajat Sinha, Aakash Lodha, Advocates.

For Respondent: Mr. Pratik Thakkar, Advocate for R-1. Mr. Rohan Agrawal and Ms. Meghna Rao, Advocates for R-3.

J U D G E M E N T

Ashok Bhushan, J:

1. These two Appeals filed by the same Appellant have been heard together and are being decided by this common Judgement. Company Appeal (AT) Ins. No. 22 of 2022 has been filed by the Appellant challenging the Judgement and Order dated 07.02.2022 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (the Adjudicating Authority) rejecting the I.A. No. 658 of 2019 filed by the Appellant. By this I.A., Appellant prayed that his claim be admitted as a “Financial Debt” and he be declared to be “Member of Committee of Creditors”. I.A. No. 658 of 2019 has been dismissed by the Impugned Judgement. Aggrieved by the Order, this Appeal has been filed. Company Appeal (AT) Ins. No. 21 of 2022 has been filed against the Order dated 27th May, 2020 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (the Adjudicating Authority) allowing the Application filed by the Resolution Professional (RP in short) for approval of the Resolution Plan. By the Order dated 27.05.2020, Resolution Plan was approved. Aggrieved by the Order dated 27.05.2020, this Appeal has been filed by the Appellant.

2. Brief facts of the case and sequence of the events for deciding these Appeals are:

- i. The Appellant sent a letter dated 14.09.2018 to the Corporate Debtor (M/s. Digjam Limited) setting out his offer to purchase surplus land available at the Mills premises of the Corporate Debtor at Jamnagar (Gujarat).

- ii.** Subsequent to the sending letter dated 14.09.2018, the Appellant made payment of Earnest Money by RTGS/NEFT to the Corporate Debtor between 26.09.2018 to 08.04.2019 of Rs. 7 Crores.
- iii.** In the meantime, an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “The Code”) was filed by one M/s. Oman Inc. against the Corporate Debtor M/s. Digjam Limited for “Operational Debt” of Rs. 21,74,626/-. Vide Order dated 26th April, 2019, the Adjudicating Authority admitted the Application under Section 9 of the Code and initiated “Corporate Insolvency Resolution Process” (CIRP in short) against the Corporate Debtor.
- iv.** On 22.05.2019, the Appellant filed his claim under Form-F (claim by Creditor other than Financial and Operational Creditor). Thereafter, the Appellant on 02nd July, 2019, filed his claim under Form-C as a Financial Creditor.
- v.** The Erstwhile Resolution Professional sent an email stating that Appellant had remitted funds to Digjam Limited as interest free advance to be adjusted against sale consideration for proposed sale of land which shall not fall under “Financial Debt”.
- vi.** I.A. No. 658 of 2019 was filed by the Appellant seeking direction to Resolution Professional to adjudicate the claim of the Appellant revise the list of the Committee of Creditors (CoC in short) and to admit him as a “Member of CoC”. The IRP filed a Reply to I.A. No. 658 of 2019. The Adjudicating Authority vide Order dated 07th February, 2020 dismissed the I.A. No. 658 of 2019 filed by the Appellant. Aggrieved by

the Order dated 07.02.2020, the Appeal No. 22 of 2022 has been filed. In the CoC Meeting held on 11.02.2020, the Resolution Plan submitted by M/s. Finquest Financial Solutions Pvt. Ltd. was approved by the CoC. The Resolution Professional filed an I.A. No. 144 of 2020 for approval of the Resolution Plan and vide Order dated 27th May, 2020, the Adjudicating Authority approved the Resolution Plan by allowing I.A. No. 144 of 2020. The Appellant filed an I.A. No. 195 of 2021 dated 04.03.2021 before the Adjudicating Authority praying for quashing the entire 'CIRP' which Application was dismissed vide Order dated 21st June, 2021. Appellant challenged the Order dated 21st June, 2021 before this Appellate Tribunal which Appeal was also dismissed on 29th July, 2021. The Appeal No. 21 of 2021 has been filed by the Appellant challenging the Order dated 27th May, 2020.

