

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 139 of 2018

[arising out of Order dated 25th March, 2018 by NCLT, Mumbai Bench, Mumbai in CP(IB) No. 1382/I&BC/2017]

IN THE MATTER OF:

Vishal Vijay Kalantri,
S/o Mr. Vijay Kalantri,
R/o Flat No. 2, Wahedna CHS Ltd.,
75, Hill Road, Bandra (W),
Mumbai 400 051

.... Appellant

Vs

1. DBM Geotechnics & Construction Pvt. Ltd.
B/301, Centaur House,
Shantinagar Industrial Estate,
Vakola, Santacruz (E),
Mumbai – 400 055.

2. Dighi Port Ltd.,
New Geotechnics & Constructions Pvt. Ltd.,
New Excelsior Building,
6th Floor, A.K. Nayak Marg, Fort,
Mumbai – 400 001.

.... Respondents

Present:

For Appellant:

**Mr. Amit S. Chadha, Senior Advocate with
Ms. Neeha Nagpal, Ms. Srishti Govil, Mr. Akshay
Sharma, Mr. Vishvendra Tomar, Mr. Rohan Jaitley,
and Ms. Sanya Ahluwalia, Advocates.**

For Respondents:

**Mr. Gourab Banerji, Senior Advocate with
Ms. Aditi Sharma, Mr. Raka Chatterjee, Advocate
for Committee of Creditors.**

**Mr. Kunal Vajani, Mr. Varun Ahuja and Mr. Paras
Anand, Advocates for Resolution Professional.
Mr. Niraj Kumar, Mr. Satendra K. Rai and
Ms. Tejali, Advocates for Resolution Professional.**

**Mr. Abhishek Puri and Ms. Surbhi Gupta, Advocates
for Maharashtra Maritime Board.**

With

Company Appeal (AT) (Insolvency) No. 697 of 2019

[arising out of Order dated 8th May, 2019 by NCLT, Mumbai Bench, Mumbai in M.A. No. 529/2019, MA. No. 761/2019 and MA No. 1147/2019 IN CP(IB) No. 1382/I&BC/NCLT/MAH/2017]

IN THE MATTER OF:

Adani Ports and Special Economic Zone Ltd.,
Adani House, Mithakhali,
Six Road, Navrangpura, Ahmedabad,
Gujarat

.... Appellant

Vs

1. Mr. Shailen Shah,
Resolution Professional of Dighi Port Ltd.,
BBSR & Co., 5th Floor, Lodha Excelus,
Apollo Mill Compound,
NM Joshi Marg, Mahalaxmi
Mumbai – 400 011

2. Committee of Creditors of Dighi Port Limited,
Through lead Bank – Bank of India,
Oriental Building, Esplanade Road,
Mumbai – 400 001.

3. The Board of Trustees of the
Jawaharlal Nehru Port Trust,
Administration Building,
Sheva, Talukauran,
Navi Mumbai – 400 707

.... Respondents

Present:

**For Appellant: Mr. Arun Kathpalia, Senior Advocate with
Ms. Diksha Gupta, Mr. Mahesh Agarwal, Mr. M.S.
Ananth and Mr. Rajeev Kumar, Advocates**

**For Respondents: Mr. Gourab Banerji, Senior Advocate with Ms. Aditi
Sharma, Advocate for Committee of Creditors.**

**Mr. Kunal Vajani, Mr. Varun Ahuja and Pranav
Vyas, Advocates for Resolution Professional.
Mr. Niraj Kumar, Mr. Satendra K. Rai, Mr. Nirav
Shah and Ms. Tejali, Advocates for Resolution
Professional.**

**Mr. Abhishek Puri, Advocate for Maharashtra
Maritime Board.**

With

Company Appeal (AT) (Insolvency) No. 698 of 2019

**[arising out of Order dated 27th May, 2019 by NCLT, Mumbai Bench,
Mumbai in CP(IB) No. 1382/I&BC/2017]**

IN THE MATTER OF:

Adani Ports and Special Economic Zone Ltd. **Appellant**

Vs

Mr. Shailen Shah, RP of Dighi Port Ltd. & Ors. **Respondents**

Present:

