

**IN THE NATIONAL COMPANY LAW TRIBUNAL AT
ALLAHABAD BENCH**

IN THE MATTER OF COMPANIES ACT, 2013

AND

IN THE MATTER OF:

CP NO.37/ALD/2017
(UNDER SECTION 74(2) OF THE
COMPANIES ACT, 2013)

JAI PRAKASH ASSOCIATES LIMITED

..... PETITIONER

JUDGMENT/ORDER DELIVERED ON 23.10.2017

CORAM : SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

For the Petitioner : Sh. R.P. Agarwal, Advocate.

AS PER : SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

JUDGMENT/ ORDER

The case is taken up today for pronouncement of order in the present petition filed U/s 74(2) of the Companies Act seeking for extension of time for making repayment of fixed deposits amount on attaining its maturity to its depositors.

The petitioner company has earlier got extension of time for making repayments of such deposits amount till 31st March, 2017. That apart the time for making repayment was being extended from time to time by the Company Law Board, New Delhi and by the NCLT as per its latest order dated 17.06.2016. This came to further challenge before the Hon'ble NCLAT, New Delhi in an appeal which while disposing of the appeal by its order dated 2nd March, 2017 confirmed such extension of time with further direction that no further extension for payment would be granted. The order of Hon'ble NCLAT



again impugned before the Hon'ble Supreme Court by way of a SLP. The Hon'ble Supreme Court vide its order dated 29th March, 2017 which pleased to grant stay on the same. At present the above mentioned SLP is still pending and subjudice before the Hon'ble Supreme Court.

Subsequent thereto, the petitioner company filed the present petition U/s 74(2) of the Companies Act before this Bench seeking extension of time from this Tribunal beyond 31st March, 2017 on the grounds as stated in the petition. This court during the course of hearing, felt appropriate to issue a formal notice to the Central Government through the office of the ROC by inviting the comments/objection, if any, on further extension of time being sought for by the petitioner company for making repayment of amount due under the fixed deposits.

This Court framed following issue for consideration and disposal of the present petition which may be stated as under:-

1. *Whether the present petition is maintainable before this Bench as the Hon'ble NCLAT by its order dated 2nd March, 2017 has granted time till 31st March, 2017 for making payment of deposits and further directed consequential action that may be taken by the concerned authorities in case of default.*



2. *It is pointed out the order of NCLAT has been challenged by the way of SLP No.Civil Appeal No.4525-4526/2017 before the Hon'ble Supreme Court wherein their Lordship have stayed the operation of impugned order dated 2nd March, 2017 and 7th March, 2017 of Hon'ble NCLAT, therefore the question arises for consideration of this tribunal as to whether a fresh petition on almost similar grounds/circumstances for seeking further extension*

of time from this Bench is maintainable or whether it operate as Res-judicata.

It is a matter of record that during the course of hearing, this court as an interim major and in exercise of its power conferred U/s 74(2) of the Companies Act and after being satisfied with the reason shown by the petitioner company for seeking such extension (kept on granting time for making payment and thus equally monitored the performance of the company for taking measure for repayment).

As per record the SLP filed before the Hon'ble Supreme Court is still pending and the operation of the order impugned as passed by the Hon'ble NCLAT has now been stayed. It may be noted that during the course of hearing of the present petition, the petitioner company made sincere effort to make repayment of the amount of due under the FDs to its depositors. As per its report as submitted time to time to this Court an amount of **Rs.1442.91 Crores** between the period of 01.04.2014 to 31.03.2017 has already been paid in respect of **92994 depositors** out of total **178704 depositors** aggregating to **Rs.2722.53 Crores** as were outstanding on **01.04.2014**. The petitioner company has made further payment of **Rs.1279 Crores** and above between the period of 31.03.2017 till 13.09.2017. Thus, the current outstanding due remains only around Rs.38 Lakhs and odd in respect of some of withheld deposits which are around 51, those are withheld for want of necessary clearance from the statutory authority like CBI, a Court of Law etc. which in fact is not within the domain of the petitioner company. That apart the petitioner company has further clarified through its compliance report dated 13.10.2017 to take care of the interest of such depositors and informed as under:-



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A separate arrangement has been made by the respondent company by opening an account with IDBI to keep the maturity amount of remaining and unclaimed fixed deposits till such time, the payment made to be thereunder are not cleared by a Court of Law for releasing payments to the depositors concern or his representative/next kin. It is also stated that such payment can be made to such authorised person by a competent court of law as and when such occasion arises.

