

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 461 of 2018

(Arising out of Order dated 31st July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA Nos. 491/2018, 341/2018, 515/2018, 410/2018, 91/2018, IA Nos. 35/2018 & 30/2018 in CP (IB) 1137 (MB) 2017)

IN THE MATTER OF:

Mr. Sharad Sanghi

...Appellant

Vs.

Ms. Vandana Garg & Ors.

...Respondents

Present: **For Appellant:-** Mr. Arun Kathpalia, Senior Advocate with Mr. Sameer Rohatgi and Mr. Akshit Pradhan, Advocates.

For Respondents:- Mr. Sumesh Dhawan, Ms. Vatsala Kak, Ms. Geetika Sharma, Ms. Tannya Barawap, Ms. Shivani Sinha, Ms. Ashly Cherin, Ms. Vrinda Sagar, Advocates for R-1 (RP).

Mr. Bishwajit Dubey, Ms. Surabhi Khattar, Mr. Prafull Goyal, Mr. Aditya Marwah, Mr. Shatrajit Banerji, Advocates for R-5 (SBI).

Mr. Nithin Saravanan, Ms. Priyadarshini and Ms. Arunima Singh, Advocates for IndusInd Bank.

Mr. Rajiv Mehra, Sr. Advocate with Mr. Shubhabrato Chakraborti, Mr. Ashish Mukhi, Mr. Dhruv Malik, Mr. Kamendra Singh, Advocates for DBS Bank.

Mr. Ashok KV Jain, Ms. Priyanka Das, Mr. Amit Kasva, Advocates for Allahabad Bank.

Mr. Manu Sheshadri, Mr. Arjun Syal, Mr. Shreyam Das, Mr. Samasth Chowdhary and Ms. Tanvi, Advocates for Industrial Securities.

Company Appeal (AT) (Insolvency) No. 464 of 2018

(Arising out of Order dated 31st July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA Nos. 491/2018, 341/2018, 515/2018, 410/2018, 91/2018, IA Nos. 35/2018 & 30/2018 in CP (IB) 1137 (MB) 2017)

IN THE MATTER OF:

**Ashutosh Koul and 814 Other Employees of
Jyoti Structures Limited**

...Appellant

Vs.

DBS Bank Limited & Ors.

...Respondents

Present: For Appellant:- Mr. Ashim Sood, Ms. Payal Chandra, Mr. Aditya Kumar, Mr. Rhythm Buara, Advocates.

For Respondents:- Mr. Sumesh Dhawan, Ms. Vatsala Kak, Ms. Geetika Sharma, Ms. Tannya Barawap, Ms. Shivani Sinha, Ms. Ashly Cherin, Ms. Vrinda Sagar, Advocates for RP.

Mr. Bishwajit Dubey, Ms. Surabhi Khattar, Mr. Prafull Goyal, Mr. Aditya Marwah, Mr. Shatrajit Banerji, Advocates for R-5 (SBI).

Mr. Nithin Saravanan, Ms. Priyadarshini and Ms. Arunima Singh, Advocates for IndusInd Bank.

Mr. Rajiv Mehra, Sr. Advocate with Mr. Shubhabrato Chakraborti, Mr. Ashish Mukhi, Mr. Dhruv Malik, Mr. Kamendra Singh, Advocates for DBS Bank.

Mr. Ashok KV Jain, Ms. Priyanka Das, Mr. Amit Kasva, Advocates for Allahabad Bank.

Mr. Manu Sheshadri, Mr. Arjun Syal, Mr. Shreyam Das, Mr. Samasth Chowdhary and Ms. Tanvi, Advocates for Industrial Securities.

Company Appeal (AT) (Insolvency) No. 548 of 2018

(Arising out of Order dated 31st July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA Nos. 491/2018, 341/2018, 515/2018, 410/2018, 91/2018, IA Nos. 35/2018 & 30/2018 in CP (IB) 1137 (MB) 2017)

IN THE MATTER OF:

Apollo Jyoti LLC and Ors.

...Appellants

Vs.

