

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 22.10.2020

Date of Decision: 29.10.2020

Appeal No.238 of 2020

Monnet Ispat & Energy Limited.

Art Guild House, A-Wing,

2nd Floor, Unit No-13,

Phoenix Mall Compound,

LBS Marg, Kurla West,

Mumbai – 400 070.

... Appellant

Versus

Securities and Exchange Board of India

SEBI Bhavan, Plot No.C4-A,

G Block, Bandra Kurla Complex,

Bandra (East), Mumbai – 400051.

... Respondent

Mr. Tarun Gulati, Senior Advocate with Mr. Kumar Sambhav, Mr. Shubhabrata Chakraborti, and Ms. Madhura Kulkarni, Advocates i/b Juris Corp and Mr. Ajay Kadhao, Authorised Representative for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates i/b K Ashar and Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer

Dr. C.K.G. Nair, Member

Justice M.T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order of the Adjudicating Officer dated 26th June, 2020 imposing a penalty of Rs.6,00,000 for violating Regulations 52(4) and 54(2) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as 'LODR Regulations, 2015') during the period from 2013 to 2014.
2. The facts leading to the filing of the present appeal is, that the Adjudicating Officer issued a show cause notice dated 18th October, 2019 alleging that the appellant had issued non-convertible debenture securities in 2013-14 but failed to make the necessary disclosures as required under the LODR Regulations.
3. In response to the show cause notice, the appellant replied that on 15th June, 2017 Reserve Bank of India directed the lenders to commence insolvency proceedings against the appellant under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') based on which the State Bank of India filed a

petition before the National Company Law Tribunal, Mumbai bench (hereinafter referred to as 'NCLT') for the commencement of the corporate insolvency resolution process. The petition was admitted on 18th July, 2017 and a resolution professional was appointed. Thereafter, resolution professional invited prospective investors to submit a resolution plan. A consortium comprising of AION Investments Private II Limited and JSW Steel Limited submitted a resolution plan and eventually after undergoing due process, NCLT by an order dated 24th July, 2018 approved the resolution plan. On this basis, the consortium acquired the management control of the company on 31st August, 2018. New Board of Directors was accordingly appointed and necessary disclosure of this fact was made to the stock exchange.

4. The contention of the appellant before the adjudicating officer was that in view of the resolution plan being approved by the NCLT, all financial liabilities, past or future is deemed to be extinguished by virtue of the NCLT order and that no show cause

notice or fresh proceedings against the appellant could be initiated nor any penalty could be imposed. It was further stated that action, if any, can be initiated by the respondent against the erstwhile promoters or against those persons who were in charge of the management of the company prior to the commencement of the resolution plan.

5. The adjudicating officer without considering as to whether proceedings could be initiated against the appellant in view of the resolution plan being approved by the NCLT under IBC skirted the issue by holding that it is beyond her ambit to comment as to whether such proceedings could be initiated against the new management or the erstwhile management and that her role under the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'Adjudication Rules, 1995') is to adjudge the alleged violation by the appellant. For facility, the extract of the findings of the adjudicating officer on this aspect is extracted hereunder:

“As regards, the various contentions of the Noticee that the instant or such proceedings need to be initiated against erstwhile management and not the current/new management/Noticee, it is beyond my ambit to comment on the same. My role within contours of Adjudication Rules, 1995, is to adjudge the alleged violation by the Noticee which is mentioned in the AO communique shared with the Noticee.....”

