

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 03 of 2022**

[Arising out of Order dated 24.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) in CP (IB)-1913(ND)/2019]

In the matter of:

Sanjeev Mahajan

...Appellant

Vs.

India Bank (Erstwhile Allahabad Bank) & Anr.

.....Respondents

For Appellants: Mr. Abhijeet Sinha, Mr. Kumar Anurag Singh, Mr. Zain A. Khan & Mr. Vinayak Bhandari, Advocates.

For Respondents: Mr. Rajesh Kumar Gautam, Mr. Anant Gautam, Mr. Nipun Sharma & Mr. Vidur Ahluwalia, for R-1.

**J U D G M E N T
(04th July, 2022)**

Ashok Bhushan, J.

1. This Appeal has been filed against order dated 24.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) by which order the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short) by the Indian Bank-Respondent No.1 has been admitted. The brief facts of the case and sequence

of the events necessary to be noted for deciding the issue raised in this Appeal are:

The Corporate Debtor- 'Nimitaya Hotel and Resorts Limited' as its name suggests is in the hospitality business. Nimitaya Group consisted of three other entities apart from the Corporate Debtor. Against Corporate Debtor and three other entities of Nimitaya Group amounts were due to the Allahabad Bank (now Indian Bank). The compromise proposal of the Nimitaya Group was accepted by Allahabad Bank for Rs.260 Crores by letter dated 19.03.2019. As per compromise, Rs.154 Crores was to be paid by 31.03.2019 and remaining balance of Rs.102 Crores was to be paid within 90 days. Although Nimitaya Group including the Corporate Debtor made the payment of Rs.156 Crores by 31.03.2019 but could not make the balance payment within three months as per the time granted. A Section 7 Application filed by the Allahabad Bank against the Corporate Debtor after acceptance of the compromise proposal was withdrawn on 11.04.2019. The Corporate Debtor could not pay the balance of Rs.102 Crores which led to filing of Section 7 Application by the Allahabad Bank in July, 2019. During pendency of Section 7 Application, the Respondent Bank invited bid from eligible Asset Reconstruction Companies (ARC's)/ Non-Banking Financial Companies (NBFC's)/ Financial Institution (FI's) for acquisition of categories of NPA's on 100% cash on "As is where is Basis". The name of the Corporate Debtor was also mentioned in the invitation letter dated 18.01.2021 where INR 81 Crores was offer of Bank for acquisition of NPA of the Corporate Debtor. No bid was received by the Bank in pursuance of the Invitation letter dated 18.01.2021

with regard to Corporate Debtor. After failure of the acquisition process, the Appellant submitted several OTS proposals to the Bank beginning with INR 60 Crores. Earlier proposals were not accepted by the Bank. On 03.12.2021, Corporate Debtor submitted an OTS proposal offering Rs. 81 Crores with repayment plan. The said OTS proposal was rejected by the Bank vide letter dated 06.12.2021. Appellant on 07.12.2021 again sent a letter to the Bank requesting the Bank to place the proposal before the Competent Authority. The Appellant had filed a Writ Petition being Writ Petition (Civil) No. 14108 of 2021 in the Delhi High Court questioning the decision of the Bank to reject the OTS proposal which is said to be pending. The Adjudicating Authority vide order dated 24.12.2021 admitted Section 7 Application holding that there was debt and default on the part of the Corporate Debtor. Entertaining this Appeal, this Tribunal on 05.01.2022 passed following interim order:-

“05.01.2022: Learned Counsel for the Appellant submits that the Appellant has offered Rs. 81 Crores to the Bank for One Time Settlement which was not accepted by the Bank on 06.12.2021 against which Writ Petition No. 14108 of 2021 has been filed in the Delhi High Court which has been already directed to be listed on 18.01.2022. It is submitted that the offer of Rs. 81 Crores was made in view of the fact that the Bank proposes to assign its debt to Asset Reconstruction Company for the same amount. It is further submitted that the Committee of Creditors has not yet been constituted in pursuance of the impugned order dated 24.12.2021.

2. Let notice be issued on Respondents by speed post. Requisite along with process fee be filed within three days. If the Appellant provides the e-mail address of Respondents, let notice be also issued through e-mail. Respondents may file Reply within two weeks. Rejoinder, if any, may be filed within two weeks thereof.

3. List the Appeal on 14.02.2022.

In the meantime, the 'Interim Resolution Professional' will not constitute the 'Committee of Creditors', if not yet constituted. However, the 'Interim Resolution Professional' will ensure that the company remains a going concern."

2. Subsequently, the interim order passed by this Tribunal was vacated on 15.03.2022. Paragraph 2 of the order is as follows:-

"2. Be that as it may, it is open for the Appellant to make deposit without any prejudice to the rights of the parties and approach the Bank for accepting the offer. We make it clear that we are not expressing any opinion at this stage regarding the claim of the Appellant. However, we are of the view that Interim Order dated 05.01.2022 is modified and let the 'Committee of Creditors' be constituted. However, the Interim Resolution Professional shall ensure that Company remains a 'going concern'.

