

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 172-173 of 2022

(Arising out of Order dated 03.02.2022 passed by National Company Law Tribunal, Mumbai Special Bench, Court-II in I.A. No. 1447/MB/C-II/2021 in CP(IB) No. 1790/MB/C-II/2017).

IN THE MATTER OF:

Committee of Creditors of Ushdev International Limited through State Bank of India,

SAMB-II, Raheja Chambers, 1st Floor, B Wing,
Free Press Journal Marg,
Nariman Point, Mumbai - 400021

...Appellant

Versus

1. Mr. Subodh Kumar Agrawal, Resolution Professional of Ushdev International Limited.

1, Ganesh Chandra Avenue, 3rd Floor, R. N-301, Kolkata – 700013

2. Taguda Pte. Limited, Singapore

1, Magazine Road,
#04-11 Central Mall,
Singapore 059567

3. ICICI Bank Limited

Having its registered office at
ICICI Bank Towers, Near Chakli Circle,
Old Padra Road, Vadodra - 390007

...Respondents

Appellant:

Mr. Tushar Mehta, SGI and Mr. Niranjana Reddy Sr. Advocate with Ms. Shivani Sinha, Ms. Misha, Mr. Vijayant Paliwal, Ms. Charu Bansal and Ms. Prabh Simran Kaur, Advocates.

Respondent:

Ms. Vishrutya Sahni and Mr. Kumar Kislay, Advocates with Mr. Subodh Kr. Agrawal, RP in person for R-1. Mr. P. Chidambaram, Sr. Advocate with Mr. Gautam Ankhad, Mr. Ujjal Banerjee and Mr. Kumar Anurag Singh, Advocates for R-2. Mr. K. Datta, Sr. Advocate, Mr. Nitesh Jain, Mr. Vividh Tandon and Mr. Prakshal Jain, Advocates for R-3.

WITH
Company Appeal (AT)(Insolvency) No. 199-200 of 2022

(Arising out of Order dated 03.02.2022 passed by National Company Law Tribunal, Mumbai Special Bench, Court-II in I.A. No. 1799/MB/C-II/2021 in CP(IB) No. 1790/MB/C-II/2017).

IN THE MATTER OF:

ICICI Bank Limited

Having its registered office at
ICICI Bank Towers, Near Chakli Circle,
Old Padra Road, Vadodra - 390007

...Appellant

Versus

**Mr. Subodh Kumar Agrawal, Resolution
Professional of Ushdev International Limited.**
1, Ganesh Chandra Avenue, 3rd Floor, R. N-301,
Kolkata – 700013

...Respondents

Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Vividh Tandon and Mr. Prakshal Jain, Advocates.
Respondent: Ms. Vishrutyi Sahni and Mr. Kumar Kislay, Advocates with Mr. Subodh Kr. Agrawal, RP in person.

J U D G E M E N T

Ashok Bhushan, J:

1. These Appeals have been filed challenging two separate Orders dated 03.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Special Bench, Court II). The First Order dated 03.02.2022 (hereinafter referred to as “Plan Approval Order”) was passed in I.A. No. 1447/MB/C-II/2021 in CP(IB) No. 1790/MB/C-II/2017 approving the Resolution Plan on the application filed by the Resolution Professional. The Second Order dated 03.02.2022 (hereinafter referred to as “Clarification

Order”) was passed in I.A. No. 1799/MB/C-II/2021 in CP(IB) No. 1790/MB/C-II/2017 on the Application filed by the ICICI Bank. Both the above Orders dated 03.02.2022 have been challenged in these Appeals, respectively.

2. The facts and issues raised in these Appeals being common they have been heard together and are being disposed of by this common Judgment.

3. Brief facts of the case necessary to be noted for deciding these Appeals are:

- Corporate Insolvency Resolution Process (CIRP in short) was initiated of the Corporate Debtor-Ushdev International Limited vide Order dated 14th May, 2018. The Resolution Plan submitted by Respondent No. 2-Taguda Pte. Limited, Singapore came to be considered and consequently approved by the Committee of Creditors by 91.06 % majority of votes on 25th June, 2021.
- The Resolution Professional filed an Application No. 1447 of 2021 before the Adjudicating Authority under Section 31 of the Code for approval of the Resolution Plan. On 04th August, 2021, ICICI Bank filed an application bearing I.A. No. 1799 of 2021 before the Adjudicating Authority seeking clarification on enforcement of the Excluded Securities under the Resolution Plan.
- The Adjudicating Authority vide its separate Order dated 03.02.2022 approved the Resolution Plan and also vide same Order dismissed the I.A. No. 1799 of 2021 filed by the ICICI Bank.

