

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

6th October, 2018

Subject: Judgement¹ dated 4th October, 2018 of the Hon’ble Supreme Court of India in the matter of Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Ors. arising from Corporate Insolvency Resolution Process (CIRP) of Essar Steel India Limited (Civil Appeal Nos. 9402 – 9405 of 2018)

While determining the eligibility of Arcelor Mittal India Private Limited (**AM**) and Numetal Limited (**Numetal**) to submit a resolution plan for Essar Steel India Limited (**ESIL**), the Hon’ble Supreme Court settled several issues relating to CIRP under the Insolvency and Bankruptcy Code, 2016 (Code), as under:

Sl.	Section / Regulation	Provision	Issue	Held	Para / Page No.
1	Section 29A	A person shall not be eligible to submit a resolution plan, if such person, or any other person <u>acting jointly</u> or <u>in concert</u> with such person- (a)..... (b)	Whether section 29A should have wooden, literal interpretation or the text and context should inform its interpretation?	Section 29A is a <i>de facto</i> as opposed to a <i>de jure</i> position of persons mentioned therein. This is a ‘typical see through provision’ so that one can see persons who are actually in ‘control’, whether jointly or in concert. A purposeful and contextual interpretation of section 29A is imperative to find out the real individuals or entities who are acting jointly or in concert for submission of a resolution plan.	29 / 51
			Whether ‘acting jointly’ requires ‘joint venture agreement’?	For ‘acting jointly’, what is to be ascertained is whether certain persons have got together and are acting jointly in the sense of acting together. If this is made out on the facts, no added element of ‘joint venture’ is to be seen.	35 / 61-62

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		What is the meaning of the phrase ‘in concert’?	The Code adopts definitions from the SEBI Act, 1992 and consequently the definition of ‘acting in concert’ from the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994. It includes any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over a target company.	35 / 62 39 / 67
			Whether a person is or is not acting in concert depends upon the facts of each case.	41 / 72
		<u>(c) at the time of submission of the resolution plan</u> has an account, or an account of a corporate debtor under <u>the management or control</u> of such person or of whom such person is a <u>promoter</u> , classified as non-performing asset in accordance with law and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor	Whether the clause (c) operates as at the date of commencement of CIRP or the date of submission of resolution plan?	43 / 73
		Provided that the person shall be eligible to submit a resolution plan if such person <u>makes payment of all overdue amounts with interest</u> thereon and charges relating to nonperforming asset accounts before submission of resolution plan.	Whether all three things - management, control and promoter – need to be present for ineligibility?	44 / 74
			Meaning of management.	45 / 74
			Meaning of control.	47-48 / 75
			The management refers to <i>de jure</i> management of a corporate debtor.	
			Section 2(27) of the Companies Act, 2013 defines control, which includes both <i>de jure</i> and <i>de facto</i> control. Further, it denotes only positive control or <i>de facto</i> control. Mere	

	(d) (e)	Meaning of promoter.	power to block special resolutions of a company cannot amount to control. Section 2(69) of the Companies Act, 2013 defines promoter, which includes both <i>de jure</i> and <i>de facto</i> position.	52-53 / 80
		How can this ineligibility be removed?	The ineligibility under clause (c) can only be removed if the person submitting the resolution plan makes payment of all overdue amounts before submission of a resolution plan.	54 / 81
		Purpose of this provision.	Since section 29A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor do not come back in some other form to regain control of the company without first paying off its debts.	56 / 84
	(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;	When does this ineligibility attach?	If any of the persons mentioned in section 29A is prohibited by SEBI from either trading in securities or accessing the securities market, ineligibility of the person submitting the resolution plan attaches.	58 / 86
	(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this	Whether this ineligibility can be cured by paying off the debts of the corporate debtor?	No.	56 / 84

		Code: (h)			
		(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or (j)	Does a prohibition similar to (f) outside India make one ineligible? Does a prohibition on political considerations outside India make one ineligible?	If a person situate abroad is subject to any disability which corresponds to sub-clause (f), such person also gets interdicted. If a person is prohibited by a regulator of the securities market in a foreign country from trading in securities or accessing the securities market, the disability under sub-clause (i) would then attach. A prohibitory sanction by an authority situate outside India for political reasons is not covered by sub-clause (i).	58 / 86 59 / 87 103 / 142
2	Section 12(1)	Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.	Whether the timeline is mandatory?	Section 33 provides that if no resolution plan is received before the end of the period or the resolution plan is rejected, the corporate debtor is required to be liquidated. Therefore, the period under section 12 is mandatory.	71-72 / 107-108
3	Section 12(3)	On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as	Whether timeline of 180 days can be extended?	The duration of 180 days may be extended further, but not exceeding 90 day, making it clear that a maximum of 270 days is laid down statutorily. Also, the proviso to Section 12 makes it clear that the extension shall not be granted more than once.	72 / 108