**For Appellant: Mr. Arun Kathpalia, Senior Advocate with
Ms. Diksha Gupta, Mr. Mahesh Agarwal, Mr. M.S.
Ananth and Mr. Rajeev Kumar, Advocates**

**For Respondents: Mr. Gourab Banerji, Senior Advocate with Ms. Aditi
Sharma, Advocate for Committee of Creditors.**

**Mr. Kunal Vajani, Mr. Varun Ahuja Advocates for
Resolution Professional.**

**Mr. Niraj Kumar, Mr. Satendra K. Rai and
Ms. Tejali, Advocates for Resolution Professional.**

**Mr. Abhishek Puri, Advocate for Maharashtra
Maritime Board.**

With

Company Appeal (AT) (Insolvency) No. 722 of 2019

**[arising out of Order dated 8th May, 2019 by NCLT, Mumbai Bench,
Mumbai in M.A. No. 529/2019, MA. No. 761/2019 and MA No.
1147/2019 IN CP(IB) No. 1382/I&BC/NCLT/MAH/2017]**

IN THE MATTER OF:

Mr. Vishal Vijay Kalantri,
Former Director and Shareholder of
Dighi Port Limited,
R/o Flat No. 2, Wahedna CHS Ltd.,
75, Hill Road, Bandra (W),
Mumbai – 400 051.

.... **Appellant**

Vs

1. Dighi Port Ltd.,
Corporate Debtor,
New Excelsior Building,
6th Floor, A.K. Nayak Marg, Fort,
Mumbai – 400 001.
2. Jawaharlal Nehru Port Trust,
The Resolution Applicant,
New Excelsior Building,
A.K. Nayak Marg, Fort,
Mumbai – 400 001.

.... Respondents

Present:

For Appellant: Mr. Amit Chadha, Senior Advocate with Ms. Neeha Nagpal, Ms. Srishti Govil and Mr. Vishvendra Tomar and Ms. Sanya Ahluwalia, Advocates.

For Respondents: Mr. Gourab Banerji, Senior Advocate with Ms. Aditi Sharma, Advocate for Committee of Creditors.

Mr. Kunal Vajani, Mr. Varun Ahuja Advocates for Resolution Professional.

Mr. Niraj Kumar, Mr. Satendra K. Rai and Ms. Tejali, Advocates for Resolution Professional.

Mr. Abhishek Puri, Advocate for Maharashtra Maritime Board.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

‘DBM Geotechnics and Constructions Pvt. Ltd.’ moved an application under Section 9 of the ‘Insolvency and Bankruptcy Code, 2016 (‘I&B Code’, for short) for initiation of the ‘Corporate Insolvency Resolution Process’ against ‘Dighi Port Limited’ (Corporate Debtor). The Adjudicating Authority by impugned order dated 25th march, 2018 admitted the application.

2. Mr. Vishal Vijay Kalantri (Director and Shareholder of the Corporate Debtor) initially challenged the impugned order on one of the ground that there is an 'existence of dispute'. The notice was issued on Respondents pursuant to which the Respondent (DBM Geotechnics and Constructions Pvt. Ltd. – Operational Creditor) appeared. The learned counsel for the Appellant sought time to settle the dispute, which was agreed upon by the learned counsel for the Respondent as recorded on 12th July, 2018, which is :

“12.07.2018: The appeal was preferred against order of initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016. The matter was taken up and ultimately the senior counsel for the Appellant sought for time to settle the dispute, which was agreed by learned senior counsel for the Respondent (Operational Creditor).

Today, learned senior counsel for the Appellant again sought for some more time to ensure settlement. Learned senior counsel appearing on behalf of Respondent (Operational Creditor) agreed to negotiate, if the Appellant approach.

In these circumstances, adjourn the case. If no settlement is made, the court may proceed with the appeal on merit.

Mr. Gourab Banerji, learned senior counsel alongwith Mr. I. P. A. Oberoi, Advocate submits that

he wants to intervene on behalf of the CoC, as the Resolution Process is on-going.

