

National Company Law Appellate Tribunal,
Principal Bench
Company Appeal (AT) (Ins) No. 624 of 2021

IN THE MATTER OF:

1. **Mr. Sachin Manohar Deshmukh,**
Aged about 49 years, Occupation: Business,
Residing at Man Sneh Bungalow,
P.K. Road, Mulund West,
Mumbai 400080
Email id: Sachin_d@neptunegroup.in
Mobile No. 9320090322

...Appellant

Versus

1. **Central Bank of India,**
Nariman Point Branch,
Corporate Office at Chandra Mukhi,
Building, Nariman Point,
Mumbai- 400021.
2. **Neptune Developers Ltd.**
A company incorporated under the
Companies Act, 1956 having its registered
office at 4th Floor,
Neptune Magnet Mall,
Near Mangatram Petrol Pump,
L.B.S. Road, Bhandup (West), list
Mumbai- 400078.
Through its Insolvency Resolution
Professional,
Mr. Vijay Pitamber Lulla
Registration No. IBBI/IPA-PA 001/
IP- P00323/2017-2018/20593
Residing at, 201, Sanchit Anand
Building, Opp. Ram Mandir, Khar (West),
Mumbai – 400052.

...Respondents

Present:

For Appellant: Mr. P. Nagesh, Sr. Advocate with Mr. Anshuman

**Srivastava, Mr. S. Sahil Reddy and Mr. Ankit Yadav,
Advocates.**

**For Respondents: Mr. Ravi Raghunath, Ms. Rathina Maravarman and Ms.
Aakash Lodha, Advocates for R-1.
Mr. Chaitanya B. Nikte, Advocate for RP, R-2.**

J U D G M E N T

Dr. Ashok Kumar Mishra, Technical Member

The Present Appeal has been filed under Section 61 read with Section 7 of the IBC, 2016 against the order dated 16.07.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Mumbai) Court –III, in CP No. 3794/IBC/MB/2019.

2. The Appellant Mr. Sachin Manohar Deshmukh is the Ex-Director of M/s. Neptune Developers Ltd./ R-2 and is aggrieved with the order passed by the Adjudicating Authority holding that the Appellant had defaulted in paying the R-1 i.e. Central Bank of India (CBI) under the loan documentation.

3. The aforesaid direction would cause grave prejudice to the Appellant the same is fatal to the functioning of the Appellant. The fact of the case as stated by the Ld. Sr. Counsel for the Appellant are as follows:

(a) The Respondent No. 1/CBI has claimed an amount of Rs. 185,35,24,319/- as amount due to them from Corporate Debtor/R-2 towards the loan advance by them. The R-1/CBI in support of its claim has relied on the loan agreement and the application filed by it before

DRT against the demand notice dated 29.09.2018 and 05.10.2018 from the R-1/CBI.

(b) The Appellant vide its letter dated 12.10.2018 denied the allegations made therein and thus raising a dispute.

(c) The Appellant approached the R-1 for a One Time Settlement (OTS) and paid an amount of Rs. 10 Crores to the R-1. The said Settlement Proposal was accepted by the R-1 vide its sanction letter dated 28.01.2019 and consequently R-1 withdraw the Company Petition on 31.01.2019.

(d) Respondent No. 1 once again filed Company Petition No. 3794 of 2019 before the Adjudicating Authority, (NCLT, Mumbai Bench) on 17.06.2019.

(e) The Respondent No. 1 was approached by the Appellant vide their letter dated 24.01.2020 with a proposal for one time settlement at Rs. 40 Crore and deposited an amount of Rs. 4.00 Crore as upfront deposit. The R-1/CBI vide their letter dated 13.03.2020 accepted the said proposal of OTS & sanction the same vide the R-1 letter dated 13.03.2020.

(f) Thereafter, Global Pandemic Covid -19 emerged in India/world at large from 24.03.2020, the entire country has been under a complete lockdown and curfew was imposed. Even the banks started working on minimal staff only to provide essential services to the public at large. All this laid investors who were willing to invest in the Appellants Company

were not able to pump in the money as they were completely stuck up. The Appellant found mobilizing resources extremely difficult. The Petitioner's representative were also not able to meet the Bank due to lockdown.

(g) The Petitioner addressed various letters to the R-1 requesting for extension of time to make balance payment of OTS amount. Initially R-1/Bank extended the period for making the balance payment subject to interest.

(h) The Appellant was in constant co-ordination with the R-1/Bank and again submitted a OTS on 28.06.2021 before the commencement of hearing and agree to make payment of balance amount of Rs. 36 Crores to the R-1/Bank.

