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Cementing Debt Cracks through IBC: Binani Cement

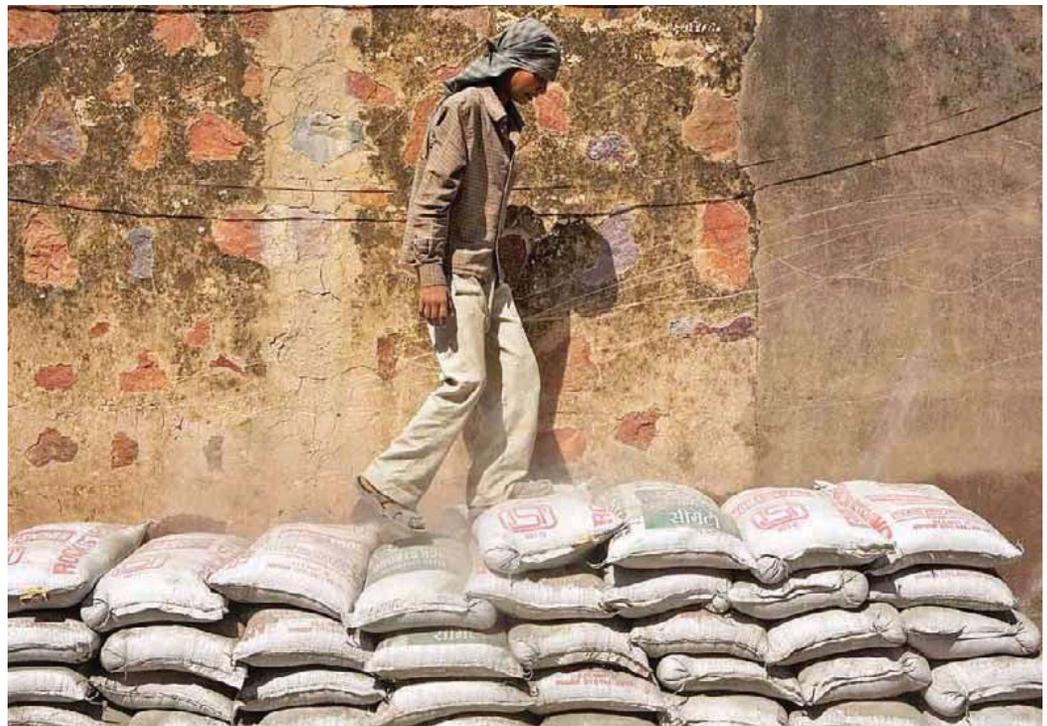
■ Sachin Gupta & Manmayi Sharma



The insolvency proceedings of Binani Cement, the flagship cement manufacturing subsidiary of the Binani Industries, faced multiple issues during the Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC). The orders passed by the National Company Law Tribunal (NCLT) were appealed before the National Company Law Appellate Tribunal ('NCLAT') and all the way up to the Supreme Court, which, by its order dated -2nd July 2018 directed that all pending issues and

appeals be heard by the NCLAT on a day-to-day basis so that judgment can be pronounced as early as possible.

The NCLAT adjudicated upon five appeals that were referred from orders passed by the NCLT, under Section 61 of the IBC. These appeals were primarily related to the settlement of dues, discrimination against unsecured financial and operational creditors, and the inequitable consideration of resolution applicants that had seen a prolonged battle between the two prime contenders, namely, Dalmia Bharat led Rajputana Properties Pvt. Ltd. and



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Kumarmangalam Birla's, Ultratech Cement.

On 14th November 2018 the NCLAT in a detailed judgment approved Ultratech Cement's revised offer to acquire the debt-laden Binani Cement Ltd and also upheld the NCLT's order rejecting the resolution plan submitted by Rajputana Properties Pvt. Ltd. as discriminatory in its treatment towards the creditors of Binani Cement. The NCLAT also disallowed any settlement of insolvency proceedings by Binani Industries after the admission of the insolvency proceedings and further, recognized the applicability of Section 29A of the IBC when the Binani Industries tried to pay off its debts by transfer of its shareholding to Ultratech.

When Rajputana Properties appealed against the NCLAT judgment, the Supreme Court, by its order dated 19th November 2018 upheld the NCLAT judgment and allowed the takeover of Binani Cement by Ultratech Cement.

THE JUDGMENT

In its judgment, the NCLAT initially discusses its views on the primary objectives of the IBC as being the resolution of the Corporate Debtor (CD), while ensuring maximizing the value of its assets, and balancing the interests of all stakeholders. In the absence of any parameters for structuring of a Resolution Plan in the IBC, the NCLAT explains that a Resolution Plan, is not a sale, or an auction of the assets of the CD and thus, requires the application of mind by the Committee of Creditors (CoC) on the long-

term commercial prospects of the CD. The NCLAT stressed that the resolution of the Corporate Debtor is different from mere recovery, or from liquidation, on the reasoning that these processes are inequitable as they satisfy dues of some creditors in priority to others.

