

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No. 536 of 2019 with
I.A. No. 1857 of 2019

[arising out of Order dated 6th May, 2019 by National Company Law Tribunal, Allahabad Bench in C.A. No. 115 of 2019 in CP(IB) No. 77/ALD/2017]

IN THE MATTER OF:

IDBI Bank Ltd.,

....Appellant

Vs.

Mr. Anuj Jain
Interim Resolution Professional,
Jaypee Infratech Ltd. & Anr.

...Respondents

With

Company Appeal (AT) (Ins) No. 708 of 2019

IN THE MATTER OF:

Jaypee Greens Krescent Home Buyers Welfare
Association & Ors.

....Appellants

Vs.

Jaypee Infratech Ltd.
Through Mr. Anuj Jain,
Interim Resolution Professional

...Respondent

Present:

Mr. Ramji Srinivasan, Sr. Advocate with
Mr. Bishwajit Dubey, Mr. Uday Khare, Mr. Aditya Marwah,
Ms. Sylona, Ms. Surabhi Khattar, Mr. Aditya Marwah, Ms.
Visalakshmi, Mr. R.K. Sinha and Mr. Nikhil, Advocates for
IDBI Bank & Secured Financial Creditors

Mr. L.K. Bhushan, Advocate for Fixed Deposit Holder
Mr. Mahesh Agarwal and Mr. Rajeev Kumar, Advocates for
Adani Infra (I) Ltd.

Mr. Sumant Batra, Ms. Niharika Sharma, Ms. Jannhvi
Bhasin and Mr. Sanjay Bhatt, Advocates for Resolution
Professional

Mr. Mohit Singh and Ms. Mitakshara Goyal, Advocates for Jaypee Green Krescent 'Home Buyers Welfare Association'.

Mr. Ronvijay Gohain, Advocate for NBCC India Ltd.

Mr. M.L. Lahoty, Mr. Amit K. Mishra, Mr. Shivam Pandey and Mr. Anchit Sripat, Advocates for Home Buyer

Mr. Hemant Kumar Singh, Advocate for Home Buyer

Mr. Anupam Lal Das, Sr. Advocate with Mr. Vishal Gupta, Mr. Sumeet Sharma and Mr. Divyanshu Gupta, Advocates for Jaiprakash Associates Ltd.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

As both the appeals relate to 'Corporate Insolvency Resolution Process' against 'Jaypee Infratech Limited' (Corporate Debtor) they were heard together and disposed of by this common order.

2. The relevant facts of the case are as follows.

The 'Corporate Insolvency Resolution Process' was initiated against 'Jaypee Infratech Limited' pursuant to an application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016 (for short, 'the I&B Code') filed by the 'IDBI Bank Limited' which was admitted with respect to same 'Corporate Debtor'. One 'Chitra Sharma' moved before the Hon'ble Supreme Court, in '**Chita Sharma Vs. Union of India**' wherein the Hon'ble Supreme Court by its judgement reported in '2018 SCC OnLine SC 874' (decided on 9th August, 2018) passed the following order and directions "

“55. *We, accordingly, issue the following directions:*

- (i) *In exercise of the power vested in this Court under Article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC;*
- (ii) *We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression “financial creditors”;*
- (iii) *We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered;*
- (iv) *JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29A;*

- (v) *RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;*
- (vi) *The amount of Rs. 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT.”*

3. After the decision of the Hon’ble supreme Court, during the ‘Corporate Insolvency Resolution Process’, the ‘Home Buyers Association’ preferred an application before the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench on 17th September, 2018 seeking clarification as to what will be the manner in which the voting percentage of allottees (Financial Creditors) has to be calculated.

4. On 13th December, 2018 the Hon’ble Members of Adjudicating Authority (National Company Law Tribunal), Allahabad Division Bench expressed difference of opinion, as under :

Question of law raised in the order of NCLT, Allahabad Division Bench :

- i. The question of law that has been raised in both applications, one by Nine Home Buyers Association and other by eight Financial Creditors, all of them being the members of the*

Committee of Creditors (CoC) is whether the various threshold voting share fixed for the decision of the CoC under various sections of the I & B Code needs to be followed literally or whether they are directory, and if so, what procedure has to be followed in determining the voting percentage among the CoC to pass a particular resolution.

