

## Resolution Plan Not to Discriminate Against One or Other 'Financial Creditor' or 'Operational Creditor': Rules NCLAT

written by Rajdev Singh | January 12, 2019

### Introduction

Hon'ble

National Company Law Appellate Tribunal ("NCLAT") in the case of Binani Industries Limited V. Bank of Baroda & Anr. on November 14, 2018 along with other

connected matters has pronounced its ruling and has upheld the revised resolution plan submitted by UltraTech Cement Limited ("UltraTech") for Binani

Cements Limited and has further held that the resolution plan submitted by the

rival contender being Dalmia Bharat Led Rajputana Properties Pvt. Ltd.

("Rajputana") to be "unbalanced and discriminatory" in nature. The Rajputana moved to the Supreme Court and challenged the order of NCLAT, whereby, the Apex

Court rejected the said plea by enunciating no interference and thereby, upheld

the order passed by NCLAT.

### Background

On the basis of invitation received by the Resolution Professional, Mr. Vijay Kumar Iyer ("Resolution Professional") for initiating "Corporate Insolvency Resolution Process" against Binani Cements Limited ("Corporate Debtor"), various resolution plans were submitted by various creditors including Rajputana and UltraTech. On March 8, 2018, UltraTech submitted a 'Resolution Plan' including revised offer ("Revised Plan") but the committee of

creditors failed to consider the revised offer properly and approved the resolution plan submitted by Rajputana ("Resolution Plan") in a meeting of committee of creditors held on March 14, 2018.

The Resolution Professional then filed an application under section 30 and 31 of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Regulation

39 of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 ("Regulation") for approval of

the said Resolution Plan for Corporate Debtor. The Adjudicating Authority noticed that the said Resolution Plan was approved with 99.43% voting which is

inclusive of 10.43% voting by committee of creditors who were forced to vote in

favour of the said plan. The 10.43% of committee of creditors recorded a protest note alleging that they had not been dealt equitably when compared with

financial creditors. The Adjudicating Authority also noticed that the Revised Plan was not properly considered by the committee of creditors even though it was submitted much before March 14, 2018.

When the Resolution Professional filed the said application for approval of Resolution Plan of Rajputana with Hon'ble National Company Law Tribunal, Kolkata bench, ("NCLT") it was observed that number of objections

were filed by various stakeholders, raising various issues including discriminatory treatment of certain financial creditors and operational creditors. As such, the NCLT held that the Resolution Plan was discriminatory and contrary to the scheme of IBC and further directed the committee of creditors to consider the other resolution plan, including the Revised Plan.

After NCLT's decision by impugned order dated May 2, 2018, the committee of creditors' held in its 17th Meeting on May 28, 2018 and considered

the Revised Plan. It was put to vote and all members of the committee of creditors'

by 100% voting shares, voted in favour of the Revised Plan.

The matter however reached NCLAT and eventually an appeal was preferred against the order of the NCLAT to the Supreme Court.

Issues Involved

Whether the committee of creditors discriminated between the eligible resolution applicants, while considering the Resolution Plan? and;

Whether the Resolution Plan submitted by Rajputana is discriminatory in nature?

Analysis of Issues:

The NCLAT while passing the said Order dated November 14, 2018, had considered the issues involved and taken into account the objective of IBC, objective of Resolution, financial creditors as members of the committee of creditors and their role and had thus made following observations which are summarised as below:

The liabilities of all creditors who are not part of committee of creditors must also be met in the resolution. The financial creditors can modify the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospectus. That is, financial creditors can take haircut and can take their dues in future, while operational

creditors need to be paid immediately. A creditor cannot maximise his own interests in view of moratorium.

If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit. The IBC aims to balance the interests of all

stakeholders and does not maximise value for financial creditors. Therefore, the dues of creditors of operational creditors must get at least similar treatment as compared to the due of financial Creditors'.

The resolution plan is distinguishable from sale, auction, recovery and liquidation. The NCLAT on the basis of above said observations held as under:

The committee of creditors discriminated the Resolution Plan with the other 'Resolution Applicants' which is evident from the fact that the better proposal i.e. the Revised Plan given by UltraTech was not at all considered even though it was submitted on March 8, 2018 i.e. much prior to the approval of the said Resolution Plan on March 14, 2018. The Adjudicating Authority has rightly rejected the plea or objections taken by the committee of creditors by

detailed order.

The committee of creditors not only failed to safeguard the interest of

the stakeholders of the Corporate Debtor while approving the Resolution Plan, but has also ignored the Revised Plan offered by UltraTech which has taken care

of maximization of the assets of the Corporate Debtor and also balanced the claim of all the stakeholders of the Corporate Debtor. The NCLAT has thus held

that the non-application of mind by the committee of creditors and discriminatory behaviour in approving the Resolution plan is apparent.

The NCLAT has observed that all the resolution plan which meets the requirements of section 30(2) of the IBC are required to be placed before the committee of creditors and the resolution professional can review the resolution plan and the committee of creditors is entitled to negotiate and modify with consent of the resolution applicant. To apply this clause there is

no time limit prescribed except that the resolution process should be completed

within the stipulated period of 180 days or maximum 270 days.

Rajputana in its Resolution Plan has discriminated some of the financial creditors who are equally situated and not balanced other stakeholders, such as operational creditors. Therefore, the Adjudicating Authority has rightly held the Resolution Plan submitted by Rajputana to be discriminatory.

While emphasizing on maximization of the assets of the corporate debtor, it is necessary to balance the financial creditors and the operational

creditors. Any resolution plan if shown to be discriminatory against one or other financial creditors or the operational creditors, such plan can be held to be against the provisions of IBC.

The NCLAT has thus approved the Revised Plan submitted by UltraTech which has been approved by the committee of creditors in its 17th meeting held

on May 28, 2018, which shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Supreme Court Order:

The Dalmia Bharat Group Firm had approached the Supreme Court challenging the NCLAT order allowing rival UltraTech Cement to acquire debt-ridden Corporate Debtor. The Apex Court has upheld the order of NCLAT vide

its order dated November 19, 2018 stating that there is no infirmity in the NCLAT's order.

Recently, in a different matter filed by King Stubb & Kasiva, on behalf of Daimler Financial Services India Pvt. Ltd, the Hon'ble NCLAT has reiterated its ruling in Daimler Financial Services India Pvt. Ltd. Vs. Cosmic Ferro Alloys Ltd. & Ors. wherein it has considered the observation of

the counsel for financial creditor that the resolution plan submitted by United

Tredco FZC have discriminated between similarly situated financial creditors, which is against the decisions of the Hon'ble Tribunal in Binani Industries Ltd. V. Bank of Baroda & Anr. and has issued notice and held that the

implementation of said resolution plan shall be subject to this Appeal.

Conclusion:

The principle emerging from NCLAT ruling is that the committee of creditors should always follow a fair and transparent procedure to select the resolution plan pursuant to the objective of the IBC i.e. the maximization of value of assets of the corporate debtor. Further, the resolution plan should not be discriminatory against one or other financial creditors or the operational creditors, else the same can be held to be against the provisions of IBC. However, from the said ruling of NCLAT the question of whether discrimination can be done between the secured and unsecured financial creditors as they are not similarly situated is still left unanswered.

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