(i) The Appellant states that it may not be out of place of mention that the R-2 Company has principally two major ongoing projects viz, (1) Project Ramrajya and (2) Project Swarajya and around 2500 flats have been sold to various homebuyer whose value of each flat ranges from Rs. 5 Lakhs to Rs. 7.5 Lakhs who have invested hard earned money or sold their existing house or even borrowed money to own a home for themselves. Further so far as "Project Swarajya" is concerned almost 90% of work has been completed including obtaining Occupation Certificate (OC) barring some small internal work has remained. It is humbly prayed that if a stay to Corporate Insolvency Resolution Process

(CIRP) is not ordered the possession of these homebuyer who are from lower spectrum of society will be delayed by at least 6-9 months for no fault of theirs.

(j) Adjudicating Authority took up the hearing in the above matter by virtual mode. The Appellant wanted to place the aforesaid material on record and also the fact that they were willing to make payment of the interest on the delayed period. However, the Hon'ble Bench refused to hear the Appellant. Further due to certain technical snag, the Appellant and their counsel were removed from the Virtual hearing. The Appellants immediately called up the helpline available on the Virtual Hearing portal, however, since there was no response, the Appellant were compelled to place the aforesaid facts to the Registry of the Hon'ble Tribunal and requested for re-entry into the hearing however were not allowed to re-enter the same.

(k) It is relevant to mention herein that though the order was passed on 16.07.2021, the Appellant was informed about the same on 22.07.2021 when it was uploaded on the website.

(l) The Appellants further state that the R-2 has subsidiary companies which are completely relying on the business of the R-2 and upon passing of the impugned order for CIRP of Corporate Debtor, these subsidiary companies have come to an abrupt stand still thus affecting of

the working of not only the Appellants but for all its subsidiary companies.

4. The Crucial dates and events as presented by the Ld. Sr. Counsel for the Appellant are stated below:

1.	13.08.2019	The Respondent no.1 Bank filed Application under Section 7 of the IBC for alleged default of Rs. 185,35,24,319/-. [Form 1 at Pg. 55]
2.	24.01.2020	The Appellant approached the Respondent Bank with a One Time Settlement (OTS) proposal. The proposal envisaged payment of Rs. 40 crores against the entire dues of the Bank.[pg. 573]
3.	13.03.2020	The Respondent Bank agreed to the OTS and to settle entire dues for a sum of Rs. 40 crores. The OTS further contemplated an upfront payment of Rs. 4 Crores which was admittedly paid by the Appellant.[pg. 578]
4.	15.03.2020	The entire world came to a standstill with the onslaught of the pandemic –Covid 19. Complete lockdown and several other restrictions were imposed by the Governments.
5.	30.03.2020 16.05.2020 28.06.2020	In the circumstances caused due to the pandemic, the Appellant sought further time for complying with the OTS. The Respondent Bank granted such extension upto 30.06.2020.[pg 580] The Appellant again sought extension for further period as the entire real estate industry had come to a standstill.[pg. 584]
6.	08.07.2020	The Respondent Bank cancelled the above OTS.[Pg. 581]
7.	08.07.2021 16.07.2021	The Insolvency Application was taken up by the Ld. NCLT through virtual mode. During the course of hearing, the counsel for the Appellant got disconnected from the hearing and could not apprise the Ld. NCLT of the above mentioned developments qua the OTS. The counsel for the Appellant immediately attempted to contact the registry of the Ld. NCLT to enable him to join the hearing again. [see email at pg. 585]

		The Ld. NCLT pronounced the impugned order on 16.07.2021 whereby it erroneously admitted the Insolvency Application against the Corporate Debtor-R-2.[See page 40-45] N.B.: A bare perusal of the impugned order reveals that the same was passed without being apprised of the developments in the case which took place subsequent to the filing of the Section 7 Application.
8.	23.08.2021	The Appellant filed the present Appeal before this Tribunal. By order dated 23.08.2021, this Hon'ble Tribunal issued notice without granting stay.
9.	27.08.2021 09.11.2021 10.12.2021	The Appellant filed Civil Appeal No. 4982 of 2021 before the Hon'ble Supreme Court which granted a stay of the CIRP for a period of 8 weeks. The said stay was extended from time to time.
10.	25.02.2022	By way of its final judgment, this Hon'ble Supreme Court was pleased to make the stay order absolute until the pendency of the present Appeal before this Hon'ble Court.

5. Reliance is placed on the celebrated case of *"Swadeshi Cotton Mills vs UIO (1981) 1 SCC 664"* (paras 26-30). The Hon'ble Madras High Court has also in *"Shree Krishna Educational Trust vs Government of TN 2016 SCC"* Online Mad 2011 5 (para 6.12 to 6.17) succinctly laid down the components of a fair hearing which have not been complied with in the present case. The principles of natural justice are embedded in the Indian legal jurisprudence. In *"Maneka Gandhi vs. Union of India (1978) 1 SCC 248"*, the Hon'ble Supreme Court has held

"... The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial

*decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucher, L.J., emphasized in Russel v. Duke of Norfolk (1949) 1 All ER 109 that “**whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case**”.*

6. Section 10A of the IBC, 2016 was inserted by an amendment specially to cater to the situation created due to the spread of pandemic. Section 10A reads as under:

10A. Suspension of initiation of Corporate Insolvency Resolution Process-

Notwithstanding anything contained in sections 7, 9 & 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: Provided that no application shall even be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.
...
(emphasis supplied)

7. The above provision starts with a non-obstante clause. Further, the provision clearly stipulates that “no application shall ever be filed” for the initiation of the CIRP for the said default occurring during the said period. The expression “shall ever be filed” is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25.03.2020.

