

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 467 of 2019

IN THE MATTER OF:

JSW Steel Limited

....Appellant

Vs.

Ashok Kumar Gulla & Ors.

....Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Senior Advocate with Mr. Manmeet Singh, Mr. Nakul Sachdeva and Mr. Aakarshan Sahay, Advocates.

For Respondents: Mr. Ashok Kumar Gulla, R.P. Mr. Saurabh Jain and Mr. Abhindra Maheshwari, Advocates for R-2. Ms. Lakshmi Gurung, Senior Standing Counsel for Income Tax Department.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process’ of ‘Vardhman Industries Limited’- (‘Corporate Debtor’), the Appellant- ‘JSW Steel Limited’ has become ‘Successful Resolution Applicant’. The ‘Resolution Plan’ submitted by the Appellant was approved by the ‘Committee of Creditors’ by 100% voting shares on 10th August, 2018.

2. When the matter was placed before the Adjudicating Authority (National Company Law Tribunal), Bench-III, New Delhi, the

Adjudicating Authority by order dated 19th December, 2018 as clarified vide order dated 16th April, 2019, having found the plan in compliance with the provisions of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) particularly Section 30(2), approved the plan with two conditions.

3. The Appellant has challenged part of the impugned order dated 16th April, 2019 in so far it relates to ‘right to receivables’, ‘carry forward losses’ and ‘subsidiaries, associate companies and joint ventures of the Company’.

4. According to counsel for the Appellant, the ‘Resolution Plan’ having been found to be in accordance with Section 30(2) of the ‘I&B Code’ and having been approved by the ‘Committee of Creditors’ with 100% voting shares in absence of any objection by any of the party, the Adjudicating Authority while passing order under Section 31 of its own, was not empowered to impose any condition either relating to ‘right to receivables’ or ‘carry forward losses’ or ‘subsidiaries, associate companies and joint ventures of the Company’.

5. The ‘Resolution Professional’ or the ‘Committee of Creditors’ have not opposed the prayer. On the other hand, the ‘Committee of Creditors’ prayed for a direction to the ‘Resolution Applicant’ for immediate implementation of the ‘Resolution Plan’ and to pay the interest at the

'IDBI Bank's one year MCLR (Y) i.e. @8.85% on the agreed resolution amount to the Creditors of the 'Corporate Debtor'.

6. After deliberations, the Appellant proposed modification of the plan with regard to the aforesaid three issues as noticed below.

7. Learned counsel for the Appellant has brought to our notice Section 79 of the Income Tax Act, 1961 which relates to 'carry forward and set off of losses in case of certain companies', as follows:

“79. Carry forward and set off of losses in case of certain companies.— *Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year,—*

(a) in the case of a company not being a company in which the public are substantially interested and other than a company referred to in clause (b), no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less

than fifty-one percent of the voting power on the last day of the year or years in which the loss was incurred;

(b) in the case of a company, not being a company in which the public are substantially interested but being an eligible start-up as referred to in section 80-IAC, the loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, if, all the shareholders of such company who held shares carrying voting power on the last day of the year or years in which the loss was incurred-

(i) continue to hold those shares on the last day of such previous year; and

(ii) such loss has been incurred during the period of seven years beginning from the year in which such company is incorporated:

Provide *that nothing contained in this section shall apply to a case where a change in the said voting power and shareholding*

takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift:

Provided further that nothing contained in this section shall apply to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty-one per cent shareholders of the amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company:

[Provided also that nothing contained in this section shall apply to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), after affording a reasonable opportunity of being

*heard to the jurisdictional Principal
Commissioner or Commissioner.]”*

8. However, in view of the modification of the plan as proposed by the ‘Resolution Applicant’ (Appellant herein), we are not deliberating such issue on merit.

9. With regard to ‘right to receivables’, the Adjudicating Authority has directed that any amount recovered by the ‘Corporate Debtor’ due from any third party which has been written off as bad debts or which stands in the books but has not been recovered as on the date Adjudicating Authority approved, before being put to any other use, would be used to pay the balance amount to dissenting ‘Financial Creditors’.

10. We agree with the submissions made on behalf of the Appellant that the Adjudicating Authority has no jurisdiction to impose such conditions with regard to amount as may be recoverable by the ‘Corporate Debtor’ in future.

11. Therefore, the Appellant rightly suggested that any amount receivable by the Company, being an asset of the Company, shall continue to remain with the Company upon implementation of the ‘Resolution Plan’. After approval of the plan in terms of Section 31 of the ‘I&B Code’, it is binding on all the stakeholders, including the Creditors

and no party can claim any right against the 'Corporate Debtor' including right to set off. In fact, the 'Resolution Plan' makes the debt payable to any stakeholders/ Creditors clear and no stakeholders including the Creditors can claim any dues from the earlier period thereafter.

12. As to the determination of the issue of 'carry forward losses' of the 'Corporate Debtor', in spite of notice to the Income Tax Authority, no reply has been filed and no objection has been raised.

However, taking into consideration the submissions made by the counsel for the Appellant- 'JSW Steel Limited' and taking into consideration the provisions of the Income Tax Act, 1961, including Section 79 and the Rules and Regulations framed thereunder, we hold that both the 'Successful Resolution Applicant' and the Income Tax Department will be guided by the Income Tax Act, 1961 and the Rules and Regulations framed thereunder. If the 'Successful Resolution Applicant' is entitled to 'carry forward losses' under Section 79 of the Income Tax Act, it may claim such benefit before the appropriate Authority, who will pass appropriate order in accordance with Section 79 of the Income Tax Act, 1961 and the Rules and Regulations framed thereunder.

13. As regards the 'subsidiaries', 'associate companies' and 'joint ventures' of the 'Corporate Debtor' are concerned, if any of them had

any privilege or claim or assets to which they are entitled from the 'Corporate Debtor' prior to approval of the 'Resolution Plan', we hold that such right of privilege, claim or rights over the assets stand extinguished after the approval of the plan under Section 31.

14. In the case of **“Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors.— Civil Appeal Nos. 8766-67 of 2019 etc.”**, the Hon'ble Supreme Court by its judgment dated 15th November, 2019 observed and held:

“67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the

successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”

15. From the decision of the Hon’ble Supreme Court in “**Committee of Creditors of Essar Steel India Limited Through Authorised Signatory**” (Supra), it is clear that a successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by the Hon’ble Supreme Court.

16. However, if the ‘Corporate Debtor’ has any right over the ‘subsidiaries’ or ‘associate companies’ or ‘joint ventures’ of the ‘Corporate Debtor’, once the ‘Successful Resolution Applicant’ takes over the ‘Corporate Debtor’, it is for the ‘Corporate Debtor’ to decide whether they will continue with such right over the ‘subsidiaries’ or ‘associate companies’ or ‘joint ventures’ and others. For such right, the

Adjudicating Authority is not required to make any such suggestion nor can lay down any condition

17. In view of the discussions as made above, the part of the impugned order dated 19th December, 2018 so far as it relates to laying down conditions by the Adjudicating Authority is concerned, are set aside and deleted and substituted with clarification as made above. The rest part of the impugned order dated 19th December, 2018 as clarified vide order dated 16th April, 2019 approving the 'Resolution Plan' in favour of the Appellant is confirmed.

The appeal is allowed with aforesaid observations. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI
4th December, 2019

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