2024 INSC 14

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9133 OF 2019

DBS BANK LIMITED SINGAPORE ..... APPELLANT

VERSUS

RUCHI SOYA INDUSTRIES LIMITED
AND ANOTHER ..... RESPONDENTS

WITH

CIVIL APPEAL NO. 787 OF 2020

J U D G M E N T

SANJIV KHANNA, J.

The issue that arises for consideration in the present appeals is:

Whether Section 30(2)(b)(ii) of the Insolvency and Bankruptcy Code, 2016[1], as amended in 2019, entitles the dissenting financial creditor to be paid the minimum value of its security interest?

2. Appellant - DBS Bank Limited Singapore had extended financial debt of around USD 50,000,000 (fifty million dollars only) or Rs.

[1] For short, "IBC" or "the Code", as the case may be.

243,00,00,000 (rupees two hundred forty three crore only) to M/s. Ruchi Soya Industries Limited[2], the corporate debtor.

3. The financial debt was secured by: (i) a sole and exclusive first charge over certain immovable and fixed assets of the Corporate Debtor in Kandla, Gujarat; and (ii) sole and exclusive first charge over assets of the Corporate Debtor in Baran, Rajasthan; Guna, Madhya Pradesh; Dalauda, Madhya Pradesh; Gadarwara, Madhya Pradesh; and a commercial office space at Nariman Point, Mumbai.

4. On 15.12.2017, Corporate Insolvency Resolution Process[3] was initiated against the Corporate Debtor under the provisions of the Code. The company petition seeking to initiate CIRP was admitted and a Resolution Professional[4] was appointed.

5. The appellant had submitted its claim, which was admitted by the RP at Rs. 242,96,00,000 (rupees two hundred forty two crore ninety six lakh only).

6. On 20.03.2019, Patanjali Ayurvedic Limited submitted a resolution plan for Rs. 4134,00,00,000 (rupees four thousand one hundred thirty four crore only) against the aggregate claims of around Rs.

[2] For short, “Corporate Debtor”.
[3] For short, “CIRP”.
[4] For short, “RP”.

8398,00,00,000 (rupees eight thousand three hundred ninety eight crore only), representing approximately 49.22% of the total admitted claims of the financial creditors.

7. On 12.04.2019, by a communication, the appellant informed the Committee of Creditors[5] that the sole and exclusive nature of security held by the appellant by way of mortgage/hypothecation over immovable and fixed assets of the Corporate Debtor was of greater value compared to collaterals held by other creditors. Emphasising the specific treatment of the exclusive and superior security, the appellant requested the CoC to take into account the liquidation value of such security while considering the distribution of proceeds and to make such distribution in a "fair and equitable" manner.

8. In the 21st and 22nd CoC meetings held on 15.04.2019 and 23.04.2019 respectively, the appellant's concern regarding treatment/proposed pay-out was noted. However, in the meeting held on 23.04.2019, the CoC approved *pari passu* distribution of the resolution plan proceeds.

[5] For short, "CoC".

9. On 30.04.2019, the resolution plan was approved by 96.95% of the CoC. The appellant had voted against the resolution plan, thereby becoming a dissenting financial creditor.

10. The resolution plan was filed for approval before the National Company Law Tribunal[6], Mumbai. Separately, the appellant challenged the distribution mechanism of the resolution plan proceeds by way of an application before the NCLT, Mumbai.

11. On 24.07.2019, the NCLT granted provisional/conditional approval to the resolution plan. By the same order dated 24.07.2019, the NCLT dismissed the appellant's application challenging the distribution mechanism of the resolution plan proceeds.

12. On 31.07.2019, the appellant challenged the dismissal of its application before the National Company Law Appellate Tribunal[7].

13. During pendency of the appeal, Section 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019[8], was notified by way of a gazette notification dated 16.08.2019. It amended Section 30(2)(b) of the Code. Amended Section 30(2)(b)(ii) of the Code provides that operational and dissenting financial creditors shall not

[6] For short, "NCLT".
[7] For short, "NCLAT".
[8] For short, "Amendment Act".

be paid an amount lesser than the amount to be paid to creditors in the event of liquidation of the Corporate Debtor under Section 53(1) of the Code. Explanation 2 added thereby makes the amended Section 30(2)(b) applicable to pending proceedings. Section 30(4) was also amended to state the CoC shall take into account "the order of priority" amongst creditors as laid down in Section 53(1) of the Code.

