

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.48 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

[Appeal arising out of the Impugned Order dated 22.04.2021, passed in IA/361/CHE/2021 in
MA/06/2021 in CP/597/(IB)/2017), passed by the Adjudicating Authority
(National Company Law Tribunal, Division Bench, Court No.1, Chennai)]

In the matter of:

1. Mr. K.N. Rajakumar
Suspended Director, Aruna Hotels Ltd.
No. 145, Sterling Road
Nungambakkam, Chennai- 600034. ...APPELLANT

V.

1. V. Nagarajan
Resolution Professional, M/s. Aruna Hotels Limited
New No. 29, Kavarai Street
West Mambalam, Chennai- 600033 ...RESPONDENT 1

2. N. Subramanian
No 4/33, Officers Colony,
1st Street, Flat No. 6 Corner Enclave,
Rajaram Mehta Nagar,
Aminjikarai, Chennai- 600029 ...RESPONDENT 2

3. The Manager
HDFC Bank
Dr. Radhakrishnan Salai
Chennai- 600004 ...RESPONDENT 3

Present:

For Appellant : Mr. P.H.Aravindh Pandiyan, Sr. Counsel
For Sandeep Kumar Ambalavanan, Advocate

For Respondent No.1 : Mr.R. Subramanian, Advocate,

For Respondent No.3 : Mr.C. Mohan, Advocate, King and Patridge (For
Financial Creditor)

J U D G M E N T

Heard Both sides.

2. According to the Learned Counsel for the Appellant the Company Appeal (AT) (INS) No.48 of 2021 is preferred against an Impugned Order dated 22.04.2021 in I.A.No.361CHE/2021 in M.A.No.6/2021 in C.P./IB/CHE/597 of 2017 passed by the Adjudicating Authority [National Company Law Tribunal, Division Bench (Court No.1), Chennai].

3. The Learned Counsel for the Appellant points out that the Adjudicating Authority in the Impugned Order dated 22.04.2021 in I.A.No.361CHE/2021 in M.A.No.6/2021 in C.P./IB/CHE/597 of 2017 had among other things had directed the ‘Resolution Professional to convene the meeting of the ‘CoC’ of the Members, who constituted the ‘CoC’ originally i.e. in the year 2017, soon after the order of admission was passed by this Tribunal’ initiating the CIRP and place the draft of Application prepared under 12A of IBC, if any, along with Form FA or at the least Form FA as lodged with the IRP/RP, before the ‘CoC’ to be called and convened, as directed above and hold a meeting of the ‘CoC’ and report to this Tribunal about the decision of the Members of the ‘CoC’ as constituted in the year 2017. The ‘CoC’ constituted presently by the IRP/RP in derogation of the Order passed by this Tribunal shall stand suspended and shall not exercise any of the Powers as provide under the Provisions of IBC, 2016.’ Further, the Adjudicating Authority in the Impugned Order had directed the IRP/RP to comply with the above directions within a period of ten days from today and report to this Tribunal, about the outcome of the ‘CoC’ meeting, as required to be called and convened and the matter was directed to be posted on 03.05.2021 under the caption ‘urgent listing’ along with other connected Applications.

4. Challenging the Impugned Order dated 22.04.2021 in I.A.No.361CHE/2021 in M.A.No.6/2021 in C.P./IB/CHE/597 of 2017 passed by

the Adjudicating Authority [National Company Law Tribunal, Division Bench (Court No.1)Chennai], the Learned Counsel for the Appellant submits that the Adjudicating Authority should not have directed the Resolution Professional to call for a meeting of the ‘Committee of Creditors of Corporate Debtor’ constituting of members, who originally constituted the ‘CoC’ during the year 2017, soon after the order of admission of CIRP of the Corporate Debtor, without taking into account the present status of the Financial and Operational Creditors and claims filed to that extent.

5. The Learned Counsel for the Appellant contends that the Adjudicating Authority had not appreciated the fact that most of the Members who initially constituted the ‘CoC’ in the year 2017, soon after the order of admission of CIRP of the Corporate Debtor, are no longer ‘Creditors’ of the ‘Corporate Debtor’ as on the date of Order and hence, had committed an error in directing the Resolution Professional to convene a ‘CoC’ including such Members.

