

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 360 of 2018
(arising out of order dated 6th June, 2018 passed by National Company Law Tribunal, Kolkata Bench, in C.P. (IB) No. 312/KB/2018)

IN THE MATTER OF:

Nicco Corporation Ltd.

...Appellant

Versus

Technology Development Board

...Respondent

Present:

For Appellant :

Mr. Anirudh Wadhwa, Advocate

Ms. Nitu Poddar, PCS

Mr. Bunny Sehgal, PCS

For Respondent :

Mr. B.B. Sawhney, Senior Advocate with

**Mr. Lakshay Sawhney and Mr. Yogender Singh,
Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench passed an order for liquidation of ‘Nicco Corporation Ltd.’ (Corporate Debtor). During the liquidation, the respondent – ‘Technology Development Board’ (**‘Board’** for short), Government of India, a ‘Financial Creditor’ filed its claim, part of which was rejected by the ‘Liquidator’. In view of the aforesaid rejection, the ‘Board’ filed an appeal before the Adjudicating Authority under Section 42 of the Insolvency & Bankruptcy Code 2016 (for short, ‘the **I&B Code**’). The said appeal having allowed by the Adjudicating Authority by the

impugned order dated 6th June, 2018 it has been challenged by the 'Liquidator'.

2. The brief facts of the case are as follows.

The 'Board' provided two loans to the 'Corporate Debtor', namely-

- (i) Term Loan of Rs. 5.62 Crores under the Loan Agreement dated 16th December, 1997 for XLPE Project; and
- (ii) Term Loan of Rs. 18.46 Crores under Loan Agreement dated 28th July, 1999 for Irradiation Project.

Security /charge were created separately for each of the two Term Loan Agreements. Deed of Hypothecation dated 12th December, 2000 in respect of loan amount of Rs. 18.46 Crores was created.

3. The 'Corporate Debtor' defaulted in effecting repayments and approached the 'Board' for restructuring the debt. By the 'Debt Restructuring Agreement' dated 24th March, 2004, the debt was restructured whereby, *inter alia*, the principal amount of Irradiation Project Loan of Rs. 18.46 Crores was agreed to be converted to redeemable preference shares as per Clause 4 coupled with firm binding obligation of the 'Corporate Debtor' to redeem the shares in three instalments on specified fixed future dates by paying the principal amount and fixed accrued dividend amounts [Clause 4.3].

The accrued unpaid interest relating to the loan of Rs. 18.46 Crores was agreed to be paid after a moratorium of 2 years in 3 equal instalments [Clause 5.2(a)].

4. Clause 3.1(d) of the Debt Restructuring Agreement provides as follows:

“(d) The borrower issuing an undertaking to the Board that it shall continue to observe and be bound by obligations in accordance with the Irradiation Project Loan Agreement and the XLPE Cable Project Loan Agreement to the extent that such obligations have not been modified by the Agreement.”

5. The ‘Supplementary Agreement’ was reached between the parties on 19th January, 2011 whereby dates of redemption of shares and repayments were deferred/rescheduled. ‘Clause 1’ of the ‘Supplementary Agreement’ reads :

“1. This agreement shall form part of and shall be attached to and read with the Loan Agreements dated 16th December 1997 and 28th July 1999, and the Debt Restructuring Agreement dated 24th March 2004.”

6. ‘Clause I’ of the said ‘Supplementary Agreement’ reads as follows:

“I. The Borrower has agreed that in case of default in payment of the loan etc. as rescheduled in the Supplementary Agreement to the Debt

Restructuring Agreement as above, this agreement shall be treated as cancelled and the Borrower will be required to pay the entire amount in terms of the Loan Agreement without any remission.

The purpose and intent of this provision clearly is that in case of default by the Company of terms thereof, not only will the supplementary agreement relaxing restructuring conditions be treated as cancelled but the Company will also become liable to pay the entire amount due in terms of the Loan Agreement. In other words, in case of default financial obligations of the company will revert back to those provided in the Loan Agreement.”

7. In the aforesaid background the respondent made claim and taken plea that the ‘Corporate Debtor’ defaulted in effecting repayments as rescheduled thereby it became liable to pay in terms of the original Loan Agreement dated 28th July, 1999 without any remission. The Board, is a ‘Financial Creditor’ in respect of the loan of Rs. 18.46 Crores and interest thereon.