14. On 30.08.2019, at the 26th CoC meeting, the appellant requested the CoC to reconsider the distribution of the resolution proceeds in light of the amendments to the Code. The appellant had submitted that if the amendments were considered, it would be entitled to receive Rs. 217,86,00,000 (rupees two hundred seventeen crore eighty six lakh only) which is the liquidation value of the security interest. The CoC, however, did not accept the prayer, observing *inter alia* that the appellant had already filed an appeal before the NCLAT, which was pending. The CoC was of the view that there was a fair amount of ambiguity in the amendments, and no view should be expressed by them.

15. The NCLT *vide* order dated 04.09.2019 finally approved the resolution plan, which was already provisionally approved *vide* order dated 24.07.2019.

16. On 11.10.2019, the appellant challenged the final approval order dated 04.09.2019 by way of an appeal before the NCLAT. The first NCLAT appeal preferred by the appellant on 31.07.2019 was still pending.

17. The two appeals preferred by the appellant against the orders/judgments of the NCLT dated 24.07.2019 and dated 04.09.2019 were taken up for hearing by the NCLAT. By order dated 18.11.2019, the first appeal preferred by the appellant was dismissed. By the subsequent order dated 09.12.2019, the NCLAT dismissed the second appeal filed by the appellant.

18. The orders dated 18.11.2019 and 09.12.2019 passed by the NCLAT are in challenge before us. This Court, *vide* order dated 06.12.2019, was pleased to issue notice in the appeal preferred against the order dated 18.11.2019 and by way of an interim order, has directed that Rs. 99,74,00,000 (rupees ninety nine crore seventy four lakh only), being the difference between the amount which the appellant would have received in terms of the amendments noticed above and the amount received by the appellant on *pro rata* distribution of proceeds, should be deposited in an escrow account. Accordingly, Rs. 99,74,00,000 (rupees

ninety nine crore seventy four lakh only) had been set aside and kept in an escrow account.

19. The appellant, it should be stated, has made no claims against Patanjali Ayurvedic Limited.

20. As per the appellant, the *pro rata* distribution of proceeds does not give regard to the sole, exclusive and higher value of their security interest. The appellant will receive approximately Rs. 119,00,00,000 (rupees one hundred nineteen crore only) as against the liquidation value of the security interest of Rs. 217,86,00,000 (rupees two hundred seventeen crore eighty six lakh only). The admitted claim of the appellant is Rs. 242,96,00,000 (rupees two hundred forty two crore ninety six lakh only). Thus, the appellant, notwithstanding the amendments to Section 30 of the Code, has been deprived of its due share given its superior security assets. Equating the appellant with financial creditors having inferior security interest has resulted in unjust enrichment and windfall benefits to the dissimilarly placed creditors to the detriment of the appellant.

21. To appreciate the legal question, which requires an answer, we would like to reproduce Section 30(2) and Section 30(4) of the Code, with the amendments made *vide* the IBC (Amendment) Act,

2019, which for clarity have been highlighted in italics and bold.

Relevant portions of the two sections read:

> "30. Submission of resolution plan.—
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> xx xx xx
>
> (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
>
> (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
>
> ***(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.***
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> ***Explanation 1.—For the 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.***
>
> ***Explanation 2.—For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy***

Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

Explanation.—For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

xx xx xx

(4) 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:

xx xx xx

22. The first issue that arises for consideration in these appeals is whether the amendments made in the substantive portion of Section 30(2), in terms of Explanation 2 will be applicable when the first appeal was heard by the NCLAT. The Amendment Act was notified and came into effect on 16.08.2019. The appellant had preferred the first appeal before the NCLAT on 31.07.2019, which appeal was directed against the provisional approval order passed by the NCLT on 24.07.2019. In our opinion, Explanation 2(ii) clearly states that an appeal preferred under Section 61 or 62, when it is not barred by time under any provision of law, shall be heard and decided after considering the amended Section 30(2)(b) under the Amendment Act. In fact, Explanation 2(i) states that the amended clause shall "also" apply to the CIRP of the corporate debtor where a resolution plan has not been approved or rejected by the adjudicating authority. Explanation 2(iii) states that the amended Section 30(2)(b) shall "also" apply where legal proceedings have been initiated in any court against the decision of the adjudicating authority. Clauses (i), (ii) and (iii) of Explanation 2 reflect the wide expanse and width of the legislative intent *viz.* the application of the Amendment Act, whether proceedings are pending before the