3. We have heard Shree Krishnendu Datta, Learned Sr. Counsel with Shree Ravi Raghunath, Learned Counsel for the Appellant. Mr. Pratik Thakkar has appeared for Resolution Professional and Mr. Atul Sharma, Advocate for CoC and Mr. Rohan Agrawal and Ms. Meghna Rao, Advocates appeared for R-3.

4. Learned Counsel for the Appellant submits that the Adjudicating Authority committed error in passing Order dated 07.02.2020 rejecting the claim of the Appellant as a Financial Creditor. He submitted that Appellant had paid sum of Rs. 7 Crores as earnest money to the Corporate Debtor with regard to which receipt was issued by the Corporate Debtor and payment has not been disputed by the Corporate Debtor. The Resolution Professional

has admitted the payment of earnest money by the Appellant to the Corporate Debtor but has wrongly classified the Appellant as other Creditor. Learned Counsel for the Appellant referring to the Annual Reports of the Corporate Debtor for the Financial Year 2018-19 and 2019-20 submits that earnest money has been classified as “other Financial Liability” hence the Appellant’s claim deserved to be admitted as a “Financial Debt”. Learned Counsel for the Appellant submits that Resolution Professional failed to produce the Annual Reports before the Adjudicating Authority which reports have now been brought on record in this Appeal.

5. In support of Company Appeal (AT) Ins. No. 21 of 2022, Learned Counsel for the Appellant submits that the Resolution Plan has been approved without earmarking any amount to the Appellant whereas the claim of the Appellant of Rs. 7 Crores was admitted as other creditors. The CoC by approving the plan has not taken into account the interest of all the stakeholders. No amount having been earmarked to the Appellant whose claim was admitted as other creditors the plan is not in accordance with the provisions of Section 30(2)(e) and Section 30(2)(f) of the Code. The Resolution Plan does not at all states how it has dealt with the interest of all the stakeholders as per Regulation 38(1-A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 (CIRP Regulations in short). The Resolution Plan envisages Nil payment to other creditors. The decision of the CoC must reflect that it has taken into account in maximising the value of the assets of the Corporate Debtor and the fact that it has adequately balanced the interest of all the stakeholders.

While the Financial Creditors and Operational Creditors have been made paid huge payment, the Other creditors like Appellant who is also stakeholder is being paid Nil amount.

6. Learned Counsel appearing for the Respondents refuting the submissions of the Learned Counsel for the Appellant submits that the claim of the Appellant was rightly admitted in the category of other creditors. The Appellant was not a Financial Creditor. There was no contract between the Appellant and the Corporate Debtor for sale of any land. The Appellant of his own has made payment of the earnest money to the Corporate Debtor without there being any acceptance of the offer of the appellant. There was no contract with the Corporate Debtor hence the earnest money advanced by the Appellant cannot be treated to be a 'Financial Debt'. The Adjudicating Authority in its Order dated 07th February, 2020 has held that there was no contract between the parties for sale of any land. Essential conditions for holding a debt to be Financial Debt within the meaning of Section 5(8) of the Code are not present in the present case hence the Adjudicating Authority has not committed any error in not accepting the claim of the Appellant as a Financial Creditor.

7. There is no error in the decision of the CoC approving the Resolution Plan. The Appellant as other creditor was not entitled for any payment of any amount as per the provisions of the Code. Hence the Resolution Plan cannot be faulted. Appellant's I.A. No. 195 of 2021 where he had made a prayer to quash the CIRP was rejected by the Adjudicating Authority against which Company Appeal (AT) Ins. No. 522 of 2021 filed by the Appellant was also

dismissed on 29th July, 2021. Appellant cannot be allowed to reagitate the same issue.