4. We have heard Mr. Tushar Mehta, Learned Solicitor General appearing on behalf of Committee of Creditors of Ushdev International Ltd., Mr. P. Chidambaram, Sr. Advocate appearing for the Resolution Applicant-Taguda Pte. Limited, Singapore, Mr. Krishnendu Datta, Sr. Advocate for ICICI Bank and Ms. Fatema Kachwalla, Advocate for the Resolution Professional. With the consent of the parties, these Appeals are being decided at the admission stage.

5. Mr. Tushar Mehta, Learned Solicitor General submits that Resolution Plan approved by the Committee of Creditors specifically provided that excluded securities shall not be extinguished by the approval of the Resolution Plan and referred to Paragraph 3.3(iii)(e)(g). It is submitted that excluded securities as per definition provided at Sr. No. 21 in Schedule I meant the Promoter Guarantee, Corporate Guarantee dated 10th August, 2016 given by Ushdev Engitech Limited to ICICI Bank, and encumbrances created on the immovable properties mentioned therein. It is submitted that Adjudicating Authority while approving the Resolution Plan has erroneously directed that Excluded Securities are no longer enforceable as defined under Resolution Plan which direction is contrary to the Resolution Plan. Resolution Plan never claimed any such relief that excluded securities be extinguished and shall not be enforceable. It is submitted that on the clarification filed by the ICICI Bank the same erroneous conclusion was recorded by the Adjudicating Authority in Paragraph 29 of the Judgment.

6. Mr. P. Chidambaram, Sr. Advocate appearing for the Resolution Applicant submits that Resolution Applicant in the Resolution Plan never

provided for extinguishment of excluded securities. Mr. P. Chidambaram. Sr. Advocate further submits that he is not in disagreement with the arguments and submissions which have been made by the Learned Counsel appearing for the Committee of Creditors (CoC in short).

7. Mr. Krishnendu Datta, Sr. Advocate appearing for the ICICI Bank who is also the Appellant in Company Appeal (AT) Ins. No. 199-200 of 2022 submits that ICICI Bank had filed an Application for clarification before the Adjudicating Authority much before the 'Resolution Plan Approval' Order was passed. The ICICI Bank wanted a clarification since it has doubts that the Resolution Plan is capable of mis-interpretation that excluded securities are extinguished. Mr. Dutta further submits that in his Application he has also prayed that in the event that Hon'ble Tribunal were to hold that conversion of Corporate Debtor's entire unpaid debt into preference shares would not impact the enforceability of the excluded securities, his dissenting vote to the final Resolution Plan dated 22nd June, 2021 shall be considered as an assenting vote. Mr. Dutta submits that the above prayer of the Applicant which was specifically mentioned, but has not been considered by the Adjudicating Authority although Members of the CoC had no objection regarding the aforesaid prayer.

8. Learned Counsel for the CoC has submitted before us that CoC has no objection with regard to the prayer of the ICICI Bank in treating his dissenting vote to the Resolution Plan as assenting vote.

9. Learned Counsel for the Resolution Professional does not oppose the prayers made in the Appeals.

10. We have considered the submissions of Learned Counsel for the parties and perused the record.

11. Before we proceed to consider the respective submissions, it is necessary to notice certain portion of the Resolution Plan which is approved by the Committee of Creditors. Schedule I of the Resolution Plan deals with 'Definitions' and Clause 21 of the Schedule I deals with 'Excluded Securities' in following words:

"Excluded Securities shall mean the Promoter Guarantee, corporate guarantee dated 10th August, 2016 given by Ushdev Engitech Limited to ICICI Bank, and the Encumbrances created on the following immovable properties by the Promoters or third parties in favour of the Financial Creditors; (i) Basement No. 8, Apeeyjay House, Mumbai; (ii) Unit 1,2,&3 2nd floor, Old Harileela House, Mumbai; (iii) Villa no 92&94 at Lavasa; and (iv) Shop no 8,9,10 Tiara Complex, Thane (exclusively charged to Bank of Maharashtra)."

