Part Played by Adjudicating Authority in Considering Resolution Plan

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I. INTRODUCTION

This article tends to focus on the part that the adjudicating authority i.e. The National Company Law Tribunal ("**NCLT**") plays while considering the resolution plans ("**Plan**") that the resolution professional ("**RP**") presents to the committee of creditors ("**CoC**"). The Insolvency and Bankruptcy Code, 2016 ("**IBC**") provides for resolution of insolvency of persons in a time bound manner along with the maximisation of value of such person's assets, to promote entrepreneurship, availability of credit and to balance the interests of all stakeholders. Under the IBC, upon occurrence of default in payment, the financial creditors, operational creditors and corporate debtor can each individually approach the adjudicating authority ("**NCLT**") for admitting the corporate debtor into the corporate insolvency resolution process ("**CIRP**"). Once admitted, an interim resolution professional ("**IRP**") is appointed who, after collation of financial data, constitutes a committee of creditors ("**CoC"**) comprising financial creditors. The resolution professional thereafter proceeds to prepare an information memorandum as per Section 29[1] and call for plans from resolution applicants for resolution of insolvency under the guidance and approval of the CoC. The process of reviving the companies and doing justice to the creditors and the other stakeholders is what the CIRP aims at doing. This whole genre is governed by the Code. The RP is duty bound to invite perspective resolution applicants to submit their Plans made on the basis of the information memorandum or say in other words considering the best for the financial and other matters related to the corporate debtor. The author tends to diligently analyse the superficial power of the NCLT to approve or reject the Plan keeping in mind the best of the corporate debtor. At the initial stage, the RP examines the Plans and filters those according to the criterion enlisted in Section 30(2)[2]. Additionally, the measures for the implementation of the Plan and the mandatory contents of plan as entailed in Rule 37 and 39[3] respectively have to be adhered to. Then, the selected ones are presented to the CoC for them to vote over. The final selection of the Plan is done by the CoC through voting, the plan that gains votes of 75% of the voting members is the one to be implemented. The resolution applicant does not possess the right to vote in CoC unless he has a dual role i.e. of an applicant and also a financial creditor. Now the approved plan is submitted to

[1] The Insolvency and Bankruptcy Code, 2016.
[2] Id.
[3] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations,2016.

NCLT and under Section 31[4] of IBC, the NCLT has a power to examine the plan and critically analyse if necessarily fits the criterion enlisted in Section 30(2)[5]. If NCLT at any point observes that the Plan does not goes in line with Section 30(2)[6] it can display its dissatisfaction by rejecting the said Plan, if not the Plan stands approved and is applied in the CIRP. The order of approval is binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the plan. On approval, the moratorium cease to exist and the RP forwards the records relating to the conduct of the business of the corporate debtor to the Board for it to record the same on its database. The ground of material irregularity as provided in clause 31(1)(b) is vague and open ended which may provide discretion/ scope to the NCLT to reject the plan on any procedural or technical ground[7]. Regulation 37(1)[8] states that a plan shall provide for obtaining necessary approvals from the Central and State Governments and other authorities. The duty that is vested in the NCLT to re examine the plan would be discussed in detail in the following parts of the article through critical analysis of Rajputana Properties Pvt. Ltd. v. Ultra Tech Cement Ltd. & Ors.

II. BACKGROUND

The insolvency resolution process of Binani Cements has been through various twists and turns. The Supreme Court in *Rajputana Properties Pvt. Ltd. v. Ultra Tech Cement Ltd. & O*rs.[9] (Order dated 19 November 2018) dismissed Dalmia Bharat's plea to gain a stay on Ultra tech's bid for Binani Cement, thereby upholding the Ultra Tech Cement's bid for Binani Cement sale. Earlier, on 14 November 2018, the National Company Law Appellate Tribunal ("**NCLAT**") had also held that Ultra Tech's offer for Binani Cement is valid, stating that Dalmia Bharat's offer was discriminatory against some of the creditors.

The primary question that arises out of the above statement is whether the courts or tribunals are allowed to intercede in the functioning of the CoC and upend their decisions related to resolution plans. In this regard, the UK Insolvency Act, 1986 provides for remedies in case the voluntary agreement is either unfairly detrimental to the interests of creditors or there has been some material irregularity in qualifying procedure of leading to the decision. Adding to the lack of a specific provision in the Code, the NCLT has, in several cases, lengthened the scope of its power under Section 31 of the Code in the process of examination of the proposed resolution plans and, silently has provided remedies upon creditors whose interests have been affected or hindered by the approval of the said resolution plan. This article seeks to answer the question by analyzing the case in hand.