8. We have considered the submissions of Learned Counsel for the parties and have perused the record.

9. The first issue to be answered in this Appeal is as to whether the payment of earnest money of Rs. 7 Crores by the Appellant to the Corporate Debtor between the period from 26.09.2018 to 08.04.2019 is a financial debt within the meaning of Section 5(8) of the Code?

10. We need to first notice the nature of transaction, the details of the facts and sequence of the events which can throw light on the nature of transaction, if any, between the Appellant and the Corporate Debtor. The Appellant has claimed the payment of amount to Corporate Debtor as an earnest money for purpose of purchase of surplus land belonging to the mills of the Corporate Debtor. The payment of earnest money began after letter dated 14.09.2018 was sent by the Appellant to the Corporate Debtor. The Copy of the Letter dated 14.09.2018 has been brought on record which is to the following effect:

“ 14-09-2018

Digjam Limited
Aerodrome Road
Jamnagar 361006
Gujarat

Kind Attn: Jatin Jain
Company Secretary

Dear Sir,

This has reference to our discussions we had with you regarding proposal sale of surplus land available at your mills premises in Jamnagar (Gujarat).

In connection with the above, we submit herewith our offer as under:-

- *Rate: Rs. 2,25,00,000/- (Rupees Two Crores Twenty Five Lakhs only) per acre, plus value for building and other assets, for land area approximately 10 Acres together with structures thereon on “as is where is” basis;*
- *Title of the land must be clear and free from all encumbrances and litigations;*
- *Sale consideration will be paid in instalments as may be mutually agreed, over a period of 12 months; and*
- *Formal Agreement to sell in this regard will be entered into in consultation with the legal team of both the parties.*

We propose to remit upto Rs. 10.00.00.000/- (Rupees Ten Crores only) interest free advance which will be paid in various instalments and the same will be adjusted against sale consideration or will be refunded forthwith in case our offer is not found acceptable to you.

To start with, we hereby remit Rs. 1.00.00.000/- (Rs. One Crore only) as interest free advance through RTGS.

We look forward to your response in the matter at the earliest.

Thanking you.”

11. After writing the aforesaid letter dated 14.09.2018, the Appellant has made advance payment with effect from 26.09.2018. There is nothing on record to indicate that proposal submitted by the Appellant by letter dated 14.09.2018 was accepted or agreed by the Corporate Debtor. Earnest Money was paid by the Appellant after submitting a proposal by the Appellant himself without their being any acceptance. There is neither any agreement between the parties nor any agreement has been brought on record. It is true that contract between the parties can be oral as well as in writing however, there is no foundation in the Application filed by the Appellant or materials brought by him to indicate that there was even an oral agreement with the Corporate Debtor for sale of the land to the Appellant. The Adjudicating Authority in the Impugned Order has discussed the entire sequence of the events and materials on record. The Adjudicating Authority returned findings in paragraphs 4 and 9. The Adjudicating Authority considered the claim of the Appellant based on clause (f) of Section 5(8). The Adjudicating Authority has even observed that there is no proof that this letter dated 14.09.2018 was served on the Corporate Debtor. We however proceed to examine the case on the premise that after sending letter dated 14.09.2018, the Appellant made payment of Earnest Money as claimed by him.

12. We now need to notice the statutory provisions of the Code defining “Financial Debt”. Section 5(8) of the Code is as follows:

“(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non- recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.*

[Explanation.- For the purpose of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit

or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

13. Section 5(8) begins with the expression "financial debt means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—". Sub-Section 8 begins with the words “means” and in the end of sentence the expression “includes” is also captured. Sub-Section 8 of Section 5 defines the ‘Financial Debt’ which is disbursed against the consideration for the time value of money. For a debt to be financial debt, essential condition to be proved is that the debt is disbursed **against the consideration for the time value of money**. The word ‘time value money’ has been defined in ‘Black’s Law Dictionary’ to the following effect:

“The price associated with the length of time that an Investor must call only when investment matures or the related income is earned.”