12. Paragraph 3.3. of the Resolution Plan deals with 'Financial Creditors'.

Sub-Clause 3.3.iii. (H) and (g), are relevant to the following effect:

".....

H. In order to implement the proposal set out in this Clause 3.3.(iii)(e), the Resolution Applicant proposes that any balance Financial Debt forming part of the Admitted Debt (Unpaid Debt), i.e. the Admitted Debt as reduced by the amounts mentioned in sub-Clauses (a),(b),(c) and (d) above, shall stand converted into Non-Convertible Redeemable Preference Shares (New Preference Shares) of the Company being zero dividend and non-cumulative in nature at their face value. The Unpaid Debt shall be converted into the New Preference Shares as per the detailed terms set out in Schedule V simultaneously with the payment of the final tranche of INR 27 Crore

(which shall be payable by the Resolution Applicant on or before the 120th day from the closing date). Subject to the Applicable Laws, the memorandum of association and the articles of association of the Company, the New Preference Shares, which shall be issued to the Financial Creditors upon conversion of the Unpaid Debt, shall not have rights to receive any dividends and/or voting rights of any nature whatsoever. The New Preference Shares shall not have any rights to appoint director on the board of the Corporate Debtor. The detailed terms of such New Preference Shares are set out in Schedule XII. Further, the rights and obligations of the New Preference Shares shall be governed by the memorandum of association and the articles of association of the Company as well as the agreements, if any, mas may be entered into by the Resolution Applicant and the Financial Creditors. Upon approval of the Resolution Plan by the Adjudicating Authority, the provisions of Section 43 and Section 47 of the Act (including the rules made thereunder) and other Applicable Laws, if any, shall not be applicable to the terms of New Preference Shares set out in Schedule XII.”

.....

(g) Security: All Encumbrances provided by the Promoters or any third party, other than the Excluded Securities, in favour of the Financial Creditors for securing the Financial Debt of the Company (hereinafter referred as the Assigned Securities), which are valued by Resolution Applicant and included as part of Resolution Plan amount, shall not be extinguished or waived under this Resolution Plan and shall be assigned to Taguda India Prvaite Limited (which entity is the Identified Affiliate), along with the payment of INR 50 crore constituting the Assigned Debt by Taguda Indai Private Limited in the manner set out in Schedule XI. The Excluded Securities shall also not be extinguished or waived under this Resolution Plan and will continue be available with the Financial Creditors in accordance with their terms, which may be exercised by the

Financial Creditors at their discretion for its for its debt. All other securities or other Encumbrances provided by the Company including on the fixed assets of the Company shall be extinguished as on the Final Settlement Date. The Financial Creditors reserve the right to take any action against the Promoters.”

13. Sub-Clause 3.3(v) also makes it clear that excluded securities shall continue to survive in the manner set out in this Resolution Plan. Following portion of Sub-Clause 3.3 (v) is as follows:

“(v) ...Furthermore, subject to sub-clause (vii) below, any third party (other than the Promoters) who has guaranteed or secured the obligations of the Company shall stand discharged of and not liable for any default or event of default under any loan documents or other financing agreements or financing arrangements (including any side letter, letter of comfort, letter of undertaking etc) and all rights/remedies of the creditors shall stand permanently extinguished. Notwithstanding anything stated herein, the Excluded Securities and Assigned Securities shall continue to survive, in the manner set out in the Resolution Plan. The Resolution Professional (and his representatives, advisers and agents), the Company or the Resolution Applicant shall have no liability, either present or arising in future, and all such liability shall be waived in entirety, either pursuant to a right of subrogation under law or otherwise, for any amounts or obligations paid or discharged by the Promoters or any third party pursuant to any guarantee or surety given by such Promoters or third party on or before the Closing Date to secure the obligations of the Company or to any creditor of the Company. Furthermore, it is hereby clarified that upon approval of the Resolution Plan by the Adjudicating Authority, no further consent of any creditor (Financial Creditor or otherwise) shall be required to implement the Resolution Plan.”