6. The Learned Counsel for the Appellant brings to the notice of this Tribunal that 961 days had elapsed between the Judgment of the National Company Law Appellate Tribunal, dated 16.07.2019 in Company Appeal (AT) (INS) 290 of 2017 whereby ‘CIRP’ of Corporate Debtor was setaside and the Order of the Hon’ble Supreme Court dated 03.03.2021 in Civil Appeal No.187, whereby ‘CIRP’ of the Corporate Debtor restored and the Members of ‘Committee of Creditors’ should be updated based on the submissions of claims and withdrawal claims, as specified under the I&B Code, 2016.

7. It is represented on behalf of the Appellant that the Adjudicating Authority ought to have considered Regulation 12(A) and 13 of the Insolvency and Bankruptcy Board of India (Insolvency Process for Corporate Persons) Regulations, 2016 whereby both the Creditor and Resolution Professional of any Corporate Debtor ought to update the ‘status’ of claims of the ‘Corporate Debtor’.

8. The other argument projected on the side of the Appellant is that the claim of 3rd Respondent/HDFC Bank dated 08.04.2021 should have been considered by the Adjudicating Authority before passing the Impugned Order because of the fact that the 3rd Respondent/Bank is the present 'Financial Creditor' of the 'Corporate Debtor'.

9. The prime stand of the Appellant is that soon after the order of admission of 'CIRP' of the 'Corporate Debtor', the Members who originally constituted the 'CoC' in 2017, are no longer 'Financial Creditors' and the said fact was pleaded by the 'Resolution Professional' himself, the 1st Respondent in his Affidavit dated 27.03.2021 filed in M.A.NO.6/2021 in C.P./IB/CHE/597 of 2017.

10. The Learned Counsel for the Appellant contends that the Members who originally constituted the 'Committee of Creditors' in 2017, soon after the admission order of 'CIRP' of the 'Corporate Debtor' are no longer 'Financial Creditors' of the 'Corporate Debtor' and placing for voting Form FA Insolvency and Bankruptcy Board of India(Insolvency Process for Corporate persons) Regulations, 2016 for withdrawal of the 'CIRP' of the 'Corporate Debtor' before such members who are third parties today, to the affairs of the 'Corporate Debtor' is against the Letter and Spirit of the Code itself.

11. The Learned Counsel for the Appellant refers to the Judgment of this Tribunal in Company Appeal (AT)(Ins)No.519 of 2020 in Rajinish Jain V. Manoj Kumar Singh – I.R.P. (struck off as per Order dated 24.06.2020) and two others wherein at Paragraphs No.54.4 and 59 it is observed as under:

54.4) "After Adjudicating Authority passed Interim Order, Resolution Professional in 7th Meeting of CoC (Annexure A8 Page 116 @ Page 127) took up Agenda 13 "Discussion/Approval for not considering M/s. BVN Traders as Financial Creditor..." It is surprising and interesting to note that Members recorded that "despite the Order passed by Hon'ble NCLT Allahabad the CoC is

of the view that **they no longer wish to continue M/s BVN Traders in the category of the “Financial Creditor”** in the CoC and want to review their decisions in this regard.” “No Longer wish”? This is strange. This is the danger due to which collating is not left to CoC. As mentioned, this was taken up, and resolutions were passed in the 7th Meeting and also 8th Meeting dated 18.2.2020 (Annexure A9) to resolve and oust BVN from CoC. Thus CoC sat in Appeal over Impugned Order and passed resolutions to the contrary, which cannot be said to be legal.”

59. “Based on the above discussion, we clarify and hold that during CIRP, the IRP is authorised to collate the claims, and based on that he has empowered to constitute the Committee of Creditors. We hold that the Resolution Professional may add to existing claims of claimants already received, or admit or reject further Claims and update list of Creditors. But after categorisation of a claim by the IRP/Resolution Professional we hold that they cannot change the status of a Creditor. For example, if the Resolution Professional has accepted a claim as a Financial Debt and Creditor as a Financial Creditor, then he cannot review or change that position in the name of updation of Claim. It is also to be clarified that while updating list of Claims the Resolution Professional, can accept or reject claims which are further received and update list.”

