

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) No. 11 of 2016

(arising out of Order dated 17th June 2016 passed by NCLT, New Delhi in
C.A. No. 01/2016 in C.P. No. 25/10/2014)

Jainendra Sahai Sinha

.....Appellant

Vs.

Jaiprakash Associates Ltd.

.....Respondents

**Present: For Appellants: Mr. M.P.Sahai, Advocate with
appellant in person**

**Mr. Virendra Kumar Gupta, Company Secretary for Ms.
Sushma Khemka**

**For Respondent: Mr. Krishnendu Datta and Mr. Rahul
Malhotra, Advocates**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by appellant against order dated 17th June 2016 passed by the National Company Law Tribunal, New Delhi Bench in C.A. No. 01/2016 in C.P. No. 25/10/2014. By the impugned order the Tribunal while extending the time in favour of the respondent company/applicant till 31st March 2017 for repayment of balance outstanding amount of Rs. 1079.31 Crore (Rs. One Thousand Seventy-Nine

Crore Thirty-One lakh only) plus interest thereof, kept the petition pending for some report.

2. Section 74 of the Companies Act 2013 (hereinafter referred to as the 'Act 2013') mandates the companies' repayment of deposits, etc., accepted before the commencement of the Act 2013, as quoted below: -

“74. Repayment of deposits, etc., accepted before commencement of this Act. — (1) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall—

- (a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and*
- (b) repay within one year from such commencement or from the date on which*

such payments are due, whichever is earlier.

(2) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

(3) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both."

3. The provision of section 74 came into effect from 1st April 2014. As per the provision, the respondent company was liable to pay the matured amount with interest to the depositors which had matured prior to 1st April 2014. The other deposits which were accepted by the company before 1st April 2014 but matured later, under sub-section (1) of Section 74, the company was liable to pay such deposits along with interest within one year from the date of such commencement, i.e. by 31st March 2015 or date on which such payment were due, whichever was earlier.

4. Admittedly, the respondent company failed to pay the depositors the amount received before the commencement of the Act within the prescribed time. For the said reason, the Company filed a petition under sub-section (2) of Section 74 before the erstwhile Company Law Board to allow further reasonable time to repay the deposits with interest.

5. It is to be noticed that if a company fails to repay the deposit or part thereof or any interest thereon within time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company, in addition to the payment of the amount of deposit or part thereof and the interest due, is liable for 'punishment' with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default is liable for punishment with imprisonment which may extend to seven years or fine should not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both, as per sub-section (3) of Section 74 of the Act 2013.

6. The appellant is a depositor who invested in the Fixed Deposit scheme(s) of the company on 12th June 2013. The respondent company was liable to pay back the matured amount as per sub-section (1) of Section 74 of the Act on its maturity or at best within a year i.e. by 31st March 2015 but not paid.

7. Further grievance of the petitioner is that the Tribunal since filing of the petition under sub-section (2) of Section 74, granting time after time to the company since 2015. Now by the impugned order, the Tribunal has

extended the time up to 31st March 2017, to repay the dues with interest as is payable to the depositors.

8. Learned counsel for the appellant submitted that there is no provision made under Section 74 to constitute any Hardship Committee to assess the payment situation, as the Tribunal is competent to extend time taking into consideration the financial condition of the company, the amount of deposit or part thereof and interest payable and such other matters which company brought to the notice of the Tribunal, as provided under sub-section (2) of Section 74 of the Act. Earlier, the then Company Law Board constituted a 'Hardship Committee' without taking into consideration the mandate of repayment as prescribed under sub-section (1) of Section 74. Now by Interim Order, the time has been extended up to 31st March 2017, without disposing of the main Company Petition.

9. It is further submitted that there is no specific direction issued by the Tribunal directing the company to utilize the sale proceeds of the ten cement plants towards the payment to the depositors as per sub-section (1) of Section 74 of the Act. There is no such undertaking given by the company that it will not utilize the fund for other purpose.

