
(2021) 12 NCLT CK 0063
In the National Company Law Tribunal
Case No : IA(I.B.C) 2025 Of 2021

Union Bank of India

APPELLANT

Vs

Vandana Garg

RESPONDENT

Date of Decision : 23-12-2021

Acts Referred:

Insolvency & Bankruptcy Code, 2016 — Section 7, 30(2)b)(ii), 31, 31(1), 53, 53(1), 60(5), 61, 62

Citation : (2021) 12 NCLT CK 0063

Hon'ble Judges : Pradeep Narhari Deshmukh, Member (J);Kapal Kumar Vohra, Member J

Bench : Division Bench

Advocate : Rathina Maravarman, Darshti Dave, Ativ Patel, Harshad Vyas, Salonee Kulkarni, Sagar Dhawan, Aishani Das, Rohan Agarwal, Rajeev Pandey, Ruben Mascreen, Malak Bhatt

Final Decision : Dismissed

Judgement

Pradeep Narhari Deshmukh, Member (Judicial)

1. Application IA 2025 has been filed by Union Bank of India (Dissenting Financial Creditor), IA 2028 has been filed by Bank of Maharashtra (Abstaining Financial Creditor) and IA 2035 has been filed by Central Bank of India (Dissenting Financial Creditor) who have prayed that the discrimination in payment under the Resolution Plan on the basis of the Assenting and Dissenting/ Abstaining Financial Creditor be modified to the extent that all Secured Financial Creditors (FCs) inter alia Applicants be treated equally for payment of plan value subject to their individual exposure with the same terms as that of Assenting FCs.

2. Facts as submitted by Applicants, among others:

a) The Company Petition (CP 1137 of 2017) filed under section 7 of the Insolvency and Bankruptcy Code 2016 (the Code) seeking Corporate Insolvency Resolution Process (CIRP) of Jyoti Structures Limited (Corporate Debtor) was

admitted by this bench on 04.07.2017. Thereafter, the Committee of Creditors (CoC) was constituted and the 1st CoC meeting was held on 10.08.2017 in which 32 FCs inter alia the applicants herein (Union Bank of India, Bank of Maharashtra, Central Bank of India) participated.

b) During CIRP, Mr. Sharad Sanghi (Resolution Applicant) had submitted a Resolution Plan along with others. Firstly, Resolution Plan was approved with 62.6% of CoC Members on 27.03.2018. After reviewing the outcome, three creditors changed their voting from Dissenting to Assenting and in addition, one more creditor who abstained on 27.03.2018 assented in favour of Resolution Plan. Thus, four more creditors constituting about 19% of CoC members made up their mind after 27.03.2018 to vote in favour of the Resolution Plan. CIRP expired on 02.04.2018. On 06.04.2018, Resolution Plan was approved with more than 81% of voting shares.

c) Resolution Professional approached this Bench for approval of Resolution Plan and the same was rejected by this bench vide its order dated 31.07.2018 as CIRP had expired by the date of approval. Thereafter, Resolution Applicant preferred an Appeal (CA 461 of 2018) before NCLAT and the same was allowed on 19.03.2019 observed that:

"In the Result, the case is remitted to the Adjudicating Authority, Mumbai Bench, Mumbai to approve the plan in terms of Section 31 of the Insolvency and Bankruptcy Code, 2016 with modification i.e. that the plan is to be implemented within the period of 12 years as offered by the 'Successful Resolution Applicant'."

Subsequently this Bench approved the Resolution Plan vide its order dated 27.03.2019.

d) Applicant further submits that in the approved Resolution Plan, there is glaring inequality in the payment between the Assenting/ Dissenting FCs and Operational Creditors (OCs). OCs are paid 10% more than that of the Dissenting/ Abstaining FCs and Assenting FCs are getting around 18 times more under the Resolution Plan.

e) The Apex Court in the matter of Committee of creditors of Essar Steel India Limited Vs. Satish Kumar Gupta held that, "equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secure or unsecure, financial or operational". Therefore, although Section 30(2)b)(ii) provides for liquidation value to be given to Dissenting FCs but that does not mean there shall be any Discrimination between the Dissenting and Assenting Creditors under similar class.

f) Applicant submitted judgment in the matter of Central bank of India vs. Resolution Professional of the Sirpur Paper Mills Ltd & Ors. where it was pointed out that Code nowhere intends to discriminate between Assenting and Dissenting FCs.

g) Hence Applicant filed present Applications on 21.09.2021 to modify the

payment under Resolution Plan to the extent that all Secured FCs are treated equally for payment of Plan value subject to their individual exposure with the same terms as that of Assenting FCs.

