

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

**I.A. No. 594 of 2018 in
Company Appeal (AT) (Insolvency) No. 188 of 2018**

IN THE MATTER OF:

Rajputana Properties Pvt. Ltd.

...Appellant

Vs

Ultra Tech Cement Ltd. & Ors.

....Respondents

Present:

For Appellant: Mr. C. A. Sundaram and Mr. Neeraj Kishan Kaul, Senior Advocates assisted by Mr. Manu Nair, Ms. Misha, Mr. Siddhant Kaul, Ms. Rubika, Mr. Deepak Joshi, Mr. Rajeev, Mr. Samar and Ms. Hansa Kaul, Advocates.

For Respondents: Mr. Mukul Rohatgi and Mr. Amrendra Saran, Sr. Advocates assisted by Mr. Mahesh Agarwal, Mr. Rajeev Kumar, Ms. Aastha Mehta and Mr. Himanshu Satija, Advocates for R-1.

Mr. Arvind Kumar Gupta, Mr. Kumar Karthikay, Mr. Vishal Meghwa, Advocates for R-2 (BIL).

Mr. Tushar Mehta, Sr. Advocate with Mr. R. Sudhinder, Ms. Amrita Sarkar, Mr. Sumant Batra, Advocates for R-4 (CoC).

Mr. Sumant Batra, Ms. Honey Satpal and Ms. Srishti Kapoor, Advocates for EARC.

Mr. Abhinav Vashishta, Mr. Prashant Pakhiddey, Mr. Pranshu Paul, Advocates for RP.

O R D E R

15.05.2018: An Interlocutory Application has been filed by the 1st Respondent alleging violation of the interim order passed by this Appellate Tribunal on 4th May, 2018 which reads as follows:

“During the pendency of the Appeal, it will be open to the ‘Committee of Creditors’ and the Adjudicating Authority to approve one or other ‘Resolution Plan’, including the Plans if received subsequently which will be subject to the decision of this Appeal.”

2. Learned senior counsel for 1st Respondent submits that the resolution plan or the eligibility of Resolution Applicant are to be considered by the ‘Committee of Creditors’ and the ‘Adjudicating Authority’ but the Resolution Professional has given notice to the parties that he will decide about the eligibility of one or other Resolution Applicant.

3. According to learned senior counsel for the Appellant, the Resolution Professional is required to decide whether resolution plan(s) are in accordance with existing provisions of law and fulfil other conditions as prescribed under Section 30(2) of the I&B Code, 2016 and therefore, it is within the domain of the Resolution Professional to decide such issue.

4. Learned senior counsel appearing on behalf of ‘Committee of Creditors’ submits that the Committee of Creditors are required to consider all the resolution plans for maximization of assets and taking into consideration all aspects a resolution plan may be approved by the Committee of Creditors.

5. Learned counsel appearing on behalf of the Resolution Professional submits that in the notice he has not intimated Resolution Applicants that he will decide eligibility of one or other Resolution Applicant. He has only called for comments of all the Resolution Applicants. The meeting of the Committee of

Creditors has been fixed for 18.05.2018 to consider all the aspects in accordance with law.

6. The questions arises for consideration in this appeal are:-

- (i) Whether the Resolution Professional is required to notice the comments of one or other Resolution Applicant(s) to decide the eligibility? and
- (ii) What procedure the 'Committee of Creditors' are required to be followed at the time of approval of resolution plan?

7. To decide the aforesaid issues it is desirable to notice different provisions of I&B Code, 2016, as discussed herein.

7(A). In terms of Section 29, the Resolution Professional is required to prepare an 'Information Memorandum' in the form and manner containing relevant information as specified by the Insolvency and Bankruptcy Board of India ('Board' for short) for formulating a resolution plan. The Resolution Professional is required to provide Resolution Applicant all the relevant information in physical and electronic form. As per Section 29(2), the Resolution Applicant is required to undertake –

- a. to comply with provisions of law for the time being in force relating to confidentiality and insider trading;
- b. to protect any intellectual property of the corporate debtor it may have access to; and

- c. not to share relevant information with third parties unless clauses (a) and (b) of sub-section aforesaid are complied with.

From the aforesaid provision it is clear that the Resolution Professional cannot share the information with third parties without complying with clauses (a) and (b) of Sub-section (2) of Section 29.

- 7(B). Section 30 relates to Submission of resolution plan by Resolution Applicant based on 'Information Memorandum'. As per Section 30(2), the Resolution Professional is required to examine **each** resolution plan received by him to confirm that the resolution plan provides for payment of Insolvency Resolution Process costs, payment of debts of Operational Creditor(s), management of the affairs of the corporate debtor, implementation and supervision of the resolution plan, other requirements as may be specified by the Board and does not contravene any of the provisions of law for the time being in force. The relevant provisions of Section 30 are quoted below for proper appreciation:

“30. Submission of resolution plan. – (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board

in priority to the repayment of other debts of the corporate debtor;

- (b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;*
- (c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;*
- (d) the implementation and supervision of the resolution plan;*
- (e) does not contravene any of the provisions of the law for the time being in force;*
- (f) conforms to such other requirements as may be specified by the Board.*

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.”

The Committee of Creditors may approve the resolution plan by a vote of not less than 75 per cent of the voting share of the financial creditors as per Section 30(4).