adjudicating authority, the appellate authority, or before any court in a proceeding against an order of the adjudicating authority in respect of a resolution plan. Only when the resolution plan, as approved, has attained finality as no proceedings are pending, that the amendments will not apply to re-write the settled matter.

23. A three Judge Bench of this Court in ***Committee of Creditors of Essar Steel India Limited*** v. ***Satish Kumar Gupta & Ors***.[9], in paragraph 130, has observed that Explanation 2 applies to the substituted Section 30(2)(b) to pending proceedings either at the level of the adjudicating authority, appellate authority or in a writ or civil court. Referring to several decisions, it is observed that no vested right inheres in any resolution applicant who has plans approved under the Code. Further, an appellate proceeding is a continuation of the original proceeding. A change in law can always be applied to original or appellate proceedings. Thus, Explanation 2 is constitutionally valid and despite having retrospective operation, it does not impair vested rights.

24. We must also take note of the second submission of the appellant in this regard relying upon Explanation 2(i), *inter alia*, on the ground that the final approval to the resolution plan by the NCLT was *vide*

[9] (2020) 8 SCC 531.

order dated 04.09.2019, which is after the notification of the Amendment Act on 16.08.2019. The first order provisionally/ conditionally approving the resolution plan was dated 24.07.2019 and hence, the effect of the Amendment Act could not have been considered and applied by the NCLT. There is merit in the contention of the appellant, but we need not firmly decide this issue, for we are of the opinion that the Amendment Act was certainly applicable when the appeals were heard and decided by the NCLAT on 18.11.2019 and 09.12.2019, which was post the enforcement of the Amendment Act.

25. The second question relates to the interpretation of Section 30(2)(b)(ii) of the Code. As we read Section 30(2)(b)(ii), the dissenting financial creditor is entitled to payment, which should not be less than the amount payable under Section 53(1), in the event of the liquidation of the corporate debtor. The provision recognises that all financial creditors need not be similarly situated. Secured financial creditors may have distinct sets of securities. There are a number of decisions of this Court, *viz.* ***Committee of Creditors of Essar Steel India Limited*** (supra), ***Swiss Ribbons Private Limited and Another*** v. ***Union of India and Others***[10], and ***Vallal***

[10] (2019) 4 SCC 17.

RCK v. ***Siva Industries and Holdings Limited and Others***[11], which have held that the commercial wisdom of the CoC must be respected. Therefore, the resolution plan accepted by the requisite creditors/members of the CoC upon voting, is enforceable and binding on all creditors. The CoC can decide the manner of distribution of resolution proceeds amongst creditors and others, but Section 30(2)(b) protects the dissenting financial creditor and operational creditors by ensuring that they are paid a minimum amount that is not lesser than their entitlement upon the liquidation of the corporate debtor.

26. The Code had been enacted to balance the interests of various stakeholders, *inter alia,* by facilitating the resolution of insolvency, promoting investment, maximising the value of assets, and increasing the availability of credit. Secured credit is important for commerce as it reduces credit risk and carries lower interest due to lower loss value in the event of failure. On the resolution plan being approved, an unwilling secured creditor does and must forgo the security, albeit such an unwilling secured creditor is entitled to the value of the security as payable on the liquidation of the corporate debtor. The provision is enacted to protect the minority autonomy

[11] (2022) 9 SCC 803.

of creditors. It should not be read down to nullify the minimum entitlement. Section 30(2)(b)(ii) forfends the dissenting financial creditor from settling for a lower amount payable under the resolution plan.