10. On 28th November 2016, the Court directed the company to file affidavit providing mode of payment. Pursuant to the same an affidavit was filed by the company which was noticed by this Court in its order on 8th December 2016, as quoted below: -

"Pursuant to this Court's Order dated 28th November 2016, an affidavit has been filed by the respondent, relevant portion of which reads as follows:-

"NAMES OF THE CEMENT PLANTS, PLACE AND CONSIDERATION

6. *The Respondent is in process of selling its business of manufacture and sale of cement and clinker which comprises of the following cement plants and, apart from transfer of plants, the same constitutes transfer of licenses, clearances, etc.*
 - a. *Baga Plant in the State of Himachal Pradesh,*
 - b. *Bagheri Plant in the State of Himachal Pradesh,*
 - c. *Roorkee Plant in the State of Uttarakhand,*
 - d. *Dalla Cement Factory in Uttar Pradesh,*
 - e. *JP Super Captive Power Plant in Dalla, Uttar Pradesh,*
 - f. *Tanda Plant in the State of Uttar Pradesh,*
 - g. *Sikandrabad Plant in the State of Uttar Pradesh,*
 - i. *Bela Plant in State of Madhya Pradesh, and*
 - j. *Sidhi Plant in the State of Madhya Pradesh*
7. *The parties have entered into the agreement for sale of business with a consolidated enterprise value of Rs. 15,900 crores, which value was subsequently increased to Rs.*

16,189 crores. No independent price consideration has been assigned to individual plants of the Respondent.

MODUS OPERANDI ADOPTED FOR SALE OF BUSINESS;

8. After the failed attempt to sell the two cement plants due to change in law, there had been another amendment in May, 2016 effected to the Mines and Minerals (Development & Regulation) Act, 2010 by way of which an exception to the sale of only auctioned mines had been inserted and now the captive mines are also permitted to be transferred.
9. In the wake of the said amendment as a result of simultaneous ongoing efforts to reduce its debts including repayment of outstanding fixed deposits, the Company has entered into an Implementation Agreement with UTCL on 31.3.2016 for sale of its identified business of manufacture and sale of cement and clinker to the transferor company at an enterprise value of Rs. 15,900 crores, which EV was subsequently increased to Rs. 16,189 crores. The Respondent craves leave of this Hon'ble Tribunal to produce the said agreement as and when directed as the same is not being filed

along with the present affidavit to preserve the confidentiality thereof. The said transaction is being effected between the respondent Company **Transferor-1 Company** along with a subsidiary viz. M/s Jaypee Cement Corporation Limited (**Transferor-2 Company**), and M/s Ultra Tech Cement Limited (**Transferee Company**) and the business is being sold as a going concern on a slump exchange basis.

10. In the said arrangement with UTCL, the Respondent Company (**Transferor-1 Company**) along with a subsidiary, viz. M/s Jaypee Cement Corporation Limited (**Transferor-2 Company**), is selling its identified business of manufacture and sale of cement and clinker at an Enterprise Value of Rs. 16,189 crores to the transferor company, M/s Ultra Tech Cement Limited (**Transferee Company**) as a going concern on a slump exchange basis. The Transferor Company and the Transferee Company are public limited and listed companies.

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BANK DETAILS FOR REPAYMENTS OF THE FIXED DEPOSITS

26. *The bank details of the account in which the sale proceeds will be deposited for the purpose of repayment to the depositors is bank account bearing no. 011125000000718 with IDBI Bank, Red Cross Road, New Delhi-110001. The repayment to the depositors shall be made at one go upon receipt of the funds, save and except the hardship cases which may arise.*

PROPOSED DATE TO COMMENCE REPAYMENT OF FIXED DEPOSITS

27. *The Respondent intends to start paying the depositors as soon as the Respondent receives funds from the Transferee Company pursuant to the approval of the scheme and such repayment is expected to commence around 25.03.2017 and the same is expected to conclude by 30.03.2017.*
28. *The details of the outstanding payments, i.e. principal as well as interest, have already been submitted with the Registrar of Companies in terms of Rule 16 of the Companies (Acceptance of Deposits) Rules, 2014."*

In view of aforesaid stand taken by the respondent, we allow the respondent to complete the sale of plant(s) as identified at paragraph 6 and quoted above and to deposit the amount in the bank account mentioned in paragraph 26 to the affidavit filed today.

