

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.499 of 2023

(Arising out of Order dated 13.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Court III, Mumbai Bench in I.A. No.2767 of 2022 and in C.P. (I.B.) No.4301 of 2018)

IN THE MATTER OF:

Cosmos Cooperative Bank Ltd. ... Appellant

Versus

Edelweiss Asset Reconstruction Company
Ltd. & Ors. ... Respondents

Present:

For Appellants: Mr. Abhijeet Sinha, Sr. Advocate with Mr. Aditya Gauri, Mr. Jayesh Gupta, Advocates.

For Respondents: Mr. Neeraj Malhotra, Sr. Advocate with Mr. R.P. Agarwal, Ms. Reema Mishra, Mr. Nimish Kumar, Advocates for R1.

Shreyas Edupuganti, Kaarunya Lakshmi, Advocates for R-5.

Ms. Dyuti, Advocate for R-8.

With
Company Appeal (AT) (Insolvency) No.519 of 2023
& I.A. No. 1693, 1696, 2971 of 2023

IN THE MATTER OF:

Anil Kumar ... Appellant

Versus

Edelweiss Asset Reconstruction Company
Ltd. & Ors. ... Respondents

Present:

For Appellants: Mr. Krishnendu Datta, Sr. Advocate with Mr. Aditya Gauri, Mr. Amar Vivek, Mr. Abhinav Tyagi, Mr. Rajat Sinha, Mr. Rahul Gupta, Ms. Damini S., Advocates.

For Respondents: Mr. R.P. Agarwal, Ms. Reema Mishra, Mr. Nimish Kumar, Advocates for R1.

Ms. Dyuti, Advocate for R-8.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeals have been filed against the order dated 13.02.2023 passed by National Company Law Tribunal, Court-III, Mumbai Bench, allowing IA No.2767 of 2022 filed by Edelweiss Asset Reconstruction Company Limited (Respondent No.1 herein) under Section 33, sub-section (3) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”). The Adjudicating Authority by the impugned order directed the liquidation of the Corporate Debtor – S.K. Wheels Private Limited. Aggrieved by which order, Company Appeal (AT) (Insolvency) No.499 of 2023 has been filed by Cosmos Cooperative Bank Limited, a Financial Creditor, who has vote share of 48.42% in the Committee of Creditors (“**CoC**”) of the Corporate Debtor. Company Appeal (AT) (Insolvency) No.519 of 2023 has been filed by Successful Resolution Applicant, challenging the order of liquidation. Both the Appeals having been filed against the same order, have been heard together and are being decided by this common judgment.

2. Brief facts necessary for deciding the Appeals are:

- (i) The Adjudicating Authority vide order dated 29.03.2019 directed for commencement of Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor - S.K. Wheels Private Limited. Mr. Vishal Ghishulal Jain was appointed as Interim Resolution Professional (“**IRP**”), who was confirmed as Resolution Professional (“**RP**”).

- (ii) The Corporate Debtor being a MSME, the Resolution Plan submitted by Anil Kumar, the Promoter/ Director of the Corporate Debtor was approved by the CoC in its 12th Meeting held on 23.01.2020 with 75.78% vote share. The RP filed IA No.976 of 2022 for approval of the Resolution Plan and Adjudicating Authority vide order dated 09.11.2021, approved the Resolution Plan.
- (iii) IA No.80 of 2022 was filed by Successful Resolution Applicant (“**SRA**”) for exclusion of time due to Covid-19 pandemic and extension of time for making further payments, which Application was dismissed by the Adjudicating Authority vide order dated 04.05.2022.
- (iv) IA No.1054 of 2022 was filed by the RP under Section 33, sub-section (3) seeking liquidation of the Corporate Debtor. The Adjudicating Authority vide order dated 04.05.2022 directed the RP to convene a Meeting of the CoC and file appropriate application for liquidation if suggested by the CoC with the mandate of the CoC. IA 1054 of 2022 was disposed of accordingly.
- (v) In the meeting dated 08.07.2022, RP invited all Members of CoC where a Resolution was put before the CoC as to whether the Corporate Debtor be liquidated or not. With voting share of 59.73%, CoC decided not to liquidate the Corporate Debtor.

Respondent No.1, who had vote share of 20.28% voted against the majority decision.