Thus, it may be seen that the petitioner company has paid almost entire amount except to Rs.38,84,715/- as such payment can also be released by the company, provided the cause for withholding the amount is removed. Hence, such withheld payment on such deposits cannot be treated as wilful default U/s 74(3) of the Companies Act.

In addition to the above, the learned counsel for the petitioner put forth a synopsis of written submission giving justification on behalf of the petitioner company for such crying need for extension of time to be granted to make payment. The relevant portion of written submission is reproduced herein below:-

PLAN TO ARRANGE FUNDS TO MEET THE ABOVE UNPAID LIABILITY:

On 31.03.2016, the Company alongwith its wholly owned subsidiary namely Jaypee Cement Corporation Limited, has entered into an agreement with UltraTech Cement Limited for sale of 10 of its cement and clinker plants at an enterprise value of Rs.16,189 crores. A Scheme of Arrangement to give effect to above agreement was filed in the respective Hon'ble High Courts [Allahabad and Bombay] but just before the date of hearing of the second motion petition, notification dated 06.12.2016 was issued by the Ministry of Corporate Affairs by virtue of which, inter alia, all the



petitions concerning schemes under Section 391 to 394 of the Companies Act, 1956 were transferred to the respective NCLTs w.e.f. 15.12.2016. This notification has resulted in delay of almost 2 months in the sanction of the Scheme. The Scheme has finally been sanctioned by NCLT, Mumbai on 15.02.2017 and by this Hon'ble Tribunal vide its order dated 02.03.2017, as corrected on 09.03.2017. Because of this unforeseen delay the petitioner has not been able to repay the deposits within 31.03.2017, being the extension granted by the NCLT, Delhi, vide order dated 17.06.2016.

The repayment of dues of depositors including accrued interest, will be made in one go out of the sale consideration which will be received by the company under the above Scheme. The Company has filed an Undertaking to that effect in the NCLAT. The Lenders (Secured Creditors) have also given their consent for above payments. Thus there is absolute surety that the sale proceeds received pursuant to the above Scheme will not be diverted for any other purpose.

JUSTIFICATION FOR SEEKING EXTENSION



Various statutory approvals are required to be obtained and actions taken in terms of the Scheme before the Scheme can be given effect to. The details of these approvals/actions and steps already taken by the company, post sanction of the Scheme by Hon'ble NCLT, are given below-

- (1) *Approval of SEBI* - *Obtained on 20.03.2017*
- (2) *Approval of Stock Exchanges* - *Obtained on 23.03.2017*
- (3) *Approval of respective State Governments for transfer of mines-*

There are 17 mines spread over 4 States. Duly completed Applications signed by the company and UltraTech have been submitted on 30.03.2017. Under Section 12A (3) of the Mines and Minerals (Development & Regulation) Act, 1957, the State Governments may take upto 90 days for

granting approval for transfer of leases and if approval is not communicated within 90 days then it will be assumed that the State Government has not objection to proposed transfer.

REG. MAINTAINABILITY OF THE PETITION:

The orders dated 02.03.2017 and 07.03.2017 passed by the NCLAT have been stayed by the Hon'ble SC vide order dated 29.03.2017. Because of this stay order, the above orders of the NCLAT stand nullified and there is plenary eclipse of the above orders. Hence various observations made and directions given by the Hon'ble NCLAT in paragraphs no.11 to 16 of the Order dated 02.03.2017 have ceased to be operative and accordingly the said orders do not restrict the power of this Hon'ble Tribunal to exercise its power under Section 74(2) and decide the instant petition on merit.

Reliance is placed on the following Judgment of SC-

AIR 1975 SC 1590 (Para 24, 25)

Smt. Indira Nehru Gandhi Vs. Raj Narain and another.

