

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

Principal Bench, New Delhi

Comp. App. (AT) (Ins) No. 729 of 2021

IN THE MATTER OF:

Rupinder Singh Gill

...Appellant

Vs.

Three C Universal Developers Pvt. Ltd.

....Respondents

Through Resolution Professional

Rakesh Kumar Gupta

Present:

**For Appellants : Mr. Krishnendu Datta, Sr. Advocate, Ms. Prachi Johri,
Mr. Rahul Gutpa, Advs**

**For Respondent : Mr. Abhishek Anand, Mr. Mohak Sharma, Mr. Vaibhav
M. Adv for R1**

ORDER

Per: Justice Rakesh Kumar Jain (Oral)

25.05.2023: This appeal is directed against the order dated 01.09.2021 passed by the National Company Law Tribunal, New Delhi Court -II (hereinafter referred as to 'the Adjudicating Authority) by which an application bearing IVNP-05/2021 filed in IB-2582 (ND) 2019 in which the Applicant/Appellant made the following prayers *(a) Allow the present application and permit the Applicant to intervene in IA No. 655 (ND)/2021 (b) direct the Resolution Professional to supply a copy of IA No. 655 (ND) /2021,* has been declined.

2. In brief, the facts of this case are that the Appellant entered into an Agreement to sell dated 08.10.2018 with the Corporate Debtor, in order to purchase the entire shareholding of Challengerz Websolutions Pvt. Ltd.

(Challengerz) and Hacienda Infosoftech Pvt. Ltd. (Hacienda). According to the Appellant, the Corporate Debtor was to obtain requisite permission and approvals within a period of 11 months and after procuring the approval, the Appellant was to pay the balance consideration. However, the Corporate Debtor initiated proceedings against the Appellant under Section 241-242 of the Companies Act, 2013 (for short 'The Act') in which the Adjudicating Authority passed an interim order dated 05.04.2019 and granted 'status quo' on shareholding. However, the Corporate Debtor went into 'Insolvency' on 17.12.2019 and the Resolution Professional filed an application bearing IA No. 655/2021, seeking approval of the Resolution Plan of M/s. Ace Infracity Developers Pvt. Ltd. In the said application, the present Appellant filed the application in question, bearing INVP-05/2021, in which the aforesaid two prayers have been made. The Application for intervention as well as supply of the Resolution Plan during the pendency of the approval of the Resolution Plan by the Adjudicating Authority has been declined on the ground that *"considering the fact that the applicant has not submitted any claim before RP, we are of the considered view that the Applicant has no locus standi. Simply on the ground that there is litigation between the applicant and Suspended board of Directors of the Corporate Debtor, we are not inclined to permit the applicant to intervene and direct the RP to serve a copy of the Resolution Plan. Accordingly, we hereby reject the prayer of the Appellant."*

3. Counsel for Appellant has argued that the Appellant has an interest in the shareholding of the Corporate Debtor by virtue of Agreement dated

08.10.2018, therefore, the Appellant is entitled to a copy of the Resolution Plan. In this regard, reliance has been placed upon a decision of this Tribunal, rendered in the case of 'Association of aggrieved workmen of Jet Airways (India) Limited Vs. Jet Airways (India) Ltd 2022 SCC online NCLAT 36' and para 25 has been referred to which read as under:

“25. Section 196, sub-section (1) deals with ‘Powers and functions of the Board’. Sub-clause (h) of sub-section (1) empowers the Board to “call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities”. The power of the Board is thus also to call for any record from the Insolvency Professional, which may also include the Resolution Plan. Sub-clause (k) further empowers the Board to collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases. We, thus, are of the view that sending of the records by the Resolution Professional to Board as contemplated by Section 31 sub-section (3) is not only for proper data research studies only and the records and information can be recorded in its database and also can be published. The above scheme of the Code also indicates that after Resolution Plan is submitted to the Adjudicating Authority and it is approved by the Adjudicating Authority, it no longer remains a confidential document, so as to preclude Regulator and other persons from access the said document.”

