# Analysis: Essar Steel - Arcelor Mittal Judgement

## Background

- As recommended by the Oversight Committee, the Reserve Bank of India issued a press release dated June 13, 2017 identifying 12 (twelve) large stressed accounts (totalling about 25% (twenty five percent) of the then gross non-performing assets of the banking system in India) for immediate reference under the insolvency and Bankruptcy Code, 2016 (**Code** or **IBC** or **IBC Code**), Essar Steel India Limited (**ESIL**) being one of them.
- Pursuant to the above, the lenders' of ESIL initiated the corporate insolvency resolution process (**CIRP**) for ESIL. As part of the CIRP, the resolution professional invited plans and the committee of creditors (**CoC**) approved the resolution plan submitted by ArcelorMittal India Private Limited (**Arcelor**) (post judgement of Hon'ble Supreme Court dated October 4, 2018, reported as *ArcelorMittal India Private Limited v. Satish Kumar Gupta, (2019) 2 SCC* and post fulfilment of the conditions mentioned in the said judgement).
- Several issues were contested before the Hon'ble Supreme Court of India (pursuant to the order dated July 4, 2019 passed by the Hon'ble National Company Law Appellate Tribunal (**NCLAT**)). The Hon'ble Supreme Court of India vide its order dated November 15, 2019 dealt with the following key issues:

## Key Issues

- Role of (i) the Resolution Professional; and (ii) the CoC that is constituted under the Code;
- Jurisdiction of the National Company Law Tribunal (**NCLT**) and the NCLAT, qua resolution plans that have been approved by the CoC;
- Treatment of Secured and Unsecured creditors - *"the equality principle*"*;*
- Extinguishment of rights of Creditors against Guarantors;
- Undecided Claims;
- Constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019/CIRP relating to the mandatory time period of 330 (three hundred and thirty) days;
- Constitution of the Sub-Committee; and
- CoC does not act as a fiduciary.

## Findings of the Hon'ble Supreme Court

### (i) Role of the Resolution Professional and the CoC that is constituted under the Code

***Role of the Resolution Professional***: The Hon'ble Supreme Court of India has again clarified that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application (under Sections 7, 9 or 10 of the Code) till a resolution plan is approved by the NCLT, but is also the key person to collect, collate and finally admit claims of all creditors, which must then be examined for payment (in full or in part or not at all) by the resolution professional, appoint and convene meetings of the CoC, so that they may decide upon resolution plans based on the information memorandum prepared by the resolution professional. The Hon'ble Supreme Court of India has also again clarified that the role of the resolution professional is not adjudicatory but administrative which was also earlier held in *ArcelorMittal India Private Limited v. Satish Kumar Gupta*[1].

> *"It is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors."*
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> Para 36, Page 55

[1] *(2019) 2 SCC 1*


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***Role of the CoC:*** The Hon'ble Supreme Court of India upheld the earlier judgements passed in various cases that it is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the corporate debtor by accepting a particular resolution plan. The CoC may approve a resolution plan by a vote of not less than 66% (sixty-six percent) of voting share of the financial creditors, after considering its feasibility and viability.

(ii) **Jurisdiction of the NCLT and the NCLAT, qua resolution plans that have been approved by the CoC**

The Hon'ble Supreme Court of India has held that the limited judicial review of the NCLT has to be within the four corners of Section 30(2) of the Code and with respect to NCLAT, it has to be within the parameters of Section 32 read with Section 61(3) of the Code. Therefore, such review can in no circumstance trespass upon a business decision of the majority of the CoC.

The Hon'ble Supreme Court of India has also held that the residual jurisdiction of the NCLT under Section 60(5)(c) of the Code cannot, in any manner, whittle down section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the NCLT outside Section 30(2) of the Code, while adjudicating a resolution plan.

> "*46…While the Adjudicating Authority* (NCLT) *cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to ensure that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit it after satisfying the aforesaid parameters.*"

(iii) **Treatment of Secured and Unsecured Creditors- *the "equality principle"***

> *"Fair and equitable dealing of operational creditors rights under the Regulation 38 of CIRP Regulations involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately."*
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> Para 56, Page 96

The Hon'ble Supreme Court of India is of the view that if an "equality for all" approach, recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor is liquidated. This would defeat the objective of the Code which is resolution of distressed assets and only if the same is not possible, should liquidation follow.

The Hon'ble Supreme Court of India has held that the amended Regulation 38 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) does not lead to the conclusion that financial creditors and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. The Hon'ble Supreme Court of India held that the equal treatment means only equals need to be treated equally.

Therefore, so long as the provisions of the Code and the CIRP Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

(iv) **Extinguishment of rights of Creditors against Guarantors**

The Hon'ble Supreme Court of India held that Section 31(1) of the Code makes it clear that once a resolution plan is approved by the CoC, it shall be binding on all stakeholders, including guarantors. This provision ensures that the successful resolution applicant starts conducting the business of the corporate debtor on a fresh slate, as it were. The Hon'ble Supreme Court of India observed as follows:


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"66.... *In State Bank of India v. V. Ramakrishnan, 2018 (9) SCALE 597, this Court relying upon Section 31 of the Code has held:*

> *22. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, Under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."*

Therefore, it is difficult to accept the argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. The judgment dated July 4, 2019 of the NCLAT is contrary to section 31(1) of the Code and the Hon'ble Supreme Court's judgement in *State Bank of India Vs. V. Ramakrishnan*[2].

(v) **Undecided Claims**

*"A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor."*

Para 67, Page 113

All claims, therefore, must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor.

(vi) **Constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 / CIRP time period of 330 days**

The Hon'ble Supreme Court of India held that time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant - a provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India.

However, the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail. While leaving the provision otherwise intact, the term

*"A provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from **Madras Petrochem** (supra)."*

Para 79, Page 131

[2] *((9) SCALE 597)*


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"mandatorily" was struck down as being manifestly arbitrary under Article 14 of the Constitution of India and as being an unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution.

The effect of this declaration is that ordinarily the time taken in relation to the CIRP must be completed within the outer limit of 330 (three hundred and thirty) days from the insolvency commencement date, including extensions and the time taken in legal proceedings. If the delay or a large part thereof is attributable to the tardy process of the NCLT and/or the NCLAT itself, it may be open in such cases for the NCLT and/or NCLAT to extend time beyond 330 (three hundred and thirty) days.

Therefore, it is only in exceptional cases that time can be extended, the general rule being that 330 (three hundred and thirty) days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which it is to be driven into liquidation.

(vii) **Constitution of the Sub-Committee**

A sub-committee or core committee cannot be constituted under the Code. The CoC alone is to take all decisions by themselves. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the CoC.

(viii) **CoC does not act as a fiduciary**

The CoC does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors.

**ELP COMMENTS**

The spirit of the law has been upheld. This is a landmark judgement, providing a clear and conclusive interpretation on the key issues mentioned above. This judgement sets a clear path ahead on the Corporate Insolvency Resolution Process in India and will aid in faster insolvency resolution for corporate debtors, increased recovery of debts of creditors and finally, greater confidence amongst bidders.

Industry strongly believes that this case will be a turning point for the number of cases reaching a successful CIRP (till date, only 15% of the cases have reached successful CIRP under IBC). There is a strong expectation on increased liquidity, (estimated close to INR 70,000-80,000 crores with Essar Steel and similar cases being resolved under IBC), relief for the banking sector, renewed investor confidence and increased investments from private equity investors/stressed asset funds.

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