REG. RESJUDICATE



The legal position that the NCLT has power to grant repeated extensions under Section 74(2) is not in dispute. Repeated extensions have been granted in the past as well in the case of petitioner itself. Details of such earlier extension are given in the petition. Moreover, the issue in the earlier application moved before the CLB/NCLT was to grant extension up to 31.03.2017, which was allowed. The NCLT did not say that no further extension will be granted on any ground in future, hence the last order dated 17.06.2016 of the NCLT, Delhi, does not act as resjudicata.

The NCLAT, vide order dated 02.03.2017 did say that no further extension after 31.03.2017 will be allowed but this

order has been stayed by Hon'ble SC. Hence the order of NCLAT cannot act as resjudicata.

Moreover, the grounds on which extension is being prayed for in the instant petition are substantially different than the grounds on which the NCLT granted extension vide order dated 17.06.2016. The Scheme of Arrangement under which 10 cement plants of the petitioners are being sold to UltraTech has been approved by this Hon'ble Tribunal only on 02.03.2017/09.03.2017. The follow up actions for giving effect to the sanctioned Scheme are being taken now which are likely to be completed and money received within four months. The bankers have given consent through letter dated 28.10.2016 issued by ICICI Bank permitting the petitioner to utilise the sale proceeds for repayment of the dues of the depositors including interest in one go. These and various other facts which are mentioned in the petition did not exist on 17.06.2017. Hence, the present petition cannot be said to be based on almost similar grounds/circumstances. In view of these and other facts stated in the petition the resjudicata is not applicable in the present case.

The Civil Appeals filed by the petitioner in SC challenging the NCLAT orders dated 02.03.2017 and 07.03.2017, also do not affect the power of this Hon'ble Tribunal to consider and decide the instant petition. The prayers made in the above civil appeals do not include any relief for extension of time beyond 31.03.2017. The reliefs are confined to various incorrect findings and directions given by the NCLAT in the impugned orders.

WHETHER PETITIONER CAN FILE APPLICATIONS FOR EXTENSION OF TIME IN THE HON'BLE COURT OR NCLAT:

The petitioner is not entitled to move any application before the Hon'ble NCLAT or the Hon'ble SC for granting further extension of time beyond 31.03.2017. Both the forums are appellate authorities and their jurisdiction and powers are



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governed by Sections 421 and 423 of the Act. They are not the original courts. In earlier petition the petitioner had applied for extension of time only upto 31.03.2017, which was granted by NCLT, Delhi. Hence, the question of any denial of extension beyond 31.03.2017 was not an issue before the NCLAT and is not an issue in the appeal before the Hon'ble SC or NCLAT seeking extension of time beyond 31.03.2017, it will be patently misconceived and would be liable to be rejected outright and may be with heavy cost. The power to grant extension for repayment of deposits is vested in the NCLT under Section 74(2) alone and not in any superior forum.

REQUIREMENTS OF SECTION 74(2) ARE SATISFIED:

Under Section 74(2), this Hon'ble Tribunal may allow further time as considered reasonable for repayment of deposits, upon application made by the company and after considering its financial position, the amount of deposit/ interest outstanding and other facts. The petitioner company has disclosed all the above facts and explained in detail that in the light of facts on record, it is in the interest of all concerned, including the depositors, that further time of 4 months be allowed for repayment of deposits.



The company further has given an undertaking to this effect that such amount to be kept in a separate account with IDBI subject to fulfilment of the statutory requirement and relating to transfer of unpaid deposits amount to the Investors' Education & Protection Fund of the Central Government in case the repayment is not possible within seven years. The petitioner is also under took to file quarterly statement to this court showing the current status of the unpaid depositors with the Registrar of this Tribunal. Thus, we find that during the course of hearing of the present petition and by getting interim extension of time the petitioner company could not be able to make payment of more than 85,710 deposits of aggregate amount of Rs.1279.62 Crores and such payment could be made

possible after coming into effect the scheme of arrangement as sanctioned by this Bench of the NCLT and by selling of its cement plant for the value of Rs.16,189 Crores in favour of one Ultratech Cement Ltd.

