

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 194 of 2018

[arising out of Order dated 18th April, 2018 by NCLT, Kolkata Bench, Kolkata in CA (IB) No. 270/KB/2017 & CA (IB) No. 238/KB/2018 & CA (IB) No. 288/KB/2018 IN CP(IB) No. 1370/KB/2017]

IN THE MATTER OF:

IDBI Bank Ltd.

...Appellant

Versus

MBL Infrastructures Ltd. & Ors.

...Respondents

Present:

For Appellant :

Mr. Alok Dhir, Ms. Varsha Banerjee, Mr. Milan Singh Negi, Mr. Kunal Godhwani and Ms. Juhi Bhambhani, Advocates

For Respondents:

Mr. Amit Sibal, Mr. Arun Kathpalia and Mr. Ratnako Banerjee, Senior Advocate assisted by Mr. Sameer Rohatgi and Mr. Akshit Pradah, Advocates for Respondent No. 1

Mr. Saraswate Mohapatra, Advocate for Employees Ms. Anusuya Salwan, Ms. Nikita Salwan and Mr. Kunal Kohli, Advocates

Mr. Mukesh and Mr. Debal Banerjee, Senior Advocates with Ms. Reema Khurana, Mr. Kartik Rathi, Advocates for Allahabad Bank

Mr. Harin Rawal, Senior Advocate with Mr. Sanjay Kapur and Ms. Megha Karnwal, Advocates for SBI

Company Appeal (AT) (Insolvency) No. 225 of 2018

IN THE MATTER OF:

Bank of Baroda & Anr.

...Appellants

Versus

MBL Infrastructures Ltd. & Ors.

...Respondents

Present:

For Appellant :

Mr. Ramji Srinivasan, Senior Advocate with Mr. Bishwajit Dubey and Ms. Srideepa Bhattacharya, Advocates

For Respondents: Mr. Amit Sibal, Mr. Arun Kathpalia and Mr. Ratnako Banerjee, Senior Advocate assisted by Mr. Sameer Rohatgi and Akshit Pradhan, Advocates for MBL
Ms. Anusuya Salwan, Ms. Nikita Salwan and Mr. Kunal Kohli, Advocates

Company Appeal (AT) (Insolvency) No. 235 of 2018

IN THE MATTER OF:

Bank of India

...Appellant

Versus

MBL Infrastructures Ltd. & Ors.

...Respondents

Present:

For Appellant : Mr. V. Seshagiri, Mr. Siddharth Sachar, Ms. Shubhangi Mehrish, Mr. Shreyas S. Johri, Mr. Anchit Tripathi and Karan Bhambri, Advocates

For Respondents: Mr. Amit Sibal and Mr. Arun Kathpalia, Senior Advocate assisted by Mr. Sameer Rohatgi, Advocate for MBL

Mr. Harin P. Raval, Senior Advocate with Mr. Sanjay Kapur, Mr. Kauser Hussain and Ms. Megha Karnwal, Advocates for SBI

Ms. Anusuya Salwan, Ms. Nikita Salwan and Mr. Kunal Kohli, Advocates for Respondent No. 3

Mr. Saraswata Mohapatra, Advocate

Company Appeal (AT) (Insolvency) No. 268 of 2019

IN THE MATTER OF:

State Bank of India & Ors.

...Appellants

Versus

MBL Infrastructures Ltd. & Anr.

...Respondents

Present:

For Appellant : Mr. Ramji Srinivasan, Senior Advocate with Mr. Sanjay Kapur, Ms. Megha Karnwal, Mr. Harshal Narayan and Mr. Nikhil Ramdev, Advocates

For Respondents: Mr. Amit Sibal, Mr. Arun Kathpalia and Mr. Ratnako Banerjee, Senior Advocate assisted by Mr. Sameer Rohatgi, Advocate for MBL

Ms. Anusuya Salwan, Ms. Nikita Salwan and Mr. Kunal Kohli, Advocates

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

On an application under Section 7 of the ‘Insolvency and Bankruptcy Code, 2016’ (for short, ‘the I&B Code’) filed by the ‘RBL Bank Limited’ (Financial Creditor) ‘Corporate Insolvency Resolution Process’ was initiated against ‘MBL Infrastructures Limited’ (Corporate Debtor). By impugned order dated 18th April, 2018, the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata while disposed of 3 applications filed under sub-section (5) of Section 60 of the ‘I&B Code’, approved the ‘resolution plan’ submitted by the 3rd Respondent – Mr. Anjanee Kumar Lakhotia after allowing exclusion of 106 days for the purpose of counting 270 days of resolution period. The Adjudicating Authority noticed that the ‘Committee of Creditors’ has approved ‘resolution plan’ with voting share of 78.50% and the plan meets the requirements of sub-section (2) of Section 30 of the ‘I&B Code’.

2. Appellants - ‘IDBI Bank Limited’, ‘Bank of Baroda’, ‘Bank of India’ and ‘State Bank of India’ are the dissenting financial creditors, who have challenged the approval of the plan on the grounds as discussed below.