List this Appeal on 19th April, 2022."

3. Respondents have filed their Reply-Affidavit. Appellant has also filed an Additional-Affidavit.

4. We have heard Shri Abhijeet Sinha, Learned Counsel for the Appellant and Shri Rajesh Kumar Gautam, Learned Counsel for the Respondents.

5. Learned Counsel for the Appellant submits that the grievance of the Appellant is that the Financial Creditor is not willing to settle with the Appellant in the same terms as it was ready to settle with ARCs. It is submitted that the Bank has invited a bid for NPA of the Corporate Debtor for an amount of Rs.81 Crores and when the same amount with the same conditions of repayment was being offered by the Appellant, the same has been rejected by the Bank. It is submitted that the hotel business was one of the most affected sectors due to COVID. The Corporate Debtor had every intention to honour the earlier compromise dated 19.03.2019 and a payment of Rs.158 Crores was already made and it was only Rs.102 Crores which was balance. The Financial Creditor is a 100% member of the Committee of Creditors. A proposal was also sent to IRP/RP to place before the CoC under Section 12A. IRP sent an e-mail on 07.04.2022 that on 11.04.2022 Bank rejected the same. The object of the IBC is to revive the Corporate Debtor and the Bank on the same amount is ready to assign the debt to ARCs. What is the reason for not accepting the same amount from the Appellant has not been explained by the Bank. The Appellant is still willing to settle and pay the dues but due to obstinate attitude of the Bank, Corporate Debtor is not able to settle the matter and revive its business.

6. Shri Rajesh Kumar Gautam, Learned Counsel appearing for the Bank refuting the submissions of the Learned Counsel for the Appellant submitted

that the submissions which are being raised by the Appellant in this Appeal are being raised by the Appellant before the Delhi High Court in Writ Petition (Civil) No. 14108 of 2021. OTS proposal dated 03.12.2021 of Rs.81 Crores has been rejected by the Bank. It is submitted that the offer to ARCs of Rs.81 crores was on consideration of 100% payment of cash and it was a combined offer with regard to other NPAs and the Appellant cannot claim to settle on the said amount. Bank is not going to accept the amount less than Rs.102 Crores. It is submitted that no borrower as a matter of right can pray for grant of benefit of OTS. The grounds made in the present Appeal cannot be the subject matter of the Appeal under IBC. Appellant has no right much less the right to seek direction for acceptance of OTS proposal. The debt and default having been held, there is no ground to interfere with the order impugned by which the Application under Section 7 has been admitted.

7. We have considered the submissions of the Learned Counsel for the parties and perused the record.

8. The present is a case where the Corporate Debtor is not denying its financial liabilities to the Bank. As noted above, a compromise proposal was accepted for Rs.260 Crores against the Nimitaya Group consisting of Corporate Debtor and three other entities. An amount of Rs. 154 Crores was paid by 31.03.2019 and due was only Rs.102 Crores which remains to be paid. Consequently, an earlier compromise failed. Subsequent to filing Section 7 Application, the Bank had issued a proposal for sale of NPAs to Asset Reconstruction Companies (ARC's)/ Non-Banking Financial Companies

(NBFC's)/ Financial Institution (FI's) vide its Notice dated 18.01.2021. Copy of the proposal for sale notice in Annexure A-9 annexed in the Appeal in which under heading "NPAs with book balance of above Rs. 50.00 Crs. and upto 100 Crs.". The Corporate Debtor is mentioned at Item No.1 with following details:-

"II NPAs with book balance of above Rs.50.00 Crs. and upto 100 Crs

S No.	BRANCH	NAME OF THE ACCOUNT	BALANCE	TOT.DUES	RESERVE PRICE	DATA ROOM
1	SAMB, DELHI	NIMITAYA HOTEL and RESORTS LTD.	99.69	152.34	81.00	SAM Branch, Delhi
2	SAMB, MADURAI	G NARAYANAN EDUCATIONAL TRUST	84.40	123.98	61.20	SAM Branch, Chennai
3	SAMB, DELHI	MOHAN CHARITABLE EDUCATIONAL TRUST	70.06	115.18	50.00	SAM Branch, Delhi
4	SAMB, COIMBATORE	SRI KARUNAMBIKAI MILLS P LTD.	68.83	98.25	21.60	SAM Branch, Chennai
5	SAMB, LUDHIANA	KAUR SAIN SPINNERS LTD.	55.48	78.40	43.60	SAM Branch, Delhi
		TOTAL	378.45	568.15	257.40	

9. It was after the said sale proposal that on 03.12.2021, the Appellant gave an offer of Rs.81 Crores which has been rejected on 06.12.2021 by the Bank. In April, 2021 also the Appellant made a request to the IRP for submitting an Application under Section 12A which according to the Appellant has also not been accepted by the CoC. In the present case, 100% CoC member is the Respondent- Bank. There are no other Financial Creditors except the Respondent Bank.

