

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins.) No. 19 of 2021

[Arising out of Order dated 23 December 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench, Chennai in IA No.1001 of 2020 in IBA/1459/2019]

IN THE MATTER OF:

**Ramasamy Palaniappan
S/o Palaniappan
No.44, A S Pettai, Mela Street,
Namakkal, Tamil Nadu – 637 001**

...Appellant

Versus

**1. Radhakrishnan Dharmarajan
Resolution Professional
M/s Appu Hotels Ltd
No.26, 'O' Block, 18th Avenue
Ashok Nagar, Chennai – 600 083**

...Respondent No.1

**2. Tourism Finance Corporation of India Limited
4th Floor, 1, NBCC Plaza, Pushp Vihar
Sector 5, Saket
New Delhi – 110 017**

...Respondent No.2

**3. M/s Appu Hotels limited
Regd Off PGP House, No.57
Sterling Road, Nungambakkam,
Chennai – 600 034**

...Respondent No.3

Present:

**For Appellant : Mr Om Prakash, Senior Advocate
Mr Sanjesh, Advocate**

**For Respondent : Vijay Narayan, Senior Advocate (R1 & R3)
Mr T. Ravichandran, Advocate (RP)
Mr E. Hariharan, Advocate for
Mr P.L. Narayanan, Sr. Counsel (R-2)**

With

Company Appeal (AT) (CH) (Ins.) No. 20 of 2021

IN THE MATTER OF:

Chandrasekaran

S/o Marappan

No.B-2 Type Quarters Dharani Nagar

Athuvazhi Kottaiyur, Naranapuram

Sivagiri, Thirunelveli, Tamil Nadu 627 760

...Appellant

Versus

1. Radhakrishnan Dharmarajan

Resolution Professional

M/s Appu Hotels Ltd

No.26, 'O' Block, 18th Avenue

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...Respondent No.2

3. M/s Appu Hotels limited

Regd Off PGP House, No.57

Sterling Road, Nungambakkam,

Chennai 600 034

...Respondent No.3

Present:

**For Appellant : Mr Om Prakash, Senior Counsel
Mr Naveen Kumar Murthy &
Mr G.V. Mohan Kumar, Advocates**

**For Respondent : Mr Vijay Narayan, Sr. Counsel
Mr T. Ravichandran, Advocate (R-1 & R-3)**

**Mr E. Hariharan, Advocate for
Mr P.L. Narayanan, Sr. Counsel (R-2)**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These two Appeals emanate from the common order 23 December 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench, Chennai in IA No. 1001 of 2020 in IBA/1459/2019, whereby the Adjudicating Authority has allowed the Application filed under Section 12 (2) of the Insolvency and Bankruptcy Code, 2016 filed by Radhakrishnan Dharamrajan, the Resolution Professional (RP) and the 1st Respondent herein, excluded the period commencing from 5 May 2020 till 31 October 2020, from the CIRP, to provide the benefit under Regulation 40 C. The original parties status in the Company Petition represents them in this Appeal for the sake of convenience.

Brief Facts

2. The Corporate Insolvency Resolution Process was initiated against the Corporate Debtor viz M/S Appu Hotels Limited on 5 May 2020, and Mr Mukesh Kumar Gupta was appointed as Interim Resolution Professional (IRP). After that, IRP made a public announcement on 8 May 2020, and the last date for submission of claims was 21 May 2020. Thereafter, the suspended director of the Corporate Debtor filed a petition before Madras High Court challenging the Order of the Adjudicating Authority/NCLT dated 5 May 2020. By its Order dated 20 May 2020, Hon'ble High Court stayed the constitution of the Committee of Creditors (in short CoC) for three weeks, i.e. till 10 June 2020.