8. In the present case, the alleged outstanding amount had ceased to exist as soon as the OTS was entered into between the parties. Admittedly, the Respondent Bank agreed to settle the entire dues for a sum of Rs. 40 crores and further accepted the upfront amount of Rs. 4 Crores. Further, the last date of payment as per the revised OTS letter was 30.06.2020 and hence the default was within the protected period stipulated in Section 10A.

9. The Respondent No. 1 Bank hold about 24.53% share of the overall financial claim against the Corporate Debtor. As against its overall claim of Rs. 185 crores (approx.) the Respondent Bank had entered into the OTS dated 13.03.2020 for an amount of Rs. 40 Crores only. However, now the Respondent Bank is receding to accept the OTS amount which will expose the other financial creditors who would be condemned to huge losses.

10. However, the Adjudicating Authority vide its order dated 16.07.2021 in CP No. 3794/IBC/MB/2019 has observed the followings:

“1. The Corporate Debtor, except putting up appearance through Shri Akshay Patil, advocate even did not chose to file any reply in the above matter. The above Company Petition is nothing but a second round of litigation. The earlier company petition bearing no. 4086 of 2018 was withdrawn by the applicant on account of OTS (One Time Settlement) sanctioned to the Corporate Debtor. Except paying upfront amount of 10 crores, the Corporate Debtor did not adhere to the compliance of the remaining terms of the OTS despite availing nearly two years’ time.

2. Thus, the debt and default are admitted in this case and the debt is also within limitation. The application is complete in all respects and the Financial Creditor also suggested the name of Mr. Vijay Pitamber Lulla as Interim Resolution Professional along with his consent letter in

Form II. Thus, the present Company Petition satisfies all the necessary legal requirements for admission.

3. Under these circumstances, this tribunal is of the considered opinion that the above company petition is liable to be admitted and accordingly the same is admitted.”

11. The Resolution Professional/R-2 has submitted the following:

(a) He made public announcement on 26.07.2021 under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the following newspaper i.e., Free Press Journal and Navakal for inviting claims from creditors of Neptune Developers Ltd. And the last date for submission of claim was 06.08.2021.

(b) That the IRP has filed its report certifying Constitution of Committee of Creditors on 18.08.2021 and till that date the IRP received claims from 350 Class of Creditors (Homebuyers), 3 claims from Financial Creditor and 3 from unsecured Financial Creditor. A few connected details from the copy of the IRP's report certifying Constitution of Committee of Creditors is given hereunder:

10

Annexure-B

Vijay P. Lulla

Chartered Accountant & Insolvency Professional

Registered Office: 201, Satchitanand Bldg., 12th Road, Khar (W), Mumbai – 400 052 Tel 022-26498007
Corporate Office: 203B Arcadia, 195, Next to N.C.P.A Marg, Nariman Point, Mumbai-400021
Tel No. : 022 22845755 / 22828994 Cellular No.: +91-9920279899 E-mail: vijayplulla@rediffmail.com

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

Company Petition No.-3794/IBC/MB/2019, under section 7 of the IBC, 2016

In the Matter of:

Central Bank of India

... Financial Creditor

V/s

Neptune Developers Limited

...Corporate Debtor

Dear Sir,

Please find enclosed herewith IRP's Report certifying Constitution of Committee of Creditors.

Kindly to be noted.

Yours sincerely,



Vijay P Lulla
Interim Resolution Professional
Neptune Developers Limited

Place: Mumbai
Date: 19.08.2021

(11)

**BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**
Company Petition No.-3794/IBC/MB/2019, under section 7 of the IBC, 2016

In the Matter of:

Central Bank of India

... Financial Creditor

V/s

Neptune Developers Limited

...Corporate Debtor

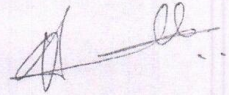
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2.	Copy of Public Announcement – Annexure 1	6-7
3.	List of Claims received – Annexure 2	8-10