27. The order passed by the NCLAT dated 18.11.2019 noticing the amendments states that Section 30(4) had not been given retrospective effect but is prospective in nature. While it was open to the CoC to follow the amended Section 30(4), it was not mandatory to follow the same. A financial creditor can dissent if the resolution plan is discriminatory or against a provision of law. However, a dissenting financial creditor cannot take advantage of Section 30(2)(b)(ii). A secured creditor cannot claim preference over another secured creditor at the stage of distribution on the ground of a dissent or assent, otherwise the distribution would be arbitrary and discriminative. The purpose of the amendment was only to ensure that a dissenting financial creditor does not get anything less than the liquidation value, but not for getting the maximum of the secured assets.

28. In ***India Resurgence ARC Private Limited*** v. ***Amit Metaliks Limited & Another.***[12], a two Judge Bench of this Court has referred

[12] 2021 SCC Online SC 409.

to a judgment by a three Judge Bench of this Court in ***Jaypee Kensington Boulevard Apartments Welfare Association & Others.*** v. ***NBCC (India) Limited & Others.***[13], to observe and hold:

> "18. In the case of Jaypee Kensington (supra), the proposal in the resolution plan was to the effect that if the dissenting financial creditors would be entitled to some amount in the nature of liquidation value in terms of Sections 30 and 53 of IBC read with Regulation 38 of the CIRP Regulations, they would be provided such liquidation value in the form of proportionate share in the equity of a special purpose vehicle proposed to be set up and with transfer of certain land parcels belonging to corporate debtor. Such method of meeting with the liability towards dissenting financial creditors in the resolution plan was disapproved by the Adjudicating Authority; and this part of the order of the Adjudicating Authority was upheld by this Court with the finding that the proposal in the resolution plan was not in accord with the requirement of 'payment' as envisaged by clause (b) of Section 30(2) of the Code. In that context, this Court held that such action of 'payment' could only be by handing over the quantum of money or allowing the recovery of such money by enforcement of security interest, as per the entitlement of a dissenting financial creditor. This Court further made it clear that in case a valid security interest is held by a dissenting financial creditor, the entitlement of such dissenting financial creditor to receive the amount could be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. This Court clarified that by enforcing such a security interest, a dissenting financial creditor would receive payment to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code. This Court, inter alia, observed and held as under:
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> > "121.1. Therefore, when, for the purpose of discharge of obligation mentioned in the second part of clause (b) of Section 30(2) of the Code, the dissenting financial creditors are to be "paid" an "amount" quantified in terms of the "proceeds" of

[13] (2022) 1 SCC 401.

> assets receivable under Section 53 of the Code; and the "amount payable" is to be "paid" in priority over their assenting counterparts, the statute is referring only to the sum of money and not anything else. In the frame and purport of the provision and also the scheme of the Code, the expression "payment" is clearly descriptive of the action of discharge of obligation and at the same time, is also prescriptive of the mode of undertaking such an action. And, that action could only be of handing over the quantum of money, or allowing the recovery of such money by enforcement of security interest, as per the entitlement of the dissenting financial creditor.
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> 121.2. We would hasten to observe that in case a dissenting financial creditor is a secured creditor and a valid security interest is created in his favour and is existing, the entitlement of such a dissenting financial creditor to receive the "amount payable" could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. Obviously, by enforcing such a security interest, a dissenting financial creditor would receive "payment" to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code…."

29. Thereafter, this Court in ***India Resurgence ARC Private Limited*** (supra) has observed:

> "19. In Jaypee Kensington (supra), this Court repeatedly made it clear that a dissenting financial creditor would be receiving the payment of the amount as per his entitlement; and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It has never been laid down that if a dissenting financial creditor is having a security available with him, he would be entitled to enforce the entire of security interest or to receive the entire value of the security available with him. It is but obvious that his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him.

> 20. The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.
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> 21. The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further exposited in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors."

30. Our attention is also drawn to paragraph 17 and 22 of ***India Resurgence ARC Private Limited*** (supra), wherein after elucidating on the ratio in ***Jaypee Kensington*** (supra), the Bench has observed:

> "17. Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.
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> xx xx xx
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> 22. It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of

> assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced. We may profitably refer to the relevant observations in this regard by this Court in Essar Steel as follows:
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> > "85. Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.""

31. We believe that there is a contradiction in the reasoning given in the judgment of this Court in ***India Resurgence ARC Private Limited*** (supra), which is in discord with the *ratio decidendi* of the decisions of the three Judge Bench in ***Committee of Creditors of Essar Steel India Limited*** (supra) and ***Jaypee Kensington*** (supra).

