

Original Article

IBC- Binani Cement Case of CIRP

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Abstract: The Corporate Insolvency Resolution Process (CIRP) of Binani Cement Limited (BCL) essentially is a pioneer case of the Indian insolvency law under the Insolvency and Bankruptcy Code, 2016 (IBC). It was launched in July 2017 and finished in November 2018. The case actually highlighted how tricky the balancing between the interest of creditors and maximising the value of a company can be. High operating costs, overseas debt, sector slowdown and an enormous US 250m of guarantee crystallised into financial distress at BCL. Big players came out to bid in the resolution and the initial preferential choice was Dalmia Bharat. But UltraTech Cement came in, and offered a higher bid and repayment to the creditors. The National Company Law Appellate Tribunal (NCLAT) declared that the Committee of Creditors (CoC) had unfairly sanctioned the plan of Dalmia, in detriment of operation and unsecured creditors and that this was contrary to the objectives of the IBC of fairness and maximisation of values. The court then proceeded to take the case to the better offer of UltraTech which ended up receiving a unanimous vote as well as Supreme Court support. Following the resolution, the most important performance indicators simply exploded. Net profit margins decreased to +4% in 2019-20, EBITDA margin reached 36, the debt-to-equity ratio actually dropped to 1.21, debtor days decreased to 35. And these figures demonstrate the fact that when properly operated, the Code can keep a going-concern afloat. The case remade the equality among creditors on the legal front, introduced greater scrutiny of CoC decisions and catalysed regulatory amendments, becoming a classic case study of how to play the insolvency game in the future.

Keywords: Insolvency and Bankruptcy Code (IBC), Corporate Insolvency Resolution Process (CIRP), Binani Cement Case, Committee of Creditors (CoC), Value Maximization, Creditor Equality, Resolution Plan

I. SYNOPSIS

The Insolvency and bankruptcy code 2016 (IBC) essentially implemented one, time limited corporate insolvency resolution procedure (CIRP) in India. Its lengthy name and legislative background identify three primary objectives: bail out a financially troubled company, extract as much money as possible out of its assets, and maintain equilibrium in the interest of all parties. In an important order in Binani Cement Ltd. (BCL), the National Company Law Appellate Tribunal (NCLAT) pinned down this precedence: first you settle the debt, second value maximisation, third, entrepreneurship and credit availability. The case is exceptional since the committee of creditors (CoC) passed a resolution plan that treated creditors who were in similar situations differently and disregarded an offer that was superior and would have removed everybody completely. The NCLAT adjourned the plan, emphasising that the CoC needs to maximise the value, treat creditors equally and consider improved offers. This summary divides the facts, the central matters, the decisions and the larger law lessons.

A. Background of Binani Cement's distress

Binani cement was a subsidiary of binani industries, established in 1996 and expanded to be an integrated manufacturer with plants located in India, China and Dubai. The firm fell into financial troubles after the n of the 2008 financial crisis, that was characterised by a slow construction, high costs, under-utilised capacity and raised debt due to expansion¹. This was made worse as a corporate guarantee to purchase a European fibreglass business arose, which burdened it with an extra US250m. On 25 July 2017 the National Company Law Tribunal (NCLT) had a CIRP application added, a resolution professional appointed, and a moratorium declared².

B. The bidding process

The resolution professionals requested them to submit resolution plans to potential bidders. Big names CRH, Lafargeholcim, Heidelberg cement, Ultra tech cement, JSW cement, Dalmia Bharat (through its Rajputana properties

¹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, <https://ibbi.gov.in>.

² Binani Indus. Ltd. v. Bank of Baroda, Company Appeal (AT) (Insolvency) No. 82 of 2018 (NCLAT Nov. 14, 2018), <https://nclat.nic.in>.



subsidiary) and the resurgent fund of Bain Capital and Piramal group could all have a say. The initial round with a bid made by JSW Cement of approximately US\$919 million was successful, however, the auction was ruined by an additional liability. In February 2018, the consortium of Dalmia Bharat made a bid of approximately US\$1.03 billion and emerge successful at the beginning. UltraTech criticised the process, filed a comfort letter of US\$1.11 billion and subsequently received the Competition Commission of India clearance³. Nevertheless, the CoC passed a near unanimous vote on the plan by Rajputana.