14. Now we may notice the Judgment of the Adjudicating Authority passed on 03.02.2022 approving the Resolution Plan. The Adjudicating Authority under the heading 'Reliefs, Concessions and Dispensations' passed following Order:

“With regard reliefs, concessions and waivers as sought by the Resolution Applicant, this Bench orders that the reliefs and concessions are guaranteed as per the judgment of the Hon’ble Supreme Court in Ghanshyam Mishra and Sons Vs. Edelweiss Asset Reconstruction Company Limited, where at para 95(i) it was held that once a resolution plan was approved a creditor cannot initiate proceedings for recovery of the claim which are not part of the Resolution Plan. Hence, all past liabilities arising out of any levies/tax dues to any government authority such as VAT, CST, Customs Excise Duty and employees, workmen, operational creditor, financial creditor etc., which are not part of the resolution plan and pertaining to the pre CIRP period, shall stand extinguished, post approval of the resolution plan.

- 1. The unpaid debt shall stand converted into non-convertible redeemable preference share. Hence, the excluded securities are no longer enforceable as defined under the resolution plan.*
- 2. The approval of the Resolution Plan shall not be construed as waiver of any statutory obligations/liabilities of the Corporate Debtor and shall be dealt by the appropriate Authorizes in accordance with law. Any waiver sought in the Resolution Plan, shall be subject to approval by the Authorities concerned.”*

15. The Order passed by the Adjudicating Authority approving the Plan was subject to observations made in the Order i.e. subject to directions no. 1

under the heading 'Reliefs, Concessions and Dispensations'. Further in clarification Order in Paragraph 29 following observations have been made:

"Heard the counsel for the applicant and the counsel for the Respondent/RP and perused the documents. This bench is of the prima facie view that though the excluded securities as defined under the resolution plan means the promoter guarantee, Corporate guarantee issued by the Ushdev International Limited, the encumbrance created on the following immovable by the promoter of third parties, but however, these expressly declared excluded security are subsumed under clause 3.3.(iii)(c) and (h) wherein the plan proposal any balance financial debt forming part of admitted debt (unpaid debt) shall be converted into non-convertible redeemable preference share of the company being zero dividend and non-cumulative in nature at their face value. Further, the unpaid debt shall be converted into new preference share as detailed in schedule V. When the unpaid debt is converted into preference share there is no question of any outstanding liability which is available for enforcement qua the excluded the securities as provided to the Financial Creditor. It is seen that 91.06% of the CoC have taken a commercial decision to approve the said resolution plan, hence the approval of the resolution plan ipso facto discharge the enforcement of excluded securities. When there is no debt which is realisable there is no question of any enforcement thereof. The applicant being dissenting Financial Creditor has opted to choose out of the plan but will be entitled to the rights available to the dissenting Financial Creditor as per Section 53 of the Code."

16. The view which was taken by the Adjudicating Authority both in the Order dated 03.02.2022 approving the Resolution Plan and Clarification Order was that in view of the fact that unpaid debt shall stand converted into non-convertible redeemable preference share hence the excluded

securities are no longer enforceable. The Adjudicating Authority held that excluded securities are subsumed under Clause 3.3.(iii). The Adjudicating Authority obviously referred to Paragraph 3.3. (e) (H) which provided that balance Financial Debt forming part of the Admitted Debt shall stand converted into non-convertible redeemable preference shares of the company which shall be issued to the Financial Creditors upon conversion of the unpaid debt. The above provision in the Plan for conversion into non-convertible redeemable preference shares of the balance financial debt has no bearing on specific provisions in the plan by 3.3.(iii)(g) which clearly provided that excluded securities shall not be extinguished or waived under this Resolution Plan. When the Resolution Plan itself states that excluded securities shall not be extinguished under the Resolution Plan which is the provisions in the plan made in 3.3.(iii)(h). Further as noted in 3.3.(v) there was again clear provision that excluded securities shall continue to survive. When the plan is read as a whole it is clear that excluded securities were to continue and no contrary intention is reflected in the plan. It is due to the above contents of the plan that Learned Counsel for the Resolution Applicant also does not dispute that the Plan never contemplated for extinguishment of excluded securities. Both the parties had argued that plan never contemplated for extinguishment of the excluded securities. The Adjudicating Authority thus committed error in making observation in issuing direction no. 1 of the Impugned Order under the heading 'Reliefs, Concessions, and Dispensations. Hence the following part of the Direction no. 1 " Hence, excluded securities are no longer enforceable as defined under

the resolution plan” are deleted from the Order. The deletion of the above Direction No. 1 shall in no manner affect the approval of the Resolution Plan vide Order dated 03.02.2022. The Order dated 03.02.2022 is untouched with regard to other aspects of the Impugned Order.