[4] The Insolvency and Bankruptcy Code, 2016.
[5] Id.
[6] Id.
[7] .S. Wahi, Treatise on Insolvency & Bankruptcy Code, 346 &347(2nd edition).
[8] Insolvency Resolution Process Regulations for Corporate Persons,2016.
[9] Civil Appeal No. 10998 of 2018, SC.

III. FACTS OF THE CASE

The NCLAT significantly noted that Rajputana Properties Private Limited in its resolution plan had discriminated between some of the financial creditors who have an equal voting share and did not balance out the interest of the stakeholders such as the operational creditors who do not have a voting share *per se*. The non-application of mind while adjudicating the resolution plan's viability and feasibility by the CoC and the discriminatory behaviour in approval of the plan was noticeable. The NCLAT held that the plan of Rajputana Properties was discriminatory and contrary to the colour of the Code. In furtherance the tribunal held that if the resolution plan is depicted as discriminatory against any one of the financial creditors or operational creditors, such plan can firmly be held to be against the provisions of the Code.

The NCLAT held that the wrong of the CoC has to be corrected by the adjudicating authority, stating that merely because a discriminatory plan has been proposed to the CoC and has secured their approval, it does not imply that it should be approved by the adjudicating authority, as this would stand against the basic object of maximization of the assets of the corporate debtor and the object of balancing the stakeholders as laid in the ICICI Bank Ltd. V. Innoventive Industries[10].

The two key issues pain staked by the NCLAT were as follows:

(i) Whether CoC has discriminated between the resolution applicants, while considering the resolution plan of Rajputana Properties; and

(ii) Whether the resolution plan submitted by Rajputana Properties is discriminatory or not.

The NCLAT laid emphasis on the financial terms of the plans to establish that the CoC has discriminated between the eligible resolution applicants, which were superficially visible from the fact that the proposal for negotiation and a comparatively better bid offered by the Ultratech Cement were not at all considered while approving the resolution plan. It also observed that the object in ascertainment of a resolution applicant who can offer maximum amount so as to safeguard and benefit the interest of all stakeholders of the corporate debtor is lacking on the part of the CoC.

IV. SCOPE AND EXTENT OF POWER VESTED ON THE ADJUDICATING AUTHORITY

Earlier, in *Bhaskara Agro Agencies v. Super Agri Seeds*[11] (23 July 2018), the NCLAT held that the adjudicating authority cannot revisit the decision of CoC to determine the viability and feasibility of a resolution plan, meaning thereby in case a plan is rejected by the CoC, the adjudicating authority cannot approve a plan unless approved by the requisite majority of CoC, and in *Darshak Enterprise Pvt. Ltd. v.*

[10] (2018) 1 Supreme Court Cases 407.
[11] 2018 SCC OnLine NCLAT 340.

Chhaparia Industries Pvt. Ltd.[12] (2 May 2018), the NCLAT held that in the absence of any prima facie discrimination or obstinate decision, it is not under the power of the adjudicating authority or the NCLAT to modify the plan. The words "may by an order" appearing in section 31(2) indicates power of the NCLT to reject the plan is discretionary[13].The propriety of the plan or its potential success in meeting the needs of the entity, are matters primarily left to the CoC and secondarily to the NCLT.[14]

However, it minutely failed to note that one of the conditions precedent to the approval of a plan by the adjudicating authority is its "satisfaction" which would only be reached once the approved resolution plan meets the requirements of section 30(2) of the Code. This principle was applied by the Supreme Court in *ArcelorMittal India Private Limited v. Satish Kumar Gupta*[15](4 October 2018), wherein the Court stressed on the extent to which the adjudicating authority can exercise its power under section 31, and in this regard the following observations were made:

- Once a resolution plan is approved by the CoC, it has to be submitted to the adjudicating authority; and at that stage, the adjudicating authority has to apply its judicial mind in determining whether the requirements mentioned in section 30[16] have been complied with or not on the basis of its satisfaction the authority may approve or reject such plan

- The adjudicating authority, performing a quasi-judicial action, can determine whether the resolution plan violates any law, including section 29A of the Code, after paying heed to the arguments made by the resolution applicant as well as the CoC.

In *Pratik Ramesh Chirana v. Trinity Auto Components Ltd*[17]. (Order dated 22 January 2018) too, NCLT, Mumbai Bench judicially interpreted the phrase "if the adjudicating authority is satisfied…." under section 31 and stated that "satisfaction" must be objective, subjective or both and, to form an opinion, a thorough study of a resolution plan is a must. Further laying the meaning of

A. *Objective Satisfaction*: The objective satisfaction runs around the object of enactment of the Code, as enshrined in the preamble.