- (vi) An Application dated 26.09.2022 was filed by Respondent No.1 being IA No.2767 of 2022 before the Adjudicating Authority under Section 33, sub-section (3) seeking commencement of liquidation process.
- (vii) On 02.12.2022, a Meeting of Financial Creditors of the Corporate Debtor was held where with a majority decision of 69.04%, the Financial Creditors decided to extend the time for Resolution Applicant to make the payments as per schedule contained in the Resolution.
- (viii) Respondent No.1 in IA No.2767 of 2022, did not implead either CoC, RP or SRA. IA was heard by the Adjudicating Authority and by the impugned order dated 13.02.2023, the Adjudicating Authority directed for liquidation. The Adjudicating Authority although noted the decision of the Financial Creditors dated 08.07.2022, where the Financial Creditor with 59.73% voted not to liquidate the Corporate Debtor, but the said decision was not accepted by the Adjudicating Authority on the premises that decision not to liquidate will lead to modification of the Resolution Plan, which is impermissible in the Code. Returning the aforesaid finding the Adjudicating Authority allowed the aforesaid IA filed for

liquidation. Aggrieved by which order these two Appeals have been filed.

3. These Appeals were heard by this Tribunal on 26.04.2023, on which date, following interim order was passed:

“26.04.2023 Both these Appeals have been filed challenging order dated 13.02.2023 by which the Adjudicating Authority has directed for Liquidation on an application filed by the Respondent No. 1.

It is submitted that earlier on the order of Adjudicating Authority meeting of Committee of Creditors was convened on 02.12.2022 where CoC granted further time to the Successful Resolution Applicant to deposit the amount. It is further submitted that the proceeding of 02.12.2022 were not before the Adjudicating Authority. Any of the Appellant were not party to the Application. Learned Counsel for the Respondent submits that several opportunities were granted to comply the plan which was not complied hence the Adjudicating Authority rightly directed for liquidation. Submission needs scrutiny.

Issue Notice. Requisites alongwith process fee be filed within three days.

Let the Reply Affidavit be filed within three weeks. Rejoinder, if any, may be filed within two weeks thereafter.

List these Appeals ‘For Admission (After Notice)’ on 10th July, 2023.

In the meantime, order impugned shall remain stayed.

Looking to the issues in these appeals, the Appeals itself may be disposed of on the next date of hearing”

4. In the Appeal, reply has been filed by Respondent No.1 - Edelweiss Asset Reconstruction Company Ltd. On 14.02.2024, learned Counsel appearing for Respondent No.1 sought liberty to bring IA No.2767 of 2022

on record by means of additional affidavit. By an affidavit dated 19.02.2024, Respondent No.1 has brought on record IA No.2767 of 2022.

5. We have heard Shri Abhijeet Sinha, learned Senior Counsel appearing for Appellant in Company Appeal (AT) (Insolvency) No.499 of 2023; Shri Krishnendu Datta, learned Senior Counsel appearing for the Appellant in Company Appeal (AT) (Insolvency) No.519 of 2023; and Shri Neeraj Malhotra, learned Senior Counsel and Shri R.P. Agarwal, learned Counsel appearing for Respondent No.1.

6. The learned Senior Counsel for the Appellants, challenging the impugned order submits that Adjudicating Authority committed error in taking the view that extension of timeline for payment as approved by the Financial Creditors is modification of the Plan. It is submitted that extension of timeline in payment to be made by SRA is not modification of the Plan and the Adjudicating Authority, taking the erroneous view of law, has allowed the liquidation Application. It is further submitted that when by order dated 04.05.2022 Adjudicating Authority had disposed of the liquidation Application directing the RP to convene the Meeting of the CoC and to file appropriate application for liquidation in event the CoC decides to liquidate and in the Meeting dated 08.07.2022 of the CoC, when majority of the Members with 59.73% decided not to liquidate, thus, there was no decision by the CoC to liquidate the Corporate Debtor, which decision has been ignored by the Adjudicating Authority erroneously. It is further submitted that by a further Resolution of the Financial Creditors, passed on 02.12.2022, extension was allowed by the Financial Creditors to the SRA