32. In ***Committee of Creditors of Essar Steel India Limited*** (supra), this Court had referred to the UNCITRAL Legislative Guide on the treatment of dissenting creditors to observe that it is essential to provide a way of imposing a plan agreed upon by a majority of a class upon the dissenting minority to increase the chances of success of the reorganisation. However, it is also necessary

depending upon the mechanism that is chosen for voting on the plan and whether the creditors vote in class, to consider whether the plan can be made binding upon dissenting classes of creditors and other affected parties. To the extent that the plan can be approved and enforced upon the dissenting parties, there is a need to ensure that the plan provides appropriate protection for the dissenting parties and, in particular, the rights may not be unfairly affected. Thereupon, the UNCITRAL Legislative Guide states:

> "…The law might provide, for example, that dissenting creditors cannot be bound unless assured of certain treatment. As a general principle, that treatment might be that the creditors will receive at least as much under the plan as they would have received in liquidation proceedings. If the creditors are secured, the treatment required may be that the creditor receives payment of the value of its security interest, while in the case of unsecured creditors it may be that any junior interests, including equity holders, receive nothing…"

33. In our opinion, the provisions of Section 30(2)(b)(ii) by law provides assurance to the dissenting creditors that they will receive as money the amount they would have received in the liquidation proceedings. This rule also applies to the operational creditors. This ensures that dissenting creditors receive the payment of the value of their security interest.

34. In paragraph 128 in the case of ***Committee of Creditors of Essar Steel India Limited*** (supra), it has been clearly held:

> "128. When it comes to the validity of the substitution of Section 30(2)(*b*) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(*b*) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (*i*) and (*ii*) of sub-clause (*b*) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (*b*) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(*b*) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (*i*) and (*ii*) of clause (*b*), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cram down unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(*b*) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder."

35. The reasoning and the ratio in ***Jaypee Kensington*** (supra) is also the same:

> "164.2. We would hasten to observe that in case a dissenting financial creditor is a secured creditor and a valid security interest is created in his favour and is existing, the entitlement of such a dissenting financial

> creditor to receive the "amount payable" could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. Obviously, by enforcing such a security interest, a dissenting financial creditor would receive "payment" to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code."

36. We have reservation on portions of the view expressed in paragraphs 17, 21 and 22 in the judgment of ***India Resurgence ARC Private Limited*** (supra). Paragraph 17 is respectfully correct in its observations when it refers to the provisions of Section 30(4) and that the voting is essentially a matter which relates to commercial wisdom of the CoC. The observation that a dissenting secured creditor cannot suggest that a higher amount be paid to it is also correct. However, this does not affect the right of a dissenting secured creditor to get payment equal to the value of the security interest in terms of Section 30(2)(b)(ii) of the Code. Paragraph 21 in ***India Resurgence ARC Private Limited*** (supra) again in our respectful view is partially correct. It is correct to the extent that the legislature has not stipulated that the dissenting financial creditor shall be entitled to enforce the security interest. However, it is incorrect to state that the dissenting financial creditor would not be entitled to receive the liquidation value, the amount payable to him in terms of Section 53(1) of the Code. Paragraph 22 refers to the

Committee of Creditors of Essar Steel (supra), which we have already quoted and is apposite to the view expressed by us. The reasoning given in the earlier portion of paragraph 22 in our respectful opinion is in conflict with the ratio in ***Committee of Creditors of Essar Steel India Limited*** (supra) as it does not take into account the legal effect of Section 30(2)(b)(ii) of the Code. While it is important to maximise the value of the assets of the corporate debtor and prevent liquidation, the rights of operational creditors or dissenting financial creditors also have to be protected as stipulated in law.

37. In ***Jaypee Kensington*** (supra), it has been held that the dissenting financial creditor, if the occasion arises, is entitled to receive the extent of value in money equal to the security interest held by him. It would not be proper to read ***Jaypee Kensington*** (supra), as laying down that the dissenting financial creditor would be entitled to the extent of amounts receivable by him in the resolution plan. This would undo the very object and purpose of the amendment. It would make the portion of Section 30(2)(b)(ii) specifying the amount to be paid to such creditor in accordance with Section 53(1), redundant and meaningless.

