

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 653 of 2022

IN THE MATTER OF:

NOBLE MARINE METALS CO WLL,

a Limited Liability Company incorporated under the UAE Federal Law No. (2) of 2015 having its registered office at P.O. Box No. 47563, Abu Dhabi-DAE Correspondence Address 105361, ICAD I, Musaffah, Abu Dhabi – UAE

...Appellant

Versus

1. KOTAK MAHINDRA BANK LIMITED,

a banking company incorporated under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having its registered office at 27 BKC, C 27, G Block, Bandra Kurla Complex, Bandra (E), Mumbai 400051 and its Branch Office at C 12, Bandra Kurla Complex, Bandra (E), Mumbai 400051, through its Authorized Representative

2. IDBI BANK LIMITED

a banking company incorporated having its registered office at IDBI Bank Ltd. IDBI Tower, WTC Complex, Cuffe Parade, Colaba, Mumbai 400005 through its Authorized Representative

3. Twenty First Century Wire Rods Limited,

a company incorporated under the Companies Act, 1956 bearing CIN U27100DL1996PLC082467 and having its registered office at K-87, B. K. Dutt Colony, New Delhi - 110003 through Mr. Udayraj Patwardhan, Resolution Professional

...Respondents

For Appellant: Mr. Avinash Bhati and Mr. Aditya Pande, Advocates Mr. Prasook Jain and Ms. Kshirja Agarwal, Advocates for Applicant (Sunrise Mining Company Private Limited)

For Respondent: Mr. Arvind Nayar, Sr. advocate with Mr. Amit Mahaliyan, Mr. Akshay Joshi, Advocates for R-1.
Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharya, Ms.

Aishwarya Gupta, Ms. Shubhangi Agarwal, Advocates for
R-2.

J U D G M E N T

ASHOK BHUSHAN, J:

1. This Appeal has been filed by Successful Resolution Applicant (SRA in short) against the Order dated 30th March, 2022 passed by the National Company Law Tribunal, Principal Bench, New Delhi (hereinafter referred to as “The Adjudicating Authority”) in CA No. 1147 of 2019 and CA No. 1179 of 2019 filed by a Member of Committee of Creditors (CoC in short). By the Impugned Order, the Adjudicating Authority remitted the Resolution Plan back to the CoC for reconsideration in accordance with law.

2. Brief facts of the case necessary to be noted for deciding this Appeal are:-

- (i) ‘Corporate Insolvency Resolution Process’ against the Corporate Debtor-Twenty First Century Wire Rods Limited was initiated by Order dated 12.09.2018. In response to request for Resolution Plan, the Appellants submitted a Resolution Plan which came to be approved by the CoC with 87.22%. The Respondent No. 2-IDBI Bank holds 87.22% voting share also consented to the Resolution Plan.
- (ii) The Resolution Professional filed an Application –CA-1147(PB)/2019 for approval of the Resolution Plan. The Kotak Mahindra Bank Limited-Respondent No. 1 also filed an Application being CA-1179/2019 with a prayer to reject the Resolution Plan submitted by the Appellant and further to set aside the voting concluded on

06/06/2019 qua the Resolution Plan having mandatory clause of release of personal guarantee of the promoters.

- (iii) The IDBI Bank who have approved the Resolution Plan was directed by the Adjudicating Authority to file an Affidavit in response to which Affidavit was filed on 22nd March, 2022 and further filed IA. No. 1507 of 2022 seeking permission of the Adjudicating Authority for placing Resolution Plan before the CoC for withdrawal of consent to Clause 4(b) and sub-clause 4(iii) of the Resolution Plan dealing with relinquishment of the rights of the secured creditor to enforce personal guarantee.
- (iv) On 30th March, 2022, the Adjudicating Authority passed the Order after hearing the parties. It is useful to extract the following part of the Order of the Adjudicating Authority:

“The merits and demerits of those contentions are not for this Tribunal to consider at this stage. However, the points that requires consideration is in the light of the new development if the majority of the CoC, take a view that matter should go back for re-consideration before he CoC, we find no impediment to allow the CoC to have a relook into the issue. The plan has to be reconsidered by the CoC on its own merits in the light of what has been stated by the M/s IDBI Bank and by the M/s Kotak Mahindra.

We also notice that this issue of deletion of the personal guarantors from the plan was a much debated subject before the CoC and it has been carried forward to this Tribunal as well.

