

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No.514 of 2023

[Arising out of Order dated 18.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Cuttack Bench, in IA (IB) No. 29/CB/2023, IA (IB) No. 39/CB/2023, IA (IB) No. 55/CB/2023, IA (IB) No. 62/CB/2023 in CP (IB) No. 34/CB/2021]

IN THE MATTER OF:

OCEAN CAPITAL MARKET LTD.

Registered office at:

A/6, Commercial Estate,
Civil Township, Rourkela,
Orissa-769004

....Appellant

Vs.

1. UDAY NARAYAN MITRA

Former Resolution Professional of
ARSS Infrastructure Projects Ltd.

Having office at:

72/1, Dawnagazi Road,
Bally, Kolkata-711201.

2. STATE BANK OF INDIA

Stressed Asset Management Branch

Having office at:

Head Office at State Bank Bhavan,
Nariman Point, Madame Cama Road,
Mumbai 400021

Also at:

SAMB-II, Kolkata, at 1,
Middleton Street, Kolkata-700071

3. PAYAL AGARWAL

Liquidator of ARSS Infrastructure Projects Ltd.

Having office at:

Old College Lane, Nimchouri,

Cont'd.../

near Odisha High Court,
Cuttack, Orissa, 753002.

4. Punjab National Bank

Having office at:
Plot No-4, Sector-IO, Dwarka,
New Delhi-110075

Also at:

Zonal Sastra Centre,
Pokhariput, Plot No-J/3,
Revenue Plot No.-1152, Jagamara,
Bhubaneswar-751030

5. Bank of India

Having office at:
Star House, C-5, G-Block,
Bandra - kurla Complex,
Bandra (East), Mumbai-400051

Also at:

Star House, 1/1D Nayapalli,
Bhubaneswar-751015.

6. KOTAK MAHINDRA BANK

Having office at:
27 BKC, G Block, Bandra Kurla Complex,
Bandra (East), Mumbai-400051

Also at:

1st Floor, Plot No. 461, Lewis Road,
Bhubaneswar, 751016.

7. ICICI BANK LIMITED

Registered Address:
ICICI Bank Tower,
Near Chakli Circle,
Old Padra Road,
Vadodara, Gujarat-390007.

8. IDBI BANK LIMITED

Registered Address:
IDBI Tower, WTC Complex,
Cuffe Parade Mumbai,
Maharashtra-400005.

9. EDELWEISS ASSET RECONSTRUCTION COMPANY

Registered Address:
Edelweiss House, Off. C.S.T Road,
Kalina, Mumbai, Maharashtra-400098

....Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate with Mr. Kaustubh Prakash, Ms. Hita Sharma, Mr. Lavish Sharma, Ms. Diksha Gupta, Advocates.

For Respondents: Mr. Abhijeet Sinha, Mr. Anand Varma, Ms. Apoorva Pandey and Mr. Ayush Gupta, Advocates for R-1.

Mr. Ankit Raj and Mr. Piyush Beriwal, Advocates for R-4.

Mr. Aditya Kumar, Advocate for R-5.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Successful Resolution Applicant challenging the order dated 18.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Cuttack Bench by which order the application filed by the Resolution Professional for approval of the Resolution Plan of the Appellant has been rejected and the IAs filed by the Dissenting Financial Creditors objecting the plan have been allowed. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- (i) In the CIRP of Corporate Debtor - ARSS Infrastructure Projects Ltd., Resolution Plan submitted by the Appellant was deliberated in the meeting of the CoC held on 30.11.2022 and as result of the voting in favour of the plan by 76.67%, the plan was approved.

- (ii) The Resolution Professional filed an application I.A. No. 29 of 2023 before the Adjudicating Authority for approval of the Resolution Plan approved by the CoC.
- (iii) Punjab National Bank, who was a Dissenting Financial Creditor having 16.47% vote share filed an objection to the Resolution Plan vide I.A. No. 39 of 2023.
- (iv) Bank of India, another Dissenting Financial Creditor having vote share of 3.16% filed objection to the Resolution Plan vide I.A. No. 55 of 2023.
- (v) Another Dissenting Financial Creditor, Kotak Mahindra Bank Ltd. having 0.64% vote share also filed his objection by I.A. No. 62 of 2023.
- (vi) The Adjudicating Authority by the impugned order allowed the objections by the Dissenting Financial Creditors and rejected the application filed by the Resolution Professional for approval of the Resolution Plan. The Adjudicating Authority took the view that the Resolution Plan which provided for assignment of securities of Dissenting Financial Creditors to the Resolution Applicant is contrary to provisions of Section 128 of the Contract Act, hence, objections filed by the Dissenting Financial Creditors deserve to be allowed. The Successful Resolution Applicant aggrieved by the said order has come up in this Appeal.