Decision of Hon'ble Member (Judicial)

- ii. *Therefore, in order to advance the object of I& B Code and the Amendment Act 2 of 2018 and with a view to safeguard the interests of all classes of creditors and all stakeholders, I am of the considered view, "That in case where the CoC comprise Real Estate Class of creditors upto 50% of voting share or more than when there is a dead lock in passing the resolutions, the highest number of voting share in favour of the resolution has to be taken into consideration without*

looking into the threshold limit provided under various provisions of the I&B Code, except for the purpose of withdrawal of the petition, the approval of the resolution plan, and liquidation i.e under Section 12A, 30(4) and 33(2) respectively, so that CIRP would continue for the time being in the meanwhile the Central Government may bring amendment to the relevant provisions of the I&B Code and CIRP regulations prescribing the procedure to be followed in determining the voting share for passing various resolutions where CoC comprise of Real Estate Class of Creditors 50% or more and when there is dead lock in passing the resolutions, or else the CIRP which remained static continue to be the same not only in this case, but in the cases of similar nature

where Real Estate/Home Buyers as a class that comprise majority percent voting share abstain from voting.”

Decision of Hon’ble Member (Technical)

iii) In the case on hand, even if all Banks and 17% of Home Buyers vote in favour of the Resolution Plan, it will still not sail through as it would not receive mandatory voting percentage of 66%. Therefore, required important/crucial decisions will still fail u/s 12A, 30(4) and 33(2), bringing CIRP to a halt at these crucial stages. Therefore, the lasting solution to the problem of dead lock can only be found by treating Home Buyers as a class and their voting pattern taken with reference to total voting share of the class, to reflect the will of the class.”

5. The matter was referred to the President, National Company Law Tribunal, Principal Bench, New Delhi to place the matter before the third Hon’ble Member, who by impugned order dated 24th May, 2019 observed:

“To sum up based on the above, this reference Bench of the Tribunal is hence of the considered view that

- i) the Committee of Creditors (COC), taking into consideration Section 21(2) of IBC, 2016, shall comprise of all financial creditors and must be construed as one and cannot be segmented class wise particularly for the purpose of computation of voting share;*
- ii) The voting share as are prescribed and required to be achieved under the respective provisions of IBC, 2016 are mandatory in nature and cannot be held to be directory;*
- iii) For the computation of voting share required to be achieved as prescribed in IBC, 2016, class wise voting of financial creditors, be it home buyers or lenders or otherwise and to treat the majority vote of that particular class in relation to a resolution, particularly by adding the voting share of those financial creditors who had abstained, as the will and vote of the entire class in the COC cannot be accepted;”*

6. The aforesaid order dated 24th May, 2019 is under challenge in '**Company Appeal (AT)(Insolvency) No. 708 of 2019**' preferred by 'Jaypee Green Krescent House Buyers Welfare Associations & Ors.'

7. In the meantime, the 'Resolution Professional, filed an application in 'C.A. No. 115 of 2019' in 'CP No. (I&B) 77/ALD/ 2017' for seeking exclusion of the period of pendency of the application for clarification for counting the total period of 270 days of 'Corporate Insolvency Resolution Process', i.e. the period during which the matter remained pending for adjudication as to how voting share of the Allottees (Financial Creditors) will be counted.

8. The Adjudicating Authority (National Company Law Tribunal) Allahabad Bench by impugned order dated 6th May, 2019 asked the authorised representative of the Allottees and other learned counsel appearing on behalf of the Allottees to file respective replies with the following observation :

"It is further brought to our notice that the third Member of Single Bench of the NCLT is considering the issue of the voting threshold of Financial Creditors including (Home Buyers) which is still sub-judice before it and has not yet been decided. Therefore, we feel appropriate that it is need of the hour that COC and RP must be allowed to proceed further with the CIRP process in accordance with law for considering the

Resolution Plan under consideration in respect of Corporate Debtor Company, which, however, shall be subject to outcome of pending IA.

List the matter on 21st May, 2019.”

9. The aforesaid order dated 6th May, 2019 has been challenged before this Appellate Tribunal by the 'IDBI Bank Limited' in 'Company Appeal (AT)(Insolvency) No. 536 of 2019'.

10. When the matter was taken up, learned counsel appearing on behalf of all the parties requested to exclude the period during which the matter remained pending before the Adjudicating Authority to decide the manner in which the voting share of the Allottees will be counted so as to enable a successful 'Corporate Insolvency Resolution Process' in the interest of Allottees.