10. The primary object of the IBC is to revive the Corporate Debtor and to ensure that it starts running. The Hon'ble Supreme Court has observed that the settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a Corporate Debtor. Following was laid down by the Hon'ble Supreme Court in "**ES**

Krishnamurthy & Ors. vs. M/s. Bharath Hi Tech Builders Pvt. Ltd.- Civil Appeal No. 3325 of 2020 in paragraphs 28 & 29:-

“28. Undoubtedly, settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as distinct from allowing it to go into liquidation. As the Statement of Objects and Reasons accompanying the introduction of the Bill indicates, the objective of the IBC is to facilitate insolvency resolution “in a time bound manner” for maximisation of the value of assets, promotion of entrepreneurship, ensuring the availability of credit and balancing the interest of all stakeholders.....

29. The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelises and circumscribes the ambit of such jurisdiction. Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity.....”

11. Learned Counsel for the Respondent has relied on the judgment of the Hon’ble Supreme Court in **“Bijnor Urban Cooperative Bank Limited, Bijnor and Ors. vs. Meenal Agarwal and Ors.- 2021 SCC OnLine SC 1255”** wherein the Hon’ble Supreme Court has laid down following in paragraph 30:-

“30. The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.”

12. The law has been clearly laid down by the Hon’ble Supreme Court that although settlement has to be encouraged in the IBC but no direction can be issued to the Financial Creditor to positively grant the benefit of OTS to a borrower. The debt and default having been found by the Adjudicating Authority by admitting Application which debt and default having not been questioned before us, we see no error in the order of the Adjudicating Authority admitting Section 7 Application.

13. The statutory scheme under the IBC delineated under Section 12A of the Code as well as Regulation 30 A of the CIRP Regulations, 2016 which has been brought in the statute w.e.f. 06.06.2018 is a clear recognition of provisions and procedures for settlement in the IBC proceedings. In the facts of the present case and sequence of the events which we have noticed above, we are of the view that one more opportunity be given to the Appellant to submit an Application under Section 12A to the IRP/ RP for being placed before the CoC which is in place in view of our order dated 15.03.2022 vacating the interim order on constitution of the CoC. We are of the view that since the offer of Rs. 81 Crores of the Appellant is not accepted by the Bank, the Application may be filed by the Appellant only if it makes an offer under Section 12A Application for an amount of more than Rs.81 Crores.

14. The CoC under the IBC has been given full freedom to grant an approval of 90% voting share to a proposal under Section 12A only thereafter Application can be filed before the Adjudicating Authority. The freedom of decision of the CoC is unfettered. However, in the facts of the present case, we are of the view that CoC while taking a decision for accepting or rejecting of proposal under Section 12A may also take following factors into consideration:-

- (i) The Bank had issued a proposal for sale of NPA of the Corporate Debtor to the Asset Reconstruction Companies (ARC's)/ Non-Banking Financial Companies (NBFC's)/ Financial Institution (FI's) for an amount of Rs.81 Crores.

(ii) Whether the Financial Creditor looking to the assets of the Corporate Debtor shall be able to realise an amount more than offered by the Appellant either in the insolvency resolution process by Resolution Plan or a liquidation process.

(iii) The maximisation of the assets of the Corporate Debtor is one of the objectives, equally important is the recovery of the financial dues of the Bank and we have no doubt that CoC while taking a decision shall take decision under which it shall be able to realise its dues to the maximum.

(iv) The CoC having been constituted after our order dated 15.03.2022 may also proceed to issue Form-G and receive the Resolution Plans. However, till the decision on proposal under Section 12A is not taken, CoC shall not proceed to take a vote on any of the Resolution Plans.

15. In view of the foregoing discussions, we dispose of this Appeal with following directions:-

(i) Appellant shall submit a fresh Application under Section 12A to the IRP/ RP for placing it before the CoC which contains an offer of more than Rs.81 Crores.

(ii) The said Application shall be filed within two weeks from this date.

(iii) The CoC shall consider the Application under Section 12A after obtaining approval of the Competent Authority of the Bank

keeping into consideration the factors as have been mentioned in paragraph 14, as above.

- (iv) The CoC shall complete the process of taking decision on Section 12A Application within a period of two months from this date. For a period till CoC takes a decision on a proposal under Section 12A, CoC may not put any Resolution Plans, if any, to vote.

16. In result, we dispose of this Appeal with above directions without interfering in the impugned order passed by the Adjudicating Authority.

**[Justice Ashok Bhushan]
Chairperson**

**[Naresh Salecha]
Member (Technical)**

New Delhi
Anjali