

Binani Industries Limited vs Bank Of Baroda & Anr on 14 November, 2018

1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal(AT) (Insolvency) No. 82 of 2018

(Arising out of Order dated 28th February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) No. 175/KB/2018 in C.P. (IB) No. 359/KB/2017)

IN THE MATTER OF:

Binani Industries Limited

...Appellant

Vs

Bank of Baroda & Anr.

....Respondents

Present:

For Appellant:

Mr. S.N. Mukherjee and Mr. Ratnako Banerjee, Senior Advocates with Mr. Arvind Kumar Gupta, Ms. Purti Marwaha Gupta, Mr. Kumar Kartikay, Mr. Abhinav Raghuvanshi, Mr. C.S. Chauhan and Ms. Henna George, Advocates for 'Binani Industries Ltd.'

For Respondents:

Mr. Arun Kathpalia and Mr. Gopal Subramaniam, Senior Advocates with Ms. Misha, Mr. Manu Nair, Mr. Siddhant Kant, Ms. Bani Brar, Ms. Shantanu Chaturvedi, Ms. Srishti Khare and Ms. Jasveen Kaur, Advocates for 'Rajputana Properties Pvt. Ltd.'

Mr. Sanjiv Sen and Mr. Tushar Mehta, Senior Advocates along with Mr. R. Sudhinder, Ms. Nimita Kaul, Ms. Amita Sarkar and Mr. Sumant Batra, Advocates for 'Committee of Creditors'.

Mr. Amit Sibal, Senior Advocate with Mr. Nakul Sachdeva, Mr. Somesh Dhawan, Mr. Pranshu Paul, Mr. Soham Kumar and Mr. Avinash Amarnath, Advocates for the RP with Mr. Vijay Iyer, RP in person.

Mr. Ashish Rana and Mr. Surekh
Advocates for Export Import Bank.

Baxy,

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

2

With
Company Appeal(AT)(Insolvency) No. 123 of 2018

(Arising out of Order dated 27th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) No. 210/KB/2018 in C.P. (IB) No. 359/KB/2017)

IN THE MATTER OF:

Rajputana Properties Pvt. Ltd.

...Appellant

Vs

Binani Industries Limited & Ors.

....Respondents

Present:

For Appellant:

Mr. Arun Kathpalia and Mr. Gopal Subramaniam, Senior Advocates with Ms. Misha, Mr. Manu Nair, Mr. Siddhant Kant, Ms. Bani Brar, Ms. Shantanu Chaturwedi, Ms. Srishti Khare and Ms. Jasveen Kaur, Advocates.

For Respondents:

Mr. S.N. Mukherjee and Mr. Ratnako Banerjee, Senior Advocates with Mr. Arvind Kumar Gupta, Ms. Purti Marwaha Gupta, Mr. Kumar Kartikay, Mr. Abhinav Raghuvanshi, Mr. C.S. Chauhan and Ms. Henna George, Advocates for Binani Industries Ltd.

Dr. A. M. Singhvi, Mr. Amarendra Sharan, Senior Advocates along with Mr. Mahesh Agarwal, Mr. Amar Dave, Mr. Himanshu Satija, Ms. Aastha Mehta, Ms. Devanshi Singh, Mr. Divyang, Mr. Avishkar Singhvi and Mr. Amit Bhandari, Advocates for UltraTech Cement Ltd.

Mr. Sanjiv Sen and Tushar Mehta, Senior Advocates along with Mr. R. Sudhinder, Ms. Nimita Kaul, Ms. Amita Sarkar, Mr. Soorjya Ganguli and Mr. Sumant Batra, Advocates for Committee of Creditors.

Mr. Amit Sibal, Senior Advocate with Mr.
Nakul Sachdeva, Mr. Somesh Dhawan, Mr.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

3

Pranshu Paul, Mr. Soham Kumar and Mr.
Avinash Amarnath, Advocates for the RP
with Mr. Vijay Iyer, RP in person.

Mr. Ashish Rana and Mr. Surekh Baxy,
Advocates for Export Import Bank.

With

Company Appeal(AT)(Insolvency) No. 188 of 2018

(Arising out of Order dated 2nd May, 2018 passed by the Adjudicating
Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA
(IB) No. 246/KB/2018 in C.P. (IB) No. 359/KB/2017)

IN THE MATTER OF:

Rajputana Properties Pvt. Ltd.

...Appellant

Vs

Ultratech Cement Ltd. & Ors.

....Respondents

Present:

For Appellant:

Mr. Arun Kathpalia and Mr. Gopal
Subramaniam, Senior Advocates with Ms.
Misha, Mr. Manu Nair, Mr. Siddhant Kant,
Ms. Bani Brar, Ms. Shantanu Chaturvedi,
Ms. Srishti Khare, Mr. Hitesh Kumar Saini
and Ms. Jasveen Kaur, Advocates

For Respondents:

Mr. Mukul Rohatgi, Dr. A. M. Singhvi, Mr.
Amarendra Sharan, Senior Advocates along
with Mr. Mahesh Agarwal, Mr. Amar Dave,
Mr. Himanshu Satija, Ms. Aastha Mehta, Ms.
Devanshi Singh, Mr. Divyang, Mr. Avishkar
Singhvi and Mr. Amit Bhandari, Advocates
for UltraTech Cement Ltd

Mr. S.N. Mukherjee and Mr. Ratnako
Banerjee, Senior Advocates with Mr. Arvind
Kumar Gupta, Ms. Purti Marwaha Gupta, Mr.

Kumar Kartikay, Mr. Abhinav Raghuvanshi,
Mr. C.S. Chauhan and Ms. Henna George,
Advocates for Binani Industries Ltd.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

4

Mr. Sanjiv Sen and Mr. Tushar Mehta,
Senior Advocates along with Mr. R.
Sudhinder, Mr. Soorjya Ganguli, Ms. Nimita
Kaul, Ms. Amita Sarkar and Mr. Sumant
Batra, Advocates for Committee of
Creditors.

Mr. Amit Sibal, Senior Advocate with Mr.
Nakul Sachdeva, Mr. Somesh Dhawan, Mr.
Pranshu Paul, Mr. Soham Kumar and Mr.
Avinash Amarnath, Advocates for the RP
with Mr. Vijay Iyer, RP in person.

Mr. Arif S. Doctor, Mr. Nimay D. Dave, Mr.
Dhaval Vussonji, Mr. Anirudh Wadhwa, Mr.
Akash Jauhari and Ms. Divyata Badlani,
Advocates for Operational Creditors.

With

Company Appeal(AT)(Insolvency) No. 216 of 2018

(Arising out of Order dated 2nd May, 2018 passed by the Adjudicating
Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA
(IB) No. 244/KB/2018 in C.P. (IB) No. 359/KB/2017)

IN THE MATTER OF:

Binani Industries Limited

...Appellant

Vs

Binani Cements Limited & Anr.

