

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 109 of 2018

[Arising out of Order dated 16th February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in (IB)-292(ND)2017.]

IN THE MATTER OF:

ANG Industries Ltd.

101-106, Sharda Chamber – IV,
Plot No. 423, Local Shopping Complex,
Kalkaji, New Delhi - 110019.

Through

Ilam Chand Kamboj

Resolution Professional.

...Appellant

Vs

1. Shah Brothers Ispat Pvt. Ltd.

5/B Trust House,
Dr. R. Borges Road, Parel (East),
Mumbai - 400012.

Through

Keystone Partners

B-126, Sarvodaya Enclave,
New Delhi – 110017.

2. Ashok Leyland Limited

No.1, Sardar Patel Road,
Guindy, Chennai – 600032,
Tamil Nadu.

....Respondent

Present:

For Appellant: Mr. Jayant K. Mehta, Mr. Ishan Madaan and Mr. Rahul Kukreja, Advocates.

For Respondent: Ms. Prita Srikumar Iyer and Mr. Nishanth, Advocates for 1st Respondent.

Mr. Rahul Lal Akhriya and Mr. Raj Dev Singh Advocates for 2nd Respondent.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s Shah Brothers Ispat Pvt. Ltd. and M/s Ashok Leyland Limited (both Operational Creditors) filed applications before the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench to direct the Resolution Professional to allow them to attend the meeting of Committee of Creditors. Their grievance was though M/s Shah Brothers Ispat Pvt. Ltd. owed operational debt of Rs.26,44,17,155/- inclusive of interest and M/s Ashok Leyland Limited owed an operational debt of Rs.15.50 Crores, and total of which is more than 10% of the aggregate of the debt but they have not been given notice to attend the meeting of Committee of Creditors in terms of Section 24(3)(c) of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short).

2. By impugned order dated 16th February, 2018, the Adjudicating Authority allowed the application and directed the 'Resolution Professional' to pass a speaking order on their claim. The Resolution Professional has challenged the said order in this appeal.

3. The question arises for consideration in this appeal are:

- (i) Whether in terms of Section 24(3)(c) of I&B Code, the Resolution Professional is required to give notice to 'Operational Creditors' or their representatives to attend the meeting of Committee of Creditors ?
- (ii) What is the intention of the legislature/ Parliament to allow the '(suspended) Board of Directors' or the 'Partners of the Corporate Debtor' and the 'Operational Creditors or their representatives' or the 'Resolution Applicant(s)' to attend the meeting of the Committee of Creditors, if they have not right to vote ?

4. For deciding the issue it is necessary to notice the background history of enactment of Section 24 which relates to invitation to the '(Suspended) Board of Directors' or their 'Partners' and the 'Operational Creditors or their Representatives' to attend the meeting of Committee of Creditors.

5. Initially '*Section 24 (3) of the draft Insolvency Bill, 2015*' only provided for notice of the meeting of Committee of Creditors to be issued to '(Suspended) Board of Directors' and the 'Financial Creditors'. No provision was made to issue notice the 'Operational Creditors'. Draft provision is quoted below:

“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.*

xxx

xxx

xxx

(3) The resolution professional shall give notice of each meeting of the committee of creditors to the members of the suspended board of directors or partners of the corporate debtor as the case may be:

Provided that any member of such board of directors or partner as the case may be shall not have any right to vote in a meeting of the committee of creditors:

Provided further that non-attendance of any director or partner as the case may be shall not invalidate proceedings of such meeting.”

6. However, the ‘Parliamentary Joint Committee’ on ‘*The Insolvency and Bankruptcy Code, 2015*’ recommended to amend the Draft Bill for the reasons as quoted below:

“21. Role of Operational Creditors - Clause 24

Some of the stakeholders in the memorandum/views furnished before the Committee were of the opinion that whereas operation creditor has right to make application for

initiation of corporate insolvency resolution process, operational creditors like workmen, employees, suppliers have not been given any representation in the Committee of Creditors which is pivotal in whole resolution process. In this regard, one of the stakeholders has suggested that Committee of Creditors may contain operational creditors as well, with some thresholds.