to make payment as per revised timeline. In view of the said decision of the CoC dated 02.12.2022, there was no question of any contravention of Plan by SRA. The SRA as per the decision dated 02.12.2022 of the Financial Creditors has already deposited the amount, which is deposited with Cosmos Cooperative Bank Limited, the largest Financial Creditor, in a fixed deposit. It is submitted that Respondent No.1 has filed IA No.2767 of 2022 in which neither RP, nor CoC or the SRA was impleaded and without issuing the notice on the said Application, the Adjudicating Authority proceeded to allow the Application. Respondent No.1 also did not bring to notice of the Adjudicating Authority about the Resolution dated 02.12.2022, which was passed subsequent to filing of the Application and before the hearing of the Application. It is submitted that action of Respondent No.1 is wholly malafide and against the majority decision of the Financial Creditors. When the Financial Creditors have decided to extend timeline for payment by SRA, action of Respondent No.1 to pray for liquidation is against the spirit and object of the Code. Liquidation of the Corporate Debtor should be a last resort. Further, the Corporate Debtor being a MSME, hence, SRA, who was Promoter/ Director of the Corporate Debtor had every right to revive the Corporate Debtor.

7. Shri Neeraj Malhotra, learned Senior Counsel appearing for Respondent No.1 submits that Adjudicating Authority has heard all the parties in IA No.2767 of 2022, who were present on the date and whose presence has been noted in the impugned order. It is submitted that the fact that RP, CoC and SRA were not impleaded in the IA No.2767 of 2022, is immaterial, since they were present on the date when Application was

heard. It is further submitted that Respondent No.1, who was not in agreement with the decision taken by the CoC, had every right to file the Application for liquidation, the SRA having not made the payment within the timeline as provided in the Resolution Plan. It is submitted that within sixty days of the approval of the Resolution Plan, upfront payment was required to be made. It is submitted that Application for extension of exclusion of time filed by the SRA being IA No.80 of 2022, having been rejected by the Adjudicating Authority on 04.05.2022, it was clearly proved that SRA has not complied with the Resolution Plan.

8. Shri R.P. Agarwal, learned Counsel appearing for Respondent No.1 submits that as per decision on 08.07.2022, the SRA had to make payment by 30.09.2022, which payment was not made by 30.09.2022 as claimed by the SRA. It is further submitted that SRA having not been able to make the payments within time, Respondent No.1 has every right to pray for liquidation and Adjudicating Authority did not commit any error in directing for liquidation.

9. Learned Counsel for SRA in his rejoinder submits that SRA has already made the payments amounting to Rs.11.5 crores, which details are on the record in the affidavit filed by SRA in Company Appeal (AT) (Insolvency) No.519 of 2023. It is submitted that total payment by end of the first year, which was required to be paid was Rs.10 odd crores, which having already been made, the SRA has complied with the decision of Financial Creditors. It is submitted that Respondent No.1 was entitled for upfront payment of only Rs.50 lakhs.

10. We have considered the submission of learned Counsel for the parties and have perused the record.

11. There is no dispute that Resolution Plan was approved by the CoC with 75.78% vote shares. As per the Resolution Plan, payments, which were required to be made within 60 days, could not be made by SRA and SRA has filed an Application praying for exclusion/ extension of time being IA No. 80 of 2022, which Application was rejected by the Adjudicating Authority vide order dated 04.05.2022. IA No.1054 of 2022 was filed by the RP, praying for liquidation under Section 33, sub-section (3) on the ground that SRA has not made the payments within the timeline allowed under the Resolution Plan for the upfront payments. IA No.1054 of 2022, came to be disposed of by Adjudicating Authority vide its order dated 04.05.2022, which order is as follows:

“I.A. 1054/2022

The above Application is filed by the RP/Applicant, Mr. Vishal Ghusulal Jain under Section 33(3) for Liquidation of the Corporate Debtor on the ground that the successful Resolution Applicant, Mr. Anil Kumar miserably failed to implement the Resolution Plan which was duly approved by the Adjudicating Authority.

The Bench notes that the Resolution Professional has made this application at the behest of Implementation and Monitoring Committee only on the oral recommendation of the IMC in such matters the view of the COC consists of the Financial Creditor and a majority beneficiary of the Resolution Process needs to be consulted.

