

Binani Industries Ltd. V. Bank of Baroda and Another – An Analysis

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ABSTRACT:

The case of Binani Industries Ltd v. Bank of Baroda and others proved to be a landmark decision by the supreme court of India. The insolvency resolution process is aimed at extracting the maximum value from the auctions of stressed assets. India's bankruptcy appeals court ruled that the UltraTech Cement Ltd's revised ₹ 7,900 crore bid to acquire debt-laden Binani Cement Ltd. Going with the order of the NCLAT, it reasoned that the insolvency law's aim was to provide a resolution process rather than preferring liquidation, in a time-bound manner for maximisation of the value of assets to promote entrepreneurship, credit availability and to balance the interest of various stakeholders. It, therefore, okayed UltraTech's offer of Rs 79.5 billion, dismissing Rajputana Properties' Rs 69.32 billion offer. After the resolution plans were invited for bid for the insolvent company of Binani Industries Ltd., the premier offer was from UltraTech cement (which is a limb of Aditya Birla Group) was for a sum of 65 billion, which was very low in comparison to Dalmia's Bharat. The former company had then amended and revised its offer to outbid the latter. The revised bid was rejected by the Committee of Creditors (CoC) and the consortium of Dalmia Bharat was duly selected. However, the same was starkly opposed by the operational creditors and other stakeholders like UltraTech, Binani, SBI Hong Kong, EXIM Bank. The NCLAT's order also ruled out that an insolvency application once filed cannot be withdrawn at a date later merely because the promoter of the financially stressed company has offered to pay all outstanding dues.

Keywords: Insolvency, liquidation, creditor, debtor.

I. INTRODUCTION

According to the statistics in India, a total of bad debt amounts to 11% of the total lending and during the course of time; it has been on an increase substantially. As compared to any other progressive economy, the time taken to resolve any matter pertaining to insolvency is much more, which henceforth makes it appear to be on the lower steps of the ladder when it comes to ease of doing business and resolving insolvency. The total percentage of corporate bad debts amounts to a whopping percentage of 56% of the total bad debts of nationalized banks. In India, there are thousands when it comes to recovery of money, squarely due overlapping jurisdictions of various laws governing insolvency resolution and courts.

The Hon'ble Supreme Court has upheld the decision of NCLAT, henceforth, upholding the decision of approving the sale of Binani Cements to UltraTech cement. The decision of NCLAT in the present case has proved to be a milestone. Apart from clarifying the most pivotal and crucial issues in the Binani case, it has also proved to set a precedence for the cases that might come up in the future under Insolvency and Bankruptcy Code, 2016, by reiterating the key issues of the case. This case laid down two important principles pertaining to

the case, they being, that there should be maximization of value and that there should be no discrimination between the creditors. The Hon'ble Bench comprising of Justice S J Mukhopadhyay has given a very intricate judgment pertaining to the case that has been set as a benchmark.

II. FACTS OF THE CASE:

The Binani Cement Limited was a bellwether subsidiary of the Appellant Binani Industries Limited which represented the BrajBinani Group. The Appellant raised a company appeal against the order passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench. The grievance of the Appellant is garbed under two folds – the first being, that the Adjudicating Authority should have passed positive direction and secondly, that it should have given an opportunity to the appellant, i.e. Binani Industries Limited, to interact with/and or meet the bidders Resolution Applicants, Financial Creditors and other stakeholders of the Corporate Debtor from time to time.

The Resolution Professional of this case, Mr. Vijay Kumar Iyer, filed an applications under S. 30¹ and S.31² of the Insolvency and Bankruptcy Code of India, 2016 for the approval of the Resolution Plan for Binani Cement Limited. It was duly notified that the application was within the time prescribed and that Committee of Creditors majorly voted for approving the 'Resolution Plan' that was submitted by Rajputana Properties Private Limited. To this, umpteen numbers of objections were filed by the Respondents which included Binani Industries Limited, a group company of Binani Cement Limited- (Corporate Debtor), Ultratech Cement Limited and others.

The respected Adjudicating Authority took cognizance of the fact that the Committee of Creditors after a much exhaustive consultation and negotiation with the Rajputana Properties voted with 99.43% of approval and henceforth, approved the plan. However, on the face of it, 10.53% of the Committee of Creditors were mandatorily contrived to vote in favor of the Resolution Plan despite the protests which had not been dealt with equality when compared with other Financial Creditors who were corporate guarantee beneficiaries of the Corporate Debtor.

III. A COMMENT ON THE DECISION

The Insolvency and Bankruptcy Code, 2016 aims to consolidate and amend the laws relating to insolvency resolution of companies and limited liability entities, partnerships and individuals, which are contained in

¹Sec. 30, Insolvency and Bankruptcy Code, 2016, Act No. 31.