38. Our reasoning finds resonance in the reasoning given in ***Jaypee Kensington*** (supra), which states that for the purpose of discharge

of obligation mentioned in the second part of Section 30(2)(b) of the Code, the dissenting financial creditors are to be paid an amount quantified in terms of the proceeds of assets receivable under Section 53 of the Code. This amount payable is to be paid on priority over the dissenting counterparts. However, Section 30(2) refers only to the sum of money and nothing else, that is, it does not permit the dissenting financial creditor to enforce the security and sell the same. This would be counterproductive and may nullify the resolution plan. What the dissenting financial creditor is entitled to is the payment, which should not be less than the amount/value of the security interest held by them. The security interest gets converted from the asset to the value of the asset, which is to be paid in the form of money. This is clear from the relevant portions of paragraphs 164.1, 164.2, 166.4, and 167 in ***Jaypee Kensington*** (supra), which read as under:

> "164.1. Therefore, when, for the purpose of discharge of obligation mentioned in the second part of clause (b) of Section 30(2) of the Code, the dissenting financial creditors are to be "paid" an "amount" quantified in terms of the "proceeds" of assets receivable under Section 53 of the Code; and the "amount payable" is to be "paid" in priority over their assenting counterparts, the statute is referring only to the sum of money and not anything else. In the frame and purport of the provision and also the scheme of the Code, the expression "payment" is clearly descriptive of the action of discharge of obligation and at the same time, is also prescriptive of the mode of undertaking such an action. And, that action could only be of handing over the quantum of money, or allowing the recovery of such

money by enforcement of security interest, as per the entitlement of the dissenting financial creditor.

164.2. We would hasten to observe that in case a dissenting financial creditor is a secured creditor and a valid security interest is created in his favour and is existing, the entitlement of such a dissenting financial creditor to receive the "amount payable" could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. Obviously, by enforcing such a security interest, a dissenting financial creditor would receive "payment" to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code [Though it is obvious, but is clarified to avoid any ambiguity, that the "security interest" referred herein for the purpose of money recovery by dissenting financial creditor would only be such security interest which is relatable to the "financial debt" and not to any other debt or claim.] . In any case, that is, whether by direct payment in cash or by allowing recovery of amount via the mode of enforcement of security interest, the dissenting financial creditor is entitled to receive the "amount payable" in monetary terms and not in any other term.

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166.4. The suggestion about prejudice being caused to the assenting financial creditors by making payment to the dissenting one has several shortcomings. As noticeable, in the scheme of IBC, a resolution plan is taken as approved, only when voted in favour by a majority of not less than 66% of the voting share of CoC. Obviously, the dissenting sect stands at 34% or less of the voting share of CoC. Even when the financial creditors having a say of not less than 2/3rd in the Committee of Creditors choose to sail with the resolution plan, the law provides a right to the remainder (who would be having not more than 34% of voting share) not to take this voyage but to disembark, while seeking payment of their outstanding dues. Even this disembarkment does not guarantee them the time value for money of the entire investment in the corporate debtor; what they get is only the liquidation value in terms of Section 53 of the Code. Of course, in the scheme of CIRP under the Code, the dissenting

> financial creditors get, whatever is available to them, in priority over their assenting counterparts. In the given scheme of the statutory provisions, there is no scope for comparing the treatment to be assigned to these two divergent sects of financial creditors. The submissions made on behalf of assenting financial creditors cannot be accepted.
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> 167. To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (b) of sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e. by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities. In the true operation of the provision contained in the second part of sub-clause (ii) of clause (b) of sub-section (2) of Section 30 (read with Section 53), in our view, the expression "payment" only refers to the payment of money and not anything of its equivalent in the nature of barter; and a provision in that regard is required to be made in the resolution plan whether in terms of direct money or in terms of money recovery with enforcement of security interest, of course, in accordance with the other provisions concerning the order of priority as also fair and equitable distribution. We are not commenting on the scenario if the dissenting financial creditor himself chooses to accept any other method of discharge of its payment obligation but as per the requirements of law, the resolution plan ought to carry the provision as aforesaid."