In view of this, the Bench hereby direct the Resolution Professional to convene the meeting of COC and file appropriate application for liquidation if suggested by COC with the mandate of COC.

With the above observations and directions, the above I.A. 1054/2022 is disposed of.”

12. The above order of the Adjudicating Authority clearly indicate that prayer made by RP for liquidation of the Corporate Debtor was not accepted. Rather, the Adjudicating Authority directed the RP to convene a Meeting of CoC and file an appropriate application, if suggested by the CoC with the mandate of CoC.

13. Consequent to the order dated 04.05.2022, a Meeting was held on 08.07.2022 in which Financial Creditors (Members of the erstwhile CoC) were invited and under the ‘List of the Issues to be voted upon at the Meeting, at Item (a), following was provided:

“2. LIST OF THE ISSUES TO BE VOTED UPON AT THE MEETING:

a. To vote upon liquidation of the Corporate Debtor consequent to default in the implementation of the Resolution Plan and filing an application to the Adjudicating Authority and to authorize the erstwhile Resolution Professional for the same and pass the following resolution with or without modifications.”

14. The Resolution at Item (a) was voted by the Financial Creditors and the Resolution of liquidation was not approved. The Cosmos Cooperative Bank Limited, who has 48.42% share, voted against the liquidation of the Corporate Debtor and it is noted by the Adjudicating Authority by itself that the CoC with 59.73% vote share decided not to liquidate the Corporate Debtor.

15. It is relevant to notice that order dated 04.05.2022, by which Adjudicating Authority directed the RP to convene a Meeting of CoC was not challenged by Respondent No.1 or any other Financial Creditors and the said order had become final and was given effect.

16. When the CoC had already been taken a decision in its Meeting dated 08.07.2022 against the liquidation, we fail to see the reason for Respondent No.1 to file the Application against majority decision.

17. The copy of the Application – IA No.2767 of 2022 was not brought on record by Respondent No.1 in its reply filed in the Appeal and it was only after order passed by this Tribunal on 14.02.2024, the copy of the Application has been brought on record by an affidavit dated 19.02.2024. A perusal of the copy of the IA No.2767 of 2022 shows that neither CoC, nor RP or SRA were impleaded and in the IA following prayers were made:

- a. Pass an order under Section 33 (3) of the Code directing initiation of Liquidation of the Corporate Debtor and appoint a Liquidator of the Corporate Debtor;
- b. Pass an order appointing Sachin Shrinivas Bhattad having Registration No. Reg No. – IBBI/IPA-001/IP-P00680/2017-2018/11159 herein as the Liquidator of the Corporate Debtor;
- c. Pass appropriate orders, as deemed fit under Section 74(3) against the Resolution Applicant, for willfully failing to comply with the Resolution Plan;
- d. In the alternative to prayer Clause (a) and (b) and only in the event this Hon'ble Tribunal doesn't grant the prayer of liquidation, pass an order:

- i. classifying Applicant as a Financial Creditor who did not vote in favour of the Resolution Plan in terms of Regulation 38(1)(b) of CIRP Regulations; and
 - ii. direct Resolution Applicant to pay the pro-rata Liquidation Value of Applicant's claim amounting to Rs8,06,03,853 (Rupees Eight Crores Six Lakhs Three Thousand Eight Hundred and Fifty Three only) in priority to other financial creditors in terms of Section 30(2)(b) read with Regulation 38(1)(b) of the CIRP Regulations.
- e. Pass any other orders as this Hon'ble Tribunal may deem fit."

18. A perusal of IA No. 2767 of 2022 indicates that Respondent No.1 was aggrieved by the decision of the CoC, which was taken on 08.07.2022. In the synopsis of the Application in paragraphs 15, 16, 17, following has been pleaded by Respondent No.1:

- "15. That on 08 July 2022, the fourth meeting of the IMC was held wherein the Resolution Applicant again sought an extension to make upfront payment by 30 September 2022. The IMC agreed to table a resolution in front of the erstwhile members of the CoC to liquidate the Corporate Debtor. In this voting by the erstwhile members of the CoC, 59.73% of the members of voted to not liquidate, while 28.23% including the Applicant voted in favour of liquidation.
16. That this decision of the erstwhile members of the CoC amounts to a modification of an approved Resolution Plan and is impermissible under the Code. Furthermore, in spite of being given various opportunities, the Resolution Applicant has consistently failed to meet his obligations under the Resolution Plan because of which the Applicant, along with other creditors have lost faith in the Resolution Applicant to meet his obligations.