We allow him to file an Intervention Application within a week and make it clear that we have not stayed the Resolution Process, therefore, the Resolution Professional, Committee of Creditors and the Adjudicating Authority, in the meantime, may proceed in accordance with law.

*Place the case 'for orders' on **1st August, 2018.***

3. However, the matter was not finally settled between the Appellant – ‘Vishal Vijay Kalantri’ and the Respondent – ‘DBM Geotechnics and Constructions Pvt. Ltd.’ (Operational Creditor). The Appellant sought time to move an application under Section 12A of the ‘I&B Code’. Therefore, the ‘*Company Appeal (AT) (Insolvency) No. 139 of 2018*’ remained pending and during the pendency of the Appeal, ‘Corporate Insolvency Resolution Process’ continued.

4. ‘Resolution Plan’ by ‘Adani Ports and Special Economic Zone Limited’ (**‘APSEZL’**, for short) was declared as the highest evaluated compliant resolution plan and the same was put to the vote of ‘Committee of Creditors’ on 31st January, 2019 and was rejected by 99.38% of votes by the ‘Committee of Creditors’. Subsequently, the ‘Jawaharlal Nehru Port Trust’ (**‘JNPT’** for short) resolution plan being the second highest resolution plan as per the scoring was put to the vote on 1st February, 2019 which was approved by 99.38% of the requisite majority of the ‘Committee of Creditors’. The

Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by impugned order dated 8th May, 2019 approved the resolution plan of 'JNPT', 'Government of India Undertaking' with certain conditions. The said order has been challenged by 'Adani Ports and Special Economic Zone Limited', one of the resolution applicant and also by 'Vishal Vijay Kalantri' - a shareholder of the 'Corporate Debtor' in their respective '*Company Appeal (AT) (Insolvency) No. 697 of 2019*' and '*Company Appeal (AT) (Insolvency) No. 722 of 2019*'. At the relevant point of time, the proposal under Section 12A of the 'I&B Code' was submitted by 'Vishal Vijay Kalantri' which was rejected by the 'Committee of Creditors'. Subsequently, the 'Successful Resolution Applicant' (JNPT) sought additional time of 30 days for filing the affidavit for acceptance or rejection of the modifications in terms of the order dated 8th May, 2019. In the said application, it was contended that it was very critical for JNPT to fully understand and holistically evaluate the impact of modifications directed in the JNPT's resolution plan before taking any decision in this respect and for this additional time of at least 30 days was required for filing the affidavit regarding its acceptance or rejection in terms of order dated 8th May, 2019.

5. It was further stated that 'JNPT' being the Government of India Undertaking is required to follow certain procedure for obtaining appropriate internal approvals, including from the Ministry of Shipping before proceeding further on the 'resolution plan' because it has financial implications, which may also require consultation with the Ministry of Finance. In this background the Adjudicating Authority by impugned order dated 27th May, 2019 allowed 30 days' time for filing an additional affidavit, as the last opportunity. The said order has been challenged by 'Adani Ports and Special

Economic Zone Limited' as another 'resolution applicant' in '*Company Appeal (At) (Insolvency) No. 698 of 2019*'.

6. When the matter was taken up, the learned counsel appearing on behalf of the 'Resolution Professional' submitted that in 19th meeting of the 'Committee of Creditors', it was decided that the 'resolution plans' from all the three 'resolution applicants' and the 'settlement proposal' of 'Vishal Vijay Kalantri' and other promoters of the 'Corporate Debtor' be called and received on or before 4th September, 2019. Such meeting was held pursuant to the direction as was given on 21st August, 2019 by this Appellate Tribunal as JNPT was not agreed to proceed with the modified resolution plan as was approved. The 'Committee of Creditors' decided that the 'Resolution Professional' will write to the existing three resolution applicants i.e. (a) 'Jawaharlal Nehru Port Trust (JNPT); (b) 'Adani Ports and Special Economic Zone Limited (APSEZL)' and (c) 'Veritas India Limited and UV Asset Reconstruction Company Limited ('Veritas Consortium') calling for the revised/improved/revalidated resolution plans. The 'Committee of Creditors' also requested the Appellant to submit the 'Promoters' Settlement Proposal' under Section 12A within the time limits.