2. We have heard learned counsel for the parties.

3. Shri Arun Kathpalia, learned senior counsel appearing for the Appellant submits that in the Resolution Plan relevant clause which provide for assignment of security interest in favour of the Appellant was voted upon by the CoC and no objection was raised at any point of time by the Dissenting Financial Creditors about the aforesaid. It is submitted that plan also includes additional payment of Rs.40 Crores for assignment of securities. Shri Kathpalia, however, submits that in any view of the matter the Successful Resolution Applicant has filed an undertaking by an affidavit on 20.02.2023 that securities of the Dissenting Financial Creditors shall not be assigned and they shall be allowed to retain their securities. In view of the aforesaid affidavit, the objections of the Dissenting Financial Creditors were fully satisfied and there was no reason for allowing the objections of the Dissenting Financial Creditors by rejecting the Resolution Plan of the Appellant. Learned counsel for the Appellant further submits that Appellant are also ready and willing to submit an Addendum incorporating the undertaking of the Appellant by way of Addendum to the Resolution Plan which may be considered by the CoC and thereafter plan be placed for approval afresh before the Adjudicating Authority.

4. Learned counsel appearing for the Punjab National Bank, Bank of India and Kotak Mahindra Bank submitted that the affidavit submitted by the Appellant on 20.02.2023 was not sufficient to allay the objections of the Respondents. The Resolution Plan required modification and as submitted before the Adjudicating Authority on behalf of the Bank, the Resolution Plan ought to have sent back to the CoC for consideration of Revised Plan. Learned

counsel for the Bank submits that in event, by Addendum the clause which require assignment of securities of Dissenting Financial Creditor to the Resolution Applicant is modified, the objection of the Respondents shall be satisfied.

5. We have considered the submissions of the parties and perused the record.

6. The objection which was raised by the Dissenting Financial Creditor before the Adjudicating Authority, has been noticed in detail by the Adjudicating Authority. The submission on behalf of the Resolution Applicant to modify the plan and not to demand release of the Personal and Corporate Guarantees of dissenting and absenting financial creditors has also been noted in Para 35 of the judgment, which is to the following effect:

“35. On the Resolution Applicant side during the hearing expressed that the Resolution applicant has agreed to modify the plan and not to demand release of the personal and Corporate Guarantees of dissenting and absenting financial creditors viz. Punjab National Bank, Bank of India, and Kotak Mahindra, affidavit dated 20.02.2022 also filed in this regard. On the Kotak Mahindra side argued that once the plan is approved by COC the Adjudicating authority cannot alter or modify the plan for whatever reason and opposed to act upon the affidavit of Successful Resolution applicant; instead he prayed to send back the plan to COC for considering the revised plan. In the applications I.A. Nos. 39,55 and

62/CB/2023 filed by dissenting financial creditors also prayed for liquidation of corporate debtor.”

7. The affidavit filed by the Successful Resolution Applicant on 20.02.2023 has also been noted by the Adjudicating Authority. The submission of the Dissenting Financial Creditor was also noted that if, in event, any amendment/modification needs to be carried out, the plan should be remitted back to the CoC for further consideration and the Resolution Plan cannot be acted upon the Affidavit. The aforesaid submission has been noted in Para 36, which is to the following effect:

“36. On the resolution professional side put forth the case that since the Successful resolution applicant itself filed an affidavit dated 20.02.2023 releasing its assignment or its right over the personal and corporate Guarantees of dissenting financial creditors viz. Punjab National Bank, Bank of India and Kotak Mahindra, and also agreed to deletion of capital reduction of existing share capital of promoters to Zero at the sole discretion of Resolution Applicant hence made request to approve the plan. The dissenting financial creditor Kotak Mahindra side argued that the COC approved Resolution plan with its commercial wisdom, the said approved plan cannot be altered merely on the basis of an affidavit of Successful Resolution applicant, if any amendment/modification needs to be carried out, the plan should be remitted to the CoC for further consideration and opposed to act upon the affidavit of Resolution applicant.”

8. The Adjudicating Authority after noticing the aforesaid submission proceeded to reject the Resolution Plan observing that once the Resolution Plan has been approved by the CoC, the Adjudicating Authority has either to approve the plan or reject the plan and there is no other alternative to approve the plan with modification. The reasons have been also given by the Adjudicating Authority for rejection of the plan in Para 38, which is to the following effect:

*“38. After perusal of the Resolution plan submitted for approval it is found that clause 2 (d) & (e) of the plan requiring the financial creditors to assign their debts payable by the corporate debtor inclusive of the personal Guarantee, the corporate Guarantee and other security Interests, and surrender the original guarantee deed and all other relevant security documents including title deeds, Hypothecation deeds and pledge Agreements to the Resolution applicant contravene section 128 of Indian Contract Act 1892 and the same is in violation section 30(2)(e) of IBC 2016. Thus, this point is answered. The Resolution plan is not in conformity with the requirements as referred in sub-section (1) of section 31 of the IBC 2016 hence the Resolution plan is hereby **Rejected**.*

In the result I.A.(IB) No.29/CB/2023 is dismissed, I.A.(IB) Nos. 39;55 1 and 62/CB/20i3 are Allowed.”

