

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 289 of 2017

IN THE MATTER OF:

Srei Equipment Finance Limited **...Appellant**

Vs.

Sree Metaliks Limited **...Respondent**

Present: For Appellant: - Mr. Abhijeet Sinha, Mr. Arjit Mazumdar, Mr. Diwakar Maheshwari, Mr. Saunak Mitra, Mr. Saikat Sarkar and Mr. Aditya V. Singh, Advocates.

For Respondent:- Mr. Akasht Singh, Advocate and Ms. Kiran Sharma, C.S for R-3.

Mr. Pritpal Singh Nijjar, Advocate for R-11.

Mr. Rajiv R. Raj, Advocate for JMF ARC

Mr. Anand Shankar Jha and Mr. Arpit Gupta, Advocates for R-6.

Mr. Ramji Srinivasan, Senior Advocate with Ms. Gauri Rastogi, Mr. Ronak Dhillon Ms. Sylona Mohapatra, Mr. Karan Khanna and Ms. Ananya Dhar Chaudary, Advocates for R-2.

Mr. Diwakar Singh, Advocate for R-10.

ORDER

13.12.2018— This appeal has been preferred by ‘Srei Equipment Finance Limited’- (‘Financial Creditor’) against the order dated 7th November, 2017, whereby and whereunder, the ‘Resolution Plan’ submitted by Mr. Mahesh Kr. Agarwal has been approved by the Adjudicating Authority (National Company Law Tribunal), Kolkata

Bench, Kolkata, on the ground that the 'Resolution Plan' discriminates between two similarly situated 'Financial Creditors'.

2. The appeal was heard on numerous occasions and opportunity was given to the 'Successful Resolution Applicant' to decide whether it intends to address the grievance of the Appellant and other similarly situated 'Financial Creditors'. Pursuant to the said observations, the 2nd Respondent- Mr. Mahesh Kr. Agarwal, the 'Successful Resolution Applicant' has filed supplementary additional affidavit dated 4th December, 2018 wherein following statement has been made:

"5. In order to obviate any grievance of the Appellant and without prejudice to its rights and contentions, the Respondent No.2, the successful Resolution Applicant hereby offers to treat all secured Financial Creditors similarly, as set out in Paragraph No. 6.1 below. Therefore upon request of the Respondent No.2, this Hon'ble Tribunal by its order dated November 29, 2018 was pleased to permit the Respondent No. 2 to file a Supplementary Additional Affidavit.

6. The Settlement amounts payable under the original Resolution Plan submitted to the Adjudicating Authority were as follows:

PAYMENTS TO FINANCIAL CREDITORS (As per Original Plan)				RS LACS
SR. NO	NAME OF THE FINANCIAL CREDITOR	PRINCIPAL AMOUNT	SETTELMENT AMOUNT	INT.FREE TERM LOAN
1	EDELWEISS (Class A)	27,811.21	20,858.41 (75%)	6,952.80
2	JM (Class A)	6,510.61	4,882.96 (75%)	1,627.65
3	PEGASUS (Class A)	581.21	435.91 (75%)	145.30
4	OBC (Class A)	5,216.95	3,912.71 (75%)	1,304.24
	ICICI BANK (Class A)	1,530.03	1,147.52 (75%)	382.51
6	SREI (Class B)	10,346.00	5,173.00 (50%)	5,173.00
7	IFCI (Class B)	8,505.00	4,252.50 (50%)	4,252.50
8	KOTAK ARC (Class B)	230.00	115.00 (50%)	115.00
	TOTAL	60,731.01	40,778.01	19,953.00
Notes:				
1) Interest will be payable to all Financial Creditors on the Settlement amount as per the approved Resolution Plan.				