....Respondents

Present:

For Appellant:

Mr. S.N. Mukherjee and Mr. Ratnako
Banerjee, Senior Advocates with Mr. Arvind
Kumar Gupta, Ms. Purti Marwaha Gupta,
Mr. Kumar Kartikay, Mr. Abhinav
Raghuvanshi, Mr. C.S. Chauhan and Ms.

Henna George, Advocates for Binani Industries Ltd.

For Respondents:

Mr. Arun Kathpalia and Mr. Gopal Subramaniam, Senior Advocates with Ms. Misha, Mr. Manu Nair, Mr. Siddhant Kant, Ms. Bani Brar, Ms. Shantanu Chaturvedi,

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

5

Ms. Srishti Khare and Ms. Jasveen Kaur, Advocates for Rajputana Properties Pvt. Ltd.

Mr. Sanjiv Sen and Mr. Tushar Mehta, Senior Advocates along with Mr. R. Sudhinder, Mr. Soorjya Ganguli, Ms. Nimita Kaul, Ms. Amita Sarkar and Mr. Sumant Batra, Advocates for Committee of Creditors.

Mr. Amit Sibal, Senior Advocate with Nakul Sachdeva, Mr. Somesh Dhawan, Pranshu Paul, Mr. Soham Kumar and Avinash Amarnath, Advocates for the with Mr. Vijay Iyer, RP in person.

Mr.
Mr.
Mr.
RP

Mr. Ashish Rana and Mr. Surekh Baxy, Advocates for Export Import Bank.

Mr. P.V. Dinesh and Mr. Rajendra Beniwal, Advocates for R-5- SBI.

And

Company Appeal(AT)(Insolvency) No. 234 of 2018

(Arising out of Order dated 2nd May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) No. /KB/2018 in C.P. (IB) No. 359/KB/2017)

IN THE MATTER OF:
Mr. Vijay Kumar Iyer
Resolution Professional

...Appellant

Vs

Mr. Braj Bhusandas Binani & Ors.

....Respondents

Present:

For Appellant:	Mr. Amit Sibal, Senior Advocate with Nakul Sachdeva, Mr. Somesh Dhawan, Pranshu Paul, Mr. Soham Kumar and Avinash Amarnath, Advocates for the with Mr. Vijay Iyer, RP in person.	Mr. Mr. Mr. RP
For Respondents:	Mr. Arun Kathpalia and Mr. Gopal Subramaniam, Senior Advocates with Ms. Misha, Mr. Manu Nair, Mr. Siddhant Kant,	

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

6

Ms. Bani Brar, Ms. Shantanu Chaturvedi,
Ms. Srishti Khare and Ms. Jasveen Kaur,
Advocates for 'Rajputana Properties Pvt.
Ltd.'

Mr. Mukul Rohatgi, Dr. A. M. Singhvi, Mr.
Amarendra Sharan, Senior Advocates along
with Mr. Mahesh Agarwal, Mr. Amar Dave,
Mr. Himanshu Satija, Ms. Aastha Mehta, Ms.
Devanshi Singh, Mr. Divyang, Mr. Avishkar
Singhvi and Mr. Amit Bhandari, Advocates
for UltraTech Cement Ltd.

Mr. Sanjiv Sen and Mr. Tushar Mehta,
Senior Advocates along with Mr. R.
Sudhinder, Mr. Soorjya Ganguli, Ms. Nimita
Kaul, Ms. Amita Sarkar and Mr. Sumant
Batra, Advocates for 'Committee of
Creditors'.

Mr. Arif S. Doctor, Mr. Nimay D. Dave, Mr.
Dhaval Vussonji, Mr. Anirudh Wadhwa, Mr.
Akash Jauhari and Ms. Divyata Badlani,
Advocates for 'Operational Creditors'.
Mr. P.V. Dinesh and Mr. Mohit Bhardwaj,
Advocates for Respondent No. 5 - SBI,
Hongkong.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

As all these appeals arise out of the order(s) passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, in 'Corporate Insolvency Resolution Process' initiated against 'Binani Cement Limited'- ('Corporate Debtor'), they were heard together and are disposed of by this common judgment.

2. In the 'Corporate Insolvency Resolution Process' against 'Binani Cement Limited'- ('Corporate Debtor'), at the stage of 'Resolution Process' Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 different prayers and objections were made/raised by the Appellants and others, which were taken up together by the Adjudicating Authority, and disposed of by different order(s) as detailed below.

3. The 'Binani Cement Limited', a flagship subsidiary of the Appellant- 'Binani Industries Limited' representing the 'Braj Binani Group', has preferred Company Appeal (AT) (Insolvency) No. 82 of 2018 against the order dated 28th February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, whereby CA(IB)No. 175/KB/2018 has been referred back to the 'Resolution Professional' to consider in accordance with the rules and regulations of the 'I&B Code'.

4. The grievance of the Appellant is that the Adjudicating Authority should have passed positive direction and should have allowed the Appellant- 'Binani Industries Limited' to interact with and/or meet the bidders/ 'Resolution Applicants', 'Financial Creditors' and other stakeholders of the 'Corporate Debtor' from time to time.

5. 'Binani Industries Limited' has also preferred another Company Appeal (AT) (Insolvency) No. 216 of 2018 against common order dated 2nd May, 2018, whereby the Adjudicating Authority refused to accept the proposal of 'Binani Industries Limited' for repayment of the dues of the 'Financial Creditors' and close the 'Corporate Insolvency Resolution Process', in absence of any jurisdiction.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

6. 'Rajputana Properties Private Limited' has preferred Company Appeal (AT) (Insolvency) No. 123 of 2018 against the order dated 27th March, 2018 passed by the Adjudicating Authority, whereby liberty was granted to the 'Committee of Creditors' to consider the settlement plan proposed by the 'Binani Industries Limited'.

7. Another Company Appeal (AT) (Insolvency) No. 188 of 2018 has been preferred by 'Rajputana Properties Private Limited' against the order dated 2nd May, 2018, whereby the CA (IB) No. 246/KB/2018 filed by the 'Resolution Applicant' for approval of the plan of the 'Rajputana Properties Private Limited' has not been accepted for the reasons mentioned in the said order.

8. Mr. Vijay Kumar Iyer, who is the 'Resolution Professional' has preferred Company Appeal (AT) (Insolvency) No. 234 of 2018 against the order dated 2nd May, 2018 in so far it relates to adverse observations made by the Adjudicating Authority against the said 'Resolution Professional'.

9. In the aforesaid background, all the appeals were heard together for disposal.

10. For deciding the issue, it is necessary to discuss all the relevant facts, as detailed below.

11. Mr. Vijay Kumar Iyer- 'Resolution Professional' filed an application under Sections 30 and 31 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) read with Regulation 39 of the 'Insolvency and Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016' for approval of the 'Resolution Plan' for 'Binani Cement Limited'. It was informed that the application is within time and the 'Committee of Creditors' by majority vote approved the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited'.