Date: 18.08.2021

Place: Mumbai

For Neptune Developers Limited



Vijay Lulla

Interim Resolution Professional

IBBI Registration No - IBBI/IPA-001/IP-P00323/2017-18/10593

Address: 201, Satchitanand Bldg., 2nd Floor,

12th Road, Khar (West), Mumbai 400 052

Mobile : 99202 79899

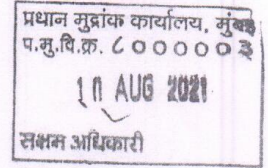
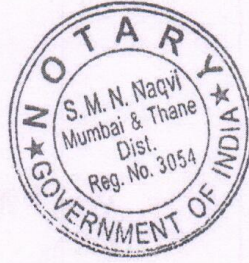
Email: vijayplulla@rediffmail.com



महाराष्ट्र MAHARASHTRA

2021

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BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

Company Petition No.-3794/IBC/MB/2019,

under section 7 of the IBC, 2016

In the Matter of:

Central Bank of India

... Financial Creditor

V/s

Neptune Developers Limited

...Corporate Debtor



(B) 2

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
Company Petition No.-3794/IBC/MB/2019, under section 7 of the IBC, 2016

In the Matter of:

Central Bank of India

... Financial Creditor

V/s

Neptune Developers Limited

...Corporate Debtor

IRP's Report Affidavit Certifying Constitution of Committee of Creditors (CoC)

I, Vijay Pitamber Lulla S/o Shri Pitamber Lulla, aged about 49 years, having my office at 201, Satchitanand Bldg., 2nd Floor, 12th Road, Khar (West), Mumbai 400 052, do hereby solemnly affirm and declare as under:

1. That I have been appointed as Interim Resolution Professional (IRP) vide order dated 16th July, 2021, received on 23rd July 2021, in the aforesaid matter.
2. That I am familiar with the facts and circumstances of the case having dealt with it in my official capacity and am competent to depose this affidavit.
3. That I have read and understood the present Report on Constitution of Committee of Creditors which is set as below: -
 - i. That pursuant to the direction of Hon'ble Tribunal the Public Announcement was made in Form A on 26th July, 2021 in the Free Press Journal (Mumbai) & Navakal (Mumbai). Copies of Public Announcement are enclosed as Annexure - 1.
 - ii. That the last date of submission of Claims was 06.08.2021.
 - iii. The Interim Resolution Professional has filed the application under section 21(6A)(b) of the Insolvency & Bankruptcy code 2016 for provisionally appointing Mr. Manish Motilal Jaju having registration No. IBBI/IPA-001/IP-P00034/2016-17/10087 as the Authorized Representative of Financial Creditor of the Corporate Debtor in the class of Creditors- Home Buyers with Hon'ble NCLT (Mumbai Bench) on 18.08.2021. The IRP has received claims from 350 Home Buyers and there are more than 2000 Home Buyers and IRP is yet to receive claims from them.

14/3

iv. That the list of claims received are in the process of being verified by the IRP. List of claims received are annexed herewith as Annexure – 2.

v. That the undersigned IRP constituted on 18.08.2021 the Committee of Creditors consisting the following creditors: -

Sr No	Name and Address of the Financial Creditor	Amount of Claim Received (Rs.)	Amount of Claim Admitted (Rs.)	Claim Amount Under Verification	Date of Receipt of Claim	Vote of Share
Secured Financial Creditors						
1.	Assets Care & Reconstruction Enterprise Limited 2nd Floor, Mohandev Building, 13, Tolstoy Marg, New Delhi - 110001	11,56,56,84,992	6,91,51,36,239	4,65,05,48,753	06.08.21	67.31%
2.	Central Bank of India Ground Floor, Chandermukhi Building, Nariman Point, Mumbai - 400021	2,51,99,29,090	2,51,99,29,090	-	09.08.21	24.53%
3.	Tomorrow Capital Enterprises Private Limited (Lodha Finserv Private Limited) 7th Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalakshmi, Mumbai - 400011	60,13,45,001	39,51,03,932	20,62,41,069	05.08.21	3.85%
Total A		14,68,69,59,083	9,83,01,69,261	4,85,67,89,822		95.69%
Unsecured Financial Creditors						
4.	Edelweiss Asset Reconstruction Company Limited Edelweiss	3,64,74,02,691	-	3,64,74,02,691	03.08.21	0%

PART OF INDIA

	House, Off CST Road, Kalina, Mumbai 400098					
5.	Axis Bank Limited Structured Assets Group, Corporate Office, Axis House, 7th Floor, C-2, Wadia International Centre, Pandurang Budhkar Marg, Worli, Mumbai -400025	18,84,41,217	-	18,24,63,306	05.08.21	0%
6.	Duddu Fin-Lease Limited ABM House, TPS III, Near Shoppers Stop, CTS No. F/750. F.P.268, Linking Road, Bandra (w), Mumbai - 400050	15,55,65,754	15,55,65,754	-	06.08.21	1.51%
Total B		3,99,14,09,662	15,55,65,754	3,83,58,43,908		1.51%
Financial Creditors in a Class						
	Class - Home Buyer No. of claims received - 350 (Mr. Manish Jaju provisionally appointed as Authorised Representative (application filed with AA on 18-8-2021.	55,21,25,075	28,76,05,733	26,45,19,342	Various Dates	2.80%
Total Claims		19,23,04,93,820	10,27,33,40,748	8,95,71,53,072		100.00%



Note: The claims are under verification

vi. That the IRP submits the present report in compliance to the Regulation 17(1) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

DEPONENT

VERIFICATION:

Verified on this 18.08.2021 that the contents of the foregoing affidavit are true and correct to the best of my knowledge are true and correct. No part of it is false and nothing material has been concealed therefrom.