4. Counsel for Appellant has also relied upon a decision of the Hon'ble Supreme Court in the case of 'Vijay Kumar Jain Vs. Standard Chartered Bank & Ors. in Civil Appeal No. 8430 of 2018 decided on 31.01.2019'. In this case para 12 has been referred to which read as under:

“12. There is no doubt whatsoever that Notes on Clauses are an important aid to the construction of Sections of the Code as they show what the Drafting Committee had in mind when such provisions were drafted. However, a closer look at the Notes on Clause 24 makes it clear that the third sentence of the Notes on Clause 24 is itself problematic. First and foremost, it speaks of the resolution professional seeking information. The resolution professional does not seek information at a meeting of the committee of creditors, which is what Section 24 is all about. The resolution professional only seeks information from the erstwhile Board of Directors under Section 29 before preparing an information memorandum, which then includes the financial position of the corporate debtor and information relating to disputes by or against the corporate debtor etc. All this has nothing to do with Section 24 of the Code which deals with meetings of the committee of creditors. Secondly, the resolution professional does not prepare a resolution plan as is mentioned in the Notes on Clause 24; he only prepares an information memorandum which is to be given to the resolution applicants who then submit their resolution plans under Section 30 of the Code. The committee of creditors, in turn, gets information so that they can assess the financial position of the corporate debtor from various sources before they meet. It is, therefore, difficult to understand the Notes on Clause 24. Even assuming that the Notes on Clause 24

may be read as being a one-way street by which erstwhile members of the Board of Directors are only to provide information, we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The Regulations also make it clear that these persons are vitally interested in resolution plans as they affect them. Thus, under Regulation 36 of the CIRP Regulations, the information memorandum that is given to each member of the CoC and to any potential resolution applicant, will contain details of guarantees that have been given in relation to the debts of the corporate debtor (see Regulation 36(2)(f) of the CIRP Regulations). Also, under Regulation 37(d) of the CIRP Regulations, a resolution plan may provide for satisfaction or modification of any security interest. Security interest is defined by Section 3(31) of the Code as follows:

“3. Definitions.—In this Code, unless the context otherwise requires,— xxx xxx xxx (31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any

person: Provided that security interest shall not include a performance guarantee; xxx xxx xxx”

This would certainly include a guarantor who may be a member of the erstwhile Board of Directors. Further, under Regulation 37(1)(f), a resolution plan may provide for reduction in the amount payable to the creditors, which again vitally impacts the rights of a guarantor. Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to “participants” which would include members of the erstwhile Board of Directors – vide Regulation 39(5) of the CIRP Regulations. Obviously, such copy can only be sent to participants because they are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the Adjudicating Authority’s order to the Appellate Tribunal under Section 61 of the Code. Quite apart from this, Section 60(5)(c) is also very wide, and a member of the erstwhile Board of Directors also has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code.”

5. However, during the course of hearing, on our pointed question as to whether there is any provision, either in the Code or the Regulations, to provide a copy of the Resolution Plan during the pendency of the approval of the Resolution Plan by the Adjudicating Authority. Counsel for Appellant has categorically submitted that there is no such provision to his knowledge and has solely relied upon the aforesaid two decisions of this Tribunal as well as decision of Hon’ble Supreme Court.

6. On the other hand, Counsel for Resolution Professional has referred to Section 3(6)(b), Section 24(3) & Section 30(3) of the Code and Regulation 2(1)(L), Regulation 39(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. All the aforesaid Sections and Regulations are reproduced hereunder:

“Section 3(6)(b)- *(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured”*

Section 24 (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 notice¹ of each meeting of the committee of creditors to— (a) members of [committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)]; (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 subsection (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 direct or, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) [Subject to sub-sections (6), (6A) and (6B) of section 21, 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.

Section 30(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).*

Regulation 2(1) (L) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 :-

“participant” means a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting;

Regulation 39(2) - *The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:- (a) preferential transactions under section 43; (b) undervalued transactions under section 45; (c) extortionate credit transactions under section 50; and (d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.”*

7. Firstly, it is contended that the Appellant is neither a Claimant nor a Creditor or a participant, therefore, cannot be supplied the copy of the Resolution Plan.

8. Secondly, it is argued that the judgments relied upon by the Appellant in case of Association of Jet Airways (Supra) and Vijay Kumar Jain (supra) are both on different issues decided by the Hon'ble Courts. In this regard, he has referred to the decision in the case of Association of Jet Airways (Supra) in which the question was as to whether the Appellant/Applicant is entitled to be give a copy of Resolution Plan or any part of the Resolution Plan in the appeal or not. In the said judgment, it was also a question as to whether the Appellant who has filed an appeal against the order of Adjudicating Authority, is entitled for a copy of the Resolution Plan or any part of the proceedings or not.

9. Counsel for Respondent has then referred to the judgment rendered in the case of Vijay Kumar Jain (supra) in which the question raised was as to whether an Appellate Tribunal's judgment rejecting the appellant's prayer for directions to the resolution professional to provide all relevant documents including the insolvency resolution plans in question to members of the suspended Board of Directors of the corporate debtor in each case so that they may meaningfully participate in meetings held by the committee of creditors? It is submitted that this question has been answered in para 13, 15, 16 and 18 and the same are reproduced hereunder:

“13. It is also important to note that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters

to be discussed and the issues to be voted upon at the meeting vide Regulation 21(3)(iii). Obviously, resolution plans are “matters to be discussed” at such meetings, and the erstwhile Board of Directors are “participants” who will discuss these issues. The expression “documents” is a wide expression which would certainly include resolution plans.

