



**Dhir
& Dhir**
Advocates & Solicitors

30
YEARS

THE

Banking & Finance Special Edition

HORIZON

Vol. 5 | Issue 8

02

**POSITION OF SECURED
CREDITOR (NOT BEING
FINANCIAL OR OPERATIONAL
CREDITOR) UNDER IBC**

05

SELECT SPEAKERSHIPS

06

IN THE NEWS

08

NOTABLE DEALS

09

AWARDS & ACCOLADES



POSITION OF SECURED CREDITOR (NOT BEING FINANCIAL OR OPERATIONAL CREDITOR) UNDER IBC

GURANPREET SINGH SARNA, Partner
SHIKHA SINGH, Principal Associate

The Supreme Court in its recent judgement *Vistra ITCL (India) Ltd. and Ors. V. Dinkar Venkatasubramanian and Ors.*, discussed and clarified the treatment of a secured creditor who would not fall under the category of the financial creditor or operational creditor as per Insolvency and Bankruptcy Code, 2016 (“IBC”). While passing the judgement, the Apex Court explained the amendments carried out in IBC alongwith other various important related provisions under the IBC.

Brief Facts of the Case

Amtek Auto Limited (“Corporate Debtor”) approached appellants for a short-term loan facility of INR 500.00 crores for its group companies viz. Brassco Engineers Ltd and WLD Investments Pvt. Ltd ultimately to be used by the Corporate Debtor. The loan was to be secured by pledging 16,82,06,100 equity shares of face value of INR 2/- each of JMT Auto Ltd. held by the Corporate Debtor.

Pursuant thereto, by executing pledge agreement on July 05, 2016, the Corporate Debtor pledged its 66.77% shares in JMT Auto Limited in favour of Vistra ITCL (India) Pvt. Limited for the benefit of KKR and L&T. Thereafter, an application for insolvency

was admitted against the Corporate Debtor on July 24, 2017 and Mr. Dinkar T. Venkatasubramanian was appointed as the resolution professional.

The appellants filed a claim as a secured creditor of the Corporate Debtor, but it was rejected by the resolution professional, which order was not challenged by the appellants. Subsequently, the appellants filed another application under Section 60(5) of the IBC claiming rights based on the pledged shares. The Adjudicating Authority dismissed the said application, which was appealed to the NCLAT. The NCLAT dismissed the appeal, stating that the appellants claim in purported capacity of ‘secured financial creditor’ has already been rejected in year 2017 and could not be raised again in year 2020. Further, it was also stated that the appellants have not lent any money to the Corporate Debtor, therefore, they would not fall under the ambit of financial creditor of the Corporate Debtor.

The appellants aggrieved by the NCLAT decision, moved to the Hon’ble Supreme Court for seeking relief in their favour and preferred the appeal.

Judgement

The Hon’ble Supreme Court had two issues to resolve viz. whether the appellant shall be considered as financial creditor or operational creditor of the corporate debtor;



and whether the resolution plan can dilute, negate or override the pledge agreement because a resolution plan has been approved by the committee of creditors.

While resolving this predicament, the Apex Court explained the amendment/ substitutions made in several provisions of the IBC in year 2019 with retrospective effect from June 06, 2018. Amended provisions of Section 30(2) of IBC were referred, wherein the said section ensures that the amount payable to the operational creditor under the resolution plan and financial creditor voted against the resolution plan, should not be less than the amount payable to them, in the case of liquidation of the corporate debtor under Section 53 of the IBC. The resolution professional and the adjudicating authority are bound to protect the interest of the operational creditor and financial creditor voted against the resolution plan in accordance with provisions of Section 30(2) read with Section 31 of the IBC.

In the instant case, the Appellant being a

secured creditor would not fall under the ambit of the financial creditor or operational creditor in accordance of the decision made by the Court in case of Anuj Jain (Supra) and Phoenix ARC (Supra), and thus per se shall not be entitled in law seek insistence on due implementation of the terms of the Pledge agreement.