3. According to the Appellants, 3rd Respondent - ‘Mr. Anjanee Kumar Lakhotia’ is ‘the Promoter’ and ‘Chairman & Managing Director’ of ‘MBL

Infrastructure Ltd.’ (Corporate Debtor) and is ineligible under Section 29A(h) of the ‘I&B Code’.

4. Learned counsel appearing on behalf of the Appellants also raised the question of viability and feasibility of the ‘resolution plan’ on different counts.

5. It was submitted that the liquidation value of the ‘Corporate Debtor’ is Rs.269.90 Crores excluding the amount of Rs.1708.03 Crores realizable from the debtors/cash accruals/sale of investments, which should have been part of the liquidation value. In the revised resolution plan, the 3rd Respondent has proposed to infuse Rs. 128.30 Crores as against the total payment of Rs.1890 Crores under the ‘resolution plan’.

6. It was submitted that the total debt of ‘Financial Creditors’ is Rs. 1480.17 Crores whereas the percentage-wise repayment to the ‘Financial Creditors’ proposed is as follows:

- i) In form of cash :
25.70% i.e. Rs. 390.62 Crores - to be paid over a period of 8.5 years.
- ii) In form of Non-convertible Debentures (NCDS) :
74.30% i.e. Rs. 1188.34 Crores – redeemable after 8 years.

7. Total upfront payment proposed in favour of the ‘Financial Creditor’ is Rs.59.86 Crores excluding ‘non-convertible debentures’ amounting to Rs. 1188.34 Crores, redeemable after 8 years. On the other hand, a sum of Rs.70.28 Crores proposed for payment (excluding statutory dues), no upfront payment has been shown. It was submitted that the total debt of ‘Operational Creditors’ is Rs. 157.91 Crores; for workmen/employees : Rs.14.55 Crores and statutory dues : Rs.47.97 Crores but the period of implementation of ‘resolution plan’ proposed is 8.5 years. Therefore, according to the Appellants the ‘resolution

plan' is not 'viable' and 'feasible' in the eye of law nor meets the commercial aspect.

8. It was also submitted that the 'Resolution Applicant' - 'Mr. Anjaneer Kumar Lakhota' is ineligible in terms of Section 29A(h) of the I&B Code being a personal guarantor to 'RBL Bank Limited' on whose application 'Corporate Insolvency Resolution Process' was initiated and personal guarantee has been invoked by the 'RBL Bank Limited' on 23rd January, 2017 due to defaulted amount of Rs.7,16,46,626/-.

9. Insofar as 'State Bank of India' is concerned, it is submitted that 'Mr. Anjaneer Kumar Lakhota' is also a personal guarantor, which was invoked by 'State Bank of India' on 2nd March, 2017 for default in payment of Rs. 56,46,71,807/- by the principal borrower.

10. Insofar as 'IDBI Bank' is concerned, it is submitted that 'Mr. Anjaneer Kumar Lakhota' is a personal guarantor, which was invoked on 27th July, 2018 as the principal borrower failed to pay the debt of Rs. 115,08,15,309/-.

11. Similarly, 'Mr. Anjaneer Kumar Lakhota' is also a personal guarantor of 'State Bank of India' in another matter, in respect of which personal guarantee has not been invoked. He is also a member of the consortium of 'Bank of Baroda', which has preferred one of the appeals. However, with regard to the 'Bank of India' no relationship has been shown.

12. Learned counsel for the Appellant(s) submitted that the 'resolution plan' was not approved by 'Committee of Creditors' with requisite majority. The original plan was put to vote in the meeting of the 'Committee of Creditors' held on 21st December, 2017 and in terms of sub-section (4) of Section 30, it was approved by voting share of 68.50% which was not sufficient for the approval of

the 'resolution plan' as on the date of approval amended provision of the 'I&B Code' was not applicable.

13. It was further submitted that time limit of 'Corporate Insolvency Resolution Process' completed on 25th December, 2017 and no 'Committee of Creditors' meeting was held pursuant to the decision dated 21st December, 2017. After 25th December, 2017, the 'resolution applicant' – 'Mr. Anajee Kumar Lakhotia' filed an application bearing CA(IB) No. 50 of 2018 before the Adjudicating Authority for issuance of notices to the 'Committee of Creditors', who dissented or abstained from the voting. The Adjudicating Authority on 15th January, 2018 issued notice to the dissenting creditors as also to those who were absent. Subsequently, consent was given by the 'Indian Overseas Bank' and 'Bank of Maharashtra' on 31st January, 2018 and the 'resolution plan' was approved with consent of 78.15% voting share. In this background on the application filed by the 'resolution applicant', the Adjudicating Authority while excluded 106 days for the purpose of counting 270 days (i.e. the period of litigation and non-progress of the 'Corporate Insolvency Resolution Process') simultaneously approved the 'resolution plan'.

