

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 47 of 2019

IN THE MATTER OF:

M/s. Kotak Mahindra Prime Ltd. ...Appellant

Versus

Mr. Bijay Murmuria & Ors. ...Respondents

Company Appeal (AT) (Insolvency) No. 48 of 2019

IN THE MATTER OF:

M/s. Kotak Mahindra Investment Ltd. ...Appellant

Versus

Mr. Bijay Murmuria & Ors. ...Respondents

Company Appeal (AT) (Insolvency) No. 49 of 2019

IN THE MATTER OF:

M/s. Kotak Mahindra Prime Ltd. ...Appellant

Versus

Mr. Bijay Murmuria & Ors. ...Respondents

Company Appeal (AT) (Insolvency) No. 50 of 2019

IN THE MATTER OF:

M/s. Kotak Mahindra Investment Ltd. ...Appellant

Versus

Mr. Bijay Murmuria & Ors. ...Respondents

Present:

For Appellant(s) : Mr. P. Nagesh, Mr. Dhruv Gupta, Mr. Mahip Datta, Advocates.

For Respondents: Mr. Abhijeet Sinha, Mr. Sanjay Bhatt and Ms. Niharika Sharma, Advocates for R-3.
Mr. K. Dutta, Ms. Srishti Kapoor, Mr. Akshit Kapoor, Advocates for R-1.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In all these appeals as common impugned order dated 7th December, 2018 is under challenge and common question of law involved, they were heard together and are being disposed of by this common judgment.

2. The brief case of the Appellant(s) is that Appellant(s) entered into 'Term Loan Agreement(s)' on 8th March, 2008 with the 'M/s. Kitply Industries Limited' ('Corporate Debtor') for a sum of Rs. 6.03 Crore whereby the Appellant(s) advanced the said sum of Rs. 6.03 Crore to the 'Corporate Debtor' which was to be repaid by 13th December, 2009 along with interest @ 12% per annum and 24% (penal) and Liquidated Damages @ 24%. On 19th February, 2010, upon the failure of the 'Corporate Debtor' to pay back the loan amount to the Appellant(s), the Appellant(s) sent Demand Notice against the 'Corporate Debtor' for the outstanding financial debt of Rs. 8,13,37,961/- along with interest and liquidation damages.

3. The 'Corporate Debtor' sent a reply dated 31st March, 2010 denying the liability to pay the outstanding debts as claimed by the Appellant(s) Company. Upon failure of the 'Corporate Debtor' to pay back the loan amount to the Appellant(s), the Appellant(s) sent Statutory Notice against the 'Corporate Debtor' on 30th April, 2010 for the outstanding financial debt under Sections 433 and 434 of the Companies Act, 1956 demanding their respective debt amounts with interest and liquidation damages.

4. Based on the notice dated 30th April, 2010, the 'Corporate Debtor' filed a suit before the Hon'ble High Court of Kolkata seeking direction to convert the entire amount outstanding into equity shares. According to the Appellant(s), the main contention of the 'Corporate Debtor' was that the Appellant(s) and the 'Corporate Debtor' had an oral Agreement that the entire Term Loan would be converted into equity shares, after sanction of the scheme of Arrangement, pending, on the file of the Hon'ble Guwahati High Court.

5. With reference to the Arbitration Clause No. 11.3 of the 'Term Loan Agreement' between the parties, the Appellant(s) Company filed an application before the Hon'ble Calcutta High Court under Section 8 of the Arbitration & Conciliation Act, 1996. The Application under Section 8 was dismissed by the Hon'ble High Court vide its order dated 10th September, 2010. The Appellant(s) Company filed an appeal against the order dated 10th September, 2010 which was dismissed by the Hon'ble High Court of Calcutta vide its order dated 17th August, 2011. The Appellant(s) Company filed a Special Leave Petition bearing No. 21492/2012 before the Hon'ble

Supreme Court against the order dated 17th August, 2011 passed by the Hon'ble High Court of Calcutta. The SLP bearing No. 21492/2012 later got converted into a Civil Appeal bearing No. 165 of 2014 and vide its Order dated 7th January, 2014, the Hon'ble Supreme Court set aside the order dated 10th September, 2010 and further remanded back the matter to the Hon'ble High Court of Calcutta for fresh consideration of the Application filed under Section 8 of the Arbitration & Conciliation Act, 1996. Thereafter, the Hon'ble High Court of Calcutta vide its order dated 13th June, 2016 referred the Appellant(s) Company and the 'Corporate Debtor' to Arbitration in terms of the 'Term Loan Agreement' dated 8th March, 2008.

6. It is stated that while Arbitration Proceeding is pending, in November, 2017, the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 was preferred by the 'IDBI Bank' for initiation of the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor', which was admitted on 1st May, 2018. For the said reason, Learned Arbitrator by order dated 11th August, 2018 adjourned the Arbitration Proceedings *sine die*.

7. According to the Appellant(s), they have no knowledge of the order of admission dated 1st May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, but subsequently they having come to know on 27th August, 2018 and filed their respective claims in Form C before the 'Resolution Professional' claiming their respective amounts.