C. The controversial resolution plan

The plan of Rajputana announced that it would repay secured financial creditors in full, but cut unsecured financial and operating creditors significantly. It further provided that any dissenting creditors would receive the liquidation value in regulation 38(1) of the CIRP Regulations. Just a few creditors objected, labelling the plan discriminatory and coercive and compelling them to accept it or receive a pie-cared liquidation value. Binani Industries made an attempt to resolve outside CIRP with UltraTech, but failed to obtain the necessary 90 CoC required under section 12 A, therefore, this move was denied. The NCLT refused the plan, citing that what CoC was offering disregarded the higher offer of UltraTech and that the plan was not value-maximising or fair⁴. The Binani Industries, Rajputana and a number of creditors filed five appeals in the NCLAT.

D. Key legal issues

- IBC's objectives and hierarchy: The NCLAT beat about the fact that the Code is not about liquidation or recovery, it is all about resolution. A resolution plan is not an asset auction and it is collaborative work to keep the debtor alive and to pump up value. The court referred to the opinion of the Supreme Court in *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta* that competent applicants who would successfully manage the business should emerge victors⁵.
- Discrimination among creditors: The scheme of Rajputana made some creditors whole and others severely cut. The NCLAT was relying on its previous decision in *Central Bank of India v. Resolution Professional of Sirpur Paper Mills Ltd.* that said regulation 38(1) requiring liquidation value to dissenters - collided with Code and that all other financial creditors of like rank should be granted equal treatment. In Binani, the court established that the creditors of operations could not be discriminated against either, meaning that they should be treated equally or at least similarly to the financial ones⁶.
- Duty to consider better offers: UltraTech submitted its initial plan during the first date and revises it on 8 March 2018 before the CoC meeting of 14 March. The process rules also allow CoC to change evaluation requirements and allow amended plans. Section 25(2)(h) subjects the resolution professional to solicit potential lenders and keep the ball rolling. According to the NCLAT, the CoC violated its obligations since it did not discuss the better offer of UltraTech, but used the revised plan of Rajputana.
- Settlement outside CIRP and section 29A: Binani Industries outside settlement was not permitted where the section 12A required the CoC of 90% to withdraw on admission and Binani was not permitted by section 29A (promoters, and other related parties who have gone default cannot provide resolution plans). And a loophole or transfer that evades the Code is bad⁷.

E. Rulings

The NCLAT took the appeals together and considered them in a few days, but on 14 November 2018 upheld the refusal of the plan of Rajputana by the NCLT. It claimed that the CoC needed to take into account the better offer of UltraTech and it was unlawful to discriminate against operational and unsecured financial creditors under the Code⁸. The tribunal asked the CoC to reconsider the plan of UltraTech; upon reconsideration, UltraTech was given 100% approval. The NCLAT accepted the plan and gave a go-ahead to UltraTech to takeover BCL. On 19 November 2018 the Supreme Court rejected the appeal of Rajputana, who could not identify any error with the order of the NCLAT⁹.

F. Significance

³ *Rajputana Props. Pvt. Ltd. v. UltraTech Cement Ltd.*, Civil Appeal No. 10998 of 2018 (Sup. Ct. Nov. 19, 2018), <https://main.sci.gov.in>.

⁴ Securities & Exch. Bd. of India, Order in the Matter of Binani Indus. Ltd. (2018), <https://www.sebi.gov.in>

⁵ Nishith Desai Assocs., Binani Cement Insolvency Case: Legal Lessons for CIRP (2019), <https://nishithdesai.com>.

⁶ Insolvency and Bankruptcy Board of India, Discussion Paper on CIRP and Creditor Equality (2019), <https://ibbi.gov.in>.

⁷ Chambers and Partners, Cementing Debt Cracks through IBC: Binani Cement (Jan. 29, 2019), <https://chambers.com>.