12. As noticed, number of objections were filed by the Respondents including, 'Binani Industries Limited', a group company of 'Binani Cement Limited'- ('Corporate Debtor'), 'Ultratech Cement Limited' and others.

13. The Adjudicating Authority noticed that the 'Committee of Creditors' after extensive negotiation and consultation with the 'Rajputana Properties Private Limited' voted in the meeting held on 14th March, 2018 with 99.43% and approved the plan submitted by the 'Rajputana Properties Private Limited'. However, 10.53% of the 'Committee of Creditors' who were forced to vote in favour of the 'Resolution Plan' recorded a protest note(s) alleging that they had not been dealt with equitably when compared with other 'Financial Creditors' who were corporate guarantee beneficiaries of the 'Corporate Debtor'.

14. The Adjudicating Authority also noticed that the 'Resolution Plan' submitted by the 'Ultratech Cement Limited', including revised offer submitted on 8th March, 2018 was not properly considered by the 'Committee of Creditors' for wrong reasons.

15. The Adjudicating Authority held that the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' was discriminatory and contrary Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 to the scheme of the 'I&B Code'. Thereby, while rejecting the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' as discriminatory, directed the 'Committee of Creditors' to consider the other 'Resolution Plans', including the 'Resolution Plans' submitted by 'Ultratech Cement Limited'.

16. Mr. Arun Kathpalia, learned Senior Counsel appearing on behalf of 'Rajputana Properties Private Limited' while assailed the decision of the Adjudicating Authority relating to rejection of the 'Resolution Plan' as was approved by the 'Committee of Creditors', Mr. Gopal Subramaniam, learned Senior Counsel appearing on behalf of 'Rajputana Properties Private Limited' challenged the part of the order whereby the 'Resolution Plan' of 'Ultratech Cement Limited' was ordered to be considered. The 'Binani Industries Limited' has also challenged the 'Resolution Plan' on other grounds.

17. To decide the issue, it will be desirable to notice the object of the 'I&B Code', object of 'Resolution' and what is expected from the 'Committee of Creditors', as summarized below: -

1. The objective of the 'I&B Code' As evident from the long title of the 'I&B Code', it is for reorganisation and insolvency resolution of corporate persons, partnership firms

and individuals in a time bound manner for maximisation of value of assets of such persons to promote entrepreneurship, availability of credit, and balance the interests of Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 all stakeholders. The recent Ordinance explicitly aims to promote resolution over liquidation.

2. The objective of the 'I&B Code' is Resolution.

The Purpose of Resolution is for maximisation of value of assets of the 'Corporate Debtor' and thereby for all creditors. It is not maximisation of value for a 'stakeholder' or 'a set of stakeholders' such as Creditors and to promote entrepreneurship, availability of credit and balance the interests. The first order objective is "resolution". The second order objective is "maximisation of value of assets of the 'Corporate Debtor'" and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objective is sacrosanct.

In the matter of "Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors.", the Hon'ble Supreme Court observed that "the 'Corporate Debtor' consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible".

3. 'Financial Creditors' as members of the 'Committee of Creditors' and their Role.

a. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the 'I&B Code', reasoned as under:

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 i. Under Para 5.3.1, sub-para 4, the BLRC provided rationale for 'Financial Creditors' as under:

"4. Creation of the creditors committee ...

The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations.

Typically, 'Operational Creditors' are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that for the process to be rapid and efficient, the 'I&B Code' will provide that the creditors committee should be restricted to only the 'Financial Creditors'.

ii. In Para 3.4.2 dealing with 'Principles driving design', the principle IV reads as under:

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 "IV. The 'I&B Code' will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process.

The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution."

b. The 'I&B Code' aims at promoting availability of credit. Credit comes from the 'Financial Creditors' and the 'Operational Creditors'. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. 'Operational Creditors' need to provide goods and services. If they are not treated well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.

c. The 'I&B Code' is for reorganisation and insolvency resolution of corporate persons,for maximisation of value of assets of such persons to.... balance interests of all stakeholders. It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the 'Corporate Debtor'. One cannot balance interest of all Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 stakeholders, if resolution maximises the value for a or a set of stakeholder such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another.

d. The 'I&B Code' prohibits any action to foreclose, recover or enforce any security interest during resolution period and thereby prevents a creditor from maximising his interests.

e. It follows from the above:

i. The liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution.

ii. 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.

iii. A creditor cannot maximise his own interests in view of moratorium.' iv. 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.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 v. The 'I&B Code' aims to balance the interests of all stakeholders and does not maximise value for 'Financial Creditors'.

vi. Therefore, the dues of creditors of 'Operational Creditors' must get at least similar treatment as compared to the due of 'Financial Creditors'.

3. 'Resolution Plan' The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

It is not a sale. No one is selling or buying the 'Corporate Debtor' through a 'Resolution Plan'. It is resolution of the 'Corporate Debtor' as a going concern. One does not need a 'Resolution Plan' for selling the 'Corporate Debtor'. If it were a sale, one can put it on a trading platform. Whosoever pays the highest price would get it. There is no need for voting or application of mind for approving a 'Resolution Plan', as it will be sold at the highest price. One would not need 'Corporate Insolvency Resolution Process', 'Interim Resolution Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 Professional', 'Resolution Professional', interim finance, calm period, essential services, Committee of Creditors or 'Resolution Applicant' and detailed, regulated process for the purpose of sale. It is possible that under a 'Resolution Plan', certain rights in the 'Corporate Debtor', or assets and liabilities of the 'Corporate Debtor' are exchanged, but that is incidental.

It is not an auction. Depending on the facts and circumstances of the 'Corporate Debtor', 'Resolution Applicant' may propose a 'Resolution Plan' that entails change of management, technology, product portfolio or marketing strategy; acquisition or disposal of assets, undertaking or business; modification of capital structure or leverage; infusion of additional resources in cash or kind over time; etc. Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.

It is not recovery: Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. When creditors recover their dues - one after another or simultaneously- from the available assets of the firm, nothing may be left in due course. Thus, while recovery bleeds the 'Corporate Debtor' to death, resolution endeavors to keep the 'Corporate Debtor' Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 alive. In fact, the 'I&B Code' prohibits and discourages recovery in several ways.