DEPONENT

BEFORE ME

Sm
20-8-21



S. M. N. NAQVI
NOTARY

Residential Add.: Akruhi Bldg. No. 3,
Flat No. 401, Hiranandani Lallu Bhai Compound
Mankhurd (W), Mumbai - 400 043.

Notary Serial No. 776 Page No. 96
Notary Book No. 490 Date No. 20/08/2021



List of Claims Received

Annexure-2 ✓

A- Financial Creditor

Sr No	Name and Address of the Financial Creditor	Amount of Claim Received (Rs.)	Amount of Claim Admitted (Rs.)	Claim Amount Under Verification	Date of Receipt of Claim	Vote of Share
Secured Financial Creditors						
1.	Assets Care & Reconstruction Enterprise Limited 2nd Floor, Mohandev Building, 13, Tolstoy Marg, New Delhi - 110001	11,56,56,84,992	6,91,51,36,239	4,65,05,48,753	06.08.21	67.31%
2.	Central Bank of India Ground Floor, Chandermukhi Building, Nariman Point, Mumbai - 400021	2,51,99,29,090	2,51,99,29,090	-	09.08.21	24.53%
3.	Tomorrow Capital Enterprises Private Limited (Lodha Finserv Private Limited) 7th Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalakshmi, Mumbai - 400011	60,13,45,001	39,51,03,932	20,62,41,069	05.08.21	3.85%
Total A		14,68,69,59,083	9,83,01,69,261	4,85,67,89,822		95.69%
Unsecured Financial Creditors						
4.	Edelweiss Asset Reconstruction Company Limited Edelweiss House, Off CST Road, Kalina, Mumbai - 400098	3,64,74,02,691	-	3,64,74,02,691	03.08.21	0%

(20)
(9)

5.	Axis Bank Limited Structured Assets Group, Corporate Office, Axis House, 7th Floor, C-2, Wadia International Centre, Pandurang Budhkar Marg, Worli, Mumbai -400025	18,84,41,217	-	18,24,63,306	05.08.21	0%
6.	Duddu Finance Lease Limited ABM House, TPS III, Near Shoppers Stop, CTS No. F/750. F.P.268, Linking Road, Bandra (w), Mumbai - 400050	15,55,65,754	15,55,65,754	-	06.08.21	1.51%
	Total B	3,99,14,09,662	15,55,65,754	3,83,58,43,908		1.51%
Financial Creditors in a Class						
	Class - Home Buyer No. of claims received - 350 (Mr. Manish Jaju provisionally appointed as Authorised Representative (application filed with AA on 18-8-2021.	55,21,25,075	28,76,05,733	26,45,19,342	Various Dates	2.80%
	Total Claims	19,23,04,93,820	10,27,33,40,748	8,95,71,53,072		100.00%

B-Operational Creditor

Sr No	Name & Address of Operational Creditor	Amount of Claim Received (Rs.)	Amount of Claim Admitted (Rs.)	Claim Amount Under Verification	Date of Receipt
1	Xanadu Realty Private Limited WeWork Raheja Platinum, Unit 3A106, Sag Baug Road, Off Andheri-Kurla road, Marol, Andheri East, Mumbai -400059	17,87,06,652	-	17,87,06,652	07-08-2021
2	Stronbuilt Constructions Private Limited Office-4, 9th Floor, Kaledonia, Sahar road Opp. Vijay Nagar Society, Andheri East, Mumbai - 400058	26,11,83,618	2,85,89,247	23,25,94,371	07-08-2021
3	Income Tax Department Deputy Commissioner of Income Tax, Circle - 2(3), Room No. 718, 7th Floor, Smt. K. G. Mittal Ayurvedic Hospital Building, Charni Road, Mumbai - 400002	37,09,80,700	20,23,07,894	16,86,72,806	07-08-2021
	Total	81,08,70,970	23,08,97,141	57,99,73,829	

(c) That the IRP called its 1st Committee of Creditors meeting on 26.08.2021. During the meeting one of the Financial Creditor viz; Asset Care & Reconstruction Enterprise Ltd. & Anr. (who holds 67.31%) informed the IRP that an application has been filed with Hon'ble NCLT with a contention that their projects/securities should be kept out of CIRP proceedings and therefore requested for adjournment of 14 days

and the same was agreed by other Financial Creditors. Thereafter the meeting was adjourned to 09.09.2021.