3. After that, the Committee of Creditors (in short, CoC), in its 3rd meeting held on 4 September 2020, resolved to appoint Respondent No 1 as Resolution Professional of the Corporate Debtor. After that, based on the Resolution of the CoC, the Resolution Professional was appointed by Order of the Adjudicating Authority dated 2 November 2020 in IA 726/2020. During the CIRP period, due to the lockdown imposed by the Central/State Government on account of the Covid 19 pandemic, various activities about the CIRP could not be completed as per the timelines prescribed under the Code and statutory period of 180 days for completion of the Corporate Insolvency Resolution Process was to end on 4 November 2020. Therefore, the CoC, in its 5th meeting held on 12 November 2020, deliberated on the issue of filing an Application before the Adjudicating Authority for excluding the period from 5 May 2020 till 31 October 2020 on the ground of lockdown imposed by the Central Government. The COC with 100% voting has passed the Resolution to seek an extension of the CIRP period by excluding 179 days.

4. The Insolvency and Bankruptcy Board of India brought Regulation 40 C under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 to deal with the unprecedented situation of Covid 19 lockdown, for exclusion of the period of lockdown from the CIRP, for completion of CIRP as per the timelines provided under the I&B Code, 2016.

5. The CIRP about the Corporate Debtor was initiated on 5 May 2020, i.e. during the lockdown period. The IRP/RP had sought to exclude the period from 5 May 2020 to 31 October 2020 from the CIRP period. The

Adjudicating Authority considering the Covid 19 pandemic situation coupled with attendant lockdown imposed by the Central/State Government, allowed the exclusion of the period from 5 May 2020 till 31 October 2020 from the CIRP in terms of section 12 (2) of The Insolvency and Bankruptcy Code 2016, under Regulation 40 C¹.

6. The Order to exclude the 179 days from CIRP of the Corporate Debtor is challenged by the Appellants, who happens to be the Shareholder of Respondent No. 3, Corporate Debtor Appu Hotels Limited, on the following grounds;

Grounds of Appeal

(a) The Appellant are equity Shareholders in the 3rd Respondent Company / Corporate Debtor in IBA/1459/2019. By the impugned Order dated 23 December 2020, the Adjudicating Authority (National Company Law Tribunal, Chennai), invoking the power under Regulation 40 C, IBBI (Insolvency Resolution of Corporate Persons) Regulation, 2016, granted a mechanical extension of 179 days from the Corporate Insolvency Resolution Process period without complete exclusion of the timelines and the activities undertaken during the lockdown period to render a considerable benefit to all the Stakeholders.

(b) The Petition filed by the Financial Creditor, i.e., the 2nd Respondent herein, was admitted by the Adjudicating Authority on 5 May 2020, i.e. during the lockdown period. Following the same,

¹IBBI (Insolvency Resolution of Corporate Persons) Regulation 2016

the Adjudicating Authority appointed the IRP, who invited claims, constituted the Committee of Creditors (CoC); conducted several meetings of the CoC between 22 June 2020 to 12 October 2020, and issued form G on 17 August 2020. After this, the Expression of Interest (EOI) was submitted by the bidders. Despite the Committee of Creditors raising the issue about the value of the Resolution Plan submitted by the prospective Resolution Applicants, which was far below the liquidation value, and due to the Covid 19 lockdown, several interested and desirous Resolution Applicants were unable to submit their Expression of Interest. Because the market conditions were not encouraging, it would have been commercially prudent to grant additional time.

- (c) The Appellant contends that the Resolution Professional has committed the categorical violation of Regulation 40 C by not considering the interests of all Stakeholders of the Corporate Debtor and merely seeking exclusion to complete the formalities in the capacity of the Resolution Professional before the Adjudicating Authority. The Resolution Professional ought to have considered the interest of all the Stakeholders and sought complete exclusion of the timeline and the activities undertaken during the excluded period to render a considerable benefit to all the Stakeholders. Whereas, the Resolution Professional, the extent of the same sought exclusion like a mere extension of the timeline to complete its part of the formalities. The Resolution Professional has neither

considered the interests of the Corporate Debtor to be a going concern nor the interests of the Stakeholders. They have invested their hard-earned money in the Corporate Debtor, such as the Appellant herein. The Resolution Professional has taken a unilateral approach in seeking the exclusion of the time. The same is a complete violation of Regulation 40 C, brought into force with a different intention.