It is not liquidation: Liquidation brings the life of a corporate to an end. It destroys organisational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. The 'I&B Code', therefore, does not allow liquidation of a 'Corporate Debtor' directly. It allows liquidation only on failure of 'Corporate Insolvency Resolution Process'. It rather facilitates and encourages resolution in several ways. 'Resolution Plan' submitted by 'Rajputana Properties Private Limited'

18. To decide the question whether the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' is discriminatory and against the provisions of the 'I&B Code', it is desirable to notice the

financial terms of the 'Resolution Plan' of the 'Rajputana Properties Private Limited' gist of which has been produced by Mr. Arun Kathpalia, learned Senior Counsel and is as follows:

"FINANCIAL TERMS OF RESOLUTION PLAN OF RPPL S. PARTICULARS VOTING VERIFIED PROPOSED PERCENTAGE NO. SHARE CLAIM PAYMENT (IN Rs. (IN RS.

			Crores)	CRORES)	
1.	Insolvency Resolution Process Costs	N.A.	114.08	114.08	100%
2.	Workmen Wages	N.A.	18	18	100%

FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR

3. Edelweiss Asset 42.9% 2775.82 2775.82 100% Reconstruction Company Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

4. IDBI Bank Limited 5.2% 335.85 335.85 100%

5. Bank of Baroda 6.6% 427.69 427.69 100%

6. Canara Bank 5.7% 370.34 370.34 100%

7. Bank of India 1.5% 94.66 94.66 100%

8. State Bank of India 0.6% 36.89 36.89 100% FINANCIAL CREDITORS TO WHOM CORPORATE DEBTOR WAS A GUARANTOR

9. IDBI Bank Limited 24.2% 1567 1567 100% (Dubai Branch)

10. Export-Import Bank 9.6% 620 450 72.59% of India

11. State Bank of India 0.6% 37 3.7 10% (Hong Kong)

12. Bank of Baroda 2.7% 172 172 100% (London)

13. State Bank of India 0.4% 25 25 100% (Bahrain)

14. Syndicate Bank 0.1% 7 7 100% OPERATIONAL CREDITORS (OTHER THAN WORKMEN)

15. Unrelated Parties N.A. 443.23 151 35%

16. Related Parties N.A. 60.14 NIL N.A.

17. Statutory Liabilities N.A. 177.50 33.10 19.3%

18. Equity/Working N.A. N.A 350 N.A. Capital Infusion TOTAL 7289.05 6932.46

19. From the gist aforesaid, it will be evident that the 'Financial Creditors' such as, 'Edelweiss Asset Reconstruction Company Limited', 'IDBI Bank Limited', 'Bank of Baroda', 'Canara Bank', 'Bank of India' and 'State Bank of India' has been provided with 100% of their verified claim, the 'Resolution Applicant' ('Rajputana Properties Private Limited') has given lesser percentage to Export-Import Bank of India (72.59%) and State Bank of India-Hong Kong (10%). Discrimination has been made on the ground that some of the 'Financial Creditors' are direct exposure to the 'Corporate Debtor' or some of the 'Financial Creditors' to whom the 'Corporate Debtor' was guarantor. Even the guarantors who are treated to be the 'Financial Creditors', such as 'IDBI Bank Limited (Dubai Branch)', 'Bank of Baroda Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 (London)', 'State Bank of India (Bahrain)', 'Syndicate Bank' have been provided with 100% proposed payment of their verified claim but the 'Export-Import Bank of India' and the 'State Bank of India (Hong Kong)' who are similarly situated have been discriminated.

20. Learned Senior Counsel appearing on behalf of the 'Rajputana Properties Private Limited' submitted that the 'Exim Bank' has been allotted 72.59% as the principal borrower is 'Binani Industries Limited' which itself is a non-performing asset and facing proceedings under the 'I&B Code'.

With regard to claim of 'State Bank of India (Hong Kong)', it was submitted that it could not be paid in full as 'Rajputana Properties Private Limited' was never granted the opportunity to undertake diligence of the underlying plans in China despite repeated requests. Therefore, no opportunity to appropriately analyse the commercial viability.

21. Though the aforesaid explanation seems to be attractive but such ground cannot be taken to discriminate between two same sets of the Creditors namely the 'Financial Creditors' who are similarly situated as guarantors.

22. In so far as the 'Operational Creditors' (other than workmen) are concerned, it will be seen that 'unrelated parties' have been provided with 35% of their verified claim which is about Rs. 90 crores. However, 'related parties' have not been provided with any amount. The breakup of payments to the 'Operational Creditors' has been shown as follows:

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 "(a)Trade creditors with o/s of less than Rs. 1 Crore are being paid 100% of their verified claims and form 98.5% of the total trade creditors (i.e. approximately 2937 out of a total of

2988 creditors)

(b) Trade creditors with o/s of Rs. 1-5 Crores are being paid 40% or Rs. 1 Crore, whichever is higher (i.e. approximately 24 'Operational Creditors')

(c) Trade creditors with o/s of Rs. 5-10 Crores are being paid 25% or Rs. 2 Crores, whichever is higher (i.e. approximately 5 'Operational Creditors')

(d) Trade creditors with o/s of higher than Rs. 10 Crores are being paid 5% or Rs. 2.5 Crores, whichever is higher (i.e. approximately 10 'Operational Creditors')"

23. However, the 'I&B Code' or the Regulations framed by the Insolvency and Bankruptcy Board of India do not prescribe differential treatment between the similarly situated 'Operational Creditors' or the 'Financial Creditors' on one or other grounds.

24. Learned counsel appearing on behalf of the 'Exim Bank' submitted that they were forced to vote in favor of the 'Resolution Plan' as the 'Resolution Applicant' ('Rajputana Properties Private Limited') in its plan made it clear that those who will not vote in favour of its 'Resolution Plan' will be paid liquidation value.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

25. In view of such threat, it was alleged that those who had objections against the 'Resolution Plan' were forced to vote in favour to ensure that the liquidation value is not paid to one or other 'Financial Creditors', which is almost "Nil".

26. Plea taken by Mr. Arun Kathpalia, learned Senior Counsel for 'Rajputana Properties Private Limited' that the intent of the legislature is to bind 'minority Financial Creditors' with the decision of the 'majority Financial Creditors' is not based on basic principle of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

27. In "Central Bank of India Vs. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors. □ Company Appeal (AT) (Insolvency) No. 526 of 2018", this Appellate Tribunal while noticed the provisions of Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016, observed and held as follows:

"8. From the aforesaid provisions of I&B Code it is clear that the Board may make regulation but it should be consistent with the I&B Code and rules made therein (by Central Government) to carry out the provisions of the Code. Therefore, we hold that the provisions made by the Board cannot override Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 the provisions of I&B Code nor it can be inconsistent with the Code.

9. Clause (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such as 'Financial Creditor' or 'Operational Creditor', Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the 'Operational Creditors' (clause (b) of regulation 38(1)) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)). Such regulation being against Section 240(1) cannot be taken into consideration and any Resolution Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' or the 'Operational Creditors' cannot be approved being illegal."