(d) In the meantime, Mr. Sachin Manohar Deshmukh, Ex-Director of Neptune Developers Ltd. filed an appeal before this Tribunal against the order passed by Adjudicating Authority dated 16.07.2021 on various contention and mainly on the grounds that initiation of CIRP was bad in law and hence the CIRP order be recalled.

(e) The matter was first heard on 23.08.2021 by this Hon'ble Bench and after hearing the arguments of the Counsels, two weeks was granted for reply to be filed by all the Respondents, however, no interim orders were passed by the Adjudicating Authority.

(f) That Mr. Sachin Manohar Deshmukh, erstwhile Director of Neptune Developers Ltd. Being aggrieved by the order dated 23.08.2021 preferred an appeal before Hon'ble Supreme Court bearing Civil Appeal No. 4982/2021.

(g) That the matter was heard by the Hon'ble Supreme Court on 27.08.2021, the Hon'ble Supreme Court of India by its order dated 27.08.2021 was pleased to stay on further proceedings in the CIRP for a period of 8 weeks from the date of the order.

(h) That on learning of the order dated 27.08.2021, the IRP wrote an email dated 28.08.2021 to the CoC members and informed them of the said development and also to the erstwhile management. The erstwhile

management vide its email dated 30.08.2021 contended that the IRP cannot remain in control and management of the Corporate Debtor and that he should hand over the management.

(i) Thereafter the R-2 vide its email dated 01.09.2021 replied that the Hon'ble Supreme Court order dated 27.08.2021 clearly stated that there shall be a stay of further proceedings for a period of 8 weeks from today, which implies that no further steps to be taken in connection with the CIR Process. The stage at which the CIRP has reached should remain the same. At this stage the IRP has been appointed and CoC has been constituted and the first CoC meeting was held and adjourned and therefore no further steps will be taken in the CIRP. The IRP further states that, based on the legal advice received and after considering the same, the IRP will continue to manage the affairs of the corporate debtor till further orders of the supreme court and the powers of the Board of Directors shall remain suspended and their powers be exercised by the IRP.

(j) In the meantime, Asset Care & Reconstruction Enterprise Ltd. & Anr. ("ACRC") has preferred an IA bearing No. 1979/2021 before NCLT, Mumbai for following reliefs:

(i) That the CIRP initiated applies only to the project known as Neptune Swarajya, Ambivali, Kalyan, Thane and the creditors thereof.

(ii) That the CIRP initiated does not extend and apply to the project known as Project Ramrajya being developed by the Corporate Debtor at Ambivali, Kalyan, Thane and all securities furnished in that regard and that the same shall stand excluded from the CIRP of the Corporate Debtor and also to furnish the same in the Information Memorandum to the CoC of the Corporate Debtor.

(iii) Stay the preparation of the Information Memorandum of the Corporate Debtor and further steps in the CIRP of the Corporate Debtor in relation to the project Ramrajya and also to restrain and prohibits in any manner taking over, exercising power, and /or taking steps, against and/or in relation to the project Ramrajya.

(k) Similarly, in the meantime, the flat holders of Project Ramrajya have also filed an IA bearing No. 1980/2021 in NCLT for declaring that the CIRP which has been initiated against the Corporate Debtor be restricted to only Swarjya Projects of the Corporate Debtor and the Project Ramrajya be excluded from CIRP.

(l) In the meantime, if has come to the knowledge of the IRP/R-2 that the farmers were trying to encroach upon the Corporate Debtor's land at Pune and therefore the IRP had to increase the security and has also authorized the Corporate Debtor's officials to file police complaint and

take such steps as may be required to safeguard the Corporate Debtor's assets.

(m) Respondent No. 2 had conducted CIRP till the date the stay was granted with all the sense of duties and responsibilities as per the provisions of the I & BC, 2016 and thereafter as stated herein above has been managing the affairs of the Corporate Debtor.

The Ld. Counsel for R-2 given the status as above.