- (d) The Appellant's further contended that the Adjudicating Authority/ NCLT ought to have excluded the activities carried out during the lockdown instead of merely excluding the time from the CIRP. The Adjudicating Authority ought to have taken into account the interest of all the Stakeholders instead of mechanically excluding the period sought by the Resolution Professional from the CIRP.
- (e) It is contended that the Adjudicating Authority has not applied its mind by granting the exclusion sought by the Resolution Professional, which is merely for the completion of the formalities.
- (f) In contrast, the introduction of Regulation 40 C of the IBBI (Insolvency Resolution of Corporate Persons) Regulation 2016 was for a much bigger purpose which would be for the benefit of the Corporate Debtor and the stakeholders of the Corporate Debtor including the Appellant herein. The Adjudicating Authority has not applied Regulation 40 C in its true sense while granting time

exclusion. It has merely used it as the provision to extend the timeline for the completion of the CIRP.

(g) The Appellant contends that the Adjudicating Authority has extended the CIRP timeline under Section 12 (2) of the Code and not by Applications under Regulation 40 C which is fundamentally different from the extension provided under the Code since the former is to protect the interests of all the Stakeholders and hence, it is mandatory to consider the same before granting exclusion. Further section 12(2) of the Code only permits a 90-day extension, whereas Regulation 40 C qualifies for excluding the entire period of inactivity.

(h) The Appellant further contends that the Resolution Professional has acted only to recover the bad loans and repay the creditors. The Resolution Professional made no attempts to seek exclusion of the lockdown for re-issuing Form G. Whereas, on the contrary, the resolution applicant proceeded ahead with the entire CIRP Process in full force during the peak of the pandemic where all businesses were down to rock bottom and more so, the hospitality and the hotel industries. The Resolution Professional did not attempt to safeguard the valuable assets of the Corporate Debtor and has presented the plan of the Resolution Applicant, which takes care of just the minimum requirement as prescribed under the Insolvency and Bankruptcy Code 2016 by paying back only the financial, secured, unsecured and Operational Creditors. However, the

members of CoC themselves have felt that the Resolution Plan amount is far lower than the liquidation value of the Corporate Debtor and hence, suggested re-invitation of expression of interest and the re-issuance of Form G. The Resolution Professional did not take any steps to obtain a better offer for the Corporate Debtor and mindlessly proceeded ahead with the CIRP formalities. However, there was no economic activity during Covid 19 pandemic. The Resolution Professional has acted entirely against the object of the Insolvency and Bankruptcy Code 2016, which is primarily for enhancement of entrepreneurship and maximisation of the value of the Corporate Debtor's assets while balancing the interests of all the Stakeholders.

- (i) The Appellant further contends that due to the unprecedented Covid 19 situation and entire halt in economic activities, Regulation 40 C was brought into force as early as 29 March 2020. The Resolution Professional did not take into account that the pandemic had completely shut hotel industries down and push their businesses to rock bottom; the said period could not be conducive to carrying out vital activities such as valuation of the Corporate Debtor and preparation of Information Memorandum to seek potential resolution applicants to offer their bids.

Respondent No's 1 & 3 Contention

7. Respondent No. 1 & 3 contends that impugned Order reveals that an Application filed by 1st Respondent, the Resolution Professional, has been
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allowed by the Adjudicating Authority, who had excluded the period from 5 May 2020 to 31 October 2020, 179 days from the period of CIRP. Regulation 40 C of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 is an enabling provision that enables the Resolution Professional to seek approval of the Adjudicating Authority for exclusion, if any, of the activities which could not be completed due to such lockdown. It is not the case of the 1st Respondent before the Adjudicating Authority that no process could be initiated during the lockdown period. On the other hand, some of the activities could not be completed, which warranted the exclusion. The Adjudicating Authority was satisfied with the material evidence place before it and concluded that such exclusion is required. The grant of time by the Adjudicating Authority cannot be the subject matter of an Appeal.

