Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi -110001

15th November, 2019

Subject: Judgment[1] dated 15th November, 2019 of the Hon'ble Supreme Court of India in the matter of *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors*. [Civil Appeal No. 8766-67/2019 and other petitions]

While setting aside the judgment dated 4th July, 2019 of the NCLAT and upholding the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the Hon'ble Supreme Court settled several issues and made important rulings as under:

Sl. No.	Issue/ Theme	Rulings	Para / Page No.
1	Role of the Resolution Professional	It is the responsibility of the resolution professional (RP) to (a) manage the affairs of the corporate debtor (CD) as a going concern during corporate insolvency resolution process (CIRP), (b) appoint and convene meetings of the CoC, so that they may decide upon resolution plans, and (c) collect, collate and finally admit claims of all creditors, which must be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated by the Committee of Creditors (CoC). The role of the RP is not adjudicatory but administrative.	27/40
2	Role of the Prospective Resolution Applicant	a. The prospective resolution applicant has a right to receive complete information as to the CD, debts owed by it, and its activities as a going concern, prior to the commencement of CIRP. It has a right to receive information contained in the information memorandum as well as the evaluation matrix mentioned in Regulation 36B of the CIRP Regulations. b. The resolution plan submitted by the prospective resolution applicant must provide for measures as may be necessary for the insolvency resolution of the CD for maximisation of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not. The plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors.	29/45 29/46

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		c. The resolution plan must (a) provide that the amount due to operational creditors (OCs) shall be given priority in payment over FCs, (b) must include provisions as to how to deal with the interests of all stakeholders, including financial creditors (FCs) and OCs of the CD, (c) provide for the term of the plan, management and control of the business of the CD during such term, and its implementation, and (d) demonstrate that it is feasible and viable, and that the resolution applicant has the capability to implement the said plan.	30/46
3	Role of CoC in CIRP	a. It is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the CD by accepting a particular resolution plan. The rationale for only FCs handling the affairs of the CD and resolving them have been deliberated upon by the BLRC, which formed the basis for the enactment of the Insolvency Code. b. The insolvency resolution is ultimately in the hands of the majority vote of the CoC. It may approve a resolution plan by a vote of not less than 66% of the voting share of the FCs, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations. c. What is left to the majority decision of the CoC is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. d. It is the commercial wisdom of the majority of creditors to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the CIRP is to take place.	31/48 36/55 40/59 40/60
4	Jurisdiction of the AA and NCLAT	a. The limited judicial review available to AA has to be within the four corners of section 30(2) of the Code. In respect of the NCLAT, it has to be within parameters of section 32 read with section 61(3) of the Code. Such review can in no circumstance trespass upon a business decision of the majority of the CoC. b. The residual jurisdiction of the NCLT under section 60(5)(c) cannot, in any manner, whittle down section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the AA outside section 30(2) of the Code, while adjudicating a resolution plan. c. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the CoC, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the CD and the fact that it has adequately	42/ 68 43/69 46/ 75

		balanced the interests of all stakeholders including OCs. while the AA cannot interfere on merits with the commercial decision taken by the CoC, the limited judicial review available is to see that the CoC has taken into account the fact that the CD needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including OCs has been taken care of. If the AA finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the CoC to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the CoC while approving a resolution plan may thus be looked at by the AA only from this point of view, and once it is satisfied that the CoC has paid attention to these key features, it must then pass the resolution plan, other things being equal.	
5	Secured and Unsecured Creditors	a. Protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important.	49/ 84
		b. If an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured FCs will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the CD is liquidated. This would defeat the objective of the Code which is resolution of distressed assets and only if the same is not possible, should liquidation follow.	54/ 89
		c. The amended Regulation 38 does not lead to the conclusion that FCs and OCs, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of OCs rights under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of OCs, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.	56/ 96
		d. Quite clearly, secured and unsecured FCs are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured FCs are to be paid. And, most importantly, OCs are separately viewed from these secured and unsecured FCs in Sl. No. 5 of paragraph 7 of statutory Form H of the CIRP Regulations.	57/ 98