17. That as per Section 33 (3) of the Code, the Applicant's interests are prejudicially affected by the Resolution Applicant's failure to perform its obligations under the Resolution Plan. The Applicant has lost faith in Resolution Applicant's ability to make the payments under the Resolution Plan and accordingly it is in the best interest of all the stakeholders to liquidate the Corporate Debtor.”

19. The basis of the Application of Respondent No.1 was that decision of erstwhile Members of the CoC, amounts to modification of an approved Resolution Plan and which pleadings made by Respondent No.1 was accepted by the Adjudicating Authority in the impugned order.

20. Section 33, sub-section (3) of the Code, provides for liquidation of the Corporate Debtor

“33(3) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii), (iii) of clause (b) sub-section (1).”

21. The key words in sub-section (3) of Section 33 are “*resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor*”. Thus, contravention by the SRA was to be proved. In IA No.2767 of 2022, Respondent No.1 has not even impleaded the SRA to give an opportunity to SRA to explain that SRA had not contravened the Plan. We, thus, do not approve the act of Respondent No.1 in filing IA No.2767 of 2022 without impleading the SRA, against whom contravention is

sought. Further, we notice that in IA No.2767 of 2022, the Adjudicating Authority did not issue any notice, nor granted any opportunity to the CoC, whose majority decision taken on 08.07.2022 was also questioned, to give its reply. The Adjudicating Authority did not give any opportunity to the SRA to respond to IA No.2767 of 2022.

22. The Adjudicating Authority itself on 04.05.2022 has directed the RP to convene a Meeting of CoC and file liquidation application, after CoC give its mandate. The CoC has given the mandate otherwise, but the Adjudicating Authority had proceeded to allow the Application filed by Respondent No.1.

23. It is further relevant to notice that on 02.12.2022 a Meeting of Financial Creditors took place, where it was decided to grant further time to SRA to make payments as per schedule provided in the Resolution. The Resolution dated 02.12.2022 is as follows:

“Meeting of the Financial Creditors of S K Wheels P Ltd. held on Friday 2nd December 2022 at 05:00 p.m. at Vashi, Navi Mumbai, Maharashtra.

**WRITTEN RECORD OF THE SUMMARY OF THE DECISION
TAKEN ON THE FOLLOWING AGENDA ITEM**

"RESOLVED THAT the consent of the Financial Creditors (erstwhile members of the Committee of Creditors) of S. K. Wheels Private Limited be and is hereby accorded to allow further time to the Resolution Applicant to make the payment as per the schedule as hereunder:

a. An amount of INR 1 Crore to be deposited in the CIRP account held with the Cosmos Bank latest by 14.12.2022, and a lien be marked thereon, and

i. in case allowing further time is voted in favour by majority of the voting share of Financial Creditors, and the same is further approved by the Hon'ble NCLT, then the same be appropriated against upfront payment required to be made as per the approved resolution plan; and

ii. in case allowing further time is either not voted in favour by majority of the voting share of Financial Creditors or the same is not approved by the Hon'ble NCLT, then the said amount of INR 1 Crore shall be refunded to the Resolution Applicant.

b. An amount of INR 5 Crore to be deposited in the CIRP account within 30 days of the order allowing further time is approved by the Hon'ble NCLT and the same be appropriated against upfront payment required to be made as per the approved resolution plan;

c. Balance upfront amount, along with interest, as applicable, is to be paid by the Resolution Applicant within 3 working days from the receipt of the order of De-merger from the Hon'ble NCLT:

d. The installment which was to be paid at the end of Year 1 i.e. in Nov. 22 is to be paid by 31.07.2023 alongwith interest at the rate of 10% p.a; and

e. Installments due at the end of Years 2, 3, 4 & 5 are to be paid as per the original timeline i.e. in Nov. 2023, Nov. 2024, Nov. 2025 and Nov. 2026".