8. The Appellant has filed the present Appeal, as a minority Shareholder, questioning the impugned Order, which the Adjudicating Authority passed on the Application filed by the 1st Respondent/Resolution Professional, based on the requisite approval of Committee of Creditors to file such an Application. Further, the CoC approved the Resolution Plan with a majority of 87.34%, pending consideration of the Adjudicating Authority.

2nd Respondents Contention

9. Respondent No.2, Tourism Finance Corporation of India, contends that the main contention raised by the Appellant in this Appeal is that by allowing the exclusion of period, **the steps taken during that period of**

Corporate Insolvency Resolution Process should have been excluded,

and the entire CIR process ought to have been restarted. Also, the 1st Respondent has not worked as per the objective of the Insolvency and Bankruptcy Code 2016. It is not understood how the Appellant, who is only an equity Shareholder of the Corporate Debtor, can dispute the CIR process. The Application seeking exclusion of period was not at all affecting the Appellant.

10. We have heard the argument of the Learned Counsel for the parties and perused the record.

Discussions and Findings

11. The Appellant has filed this Appeal mainly on the ground that the Resolution Professional has committed the categorical violation of Regulation 40 C by not considering the interests of all Stakeholders of the Corporate Debtor and merely seeking exclusion of time - period to complete the formalities in the capacity of the Resolution Professional. **The Resolution Professional ought to have considered all the Stakeholders' interest and sought complete exclusion of the timeline and the activities undertaken during the excluded period to render a considerable benefit to all the Stakeholders.**

12. The Resolution Professional sought exclusion like a mere extension of the timeline to complete its part of the formalities for the CIRP. The Resolution Professional has neither considered the interests of the Corporate Debtor to be a going concern nor the interests of all the Stakeholders. They have invested their hard-earned money in the Corporate Debtor, such as the

Appellant herein. The Resolution Professional has taken a unilateral approach in seeking the exclusion of the time. The same is a complete violation of Regulation 40 C, brought into force with a different intention.

13. The Learned Counsel for the Appellant submits that right from the commencement of CIRP, it has been conducted only to recover the loans and not to safeguard the survival of the 3rd Respondent Corporate Debtor and their assets to keep the business on a going concern basis.

14. In response to the above, the Counsel for the Respondents contended that the entire CIRP was conducted as per the procedure prescribed by the I&B Code. The Appellant who is holding some equity shares in 3rd Respondent/Corporate Debtor has come before this Appellate Tribunal by filing the present Appeal only to distract and delay the Insolvency Resolution Process and to bring about a halt to the approval of the Resolution Plan which the Committee of Creditors has approved with a majority of 87.34% which is pending for approval before the Adjudicating Authority.

15. The Appellant's contention about the valuation of the Corporate Debtor of ₹ 1600 crores is unsupported by any evidence. The fact remains that the Resolution Plan amount has arrived after following the procedure prescribed under the Code and the Rules and Regulations made thereunder.

16. It is pertinent to mention that Hon'ble Supreme Court in the case of *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh*, (2020) 11 SCC 467: 2020 SCC OnLine SC 67 at page 487 has dealt with the acceptability of

Resolution Plan where upfront payment offered under the Resolution Plan was below the liquidation value of the Company. Hon'ble Supreme Court has held that so long the Resolution Plan meets the other requirements and is approved by the Committee of Creditors, judicial review of such decision of CoC is not permitted. Hon'ble Supreme Court has held that though the release of assets of Maharashtra seamless at the value 20% below its liquidation value arrived at by the valuers seems inequitable, the Court ought to cede grounds to the commercial wisdom of the creditors rather than assess the Resolution Plan on the basis of quantitative analysis.

17. The Resolution passed by the CoC unanimously to seek exclusion of time from CIRP of the Corporate Debtor is a commercial decision that cannot be questioned either by the Adjudicating Authority or by the Appellate Authority as held by various judgements of the Hon'ble Supreme Court.