		<p>it thinks fit, but not exceeding ninety days:</p> <p>Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.</p>			
4	Regulation 40A	<p>The following Table presents a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days:</p> <p>.....</p>	Nature of Timeline	It is of utmost importance for all authorities concerned to follow this model timeline as closely as possible.	74 / 116
5	Section 30 (2)	<p>(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –</p> <p>.....</p>	<p>If a resolution plan is turned down at the threshold by a Resolution Professional under section 30(2), is it open to the concerned resolution applicant to challenge the rejection?</p>	<p>It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable.</p> <p>Given the timeline and the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage.</p>	75 / 117
			<p>When is a resolution applicant aggrieved?</p>	<p>An aggrieved resolution applicant can approach the NCLT for relief only after a resolution plan has been considered by the CoC after voting and not prior to that.</p>	76 / 118 80 / 122

6	Sections 25(2)(i), 30(2), 30(3), and 30(4) and Regulation 36A		Role of Resolution Professional.	<p>The Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. He is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to ‘decide’ whether the resolution plan does or does not contravene the provisions of law.</p> <p>Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans 121 under consideration, and to state briefly as to why it does or does not conform to the law.</p>	77 / 119
7	Section 30(4)	(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its	Role of the Committee of Creditors	<p>It is the Committee of Creditors which will approve or disapprove a resolution plan, given the statutory parameters of section 30.</p> <p>The disapproval of the Committee of</p>	80 / 121 80 / 122

	and Regulation 39(3)	feasibility and viability, and such other requirements as may be specified by the Board: (3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit: Provided that the committee shall record the reasons for approving or rejecting a resolution plan.		Creditors on the ground that the resolution plan violates the provisions of any law, including the ground that a resolution applicant is ineligible under section 29A, is not final. The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan is violative of the provisions of any law, including section 29A of the Code, after hearing arguments from the resolution applicant as well as the Committee of Creditors, after which an appeal can be preferred from the decision of the Adjudicating Authority to the Appellate Authority under section 61. If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under section 61 and may further be challenged before the Supreme Court under section 62, if there is a question of law arising out of such order.	81 / 122
8	60(5)	Notwithstanding anything to the contrary contained in any other law for the time being in force, the NCLT shall have jurisdiction to entertain or dispose of - (a) any application or proceeding ...; (b) any claim made by.....; and (c) any question of priorities or any question of law or facts, ..	Scope of interference by NCLT.	It does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor	81 / 123

				covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.	
9	64 (1)	Where an application is not disposed of or order is not passed within the period specified in this Code, the NCLT or the NCLAT, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the NCLT or the Chairperson of the NCLAT, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days.	Nature of timeline for Adjudicating Authority. What happens if the Adjudicating Authority decides a matter beyond the time limit of 180 / 270 days?	The timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT, if the matter is not disposed of within the time limit specified. <i>Actus curiae neminem gravabit</i> - the act of the Court shall harm no man - is a maxim firmly rooted in our jurisprudence. But the time taken by a Tribunal should not set at naught the time limits within which the CIRP must take place. Where a resolution plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making.	81 / 122-123 83 / 124-125
10			Outcome of CIRP.	The corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.	83/125
11			Eligibility of AM and Numetal.	Both are ineligible on the relevant date.	84-111/125-152
12	Article 142 of the Constitution		Complete Justice.	In order to do complete justice under Article 142 of the Constitution of India, and also for the reason that the law on section 29A is being laid down for the first time by this	113 / 153-154

				<p>judgment, both resolution applicants were given an opportunity to pay off the NPAs of their related corporate debtors within a period of two weeks from the date of receipt of the judgment, in accordance with the proviso to section 29A(c). If such payments are made within the aforesaid period, both resolution applicants can resubmit their resolution plans dated 2nd April, 2018 to the Committee of Creditors, who are then allowed a period of 8 weeks from the date of the judgment, to accept, by the requisite majority, the best amongst the plans submitted, including the resolution plan submitted by Vedanta. In the event that no plan is found worthy of acceptance by the requisite majority of the Committee of Creditors, the corporate debtor, ESIL, shall go into liquidation.</p>	
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