In support of the present application and on being enquired from time to time by this Court, the petitioner company has made an affidavit that amount towards depositors aggregating to 2722.53 Crores due to its 1,78,704 depositors as on 31.03.2014 has almost been paid till 13.09.2017 with interim extension granted time to time by this Court. Thus, the amount paid between 31.03.2017 to the date of hearing in this Court i.e. 13.10.2017 comes around to Rs.1279 Crores and odd and thus there remains only an amount of Rs.38 Lakhs and odd as outstanding balance which has further been kept in a separate count opened by the company pursuant to previous observation of this Court as discussed in the preceding para of this Judgment.



Hence, we find the reason given for withheld payment seems to be reasonable and genuine, moreover, such payments have been withheld due to some statutory/administrative order and such cannot be counted as wilful default on the part of company under Section 74(3) of the Companies Act. Moreover, the Section 74(2) confer such power to this Court to extend the time of payment by considering the financial condition of the company. The relevant provision thereof reads as under:-

“The tribunal may, on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and in the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.”

This Court also invited necessary comments of Central Government through the office of ROC which is duly received by the registry of this Tribunal on 30.03.2017 and 17.04.2017 commenting such that the company's application for further extension of time of four months to be considered on its merits. The relevant portion of Central Government's comments may be reproduced herein under:-

That sub-Section (2) of Section 74 of the Companies Act, 2013 provides that—

The tribunal may, on an application made by the company, after considering the financial condition of the company, the amount of deposits or part thereof and in the interest payable thereon and such other matter, allow further time as considered reasonable to the company to repay the deposit.

In other words, it's the Tribunal only which has the power to allow further time to the company to repay the deposits after considering various parameters provided in the Act.

In view of the above facts and circumstances, the instant Company Petition of the company may be decided on its merit.

Hon'ble National Company Law Tribunal (NCLT), New Delhi Bench vide its Order dated 17th June, 2016 granted extension of time for repayment of outstanding Fixed Deposits by 31st March, 2017 out of sale proceeds of Company's Cement Plant which was in progress. The said Order was challenged by one of the Depositors before National Company Law Appellate Tribunal (NCLAT). NCLAT vide its Order dated 2nd March, 2017 as corrected on 7th March, upheld the Order of NCLT but directed that no further extension will be granted and also gave directions for further action in the matter. The said Order was challenged



by the Company and Hon'ble Supreme Court vide its Order dated 29th March, 2017 stayed the impugned Order of NCLAT and directed the notice to be issued, returnable in three months. In the meantime, the 'Scheme of Arrangement' for sale of Cement Plant by the Company has been sanctioned by NCLT, Allahabad vide its Order dated 2nd March, 2017 as corrected on 9th March, 2017. The Company has now moved for transfer of mining leases in terms of the statutory provisions of Mining Laws which provides for 90 days' period to the Government to give its approval.

Keeping in view with the aforesaid facts, the Company's Application for further extension of time of four months may be considered on merits.

We considered the above stated comments and duly examined the merits of the present petition seeking for extension of time in the light of the above stated statutory position and by also perused the previous performance and past tract of the company's record so far as the present case is concerned in making repayment of the fixed deposits. We find that the almost amount towards fixed deposits has now been paid although at belated stage. Hence, we record our satisfaction and in our view belated payment can be regularized.

Therefore, such period needs regularization and accordingly is extended upto 13.09.2017 as per the provisions contained in Section 74(2) of the Companies Act. However, such payment stands regularized with following directions (in respect of the disputed/withhold payments) that, *"the company is directed to keep on operating separate bank account and such account not to be closed without prior intimation to this Court. Further, the petitioner company is directed to file a quarterly statement in the present matter before the registry of this Tribunal showing the updated status of unpaid deposit time to time, so that the court may issue necessary direction, if deem appropriate"*.



With the above stated observation the present petition is allowed in above stated terms and conditions and accordingly stands disposed of.

No order as to cost.

A copy of this order be communicated to the Central Government through the RD(NR) as well as to the Registrar of Company, Kanpur, for information.



Dated: 23.10.2017

— Sd —

H.P. Chaturvedi, Member (Judicial)

Typed by:
Kavya Prakash Srivastava
(Stenographer)