39. Similar view has been taken by a two Judge Bench of this Court in ***Vistra ITCL (India) Limited & Ors.*** v. ***Dinkar Venkatasubramanian & Anr.***[14], wherein it was observed in paragraphs 34, 41.2 and 42 as under:

[14] (2023) 7 SCC 324.

"34. The amendment introduced by Act 26 of 2019 ensures that the operational creditors under the resolution plan should be paid the amount equivalent to the amount which they would have been entitled to, in the event of liquidation of the corporate debtor under Section 53 of the Code. In other words, the amount payable under the resolution plan to the operational creditors should not be less than the amount payable to them under Section 53 of the Code, in the event of liquidation of the corporate debtor. The amended provision also provides that the financial creditors who have not voted in favour of the resolution plan shall be paid not less than the amount which would be paid to them in accordance with sub-section (1) to Section 53 of the Code, in the event of liquidation of the corporate debtor. Explanation (1) to clause (b) of Section 30(2) of the Code, for the removal of doubts, states and clarifies that the distribution in accordance with this clause shall be fair and equitable to such creditors.

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41.2. The second option is to treat Appellant 1-Vistra as a secured creditor in terms of Section 52 read with Section 53 of the Code. In other words, we give the option to the successful resolution applicant — DVI (Deccan Value Investors) to treat Appellant 1-Vistra as a secured creditor, who will be entitled to retain the security interest in the pledged shares, and in terms thereof, would be entitled to retain the security proceeds on the sale of the said pledged shares under Section 52 of the Code read with Rule 21-A of the Liquidation Process Regulations. The second recourse available, would be almost equivalent in monetary terms for Appellant 1-Vistra, who is treated as a secured creditor and is held entitled to all rights and obligations as applicable to a secured creditor under Sections 52 and 53 of the Code. This to our mind would be a fair and just solution to the legal conundrum and issue highlighted before us.

42. We wish to clarify that the directions given by us would not be a ground for the successful resolution applicant — DVI to withdraw the resolution plan which has already been approved by Nclat and by us. The reason is simple. Any resolution plan must meet with the requirements/provisions of the Code and any

> provisions of law for the time being in force. What we have directed and the option given by us ensures that the resolution plan meets the mandate of the Code and does not violate the rights given to the secured creditor, who cannot be treated as worse off/inferior in its claim and rights viz an operational creditor or a dissenting financial creditor."

40. One of the contentions raised by the respondent no. 2 - the CoC is that Section 30(2)(b)(ii) refers only to Section 53 of the Code and not to Section 52. We find it difficult to accept the said submission to read down Section 30(2)(b)(ii) of the Code. Reference to Section 53 of the Code in Section 30(2)(b)(ii) is made with a specific purpose and objective and accordingly, we have to understand and give a cogent and effective meaning to the words to effectuate the intent. Section 53 of the Code refers to Section 52 thereof. We would not isolate Section 53, when we refer to Section 30(2)(b)(ii) and make it meaningless and undo the legislative intent behind the amended provision, which is clear and apparent. Whenever required, in a reference made to Section 53 of the Code, we would have to refer to Section 52 to give meaning to Section 30(2)(b)(ii) of the Code. A dissenting financial creditor is entitled to not partake the proceeds in the resolution plan, unless a higher amount in congruence with its security interest is approved in the resolution plan. The "amount" to be paid to the dissenting financial creditor should be in accordance with Section 53(1) in the event of

liquidation of the corporate debtor. In other words, in our opinion, the dissenting financial creditor is entitled to a minimum value in monetary terms equivalent to the value of the security interest.

41. The submission that the secured creditor's entitlement to distribution under Section 53(1)(b)(ii) is applicable where the secured creditor relinquishes its security interest under Section 52 of the Code, and, therefore, is not applicable to dissenting financial creditors like the appellant is erroneous and unacceptable.

42. Apart from the reasons stated above, a dissenting financial creditor, as held in ***Jaypee Kensington*** (supra) is only entitled to the monetary value of the assets. The dissenting financial creditor loses the security interest, that is, it relinquishes the security interest. Dissenting financial creditor, therefore, cannot enforce the security interest. It is necessary to clearly state this position, as in case a dissenting financial creditor enforces the security interest, the resolution plan itself may fail and become unworkable. The dissenting financial creditor has to statutorily forgo and relinquish his security interest on the resolution plan being accepted, and his position is same and no different from that of a secured creditor who has voluntarily relinquished security and is to be paid under Section 53(1)(b)(ii) of the Code.