In that view of other matter without expressing any opinion on the stand taken by the IDBI Bank or by M/s. Kotak Mahindra Bank or by the RP and also taking cue from Mr. Nagesh, Ld. Counsel for the Resolution Applicant, who stated that the CoC can take a call again on the plan as per the wisdom of the CoC members. We hold that it is open to the CoC to deliberate the plan in accordance with law.”

(v) Hence, this Appeal has been filed challenging the Order dated 30th March, 2022.

3. Learned Counsel for the Appellant challenging the Order contends that Resolution Plan having been approved by the Adjudicating Authority, there is no jurisdiction in the Adjudicating Authority to send back the Resolution Plan for reconsideration at the request of Financial Creditor. It is submitted that the issue is squarely covered by the Judgement of Hon'ble Supreme Court in **“Ebix Singapore Private Limited & Ors. Vs. Committee of Creditors of Educomp Solutions Limited & Ors.” [2022 2 SCC 401]**. It is submitted that approved Resolution Plan is binding on the CoC which can neither be withdrawn nor sent back for modification.

4. Learned Sr. Counsel for the Respondent No. 1-Mr. Arvind Nayar submits that the present is not a case where the entire plan is to be reconsidered by the CoC but the Committee of Creditors have prayed before the Adjudicating Authority for deletion of the clause which provide for mandatory release of the personal guarantee given by the promoters. It is submitted that said issues were raised in the meeting of the CoC which has been noticed in the minutes. It is further submitted that the clause providing

for release of the personal guarantee of the promoters is contrary to Section 128 of the Contract Act hence deserves to be deleted from the Resolution Plan. The Plan has to be in compliance of Section 30(2)(e) of the I&B Code. It is submitted that when arguments were addressed before the Adjudicating Authority that the above clause is not in accordance with law, the Appellant himself consented for sending the Resolution Plan back for reconsideration and Appellant can not be permitted to file this Appeal which is based essentially on basis of consent order.

5. Mr. Bishwajit Dubey-Learned Counsel for Respondent No. 2 submits that although IDBI Bank has approved the Resolution Plan but certain fact came to the notice of the Bank with regard to personal guarantor hence it filed an Affidavit and Application before the Adjudicating Authority for deletion of clause by which the personal guarantee given by the promoters is sought to be withdrawn. It is submitted that Appellant is not person aggrieved by the Impugned Order while withdrawal of the clause relating to personal guarantee of the promoters, Appellant is in no manner going to be affected. The Committee of Creditors is not going to review their decision approving the Resolution Plan but only want to get those clauses deleted. It is submitted that the Adjudicating Authority had jurisdiction even at the stage of the plan approval to remand back the Plan to the CoC as has been held in Judgement of Hon'ble Supreme Court in **“Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors.” [2022 1 SCC 401]**. It is further submitted that Order impugned being passed on the consent, the Appellant has no right to file this Appeal.

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

7. The Judgement of the Hon'ble Supreme Court in "Ebix Singapore Pvt. Ltd." (supra) categorically lays down that Resolution Plan approved by CoC is binding between the Successful Resolution Applicant and the CoC. Following has been laid down in paragraph 150:

"115 While the above observations were made in the context of a scheme that has been sanctioned by the Court, the Resolution Plan even prior to the approval of the Adjudicating Authority is binding inter se the CoC and the successful Resolution Applicant. The Resolution Plan cannot be construed purely as a 'contract' governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that "[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors". The BLRC Report also mentions that, "the RP submits a binding agreement to the Adjudicator before the default maximum date". We have further discussed the statutory scheme of the IBC in Sections I and J of this judgement to establish that a Resolution Plan is binding inter se the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract."

8. The law is thus well settled that Resolution Plan is approved by the CoC is binding between the CoC and SRA. The question to be considered in this Appeal is as to whether, there are any circumstances and conditions, where Resolution Plan can be sent back for carrying out any changes. In this context, we refer to the Judgement of the Hon'ble Supreme Court in **“Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors.” [2020 8 SCC 531]**. The Hon'ble Supreme Court in the above judgement had occasion to consider the scope of judicial review of the Adjudicating Authority in the context of Resolution Plan approved by the CoC. In paragraph 73, following has been held:

“This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor 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 operational creditors has been taken care of. If the Adjudicating Authority 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 Committee of

Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

9. Thus, in view of the Judgment of the Hon’ble Supreme Court laid down above, the Adjudicating Authority if finds on given set of facts that parameters under Section 30(2)(e) have not been kept in view, the Resolution Plan can be sent back to the CoC to review such plan after satisfying the parameters. The above is the only situation provided by Hon’ble Supreme Court where the plan can be sent back.