8. The stand of the 'Board' that preference shares would stand invalidated and converted/reverted back to the original loan was not accepted by the 'Liquidator'. According to the learned counsel for the 'Liquidator' the redemption of 18,46,000 Preference Shares were deferred to 1st April, 2014, 1st April, 2015 and 1st April, 2016. Subsequently, the 'Corporate Debtor' continued to be in financial distress and consequently the 'corporate insolvency resolution process' was initiated under the I&B Code.

9. According to the 'Liquidator' a claim of 'Board' was rejected as it is not a 'creditor' for the amount of Rs. 18.46 crores or alleged interest thereon. In fact the amount has been redeemed and converted as preferential shares of 18,46,000 with face value of Rs.100/- each. For the first time, during the 'Liquidation', the 'Board' took plea that the shares were redeemable preferential shares and converted into the loan outstanding against 'Irradiation Project'.

10. Reliance has been placed on the decision of the Hon'ble High Court of Bombay in '**Aditya Prakash Entertainment Pvt. Ltd. v. Magikwand Media Pvt. Ltd.**' – '2018 SCC OnLine Bom 551' and the decision of the Hon'ble High Court of Andhra Pradesh in '**Lalchand Surana & Ors. vs. M/s. Hyderabad Vansaspathy Ltd.**' – '1988 SCC OnLine AP 290' to suggest that a preference shareholder is a contributor to the capital of the company; and is not and cannot claim to be a 'creditor' even in default on redemption. Further according to the learned counsel for the 'Liquidator' the amount of Rs. 18.46 Crores converted to and treated to be a part of the shareholder capital cannot

be reverted back or treated to be a loan upon the alleged default of redemption.

We have heard the learned counsel for the parties and perused the record.

11. 'Debt Restructuring Agreement' dated 24th March, 2004 reached between the 'Board' and the 'Corporate Debtor' deals with 'preference shares' and its redemption, which reads as follows:

"4.1 Issue and allotment

*No later than 10(ten) days from the date of receipt by the Borrower of the notice from the Board referred to in Clause 3 2(b) of this Agreement, the Borrower shall issue and allot 18,46,000 cumulative convertible preference shares to the Board ("**Preference Shares**") against the Irradiation Project Principal Amount. The date of such allotment shall hereinafter be referred to as the "**Allotment Date.**"*

4.2 Dividend

No dividend shall be paid on any shares of the Borrower (whether equity or preference) unless dividend on the Preference Shares due to the Board has been paid in full. If no dividend is paid by the Borrower on the Preference Shares for any given year then such dividend shall accrue on the Preference Shares and shall be paid cumulatively to the Board in such subsequent year for which dividend is declared by the Borrower.

4.3 Redemption

Subject to Clause 4.4 of this Agreement the Preference Shares shall be redeemed by the Borrower in the following manner:

- (a) *Series A of the Preference Shares shall be redeemed by the Borrower on the date which is the 7th anniversary of the Allotment Date:*

- (b) *Series B of the Preference Shares shall be redeemed by the Borrower on the date which is the 8th anniversary of the Allotment Date: and*
- (c) *Series C of the Preference Shares shall be redeemed by the Borrower on the date which is the 9th anniversary of the Allotment Date.*

4.4 Conversion

At any time prior to the redemption of the Preference Shares or part thereof, the Board may be written notice to Borrower convert the Preference Shares or Part thereof into equity shares of the Borrower at par and on such other terms as may be considered reasonable by the Board. No later than 30(thirty) days of receipt of such notice, the Borrower shall take all such steps (including obtaining necessary approvals and consents and undertaking all formalities)

as may be necessary to convert the Preference Shares or part thereof into such equity shares.

12. Clause 5 therein relates to ‘Rescheduled Loan & Interest’, which is as follows:

“5. RESCHEDULED LOAN & INTEREST

5.1 XLPE Cable Project Principal Amount

With effect from all the Allotment Date, the repayment of the XLPE Cable Project Principal Amount by the Borrower to the Board shall be subject to a 7(Seven) year moratorium.