17. Now we come to the I.A. No. 1799/MB/C-II/2021 filed by the ICICI Bank Limited. The Copy of the Application have been filed by the ICICI Bank Limited as Annexure A-23 in this Appeal. In the Application following are the prayers which has been made at Page 848-849:

“a) Decide the present application before adjudicating on the resolution plan for the Corporate Debtor dated 22 June 2021;

b) Consider and adjudicate the question of law i.e., whether, upon the approval of the resolution plan dated 22 June 2021 by this Hon’ble Tribunal, the Applicant and other financial creditors of the Corporate Debtor would continue to have recourse to enforce the Excluded Securities (as defined under the resolution plan dated 22 June 2021);

c) Pass an order that the Applicant’s dissenting vote to the resolution plan dated 22 June 2021 shall be considered as an assenting vote, in the event that this Hon’ble Tribunal were to hold that conversion of Corporate Debtor’s entire Unpaid Debt into preference shares would not impact the enforceability of the Excluded Securities (as defined under the resolution plan dated 22 June 2021);

d) Pass such other and further orders that this Hon’ble Tribunal may deem fit and necessary; and

e) For costs of this Application”

18. In the clarification Order dated 03.02.2022, the Adjudicating Authority in Paragraph 29 has again observed that excluded securities are subsumed under Clause 3.3(iii)(c)(h) wherein the plan proposed that any balance financial debt forming part of admitted debt shall be converted into non-

convertible redeemable preference share, for the reasons which we have noticed above, the above observations in Paragraph 29 of the Clarification Order also cannot be sustained and deserves to be deleted. The observations of the Adjudicating Authority in Paragraph 29 that 'the approval of the resolution plan ipso facto discharge the enforcement of excluded securities' is not in accordance with the Resolution Plan and is hereby deleted.

19. Mr. Krishnendu Datta, Sr. Advocate for the ICICI Bank Limited has further submitted that his prayers made in the I.A. No. 1799/MB/C-II/2021 that Applicant's dissenting vote to the resolution plan dated 22nd June, 2021 shall be considered as assenting vote has not been considered. The Resolution Plan has been approved by the CoC with 91.06% of votes. With regard to the prayer made by Mr. Dutta regarding permitting his dissenting vote to the Resolution Plan be considered as assenting vote to the Resolution Plan, the CoC has no objection as noted above. The approval of the Resolution Plan which was by 91.06% majority of votes shall not be affected by converting dissenting vote of ICICI Bank Limited to Assenting Vote of Resolution Plan. The submission of Mr. Dutta has substance that in event ICICI Bank Limited is permitted to convert his dissenting vote into the assenting vote it will receive payments as a Financial Creditor which may be to the same extent as will be received by the other Financial Creditors. CoC which consists of all the Financial Creditors having expressed its no objection to the aforesaid prayer, we are inclined to accept the said prayer of ICICI Bank. We however make it clear that we are accepting the prayer of ICICI Bank Limited in this respect only due to the reason that CoC has

expressed its no objection. This direction/order be not treated as precedent in any other matter. We are thus of the view that I.A. No. 1799/MB/C-II/2021 filed by the ICICI Bank Limited deserves to be allowed to the extent that the observations as noted above in paragraph 29 be deleted and the dissenting vote of ICICI Bank to the Resolution Plan be treated as assenting vote.

In result, Company Appeal (AT) (Ins.) No. 172-173 of 2022 are allowed by deleting the relevant part in Direction 1 of the Impugned Order under the heading 'Reliefs, Concessions and Dispensations to the extent 'hence, the excluded securities are no longer enforceable as defined under the resolution plan'. Company Appeal (AT) Ins. No. 199-200 of 2022 are also allowed by deleting the observation in paragraph 29 of the Impugned order to the effect that 'Resolution Plan ipso facto discharge the enforcement of excluded securities'. The third prayer in I.A. No. 1799/MB/C-II/2021 filed by the ICICI Bank Limited seeking conversion of dissenting vote to assenting vote to the Resolution Plan is also allowed. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI
11th March, 2022
Basant B.