7. On 4th September, 2019 at the 20th Meeting of the 'Committee of Creditors', the Resolution Professional placed before the 'Committee of Creditors' [i] the term sheet received from the promoters regarding their Settlement Proposal, and [ii] the revised/ improved/revalidated Resolution Plans from APSEZ and Veritas Consortium. At the said meeting, the Appellant was invited to explain the Promoters Settlement Plan in detail to the 'Committee of Creditors'.

8. Thereafter, the 21st Meeting of the 'Committee of Creditors' was held on 9th September, 2019 whereat the 'Committee of Creditors' discussed and deliberated upon the Resolution Plans submitted by 'APSEZL' and 'Veritas Consortium' and called upon the Resolution Applicant(s) to give a presentation on their Resolution Plans. At the said meeting, the Resolution Professional requested 'APSEZL' and Veritas Consortium to provide certain clarifications in light of the amendments made in Section 39(2)(b) of the I&B Code. Accordingly, 'APSEZL' and 'Veritas Consortium' agreed to comply with the same. Further, the 'Committee of Creditors' fixed the deadline of 12th September, 2019 for the Promoters of the Corporate Debtor to submit EMD of 20% of the Settlement Proposal along with further details/clarifications/information as sought by the Forensic Auditor/Evaluation Advisor.

9. Pursuant to the aforesaid, 'APSEZL' and 'Veritas Consortium' submitted the addendums *inter alia* to clarify on compliances with the Amendments made in Section 30(2)(b) of the I&B Code.

10. Thereafter, on 13th September, 2019, the 22nd Meeting of the 'Committee of Creditors' was held whereat the 'Committee of Creditors' decided that the Proposal for Settlement received from the Promoters under Section 12A of the I&B Code also seeking withdrawal of the 'corporate insolvency resolution process' be put to vote. It is pertinent to record that at the said Meeting, the 'Committee of Creditors' took note that EMD of 20% of the Settlement Proposal along with further details/clarifications/information as were previously sought were not received. The Resolution Professional also apprised the 'Committee of Creditors' that the relevant form FA and the Bank

Guarantee as prescribed under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 [**CIRP Regulations**], had also not been received. However, on the basis of the directions of this Hon'ble Appellate Tribunal, the 'Committee of Creditors' proposed to put the withdrawal resolution under Section 12A of the I&B Code for voting by the members of the 'Committee of Creditors'. The 'Committee of Creditors' further decided that, if in case the withdrawal is not approved by the requisite percentage of votes by the 'Committee of Creditors', then the Resolution Plan received from 'APSEZL' be put to vote immediately thereafter.

11. The voting on the resolution for approval of Settlement Proposal under Section 12A of the I&B Code proposed at the 'Committee of Creditors' Meeting held on 13th September, 2019 was concluded on 17th September, 2019. From the results of the voting, it was noted that the resolution for withdrawal of 'corporate insolvency resolution process' under Section 12A of the I&B Code was rejected by the members of the 'Committee of Creditors' by 99.68% voting shares and 'Committee of Creditors' members having the remaining 0.3% voting shares abstained from voting. As such, it is unequivocally clear that the resolution for withdrawal of 'corporate insolvency resolution process' under Section 12A of the 'I&B Code' came to be rejected by the members of the 'Committee of Creditors' as the same could not muster the requisite 90% voting share

12. It is pertinent to mention that the said Resolution Plan of the 'APSEZL' was found to be in compliance with Section 30(2) of the I&B Code and Regulation 38 of the CIRP Regulations. Since, the withdrawal resolution

under Section 12A of the I&B Code stood rejected by the members of the 'Committee of Creditors', as per the instructions of the 'Committee of Creditors' in its 22nd Meeting, the Resolution Professional put the Resolution Plan submitted by 'APSEZL' for voting by the members of the 'Committee of Creditors'. The voting on the same commenced on 17th September, 2019 and concluded on 19th September, 2019.

13. On 19th September, 2019, the voting results were received which revealed that the Resolution Plan submitted by APSEZ was approved by the members of the 'Committee of Creditors' with 99.68% votes.