14. Time value of money thus means the price received for the length of time for the money for which the money has been disbursed. The Hon’ble Supreme Court has occasion to consider sub-section (8) of Section 5 in several cases. A three bench Judgement which has been referred to and relied on time and again is the Judgement of Hon’ble Supreme Court in (2019) 8 SCC 416 **“Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India”**. The amendment made in the Code by which allottees of Real

Estate were being treated Financial Creditor was challenged before the Hon'ble Supreme Court by filing a number of writ petitions. In the above context, the Hon'ble Supreme Court of India had occasion to consider the concept of financial debt under section 5(8). Paragraph 70 and 71 are as follows:

“70. The definition of “financial debt” in Section 5(8) then goes on to state that a “debt” must be “disbursed” against the consideration for time value of money. “Disbursement” is defined in Black’s Law Dictionary (10th ed.) to mean:

- “1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable.*
- 2. The money so paid; an amount of money given for a particular purpose.”*

71. In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression “disbursed” refers to money which has been paid against consideration for the “time value of money”. In short, the “disbursal” must be money and must be against consideration for the “time value of money”, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee “disburses” money in the form of advance payments made towards construction of the real estate project. We were shown the ‘Dictionary of Banking Terms’ (Second edition) by Thomas P. Fitch in which “time value

for money” was defined thus:

“present value: today’s value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today’s value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis.” (Emphasis supplied)

That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money’s equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

15. The Hon’ble Supreme Court in **“Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited and Ors”** (2020 8 SCC 401) elaborately discussing Section 5(8) of the Code laid down following in paragraph 46 while considering the essential for financial debt.

“The essentials for financial debt and financial creditor

46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of

the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions

stated in the said sub- clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

16. The law as laid down by the Hon'ble Supreme Court as noticed above clearly lays down that root requirement is disbursement against the consideration for the time value of money which is an essential condition to be proved to accept debt to be financial debt.

17. The precise question to be answered is as to whether the payment of Earnest Money even if it is accepted as disbursement whether disbursement is against the consideration for the time value of money.

18. The disbursement made by the Appellant to the Corporate Debtor was only a payment of Earnest Money which was to be adjusted in sale of the

land. The disbursement was not in consideration for the time value of money. We may refer a Judgement of this Tribunal in Company Appeal (AT) Ins. No. 180 of 2021 **“Sach Marketing Pvt. Ltd. Vs. Resolution Professional of Mount Shivalik Industries Ltd”** where dealing with Section 5(8) in paragraph 17 and 18 following was observed by this Appellate Tribunal:

*“17. For a debt to be termed as ‘Financial Debt’, the basic elements that are to be seen is whether (a) there is disbursement against consideration for time value of money and (b) whether it has a commercial effect of borrowing. The definitions provided in Sections 5(7) and 5(8) show that a ‘Financial Creditor’ refers to a person to whom ‘Financial Debt’ is owed and includes even a person to whom such a debt has been legally assigned or transferred to. A ‘Financial Debt’ is a debt alongwith interest which is disbursed against the consideration for the time value of money and it may include any of the events specified in sub-Clause (a) to (i). The Legislature has included **any** financial transaction in the definition of ‘Financial Debt’ which are usually for a sum of money received today to be paid over a period of time in instalments, or in a single payment in future.*

18. The expression time value has been defined in Black’s Law Dictionary as ‘the price associated with the length of time that an investor must wait until an investment matures or the related income is earned’. To reiterate, any of the transactions specified in Clauses (a) to (i) of Section 5(8) would fall within the ambit of the definition of ‘Financial Debt’ only in the event if they include the essential elements stated in the principal

clause that is element of disbursal, against the consideration for time value of money and has the commercial effect of borrowing. For a person to be defined as a Financial Creditor of the 'Corporate Debtor', it has to be shown that the 'Corporate Debtor' owes such a 'Financial Debt' to such a person."