5.2 Rescheduled Accrued Interest Amount

With effect from the Allotment Date, the Rescheduled Accrued Interest Amount shall be repaid by the Borrowed to the Board after a 2(two) year moratorium in 3(three) years in equal instalments, as set out in Annex 1. The

“Rescheduled Accrued Interest Amount”

shall be equal to the sum of the following amounts.

- (a) *the accrued interest (excluding additional interest of 10% per annum) on the Irradiation Project Principal Amount calculated in accordance with the Irradiation Project Loan Agreement for the Period up to the Allotment Date, as more particularly set out in Annex II(a) (“**Irradiation Project Interest Amount**”); and*
- (b) *the accrued interest (excluding additional interest of 10% per annum) on the XLPE Cable Project Principal Amount calculated in accordance with the XLPE Cable Project Loan Agreement for a period up to the Allotment Date, as more particularly set out in Annex II(b) (**XLPE Cable Project Interest Amount**”).*

5.3 Interest

With effect from the Allotment Date, the Borrower shall pay to the Board interest on the XLPE Cable Project Principal Amount and interest thereon, as may be outstanding from time to time calculated with effect from the Allotment Date at the rate of 5% simple interest per annum. The Borrower acknowledges and agrees that the Board shall be entitled in its sole discretion to revise, upwards or downwards, the rate of interest from time to time having regard to its prevailing policy on interest.”

13. In the record of the ‘Corporate Debtor’ towards ‘Irradiation Project Loan’ as on 31st March, 2004, the principal amount and dividend payable on different dates has been shown as under:

*'Irradiation Project Loan***Rs. In Lakhs***Principal outstanding - 846 (As on 31.03.2004)**Cumulative Dividend from 1.4.2004 to 31.03.2011**Conversion of Irradiation Project Loan in to Preference Shares**Rs. In Lakhs*

<i>Sl. No.</i>	<i>Due Dates</i>	<i>Principal Amount Payable</i>	<i>Dividend Payable</i>	<i>Total Amount Payable</i>
1.	<i>1st April 2011 (7th Anniversary of Allotment date)</i>	615.00	215.37	830.37
2.	<i>1st April 2012 (8th Anniversary of Allotment date)</i>	615.00	276.92	891.92
3.	<i>1st April 2013 (9th Anniversary of Allotment date)</i>	615.00	246.16	862.16
	Total	1,846.00	738.45	2,584.55

14. As noticed earlier in the 'Supplementary Agreement on Debt' reached between the 'Corporate Debtor' and the 'Respondent Board' dated 19th January, 2011, the Clause (I) shows that the borrower had agreed that in case of default in repayment of loan etc. as scheduled in 'Supplementary Agreement to the Debt Restructuring Agreement' will be treated as cancelled and the borrower will be required to pay the entire amount in terms of the 'Loan Agreement' without any remission.

15. In '**SJK Steel Plant Limited vs. Meegada Sudhakar Reddy & Ors.**' – 'CP No. 100 of 2007' the Hon'ble High Court of Andhra Pradesh by judgment dated 4th December, 2007, while deciding the objection of the Central Government in respect of conversion of preference shares with accumulated dividend thereon into FITL and waiver of preference shares on proportionate basis on repayment of term loan the Hon'ble High Court held that the same

is contrary to Section 80(1)(a) of the Companies Act, 1956. The Hon'ble High Court of Andhra Pradesh held that Section 80 of the Companies Act, 1956 deals with power of the Company which issued redeemable preference shares. When preference shares are issued, it is not always necessary that they shall have to be redeemed. Sub-Section (1) of Section 80 of the Companies Act, 1956 clearly provides that "*such preference shares are liable to be redeemed*", at the option of the company.

16. In view of the decision of the Hon'ble High Court of Andhra Pradesh and reading all the relevant portions of the 'Agreement' particularly the 'Supplementary Agreement' and Section 80(1) of the Companies Act, 1956 (now Section 55 of the Companies Act, 2013) we hold that the borrower having agreed that in case of default of repayment of loan etc., the agreement will be treated as cancelled and the borrower will be required to pay the entire amount in terms of the loan agreement without any remission. It is not open to the 'Liquidator' to argue on behalf of the 'Borrower' (Corporate Debtor) that the borrower is not liable or required to pay the entire amount in terms of the 'Loan Agreement'. We find no merit in this appeal. It is accordingly dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

30th April, 2019.

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