14. 'Resolution Applicant' on its appearance has denied that he is ineligible in terms of Section 29A(h) of the 'I&B Code'. It was submitted that 'MBL Infrastructure Ltd.' is listed company on 'Bombay Stock Exchange' (BSE) and the 'National Stock Exchange (NSE) and have 23000 shareholders, more than 1000 suppliers and about 2500 employees were working between the years 1995 to 2016. According to him, 'MBL Infrastructure Ltd.' was consistently growing and there was never any irregularity in the bank accounts. It had paid the Income-tax of Rs. 122.62 Crores, Rs. 5.12 Crores of dividend distribution tax

and further taxes of Rs.89.17 Crores for the financial years 2010 to 2016. 'MBL Infrastructure Ltd.' has serviced interest, finance charges and bank guarantee commission of Rs. 459.58 Crores. 'MBL Infrastructure Ltd.' has paid salary and wages to the tune of Rs. 176.93 Crores during the financial years 2010 to 2016. Despite different adverse trade cycles, it survived. The reasons for the liquidity constrains was non-availability of need based and cancellation of two BOT projects due to non-release of sanctioned limits by Banks, as also delay in realization of receivables, non-issuance of LC/BGs within the sanctioned limits by some of the consortium banks, blockage of money in nearly completed projects, continued debt servicing despite inadequate cash accruals etc. After due discussions in 'Committee of Creditors' these have been recorded in TEV Study and Resolution Plan. During the 'Corporate Insolvency Resolution Process' between 30th March, 2017 to 18th April, 2018, the 'Financial Creditors' were in the control of the company through 'Resolution Professional' and during the said period 'Stock and Receivables Audit', 'Concurrent Audit' and 'Forensic Audit' was conducted by auditors empanelled with 'State Bank of India' and unanimously approved by the 'Committee of Creditors'. Statutory audit was also conducted and no irregularity was found. The 'Committee of Creditors' or the 'auditors' or 'external agencies' appointed by the 'Committee of Creditors' had not found any malfeasance on the part of the promoter or the management of the company. The 'Resolution Professional' controlled by the 'Committee of Creditors' also certified that no fraud or irregularity in transactions was found during the 'Corporate Insolvency Resolution Process' as well as last 2 years prior to the said period.

15. It was submitted that 'improved resolution plan' dated 22nd November, 2017 has been approved with 78.50% of voting share of the 'Committee of Creditors'. The source of fund as per 'Techno Economic Viability (TEV) Study Report dated 2nd December, 2017 were taken into consideration. The PNB Investments Services Limited was unanimously appointed by the 'Committee of Creditors' as its financial advisors which carried out the 'TEV Study Report' on 22nd November, 2017. Having noticed the TEV Study Report about viability and feasibility and including the study report, the Committee of Creditors approved the 'resolution plan'. It was submitted that the 'resolution plan' was submitted by the 'Resolution Applicant' prior to 23rd November, 2017 i.e. before the amendment of the 'I&B Code' and introduction of Section 29A. The eligibility of 'resolution applicant' became an issue which was raised before the Adjudicating Authority and by order dated 18th December, 2017 the Adjudicating Authority held that the 'resolution applicant' was eligible and not barred by Section 29A(c) & (h). The said decision of the Adjudicating Authority declaring the 'Resolution Applicant' not barred under Section 29A(c) and (h) was challenged by the 'RBL Bank Limited' and 'Punjab National Bank' before this Appellate Tribunal which was not entertained and subsequently disposed of as withdrawn on 23rd March, 2018 but without liberty to the banks to raise the same issue in any other appeal.

16. From the aforesaid fact, we find that the Appellants earlier raised the question of ineligibility of the 'resolution applicant', which was not accepted by this Appellate Tribunal and the appeals preferred by the two Appellant Banks were dismissed as withdrawn without any liberty to raise such issue again before this Appellate Tribunal.

17. So far as the feasibility and viability of the resolution plan is concerned, the Hon'ble Supreme Court in '**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.**' – (2019) 4 SCC 17) observed :

73. *Under the Code, the Committee of Creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The Committee of Creditors is required to evaluate the resolution plan on the basis of feasibility and viability. Thus, Section 30(4) states:*

“30. Submission of resolution plan.—(1)-

(3) * * *

(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 feasibility and viability, and such other requirements as may be specified by the Board:*

Provided that the Committee of Creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution

applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of Section 29-A, the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of Section 29-A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section:

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ordinance 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.”

74. *It is important to bear in mind that once the resolution plan is approved by the Committee of Creditors and thereafter by the adjudicating authority, the aforesaid plan is binding on all stakeholders as follows:*

“31. Approval of resolution plan.—(1) *If the adjudicating authority is satisfied that the resolution plan as approved by the Committee of Creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:*

Provided that the adjudicating authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.”

75. *Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are*

in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.”

18. As the ‘Committee of Creditors’, by majority voting share of 78.50%, has approved the plan after taking into consideration the techno economic report relating to viability and feasibility of the resolution plan and viability of the ‘Corporate Debtor’, this Appellate Tribunal cannot sit in appeal in absence of any discrimination or unequal treatment of similarly situated ‘Financial Creditors’ or ‘Operational Creditors’.

We find no merit in these appeals. They are accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

16th August, 2019

/ns/