6. The adjudicating officer thereafter proceeded and found that since necessary disclosures under regulations 52(4) and 54(2) of the LODR Regulations were not made, the adjudicating officer imposed a penalty of Rs.6,00,000. The appellant being aggrieved by the aforesaid order has filed the present appeal.
7. We have heard Mr. Tarun Gulati, the learned Senior Advocate assisted by Mr. Kumar Sambhav, Mr. Shubhabrata Chakraborti, and Ms. Madhura Kulkarni, Advocates and Mr. Ajay Kadhao, Authorised Representative for the Appellant and Mr. Mustafa Doctor, Senior Advocate assisted by Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates for the Respondent.
8. The issue that arises for consideration in the present appeal is, whether the impugned order imposing

penalty upon the appellant for alleged contravention during the period prior to the approval of the resolution plan could be passed by the adjudicating officer. The submissions of the learned senior counsel for the appellant is, that no show cause notice could be issued nor the impugned order could be passed which is contrary to the approved resolution plan and which is binding on the respondent under section 31 and 32A of the IBC.

9. In this regard section 31(1) of the IBC 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 shall, before passing the order for approval of

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

10. On a perusal of section 31(1) of the IBC, it is apparently clear that the resolution plan is binding not only on all creditors but also on central government, state government or local authority to whom statutory dues are owed. The immunities applicable to the appellant will be in accordance with the approved resolution plan. The Supreme Court in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2019) 153 CLA 275 (SC)*** held as follows:-

“A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove.”

11. The aforesaid decision makes it clear that the terms of an approved resolution plan are imperative and are binding on all creditors including government and local authorities. In this regard, it would be appropriate to peruse the relevant portion of the resolution plan approved by the NCLT which is extracted hereunder:

“(a) Paragraph 1(d)(v) of Part I of the Resolution Plan

“All financial liabilities (including without limitation, for any penalty, interest, fines or fees) and other liabilities and obligations which may have a financial impact on the Company, in relation to (A) any unmet export obligations under the Export Promotion Capital Goods Licenses held by the Company (whether subsisting or not); (B) any mining leases or rights (including such mining leases or rights as may have lapsed, expires or may have been cancelled) and/or agreements in relation to mining rights held by, the Company, its subsidiaries or its associates (other than the bank guarantees required to be provided by the Company in relation to the mines allocated to the Company (i.e. Gare Palma IV/7 coal mine, the Hahaladdi iron-ore mine, the Gaitra limestone mine and the Guma-Pausari limestone mine); (C) any investigation, inquiry or show-cause, whether civil or criminal. (D) any non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals consents or permissions; (E) change of control, transfer charges, unearned increase, compensation, or any other such liabilities whatsoever under any contract, agreement, lease, license, approval, consent, privilege or permission

to which the Company or its subsidiaries, joint ventures or associates are entitled. (F) any leasehold rights or freehold rights to movable or immovable properties or the possession of the Company; (G) any contracts, agreements or commitments made by the Company; and (H) cross subsidies availed by the Company in relation to the power generation by the Company, whether admitted or not, due or contingent, asserted or unasserted, crystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the A/L Statement, the balance sheets of the Company or the profit and loss account statements of the Company or the February 21 Creditors List, in relation to any period prior to the Acquisition or arising on account of the Acquisition will be written off in full and will be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan, and the Company and/or the Consortium shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. It is clarified that the extinguishment of liabilities as set out in this section 1(d)(v) shall not prejudice the imposition of any liability on the Existing Promoters or any existing or former members of the management of the Company including pursuant to any investigation, inquiry or show-cause, whether civil or criminal, against the Existing Promoters or any existing or former members of the management of the Company. It is further clarified that the Consortium and the members of the Board of Directors and management of the Company who are appointed on or after the Acquisition shall not be liable, in any manner whatsoever, for any criminal action or liability in relation to any inquiries, investigations, notices, causes of action, suits, claims, disputes, litigations or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Company or the affairs

of the Company in relation to any period prior to the Acquisition or arising on account of the Acquisition.”