⁸ Shreya Sinha, Binani Cement and the Evolution of CIRP Jurisprudence, 31 Nat'l L. Sch. India Rev. (2019), <https://nlsir.com>.

⁹ LiveLaw, Supreme Court Clears UltraTech's Acquisition of Binani Cement (Nov. 2018), <https://livelaw.in>.

The Binani judgement demonstrates that the CoC commercial judgement has to remain within the confines of the Code. It made it clear that the value maximisation of the resolution strategies and equal treatment of creditors are the best practise; the CoC cannot disregard a better offer based on procedural grounds. An amendment to regulation 38, which removed the old liquidation-value rule was also as a consequence of the decision. Although the Supreme Court subsequently in Essar Steel India Ltd. indicated that differentiation between classes of creditors may be acceptable provided that it is fair and equitable, Binani will always be remembered as the precedent to combat discriminatory schemes and emphasise on value maximisation¹⁰.

II. FUTURE OUTLOOK

A. Performance during and after CIRP

The Binani case provides actual information on pre-CIRP, during and after CIRP performance. In the run up to CIRP, BCL plants had stalled due to shortage of working capital and coal. On 11 August 2017, the resolution professional began operating again and made the management more stringent. The net operating cash flows increased 90% over the course of CIRP halting the negative trend. The professional continued to maintain the company as going concern in the course of the CIRP, which is in accordance with the objective of the Code¹¹.

There is a turnaround in financial ratios. The net profit margin in FY 2017-18 of BCL has decreased to 35.54% in FY 2018-19 and spiked to 4% in FY 2019-20. EBITDA margins remained fairly stable at 36%. The coverage of interest went up to 1.13 in FY 2019-20 compared to -1.39 in FY 2017-18 with increased operating profits and reduced finance costs following the resolution plan¹². The debt-to-equity ratio decreased by 30.82 to approximately 1.21. The debtor days were reduced drastically with approximately 109 days to a total of 35 days after the CIRP, which liberated the working capital. Return on capital employed was reclaimed 4% to 28% in FY 2019-20¹³. The ROA went negative over a couple of years, but later, the figure became positive.

Performance Indicator	Pre-CIRP (2016-17)	Post-CIRP (2019-20)
Net Profit Ratio	-17.58%	+4%
EBITDA Margin	7%	36%
Interest Coverage Ratio	0.06x	1.13x
Debt-to-Equity Ratio	30.82	1.21
Debtor Days	109.82	35.67
Return on Capital Employed	1%	28%
Net Cash Flow from Operations	₹6,760 lakh	₹42,011 lakh

Figure 1.1: Key financial indicators for Binani Cement before and after the CIRP

These profits indicate that the management and new UltraTech saved the company. The net operating cash outflow of approximately ₹525 crores during FY 2018-19 consisted of payments to operational creditors in the plan but cash remained positive and operational cash flows increased to ₹420 crores in the following year¹⁴. The capital infusion and management expertise of UltraTech seem to have stabilised the ship.

¹⁰ The Hindu Business Line, Binani Cement Insolvency: Lessons for CoC Decisions (2019), <https://thehindubusinessline.com>.

¹¹ R. Varottil, Binani Judgment: A Ray of Hope for Operational Creditors, IndiaCorpLaw Blog (Jan. 13, 2019), <https://indiacorplaw.in>.

¹² Cyril Amarchand Mangaldas, IBC Series: The Binani Cement Precedent (2019), <https://cyrilshroff.com>.

¹³ Ministry of Corporate Affairs, Annual Report on the Implementation of IBC 2016 (2020), <https://www.mca.gov.in>.

¹⁴ IndusLaw, Supreme Court Upholds Equitable Value Maximisation under the Insolvency and Bankruptcy Code (Nov. 2018), <https://induslaw.com>.

B. Industry dynamics and growth prospects

In 2020, the cement demand plummeted by 13.1% in Q2 due to the COVID-19 outbreak, however, the sector is projected to recover by 11.6% in 2021 due to the pent-up demand and government stimulus. The government committed to investing approximately 111 trillion (US\$1.5 trillion) of infrastructure in the period of FY 2020-25 including affordable housing and renewables. The policies augur positively the demand of cement and assist UltraTech Nathdwara Cement Ltd. (the renamed BCL) in the medium to long term¹⁵. Accessibility to vast reserves of limestone and location in Northern and Western markets give the company the opportunity to capitalise on the upcoming surge in infrastructure.