**Jyoti Structures Ltd.
Through Its Resolution Professional,
Ms. Vandana Garg & Ors.**

...Respondents

Present: **For Appellant:-** Ms. Misha, Mr. Dhruv Dewan, Ms. Charu, Mr. Shantanu Chaturvedi, Mr. Siddhant Kant, Mr. Akshit Pradhan, Advocates.

For Respondents:- Mr. Sumesh Dhawan, Ms. Vatsala Kak, Ms. Geetika Sharma, Ms. Tannya Barawap, Ms. Shivani Sinha, Ms. Ashly Cherin, Ms. Vrinda Sagar, Mr. Raunak Singh, Advocates for RP.

Mr. Bishwajit Dubey, Ms. Surabhi Khattar, Mr. Prafull Goyal, Mr. Aditya Marwah, Mr. Shatrajit Banerji, Advocates for R-5 (SBI).

Mr. Nithin Saravanan, Ms. Priyadarshini and Ms. Arunima Singh, Advocates for IndusInd Bank.

Mr. Rajiv Mehra, Sr. Advocate with Mr. Shubhabrato Chakraborti, Mr. Ashish Mukhi, Mr. Dhruv Malik, Mr. Kamendra Singh, Advocates for DBS Bank.

Mr. Ashok KV Jain, Ms. Priyanka Das, Mr. Amit Kasva, Advocates for Allahabad Bank.

Mr. Manu Sheshadri, Mr. Arjun Syal, Mr. Shreyam Das, Mr. Samasth Chowdhary and Ms. Tanvi, Advocates for Industrial Securities.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In all these appeals as common impugned order dated 31st July, 2018 is under challenge and common question of law is involved, they were heard together and disposed of by this common judgment.

2. The 'Corporate Insolvency Resolution Process' was initiated against 'Jyoti Structures Ltd.'- ('Corporate Debtor') on 12th July, 2017. The Appellant- 'Mr. Sharad Sanghi' filed 'Resolution Plan' along with others. After negotiation with the 'Committee of Creditors', the 'Resolution Plan' was improved by the Appellant. E-voting of the 'Committee of Creditors' was held between 26th March, 2018 and 27th March, 2018 during which members with 62.66% voting shares voted in favour of the 'Resolution Plan'; members with 23.12% voting shares voted against the 'Resolution Plan' and members with 14.21% remained abstained. On 27th March, 2018, after taking into consideration the result, the 'IDBI Trusteeship Services' having 0.42% voting shares and Ms. Hema Shah having 0.04% voting shares, who earlier voted against, changed their opinion and conveyed favourable vote on the same date i.e. on 27th March, 2018.

3. The 'Indian Bank' having voting shares of 6.31% which had abstained from voting previously, sent a letter to the 'Resolution Professional' approving the 'Final Resolution Plan'. The 'Standard Chartered Bank' having 3.31% voting shares changed its dissent on 2nd

April, 2018 and assented in favour of the 'Resolution Plan'. The 'Bank of India' having 9.11% voting shares changed its dissent on 6th April, 2018 and assented in favour of the 'Resolution Plan'. Thus, in fact, the voting which started on 26th March, 2018 continued upto 6th April, 2018. Finally, the 'Committee of Creditors' with 81.31% of the voting shares approved the 'Resolution Plan' on 6th April, 2018.

4. The 'Resolution Professional' submitted the approved 'Resolution Plan' of Mr. Sharad Sanghi before the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, and also requested to exclude certain period. However, the Adjudicating Authority by impugned order dated 31st July, 2018 rejected the prayer and ordered for liquidation, though it noticed that the total votes in favour of the 'Resolution Plan' stood at 81.31% after including the votes of 'Standard Chartered Bank', 'Mr. Konnongo' and 'Bank of India'.

5. The aforesaid rejection was made mainly on two grounds. One of the grounds is that total period of 270 days had lapsed by the time last voting took place on 2nd April, 2018. Secondly, as on 26th and 27th March, 2018, the voting percentage was 62.66% which is less than 75%. Prayer for exclusion of the period has not been discussed.

6. The Adjudicating Authority while passing the impugned order also noticed the viability and the feasibility of the 'Resolution Plan' and observed as follows:

“38. So far, many companies have come into initiation of this insolvency process, but we have hardly come across any company where asset value is more than liability, except a company that is known to everybody that is the case of Binani Cements. Most of the resolution plans are also with haircuts of 75%, 80%, hardly any money coming back through resolution plans, those plans are flagged with time-limes of 5 years, 10 years, in this case for 15 years for payment. This is the ground situation in respect to the resolution plans coming before us.

