IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 1129/2019 in CP(IB)1137(MB)/2017

(Under IBC, 2016)

Ms. Vandana Garg

… Applicant

In the matter of

State Bank of India …Petitioner

V/s

Jyoti Structures Limited

… Corporate Debtor

Order delivered on 27.3.2019

Coram:

Hon'ble Shri V.P. Singh, Member (Judicial)

Hon'ble Shri RavikumarDuraisamy, Member (Technical)

For the Applicant: Mr Sahil Mahajan, Counsel a/w Vandhana Garg, RP.

For Dissenting Financial Creditor: Adv. Shubhabrata Chakraborti a/w Mr Vaibhav i/b Juris Corp for DBS Bank

For Resolution Applicant: Sr. Adv. Soli Cooper, i/b Adv. Akash Menon

Per V.P. Singh, Member(Judicial) and Ravikumar Duraisamy, Member (Technical)

ORDER

MA 1129/2019 has been filed to take on record the order dated 19.3.2019 passed by Hon'ble NCLAT under Rule 11 and any other applicable provisions of NCLT Rules, 2016 about the application No.491/2018 for approval of the resolution plan.

2. MA 491/2018 has been filed by the Resolution Professional about CP No.1137/2017 under Section 60(5) and 30(6) of IBC, 2016. The said application was disposed of by the common order of this Bench dated 31.7.2018, whereby this Tribunal dismissed MA 491/2018 and imposed a cost of Rs.50,000/- payable by the Resolution professional to NCLT. This order was challenged before the Hon'ble NCLAT and Hon'ble NCLAT has passed an order in **Company Appeal (AT) (Insolvency) No. 548 of 2018**, dated 19.3.2019. The relevant portion of the order is given below for ready reference:

> *"24. In view of the aforesaid findings and as we have already held that the 'Resolution Process' took place within 270 days* ***and the 'Committee of Creditors' had the jurisdiction to change its opinion in favour of the 'Resolution Plan' to make it a success and Regulation 26(2) being directory which also stands deleted, we set aside the impugned order*** *and* ***hold that the 'Resolution Plan' being in conformity with Section 30(2) warranted approval by the Adjudicating Authority****.*
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> *25. However,* ***we make it clear that to make the 'Resolution Process' successful****, though it is open to the 'Committee of Creditors' to change its opinion by assenting in favour of one or other plan, we further hold that the 'Committee of Creditors' once voted in favour of the 'Resolution Plan' cannot change its views.*
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> ***26. 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'. The appropriate order be passed on an early date preferably within two weeks from the date of the production of the copy of this order."***

4. Resolution Professional has filed the copy of the NCLAT's order on 26.3.2019 and the matter is listed today.

5. We have heard the argument of the Ld. Counsel representing the Resolution Professional and Counsel representing the Dissenting Financial Creditor.

6. Counsel representing the Dissenting Financial Creditor submitted that he needs time for filing appeal against the order passed by Hon'ble NCLAT.

7. It is pertinent to mention that Hon'ble Supreme Court in case of K. Sashidhar vs. Indian Overseas Bank has held that :

> "*38. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors.* ***Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.***
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> ***39. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.*** *The fact that substantial or majority percent of financial creditors have accorded*

approval to the resolution plan would be of no avail, unless the approval is by a vote ofnot less than 75% (after amendment of 2018 w.e.f.06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% inOctober, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection. 40. Notably, the threshold of voting share of the dissenting financial creditors for rejecting the resolution plan is way below the simple majority mark, namely not less than 25% (and even after amendment w.e.f. 06.06.2018, 44%). Thus, the scrutiny of the resolution plan is required to pass through the litmus test of not less than requisite (75% or 66% as may be applicable) of voting share - a strict regime. That means the resolution plan must appear, to not less than requisite voting share of the financial creditors, to be an overall credible plan, capable of achieving timelines specified in the Code generally, assuring successful revival of the corporate debtor and disavowing endless speculation.

41. The counsel appearing for the resolution applicant and the stakeholders supporting the resolution plan of the concerned corporate debtor, were at pains to persuade us to take a view that voting by the dissenting financial creditors suffers from the vice of being unreasonable, irrational, unintelligible and an abuse of exercise of power. The power bestowed on the financial creditors to cast their vote under Section 30(4) is coupled with a duty to exercise that power with utmost care, caution and

reason, keeping in mind the legislative intent and the spirit of the I&B Code - fullest attempt should be made to revive the corporate debtors and not to mechanically shove them to the brink of liquidation process, which has the inevitable impact on larger public interests and the stakeholders in particular, including workers associated with the company.

42. The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground - to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. ***Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code****. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoCmuchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority."*

8. In the above case, Hon'ble Supreme Court has held that the judicial scrutiny of the approved resolution plan can only be done under the parameters of Section 30(2) and 31(1) of the IBC, 2016. Hon'ble Supreme Court has further held that no corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoCmuchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.

9. Given the decision of Hon'ble Supreme Court in the matter of *K. Sashidhar vs Indian Overseas Bank (supra)*, it is clear that the judicial scrutiny of the approved resolution plan can only be done under the parameters of Section 30(2) and 31(1) of the IBC, 2016.

10. Hon'ble NCLAT has already held that **"resolution plan being in conformity with Section 30(2) warranted approval by the Adjudicating Authority.** Hon'ble NCLAT has further directed the Adjudicating Authority **to approve the plan in terms of Section 31 of IBC with modification that the plan is to be implemented within the period of 12 years as offered by the successful resolution applicant.**

11. In this case the resolution plan has been approved by the Committee of Creditors with requisite majority and Hon'ble NCLAT has already held that the resolution plan is in conformity with Sec 30(2) of the I & B Code 2016 and has given the specific direction to approve the plan in terms of Section 31 of IBC with modification that the plan is to be implemented within the period of 12 years as offered by the successful resolution applicant.It is pertinent to

mention that given the law laid down by Hon'ble Supreme Court in K Shashidhar (supra) scope of judicial review by Adjudicating Authority is limited. Adjudicating Authority can scrutinise the approved Resolution Plan only under parameters of Sec 30(2) and Sec 31 of the Code and Hon'ble NCLAT has already given a finding that Resolution Plan conforms with the provision of Sec 30(2) of the Code. Given the Directions of Hon'ble NCLAT we as adjudicating Authority we at this moment approve the resolution plan in terms of Sec 31 of the I & B Code 2016.

12. Designated Registrar is directed to communicate this order immediately to the Resolution professional, Successful Resolution Applicant and the Dissenting Financial Creditor by way of email and submit the compliance on 28.3.2019.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

V. P. SINGH
Member (Judicial)