3. On 06.12.2021, Respondent 3 (Monitoring Committee) filed an Affidavit in reply in all three Applications stating that:

- i. Applications have been filed 2.5 years after approval of Resolution Plan.
- ii. Applications are not maintainable, as AA has no jurisdiction to modify the approved Resolution Plan.
- iii. Distribution mechanism under the Resolution Plan is a commercial decision of CoC.
- iv. Dissenting FCs are paid the liquidation value as per the terms of the Resolution Plan and in accordance with the provisions of the Code.
- v. Applicants are being paid the liquidation value which is as per the terms of the approved Resolution Plan.
- vi. Bank Guarantee (BG) invocation and the revision in the amounts of Assenting FCs are as per the terms of the Resolution Plan. Clause F (3) of the Resolution Plan specifically mentions that if a BG is issued by the lender and invoked after the approval of Resolution Plan by the AA, then the said invoked amount shall be added to the fund based debts extended by the issuing bank and Net Present Value (NPV) of the invoked BG amount will be added to the NPV of the overall amount of 3,674 crores payable to the Secured FCs. Clause F (3) of the Resolution Plan is reproduced below:

"F. Bank Guarantee/Letter of Credit Limits

3. In case any BG/LC issued on behalf of the Company is invoked by the beneficiary after the date of the approval of the Final Resolution Plan by the NCLT, the Company will be liable to make good such invocation to the issuing bank as follows:

(a) If the BG/LC was issued prior to the date of the approval of the Final Resolution Plan by the NCLT, the invoked amount will be added to fund based debt extended by the issuing bank and will be serviced on the same bank and terms alongwith the restructured repayment schedule of that fund-based debt as set out in paragraph C of this Section VI. It is clarified that NPV of the invoked BG amount to be added will be in addition to the NPV of overall amount of INR 3674 crores payable to the Secured Financial Creditor.

(b) If the BG/LC was issued after the date of the approval of the Final Resolution Plan by the NCLT, the amount of such invocation will be payable by the Company on demand, as per the terms of the BG/LC."

4. Further at the time of hearing on 06.12.2021, Counsel of Applicants was present who submitted that the Applicants in all the above three Applications

have prayed for higher share from the Resolution Applicant as part of the Resolution Plan than the share allocated in the Resolution Plan duly approved. She has drawn our attention to Section 30 (2)(b) of the Code and same was narrated at pg 19 of IA 2025 and submitted that she is entitled to get higher amount.

5. We have heard the learned Counsel for the Applicants and Respondent and have perused the pleadings and documents attached thereto. The Section 30(2) (b) of the Code reads:

"30. Submission of resolution plan. -

(1) xxxx

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) xxxx

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section

(1) of section 53 in the event of a liquidation of the corporate debtor. Explanation 1. - For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. - For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution

plan;]"

6. On perusal of the relevant provisions and after hearing the Respondent, we observed that Section 30(2)(b) of the Code provides for the payment of debts of the Dissenting FCs in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with Section 53(1) of the Code in the event of liquidation. Explanation 1 to Section 30(2)(b) of the Code further clarifies that distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

7. It is pertinent to note that the invocation of BG is as per the terms of Resolution Plan. Thus, any increase in the claim amount of the Assenting FCs due to the invocation of such BG cannot be a ground for challenge by the Dissenting FCs on grounds of discrimination. Further, the decision to include the invoked amount of the BG to the fund-based debts is a commercial decision of the CoC.

8. Further, Resolution Plan once approved by the AA shall stand frozen and binding on all stakeholders including FCs. The Hon'ble Supreme Court in the matter of Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Co. Ltd. (Civil Appeal 8129 of 2019, dated 13.04.2021) in para 95 (i) at pg. 103 held "That once a Resolution Plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor, and its employees, members, creditors, including the Central Government any State Government or any local authority, guarantors and other stakeholders."

9. It is noted that the BG invocation and the revision in the amounts of Assenting FCs is as per the terms of the Resolution Plan. Similarly, in the case of Ghanshyam Mishra (supra) it is laid down that Resolution Plan once approved by the AA shall stand frozen and shall be binding on all stakeholders including FCs. In view of this, the prayers are liable to be rejected. Hence ordered.

ORDER

IAs 2025, 2028 and 2035 of 2021 are rejected and dismissed.