6.1 The settlement amounts payable under the revised Resolution Plan as proposed are as follows:

PAYMENTS TO FINANCIAL CREDITORS (REVISED)				RS LACS
SR. NO	NAME OF THE FINANCIAL CREDITOR	PRINCIPAL AMOUNT	SETTELMENT AMOUNT (@ 75%)	INT.FREE TERM LOAN (BAL 25%)
1	EDELWEISS	27,811.21	20,858.41	6,952.80
2	JM	6,510.61	4,882.96	1,627.65
3	PEGASUS	581.21	435.91	145.30
4	OBC	5,216.95	3,912.71	1,304.24
5	ICICI BANK	1,530.03	1,147.52	382.51
6	SREI	10,346.00	7,759.50	2,586.50
7	IFCI	8,505.00	6,378.75	2,126.25
8	KOTAK ARC	230.00	172.50	57.50
	TOTAL	60,731.01	45,548.26	15,182.75

	Notes:
	1) Interest will be payable to all Financial Creditors on the Settlement amount as per the approved Resolution Plan.
	2) In case of Pegasus, they have already received the Liquidation value of Rs. 32 lacs and have issued their No Due Certificate.

7. Further, this Hon'ble Tribunal vide order dated November 28, 2017 stayed the implementation of the Resolution Plan. Subsequently, this Hon'ble Tribunal, by its order dated December 15, 2017, had directed the management to ensure that the Corporate Debtor continues as a going concern. In view of the pendency of this matter for more than one year, with an interim order staying the implementation of the Resolution Plan in force, the Respondent No. 2 humbly requests for an extension of the implementation period of the Resolution Plan, proportionately, i.e., approximately one year."

3. Learned counsel appearing on behalf of the Appellant- 'Srei Equipment Finance Limited' submitted that the amount as shown payable to the Appellant under the proposed 'Revised Resolution Plan' is acceptable to the Appellant.

4. Mr. Dinkar Singh, learned counsel appearing on behalf of M/s. Pegasus', another 'Financial Creditor' submits that the said 'Financial

Creditor' having equated with the other 'Financial Creditors' has no objection to the 'Revised Proposed Resolution Plan'. However, objection has been made with regard to Note No.2 below the proposal wherein it is mentioned that the 'M/s. Pegasus' has already received the liquidation value of Rs. 32 lacs and have issued their 'No Due Certificate'. However, the fact being that 'M/s. Pegasus' has already received Rs. 32 lacs, we do not want to interfere with Note-2, as M/s. Pegasus' is entitled for the rest of the amount after adjusting Rs. 32 lacs as per 'Proposed Revised Resolution Plan'.

5. Ms. Kiran Sharma, Company Secretary appearing on behalf of the 3rd Respondent- 'Edelweiss Asset Reconstruction Company Limited', (another 'Financial Creditor') submits that they have moved before the Hon'ble Supreme Court against the order dated 29th November, 2018, which reads as follows:-

"29.11.2018 We have discussed the matter and heard the parties. Hearing remained inconclusive.

Learned Counsel appearing on behalf of the successful Resolution Applicant prays for and is allowed time till 4th December, 2018 to file Supplementary Additional Affidavit with copy to all the parties.

*Post the case for further hearing under the heading 'for orders' on **5th December, 2018.**"*

6. However, as we want to dispose of the case on the basis of 'Proposed Revised Resolution Plan', we have heard the parties.

7. The question relating to discrimination between two similarly situated 'Financial Creditors' fell for consideration before this Appellate Tribunal in **"Binani Industries Limited Vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No. 82 of 2018 etc."**, this Appellate Tribunal by its judgment dated 14th November, 2018 observed and held as follows:

"23. However, the 'I&B Code' or the Regulations framed by the Insolvency and Bankruptcy Board of India do not prescribe differential treatment between the similarly situated 'Operational Creditors' or the 'Financial Creditors' on one or other grounds."