After the detailed analysis of various provisions of IBC and Indian Contract Act, the Apex Court briefed out 2 amicable solutions to the issues involved in the present case. The first solution suggested was to treat the Appellant as a financial creditor of the Corporate Debtor, specifically with regards to the estimated value of the pledged shares on the date when the corporate insolvency resolution process commenced entitling it to become a member of the CoC and granting it the voting rights equivalent to the estimated value of the pledged shares. However, the solution was not feasible since the resolution plan had already been approved by the CoC without Appellant. Further it was also highlighted

that this solution may require reconsideration of the rulings in the cases of Anuj Jain (Supra) and Phoenix ARC (Supra), which would necessitate a reference to a larger bench.

Therefore, the Apex Court moved to its second preferred solution wherein, Appellant is to be treated as a secured creditor under Sections 52 and 53 of the IBC. This would allow Appellant to retain the security interest in the pledged shares and receive the proceeds from the sale of these shares, as per Section 52 of the IBC and Rule 21-A of the Liquidation Process Regulations.

Further, the Apex court clarified that the directions given in the preceding paragraph should not be used as grounds for the successful resolution applicant-DVI, to withdraw the already approved resolution plan. The reason for this is that any resolution plan must comply with the provisions of the Code and other applicable laws. The directions and option provided in the previous paragraph ensure that the resolution plan adheres to the requirements of the Code and does not infringe upon the rights of the secured creditor, who should not be treated as inferior to other creditors, such as operational creditors or dissenting financial creditors.

Conclusion

Considering the second solution to be fair and just to resolve the legal conundrum and issue at hand, the Apex Court clarified that resolution plan should adhere to the requirements of the IBC and shall ensure that it does not infringe upon the rights of the secured creditor, who should not be treated as inferior to other creditors, such as operational creditors or dissenting financial creditors.

The above judgment in view of the due recognition of the right of secured creditor vis-à-vis the security interest shall indeed empower the lenders in banking and finance transactions to also seek its right as a secured creditor in case of a resolution process of a pledgor (ordinarily the promoters of the borrowers). The lenders/ secured creditors/ financial creditors of the borrower company, in addition to calling an event of default under the financing documents of the borrower company shall also be legally entitled to participate in the resolution process of the pledgor and derive value out of the security interest which was earlier reduced to Nil. The judgement in the said background has indeed brought back the sanctity associated with 'security interest' and provides a sigh of relief to the lenders.

The article was originally published at



SELECT SPEAKERSHIPS

Mr. Guranpreet Singh Sarna, Partner was a panellist at Lex Witness 'The Grand Masters 2023 - 9th Annual Corporate Counsel Legal Best Practices Summit Series'.





IN THE NEWS



BUSINESS TODAY



mid-day

Outlook



**Outlook
MONEY**

DHIR & DHIR ASSOCIATES ADVISES INDIA INFRASTRUCTURE FINANCE COMPANY LTD ON AN INR 1000 CRORES TAKEOUT FINANCE SCHEME

Team

Mr. Alok Dhir, Founder & Managing Partner

Mr. Sachin Gupta, Senior Partner

Mr. Guranpreet Singh Sarna, Partner

Ms. Shikha Singh, Principal Associate

Ms. Avlokita Kanwar, Senior Associate

Ms. Aparajita Mitra, Associate

Mr. Pranav Trikha, Associate

Dhir & Dhir Associates advised India Infrastructure Finance Company Limited (IIFCL), on the sanction and disbursement of takeout facility aggregating to INR. 1000.00 Crores under its Takeout Finance Scheme to MB Power (Madhya Pradesh) Limited, a group company of Hindustan Power. With the disbursement of the said facility, State Bank of India and Axis Bank were substituted by IIFCL facility.

Dhir & Dhir Associates acted as Lenders Legal counsel to IIFCL while the exiting consortium lenders of the Company had their separate legal counsel, which made the transaction unique and distinct from other takeout or refinancing transactions.

In its role as IIFCL's legal counsel, the scope of work was not limited to drafting of financing and security documents for securing the takeout facility but also involved in discussions and negotiations with the existing consortium lenders and their counsel. During the exercise, all previous facilities availed by the Company prior to the takeout facility were also a part of the IIFCL transaction documents for the Takeout Facility being provided by them.

The firm provided its legal opinion on more than 400 litigations pending against or by the company, conducted title search over the project land admeasuring 2034.13 Acres (including leased and private land) and provided its opinion on the title of the Company.