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

28. Therefore, the Appellant- 'Rajputana Properties Private Limited' cannot take plea that dissenting 'Financial Creditors' can be discriminated on the basis of Regulation 38. At this stage, it is desirable to notice that after the decision of this Appellate Tribunal in "Central Bank of India (Supra)" the Insolvency and Bankruptcy Board of India also amended/repealed the Regulation 38 aforesaid having found it discriminatory.

29. We agree with the submissions made by Mr. Arun Kathpalia, learned Senior Counsel that Section 53, including explanation given therein cannot be relied upon while approving the 'Resolution Plan'. However, that does not mean that a discriminatory plan can be placed and can be got through on one or other ground, which is against the basic object of maximization of the assets of the 'Corporate Debtor' on one hand and for balancing the stakeholders on the other hand.

30. Keeping in mind the aforesaid proposition, it is to be seen:

i. Whether the 'Committee of Creditors' discriminated between the eligible 'Resolution Applicants', while considering the 'Resolution Plan' of 'Rajputana Properties Private Limited'? and; ii. Whether the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' is discriminatory?

31. The Adjudicating Authority has noticed that the 'Committee of Creditors' had extensive negotiations and consultations with the 'Rajputana Properties Private Limited' on the ground that it was the highest 'Resolution Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 Applicant' and also obtained certain clarification; after due deliberation voted in favour of the 'Resolution Plan' of the 'Rajputana Properties Private Limited' in its meeting held on 14th March, 2018. At the same time the 'Committee of Creditors' discriminated with the other 'Resolution Applicants' which will be evident from the fact that the proposal for negotiation and better proposal given by the 'Ultratech Cement Limited' was not at all considered though it was submitted on 8th March, 2018 i.e. much prior to the approval of the plan (14th March, 2018). The 'Committee of Creditors' have taken plea that the revised offer given by 'Ultratech Cement Limited' was merely an

e-mail with an offer. The other plea taken was that the offer was not made in accordance with the 'process document' and if it is considered then it would be a deviation of the process laid down in the 'process document' by the 'Committee of Creditors'. Third objection was that the offer was beyond the time as stipulated under the 'I&B Code'.

32. The Adjudicating Authority has rejected such objections by detailed impugned order. It appears that the 'process document' was issued on 20th December, 2017 which inter alia stipulated general and qualitative parameters. It clearly indicated that 'Committee of Creditors' will negotiate only with the 'Resolution Applicant' which reveals highest score based on the evaluation criteria and whose 'Resolution Plan' is in compliance with the requirements of the 'I&B Code' as confirmed by the 'Resolution Professional'. We have dealt with the object of the 'I&B Code' as recorded above. The 'Resolution Professional' as well as the 'Committee of Creditors' are duty bound to ensure maximization of value within the time frame Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 prescribed by the 'I&B Code'. Such an object in finding out a 'Resolution Applicant' who can offer maximum amount so as to safeguard the interest of all stakeholders of the 'Corporate Debtor' is lacking in the case in hand from the side of the 'Committee of Creditors'.

33. In the present case, the 'Committee of Creditors' not only failed to safeguard the interest of the stakeholders of the 'Corporate Debtor' while approving the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited', also ignored the revised 'Resolution Plan' offered by 'Ultratech Cement Limited' 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'.

34. Section 25 (2) (h) provides invitation of prospective lenders, investors and any other persons to put forward a 'Resolution Plan'. Submission of revised offer is in continuation of the 'Resolution Plan' already submitted and accepted by the 'Resolution Professional'. It is not in dispute that after invitation was called for, the 'Ultratech Cement Limited' submitted the revised 'Resolution Plan' on 12th February, 2018 i.e. well within the time. It is not the case of the 'Committee of Creditors' that the plan of the 'Ultratech Cement Limited' was in violation of Section 30(2) of the 'I&B Code'. The 'Resolution Plan' having submitted by 'Ultratech Cement Limited' within time on 12th February, 2018, it was open to the 'Committee of Creditors' to notice the revised offer given by 'Ultratech Cement Limited' on 8th March, 2018. The 'Committee of Creditors' has taken note of revised offer given by the 'Rajputana Properties Private Limited' on 7th March, 2018 but refused Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 to notice the revised offer submitted by 'Ultratech Cement Limited' on 8th March, 2018 i.e., much prior to the decision of the 'Committee of Creditors' (14th March, 2018).

35. The clarification matrix is based on the terms in the process documents. The PREFACE of the Clarifications to 'Resolution Applicants' read as follows:-

1. This document is being issued to provide certain clarifications on the illustrative list of parameters set out in Annexure 1 to the Process Document dated December 20, 2017 ("Process Document") that may be considered for the purpose of evaluation of the Compliant 'Resolution Plan' submitted by the Resolution Application ("RA").

Please note that the clarifications mentioned herein are not meant to be exhaustive. The CoC reserves the right, in its sole discretion, to provide further clarifications or delete or modify the same.

2. All terms of the Process Document shall continue to apply and be effective.

Therefore, it is evident that the aforesaid clause provides that the 'Committee of Creditors' can delete or modify the clarification at any time before 'Resolution Plan' is accepted.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

36. The 'process document' do not prohibit the 'Committee of Creditors' from amending the clause as apparent from Clause 2.1.3, which reads as follows:

"i) Clause 2.1.3 of the process document provides that "the COC reserves the right to amend or modify the criteria of the evaluation of the Resolution Plan/ Financial Proposal submitted by the Resolution Applicants prior to the Resolution Plan Submission Date."

37. The aforesaid clause shows that the 'Committee of Creditors' can amend or modify the criteria of the evaluation of the 'Resolution Plan'/'Financial Proposal' submitted by the 'Resolution Applicants' prior to the 'Resolution Plan' submission date.

38. There are other Clauses of 'process document'. Clause 1.6.1 provides that the "Committee of Creditors' have right to accept or reject one or all plans prior to approval of the same by the Adjudicating Authority". A reading of clause 1.6.1 shows that the 'Committee of Creditors' have ample power to accept any plan prior to the acceptance of the plan by the Adjudicating Authority. Clause 1.6.2 (a) of the 'process document' reads as follows:

"1.6.2(a): On receipt of a Resolution Plan submitted by a Resolution Applicant, the Resolution Professional shall review the same for compliance Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 under the IB Code in consultation with his legal advisors and have deliberations with the CoC in relation to the same. Where Resolution Applicant(s) are found to have submitted a Resolution Plan which is not a Compliant Resolution Plan, that is, one which does not meet the provisions of the IB Code or the CIRP Regulations, the Resolution Professional may request the Resolution Applicant(s) to remedy the deficiencies in the Resolution Plan submitted, and submit a Revised Resolution Plan. The Revised Resolution Plan shall be reviewed by the Resolution Professional in consultation with his advisors for ensuring compliance with the IB Code and the aforesaid process would be repeated. If any Revised Resolution Plan is found to be a Compliant Resolution Plan, by the Resolution Professional, the same shall be submitted to the CoC for its consideration."