9. The stand which has been taken by the Successful Resolution Applicant in this Appeal is that the Successful Resolution Applicant has submitted an

undertaking that the Personal and Corporate Guarantees of the Dissenting Financial Creditors shall not be assigned and they will be allowed to retain their Personal Guarantees.

10. In view of the above stand, it is not necessary to consider submission as to whether the Resolution Plan violates Section 30(2)(e) of the IBC Code since the Successful Resolution Applicant himself is ready to modify the clauses which provide for assignment of securities in favour of Successful Resolution Applicant. Clause 2.2 of the Resolution Plan which is relevant in the present case needs to be extracted:

“2.2 Payment to financial creditor who are members of the CoC-

(d) The entire outstanding debt due to the financial creditors as on the CIRP initiation date shall stand satisfied, settled and extinguished, and no claims whatsoever, of any nature, either towards the principal dues, interest or penalty, shall subsist against the Company post payment of the same by the Resolution Applicant and assignment of the Debt to RA.

(e) Upon payment of Financial Creditors, the Financial Creditors shall severally and/or jointly assign the entire security interest (which includes by not limited to the items specified here below to OCML as follows:

(i) ...

...

(iv) For the Personal Guarantee, the Corporate Guarantees and other security interest, the financial

creditors shall assign the original guarantee deed and all other relevant security documents including title deeds, hypothecation and pledge agreements, share certificates and/or any other security documents whatsoever under the said personal and corporate guarantees to the RA.”

11. We have noticed the submission of the objectors before the Adjudicating Authority that if the plan needs any modification, the matter should be sent back to the CoC for considering Revised Plan. The Resolution Plan once having approved by the CoC with vote share of 76.67%, for the purpose of this case, ends of justice be served in permitting the Successful Resolution Applicant to place an Addendum to the Resolution Plan before the CoC incorporating the condition as given in the Affidavit dated 20.02.2023. Addendum be placed before the CoC for approval by the Resolution Professional and in event, the Addendum is approved, the Addendum be placed before the Adjudicating Authority for consideration.

12. We are of the view that there is no lack of jurisdiction in the Adjudicating Authority to remit the plan for reconsidering the amendment which the Successful Resolution Applicant himself was requesting to be carried out. The present is a case where the Corporate Debtor is sought to be revived by a Resolution Plan which was approved by the majority. It is also relevant to notice that the Appellant's Resolution Plan value is Rs.432.90 Crore where the liquidation value of the Corporate Debtor was only Rs.147.11 Crores. The Successful Resolution Applicant has proposed an excess amount of Rs.285.79 Crores. The Resolution Applicant having himself expressed not

insist for assignment of Personal and Corporate Guarantees and to be continued with the Dissenting Financial Creditors, the Adjudicating Authority ought not to have rejected the Resolution Plan and accepting the request of the Dissenting Financial Creditor ought to have remitted the plan to the CoC for reconsideration.

13. We have already observed that ends of justice be served in permitting the Successful Resolution Applicant to prepare an Addendum to the Resolution Plan incorporating condition as given in the Affidavit dated 20.02.2023, which Addendum be placed before the CoC for voting by the Resolution Professional and after decision of the CoC, in event, the CoC decides to approve the Addendum, the Addendum as well as the Resolution Plan be submitted before the Adjudicating Authority for fresh consideration. In view of the above, we allow the Appeal. Set aside the order passed by the Adjudicating Authority dated 18.04.2023 and dispose of this Appeal with following directions:

- (i) The Successful Resolution Applicant may submit an Addendum to Resolution Plan incorporating the undertaking as given in Affidavit dated 20.02.2023, within a period of two weeks from today.
- (ii) The Resolution Professional shall place the Addendum for consideration of the CoC, which proceeding be completed within period of four weeks.

- (iii) The Resolution Professional, two weeks thereafter, shall submit an appropriate application for approval, in case, the Addendum is also approved with the sufficient majority, before the Adjudicating Authority for consideration.
- (iv) The Adjudicating Authority shall consider the said application filed by the Resolution Profession for approval of plan as well as Addendum, expeditiously.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

9th August, 2023

Archana