Mr. Alok Dhir, Managing Partner said that, "Given the sensitive and critical nature of the transaction, numerous complex issues came up with respect to the structure, security and concerns of the existing consortium lenders, which, after much deliberation, were resolved well within the timeline to the satisfaction of all Parties. Our firm's experience, expertise, knowledge and strategic advice played a significant role in navigating the intricacies involved, which ultimately led to the successful completion of the transaction."

"We always address challenging transactions with expertise and put our best efforts for the successful closure of matters with a solution oriented approach. Our role was not only limited to documentation but also extended to conducting due diligence, deal structuring and negotiation. The said transaction was not only limited to guiding and advising IIFCL but also extending our support to other existing lenders as well, in order to protect the interest of each party involved" said Guranpreet Singh Sarna, Partner, Dhir & Dhir Associates.

The core team at Dhir & Dhir Associates, comprised Alok Dhir (Managing Partner), Sachin Gupta (Senior Partner), Guranpreet Singh Sarna (Partner) and team.

NOTABLE DEALS

Acted as Borrower's counsel for O2 Group:

The firm acted as borrower's counsel for O2 Group for availing financing from various financial institutions like NIIF Infrastructure Finance Limited, Aseem Infrastructure Finance Limited and L&T Finance Limited. The role of the firm was to review, vet and negotiate the transaction documents with the lenders and their legal counsels. The firm also advised the O2 Group in finalising the commercial structuring of the transaction including providing advisory on the land related matters. The team was involved in heavy negotiations with the lender and the lender's legal counsel and was able to conclude the transaction in the interest of the borrower.

Counsel to SBI: The Firm advised State Bank of India for financial assistance aggregating to INR 87.45 Crores granted to group SPVs of Enfinity Global, for the purpose of refinance of its existing loans including working capital facility, of their operating solar PV projects in state of Telangana. The scope of work inter-alia included drafting of transaction documents, negotiation with the borrower team, drafting of the financing and security documents, resolutions, certificates, reviewing title search report of the local counsel(s), reviewing opinion of foreign counsel and issuance of closing legal opinion.

Advised PFC as legal counsel: in connection with financial assistance of INR. 412.50 Crore granted to FPEL Ujwal Private Limited, for setting-up and implementing a wind solar hybrid project of 68.60 MW/78.70 Mwp (wind capacity: 48.60 MW; solar capacity: 20 MW/30 Mwp) at Nippani Taluk, Belgaum District, Karnataka. The scope of work as lender's legal counsel included corporate due diligence, project due diligence, land due diligence, drafting, negotiating and finalising of the financing and security documents.

Conducted PMC Legal Audit: The Firm conducted extensive legal audit for Unity Bank (erstwhile Punjab and Maharashtra Co-operative Bank) for its outstanding accounts of the borrowers (viz. Housing Development and Infrastructure Limited and its group companies) which have availed loans from Unity Bank from time to time. The audit included detailed inspection of the financing documents and related documents, and preparation of comprehensive legal audit reports in relation thereto.