39. On a careful reading of the aforesaid clauses, it is clear that all the 'Resolution Plans' which meet the requirements of Section 30(2) of the 'I&B Code' 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 Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 prescribed except that the 'Resolution Process' should be completed within the stipulated period of 180 days or maximum 270 days.

40. The 'Committee of Creditors' have failed to notice the aforesaid 'process document' and the provision of the 'I&B Code'. Only considering one of the 'Resolution Plan' of 'Rajputana Properties Private Limited' and ignoring the other 'Resolution Plans' including that of the 'Ultratech Cement Limited' which are in consonance with Section 30(2) for the purpose of negotiation and for maximization of the value of the assets. Non-application of mind by the 'Committee of Creditors' and discriminatory behavior in approving the plan submitted by the 'Rajputana Properties Private Limited' is apparent.

41. It is desirable to notice the financial terms of the 'Resolution Plan' of 'Ultratech Cement Limited', relevant of which are as follows:

"FINANCIAL TERMS OF THE RESOLUTION PLAN OF ULTRATECH CEMENT LTD.

S. No.	Particulars	Verified Claim (in Rs. Crores)	Proposed Payment	Interest as on 30.04.2018
1.	Insolvency Resolution Process Cost	115.91 (114.08 was revised by COC)	115.91	NA
2.	Workman Wages	18.01	18.01	NA

FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR

3. Edelweiss Asset 2775.82 2775.82 217.63 Reconstruction Company

4. IDBI Bank 335.85 335.85 26.33

5. Bank of Baroda 427.69 427.69 33.53

6. Canara Bank 370.34 370.34 29.03

7. Bank of India 94.66 94.66 7.42

8. State Bank of 36.89 36.89 2.89 India

9. Oriental Bank of 0.72 0.72 0.06 Commerce FINANCIAL CREDITORS TO WHOM CORPROATE DEBTOR WAS A GUARANTOR

10. IDBI Bank 1567.45 1567.45 Interest will Limited (Dubai be paid Branch) @10% p.a. quarterly rests if the Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 same is not being paid to the creditor.

11. Export Import 619.95 619.95 48.60 Bank of India

12. State Bank of 36.82 36.82 Interest will India (Hong be paid Kong) @10% p.a. quarterly rests if the same is not being paid to the creditor.

13. Bank of Baroda 171.57 171.57 13.45 (London)

14. State Bank of 24.56 24.56 1.93 India (Bahrain)

15. Syndicate Bank 7.05 7.05 0.55 OPERATIONAL CREDITORS (OTHER THAN WORKMEN) AS VERIFIED BY RESOLUTION

16. Unrelated Parties 438.13 438.13 Nil

17. Related Parties 60.75 Nil Nil

18. Statutory 177.50 177.50 Nil Liabilities

19. Equity/ Working NA 350 Nil Capital Infusion TOTAL 7289.05 7568.89 381.62
Total amount with 7950.34 interest

42. From the aforesaid financial terms of the 'Resolution Plan' of 'Ultratech Cement Limited', it will be evident that for maximization of assets of the 'Corporate Debtor' while some amount of working capital has been infused (Rs. 350 Crores) all the 'Financial Creditors' i.e. the 'Financial Creditors' and the 'Operational Creditors' have been paid 100% of dues except the related parties. In the 'Resolution Plan', the 'Ultratech Cement Limited' agreed to pay further interest @10% per annum quarterly to rest of the 'Financial Creditors' for the entire resolution period till the date of payment. In the aforesaid background, interest has been calculated to the 'Corporate Debtor' as on 30th April, 2018.

43. From the two 'Resolution Plans', it will be clear that the 'Rajputana Properties Private Limited' in its 'Resolution Plan' has discriminated some of the 'Financial Creditors' who are equally situated and not balanced the Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 other stakeholders, such as 'Operational Creditors'. Therefore, the Adjudicating Authority has rightly held the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' to be discriminatory. Resolution Plan of the 'Ultratech Cement Limited'

44. Mr. Gopal Subramaniam, learned Senior Counsel appearing on behalf of the 'Rajputana Properties Private Limited' while requested to accept the 'Resolution Plan' as approved by the 'Committee of Creditors' submitted that the process of Insolvency Resolution is in the domain of 'Committee of Creditors'. The jurisdiction of the Adjudicating Authority being a creature of the statute is limited.

45. It was further submitted that the 'Committee of Creditors', 'Resolution Professional' and all 'Resolution Applicants' are bound by the 'process document' prepared under the mandate of Section 25(2)(h) of the 'I&B Code'.

46. We appreciate the aforesaid submissions made by Mr. Gopal Subramaniam, learned Senior Counsel that the 'Committee of Creditors', 'Resolution Professional' and all 'Resolution Applicants' are bound by the 'process document' prepared under the mandate of Section 25(2)(h) of the 'I&B Code' but non-adherence to process stipulated in terms of Section 25(2)(h) of the 'I&B Code' and to stipulation made in the 'process document' will render such decision illegal.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

47. We have noticed the relevant provision of the 'process document' and Section 25(2)(h) and held that the 'Committee of Creditors' have not acted in terms with the provisions of the 'I&B Code' and the 'process document'. The maximization of the value assets of the 'Corporate Debtor' cannot be ignored nor it can be ignored that the same should balance all the stakeholders.

48. If the 'Operational Creditors' are ignored and provided with 'liquidation value' on the basis of misplaced notion and misreading of Section 30(2)(b) of the 'I&B Code', then in such case no creditor will supply the goods or render services on credit to any 'Corporate Debtor'. All those who will supply goods and provide services, will ask for advance payment for such supply of goods or to render services which will be against the basic principle of the 'I&B Code' and will also affect the Indian economy. Therefore, it is necessary to balance the 'Financial Creditors' and the 'Operational Creditors' while emphasizing on maximization of the assets of the 'Corporate Debtor'. Any 'Resolution Plan' if shown to be discriminatory against one or other 'Financial Creditor' or the 'Operational Creditor', such plan can be held to be against the provisions of the 'I&B Code'.

49. According to learned Senior Counsel for the 'Rajputana Properties Private Limited', the revised offer was submitted by 'Ultratech Cement Limited' at a belated stage on 8th March, 2018, only after becoming aware of the financial elements of 'Rajputana Properties Private Limited'. However, it is not clear that as to how revised 'Resolution Plan' submitted by the 'Resolution Professional' on 7th March, 2018 before the 'Committee Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 of Creditors' was made known to the 'Ultratech Cement Limited' who submitted its revised plan on 8th March, 2018.

