

Differential Treatment Inter se Creditors – Not Permissible

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The recent judgment of Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi in the case of **Binani Industries Limited v Bank of Baroda**, has made significant observations on certain aspects pertaining to Insolvency & Bankruptcy Code, 2016 (IBC). Though the judgement contains various aspects, decided by the Hon'ble NCLAT, in this article, we wish to deliberate on the aspect which is deliberated by Hon'ble NCLAT with respect to discriminatory or differential treatment among similarly placed creditors while submission of resolution plan by resolution applicant(s). The Hon'ble NCLAT has stated that differential or discriminatory treatment among similarly placed creditors is not what is envisaged under the IBC or its regulations. Before proceeding to further examine, let's get the facts in place to appreciate the judgment.

The matter pertains to the corporate insolvency resolution process (CIRP) of Binani Cement Limited (Corporate Debtor - CD). Corporate Debtor is a flagship subsidiary of Binani Industries Limited. After the commencement of CIRP of CD, the Resolution Professional (RP) has constituted Committee of Creditors (CoC) and started accepting resolution plans. The RP has received resolution plan from one resolution applicant 'Rajputana Properties Private Limited' (Rajputana). There was also another resolution plan which was submitted by 'Ultratech Cement Limited' (Ultratech) which was not considered by CoC for various reasons.

The CoC has met to consider such resolution application of Rajputana and approved with 99.43% and approved the plan. However, 10.53% of CoC were forced to vote in favour of resolution plan after recording protest notes. The allegation of such creditors is that they have not been treated with equitably when compared with other 'Financial Creditors' who were corporate guarantee beneficiaries of CD.

The resolution plan submitted by Rajputana is considered by the Hon'ble NCLAT, which is as under:

| S No | Particulars | Voting Share | Verified Claim (In Rs Crores) | Proposed Payment (In Rs Crore) | Percentage |
|---|--|--------------|-------------------------------|--------------------------------|------------|
| 1 | Insolvency Resolution Process Costs | NA | 114.08 | 114.08 | 100% |
| 2 | Workmen Wages | NA | 18 | 18 | 100% |
| FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR | | | | | |
| 3 | Edelweiss Asset Reconstruction Company | 42.9% | 2775.82 | 2775.82 | 100% |
| 4 | IDBI Bank Limited | 5.2% | 335.85 | 335.85 | 100% |
| 5 | Bank of Baroda | 6.6% | 427.69 | 427.69 | 100% |
| 6 | Canara Bank | 5.7% | 370.34 | 370.34 | 100% |
| 7 | Bank of India | 1.5% | 94.66 | 94.66 | 100% |
| 8 | State Bank of India | 0.6% | 36.89 | 36.89 | 100% |
| FINANCIAL CREDITORS TO WHOM CORPORATE DEBTOR WAS A GURANTOR | | | | | |
| 9 | IDBI Bank Limited (Dubai Branch) | 24.2% | 1567 | 1567 | 100% |
| 10 | Export-Import Bank of India | 9.6% | 620 | 450 | 72.59% |
| 11 | State Bank of India (Hong Kong) | 0.6% | 37 | 3.7 | 10% |
| 12 | Bank of Baroda (London) | 2.7% | 172 | 172 | 100% |
| 13 | State Bank of India (Bahrain) | 0.4% | 25 | 25 | 100% |
| 14 | Syndicate Bank | 0.1% | 7 | 7 | 100% |
| OPERATIONAL CREDITORS (OTHER THAN WORKMEN) | | | | | |
| 15 | Unrelated Parties | NA | 443.23 | 151 | 33% |
| 16 | Related Parties | NA | 60.14 | Nil | NA |
| 17 | Statutory Liabilities | NA | 177.5 | 33.1 | 19.3% |
| 18 | Equity/Working Capital Infusion | NA | NA | 350 | NA |
| Total | | | 7289.05 | 6932.46 | -- |

The Hon'ble NCLAT has observed that Financial Creditors such as Edelweiss, IDBI, Bank of Baroda, Canara Bank, Bank of India and State Bank of India has been provided with 100% of verified claim. However, Rajputana has given lesser percentage to Export Import Bank [72.59%] and State Bank of India (Hong-Kong) [10%]. The discrimination has been justified by Rajputana by stating that some of the financial creditors have direct exposure to the CD and whereas the other financial creditors are just guarantors to the CD. The Hon'ble NCLAT even observed that among the guarantors, certain financial creditors were proposed to be paid in full and others at a haircut which leads to discrimination in creditors who are similarly placed.

The counsel appearing for Rajputana tried to justify the discrimination by stating that EXIM bank has been allotted 72.59% for the reason, that the principal borrower Binani Industries Limited is also facing CIRP and regarding State Bank of India (Hong Kong), the amounts cannot be paid in full because they were never granted opportunity to undertake diligence of underlying plants in China and no opportunity to appropriately analyze the commercial viability.

The counsel appearing for the EXIM bank has stated that they have voted in favour of the resolution plan because failing so, the resolution applicant stated that they will pay them only liquidation value amounting to almost Nil and nothing more.