18. The Appellant's contention that the Resolution Professional has committed the categorical violation of Regulation 40 C by not considering the interests of all Stakeholders of the Corporate Debtor and merely seeking exclusion of time-period to complete the formalities in the capacity of the Resolution Professional. **The Resolution Professional ought to have considered all the Stakeholders' interest and sought complete exclusion of the timeline and the activities undertaken during the excluded period to render a considerable benefit to all the Stakeholders.**

19. The Learned Counsel for the Appellant has placed much emphasis on the aims and objectives which necessitated to bring Regulation 40 C. Regulation 40 C is given below for ready reference;

*“1. (1) These regulations may be called the **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020.***

*(2) **They shall be deemed to have come into force from the 29 March, 2020.***

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, after regulation 40B, the following Regulation shall be inserted, namely:—

"40C. Special provision relating to time-line.— Notwithstanding the timelines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the timeline for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process."

Explanatory Memorandum

The Governing Board of the Insolvency and Bankruptcy Board of India decided on 27 March, 2020 to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The notification amending the regulations could not be published in the Gazette of India, due to the nationwide lockdown declared by the Central Government w.e.f. 25

March, 2020, in the wake of the outbreak of Covid-19. The amendment regulations were, therefore, published on the website of the Board for it to be effective from the 29 March, 2020, with a note that the same shall be published in the Gazette of India as soon as the Government Press accepts the notification for publication. The intention of the Governing Board was to bring into force the amended regulations with effect from the 29 March, 2020.

It is certified that, since the amended regulations provide clarity to the stakeholders in regard to the model timeline in the corporate insolvency resolution process, no person is being adversely affected by giving retrospective effect.

1 Vide Noti. No. IBBI/2020-21/GN/REG059, Extra., Part III, S. 4, dated 20-4-2020, published in the Gazette of India, No. 156, dated 24-4-2020."

20. Based on the above Regulation, it is clear that the Regulator, the IBBI brought this Regulation to meet the eventualities of the Covid 19 pandemic. It is stated that the period of lockdown imposed by the Central Government in the wake of the Covid-19 outbreak shall not be counted for the timeline for any activity that could not be completed due to such lockdown about a Corporate Insolvency Resolution Process.

21. In the instant case, the IRP/RP conducted the CIR Process in the timeline with the provisions of the Code and the Regulations and, when required, invoked Regulation 40 C. The RP doesn't need to invoke Regulation 40 C as a matter of routine. Regulation 40 C provides exclusion of the timeline for completion of CIRP during the Covid-19 outbreak for any

activity that could not be completed due to such lockdown. It excludes the timeline for the activities that could not be performed due to the lockdown during the Corporate Insolvency Resolution Process. Per contra, the activities performed and completed during the lockdown in a given timeline cannot be invalidated on account of Regulation 40 C.

22. The Learned Counsel for the Appellant placed reliance on the minutes of CoC held on 12 November 2020. The relevant portion of the minutes of the CoC meeting is given below for ready reference;

"4. RP requested the COC members to take call on whether to continue with the process where the IRP had sought for RFRP and based on which 3 resolution plans were received and noted that the last date for receipt of the resolution plans was 31 October 2020 and sought the view and opinion of the COC members on either to continue with the process as on hand or if the COC members intend to either extend the timeline for receipt of the resolution plan or for fresh issuance of form G or to consider re-issuance of form G keeping in mind the facts highlighted by the RP.—

Representative Mr Santhana Gopalan from state bank of India opined that Form-G was published when Covid was at its peak. Many of the Prospective Resolution Applicants could not visit the hotel premises and further opined that at the time of issue of form G Covid was at its peak and corporate debtor being into the hospitality industries was the worst affected due to the pandemic.

Bank of India representative opined that more than 180 days time has already been lost and instead of publishing fresh Form-G the timeline for submitting EOI can be extended for a

few weeks. To this, RP clarified that the time for submission of resolution plan can be given only to those who are in provisional or final list i.e. only to those who have responded to the expression of interest and not to those who have not submitted the EOI.