11. Having noticed that the 'Committee of Creditors' were considering the 'Resolution Plan' of 'NBCC' and voting was in process, by order dated 17th May, 2019 this Appellate Tribunal while observed that the part of voting as already taken place is annulled, allowed the 'Committee of Creditors' to first renegotiate the matter with the NBCC by 30th May, 2019 and thereafter to start voting of members of 'Committee of Creditors' from 31st May, 2019 onwards. Liberty was given to the 'Committee of Creditors' to approve the plan if it is in accordance with law. However, subsequently it was informed that the 'Committee of Creditors' by majority voting share refused to accept the plan

but have not passed any order of rejection because of pendency of these appeals.

12. This Appellate Tribunal, taking into consideration that the business of the 'Corporate Debtor' is 'real estate business' primarily for construction of building for the Allottees, for keeping the company as a going concern and maximization of the assets, observed that the 'Corporate Insolvency Resolution Process' in the case of 'real estate business', which is meant for Allottees should be looked into from different angle than the 'Corporate Insolvency Resolution Process' against other 'Corporate Debtors'. It was observed that the maximization of the assets was to be of the Allottees and other financial creditors.

13. In connected case – '*Company Appeal (AT)(Insolvency) No. 708 of 2019*' this Appellate Tribunal on 12th July, 2019 observed that projects are temporary in nature as the asset of the 'Corporate Debtor' i.e. infrastructure stands transferred after sale/ allotment to the Allottees. It was also observed that phrase of "**hair-cut**" as normally used by the learned counsel cannot apply to Allottees for getting their flats and shops.

14. In such peculiar circumstances, this Appellate Tribunal observed that the 'Committee of Creditors' while considering the viability and feasibility of the 'resolution plan' may not reject plans only on the ground of insufficient upfront payment, if the plan is otherwise viable and feasible and in the interest of the Allottees. However, the issue has been left open for decision in an appropriate case, as the only argument is advanced with prayers to exclude the period aforesaid.

15. All the parties, including the 8 Associations of Allottees having more than 5000 Members, 'Resolution Professional', members of the 'Committee of Creditors' requested to exclude the period, when the matter remained pending for decision before the Adjudicating Authority to decide the question as to how the voting share of the Allottees will be counted.

16. One individual buyer – 'Mr. Hemant Kr. Singh, who claimed to be an authorised representative appeared in person without any petition and raised various allegations relating to default by the 'Interim Resolution Professional', 'Committee of Creditors' etc. but he has not given any substantive suggestion.

17. Mr. Anupam Lal Das, learned Senior Advocate appeared and submitted that he intends to appear on behalf of 'Jaiprakash Associates Ltd.' who is not a party to any of the appeal nor filed an application for intervention nor shown as to how 'Jaiprakash Associates Limited' can raise any issue. A written submissions has been filed by the counsel objecting to the prayer for exclusion of period, which shows that 'Jaiprakash Associates Limited' wants 'Liquidation' of 'Corporate Debtor' to derive advantage during the 'liquidation process'.

18. Learned counsel for the Appellants submitted that the 'Jaiprakash Associates Limited' is a related party and is ineligible under Section 29A of the I&B Code. We find that the Hon'ble Supreme Court in 'Chitra Sharma' (Supra) allowed RBI to ask for insolvency resolution proceeding against 'Jaiprakash Associate Limited'. Therefore, we are not dealing with their submission.

19. The only question arises for consideration in these appeals is whether in the facts and circumstances of the case and the interest of the Allottees, which is of primary importance in this 'Corporate Insolvency Resolution

Process', the 'Jaypee Infratech Ltd.' (Corporate Debtor) should be allowed to go for 'Liquidation' on the ground that 270 days has expired on 6th May, 2019 or the period from '17th September, 2018 to 4th June, 2019' during which the matter remained pending for consideration before the Adjudicating Authority relating to voting share of the Allottees should be excluded for the purpose of counting 270 days in the light of the decision "*Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd. & Ors.*" – 'Company Appeal (AT)(Insolvency) No. 185 of 2018' wherein this Appellate Tribunal observed:

"9. From the decisions aforesaid, it is clear that if an application is filed by the 'Resolution Professional' or the 'Committee of Creditors' or 'any aggrieved person' for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances.