15. As a result of the aforesaid discussion, the arguments of the respondents that “committee” and “participant” are used differently, which would lead to the result that resolution plans need not be furnished to the erstwhile members of the Board of Directors, must be rejected. Equally, the Regulations, far from going beyond the Code, flesh out the true intention of the Code that is achieved by reading the plain language of the Sections that have already been adverted to. So far as confidential information is concerned, it is clear that the resolution professional can take an undertaking from members of the erstwhile Board of Directors, as has been taken in the facts of the present case, to maintain confidentiality. The source of this power is Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, read with paragraph 21 of the First Schedule thereto. This can be in the form of a non-disclosure

agreement in which the resolution professional can be indemnified in case information is not kept strictly confidential.

16. The argument on behalf of the committee of creditors based on the proviso to Section 21(2) is also misconceived. The proviso to Section 21(2) clarifies that a director who is also a financial creditor who is a related party of the corporate debtor shall not have any right of representation, participation, or voting in a meeting of the committee of creditors. Directors, simplicitor, are not the subject matter of the proviso to Section 21(2), but only directors who are related parties of the corporate debtor. It is only such persons who do not have any right of representation, participation, or voting in a meeting of the committee of creditors. Therefore, the contention that a director simplicitor would have the right to get documents as against a director who is a financial creditor is not an argument that is based on the proviso to Section 21(2), correctly read, as it refers only to a financial creditor who is a related party of the corporate debtor. For this reason, this argument also must be rejected.

18. We may indicate that the time that has been utilized in these proceedings must be excluded from the period of the resolution process of the corporate debtor as has been held in

Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018] (at paragraph 83). In each of these cases, the appellants will be given copies of all resolution plans submitted to the CoC within a period of two weeks from the date of this judgment. The resolution applicant in each of these cases will then convene a meeting of the CoC within two weeks thereafter, which will include the appellants as participants. The CoC will then deliberate on the resolution plans afresh and either reject them or approve of them with the requisite majority, after which, the further procedure detailed in the Code and the Regulations will be followed. For all these reasons, we are of the view that the petition and appeal must be allowed and the NCLAT judgment set aside.”

10. We have heard counsel for the parties and perused the record with their able assistance.

11. The issue involved in this case is as to whether copy of the Resolution Plan, which has been approved by the CoC but awaits the approval of the Adjudicating authority, can be given to the Appellant who is neither a Claimant, nor a Creditor or a participant? The other question also arises in this case as to whether there is any provision in the Code for the purpose of giving a copy of the Resolution Plan to the Appellant who is neither a Claimant,

nor a Creditor or a participant, even before the approval of Resolution Plan by the Adjudicating Authority?

12. The answer to this question is no more *res integra* as it has already been answered by this Tribunal in Association Jet Airways (Supra) and by the Hon'ble Supreme Court in the case of Vijay Kumar Jain (Supra). In the case of Association of Jet Airways (Supra), this court categorically observed in para 25 that *"The above scheme of the Code also indicates that after Resolution Plan is submitted to the Adjudicating Authority and it is approved by the Adjudicating Authority, it no longer remains a confidential document, so as to preclude Regulator and other persons from access the said document."* It further said that *"We thus do not accept the submission of learned Counsel for Respondent No.4 that Resolution Plan even after approval, is a confidential document and cannot be disclosed to a claimant."* In the case of Vijay Kumar Jain (Supra), it has also held that *"Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to "participants" which would include members of the erstwhile Board of Directors – vide Regulation 39(5) of the CIRP Regulations. Obviously, such copy can only be sent to participants because they are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the Adjudicating Authority's order to the Appellate Tribunal under Section 61 of the Code. Quite apart from this, Section 60(5)(c) is also very wide, and a member of the erstwhile Board of Directors also has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code."*

13. None of the judgments, cited at the instance of the Appellant, either of this Tribunal or the Hon'ble Supreme Court has held that the copy of the Resolution Plan, which is still in the process of approval or rejection by the Adjudicating Authority, be given to a party who is neither a Claimant nor a Creditor or a participant. Therefore, we do not find any error on the part of the Adjudicating Authority in rejecting the application of the Appellant by way of the impugned order.

14. No other point has been raised.

15. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is hereby dismissed though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

Raushan/Ravi