14. It was submitted that that Hon'ble NCLT vide its Order dated 15th January, 2020 in the 'Company Petition [C.P.(I.B.) No. 1382 (MB) of 2017]' has reserved Judgement on the Application filed by the 'Resolution Professional' under Sections 30 and 31 of the I&B Code, *inter alia*, seeking approval of the Resolution Plan of 'APSEZL' which has been approved by 99.68% [voting share] of the 'Committee of Creditors'. Therefore, the determination/adjudication as to whether the Resolution Plan is in compliance to the provisions of the I&B Code and Regulations framed thereunder is *sub judice* before the NCLT i.e. Adjudicating Authority being the court of first instance. It is further submitted that the Settlement Proposal of the Appellant under Section 12A of the I&B Code has been rejected by 99.68% [voting share] of the 'Committee of Creditors'. Furthermore, almost 2[two] years have elapsed since passing of the Admission Order and in the event this Appellate Tribunal interferes with the Admission Order, this would result in one of the creditors filing a fresh application before the NCLT and 'corporate insolvency resolution process' of the 'Corporate Debtor' would have

to be recommenced. It is imperative to record that in the event the 'corporate insolvency resolution process' of the Corporate Debtor is interfered with, the same would result in a risk of the Maharashtra Maritime Board cancelling the Concession Agreement granted to the Corporate Debtor for the purpose of operating the port. Consequently, none of the lenders/stake holders would receive their dues from the subsequent 'corporate insolvency resolution process' of the Corporate Debtor and the Corporate Debtor would eventually be subjected to nothing but liquidation.

15. From the record, we find that after the 'corporate insolvency resolution process' was initiated on 25th March, 2018 and number of claims were filed by different 'financial creditors' and the 'operational creditors', the claims amounting to Rs.3000 crores. In view of the said position, the Appellant – 'Vishal Vijay Kalantri' on behalf of the 'Promoter' sought time to settle the claim under Section 12A.

16. Now at the time of hearing, the learned counsel for the Appellant wanted to highlight the merit to suggest that there is a 'pre-existence of dispute'. However, as more than one and a half year has passed and as the matter remains pending since long because of the Appellant – 'Vishal Vijay Kalantri', the 'Promoter' would have settled the matter with the creditors and also sought time, we are not inclined to determine the initial issue whether there was a 'pre-existing dispute' or not. Even if, the proceedings is quashed on the 'pre-existing dispute', as admittedly there is a default of payment and it will regenerate other proceedings, which is not desirable. Admittedly, the 'Committee of Creditors' now approved the plan as submitted by the APSEZL' with 99.68% voting share and approved on 19th September, 2019. The matter

is pending before the Adjudicating Authority for passing the order under Section 31(1) of the 'I&B Code'. In terms of the '**Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors.** – (2019) SCC Online SC 1478', the Adjudicating Authority or the National Company Law Tribunal or this Appellate Tribunal cannot sit in appeal on commercial wisdom of the 'Committee of Creditors'.

17. In the circumstances, we are not interfering with the impugned order dated 25th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench and dismiss the appeals preferred by 'Vishal Vijay Kalantri' and declare both the appeals preferred by 'APSEZL' as infructuous. The matter stands remitted to the Adjudicating Authority to pass appropriate order under Section 31 of the I&B Code in accordance with law.

In the result, the '*Company Appeal (AT) (Insolvency) No. 139 of 2018*' and '*Company Appeal (AT) (Insolvency) No. 722 of 2019*' is dismissed and the '*Company Appeal (AT) (Insolvency) Nos. 697 of 2019*' and '*Company Appeal (AT) (Insolvency) No. 698 of 2019*' is declared infructuous.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

12th March, 2020

//ns//

12.03.2020:

N.B. After the Judgment was delivered, learned counsel appearing on behalf of 'Adani Ports and Special Economic Zone Ltd.' and counsel for the 'Resolution Professional' brought on record one order dated 5th March, 2020 by which the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, has approved the 'Resolution Plan' submitted by 'Adani Ports and Special Economic Zone Ltd.'

The order dated 5th March, 2020 be kept on record.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

/ns/