²Sec. 31, Insolvency and Bankruptcy Code, 2016, Act No. 31.

various enactments, into a single legislation.³ The main focus of this legislation is at providing resurrection and resolution in a time bound manner for maximization of value of debtor's assets.⁴ Another important feature of the Code is that it does not make any distinction between the rights of international and domestic creditors or between classes of financial institutions.

The Appellate Tribunal in the case of "Central Bank of India Vs. Resolution Professional of the Sirpur Paper Mills Ltd. &Ors."⁵, observed the provisions of Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016, and ruled out as follow :

"From the aforesaid provisions of I&B Code it is clear that the Board may make regulation but it should be consistent with the I&B Code and rules made therein (by Central Government) to carry out the provisions of the Code. Therefore, we hold that the provisions made by the Board cannot override the provisions of I&B Code nor it can be inconsistent with the Code Clause (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such as 'Financial Creditor' or 'Operational Creditor', Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the 'Operational Creditors' (clause (b) of regulation 38(1)) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)). Such regulation being against Section 240(1) cannot be taken into consideration and any Resolution Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' or the 'Operational Creditors' cannot be approved being illegal."

A Resolution plan means a plan proposed by (resolution applicant) for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. The Code in totality does not spell out its exact shape, colour and texture and is left on to the colourful imagination of the stakeholders. The Resolution Plan is not a sale, not an action or recovery and is neither in liquidation. The Resolution Plan submitted by the Rajputana properties was discriminatory in its very essence and was also against the Code of I&B. Discrimination was catered on the ground that some of the 'Financial Creditors' were direct exposure to the 'Corporate Debtor' or some of the 'Financial Creditors' to whom the 'Corporate Debtor' was guarantor. The 'Export-Import Bank of India' and the 'State Bank of India (Hong Kong)' who were similarly situated have been discriminated. Section

³Singh & Associates Corporate, India: Insolvency And Bankruptcy Code, 2016: A Time-Period Puzzle, mondaq, (Jan.07,2019,10:54PM),<http://www.mondaq.com/india/x/623174/Insolvency+Bankruptcy/Insolvency+And+Bankruptcy+Code+2016+A+TimePeriod+Puzzle>.

⁴Gayatri Athare Mohapatra, Summarising the Insolvency and Bankruptcy Code, livelaw (Jan. 05, 2019, 11:34 PM), <http://www.indialaw.in/blog/blog/commercialcorporate/summarising-insolvency-bankruptcy-code-2016/>.

⁵Company Appeal (AT) (Insolvency) No. 526 of 2018.

25 (2) (h)⁶ of the I&B Code provides for invitation of prospective lenders, investors and any other persons to put forward a 'Resolution Plan'. Submission of revised offer is in continuation of the 'Resolution Plan' already submitted and accepted by the 'Resolution Professional'

The Hon'ble Supreme Court in the case of Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors⁷. very concretely observed that *"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"*.

According to Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016, no differential treatment should be meted out between the Operational Creditors and the Financial Creditors who are similarly situated. According to S.25(2) (h) of the I & B Code, all the Committee of Creditors, Resolution Professional as well as the Resolution Applicant are bound by the process document prepared under the said section. However, taking a different course altogether which is not consistent with the Section would adhere the process document as illegal. The Committee of Creditors did not act in toto with S. 25(2)(h) of the Code and ignored the maximization of the value assets of the 'Corporate Debtor' along with balancing the interest of all the stakeholders. The Ultra Tech Cement offered for the revision of its Resolution plan on 8th of March having taken in cognizance of the fact that an opportunity was given to the Rajputana properties on 7th of March. It was alleged that the offer of Ultra Tech's Cement was tainted with being as non responsive, non compliant or illegal in terms of the process document, however, the very cemented fact that the revised offer of the Company was not at all considered by the CoC despite being accepted, it cannot be held as being anything of the alleged above.

IV. CONCLUSION

The Judgment given by the Supreme Court as well as by the NCLAT is considered to be as a milestone one as it is one of the very first time that a case relating to ensuring the interests of operational creditors (who are not part of Committee of Creditors) has come into picture. The NCLAT's judgment opened up a Hornets' nest on the grounds on which the Appellate Authority can reject a resolution plan. The Hon'ble Supreme Court approved the Resolution submitted by the Ultra Tech Cement Limited by sub-section (2) of Section 30 of the I&B Code, gist of which noticed earlier and being satisfied that the Resolution Plan was approved by the Committee of Creditors under subsection (4) of Section 30.

⁶Sec. 25 (2)(h), Insolvency and Bankruptcy Code, 2016, Act No. 31.

⁷Civil Appeal No. 9402-9405 of 2018.