Name of the Creditors	SHARE%	FOR	AGAINST	ABSTAINED
The Cosmos Co-op. Bank Ltd.	58.99	58.99	-	-
Edelweiss Asset Reconstruction Company Ltd. (Edelweiss ARC)	24.71	-	24.71	-
State Bank of India	10.05	10.05	-	-
BMW India Financial Services Pvt. Ltd.	4.39	-	4.39	-
Tata Capital Financial Services Ltd.	1.76	-	-	1.76

Shriram Transport Finance Co. Ltd.	0.10	-	-	0.10
Total	100.00	69.04	29.10	1.86
Result: Approved”				

24. The said Resolution granted further time to the Resolution Applicant, which was approved by 69.04% vote shares.

25. Respondent No.1, who has filed IA No.2767 of 2022, was also part of the Meeting dated 02.12.2022 and voted against granting of extension, did not chose to bring the said Resolution before the Adjudicating Authority, which clearly prove that further time has been granted by Financial Creditors. Hence, no contravention can be alleged on the SRA. There is no material on the record to indicate that Respondent No.1, who has filed IA No.2767 of 2022 has brought into the notice of the Adjudicating Authority about the Resolution dated 02.12.2022. It is clear that Respondent No.1 having not brought on the record, the subsequent events, i.e., Resolution dated 02.12.2022, where it has participated and voted against the Resolution, clearly indicate that Respondent No.1 intended to obtain order of liquidation by concealing relevant facts. As noted above, Respondent No.1 in his Application has also not impleaded CoC, SRA or RP, whereas an order was sought by Respondent No.1 for liquidation.

26. The decision dated 08.07.2022 was taken by the Financial Creditors under the orders of the Adjudicating Authority dated 04.05.2022, which order was never challenged. When the Financial Creditors have taken decision, not to liquidate the Corporate Debtor, the said decision was

relevant and could not have been ignored by the Adjudicating Authority while passing the impugned order.

27. The Adjudicating Authority in its impugned order while noticing the Resolution dated 08.07.2022 of the Financial Creditor had made the following observation:

“18. It is pertinent to note that the first tranche of the payment was to be paid by 08.01.2022. It is fact borne on record, that till date the Resolution Applicant defaulted in payment even after the expiry of the payment term for more than a year. The Corporate Debtor further sought an extension in the 4th IMC meeting held on 08.07.2022, stating that the first upfront payment will be made by 30.09.2022, this was put on Resolution by the IMC and 59.73% voted not to liquidate the Corporate Debtor. However, the Resolution Applicant again failed to adhere the timeline assured, which is evidenced by an email dated 21.09.2022, sent by the Applicant to the IMC members. The stand taken by the IMC members not to liquidate will lead to the modification of the Resolution Plan, which is impermissible in Code.”

28. The view taken by the Adjudicating Authority in the aforesaid paragraph indicates that decision of the Members, not to liquidate, will lead to the modification of the Resolution Plan, which is impermissible in the Code. Thus, the basis of the order of liquidation passed by the Adjudicating Authority is that not to liquidate the Corporate Debtor would lead to modification of the Plan, which is impermissible in the Code. We are of the view that above decision of the Adjudicating Authority is unsustainable. It is well settled that extension of time in payment by the Resolution Applicant is not modification of the Resolution Plan.

29. Learned Senior Counsel for the Appellant has relied on judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No.1038 of 2021 – Tricounty Premier Hearing Service Inc. vs. State Bank of India and Ors.*** decided on 20.01.2022, where this Tribunal took the view that Application filed by SRA praying for extension of timeline in payment as per the Resolution Plan was wrongly rejected by the Adjudicating Authority. This Tribunal allowed the Appeal and extended time to the SRA to comply with the financial obligations as per the Resolution Plan. In paragraphs 26 and 27, following has been held:

“**26.** The facts and materials on record as noted above clearly indicate that although the Appellant had failed to make payment as per Resolution Plan, but it is not a case that efforts has not been made by the Appellant to make payment. Admittedly, payment of Rs.15 crores out of Rs.45 crores to the Financial Creditor has already been made apart from other payments as noted above. We, thus, are of the opinion that by granting 30 days’ time to Appellant to comply its all financial obligations in Resolution Plan and make payment of balance of Rs.30 crores shall not cause any prejudice to Financial Creditors, who have already been denied the said payment for a long period of time. In event, the Appellant is unable to make the payment as prayed for, it shall be open to proceed with the liquidation, no option being left thereafter.