19. Essential condition for accepting a debt to be financial debt being absent, we are of the view that Adjudicating Authority has not committed any error in rejecting the claim of the Appellant as Financial Creditor. The claim of the Appellant of Earnest Money of Rs. 7 Crores has been admitted by the Resolution Professional as under the category of other creditors. We thus do not find any error in the Order passed by the Adjudicating Authority dated 07.02.2020 and the Company Appeal (AT) Ins. No. 22 of 2022 deserves to be dismissed.

20. Learned Counsel for the Appellant has also relied on Annual Return for the Financial Year 2018-19 and 2019-20, where the earnest money liability of the Corporate Debtor has been classified as a "Financial Liability". Acknowledging the Liability of earnest money as a Financial Liability is not akin to admitting as a "Financial Debt". A debt of "other Creditors" is also a Financial Liability. Thus on the strength of Annual return of Financial Year 2018-19 and 2019-20, it can not be held that payment of earnest money by the Appellant was "Financial Debt".

21. Now we come to the Company Appeal (AT) Ins. No. 21 of 2022 by which the approval of the Resolution Plan has been questioned by the Appellant who was accepted as an Operational Creditor. The Submission of

the Appellant in this context is that Resolution Plan violates provisions of Section 30(2)(e) and 30(2)(f). It is further submitted that there is no statement as to how in the plan it has dealt with the interest of all the stakeholders of the Corporate Debtor. Learned Counsel for the Appellant has placed reliance on the Judgement of the Hon'ble Supreme Court in the matter of **“Essar Steel India Ltd. Committee of Creditors Vs. Satish Kumar Gupta”** (2020) 8 SCC 531. It is submitted by the Appellant that the Adjudicating Authority as well as this Tribunal has limited judicial review available in view of the law laid down by the Hon'ble Supreme Court to examine as to whether interest of all stakeholders has been taken care of and there are reasons given by the CoC while approving the Resolution Plan. The Resolution Plan which has been approved by CoC has also been approved by the Adjudicating Authority which does not contemplate any payment to the other creditors. The Respondent No. 2-Successful Resolution Applicant has referred to Para 4.6.3 of the Resolution Plan which is to the following effect:

“4.6.3 As per the IM dated 01.02.2020, the other creditors other than Financial Creditors/Operational Creditors/Employees and workmen, have submitted claim of Rs. 39.35 crore and the claim is admitted by the RP which includes Rs. 13.40 crore by the related parties. The resolution plan envisages NIL payment to these “other creditors”. In this category no payment is envisaged towards the related parties claim admitted by RP neither to any other parties including against Claim of Rs. 16.95 Crores filed by M/s DLF Limited,

which is disputed by the corporate debtor and pending before the court of law and admitted subject to finality”

22. The Resolution Plan envisages Nil payment to other Creditors. Now we come to the law laid down by the Hon’ble Supreme Court in **Essar Steel** (supra) in paragraph 72 and 73 of the Judgement following has been laid down down:

“72. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases 7420 would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.

73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must

reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

23. The Hon'ble Supreme Court in the above judgement has laid down that judicial review by the Adjudicating Authority as well as Appellate

Tribunal has to confine as to whether the requirement referred to in Section 30(2) has been met. It was clearly held that the Adjudicating Authority may not interfere with the merits of the commercial decision of the CoC. The limited judicial review available is to see that CoC has taken into account the fact that Corporate Debtor needs to be kept as a going concern, it needs to maximise the value, and interest of all the stakeholders including Operational Creditor have been taken care of. Section 30(2) provides as follows:

“30(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

.....

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the

provisions of this clause shall be fair and equitable to such creditors.
.....”

24. Section 30(2)(e) requires that the Resolution Plan does not contravene any of the provisions of the law for the time being in force, which clearly means that Resolution Plan should not contravene any of the provisions of the Code also. Learned Counsel for the Appellant has also referred to Regulation 38 (1-A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 (CIRP Regulations, 2016 in short) which is to the following effect:

“38(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.”

