NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 524 of 2019

IN THE MATTER OF:

Arcelormittal India Pvt. Ltd. ...Appellant

Vs.

Abhijit Guhathakurta,
Resolution Professional of
EPC Constructions India Ltd. & Ors. ...Respondents

Present: For Appellant: - Mr. Amit Sibal and Mr. Arun Kathpalia, Senior Advocates with Mr. Raghav Shankar, Mr. Sevanshu Saylav, Mr. Sudip Mahapatra, Mr. Shahezad Kazi, Ms. Misha Chandra, Ms. Adity Agarwal, Mr. Arshiya Sharda, Mr. Saksham Dhingra, Mr. Sohan Kumar, Mr. Eklavya Dwivedi and Mr. Aubert Sebastian, Advocates.

For Respondents: - Mr. Abhinav Vashisht, Senior Advocate with Mr. Sumesh Dhawan, Mr. Nakul Sachdeva and Mr. Aakarshan Sahay, Advocates.
Mr. Sudipto Sarkar, Senior Advocate with Mr. Dinakar Maheshwari, Mr. Rajeev Vidhani, Mr. Himanshu Vidhani and Ms. Pratiksha Mishra, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

'ArcelorMittal India Private Limited' (Appellant) is one of the 'Resolution Applicants', whose 'Resolution Plan' was not voted in its favour by the 'Committee of Creditors'. The 'Committee of Creditors' by majority vote of 73.14% approved the 'Resolution Plan' submitted by 3rd Respondent- 'Royale Partners Investment Fund Limited'. The Appellant preferred Miscellaneous Application challenging the decision of the

'Committee of Creditors' which has been rejected by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai.

2. Learned counsel for the Appellant submitted that approval of plan is in contravention of the mandatory requirement under the proviso to Section 31(4) of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short), as amended, requiring 'Resolution Applicants' to obtain approval of the Competition Commission of India prior to approval by the 'Committee of Creditors'.

3. According to Appellant, the 'Committee of Creditors' without appreciating the fact that the Appellant's 'Resolution Plan' is *ex facie* better 'Resolution Plan' and serves the twin objects of the 'I&B Code' has rejected the plan.

4. It was further submitted that the action of the 'Committee of Creditors' is vitiated by procedural irregularities rendering illegal approval.

5. Learned counsel appearing on behalf of the 'Resolution Professional' of 'EPC Constructions India Limited' submitted that the Appellant is 'Unsuccessful Resolution Applicant' and cannot challenge the 'Resolution Plan' as it has been duly approved by the 'Committee of Creditors'. It was informed that the Appellant was called for negotiations on 4th December, 2018, 14th December, 2018, 24th December, 2018, 4th January, 2019, 7th January, 2019 and 10th January, 2019. Thereafter, Appellant's 'Resolution Plan' was duly considered in the meeting of

'Committee of Creditors' held on 10th January, 2019, and was rejected by the 'Committee of Creditors' as it received only 17.67% of the total voting share. The reasons for rejection of the Appellant's 'Resolution Plan' were duly recorded in the meeting of the 'Committee of Creditors' as follows:

> *"The reasons for rejection of the plan as provided by the CoC was the failure to maximise the value of the assets of the Company. The receivables being assigned to the creditors while having book value of ˜700 crores would be insignificant if the contracts are cancelled as proposed in the plan. Therefore, there is no certainty in the realization of any of the amounts. It was noted that the offer made was significantly lower than the liquidation value determined for the Resolution Applicant. In the light of the object of Code being to maximise the value of the assets of the Corporate Debtor, the plan was rejected on account of the plan not satisfactory achieving the same."*

6. Learned counsel for 3rd Respondent-('Successful Resolution Applicant') submitted that the plan submitted by 3rd Respondent has been duly approved by the 'Committee of Creditors' with majority voting shares of 73.14%. The Adjudicating Authority finally heard the matter and reserved the Judgment on 9th September, 2019.

7. It was submitted that the appeal under Section 61, in absence of any approval of plan by the Adjudicating Authority is not maintainable.

8. It was also informed that the Competition Commission of India has also given its approval of the plan subsequently.

9. In ***Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors.— (2019) 2 SCC 1",*** the Hon'ble Supreme Court observed and held as follows:

> *"75. What has now to be determined is whether any challenge can be made at various stages of the corporate insolvency resolution process. Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage is it open to the concerned resolution applicant to challenge the Resolution Professional's rejection? It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable……"*
>
> *76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered,* ***it is clear that no challenge can be preferred***

to the Adjudicating Authority at this stage. *A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.*

xxx xxx xxx

79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating

Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

81. If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit specified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section

60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."

10. It is clear and apparent from the aforesaid judgment that the Appellant has no vested right to challenge the decision of the 'Committee of Creditors' which rejected its 'Resolution Plan' and approve another resolution plan which is under consideration of the Adjudicating Authority.

11. Section 5 of the Competition Act, 2002 is limited to the enterprises and the matter of merger, amalgamation and acquisition, if it comes within threshold of value of assets, as mentioned therein, which reads as follows:

*"**5. Combination.—** The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—*

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise,

whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thou sand crores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer

already has direct or indirect control jointly have,—

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees

four thou sand crores or turnover more than rupees twelve thousand crores or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—

(A) either in India, the assets of the value of more than rupees one thou sand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the

value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—

(A) either in India, the assets of the value of more than rupees four-thou sand crores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in

India, or turnover more than six billion US dollars, including at least rupees Fifteen Hundred Crores in India

Explanation.— *For the purposes of this section,—*

(a) "control" includes controlling the affairs or management by—

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise;

(b) "group" means two or more enterprises which, directly or indirectly, are in a position to —

(i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the

financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3."

12. From the said provision, it is clear that in all such combinations which do not come within the meaning of Section 5 of the Competition Act, 2002, there is no need of obtaining any approval of the Competition Commission of India under Section 6(2) by issuing notice on it.

13. As per Section 54 of the Competition Act, 2002, the power of the Central Government to exempt by notification from the application of the Act including Section 6(2). In fact, the Central Government from its Ministry of Corporate Affairs by Notification dated 27th March, 2017, in exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002, in public interest exempted number of enterprises, from any acquisition referred to in clause (a) of Section 5 of the 'Competition Act, 2002', as extracted below:

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 27th March, 2017

S.O. 988(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the enterprises being parties to —

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and

(c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

[F. No. 5/33/2007-CS]

K. V. R. MURTY, Jt. Secy.

14. In the present case, we are not deciding such issue as to whether the 3rd Respondent- 'Royale Partners Investment Fund Limited' whose plan has been approved by the 'Committee of Creditors' can claim that it does no come within the meaning of Section 5 or can take advantage of exemption under Section 54, as notified, on 27th March, 2017.

15. We have noticed and hold that proviso to sub-section (4) of Section 31 of the 'I&B Code' which relates to obtaining the approval from the 'Competition Commission of India' under the Competition Act, 2002 prior to the approval of such 'Resolution Plan' by the 'Committee of Creditors', is directory and not mandatory. It is always open to the 'Committee of Creditors', which looks into viability, feasibility and commercial aspect of

a 'Resolution Plan' to approve the 'Resolution Plan' subject to such approval by Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under Section 31 of the 'I&B Code'. In present matter already approval of the Competition Commission of India has been taken to the 'Resolution Plan'.

16. For the reasons aforesaid and in view of the decision of the Hon'ble Supreme Court, we dismiss the appeal being not maintainable. The Appellant has no vested fundamental right to challenge the plan approved by the 'Committee of Creditors'.

In absence of any merit, the appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI
16th December, 2019

AR