12. The Ld. Counsel for R-1/CBI has also provided the list of relevant dates for bringing the clarity of the Appeal:

S.No.	Date	Event
1.	18.02.2013	Term loan of 100 crores sanctioned by R1 bank to the CD [pg. 57-58]
2.	31.03.2015	CD account was declared as NPA[pg. 507,Appeal Vol. 2]
3.	30.06.2017	CD acknowledged an amount of INR 95,27,86,406/- was due to R1 Bank as of 30.06.2017 [pg 442, Appeal Vol. 2]
4.	28.01.2019	R1 Bank sanctioned 1 st OTS and CD was required to pay Rs. 93.18 crores within 90 days. Further, it was agreed to inform the concerned authority who categorized the CD's account as fraud at RBI of the acceptance of the OTS [pg 53-54, Appeal Vol. 1]
5.	17.06.2019	R1 Bank rescinded the 1 st OTS since except payment of upfront 10% amount, CD failed to pay balance 83.18 crores [pg. 517, Appeal Vol. 2]
6.	13.08.2019	Insolvency Application was filed by R1 Bank u/s 7 of the Code for default in payment of Rs. 185,53,24,319/- [pg. 55-64, Appeal Vol. 1]
7.	03.12.2019	Adjudicating Authority granted time to CD to file a reply [pg. 56, reply Vol.]
8.	24.01.2020	CD sent 2 nd OTS offer to pay Rs. 40 crores on or before 31.03.2020[pg. 573, Appeal Vol.3]
9.	13.03.2020	R1 Bank sanctioned 2 nd OTS and it was clearly stated therein the DRT/NCLT proceedings shall be

		withdrawn only on payment of entire settlement amount. Further, if the payment was not made as agreed, then the OTS would stand automatically cancelled and bank would be entitled for entire dues [pg 578-579, Appeal Vol. 3]
10.	30.03.2020	CD requested for extension of time to pay.
11.	16.05.2020	R1 Bank gave extension till 30.06.2020 only, to pay the balance sum along with simple interest @ 8% for delayed period [pg 580, Appeal vol.3]
12.	08.07.2020	R1 bank rescinded the 2 nd OTS as CD once again failed to make payment [pg 581, Appeal Vol. 3]
13.	06.04.2021	Adjudicating Authority once again granted time to CD to file reply [pg. 57, reply vol.]
14.	08.07.2021	The Insolvency Application was listed as Sl. No. 4 [pg 52, reply Vol.] and Adjudicating Authority heard the parties and reserved orders [pg. 58, reply Vol.]
15.	16.07.2021	Adjudicating Authority admitted the Insolvency Application [pg 40-45, Appeal Vol.1]
16.	19.08.2021	CoC was constituted by the IRP
17.	23.08.2021	This Hon'ble Appellate Tribunal issued notice in the present Appeal and refused to stay the constitution of CoC
18.	27.08.2021	Appellant filed C.A. No. 4982 of 2021 against order dated 23.08.2021 and the Hon'ble Supreme Court by an ex-parte order granted stay of further proceedings in the CIRP
19.	25.02.2022	Hon'ble Supreme Court extended the interim order 27.08.2021 till the disposal of present of present Appeal and requested this Hon'ble Appellate Tribunal to dispose of the present Appeal as expeditiously as possible.

13. The Ld. Counsel for R-1 further submitted that there was a dispute with respect to the claim of the Bank is baseless and contrary to the facts and law.

The Ld. Counsel for R-1 further submitted as follows:

(A) There was no violation of natural justice & suppression of material facts as alleged by the Appellant.

It was stated by the Ld. Counsel of R-1/CBI that the Appellant has erroneously contended that on 08.07.2021, the Counsel of the Appellant/CD was removed/logged out from the virtual hearing before the Adjudicating Authority and therefore had no opportunity to argue the case [averment @ pg. 27 (Ground D)]. This contention is false since:

- i. The case was listed as Sl. No. 4 on 08.07.2021 before the Adjudicating Authority [pg. 51/52, reply Vol.]*
- ii. The Corporate Debtor's Counsel has admitted in the email dated 08.07.2021 that only after the hearing in Sl. No. 4 the counsel was removed [pg. 585, Appeal vol.3]*
- iii. The Adjudicating Authority's order dated 08.07.2021 records that the parties were heard [pg. 58, reply Vol.]*
- iv. the Appellant suppressed the cause list for 08.07.2021 and the order dated 08.07.2021 while filing the present appeal.*
- v. No application or sworn affidavit has been filed by the counsel for the Appellant/CD alongwith the present Appeal stating that he was removed from the hearing and was not given any opportunity to present the case.*
- vi. Assuming without admitting that the Appellant/CD's counsel was not heard by the Adjudicating Authority, then the Appellant may have immediately approached this Hon'ble Appellate Tribunal challenging the order dated 08.07.2021, but no such appeal was filed. Furthermore, no steps were by the Appellant to file any application for recall of the order dated 08.07.2021 or for re-opening the arguments before the Adjudicating Authority;*
- vii. Only after the Adjudicating Authority had passed a judgment dated 16.07.2021 admitting the Insolvency Application, the Appellant belatedly filed the present*

Company Appeal on 09.08.2021 challenging the order dated 16.07.2021.

(B) It was also stated by Ld. Counsel of R-1/CBI that Section 10-A of the Code is inapplicable.

(a) The Appellant's contention based on Section 10-A of the Code was neither raised before the Adjudicating Authority, nor is there any pleading with respect to Section 10-A in the present Company Appeal.