25. The law thus obliges the Resolution Plan to make statement as to how it has dealt with the interest of all the stakeholders. We in the present case are concerned with the claim of Appellant who was classified as other Creditors. The Resolution Plan envisages as noticed above that amount for other Creditors is Nil. Thus the submissions that all stakeholders have not been dealt with in the plan cannot be accepted. CoC in his commercial decision has decided not to allocate any amount to the other creditors which cannot be questioned since Appellant has not been able to prove violation of any provision of code in the Resolution Plan. We thus are of the view that the Resolution Plan which has been approved by the Adjudicating Authority on 27th May, 2020 does not require any interference. We may also refer to the Judgement of this Tribunal in 2020 SCC Online NCLAT 199 **“Hammond**

Power Solutions Pvt. Ltd. Vs. Sanjit Kumar Nayayk and Ors.” where this Tribunal had set aside the Order of the Adjudicating Authority approving the Resolution Plan and remitting the matter back to the Adjudicating Authority to send back plan to CoC. This Tribunal relies on the Judgement of the Hon’ble Supreme Court in the matter of “Essar Steel” (supra). Following was reasons given in paragraph 15-16:

“15. If the above minutes are perused, it can be hardly said that there are any reasons given by the Committee to demonstrate that it has taken care of interest of all stakeholders. Para - 46 of the Judgement in the matter of "Essar Steel" requires to see "the reasons given by the Committee of Creditors while approving a resolution plan" from point of view stated in the paragraph. The reasons for giving NIL to Operational Creditors is not reflected from record. We have already reproduced portion from Part B - Financial Proposal with regard to what the approved Resolution Plan states regarding dues to the Operational Creditors. The proposal is based on the assessment that there is no liquidation value due to Operational Creditors. Although it is not stated but there is reason to doubt that the Resolution Applicants were aware of the liquidation value. There is no dispute that so many of the Operational Creditors have been left high and dry giving them nil amount which Hon'ble Supreme Court has observed that giving NIL to Operational Creditors "would certainly not balance the interest of all stakeholders or maximise the value of assets of the Corporate Debtor if it becomes impossible to continue running its business as a going concern."

16. For these reasons, we find that the Impugned Order accepting the Resolution Plan cannot be upheld. The Resolution Plan does not appear to have taken care of interest of all stakeholders including Operational Creditors and the decision of the COC also does not reflect that it has taken into account the fact that the Corporate Debtor needs to be kept as a going concern and that there is Company Appeal (AT) (Ins) No.606 of 2019 need to maximise the value of the assets and that the interest of all the stakeholders including Operational Creditor has to be taken care of.”

26. The above Judgement of this Tribunal is clearly distinguishable since present is a case where all stakeholders have been dealt with in the Plan. There is no requirement in statute that all stakeholders have to be necessarily made payment in the Resolution Plan.

27. We thus find that the above judgement of this Tribunal is not applicable in the facts of the present case. The Judgement of the Hon’ble Supreme Court in **“Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd.”** (Civil Appeal No. 2231 of 2021) decided on 26th July, 2021 has also been referred to where the Hon’ble Supreme Court has occasion to consider Section 5(8). In the above case, the Hon’ble Supreme Court while dealing with the definition of Financial Debt held that Section 5(8) does not expressly exclude an interest free loan. In paragraph 31 of the Judgment, following was laid down:

“31. At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC

is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."

28. Present is not a case where any interest free loan has been advanced to the Corporate Debtor. Present is the case where Earnest Money was paid by the Appellant to the Corporate Debtor as noticed above. The Above Judgement of the Hon'ble Supreme Court does not help the Appellant in the present case.

29. In view of the foregoing discussions, we do not find any merit in both these Appeals filed by the Appellant. In result, both these Appeals are dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Mr. Naresh Salecha]
Member (Technical)**

New Delhi
22nd July, 2022
Basant