

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1040 of 2019

IN THE MATTER OF:

Mr. Digant L. Kapadia

...Appellant

Versus

Bank of India & Anr.

...Respondents

Present:

For Appellant :

Mr. Dhaval Deshpande, Advocate

For 1st Respondent:

Mr. Jitendra Kumar, Advocate

Mr. Vishal Jain, RP

O R D E R

20.11.2019 The 'Bank of India' filed an application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016 (for short, 'the I&B Code') pursuant to which the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by impugned order dated 20th September, 2019 initiated 'Corporate Insolvency Resolution Process' of 'B.E. Billimoria & Company Limited' (Corporate Debtor).

When the matter was taken up on 15th October, 2019, learned counsel for the Appellant submitted that the Appellant was ready for amicable settlement with 'Bank of India' (Financial Creditor), which is likely to be materialised. It is also informed that the 'Committee of Creditors' was not constituted.

On 15th November, 2019, learned counsel for the Appellant informs that the 'Terms of Settlement' has been reached between the parties. Therefore, it was allowed to file the 'Terms of Settlement'.

The Appellant has filed the 'Terms of Settlement' and letter dated 1st November, 2019, which reads as follows:



Specialized Asset Recovery Management Branch
Sadhana Rayon House, 3rd floor, D.N. Road, Fort, Mumbai 400 001.
Tel : 022-22671066, 22673071

Ref. No. SARM/TKB/2019-20/ 539

Date : 01-11-2019

To,
M/s. B.E Billimoria & Co Limited
Shivsagar Estate
A-Block 2nd Floor
Dr A B Road
Worli. Mumbai-40018
/

WITHOUT PREJUDICE

Dear Sirs,

A/c. M/S. B.E BILLIMORIA & CO
OFFER FOR ONE TIME SETTLEMENT (OTS)

We refer to your compromise offer letter dated 16.10.2019 for Rs.107.50 Core towards dues of your Loan Account.

2. We are pleased to inform you that OTS amount of Rs.107.50 crore (Provisional Amount #) has been accepted by the appropriate authority on the following terms:

- a) Upfront amount paid by you Rs.0.50 Crore will be appropriated upon conveying our approval
- b) Next - Amount Rs 0.50 Crore. to be paid by 01.11.2019
- c) Next - Amount of Rs. 5.00 Crore to be paid within 2 months of conveying approval. (NCLT withdrawal will be considered only after receipt of this Rs. 5.00 Crore)
- d) Next -Amount of Rs. 40.00 Crore. in next 3 months but before 31.03.2020
- e) Balance amount of Rs. 61.50 Crore in 6 quarterly installments of Rs. 10.25 Crore from 30.6.2020 and extending up to on 30.9.2021.

Interest @2.00% over Bank's Base Rate presently 11.40% p.a (floating) simple will be charged on reducing balance from date of conveying till full payment of OTS offer.



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Presently OTS of minimum Rs 107.50 crore has been considered subject to that our OTS will not be inferior to Company's OTS with IDBI in percentage terms of outstanding. In case IDBI OTS is superior, our OTS Amount will increase accordingly. Also personal guarantees of directors will have to be provided in line with IDBI OTS approval.

Subject to:

- i) Full OTS amount as per schedule of payment with interest is payable by 30.9.2021.
- ii) PDC to be submitted at the time of conveying approval in the following manner:

A letter to be submitted to the branch by the borrower/defaulters while taking such PDC stating that the PDCs are issued in favour of the Bank, in charge of legally enforceable debt/liability in terms of the OTS and the same is enforceable under the provisions of the Negotiable Instruments Act and the same is without prejudice to the other rights and remedies available to the Bank including revocation of OTS and recovery of the full dues by exercise of other rights and remedies. PDCs to be submitted by the company at the time of conveying of OTS approval. **Non-payment of OTS amount as per schedule and non-honouring of PDC on due dates, bank will file case under section 138 of NI act**

- iii) In case there is default in payment of compromise amount as per agreed schedule, the OTS stands automatically cancelled without any further notice and bank shall be entitled to recover the entire dues with interest at contractual rate. **Bank may be free to file afresh application in NCLT**

- iv) Stamped undertaking to be submitted by the company for the following:

- All the present & future liabilities, other dues and claims, if any, will be settled by the borrower directly and the Bank will not be under any obligation to undertake any liability in this regard.
- Borrower will withdraw all the legal/other case at various forums (known/ not known to the Bank) against the Bank or its officials, if any, and it will not file any claim against the bank including defamation case.
- Any other Tax/dues against the borrower shall be borne by the Company from their own sources

- v) Company to undertake that our OTS will not be inferior to OTS with IDBI in percentage terms of outstanding. Otherwise Company to compensate the Bank to that extent.