AWARDS & ACCOLADES



RESTRUCTURING AND INSOLVENCY



ALOK DHIR
Founder & Managing Partner



ELITE PRACTITIONER

2023-24



DISPUTE RESOLUTION



MANEESHA DHIR
Founder & Managing Partner



NOTABLE PRACTITIONER

2023-24



RESTRUCTURING & INSOLVENCY



OUTSTANDING FIRM

2023-24



REGULATORY
BANKING & FINANCE
DISPUTE RESOLUTION
ENERGY



RECOMMENDED FIRM

2023-24



CAPITAL MARKET
REAL ESTATE
TECHNOLOGY & TELECOMMUNICATION
BANKING & FINANCIAL SERVICES



RECOGNISED FIRM

2023-24



CONSTRUCTION
MEDIA & ENTERTAINMENT



NOTABLE FIRM

2023-24



INFRASTRUCTURE



HIGHLY RECOMMENDED FIRM

2023-24



BUSINESS TODAY



Top 10 Restructuring and Insolvency Lawyers in India 2023

Alok Dhir
Founder & Managing Partner

 **Dhir & Dhir**
Advocates & Solicitors

 30 YEARS

NEW DELHI | MUMBAI | PUNE | HYDERABAD | JAPAN



ALOK DHIR
Founder & Managing Partner
Restructuring and Insolvency

IFLR
1000

HIGHLY
REGARDED

2023

NEW RANKINGS
PUBLISHED

 **Dhir & Dhir**
Advocates & Solicitors

 30 YEARS

NEW DELHI | MUMBAI | PUNE | HYDERABAD | JAPAN



MANESHA DHIR
Managing Partner
Restructuring and Insolvency
Mergers & Acquisitions
Banking
Technology and Telecommunications

IFLR
1000

HIGHLY
REGARDED

2023

IFLR1000
WOMEN
LEADERS

NEW RANKINGS
PUBLISHED

 **Dhir & Dhir**
Advocates & Solicitors

 30 YEARS

NEW DELHI | MUMBAI | PUNE | HYDERABAD | JAPAN



SACHIN GUPTA
Sr. Partner
Restructuring and Insolvency

IFLR
1000

HIGHLY
REGARDED

2023

NEW RANKINGS
PUBLISHED



NEW DELHI | MUMBAI | PUNE | HYDERABAD | JAPAN

- RESTRUCTURING AND INSOLVENCY
- BANKING
- PROJECT DEVELOPMENT: ENERGY, INFRASTRUCTURE, TRANSPORT, TELECOMMUNICATIONS NETWORK
- PROJECT FINANCE
- CAPITAL MARKETS: DEBT, EQUITY
- PRIVATE EQUITY
- MERGERS & ACQUISITIONS

IFLR
1000

RECOMMENDED
FIRM

2023

NEW
RANKINGS
PUBLISHED



NEW DELHI | MUMBAI | PUNE | HYDERABAD | JAPAN



**GURANPREET
SINGH SARNA**
Partner
Project Development

IFLR
1000

RISING STAR

2023

NEW
RANKINGS
PUBLISHED



NEW DELHI | MUMBAI | PUNE | HYDERABAD | JAPAN



SHIKHA SINGH
Principal Associate
Project Development

IFLR
1000

RISING STAR

2023

NEW
RANKINGS
PUBLISHED



**Dhir
& Dhir**
Advocates & Solicitors



Dhir & Dhir Associates is a leading full-service law firm in India serving as a single-window legal and regulatory advisor globally. It has offices in New Delhi, Mumbai, Hyderabad and a representative office in Japan. The firm's areas of practice include Restructuring and Insolvency, Corporate/Commercial Advisory and M&A, Real Estate, Banking and Finance, Dispute Resolution, Litigation and Arbitration, Capital Markets, Infrastructure & Energy, Environmental, Social & Governance, IPR, Technology, Media & Telecommunications, Employment Law and Consumer Law.

NEW DELHI

D 55, Defence Colony, New Delhi - 110 024, India

T: +91 (11) 42410000

E: delhi@dhirassociates.com

MUMBAI

21 & 22, 3rd Floor, Onlooker Building,
Sir P.M. Road, Fort, Mumbai - 400001, India

T: +91 (22) 67472284

E: mumbai@dhirassociates.com

HYDERABAD

#30, First Floor, Raghava Ratna Towers, Chirag Ali Lane,
Abids, Hyderabad - 500001, India

T: +91 (40) 42208077

E: hyderabad@dhirassociates.com

JAPAN

Vent Vert Toyohashi, Centre 302, 1-3-1, Maeda Minami-machi
Toyohashi-shi, Aichi-ken 440-0851, Japan

T: +81 (0532) 218586

E: japan@dhirassociates.com

www.dhirassociates.com

Disclaimer: Dhir & Dhir Associates provides knowledge updates solely for informational purposes. It is not intended to constitute, and should not be taken as legal advice, or a communication intended to solicit or establish commercial motives with any. The firm shall not have any obligations or liabilities towards any acts or omission of any reader(s) consequent to any information contained herein. The readers are advised to consult competent professionals in their own judgment before acting on the basis of any information provided hereby. Should you have any queries, please feel free to contact us at editor@dhirassociates.com