		e. The Code and the Regulations, read as a whole, together with the observations of expert bodies and the Supreme Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code - to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational. f. There is a vital difference between the jurisdiction of the High Court under section 392 of the Companies Act, 1956 and the jurisdiction of the AA under the Code. The AA is to decide on whether a resolution plan passes muster under the Code and there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of.	57/ 99 58/ 102
6	The constitution of sub-committee by the CoC	a. The powers of the CoC under section 28(1)(h) in respect of matters which have a vital bearing on the running of the business of the CD, though are administrative in nature, shall not be delegated to any other person. The CoC alone must take the decisions mentioned in section 28. b. The power to approve a resolution plan under section 30(4) cannot be delegated to any other body as it is the CoC alone that has been vested with this important business decision which it must take by itself. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are ultimately approved and ratified by the CoC.	62/ 106 62/ 106
7	Extinguishing of rights of creditors against guarantors	a. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the CoC, it shall be binding on all stakeholders, including guarantors. This provision ensures that the successful resolution applicant starts running the business of the CD on a fresh slate as it were. b. It is difficult to accept the argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the CD. The judgment of the NCLAT is contrary to section 31(1) of the Code and the Supreme Court's judgement in *State Bank of India Vs. V. Ramakrishnan*.	66/ 111 66/ 112
8	Claims	a. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by the successful resolution applicant.	67/ 112

		b. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the CD.	67/ 113
9	Utilisation of profits of the CD during CIRP	Distribution of profits made during the CIRP will not go towards payment of debts of any creditor.	68/ 113
10	Constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019	a. The legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. b. While it is true that it may well be that the law laid down by the NCLAT in this very case forms the basis for some of these amendments, it cannot be said that the legislature has directly set aside the judgment of the NCLAT. The Amendment Act cannot be struck down on the ground that it has been enacted only for curing the defect in the NCLAT order in the case of Essar Steel.	69/114 73/119
11	Constitutional validity of amendment in section 12 of the Code.	a. The reason for this amendment stems from the experience that has been plaguing the legislature ever since SICA was promulgated. Though SICA and other successor enactments provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which these statutory measures proved to be abject failures in resolving stressed assets. b. The speech of the Hon'ble Finance Minister in the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. It is therefore essential to have time-bound decisions to reinstate this legislative intent. The speech has been used as an aid not in order to construe the amended section 12, but to explain why the amendment was brought about. c. Time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution	75/123 76/126 77/129 79/131 79/132

		of India. However, the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail. d. While leaving the provision otherwise intact, the term "mandatorily" is struck down as being manifestly arbitrary under Article 14 of the Constitution of India and as being unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the CIRP must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. If the delay or a large part thereof is attributable to the tardy process of the AA and/or the NCLAT itself, it may be open in such cases for the AA and/or NCLAT to extend time beyond 330 days. e. It is only in exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the CD must take place beyond which it is to be driven into liquidation.	79/132 79/133
12	Constitutional validity of amendment in section 30 of the Code.	a. Section 30(2)(b) is a beneficial provision in favour of OCs and dissentient FCs as they are now to be paid a certain minimum amount, the minimum in the case of OCs being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient FC being a minimum amount that was not earlier payable. Prior to the amendment, secured FCs could cramdown unsecured FCs who are dissenting. But after the amendment, such FCs are now to be paid the minimum amount mentioned in sub-section (2) of Section 30. b. The order of priority of payment of creditors mentioned in section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum amount be paid to different classes of OCs and FCs. c. There is no residual equity jurisdiction in the AA or the NCLAT to interfere in the merits of a business decision taken by the requisite majority of the CoC, provided that it is otherwise in conformity with the provisions of the Code and the Regulations. d. An appellate proceeding is a continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason also, Explanation 2 to Section	80/133 80/134 81/135 82/135

		30(2)(b) of the Code is constitutionally valid, not having any retrospective operation so as to impair the vested rights.	
13	The resolution plan of ArcelorMittal	a. Ultimately it is the commercial wisdom of the requisite majority of the CoC that must prevail on the facts of any given case, which would include distribution of assets. It is, therefore, not possible that the AA and consequently, the NCLAT would be vested with the discretion that is vested in the CoC. b. The CoC does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissenting creditors. c. The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the CoC and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside. d. The appeals filed by the CoC of Essar Steel Limited and other Civil Appeals are allowed. The impugned NCLAT judgment is set aside. The CIRP of the CD in the case will take place in accordance with the resolution plan of ArcelorMittal, as amended and accepted by the CoC, as it has provided for amounts to be paid to different classes of creditors by following section 30(2) and regulation 38 of the CIRP Regulations.	91/156 93/157 94/158 103/164