50. From the record it will be evident that 'Ultratech Cement Limited' always offered for revision of its 'Resolution Plan' and having noticed that an opportunity given to the 'Rajputana Properties Private Limited' on 7th March, 2018, it submitted the revised offer on 8th March, 2018. The revised

offer of 'Ultratech Cement Limited' is Rs. 2,427 Crores as against the offer of the 'Rajputana Properties Private Limited' which is Rs. 2,224 Crores. Thereby there is a gap of Rs. 203.1 Crores.

51. It was submitted that on 13th March, 2018, the 'Resolution Professional' was furnished the forensic report submitted by M/s. HariBhakti & Co., a well-known forensic auditor appointed by the 'Resolution Professional' to carry on forensic audit to identify preferential, undervalued, fraudulent and suspect transactions. However, such issue cannot be decided in this appeal, in absence of specific pleading of relevant facts.

52. It is alleged that the 'Ultratech Cement Limited' to bail out 'Binani Industries Limited', the promoters and shareholders of the 'Corporate Debtor', wanted to acquire significant shareholding. It was submitted that the report of M/s. HariBhakti & Co., relates to scrutiny of transactions made by 'Binani Industries Limited' between 1st July, 2015 to 30th November, 2017, wherein fraudulent transactions amounting to Rs. 2,400 Crores were noticed. Out of the same, Rs. 1,187 Crores were an inter Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 corporate deposit in the form of a loan to 'Binani Industries Limited', to buy the shares of the 'Corporate Debtor' itself. However, such illegal or fraudulent transaction of 'Binani Industries Limited' having no connection with 'Ultratech Cement Limited' and such ground having not been raised before the Adjudicating Authority and in absence of any such evidence or report, it is not open to raise such issue during oral arguments, not based on pleadings.

53. Learned Senior Counsel submitted that after the 'Resolution Plan' was approved, the 'Binani Industries Limited' moved before the Hon'ble Supreme Court and intended to deposit certain amount by transferring their shares to 'Ultratech Cement Limited'. However, any subsequent step taken by 'Binani Industries Limited' for transferring its shares, as proposed before the Hon'ble Supreme Court much after the approval of the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' will not render 'Ultratech Cement Limited' ineligible under Section 29A, which submitted its plan as back as on 12th February, 2018, with modified offer submitted on 8th March, 2018.

54. It was contended that the revised offer of 'Ultratech Cement Limited' was non-responsive, non-compliant and also illegal. However, such plea has not been taken by the 'Committee of Creditors' in their meeting to reject the claim of 'Ultratech Cement Limited'. The fact that the revised offer of 'Ultratech Cement Limited' was not at all considered has also been accepted by the 'Committee of Creditors' and, therefore, it cannot be held Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 to be non-responsive, non-compliant or illegal in terms of the 'process document'.

55. In the aforesaid background, the Adjudicating Authority having directed the 'Committee of Creditors' to reconsider the 'Resolution Plan' submitted by 'Ultratech Cement Limited', it cannot be held to be illegal. Stand of the 'Committee of Creditors'

56. Mr. Tushar Mehta, learned Solicitor General appeared on behalf of the 'Committee of Creditors' highlighted the general framework and objective of the 'I&B Code', which we have already discussed

in the preceding paragraphs.

57. Learned Solicitor General referred to date of advertisement dated 13th October, 2017 inviting prospective lenders, investors and other person(s) to put forward the 'Resolution Plans' for the 'Committee of Creditors' to consider. It was submitted that the 'Committee of Creditors' always followed a fair and transparent procedure to select the 'Resolution Plan' pursuant to the object of the 'I&B Code' i.e., the maximization of value of assets of the 'Corporate Debtor'.

58. It was submitted that despite two proceedings before two different authorities i.e., the Adjudicating Authority and this Appellate Tribunal, the 'Committee of Creditors' continued to follow the same procedure.

59. Mr. Tushar Mehta, learned Solicitor General submitted that pursuant to the Adjudicating Authority order dated 4th May, 2018 and this Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 Appellate Tribunal's order dated 15th May, 2018, the 'Committee of Creditors' complied with the directions passed by the Hon'ble Tribunals and held negotiations with both 'Resolution Applicants'. In compliance with order dated 15th May, 2018 of this Appellate Tribunal, the 'Committee of Creditors' gave its decision on Section 29A and having found eligible 'Ultratech Cement Limited' 'Resolution Plan' was considered and also asked 'Rajputana Properties Private Limited' to raise its offer, to achieve "maximization of value of assets" as per the object of 'I&B Code'. The 'Committee of Creditors' after duly following the orders of the Adjudicating Authority and this Appellate Tribunal approved the plan submitted by 'Ultratech Cement Limited' with majority vote. For submitting the plans of 'Rajputana Properties Private Limited' (19th March, 2018) and 'Ultratech Cement Limited' (18th June, 2018), the 'Committee of Creditors' has shown utmost respect towards the process document, the provisions of the 'I&B Code' and judicial orders passed by different fora.

60. It was also submitted that the 'Committee of Creditors' consisting of the 'Financial Creditors' encumbered with public money, ought to act in the interest of maximization of asset value. Further, as per the scheme of the 'I&B Code', the 'Committee of Creditors' has the discretionary power to take the best decision, within the stipulated time frame, to best suit the interests of the creditors and the public money involved in the process. It was submitted that Section 25(2)(h) has to be read in conjunction with Regulation 36B of the 'Insolvency and Bankruptcy Board of India Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 (Insolvency Resolution Process for Corporate persons) Regulations, 2016'. The said provisions read as under:

"25. Duties of resolution professional. -- (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: --

XXX XXX XXX

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans."

"36B. Request for resolution plans.

(1) The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of regulation 36A to-

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

(a) Every prospective resolution applicant in the provisional list; and

(b) Every prospective resolution applicant who has contested the decision of the resolution professional against its non-

inclusion in the provisional list.

(6) The resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans."

61. Therefore, according to learned Senior Counsel for the 'Committee of Creditors', if need be and if an extraordinary situation so arises, the 'Committee of Creditors' holds the discretion in conformity with the Regulations framed by the Board to extend the timeline over and beyond the 'process documents'. The said fact is also evidenced in the proviso to Clause 1.3.1 of the 'process document' which provided that even after the deadline of the submission of the 'Resolution Plan', any 'Resolution Plan' could be verified by the 'Resolution Professional' as per 'I&B Code' and be considered by the 'Committee of Creditors'. However, it is also provided that the 'Committee of Creditors' may in its discretion, evaluate, accept or reject such 'Resolution Plans'.

62. It is informed that the 'Committee of Creditors' by majority decision has approved the plan submitted by 'Ultratech Cement Limited' which was Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 found to be eligible in absence of any demerit under Section 29A of the 'I&B Code'.

Case of 'Binani Cements Limited'

63. The Company Appeal (AT) (Insolvency) No. 82 of 2018 preferred by 'Binani Industries Limited' against the order dated 28th February, 2018 stands merged with the subsequent orders dated 27th March, 2018 and 2nd May, 2018. The said appeal against the order of the Adjudicating Authority remitting the matter to the 'Resolution Professional' to consider their proposal for settlement has

become infructuous.

