

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 754 of 2018

IN THE MATTER OF:

Export-Import Bank of India & Anr.

...Appellants

Versus

Astonfield Solar (Gujarat) Pvt. Ltd. & Anr.

...Respondents

Present:

For Appellant : **Mr. Ashish Rana, Mr. Surekh Baxy and Mr. Harshit Garg, Advocates**

For Respondent : **Mr. Gurpreet Singh, IRP**

O R D E R

04.12.2018 This appeal has been preferred by the 'Export-Import Bank of India' and 'Power Finance Corporation Limited' (Financial Creditors) jointly against the order dated 20th November, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench whereby the application under Section 10 preferred by M/s. Astonfield Solar (Gujarat) Private Limited and Anr. (Corporate Debtor and Corporate Applicant) has been admitted, order of moratorium has been passed and the 'Resolution Professional' has been appointed. Learned counsel appearing on behalf of the appellant submitted that the shareholders had no voting right to approve the decision of the Board of Directors for initiation of 'corporate insolvency resolution process' to the 'Corporate Debtor' under Section 10 of the I&B Code. He placed reliance on 'Deed of Pledge of Securities' dated 28th March, 2013 in support of his claim.

Mr. Gurpreet Singh, Interim Resolution Professional submitted that when processing the financial matrix the appellant was making hindrance on the ground that they have preferred the appeals.

On hearing the parties, the following facts emerges :

The 'Deed of Pledge of Securities' dated 28th March, 2013 was entered into between the 'Corporate Debtor' and the 'Financial Creditors' wherein the provision relating to voting rights was mentioned under clause 5.2. Relevant portion of which reads as follows :

“5.2 Voting Rights

“unless and until an Event of Default (howsoever described herein and in any of the finance Documents) shall have occurred, the pledgor shall be entitled to exercise any and all voting and other consequential rights pertaining to the Securities (except the right to sell, transfer, assign, charge, pledge or otherwise Encumber the Securities or any part thereof otherwise than in accordance with this Deed) for any purpose not in violation of or inconsistent with any of the terms of this Deed or any other agreement in respect of the Facilities, provided that the pledgor agree that it:

(a) shall not-vote or abstain from voting, in any manner that is inconsistent with the terms of this Deed or any other agreements in respect of the facilities, or which would give rise to an Event of Default or a potential Event of Default or lead to a Material Adverse Effect or

result in a breach of any of the Transaction Documents or would otherwise prejudice the interests of any of the Lenders or Security Agent;

(b) shall not-vote or abstain from voting, in favour of any resolution which would have the effect of altering the rights of the Security Agent hereunder or under any of the agreements in respect of the Facilities or the terms of the Securities or any rights attaching to the Securities in any way; and

All such voting rights of the Pledgor shall cease forthwith upon the occurrence of an Event of Default.”

Learned counsel for the appellant also placed reliance on clause 5.2.2 whereunder the pledger authorized the Security Agent, upon the occurrence of an event of default, to attend the general meeting of the members or the meeting of any class of members or meeting of the creditors or debenture holders and to exercise the voting rights, as quoted below :

5.2.2. *“The Pledgor hereby irrevocably authorizes the Security Agent, upon the occurrence of an Event of Default, to attend any general meeting of the members or meeting of any class of members or meeting of the creditors or debenture holders and to exercise the voting rights in respect of the Securities in any manner as it may deem fit or as the case may be, direct the exercise by the Pledgor of the voting and other rights attached to*

any of the Securities as it deems fit. To enable the Security Agent to exercise the Voting rights as aforesaid, the Pledgor shall register this Deed with the Borrower with irrevocable instructions that as and when any intimation is received from the Security Agent in this behalf in accordance with the terms of this Deed, the Security Agent shall be permitted to attend and exercise the voting rights in respect of the Securities on any matter at any meeting of the members of the Borrower, and the Borrower hereby acknowledges and agrees to the same. The Pledgor shall also arrange with the Borrower for forwarding copies of the notices of all such meetings to the Security Agent and and when such notices are issued to the shareholders, and the Borrower hereby acknowledges and agrees to the same. The Pledgor shall execute and deliver to the Security Agent all proxies and such other instruments as the Security Agent may require to exercise such voting and other rights as are granted by this Deed and or available under Applicable Law.”

From the aforesaid ‘Deed of Pledge’ while we find that in case of default, the voting rights of the shareholders shall cease to exist upon the occurrence of an event of default, it will not deprive the shareholder to continue to be a shareholder and their shares do not stand transferred to the ‘Financial Creditor’

and thereby the shareholder, in terms of the 'Deed of Pledge' dated 28th March, 2013 may lose their right to vote but they continue to be shareholder even thereafter.

Section 10 relates to 'initiation of corporate insolvency resolution process' by the corporate applicant', reads as follows:

"10. Initiation of corporate insolvency resolution process by corporate applicant –

- (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.*
- (2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.*
- (3) The corporate applicant shall, along with the application, furnish—*
 - (a) the information relating to its books of account and such other documents for such period as may be specified;*
 - (b) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and*
 - (c) the special resolution passed by shareholders of the corporate debtor or the*

resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.;

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

(a) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional; or

(b) reject the application, if it is incomplete or any disciplinary proceeding is pending against the proposed resolution professional:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section. “

In terms of clause (c) of sub-section (3) of Section 10 of the I&B Code the special resolution passed by shareholders of the ‘corporate debtor’ or resolution

passed by at least three fourth of the total number of partners of the corporate debtor approving to file the application, is to be enclosed.

Even if it is presumed that the shareholder ceased to exercise their right to vote with regard to the companies aforesaid, their right under clause (c) of sub-section (3) of Section 7 does not stand superseded by the aforesaid provision.

With the aforesaid observations, we hold that the shareholder has a right to decide whether approving or disapproving the decision be proceeded with the corporate insolvency resolution process under Section 10 of the I&B Code. Such right does not stand curtailed by Deed of Pledge dated 28th March, 2013. Hence No interference is called for and in absence of any merit, we dismiss the appeal. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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