



## Jaypee Kensington Boulevard Apartments Welfare Association & Ors. V. NBCC (India) Ltd. & Ors.: Supreme Court Judgment Dated 24 March 2021

The Supreme Court recently in its judgement dated 24 March 2021 has set aside an order of the National Company Law Tribunal, Principal Bench, New Delhi (“NCLT”) which had *inter alia*, approved the resolution plan submitted by NBCC (India) Limited (“NBCC”), after carrying out certain modifications to the resolution plan. The Supreme Court has remitted the process of approval of the resolution plan submitted by NBCC back to the Committee of Creditors (“CoC”) of Jaypee Infratech Limited (“JIL”) for further consideration and extended the period for completion of the corporate insolvency resolution process (“CIRP”) by another 45 days, with liberty to the Interim Resolution Professional (“IRP”) to invite modified/fresh resolution plans from NBCC and Suraksha Realty (“Suraksha”), to be submitted within 14 days from the date of the judgment.

Shardul Amarchand Mangaldas & Co. (“SAM Co.”) had the opportunity to represent ICICI Bank Limited in proceedings which raised substantial questions of law under the Insolvency and Bankruptcy Code, 2016 (“Code”). The judgment of the Supreme Court, as discussed below, settle the position of law on *inter alia* the rights of dissenting financial creditors, treatment of third party interests in a resolution plan, and the scope of a resolution plan. . They also strengthen jurisprudence on the role of the NCLT at the time of approving a resolution plan.

### Power and jurisdiction of the nclt while dealing with resolution plan approved by the CoC

The Supreme Court was called on to determine if the NCLT’s exercise of its powers to modify the resolution plan submitted by NBCC and approved by the CoC was within its jurisdiction.

In consonance with its previous judgements dealing with this issue, the Supreme Court once again clarified that the NCLT while hearing an application for approval of resolution plan cannot interfere with the commercial wisdom exercised by the CoC. The limited judicial review available to NCLT extends to examining if the parameters under Section 30(2) and Section 31 of the Code have been met. If the resolution plan does not meet the specified parameters, the NCLT can only send a resolution plan back to the CoC for resubmission of the plan after satisfying the necessary parameters, and cannot substitute any commercial term of the resolution plan approved by the CoC

### Treatment of dissenting financial creditors under a Resolution Plan

One of the most crucial questions of law clarified by the Supreme Court relates to the manner in which liquidation value may be paid to dissenting financial creditors under a resolution

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plan. In this case, the resolution plan submitted by NBCC provided the dissenting financial creditors an equivalent of liquidation value, in terms of Section 30 and Section 53 of the Code, in the form of proportionate share in equity and certain land parcels through multiple special purpose vehicles.

In this regard, the Supreme Court fully upheld the submissions and objections made on behalf of ICICI Bank Limited (*a dissenting financial creditor*) and held that the payment envisaged to dissenting financial creditors under Section 30(2)(b) could only be in monetary terms and the dissenting financial creditor (*in this case, ICICI Bank*). This would mean that the dissenting creditor is paid in money and not in kind. However, if a dissenting financial creditor is a secured creditor and a valid security interest is created and existing in its favour, the entitlement of such a dissenting financial creditor to receive the “amount payable” could also be satisfied by allowing it to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him.

The dissenting financial creditor cannot be forced to remain attached to the corporate debtor by way of provisions in the nature of equities or securities.

## **Can a resolution plan extinguish security interest of a third party secured creditor without assigning any value to the same?**

Another crucial question of law which has been settled by the Supreme Court relates to whether a resolution plan could extinguish the security interest of a third party secured creditor-i.e., a creditor in whose favour security interest has been created even though the creditor has not disbursed any debt to the corporate debtor, without assigning any value to it.

The Supreme Court found force with the argument of ICICI (*in its capacity as secured creditor of JIL*) and agreed that it had a valid mortgage over a certain property of JIL and the resolution plan cannot assume that the effect of implementation of plan would be that all encumbrances and charges on property of the corporate debtor for the loans given to third parties shall stand extinguished.

It was also successfully argued on behalf of ICICI that a legal right in property cannot be taken away without a due process of law and that when the subject mortgage had not even been taken up as a part of the CIRP of JIL, it could not have been extinguished on the *ipse dixit* of NBCC. The Supreme Court conclusively held in the favour of ICICI that the resolution plan erroneously extinguished the security interest of ICICI, which was a secured creditor who was not even involved in the CIRP of JIL.

## **Treatment of Minority shareholders of the corporate debtor**

The resolution plan provided for payment of INR 1 crore to minority shareholders in exchange for extinguishing their rights and delisting the company. This was objected to by the minority shareholders who contended that their interests were not adequately balanced by the CoC and also pleaded that the delisting should be in accordance with the delisting procedures laid down by the Securities Exchange Board of India (“SEBI”).