(Emphasis Supplied)

(b) Paragraph 1e(iv) of Part I of the Resolution Plan

“Other than the proceedings set out in Part B of Annexure 4 all inquiries, investigations, notices, causes of action, suits, claims, disputes, litigations, arbitration, or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Company or the affairs of the Company (other than against the Existing Promoters or any existing or former members of the management of the Company), pending or threatened, present or future, (including without limitation, the proceedings specifically set out in Annexure 2 and Part A of Annexure 4), in relation to any period prior to the Acquisition or arising on account of the Acquisition shall be deemed to be withdrawn or dismissed and all liabilities or obligations in relation thereto, whether or not set out in the A/L Statement, the balance sheets of the Company or the profit and loss account statements of the Company or the February 21 Creditors List, will be deemed to have been written off in full and permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan, and the Company and/or Consortium shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. By virtue of the order of the NCLT approving this Resolution Plan all new inquiries, investigations, notices, suits, claims, disputes, litigations or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Company or the affairs of the Company in relation to any period prior to

the Acquisition or arising on account of the Acquisition.”

(Emphasis Supplied)

12. A perusal of the aforesaid resolution plan indicates:-

a. Extinguishment of all financial liabilities of the Appellant, including any penalty, whether contingent, assessed, known or unknown, in relation to any period prior to the acquisition.

b. Deemed withdrawal or dismissal of inquiries, investigations, causes of action, regulatory proceeding against the Appellant in relation to any period prior to the acquisition.

c. Extinguishment of liability in relation to any new enquiry, investigations, causes of action, regulatory proceeding against the Appellant in relation to any period prior to the acquisition.

13. In view of the aforesaid clear terms of the resolution plan, the show cause notice could not be issued to the appellant for the alleged contravention

relating to the period prior to the acquisition and, consequently, the impugned order could not be passed against the appellant.

14. In *Ultra Tech Nathdwara Cement Ltd. v. Union of India*, 2020 SCC OnLine Raj 1097, the Rajasthan High Court referred to a speech of the Hon'ble Finance Minister in the Parliament clarifying the legislative intent of the amendment under section 31(1) of IBC in the following terms:

“IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but, largely, yes, it is IBC.”

There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan.”

15. In view of the aforesaid, it is clear that once the resolution plan is approved by the appropriate

authority the same is binding on all concerned including the respondent.

16. The Rajasthan High Court in ***Ultra Tech Nathdwara Cement Ltd. v. Union of India*** (*supra*) held as under:-

“66. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution Applicant starts running the business of the corporate debtor on a fresh state as it were.

67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. As successful resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”

[Emphasis supplied]

17. It is also stated here that what could not done by SEBI when the moratorium under section 14(1) of the IBC was in force cannot certainly be done after a resolution plan is approved and becomes binding on all creditors including government and local authority under section 31 of the IBC.

18. In the light of the aforesaid, we are of the opinion that once a resolution plan has been approved it becomes binding on all creditors including the government and local authorities including the respondent under section 31(1) of the IBC. It is no longer open to the respondent to issue a show cause notice or adjudicate and pass an order of penalty upon the appellant. Consequently, the impugned order cannot be sustained and is quashed. The appeal is accordingly allowed with no order as to costs.

19. Before parting, we are constrained to observe total abdication of power which is vested with the adjudicating authority under the SEBI Act, the Rules and the Regulations. The adjudicating officer is

required to adjudicate under the Adjudication Rules, 1995. One of the foremost duties is to find out as to whether the charge levelled against the appellant could be fastened upon it. Once a contention has been raised that no proceedings can be initiated or penalty could be imposed upon the appellant after the passing of the resolution plan, the adjudicating officer was required to deal with the matter and could not skirt this issue by holding that it was beyond her ambit to deal with such condition or comment on the same. Such observation made by the adjudicating officer is indicative of the lack of clarity, quasi-judicial thought in legally deciding the matter. We will not say anything further and leave it to the Chairman of the SEBI to consider and issue appropriate direction on the administrative side to the adjudicating officer in question.

20. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be

digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

Dr. C. K. G. Nair
Member

Justice M.T. Joshi
Judicial Member

29.10.2020
RHN