From Section 30(2) it is clear that the Resolution Professional himself is required to examine each resolution plan to find out whether they confirm the requirement in terms of clause (a), (b), (c), (d) and (f) of Section 30(2) and does not contravene any of the provisions of the law for the time being in force.

7(C). The persons who are ineligible to submit the resolution plan prescribed under Section 29 A which reads as follows:

“29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person –

(a) is an undischarged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;

(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

(d) has been convicted for any offence punishable with imprisonment for two years or more;

(e) is disqualified to act as a director under the Companies Act, 2013;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) as been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction,

extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code

(h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code

(i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation. – For the purposes of this clause, the expression “connected person” means –

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of this Explanation shall apply to –

- (A) a scheduled bank; or*
- (B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; or*
- (C) an Alternate Investment Fund registered with the Securities and Exchange Board of India.”*

The provision have made it clear as to who will declare whether a person is ineligible to submit resolution plan as per Section 29A.

8. Prima facie, in absence of any information through any source while scrutinizing the resolution plan under Section 30(2), the Resolution Professional cannot hold or decide as to who is ineligible under Section 29A. Section 30(2) does not confer such power to the Resolution Professional nor there is any other provision conferring such power to the Resolution Professional to scrutinize the eligibility of one or other Resolution Applicant.

9. As per Section 30(2), the Resolution Professional is required to examine whether resolution plan confirm the provisions as mentioned therein but he cannot disclose it to any other person including Resolution Applicant(s), who has submitted the resolution plan. According to us, the resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection

can be called for from other Resolution Applicants with regard to one or other resolution plan.

10. The meeting of the Committee of Creditors is prescribed under Section 24 reads as follows:

“24. Meeting of committee of creditors. – (1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to –

- (a) members of Committee of creditors;*
- (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;*
- (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.*

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.”

11. From Section 24(3) it is clear that the Resolution Professional is not only required to give notice of the meeting to ‘the members of Committee of Creditors’ but also to the members of (suspended) Board of Directors or partners of the corporate person as the case may be. The ‘Operational Creditors’ or their representatives are also to be informed to attend the meeting of Committee of Creditors, if the amount of the aggregate dues is not less than ten per cent of the

debt. Section 24(4) shows that the Directors, Partners, Representatives of Operational Creditors may attend the meeting of Committee of Creditors but have no right to vote in such meeting. The meeting of the Committee of Creditors is required to be conducted in such a manner as may be specified by the Board.

12. As per Section 30(5), the Resolution Applicants can attend the meeting of Committee of Creditors in which the resolution plans of the Resolution Applicants are considered.

13. If Section 24 is read with Section 30, it is clear that the following persons are to take part in the meeting of Committee of Creditors at the time of approval of one or other resolution plan.

- (a) members of Committee of Creditors;
- (b) members of the (suspended) Board of Directors or the Partners of the corporate persons;
- (c) Operational Creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt [Clause (a), (b), (c) of Section 24(3)]; and
- (d) Resolution Applicant(s) when resolution plan of such applicant(s) are placed for consideration [Section 30(5)].

14. The members of the 'Committee of Creditors' have voting right but others who attend the meeting as noticed above including the Board of Directors, Partners, Operational Creditor(s) and the Resolution Applicant(s) have no voting right.

15. From the aforesaid provisions the intention of the legislature is clear that the Committee of Creditors while approving or rejecting one or other resolution plan should follow such procedure which is transparent. Those who will be watching the proceeding such as (suspended) Board of Directors or its Partners; Operational Creditors or its representatives and Resolution Applicant(s) are not mere spectators but may express their views to the Committee of Creditors for coming to conclusion in one or other way.

16. For the reason aforesaid we are of the view that the Committee of Creditors should record reasons (in short) while approving or rejecting one or other resolution plan.

17. Views, if any, are expressed by the (suspended) Board of Directors or its Partners; Operational Creditors or its representatives and Resolution Applicant(s), are also required to be taken into consideration by the Committee of Creditors before approving or rejecting one or other resolution plan. The views so expressed by any of those who are watching the proceeding should also be recorded (in short).

18. As the resolution plans are opened and placed before the Committee of Creditors, as per Section 30(5), the Resolution Applicant(s) are entitled to be present. At this stage they may point out whether one or other person (Resolution Applicant) is ineligible in terms of Section 29A or not. If one or other objection is overruled, reasons should be recorded by the Committee of

Creditors. After decision of the Committee of Creditors, the Resolution Professional is required to place the decision before the Adjudicating Authority under Section 31. The Adjudicating Authority who is required to take decision as per Section 31 of the I&B Code, can go through the reasoning to accept or reject one or other objection or suggestion and may express its own opinion/decision.

19. In view of aforesaid observations while we direct the Resolution Professional not to take any comment from one or other Resolution Applicant(s), if such step has been taken be ignored. Resolution Professional and the Committee of Creditors will proceed in accordance with law taking into consideration the observations as made above and decision, if any, taken by the Adjudicating Authority shall be subject to decision of this appeal. I.A. No. 594 of 2018 stands disposed of. Matter be listed as per earlier order.

Let a copy of this order be sent to Chairperson, IBBI for information.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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