The above analysis is used as the basis for the NCLAT's decision on merits. Most importantly, this order details the ground for approval or rejection of a Resolution Plan that is not expressed amongst the requirements laid down in Section 30(2) of the IBC, but however, is made implicit in the very scheme and objectives of the IBC.

REJECTION OF RAJPUTANA'S RESOLUTION PLAN

The Resolution Plan submitted by Rajputana was at first approved by around 99% of the CoC of Binani Cement. However, around 10% of the Creditors recorded a protest note alleging that the plan gave them no option but to approve its terms and conditions. The NCLT did not approve this resolution plan, and the NCLAT upheld its reasoning.

While the resolution plan of Rajputana subjected certain unsecured Financial Creditors to a greater haircut, it also stated that dissenting creditors would be provided with only the Liquidation Value on approval of the Resolution Plan, thus, forcing even the creditors that were against the resolution plan, to vote in favour, to avoid getting only their share in the Liquidation Value, which would be much lesser as offered in the Resolution Plan.

When it was contended on behalf of Rajputana that the intent of the legislature is to bind the minority stakeholders, the NCLAT emphasized that there can be no differential treatment amongst similarly situated Financial Creditors or Operational Creditors. Further, the NCLAT explains that Section 30(2)(b) of the IBC, which requires that a Resolution Plan must pay Operational Creditors an amount that is not below what is due to them in the event of a fictional liquidation of the Corporate Debtor, ought not to be misread in a manner to say that Operational Creditors are provided with the Liquidation Value only. The decision in *Central Bank of India Vs. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors.*¹ is affirmed as per Regulation 38 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP Regulations') which was amended/repealed on the ground that the IBBI cannot mandate for a resolution plan should to provide the liquidation value to Operational Creditors [clause (b) of regulation 38(1) of the CIRP Regulations] and to dissenting Financial Creditors [clause (c) of regulation 38(1) of the CIRP Regulations]. The NCLAT repeated its view that a Resolution Plan cannot be against the basic object of maximization of value and must balance the interests of all stakeholders.

CONSIDERATION OF ULTRATECH'S REVISED RESOLUTION PLAN

The NCLAT found fault with the CoC for not considering the higher bid submitted

by Ultratech in its revised Resolution Plan. The NCLAT held that as long as Ultratech's original plan was submitted on time, and did not violate Section 30(2) of the IBC, the CoC ought to have considered the revised offer, especially given that the CoC had in fact approved the revised offer submitted by Rajputana after the last date for submission of resolution plans. The NCLAT indicates that there is no time limit for the CoC to consider a revised plan, except for the stipulated 180-extendable-to-270 day time period, as long as it adheres to the IBC and the original plan is submitted in due time.

The CoC's consideration of only Rajputana's revised plan, and non-application of mind over Ultratech's revised and higher offer, was held discriminatory and against the objective for the maximization of value of the assets.

Finally, the CoC itself represented before the NCLAT that the plan of Ultratech Cement was later, duly considered in terms of the directions of the NCLT and NCLAT and approved by a 100% vote of the CoC.

ON ATTEMPTS AT SETTLEMENT AND THE APPLICABILITY OF SECTION 29A OF THE IBC

Even after Rajputana's Plan was at first approved by the CoC, the holding company, i.e. Binani Industries tried to obtain an out of court settlement of Binani Cement's dues, through a parallel deal with Ultratech Cement. The NCLAT held that there was no provision for settlement and withdrawal of insolvency

proceedings, as even in terms of Section 12A, Binani Industries would require the consent of 90% of the CoC, which was not the case here. Conclusion

The NCLAT judgment recognizes the main objectives of the IBC viz. to ensure maximum recovery with the preservation of asset base and the balancing the interest of all stakeholders. It is now to be seen how the aspect of treatment of similarly placed creditors as laid down by NCLT is given effect in further resolution plans. NCLAT further allows consideration towards revised resolution plans submitted after the last date of submission, so long as the original resolution plan is submitted within the applicable time-frame. The time frame ought not to be merely extended on the pretext of revised resolution plans in absence of any higher or more attractive terms. Another point worth noting is that the NCLAT recognizes that the role of a Resolution Professional is limited to screening a resolution plan on its adherence to the express terms [Section 30(2)] of the IBC. However, the decision to approve or reject a resolution plan is firmly placed within the ambit of the CoC, which must be discretionary and approve a plan that accords with the aims and objectives of the IBC.

The above judgment of NCLAT thus brings clarity as regards certain material issues which invariably arise in case of a CIRP and gives certainty as regards the position and status of resolution applicants under IBC. [w](#)



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¹Company Appeal (AT) (Insolvency) No. 526 of 2018