The Hon'ble NCLAT has referred to the judgment passed by the same Tribunal in the case of Central Bank of India v Resolution Professional of the **Sirpur Paper Mills Limited & Others** – Company Appeal (AT) (Insolvency) No. 526 of 2018, wherein it was held that Regulation 38(1)(b) and (c) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016¹ are inconsistent with the provisions of IBC and accordingly found to be void. The Hon'ble NCLAT has further stated that any resolution plan which provides for liquidation value to operational creditors or dissenting financial creditors without any other reason to discriminate between two set of creditors similarly placed such as financial creditors or operational creditors cannot be approved being illegal. Keeping the above in mind, the Hon'ble NCLAT has framed the following question to be addressed – ***Whether the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' is discriminatory?***

To answer the above, Hon'ble NCLAT has also pursued another resolution plan(revised) submitted by Ultratech which was not considered by CoC for discriminatory reasons. The Hon'ble NCLAT after perusing the process document and various timelines in which Ultratech has submitted its resolution plan stated that CoC acted without application of mind and the discrimination in approving the resolution plan submitted by Rajputana is apparent. The Hon'ble NCLAT further observed that the revised resolution plan submitted by Ultratech is in excess to the tune of Rs. 203.1 Crores (approx.), in comparison with the revised resolution plan submitted by Rajputana, favouring the financial creditors. The Hon'ble NCLAT also perused the terms of resolution plan submitted by Ultratech:

| S No | Particulars | Verified Claim (In Rs Crores) | Proposed Payment (In Rs Crore) | Interest |
|---|--|----------------------------------|-----------------------------------|----------|
| 1 | Insolvency Resolution Process Costs | 115.91 | 115.91 | NA |
| 2 | Workmen Wages | 18.01 | 18.01 | NA |
| FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR | | | | |
| 3 | Edelweiss Asset Reconstruction Company | 2775.82 | 2775.82 | 217.63 |
| 4 | IDBI Bank Limited | 335.85 | 335.85 | 26.33 |
| 5 | Bank of Baroda | 427.69 | 427.69 | 33.53 |
| 6 | Canara Bank | 370.34 | 370.34 | 29.03 |
| 7 | Bank of India | 94.66 | 94.66 | 7.42 |

¹ After the above judgment, IBBI has amended the said Regulation having found it discriminatory

| | | | | |
|--|--|----------------|----------------|--|
| 8 | State Bank of India | 36.89 | 36.89 | 2.89 |
| 9 | Oriental Bank of Commerce | 0.72 | 0.72 | 0.06 |
| FINANCIAL CREDITORS TO WHOM CORPORATE DEBTOR WAS A GURANTOR | | | | |
| 9 | IDBI Bank Limited (Dubai Branch) | 1567 | 1567 | Interest will be paid @ 10% pa quarterly rests if the same is not being paid to the creditor |
| 10 | Export-Import Bank of India | 619.95 | 619.95 | 48.6 |
| 11 | State Bank of India (Hong Kong) | 36.82 | 36.82 | Interest will be paid @ 10% pa quarterly rests if the same is not being paid to the creditor |
| 12 | Bank of Baroda (London) | 171.57 | 171.57 | 13.45 |
| 13 | State Bank of India (Bahrain) | 24.56 | 24.56 | 1.93 |
| 14 | Syndicate Bank | 7.05 | 7.05 | 0.55 |
| OPERATIONAL CREDITORS (OTHER THAN WORKMEN) | | | | |
| 15 | Unrelated Parties | 438.13 | 438.13 | Nil |
| 16 | Related Parties | 60.14 | Nil | Nil |
| 17 | Statutory Liabilities | 177.5 | 177.5 | Nil |
| 18 | Equity/Working Capital Infusion | NA | 350 | NA |
| Total | | 7289.05 | 7568.89 | 381.62 |
| Total amount with interest | | | | 7950.34 |

The Hon'ble NCLAT has observed that on a perusal of both the resolution plans, it is evident that the resolution plan submitted by Rajputana has discriminated some of the Financial Creditors who are equally situated and not balanced other stake holders, such as operational creditors and accordingly upheld the order of adjudicating authority (National Company Law Tribunal – NCLT) who found the resolution plan submitted by Rajputana was discriminatory.

The counsel for Rajputana also stated that the process of Insolvency Resolution is in the domain of CoC and jurisdiction of the NCLT is limited. He also stated that CoC, RP and Resolution Applicants are bound by 'process document' which was prepared under the mandate of Section 25(2)(h) of IBC. The Hon'ble NCLAT has stated adherence to process document and non-adherence to provision of Section 25(2)(h) will render the whole process illegal and stated various instances wherein the CoC has ignored the provisions of Section 25(2)(h).

The Hon'ble NCLAT then proceeded with an important observation that the ***maximization of value of assets of the corporate debtor cannot be ignored nor it can be ignored that the same should balance all the stakeholders. If the operational creditors are ignored and provided with 'liquidation value' on the basis of misplaced notion and misreading of Section 30(2)(b) of 'I&B Code', then in such case no creditor will supply the goods or render services on credit to any 'Corporate Debtor'. All those who will supply goods and provide services, will ask for advance payment for such supply of goods or to render services which will be against the basic principle of 'I&B Code' and will also affect the Indian economy. Therefore, it is necessary to balance the 'Financial Creditors' and the 'Operational Creditors' while emphasizing on maximization of assets of 'Corporate Debtor'. Any 'Resolution Plan' if shown to be discriminatory against one or other***

'Financial Creditor' or the 'Operational Creditor', such plan can be held against the provisions of the 'I&B Code'.