64. The 'Binani Industries Limited' has also challenged the order dated 2nd May, 2018 in Company Appeal (AT) (Insolvency) No. 216 of 2018 taking the following plea.

65. According to 'Binani Cement Limited', even during the pendency of the 'Corporate Insolvency Resolution Process', it was open to the parties to settle and pay all dues and seeks relief of termination of the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor'. However, such submission cannot be accepted as there is no provision of settlement made under the 'I&B Code'.

66. It is a settled law that once the 'Corporate Insolvency Resolution Process' is initiated by admitting the application under Sections 7 or 9 or 10, it cannot be withdrawn nor can be set aside except for illegality to be shown or if it is without jurisdiction or for some other valid reason. Merely Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 because the promoter wants to pay all dues including the default amount cannot be a ground to set aside the 'Corporate Insolvency Resolution Process'.

67. In many cases, the Hon'ble Supreme Court exercised its power under Article 142 of the Constitution of India taking into consideration the settlement reached between the parties. In one of the case, the Hon'ble Supreme Court observed that the Competent Authority may make provision under their Rules for withdrawal instead of allowing the parties to move before the Hon'ble Supreme Court under Article 142 of the Constitution of India. In view of such observation of the Hon'ble Supreme Court, the Parliament amended the 'I&B Code' and inserted the provision of 12A, which reads as follows:

"12A. Withdrawal of application admitted under section 7, 9 or 10.□The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified."

68. The aforesaid provision has come into force on 6th June, 2018 i.e. much after the impugned order was passed (2nd May, 2018). The Applicant has not filed an application for withdrawal after approval of the 90% Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 voting share of the 'Committee of Creditors', therefore, the Appellant- 'Binani Industries Limited' cannot take advantage of Section 12A nor can be allowed to settle the matter. Even if they settle the matter, the 'Corporate Insolvency Resolution Process' cannot be terminated by the Adjudicating Authority or this Appellate Tribunal in absence of any illegality.

69. In so far as the observations made by the Adjudicating Authority against the 'Resolution Professional' are concerned, we are of view that the observations were uncalled for, for the following reasons:

i. The 'Resolution Professional' had approached the Adjudicating Authority for seeking clarification in respect of the applications filed by the 'IDBI' for being representative as a member of the 'Committee of Creditors'. ii. The Adjudicating Authority passed order on 17th November, 2017 against which the appeal was filed by the 'IDBI' before this Appellate Tribunal wherein by order dated 18th December, 2017, we directed the 'Resolution Professional' to reconsider the claims of 'IDBI' uninfluenced by the decision of the Adjudicating Authority, Principal Bench. In compliance with such order, the 'Resolution Professional' admitted the claim of 'IDBI' and 'SBI (Hong Kong)' as beneficiaries of corporate guarantees issued by the 'Corporate Debtor' and included their representatives to be part of the 'Committee of Creditors' subject to any final determination of the claims of 'IDBI' and Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 'SBI (Hong Kong)' at any judicial forum including the National Company Law Appellate Tribunal.

iii. Eventually, 'IDBI' and the members of 'Committee of Creditors' arrived at a settlement in consequence of which this Appellate Tribunal allowed 'IDBI' to withdraw its appeal. The 'Resolution Professional' thereby, became bound by the settlement and the decision of this Appellate Tribunal by which claims of 'IDBI' and 'SBI Hong Kong' were allowed and incorporated. In this background, in absence of any fault on the part of the 'Resolution Professional' it was not case for the Adjudicating Authority to pass adverse observations against the 'Resolution Professional'.

iv. The approval of the 'Resolution Plan' is in the domain of the 'Committee of Creditors' and not that of 'Resolution Professional' and, therefore, if the 'Resolution Plan' provides for the mandatory contents and is in accordance with the 'I&B Code' even if in case a 'Resolution Plan' does not provide for full satisfaction of claims of 'Operational Creditors', in absence of any power of the 'Resolution Professional' to reject such 'Resolution Plan', the 'Resolution Professional' cannot be blamed. The Adjudicating Authority has failed to notice the aforesaid fact and made adverse comments against the 'Resolution Professional' by impugned order dated 2nd May, 2018 which are uncalled for.

Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018

70. The Hon'ble Supreme Court vide its order dated 2nd July, 2018, while remitted the matter to this Appellate Tribunal, also directed to transfer the insolvency petition from the Adjudicating Authority to this Appellate Tribunal for passing appropriate order in accordance with law.

71. After decision of the Adjudicating Authority by impugned order dated 2nd May, 2018, the 'Committee of Creditors' held its 17th Meeting on 28th May, 2018 and considered the revised plan submitted by the 'Ultratech Cement Limited'. It was put to vote and all the members of the 'Committee of Creditors' by 100% voting shares voted in favour of 'Ultratech Cement Limited' and resolved that the Letter of Intent in connection with and amending the 'Resolution Plan' of

'Ultratech Cement Limited' be issued to 'Ultratech Cement Limited'.

72. The 'Resolution Professional' has now placed the same before this Appellate Tribunal for passing appropriate order under Section 31 of the 'I&B Code'.

73. In exercise of powers conferred by Section 31 of the 'I&B Code' read with order of remand by the Hon'ble Supreme Court, we have gone through the records, revised 'Resolution Plan' submitted by 'Ultratech Cement Limited, gist of which noticed earlier and being satisfied that the 'Resolution Plan' approved by the 'Committee of Creditors' under sub- section (4) of Section 30 in its 17th meeting held on 28th May, 2018 meets the requirements as referred to in sub-section (2) of Section 30, we approve the revised 'Resolution Plan' submitted by 'Ultratech Cement Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018 Limited' which shall be binding on the 'Corporate Debtor' and its employees, members, Creditors, guarantors and other stakeholders involved in the 'Resolution Plan'.

74. In the result, the Company Appeal (AT) (Insolvency) Nos. 123 & 188 of 2018 preferred by 'Rajputana Properties Private Limited' and Company Appeal (AT) (Insolvency) Nos. 82 & 216 of 2018 preferred by 'Binani Industries Limited' are dismissed. The Company Appeal (AT) (Insolvency) No. 234 of 2018 preferred by Mr. Vijay Kumar Iyer, 'Resolution Professional' is allowed. The observations made against Mr. Vijay Kumar Iyer is set aside. Records of Company Petition (IB) No. 359/KB/2017 is remitted to the Adjudicating Authority for constitution of monitoring committee and implementation of revised approved plan submitted by 'Ultratech Cement Limited' in accordance with law.

[Justice S.J. Mukhopadhaya] Chairperson [Justice Bansilal Bhat] Member (Judicial) NEW DELHI
14th November, 2018 AR Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018