IDBI representative enquired about the timeline available with the exclusion. To this RP replied that if we take the exclusion, the entire 180 days of CIRP is available. He further stated that 330 days is the total timeline but AA needs to be approached after 180 days for extension of CIRP process.-----

With the consensus of COC members, it was decided that no extension of timeline for submission of resolution plan should be done and the RP is directed to expedite the valuation process and check the feasibility and viability of the resolution plan already submitted and present the eligible resolution plans before the COC for consideration."

(verbatim copy)

23. On perusal of the minutes of the CoC, it appears that the RP apprised the CoC about the legal options available either to seek an extension of the timeline for submission of Resolution Plan or to make the decision for publication of fresh Form-G. It was the CoC's commercial decision that **"no extension of time for submission of Resolution Plan should be done and RP was directed to expedite the valuation process and check the feasibility and viability of the Resolution Plan already submitted and present the eligible Resolution Plan before the CoC for consideration."**

24. The commercial decision of the CoC is not justiciable. Hon'ble Supreme Court, in the case of K. Sashidhar² has held;

"the commercial wisdom of COC has been given Paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the IB code. There is an intrinsic assumption that the financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in COC meetings through voting, as per voting share, is a collective business decision. The legislature, consciously has not provided any ground to challenge the (commercial wisdom) of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable."

25. Given the law laid down by the Hon'ble Supreme Court in the case of K. Sashidhar (supra), the commercial wisdom of CoC is paramount and judicial intervention is not permitted. It is specifically held that neither the Adjudicating Authority (NCLT) and nor the Appellate Authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of CoC. Therefore CoC decision not to seek an extension of the timeline for submission of the Resolution Plan was a commercial decision that is not justiciable.

26. Appellant's contention that no opportunity of hearing was given to him by granting the exclusion is without any basis. Since the Appellant is

²K. Sashidhar v Indian Overseas Bank and Others (2019) 12 SCC 150

not a necessary party and the exclusion Application was between the Resolution Professional and the Adjudicating Authority and the Adjudicating Authority on being satisfied with the reasons adduced by the Resolution Professional and material evidence placed before it had granted the exclusion. Hence the question of granting an opportunity to Appellant or any other person does not arise.

27. In its commercial wisdom, the CoC discussed the viability and feasibility of the Resolution Plan and had taken such a decision which is pending consideration before the Adjudicating Authority.

28. The allegations that the entire CIRP up to the submission of the Resolution Plan have been completed in undue haste during the complete lockdown when the entire world was suffering from Covid 19 and India had imposed a nationwide lockdown which led to a total shutdown of economic activities throughout the country, cannot be a ground for the Appellant herein to challenge the impugned Order. The fact remains that the Resolution Professional had been conducting the CIRP and has complied with the provision of the Code and the Regulations in this regard. The Appellant cannot be aggrieved by Order of exclusion order passed by the Adjudicating Authority.

29. The mere fact that Regulation 40 C was introduced on 29 March 2020 will not make it imperative for the IRP to invoke Regulation 40 C for extending the timeline as a matter of routine is incorrect. The IRP/RP conducted the CIRP as per the timeline. When required, the Resolution Professional invoked Regulation 40 C and sought exclusion of 179 days

while calculating the CIRP period. The allegations against the IRP/RP that he acted against the interest of the Corporate Debtor and the Stakeholders are incorrect.

30. In important to mention that Section 12 (2) of the Insolvency and Bankruptcy Code 2016 empowers the Adjudicating Authority to extend the timeline for completion of CIRP beyond 180 days on the basis of the Resolution of the Committee of Creditors passed the minimum 66% of voting share. 2nd proviso to Sub-section 3 of Section 12 further empowers the Adjudicating Authority to extend the timeline for completion of CIRP up to 330 days. Section 12 of the Code reads as under;

"Section 12. Insolvency and bankruptcy code of India 2016

12. Time-limit for completion of insolvency resolution process.— (1) *Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the Application to initiate such process.*

(2) The Resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of ¹[sixty-six] per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject-matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by Order extend the duration of

such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

²[Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code(Amendment) Act, 2019.]