10. Now we come to facts of the present case. The present is a case where Application was filed by the Financial Creditors where they prayed to delete the clause in the Resolution Plan which provided for release of the personal guarantee of the promoters. The submissions which were pressed before us by Learned Counsel for the Financial Creditors that said clause which violates the provision of Section 128 of Contract Act, has to be treated to be violation of Section 30(2)(e) of the Code. When the above application came for consideration before the Adjudicating Authority, it is relevant to notice that Adjudicating Authority on the Application had passed following order on 15th March, 2022:

“ORDER

IA-2500/2021, IA-1276/2020, IA-1640/2021, IA-5186/2020, CA-1179/2019, CA-1147/2019, CA-

1267/2019, CA-1335/2019, IA-1014/2021, IA-1358/2021, CA-1466/2019, CA-2781/2019, CA-1213/2020, IA-5638/2020, IA-590/2021:-

It was submitted by Mr. Bishwajit Dubey, Ld. Counsel appearing for IDBI Bank as follows:-

“The plan may be approved, subject to the removal of the clauses that deals with the release of the personal guarantor and the Resolution Applicant, may be protected by virtue of the directions of this Tribunal, to the effect that the personal guarantors will not have the right of subrogation, in case Kotak Bank or IDBI Bank, enforce the personal guarantee and recover the amount from the person guarantors.”
In this suggestion made by Mr. Bishwajit Dubey, Ld. Counsel for the IDBI Bank Mr. Arvind Nayar, Sr. Adv. for Kotak Mahindra Bank sought time to get instructions.

At request, list the matter for physical hearing on 21.03.2022 at 02:30 PM.”

11. In reference to the Order dated 15th March, 2022, Affidavit and Application was filed by the IDBI Bank and matter was heard by the Adjudicating Authority and Order was passed on 30th March, 2022 which has been extracted above. The Adjudicating Authority in order dated 30th March, 2022 has clearly made following observation:

“In that view of other matter without expressing any opinion on the stand taken by the IDBI Bank or by M/s. Kotak Mahindra Bank or by the RP and also

taking cue from Mr. Nagesh, Ld. Counsel for the Resolution Applicant, who stated that the CoC can take a call again on the plan as per the wisdom of the CoC members. We hold that it is open to the CoC to deliberate the plan in accordance with law.”

12. When we look into the observations of the Adjudicating Authority as quoted above it is clear that Learned Counsel appearing for the Resolution Applicant, that is Appellant, also submitted that Committee of Creditors can take a call again on the plan as per the wisdom of the CoC members. Learned Counsel for the Respondents are thus right in their submission that the Order was passed on the consent of the Resolution Applicant hence the Adjudicating Authority sent the Plan back without expressing any opinion on the stand taken by the Committee of Creditors. When the Resolution Applicant himself consented that matter be sent back to the CoC for consideration, we fail to see that how the Appellant can challenge the order in this Appeal.

13. Present is a case where reconsideration is being asked only with regard to clause which was included in the Resolution Plan relating to release of personal guarantee of the promoters which according to Committee of Creditors is not in accordance with law. The Adjudicating Authority has held that it is open to CoC to deliberate the Plan in accordance with law which directions can not be faulted with more so when the Resolution Applicant himself consented before the Adjudicating Authority.

14. The present is a case where CoC is not asking to withdraw from the Plan or asking for reviewing the entire Resolution Plan rather CoC has asked

for leave of the Court for deleting clause in the plan which sought to release the promoters from personal guarantee given to the Financial Creditors.

15. We thus are of the view that no grounds have been made out to interfere with the Impugned Order. However, we are of the view that the CoC as per the Order dated 30th March, 2022 may expeditiously take a decision and Resolution Professional may submit the modified Resolution Plan if any before the Adjudicating Authority. CoC may complete its process within four weeks from today and thereafter within further period of two weeks, Resolution Professional may file an application with the Resolution Plan before the Adjudicating Authority. Looking to the time which has elapsed, we request the Adjudicating Authority to take a decision on the Application so filed at an early date preferably within a period of six months from the date Application is filed.

The Appeal is disposed of, accordingly. I.A. No. 544 of 2023 which has been filed for Impleadment is also disposed of.

**[Justice Ashok Bhushan]
Chairperson**

**[Shreesha Merla]
Member (Technical)**

09th February, 2023
New Delhi
Basant