- vi) No further exposure to the firm/borrower/guarantor will be allowed and OTS details will be reported in CIBIL etc with clause "A/C closed under compromise.

- vii) Only upon recovery of entire OTS as per sanctioned terms, Bank will issue No Dues Certificate and release personal guarantee of Directors and guarantors. Bank shall also inform the DRT New Delhi about the compromise settlement. Borrower will have to withdraw suit, if any against the Bank.



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- vii) Bank reserves the right to revoke this OTS offer and to initiate suitable action for recovery of its legitimate dues in case it is found that there has been any element of fraud in the account at any point of time in future.
- x) Bank will have right to recompense to the extent of sacrifice made, if there is turnaround and company makes net profit within next 05 financial years i.e. upto 31.03.2024. A suitable stamped undertaking in this regard is to be submitted by the Co. and release of security/guarantee to be effected only after finalization of right of recompense.
- x) Status of the account and progress of the on-going projects report to be submitted by the company till repayment of OTS amount
- xi) Company to submit list of debtors duly verified by statutory auditor countersigned by the company on half yearly basis
- x) In case of default in making payment of OTS amount as per agreed terms, the amount which has been already deposited under OTS will be forfeited
- xi) DRT suit will be withdrawn only after receipt of entire compromise amount with stipulated interest and withdrawal of any counter suit/appeal/application filed by any of the directors/guarantors or by the company against the Bank.
- xii) All legal fee and charges including those related to NCLT in addition to OTS amount will be recovered from you.

3. The said approval is subject to strict compliance by you of all the terms and conditions as stated above. Our approval shall not in any event be construed as reducing your actual liabilities under the facilities granted to you as reflected by your account with us. We, the bank expressly reserve all the rights in enforcing all the claims arising out of various credit facilities granted to you and the acceptance of your offer by us in derogation of rights available to us under the laws in force and we, the bank, are entitled to enforce all the rights and recover all liabilities due to the bank from you as if your offer had never been accepted by us in the event of your default or non compliance with the terms stated above. Further, the company will submit documents/ information as may be required by the Bank during the currency of repayment of OTS period.

4. Within 10 days from date of this letter, please acknowledge receipt of this letter of approval, duly signed and supported by **Board Resolution**, on the duplicate copy in token of acceptance of terms and conditions of compromise, failing which the OTS approval stand revoked.

Thanking you,

Yours faithfully,

Subj'd to our letter
no B&R/514 and 511/19
ACCEPTED

(Tarla K Bakhru)
Chief Manager



H. K. Bakhru
05/11/2019



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Mr. Jitendra Kumar, learned counsel appearing on behalf of the 'Bank of India' (Respondent No. 1) accepts that the settlement has been arrived at between the parties and further submits that the 'Bank of India' be allowed to

file application for withdrawal of the application filed under Section 7 of the 'I&B Code' and also submits that the 'Committee of Creditors' have not yet been constituted.

Learned counsel for the Appellant also informs that the fee and corporate insolvency resolution cost' of the 'Interim Resolution Professional', as informed by the IRP, will be paid.

In view of the aforesaid development, in exercise of powers conferred on this Appellate Tribunal under Rule 11 of the NCLAT Rules and the decision of the Hon'ble Supreme Court in '**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.- '2019 SCC Online SC 73'**', we set aside the impugned order dated 20th September, 2019 for initiation of 'Corporate Insolvency Resolution Process' against 'B.E. Billimoria & Company Limited' (Corporate Debtor). The 'Corporate Debtor' is released from the rigour of the 'Corporate Insolvency Resolution Process'. The Appellant, Directors, Shareholders and Board of Directors of the 'Corporate Debtor' are directed to ensure that the payment of rest of the amount be made, as per agreed terms and as intimated by the 'Bank of India' by its letter dated 1st November, 2019 and quoted above. In case of default of any of the payment, the present order passed by this Appellate Tribunal shall stand automatically vacated and the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' would revive. The 'Interim Resolution Professional'/ 'Resolution Professional' will take over the assets and the records of the 'Corporate Debtor'. It will be open to the 'Bank of India' to file a petition for initiation of contempt against the Appellant and other Directors, Managing Directors etc.

We further make it clear that in case the Appellant/Directors etc. objects to make the payments and the 'corporate insolvency resolution process' initiated and funds is found to be diverted by the Appellant or any other Directors/Shareholders/Corporate Debtor, apart from the payment of the dues to the 'Bank of India', other financial creditors, if any, and day to day running of the company, the Adjudicating Authority or this Appellate Tribunal may direct the Directors and 'Promoters' to refund such amount.

The appeal is allowed with aforesaid observations and directions.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

/ns/gc