B. *Subjective Satisfaction*: This depends upon the logical relevancy analysis of the financial data supplied, where a methodical scrutiny of the financial statement is expected before concurring with approval of the CoC.

[12] 2018 SCC OnLine NCLAT 224.
[13] V.S. Wahi, Treatise on Insolvency & Bankruptcy Code, 352 (2nd edition).
[14] Vinod Kothari & Sikha Bansal, Taxxman's Law relating to Insolvency & Bankruptcy Code, 2016, 280(2016).
[15] 2018 SCC OnLine SC 1733.
[16] The Insolvency and Bankruptcy Code, 2016.
[17] CP No. 1032, MB, NCLT.

Further in *J.R. Agro Industries (P) Limited v. Swadisht Oils Pvt. Ltd.*[18] (31 May 2018), it was reiterated that the positives and negatives of the resolution plan must be studied before making a decision.

V. GLOBAL VIEW

In jurisdictions like United Kingdom (UK) and the United States (US), there are provisions which provide remedies to creditors against unfair discrimination if made. Chapter 11 of the US Code contains the procedure for filing a plan in reorganisation proceedings[19].

According to, Section 6[20] provides that an application can be filed by any aggrieved creditor or person basing the same on the following grounds:

(i) That the voluntary arrangement unfairly obliterates the interests of a creditor, member, contributory of the company or any other stakeholder; and/ or

(ii) That there has been some prima facie material irregularity in relation to either the meeting of the company or in relation to the qualifying decision procedure.

If it observes the presence of either of the above mentioned two grounds, it possess power to either revoke or suspend the decision that approves the voluntary agreement or give directions to summon further meetings to consider any revised proposal or reconsider the original proposal.

Section 1123 of the US Code provides that the contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. The creditors who would be paid less than full value of the claims on the plan shall exercise vote on the plan by ballot.

The US courts on the other end follow a "cram down" test, wherein the court approves the plan over the objections of the creditors, if the plan does not discriminate unfairly and the court is of the view that the plan is "fair and equitable. Section 1129(a)[21] enumerates the requirements for confirmation of a resolution plan. The court would confirm a plan if and only if all of the following requirements are met:

(i) The plan conforms and complies with the provisions of Chapter 11[22], governing the stuffing of the plan; and

(ii) The plan has been proposed in good faith, and not by any means forbidden by law so as to say the plan must not be proposed if it caters a malafide intention.

[18] 2017 SCC OnLine NCLAT 69.
[19] V.S. Wahi, Treatise on Insolvency & Bankruptcy Code, 347 (2nd edition).
[20] The UK Insolvency Act, 1986.
[21] The US Bankruptcy Code.
[22] Id.

The criterion of unfair discrimination does not owe its existence to the fair and equitable rule or the best interests of creditors test; it rather holds onto the just treatment of a dissenting class expected from similarly placed class. However, different courts tend to employ different tests in determining whether a plan discriminates unfairly. A plan proposed to avoid taxes or a plan that has been determined as not feasible by court can't be approved.

The UNCITRAL legislative guide on insolvency law talks about reorganisation plan- nature and form of a plan, proposal of a plan, parties permitted to propose a reorganisation plan, contents of a plan, etc. In Part two Chapter IV.A.The plan must be proposed by the debtors after negotiation with a class of creditors. In some insolvency plans on debtor's failure to propose a plan, the opportunity of proposing a plan is transferred to the creditors. [23]

The laws of different countries are somewhat similar with some intricacies that base the point of differentiation.

VI. CONCLUSION

The case of Binani Cements clarified that the approval of the adjudicating authority is not a mere requirement. It is not directory in nature, although the adjudicating authority is not permitted to alter the terms of the plan. The last end power to approve or reject a plan vests with the adjudicating authority, and for that it should make the following considerations:

(i) Whether the plan complies with the requirements of Section 30(2) of the Code;

(ii) Whether the plan is fair and equitable or there is any unjust discrimination being done not envisaged in law; and

(iii) Whether the plan adheres to the object of the Code, i.e., maximises the value of assets and balances the interests of all the stakeholders.

Only if the aforesaid questions are answered the plan would turn out to be satisfactory and thus would be confirmed; if not the adjudicating authority reserves all power to deny its confirmation.

[23] Vinod Kothari & Sikha Bansal, Taxxman's Law relating to Insolvency & Bankruptcy Code, 2016, 276 &278 (2016).