27. In the result, we allow this Appeal. Set aside order dated 24th November, 2021 passed by the Adjudicating Authority and grant 30 days’ time to the Appellant from today to make the payment of balance amount of Rs.30 crores to the Financial Creditors on or before 20th February, 2022, failing which, it shall be open to proceed with the liquidation of Corporate Debtor. No order as to costs.”

30. To the same effect is the judgment of this Tribunal in ***GP Global Energy Private Limited vs. Mr. Sandeep Mahajan and Anr. - Company***

Appeal (AT) (Insolvency) No.954 of 2021, where this Tribunal after noticing judgment of the Hon'ble Supreme Court in **Ebix Singapore Private Limited vs. CoC Educomp**, made following observations in paragraphs 26, 27 and 28:

“26. This Tribunal rejected the submission that the Adjudicating Authority has no jurisdiction to extend the time for complying the financial obligations in the Resolution Plan. This Tribunal ultimately after considering all facts and circumstances allowed the Appeal and granted 30 days' time to the Appellant to make the payment of the balance amount.

27. The observations in Para 13 about behaviour as demonstrated by SRA so far that of non-seriousness towards the laws and that it defaulted on its obligations is also made without considering all facts and circumstances. The Adjudicating Authority not even was aware of the payments of INR 70.25 crores which have been made till 08.11.2019, when the application was rejected on 01.11.2021, where under the orders of the Adjudicating Authority itself the payments were made by the Appellant.

28. We, thus, are of the opinion that the Adjudicating Authority has rejected both the C.A. Nos. 2357/2019 and 1170/2019 without considering any of the grievances and issues raised by the Appellant in those applications. The order dated 01.11.2021 is thus unsustainable and deserves to be set aside. We may notice that the Appellant, as recorded by this Tribunal in order dated 07.12.2021, has offered to deposit balance amount of Rs.165.31 Crores before 27.12.2021 but before aforesaid dated an I.A. was filed by the Appellant being I.A. No. 2941 of 2021 when Appellant came to know about the Report of the Sub-Divisional Officer dated 21.12.2021 that there is encroachment on the immovable property. Learned counsel for the Appellant before us submitted that they are ready to deposit the entire balance amount of Rs.165.31 Crores within any time allowed by this Tribunal to finally implement the Resolution Plan.”

31. When the Adjudicating Authority directed the RP by order dated 04.05.2022 to convene the Meeting of CoC to take a decision, as to whether Corporate Debtor be liquidated or not, the decision taken by the CoC was a commercial decision of the CoC, i.e., not to liquidate the Corporate Debtor and the said commercial decision was not required to be interfered by the Adjudicating Authority by the impugned order directing for liquidation.

32. Shri Neeraj Malhotra, learned Senior Counsel appearing for Respondent No.1 tried to distinguish the judgment of this Tribunal in **GP Global Energy Pvt. Ltd.** by observing that in the said case time was extended for 30 days only, whereas in the present case time extension is much more. The submission of Shri Neeraj Malhotra cannot be accepted. The legal position that extension of time is not modification of the Resolution Plan is well settled and that fact that whether the time is extended for one month or one year, does not change the legal position. The time extension for payment of amount as per the Resolution Plan is not modification of the Plan. The very basis of order passed by Adjudicating Authority that not to liquidate the Corporate Debtor would lead to modification of the Resolution Plan is fallacious and unsustainable.

33. In result, we allow the Appeal, set aside the impugned order dated 13.02.2023 passed in I.A. No.2767 of 2022 and dismiss I.A. No.2767 of 2022. The SRA having already deposited the amount along with interest @ 10% in the form of fixed deposit before the largest Financial Creditor as permitted by Resolution dated 02.12.2022 by the Financial Creditors, the RP shall proceed to distribute the amount to the Financial Creditors as per

the Resolution Plan and decision of the Financial Creditors dated 02.12.2022, from the amounts already deposited by the SRA. Both the Appeal are allowed accordingly. Pending IAs, if any, are also stand disposed of. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

29th April, 2024

Ashwani