8. The 'Resolution Professional' refused to entertain their claim by order dated 1st September, 2018 as the claims were not filed within time as per

the Regulation 12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Appellant(s) filed an Interlocutory Application No. 88 of 2018 under Section 60(5) of the 'I&B Code' for directing the 'Resolution Professional' to take into consideration the claim with proof filed by the Appellant(s) in Form C.

9. The 'Resolution Plan' submitted by 'SREI Multiple Asset Investment Trust (Vision India Fund)' was approved by the 'Committee of Creditors' on 20th October, 2018 with 92.74% voting shares. The Adjudicating Authority thereafter by impugned order dated 7th December, 2018 approved the 'Resolution Plan' under Section 31 of the 'I&B Code'.

10. The Interlocutory Application No. 88 of 2018 which was preferred by the Appellant(s) was rejected by the Adjudicating Authority on 21st December, 2019. However, none of the aforesaid order of rejection has been challenged in these appeals.

11. Learned counsel for the Appellant(s) while contended that the 'Resolution Plan' is against the provisions of Section 30(2) of the 'I&B Code', it was contended that the 'Resolution Plan' does not take care of the claims filed by the Appellant(s)- ('Financial Creditor(s)').

12. In the alternative, it was submitted that the Appellant(s) may also pursue the Arbitration Proceeding in terms of sub-section (6) of Section 60 of the 'I&B Code'.

13. On 3rd September, 2019, the 3rd Respondent ('Successful Resolution Applicant') provided revised offer to the Appellant(s) which was taken into consideration by this Appellate Tribunal and observed that the offer appears to be justified. The Appellant(s) were given opportunity to accept the same, failing which the appeal may be determined on merit.

14. On 19th September, 2019, when the matter was taken up, learned counsel appearing on behalf of 3rd Respondent- 'SREI Multiple Asset Investment Trust (Vision India Fund)' submitted that that 3rd Respondent will take into consideration the claim filed by the Appellant(s) and provide the same treatment as has been given to the similarly situated 'Financial Creditors'.

15. Learned counsel for the Appellant(s) suggested that they should be allowed to continue with the Arbitration Proceeding. However, the 'Resolution Applicant' wants to get the matter finally settled at the stage of Resolution itself.

16. This Appellate Tribunal allowed the 3rd Respondent to file an Affidavit enclosing a copy of distribution chart showing the distribution as made in favour of the 'Financial Creditors'.

17. Learned counsel for the 3rd Respondent ('Successful Resolution Applicant') submitted that earlier 3rd Respondent paid a sum of Rs.3,02,000/- to the Appellants which they returned and now 3rd Respondent is ready to provide more than Rs.31,87,829/- on the basis of the claim made by the Appellants.

18. It was in this background, this Appellate Tribunal decided to look into the plan including the revised offer given by the 3rd Respondent ('Successful Resolution Applicant').

19. The revised offer given by the 3rd Respondent ('Successful Resolution Applicant') is based on the amount as distributed among other situated 'Financial Creditors'. In this circumstance, we are of the view that the Appellant(s) should have accepted the same instead of agitating to litigate the matter by allowing them to continue with the Arbitration Proceeding.

20. Sub-section (6) of Section 60 reads as follows:

“60. Adjudicating Authority for corporate persons.—(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”

21. As per the aforesaid provision, it is always open to a Creditor to proceed with the suit or arbitration proceeding, if pending, on completion of the Moratorium. However, once a Creditor/'Financial Creditor' or 'Operational Creditor' files its claim before the 'Resolution Professional' and the same is taken into consideration by the 'Successful Resolution

Applicant' and while submitting the plan or the revised plan providing them same treatment as has been given to the other similarly situated 'Financial Creditors'/ 'Operational Creditors', the 'Financial Creditors'/ 'Operational Creditors', thereafter cannot take the benefit of sub-section (6) of Section 60 of the 'I&B Code' nor they can pray to pursue the suit or arbitration proceeding or to file a fresh suit or arbitration proceeding for the same claim.

22. Section 31 of the 'I&B Code' reads as follows:

“31. Approval of resolution plan.- (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, [including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan.

[PROVIDED that the Adjudicating Authority, before passing an order for approval of resolution plan under

this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

PROVIDED that where the resolution plan contains a provision for combination as referred to in

section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the Committee of Creditors.”

23. In terms of Section 31, once the ‘Resolution Plan’ is found to be in accordance with Section 30(2) and is duly approved by the Adjudicating Authority, it is binding on all the stakeholders including the ‘Financial Creditor’/ ‘Operational Creditor’ and the ‘Corporate Debtor’ etc. The approved ‘Resolution Plan’ including the revised ‘Resolution Plan’, as per offer as inconsonance with Section 30(2) of the ‘I&B Code’, the Appellants cannot be allowed to pursue the alternative remedy of suit or arbitration proceeding even if it is pending.

24. In this background, we direct the 3rd Respondent (‘Successful Resolution Applicant’) to provide Appellant(s) with the same treatment as has been given to the other similarly situated ‘Financial Creditors’ and pay pro-rata amount i.e., same percentage of claim amount, as made available to other similarly situated ‘Financial Creditors’.

25. In view of the aforesaid findings and directions given above, no further relief can be granted.

All these appeals stand disposed of with aforesaid observations and directions. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

NEW DELHI

13th November, 2019

/AR/