The Supreme Court refrained from encroaching upon the commercial wisdom of the CoC, and on finding the plan provides for a payment greater than liquidation value payable to the minority shareholders, held it balances the interests of all stakeholders. Further, the Supreme Court noted that the SEBI (Delisting of Equity Shares Regulations), 2009 provide certain exemptions to delistings pursuant to resolution plans approved under the Code and that pursuant to

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*Explanation to Section 30(2)(e) of the Code, all shareholders' approvals are deemed to be given on approval of the resolution plan. Consequently, it held that the challenge to the resolution plan by the minority shareholders was unsustainable.*

## **Whether a resolution plan could modify the terms of the contract entered into between the Yamuna expressway industrial development authority and jil?**

While determining if NBCC could modify terms of a contract entered into between Yamuna Expressway Industrial Development Authority ("YEIDA") and JIL by virtue of the resolution plan, the Supreme Court held that all alterations in the essentials of the contract would require the consent of YEIDA. This would be the case even though the contract was not a statutory one. Without such consent, stipulations in the resolution plan modifying the contract would have to be disapproved.

## **Would a challenge to the resolution plan by an individual/association of homebuyers be maintainable, After it has been approved by the homebuyers as a class? Would provisions of the resolution plan have to be compliant with the RERA?**

While dealing with appeals of dissatisfied homebuyers against the resolution plan, the Supreme Court observed that homebuyers of JIL fall in the category of 'class of creditors' and the voting share of that class would be in terms of the financial debt owed to that class as a whole and while divergence of views may exist within the class of homebuyers, but when it comes to the vote in the CoC, their vote would be that of a class. Since Section 25A of the Code provides that minorities within the 'class' are bound by the decisions of the majority and there is no scope for a homebuyer suggesting herself to be a dissenting financial creditor merely because she was not with the majority of within the class. Further, the Court held that creditors in the class who do not agree with the majority vote are estopped from putting up any challenge to the resolution plan contrary to the decision of the requisite majority of their class.

On a conflict of certain provisions of the Code and Real Estate (Regulation & Development) Act, 2016 ("RERA"), the Supreme Court held that the provisions of the Code would override those in the RERA. Consequently, contentions relating to the claims under RERA that do not conform with the resolution plan would be rejected, and the CoC would have full powers to decide the treatment of the agreement that the resolution plan would propose with financial creditors such as homebuyers.

## **Treatment of Claims not made within the stipulated time**

While the resolution plan of NBCC provided for payments to 100% of the fixed deposit holders, the NCLT directed for a stipulation in the resolution plan to be included for payment of unclaimed fixed deposit holders as and when they would make a claim and such a right would remain in force as long as they were entitled to make a claim under the Companies Act 2013.

The Supreme Court observed that punctual compliance of requirements is fundamental to the entire process and if a claim has not been made within stipulated time, it cannot be made a part of the information memorandum prepared by the IRP and need not be accounted for in the resolution plan.

## **Whether the resolution plan can deal with assets of a subsidiary?**

In this case, the financial creditors of JIL's subsidiary Jaypee Healthcare Ltd. ("JHL") objected to stipulations in the resolution plan that prevented them from taking coercive actions against JHL or its assets, and that sought the sale of JIL's shareholding in JHL. NBCC accepted a proposal by the financial creditors of JHL on the formation of a joint committee to sell JIL's shares in JHL.

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While this compromise was accepted by the Supreme Court, it also held that to the extent the resolution plan deals with JIL's shareholding in JHL, it deals only with the assets of the corporate debtor..

## **Can a Resolution Plan unilaterally cancel transfers/transactions which lack proper agreement and are without consideration, without any corresponding obligation to the counter parties?**

In the resolution plan, NBCC had reserved a right to cancel certain transfers/transactions which had been made without proper agreements/sub-leases and without consideration, without any corresponding obligation to the counter parties. The NCLT had allowed such a stipulation but had contended that such agreement holders would have the right to remedy before the competent forum. The Supreme Court, while upholding the decision of the NCLT on this issue, observed that the decision of the NCLT to not encroach upon the commercial wisdom of the CoC worked towards viability of the resolution plan, while extending fair treatment to the Appellants (*agreement holders*) by keeping their right to seek remedy in a competent forum intact.

## **Can the CoC simultaneously vote on two resolution plans?**

In this case, certain creditors had challenged the procedure adopted by the CoC, which had voted on both NBCC and Suraksha's plans simultaneously.

The Supreme Court observed that at the relevant time, the Code or IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") did not prohibit the simultaneous consideration and voting of resolution plans. Further, the Supreme Court noted that the subsequent amendment of Regulation 39(3B) of the CIRP Regulations, expressly requiring simultaneous voting on all eligible resolution plans could only be viewed as clarificatory in nature. Consequently, it concluded that the process of simultaneous voting over two plans for electing one of them cannot be faulted with.

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