(b) It is well settled law that no new plea can be raised at the Appellate stage. This Hon'ble Appellate Tribunal in M/s Power Finance Corporation Ltd. V. M/s. Shree Maheshwar Hydel Power Corporation Ltd., CA (AT) No. 237 of 2017, judgment dt. 12.03.2018 has held that the parties cannot raise grounds which were not raised before the Tribunal below, and that an appeal against an impugned order can be found fault with only on the basis of the grounds raised before the Tribunal below.

© Assuming without admitting that the Appellant can rely upon Section 10-A of the Code, it is submitted that Section 10-A is inapplicable since the default had occurred much prior i.e., NPA on 31.03.2015, the acknowledgment of debt was on 30.06.2017, the cancellation of 1st OTS was on 17.06.2019 due to failure to pay, the Insolvency Application was filed on 13.08.2019.

(d) The contention of the Appellant that allegedly after approval of the 2nd OTS the cause of action did not survive is false and misleading. The terms and conditions of 2nd OTS clearly states that the DRT/NCLT proceedings shall be withdrawn only on payment of entire settlement amount, and that if payment was not made as agreed, then the OTS will stand automatically cancelled and the bank will be entitled for entire dues [pg 578-579, Appeal Vol. 3]

(e) It is further submitted that there were no settlement/OTS existing between the parties when the matter was heard and reserved on 08.07.2021, and even when the judgment dated 16.07.2021 was passed by the Ld. Adjudicating Authority. In fact, the 2nd OTS was rescinded on 08.07.2020 itself, i.e.,

almost a year before the Insolvency Application was heard and reserved for orders.

14.(1) We have carefully gone through the submissions made by the Ld. Sr. Counsel/Counsels of the parties, the pleadings available on record and are having the following observations:

(a) It is not in dispute that the Term Loan was not taken from Respondent No.1/CBI by the Corporate Debtor.

(b) It is also not in dispute that Corporate Debtor's account was declared as NPA on 31.03.2015.

(c) It is also not in dispute that Corporate Debtor has not acknowledged the specified amount i.e. approximately Rs. 95 Crore due to the Respondent No. 1/CBI as on 30.06.2017.

(d) The parties both the Financial Creditors/Respondent No. 1 and Corporate Debtor/Appellant is not denying that an OTS was not sanctioned on 28.01.2019 and the same was rescinded by the Bank on 17.06.2019. The Corporate Debtor failed to pay balance Rs. 83.18 Crore out of OTS sanctioned of Rs. 93.18 Crore and hence only Rs. 10 Crore was paid by the Corporate Debtor/ Appellant to the Bank.

(e) What it is observed that the Respondent No.1/Bank sanctioned 2nd OTS on 13.03.2020 for an amount of Rs. 40 Crore and out of which only

Rs. 4 crore was paid by the Corporate Debtor/Appellant to the Respondent No.1/Bank.

(2) From the above it is very much clear that the debt is neither barred by the limitation nor it is barred by the provision of Section 10(A) of the IBC, 2016 as the bank has filed the petition on 13.08.2019.

(3) The record also revealed that the Respondent No.1/CBI/FC has filed the Petition for initiation of CIRP originally on 22.10.2018 but before the admission of the said application, the Corporate Debtor has approached the Respondent No.1/Bank for settlement of their dues and accordingly, the compromise proposal submitted by the Corporate Debtor/Appellant was accepted by the Applicant Bank vide sanction letter dated 28.01.2019. As per Settlement proposal, the Corporate Debtor has paid the upfront amount of Rs. 10 Crore to the Respondent No.1/Bank/Financial Creditor. As settlement has been arrived at the matter was withdrawn on 31.01.2019 (pg. 71 of the Appeal Paper Book). Hence, this is 2nd round of litigation under IBC, 2016 by the Financial Creditor perhaps who has reached at the conclusion that the Corporate Debtor/Appellant is not in a position to run the organization or to pay their dues. Repeated settlement/OTS is of no use to supplement the organization running. Repeated failures to pay the balance amount of Settlement after agreement is also unhealthy in financial terms.

(4) The Hon'ble Apex Court has already settled the law that date of NPA/date of default is not shifted.

(5) Be that as it may, OTS is a mechanism available with the banks for years together to allow survival of Debtors and maintain cash flow for banks. However, repeated failure reflects either the intention of the Corporate Debtor/Appellant is not fair as in every OTS the settlement amount is going down and thereby reflecting that delay in CIRP will make the organization weaker and the object of the code for maximization of the value of assets of such persons shall not happen.

Hence, we do not find any infirmity in the impugned order and the order deserves to be sustained. The Appeal fails and is dismissed. IA, if any, stands disposed of. No order as to costs.

[Justice M. Venugopal]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
10.06.2022
sr