In this context, while appreciating that the operational creditors are important stakeholders in a company, the Committee took note of the rationale of not including operational creditors in the committee of creditors as indicated in notes on Clause 21 appended with the Bill which states as under:—

"The committee has to be composed of members who have the capability to assess the commercial viability of the corporate debtor and who are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. Operational creditors are typically not able to decide on matters relating to commercial viability of the corporate debtor, nor are they typically willing to take the risk of restructuring their debts in order to make the corporate debtor a going concern.

Similarly, financial creditor who are also operational creditors will be given representation on the committee of creditors only to the extent of their financial debts. Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, any resolution plan must ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).

All decisions of the Committee shall be taken by a vote of not less than seventy-five per cent of the voting share. In the event there are no financial creditors for a corporate debtor, the composition and decision-making processes of the corporate debtor shall be specified by the Insolvency and Bankruptcy Board. The Committee shall also have the power to call for information from the resolution professional.”

The Committee after due deliberations are of the view that, if not voting rights, operational creditors at least should have presence in the committee of creditors to present their views/concerns on important issues considered at the meetings so that their views/concerns

are taken into account by the committee of creditors while finalizing the resolution plan. The Committee, therefore, decide to modify clause 24(3) and (4) as given under:-

Modified Clause 24(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”

Modified Clause 24(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”.

7. After deliberations and taking into consideration the Report of the Joint Committee on ‘*The Insolvency and Bankruptcy Code, 2015*’, the Parliament enacted ‘*Insolvency and Bankruptcy Code, 2016*’ and Section 24 now 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.”

8. From the report of ‘Joint Parliamentary Committee’ following fact emerges:-

(a) The committee had been composed of members of creditors (financial) who have capability to assess the commercial viability of the ‘Corporate Debtor’ and who are willing to modify the terms of debt contract in negotiation between the creditors and the ‘Corporate Debtor’. *The Committee of Creditors can modify the terms of debt contract only by negotiation between the creditors and the ‘Corporate Debtor’ that means ‘Board of Directors’.* That is the reason that the ‘Board of Directors’ have been also allowed to attend the meeting though they have no voting right.

(b) ‘Operational Creditors’ are not able to decide the commercial viability of the ‘Corporate Debtor’ nor they can take risk of restructuring their debt in order to make the ‘Corporate Debtor’ a going concern.

However, as the ‘Operational Creditors’ have right to trigger Corporate Insolvency Resolution Process (u/s 9) the Committee

was of the view that their presence is also required to '*present their views/concerns*' on important issues.

- (c) According to the 'Joint Parliamentary Committee' the important issues and the views/concerns as may be raised by those who are present are required to be taken into account by the Committee of Creditors while finalizing the resolution plans.

9. Section 30 of I&B Code deals with submission of resolution plan by the Resolution Professional before the Committee of Creditors and on approval before the 'Adjudicating Authority'. Section 30(5) reads as follows:-

"30(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."

From the aforesaid provision it is clear that the Resolution Applicant(s) have also been allowed to attend the meeting of the Committee of Creditors in which their resolution plan(s) are considered.

10. Similar issue fell for consideration before this Appellate Tribunal in **'Rajputana Properties Pvt. Ltd. V/s. Ultra Tech Cement Ltd. & Ors. in I.A. No. 594 of 2018 in Company Appeal (AT) (Insolvency) No. 188 of 2018'**. This Appellate Tribunal by its order dated 15.05.2018 having noticed the relevant provisions held:-

"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."

“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 watching the proceeding such as (suspended) Board of Directors or its Partners; Operational Creditors or its representatives and Resolution Applicant(s) are not mere spectator 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 it's 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.”

11. The case of the Appellant being covered by decision in '**Rajputana Properties Pvt. Ltd.' (Supra)**, no interference is called for against impugned order dated 16.02.2018. The Resolution Professional is directed to act in accordance with the decision of this Appellate Tribunal in '**Rajputana Properties Pvt. Ltd.' (Supra)** as referred above. The appeal stands disposed of with aforesaid observations. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

24th May, 2018