10. For example, for following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:-

(i) If the corporate insolvency resolution process is stayed by 'a court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.

- (ii) *If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal.*
- (iii) *The period between the date of order of admission/moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the corporate insolvency resolution process.*
- (iv) *On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the corporate insolvency resolution process.*
- (v) *If the corporate insolvency resolution process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolution process is restored.*
- (vi) *Any other circumstances which justifies exclusion of certain period.*

However, after exclusion of the period, if further period is allowed the total number of days cannot exceed 270 days which is the

maximum time limit prescribed under the Code.”

20. Admittedly, no regulation was framed under the ‘Insolvency and Bankruptcy Code’ as to how the voting share of thousands of Allottees will be counted, all of whom come within the meaning of ‘Financial Creditors’ and thereby are members of the ‘Committee of Creditors’. It was in this background the Allottees Association preferred the application before the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench on 17th September, 2018 to decide such issue. The two Hon’ble Members of NCLT differed on the principle on 13th December, 2018 as noticed above and referred the matter to the Principal Bench for placing the matter before Third Hon’ble Member who has delivered its decision by the order dated 24th May, 2019. In the meantime, 270 days lapsed, if counted from the date the proceeding was remitted by the Hon’ble Supreme Court, i.e. 6th May, 2019.

21. This is an extra-ordinary situation when the law was silent and there was no guideline, which caused difference of opinion between the two Hon’ble Members and finally decided by the Third Hon’ble Member. In **‘Quinn Logistics India P. Ltd. Vs. Macksoft Tech P. Ltd.’** taking into consideration different situations including extra ordinary situation, this Appellate Tribunal held that certain period can be excluded while counting the total period of 270 days. The aforesaid principle has also been followed by the Hon’ble Supreme Court in the Case of **‘Arcelormittal India Private Limited vs. Satish Kumar Gupta & Ors.’** - (2019) 2 SCC 1 as also in the case of **‘Chitra Sharma’**(Supra).

22. In view of aforesaid extra ordinary situation, we are of the view that the period from 17th September, 2018 i.e the date of application filed by the Association of the allottees for clarification for the order and till the final decision i.e. 4th June, 2019 i.e. the date the matter was finally decided by the Third Hon'ble Member (Total 260 days), can be excluded for the purpose of counting the 270 days. However, as the matter is pending since long, we are not inclined to exclude the total period of 260 days and instead in the interest of the Allottees, we exclude 90 days for the purpose of counting the period of 270 days of 'Corporate Insolvency Resolution Process', which should be counted from the date of receipt of the copy of this order.

23. The aforesaid period is excluded to enable the 'Resolution Professional'/'Committee of Creditors' to call for fresh 'resolution plans' and to consider them, if so required after negotiations pass appropriate order under sub-section (5) of Section 30 of the I&B Code preferably within a period of 45 days. Rest of the period of 45 days margin is given to remove any difficulty and appropriate order as may be passed by the Adjudicating Authority.

The voting share of the allottees should be counted in terms of 'I & B Code' as existing on the date of voting/'Regulation' and/or in accordance with majority decision of the Adjudicating Authority.

24. It is made clear that all the earlier 'resolution plan(s)' including the plan submitted by the 'NBCC', cannot be considered, having been rejected by the 'Committee of Creditors'. However, it will be open to the 'NBCC' to file a fresh improved 'resolution plan'. It is informed that 'Adani Infra (I) Ltd.' also proposed to file 'resolution plan' but we are not expressing any opinion with

regard to the same. We have given opportunity to all the eligible persons to file 'expression of interest' / (improved) 'resolution plan', individually or jointly or in concert with any person, but those who are ineligible in terms of Section 29A, are barred from filing such plan. No liberty is given to 'Jaiprakash Associates Ltd.', in view of the aforesaid observation and decision of Hon'ble Supreme Court in 'Chitra Sharma' (Supra)

25. In view of the aforesaid observations, we are not inclined to interfere with the impugned order dated 26th May, 2019. Order of exclusion having already passed by this Appellate Tribunal, C.A. No. 115 of 2019 in C.P. No. (IB) 77/ALD/2017 preferred by the 'Resolution Professional' and the order dated 6th May, 2019 as impugned in 'Company Petition (AT) (Insolvency) No. 536 of 2019' are declared infructuous.

Both the appeals stand disposed of with aforesaid observations and directions.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

30th July, 2019

/ns/