39. In this cae, the admitted claim against this company is Rs. 7,010.55 crores, liquidation is Rs. 1,112.52crores. we have not come across anywhere as to what the fair value of this company is. The resolution plan given in this case will result into 43% haircut to the creditors of the company. Out of Rs.3,965.06crores, value of the resolution plan amount, only Rs.50crores will come as up-front payment, Rs.75crores will come in one year, remaining will come to the

creditors in as staggered payments in a period of 15 years from the effective date.

40. We don't want to get into as to whether such a plan is reasonable or not, because to test the reasonableness, viability, feasibility, the CoC has given the authority to take a decision with the power conferred upon them. We cannot transgress into the jurisdiction of CoC, unless process is devoid of the set procedures, fairness and transparency.”

7. Learned counsel appearing on behalf of the Appellants submitted that application under Section 7 was admitted on 4th July, 2017 and order was signed and uploaded on 12th July, 2017 i.e. after eight days whereinafter the 'Interim Resolution Professional' had taken charge.

8. Referring to the decision of this Appellate Tribunal in **“Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd.— SCC OnLine NCLAT 243”**, learned counsel for the Appellants submitted that the aforesaid period of **eight** days if excluded, then it will be clear that the approved 'Resolution Plan' was approved and submitted within 270 days which comes to 8th April, 2018.

9. Regulation 26 of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016'

deals with voting through electronic means. Clause (2) of the Regulation 26 as it then was, is as follows:

“26. Voting through electronic means.—

xxx

xxx

xxx

(2) Once a vote on a resolution is cast by a member of the committee, such member shall not be allowed to change it subsequently.”

In view of the aforesaid Regulation 26(2), the Adjudicating Authority refused to accept the change of voting as made by some of the members of the ‘Committee of Creditors’.

10. Under sub-section (3) of Section 30, the ‘Resolution Professional’ is required to present to the ‘Committee of Creditors’ for its approval such ‘Resolution Plans’ which confirm the conditions referred to in sub-section (2). It is the ‘Committee of Creditors’ which fix the date of voting and may approve the ‘Resolution Plan’ by vote of not less than 75% (now it is 66%) of voting shares of the ‘Financial Creditors’, after considering its viability and feasibility and such other requirements as may be specified by the Board.

11. As per sub-section (5) of Section 30, the ‘Resolution Applicant’ is required to attend the meeting of the ‘Committee of Creditors’ in which the ‘Resolution Plan’ of the Applicant is considered.

12. From the aforesaid provisions, it is clear that the 'Committee of Creditors' is required to notice the 'Resolution Plan' to find out its viability and feasibility apart from the financial matrix and in appropriate cases may ask the 'Resolution Applicant' to improve the plan. The date of approval for 'Resolution Plan' is fixed by the 'Committee of Creditors'. They may fix the date of voting and in appropriate case they may extend the period of voting. There is no provision that once a voting is made, after the final result, if it comes to the conclusion finally in absence of approval of the plan, the 'Corporate Debtor' may be ordered for liquidation. It is always open to the 'Committee of Creditors' to change their opinion.

13. Whether a member who has already opined, after final decision, can change its opinion or not? It is the matter which can be decided by the 'Committee of Creditors', which may extend the period and allow to have fresh voting. Regulation 26(2) being directory cannot override the power of the 'Committee of Creditors', which is the final decision making authority in accepting or rejecting a 'Resolution Plan'. The Insolvency and Bankruptcy Board of India also noticed that Regulation 26(2) is not workable and will amount to interference with the power of the 'Committee of Creditors' as vested under the Insolvency and Bankruptcy Code, 2016 and therefore, the Insolvency and Bankruptcy Board of India deleted Regulation 26(2) w.e.f. 4th July, 2018. If it would not have been

deleted, one could have argued that Regulation 26(2) is arbitrary as it does not allow the 'Committee of Creditors' to form its final opinion.