31. Hon'ble Supreme Court in case of Kalpraj Dharamshi,³ has clearly held that the commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under section 30 and 31 of the I&B Code. In the above-mentioned case Hon'ble Supreme Court has held;

"156. *It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with,*

³Kalpraj Dharamshi v Kotak Investment Advisors Limited 2021 SCC Online SC 204

excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.

158. *It is further to be noted, that after the resolution plan of Kalpraj was approved by NCLT on 28.11.2019, Kalpraj had begun implementing the resolution plan. NCLAT had heard the appeals on 27.2.2020 and reserved the same for orders. It is not in dispute, that there was no stay granted by NCLAT, while reserving the matters for orders. After a gap of five months and eight days, NCLAT passed the final Order on 5.8.2020. It could thus be seen, that for a long period, there was no restraint on implementation of the resolution plan of Kalpraj, which was duly approved by NCLT. It is the case of Kalpraj, RP, CoC and Deutsche Bank, that during the said period, various steps have been taken by Kalpraj by spending a huge amount for implementation of the plan. No doubt, this is sought to be disputed by KIAL. However, we do not find it necessary to go into that aspect of the matter in light of our conclusion, that NCLAT acted in excess of jurisdiction in interfering with the conscious commercial decision of CoC.*

159. *It is also pointed out, that in pursuance of the Order dated 5.8.2020 passed by NCLAT, CoC has approved the resolution plan of KIAL on 13.8.2020. However, since we have already held, that the decision of NCLAT dated 5.8.2020 does not stand the scrutiny of law, it must follow, that the subsequent approval of the resolution plan of KIAL by CoC becomes non-est in law. For, it was only to abide by the directions of NCLAT. We are of the view that nothing would turn on it. The decision of CoC dated 13/14.2.2019 is a decision, which has been taken in exercise of its 'commercial wisdom'. As such, we hold, that the decision taken by CoC dated 13/14.2.2019, which is taken in accordance with its 'commercial wisdom' and which is duly approved by NCLT, will*

prevail. Further, NCLAT was not justified in interfering with the stated decision taken by CoC."

32. In the above-mentioned case Hon'ble Supreme Court has noticed that there has been material irregularity in exercise of powers by RP but the Hon'ble Supreme Court has found that all actions of the RP have the seal of approval of the CoC. Hon'ble Supreme Court has further observed in para 157 that;

"157. No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, NCLAT was justified in view of the provisions of clause (ii) of sub-section (3) of Section 61 of the I&B Code to interfere with the exercise of power by RP. However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G', in the event he found, that the proposals received by it prior to the date specified in last Form 'G' could not be accepted. However, it has been the consistent stand of RP as well as CoC, that all actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL, having voting rights of 0.97%. We are of the considered view, that in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of 'commercial wisdom', NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%."

33. The law laid down by Hon'ble Supreme Court in the above-mentioned case squarely applies to the facts of the present case. In the instant case, even though we find that Regulation 30 C could have been applied for exclusion of 179 days on account of the unprecedented situation created by the Covid 19 pandemic and some of the Financial Creditors opined for fresh publication of form G for the invitation of EOI. But the COC had unanimously decided only for seeking exclusion of 179 days, i.e. from 5 May 2020 to 31 October 2020, for completion of CIRP. But the CoC, under its commercial wisdom, did not prefer for publication of Form-G afresh to invite Expression of Interest. Therefore such a decision of the CoC is not justiciable.

34. In the circumstances stated above, we are of the considered opinion that the decision taken by the Adjudicating Authority needs no interference, and both the Appeals deserves to be dismissed.

ORDER

Company Appeal (AT) (CH) (Ins.) Nos.19 and 20 of 2021 are dismissed.

No order as to costs.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
05 MAY, 2021

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