We also direct the respondent not to withdraw any amount in their favour or in favour of any other member or person by transfer, RTGS, etc. from IDBI Bank, Red Cross Road Branch, New Delhi-110001, Bank Account No. 01112500000718 except for releasing the dues to the depositors including principal amount, interest and other statutory dues if any. After payment of all the dues to the depositors as required under Section 74(1), it will be open to the respondent to withdraw the amount or transfer any amount from the said account. Details of the payment should be intimated to the Registrar of Companies, New Delhi. This order should be brought to the notice of the Branch Manager, IDBI Bank, Red Cross Road Branch, New Delhi.

Post the matter on 21st February 2017 at 10.30 A.M.”

11. The impugned order was passed by Tribunal on 17th June 2016 allowing the Company time till 31st March 2017 to pay the deposits with interest. Even after passing of the impugned order dated 17th June 2016 and now more than eight months have passed but the company has not deposited

any amount in its account, nor paid any amount to any of the depositors. Now, the only ground taken by the Company is that a scheme is pending consideration before the High Courts regarding selling of the plants.

12. We have heard learned counsel for the parties and perused the record. Now, approximately three years have passed since 1st April 2014 when sub section (1) of Section 74 came into effect but the deposits with interest have not been paid to the depositors. Even after extension of time granted under sub-section (2) of Section 74 there is no likely hood of payment. In the circumstances, while we are not interfering with the impugned order extended time granted by the Tribunal up to 31st March 2017, but direct the Tribunal to close the Company Petition as no ground has been shown by the Company further extension of time under sub-section (2) of Section 74, after three years of its commencement is not desirable. We make it clear that a number of extensions of time cannot be granted under sub section (2) of Section 74 without any ground, particularly when the company has not shown any interest in paying part of the deposit with interest to depositors either during the pendency of the Company Petition or this appeal. Learned Counsel for the Respondents have also informed that they will pay the dues by 31st March 2017.

13. We make it clear that if the dues of depositors with interest is not paid by the Company by 31st March 2017, the Registrar of the Companies, NCR and Haryana will take steps to file petition under sub-section (3) of Section 74 of the Act 2013 before the Special Judge to punish the company and its directors and members and every officer of the company, whoever is in

default. It will be open to the appellant and other depositors to sue the Company, its directors & officers for damages and fraud under Section 75 of the Companies Act 2013.

14. Further if it comes to the notice of the Registrar of the Companies or the Central Government, that the business of the company was being conducted with intent to defraud its creditors or any other person or otherwise for a fraudulent or unlawful purpose, they may investigate into the affairs of the company either under Section 210 or 213 of the Companies Act 2013. It is also open to the appellant to move an application under clause (b) of Section 213 of the Companies Act 2013, if the circumstances so suggest that the business of the company was being conducted with intent to defraud its creditors and other persons.

15. Further it is noted that failure to repay the deposit accepted by the company or to pay interest thereon is also disqualification for appointment of directors in terms of Section 164(2)(b) of the Companies Act, 2013 and any director who incurs any of the disqualifications specified in section 164 vacates the office of the director. Registrar of Companies may examine this aspect in case the Company fails to repay the dues by 31.03.2017 as already allowed by the Tribunal.

16. In view of the order above, the tribunal is directed to close the Company Petition No. 25/10/2014. The appeal stands disposed of with the aforesaid observations and directions. However, there shall be no order as to cost.

17. Let a copy of this order be forwarded to the National Company Law Tribunal, New Delhi Bench.

Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
2nd March, 2017