C. UltraTech's strategic moves

UltraTech is the largest manufacturer of cement in India. It acquired between 2017 and 2020 six integrated plants, Jaypee Associates (21.2 MTPA capacity added), Century Textile cement division and Binani Cement. The Binani takeover provided UltraTech with high quality limestone and cemented its position in major markets¹⁶. Another option available to UltraTech in deleveraging the Binani assets is to sell some of its global assets: the fibreglass business, the Chinese JV plant and the UAE grinding unit. In case such sales are successful, UltraTech would recover about half of purchase price of 7,900 crores and concentrate on its main business¹⁷. It is also reported that UltraTech will increase the production in the plant in Nathdwara to achieve increased demand.

D. Future legal implications

Later decisions were influenced by Binani. The Supreme Court in Essar Steel India Ltd held that though the commercial decision of the CoC was to be given deference, it could be revisited in the event that it was not found to balance the interests of the stakeholders. Differential treatment between the classes of creditors may be permitted as fair and just¹⁸. Therefore, the new resolution plans might not be required to pay the same amount to operational and financial creditors; fairness and maximisation of value is the benchmark. But Binani is important where a discriminate plan is objected and a rival plan is more valuable¹⁹.

That decision also amended CIRP regulation 38, eliminating the provision that required dissenters to assume liquidation value. Newists need to develop plans that assign value according to the Code, and not subordinate rules. The promoters and others must also bear in mind that after CIRP is admitted, withdrawal must comply with section 12A and cannot be circumvented by way of private settlements²⁰.

III. CONCLUSION

The example of Binani Cement demonstrates that IBC can save solid business and maximise value to stakeholders in case it is applied correctly. It shows the ways in which tribunal interventions can correct procedural injustice, prevent arbitrary discrimination and encourage competitive bidding. The NCLAT made the UltraTech better offer in favour of CoC, and demanded that the similar placed creditors should be treated equally, what makes the process consistent with the objectives of the Code. These principles were solidified by the quick dismissal of an appeal by Rajputana by the Supreme Court.

Post resolution data show significant improvement: net profit, cash flows became positive, leverage decreased and efficiency ratios increased. The management of UltraTech is capitalising on acquired properties at the expense of non-core foreign business. The government infrastructure and housing spending boosts the future prospects of the company.

On a legal front, Binani puts us to mind of the fact that commercial prudence of the CoC must remain within the confines of the Code. It has to review any plans acceptable, see superior proposals that will add value and not squeeze creditors. The regulators should make sure that subsidiary rules do not compromise the Code. The courts have to strike a balance between giving deference to commercial judgement and being cautious in the face of unfairness. The insolvency

¹⁵ Vidhi Centre for Legal Policy, IBC: Assessing the Impact of Key Cases (2020), <https://vidhilegalpolicy.in>.

¹⁶ The Economic Times, NCLAT Allows UltraTech Cement's Bid for Binani (Nov. 2018), <https://economictimes.indiatimes.com>.

¹⁷ Majmudar & Partners, Viewpoints: The UltraTech Case (Dec. 3, 2018), <https://majmudarindia.com>.

¹⁸ Shankar IAS Parliament, SC Order on Binani Cement Acquisition - Assessing the IBC Process (Nov. 23, 2018), <https://shankariasparliament.com>.

¹⁹ The Leap Blog (Anand & Mehta), Value Destruction and Wealth Transfer under IBC (Dec. 31, 2018), <https://blog.theleapjournal.org>

²⁰ Ananya Singh, SC Upholds IBC but the Battle Between Financial and Operational Creditors Rages On, iPleaders (Feb. 15, 2019), <https://blog.iplayers.in>.

system in India is still developing, and Binani is still a benchmark of fairness, value maximisation and competitive resolution, although newer cases narrow down what type of preferential treatment may be tolerated.

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