14. A 'Resolution Plan' which may be viable, feasible and of acceptable financial matrix and which is not against the provision of Section 30(2), if majority of the members having voting shares approve it but falls short of the 75% (now 66%) limit as has been prescribed and later on it comes to the notice of one or other members that because of the failure the 'Corporate Debtor' will be liquidated, it is always open to the members to change its opinion subsequently with the approval of the rest of the members of the 'Committee of Creditors' but it should be within 270 days.

15. In view of the aforesaid findings and the facts as emerges, we hold that the 'Resolution Plan' in question stands approved by the 'Committee of Creditors' with 81.39% voting shares.

16. In the case of **"Quinn Logistics India Pvt. Ltd."** (Supra) which was affirmed by the Hon'ble Supreme Court, this Appellate Tribunal observed that the period of non-joining of the 'Interim Resolution Professional' should be excluded for the purpose of counting the total period of 180 days or 270 days.

17. In the present case, as the application was admitted on 4th July, 2017 and after signature it was uploaded on 12th July, 2017 i.e. eight days and the 'Interim Resolution Professional' joined much thereafter, we are of the view that the Adjudicating Authority should have excluded at

least eight days of period during which the order was passed, signed and subsequently uploaded. If the aforesaid period of eight days is excluded, then we find that the 'Resolution Plan' was approved within 270 days which the Adjudicating Authority has failed to notice.

18. We have not counted the actual period, taking into consideration the date when the 'Interim Resolution Professional' had joined. The order of admission having signed and uploaded on 12th July, 2017, after excluding eight days, we hold that the process was conducted within the period.

19. 'DBS Bank Ltd.' while opposed the appeal, learned counsel submitted that its claims of Rs. 53.77 Crores with the 'Corporate Debtor' has first charge over certain assets of the 'Corporate Debtor'. It is also submitted that the liquidation value of the assets charged to 'DBS Bank Ltd.' is more than three times of its exposure. The 'Resolution Plan' having not recognized the difference between the first charge holder and the second charge holder but has distinguished between the secured and unsecured creditor, the Bank has raised grievances against the 'Resolution Plan'.

20. Reliance has been placed on the decision of the Hon'ble Supreme Court in "**ICICI Bank Ltd. vs Sidco Leathers Ltd. & Ors. – (2006) 10 SCC 452**", wherein the Hon'ble Supreme Court held that the claim of first charge holder will prevail over the claims of second charge holder.

21. Reliance has also been placed on **United National Commission on International Trade Law (UNCITRAL) and Principles for Effective Insolvency and Creditor/ Debtor Regime**, published by World Bank.

22. However, the aforesaid submissions cannot be accepted as at the 'Resolution Process', 'Financial Creditor' claims are decided as per provision of the 'I&B Code'. All the 'Financial Creditors' are treated to be similar, if similarly situated.

23. We have noticed that the Adjudicating Authority has made certain observations with regard to the timeline given by the 'Resolution Applicant'. Learned counsel appearing on behalf of the 'Resolution Applicant' submits that the total period of 15 years will be reduced to 12 years.

24. In view of the aforesaid findings and as we have already held that the 'Resolution Process' took place within 270 days and the 'Committee of Creditors' had the jurisdiction to change its opinion in favour of the 'Resolution Plan' to make it a success and Regulation 26(2) being directory which also stands deleted, we set aside the impugned order and hold that the 'Resolution Plan' being in conformity with Section 30(2) warranted approval by the Adjudicating Authority.

25. However, we make it clear that to make the 'Resolution Process' successful, though it is open to the 'Committee of Creditors' to change its opinion by assenting in favour of one or other plan, we further hold that

the 'Committee of Creditors' once voted in favour of the 'Resolution Plan' cannot change its views.

26. In the result, the case is remitted to the Adjudicating Authority, Mumbai Bench, Mumbai to approve the plan in terms of Section 31 of the Insolvency and Bankruptcy Code, 2016 with modification i.e. that the plan is to be implemented within the period of 12 years as offered by the 'Successful Resolution Applicant'. The appropriate order be passed on an early date preferably within two weeks from the date of the production of the copy of this order.

All the appeals are allowed with the aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member [Judicial]

NEW DELHI

19th March, 2019

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