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*"27. In **"Central Bank of India Vs. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors.– Company Appeal (AT)***

(Insolvency) No. 526 of 2018”, this Appellate Tribunal while noticed the provisions of Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016, observed and held as follows:

“8. From the aforesaid provisions of I&B Code it is clear that the Board may make regulation but it should be consistent with the I&B Code and rules made therein (by Central Government) to carry out the provisions of the Code. Therefore, we hold that the provisions made by the Board cannot override the provisions of I&B Code nor it can be inconsistent with the Code.

9. Clause (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such as ‘Financial Creditor’ or ‘Operational Creditor’, Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the ‘Operational

Creditors' (clause (b) of regulation 38(1)) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)). Such regulation being against Section 240(1) cannot be taken into consideration and any Resolution Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' or the 'Operational Creditors' cannot be approved being illegal."

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"43. From the two 'Resolution Plans', it will be clear that the 'Rajputana Properties Private Limited' in its 'Resolution Plan' has discriminated some of the 'Financial Creditors' who are equally situated and not balanced the other stakeholders, such as 'Operational Creditors'. Therefore, the Adjudicating Authority has rightly held the

‘Resolution Plan’ submitted by ‘Rajputana Properties Private Limited’ to be discriminatory.”

8. Civil Appeal preferred by **‘Rajputana Properties Private Limited vs. Ultratech Cement Limited and Ors.’** against the aforesaid judgment in **“Binani Industries Limited”** (Supra) has been dismissed by the Hon’ble Supreme Court by order dated 19th November, 2018 in Civil Appeal No. 10998 of 2018.

9. Decision in **“Central Bank of India”** as referred to in the said judgment at Paragraph 27 was also challenged before the Hon’ble Supreme Court and by order dated 19th November, 2018 passed in Civil Appeal No. 10737 of 2018, the Hon’ble Supreme Court dismissed the said appeal.

10. In the present case, as we find that the Appellant-‘Srei Equipment Finance Limited’ (‘Financial Creditor’), ‘M/s. Pegasus’- (‘Financial Creditor’) and some other ‘Financial Creditors’ were discriminated qua similarly situated ‘Financial Creditors’ in the ‘Resolution Plan’ originally submitted by Mr. Mahesh Kr. Agarwal and now the ‘Successful Resolution Applicant’ with a view to remove the discrimination has proposed ‘Revised Resolution Plan’. For the said reason, we accept the ‘Revised Resolution Plan’ submitted by Mr. Mahesh Kr. Agarwal ‘Successful Resolution Applicant’ which should be treated to be part of the original ‘Resolution Plan’ as approved by the Adjudicating Authority.

The substitution aforesaid is in part and is in addition to the rest of the proposal as made in the main 'Resolution Plan'.

11. We have noticed that the stand taken by the 3rd Respondent- 'Edelweiss Asset Reconstruction Company Limited' that they have moved against the order of adjournment before the Hon'ble Supreme Court. In absence of any order of stay and as the 'Corporate Insolvency Resolution Process' has completed more than 270 days, we decided to dispose of the appeal, to give effect to the approved 'Resolution Plan', not challenged by 'Edelweiss Asset Reconstruction Company Limited'.

12. This apart, we have noticed that in the 'Revised Resolution Plan', has not changed its proposal in so far it relates to 3rd Respondent- 'Edelweiss Asset Reconstruction Company Limited' and thereby the 3rd Respondent will not be affected on acceptance of 'Revised Resolution Plan'. The 3rd Respondent- 'Edelweiss Asset Reconstruction Company Limited' has also not challenged the original 'Resolution Plan' before this Appellate Tribunal and thereby seems to be happy with the proposal as made in the original 'Resolution Plan' in respect to it.

13. Taking into aforesaid facts and circumstances of the case, we exclude the period of pendency of this appeal before this Appellate Tribunal i.e. from 22nd November, 2017 till today for calculating the period of 270 days. The 'Resolution Plan' as revised pursuant our order be given effect and implemented with effect from the date of issuance of free certified copy of this order.

14. The appeal stands disposed of with aforesaid observations and directions.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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