43. The reasoning also takes care of the argument that the Explanation to Section 53 incorporates the principle of *pari passu* distribution into Section 53(1) with each class of creditors mentioned therein. We wish to clarify that Section 53(1) is referred to in Section 30(2)(b)(ii) with the purpose and objective that the dissenting financial creditor is not denied the amount which is payable to it being equal to the amount of value of the security interest. The entire Section 53 is not made applicable.

44. We would, for the above reasons, reject the submission on behalf of the respondents that Section 30(2)(b)(ii) is unworkable because it involves deeming fiction relating to liquidation, which is inapplicable during the CIRP period. This would be contrary to the legislative intent and is unacceptable.

45. Respondent no. 2 – CoC has submitted that the appellant has dissented because it did not approve the manner of distribution of the proceeds under the resolution plan. The appellant did not dispute the resolution plan itself. Accordingly, Section 30(2)(b)(ii) is not applicable. The argument is fallacious and must be rejected. Section 30(2)(b)(ii) relates to the proportion of the proceeds mentioned in the resolution plan or the amount which the dissenting financial creditor would be entitled to in terms of the waterfall

mechanism provided in Section 53(1), if the corporate debtor goes into liquidation. The dissenting financial creditor does not have any say when the resolution plan is approved by a two-third majority of the CoC. The resolution plan will be accepted when approved by the specified majority in the CoC. The dissenting financial creditor cannot object to the resolution plan, but can object to the distribution of the proceeds under the resolution plan, when the proceeds are less than what the dissenting financial creditor would be entitled to in terms of Section 53(1) if the corporate debtor had gone into liquidation. This is the statutory option or choice given by law to the dissenting financial creditor. The option/choice should be respected.

46. Respondent no. 2 – CoC had referred to the objections referred to in the CoC meetings dated 15.04.2019 and 23.04.2019. We are of the view that the objections raised by the appellant relate to the distribution of the proceeds in terms of the liquidation plan. According to them, they were entitled to money of value not less than the amount that they would have received under Section 53(1) of the Code.

47. It is also argued that the NCLAT had rejected the first appeal on the ground that the appellant had only challenged the distribution of the

pay-out under the plan *inter se* the financial creditors of the corporate debtor and not the resolution plan. Accordingly, the amendment to Section 30(2)(b) *vide* the Amendment Act of 2019 was not applicable. We have already rejected this argument, for the reasons set out above. In our opinion, the contention that the appellant is not the dissenting financial creditor is to be rejected.

48. The contention on behalf of the respondent that there is conflict between sub-section (4), as amended in 2019, and the amended clause (b) to sub-section (2) to Section 30 of the Code does not merit a different ratio and conclusion. Section 30(4) states that the CoC may approve the resolution plan by a vote not less than 66% of the voting share of the financial creditor. It states that the CoC shall consider the feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors under sub-section (1) to Section 53, including the priority and value of the security interest of the secured creditors, and other requirements as may be specified by the Board. These are the aspects that the CoC has to consider. It is not necessary for the CoC to provide each assenting party with liquidation value. However, a secured creditor not satisfied with the proposed pay-out can vote against the resolution plan or the distribution of proceeds, in which case it is entitled to full liquidation value of the

security payable in terms of Section 53(1) on liquidation of the corporate debtor. The conflict with sub-clause (ii) to clause (b) to sub-section (2) to Section 30 does not arise as it relates to the minimum payment which is to be made to an operational creditor or a dissenting financial creditor. A dissenting financial creditor does not vote in favour of the scheme. Operational creditors do not have the right to vote.

49. In view of the aforesaid discussion, and as we are taking a different view and ratio from ***India Resurgence ARC Private Limited*** (supra) on interpretation of Section 30(2)(b)(ii) of the IBC, we feel that it would be appropriate and proper if the question framed at the beginning of this judgment is referred to a larger Bench. The matter be, accordingly placed before the Hon'ble the Chief Justice for appropriate orders.

.....J.
(SANJIV KHANNA)

.....J.
(S.V.N. BHATTI)

NEW DELHI;
JANUARY 03, 2024.