12. The Learned Counsel for the Appellant takes a plea that ‘Form’ cannot control the ‘Act’ and cites the decision of Hon’ble Supreme Court Life Insurance Corporation of India V Escorts Ltd. & Ors reported in AIR 1986 at Page 1370.

13. The Learned Counsel for the Appellant adverts to Section 21(2) of the I & B Code which enjoins that ‘the committee of creditors’ shall comprise all financial creditors of the corporate debtor etc. Also, the Learned Counsel for the Appellant refers to Regulation 12 (Submission of proof of claims) Regulation 13 (Verification of Claims) and Regulation 14 (Determination of amount of claim)

and contends that when the 'Resolution Professional' comes across additional information warranting such revision, shall revise the amounts of claims admitted etc.

14. The Learned Counsel for the Appellant points out Section 3(8) of the Code which speaks of 'Corporate Debtor'. Also, the Learned Counsel for the Appellant refers to Section 5(8) of the Code which speaks of 'Financial Debt' and also Section 5(7) of the Code which deals with 'Financial Creditor'.

15. The Learned Counsel for the Appellant emphatically submits that the Appellant will submit 'Form A' and the 'Bank Guarantee' today itself and this can be taken note of by the 1st Respondent/Resolution Professional.

16. Per Contra, it is the submission of Learned Counsel for the 1st Respondent/Resolution Professional that on 01.05.2021 the 'Committee of Creditors' meeting takes place at 12 Noon and further that 'Form FA' and 'Bank Guarantees' were not furnished by the Appellant. Moreover, it is projected on the side of the 1st Respondent that the 'Resolution Professional' will act as per order of the Tribunal dated 22.04.2021 and that voting will be done on 01.05.2021 and the decision in this regard will be conveyed to the Tribunal on 03.05.2021.

17. The Learned Counsel for the 1st Respondent contends that 'Form C' is a part of CIRP Regulation which makes it necessary that the 'Claimant' set out the details and then give a declaration supported by verification and that the said 'Form C' is to be submitted by the 'Claimant' like that of the HDFC Bank.

18. The Learned Counsel for the 1st Respondent refers to 12(A) of the Insolvency and Bankruptcy Board of India (Insolvency Process for Corporate Persons) Regulations, 2016, which enjoins that a 'Creditor' shall update its claim as and when the claim is satisfied, partly or fully from any source in any manner, after the Insolvency commencement date.

19. The Learned Counsel for the 1st Respondent submits that the 12(A) Application was filed on 22.03.2021, submitted to the 1st Respondent and Form FA was given on 22.03.2021 and since the 'Bank Guarantee' was not given it was returned and the 1st Respondent can revise the amounts of claims admitted in terms of Regulation 14(2).

20. The Learned Counsel for the 1st Respondent contends that the Impugned Order of the Tribunal dated 24.11.2021 is correct and that the 1st Respondent will act as per the Impugned Order of the Tribunal because of the fact that the 'CoC' meeting is to take place on 01.05.2021 12.00 Noon and that the voting will be done and the result of the decision will be conveyed to the Tribunal on 03.05.2021.

21. The Learned Counsel for the 3rd Respondent/Bank contends that the 3rd Respondent/Bank had funded money to the 'Corporate Debtor' and balance of Rs.36 Crores and odd and that CIRP was not in place at the time of funding of money and in fact, the 3rd Respondent/Bank should be included as a 'Financial Creditor'. Furthermore, the interest of 3rd Respondent/Bank is 'Paramount' and therefore it is to be included as 'Financial Creditor' along with others.

22. The Learned Counsel for the 3rd Respondent/Bank submits that the 3rd Respondent/Bank is not an interim financier and that the 'Corporate Debtor' is functioning from 2017 till date.

23. By way of Reply, the Learned Counsel for the Appellant submits that Southern Airfurane Industries Ltd. and kges Residency P Ltd had withdrawn their claims entirely, Mr.Rohit S Bajaj (Sl.No.1 Creditor) had withdrawn one of the two claims fully and had opted to withdraw the other claim under 'Form C' as 'Financial Creditor' etc. (vide Page 1046 Vol IV of the Paper Book in Dairy No.415 dated 29.04.2021).

24. The Learned Counsel for the Appellant contends that against the 'Resolution Professional' a fine of Rs.10,000/- was imposed and that he is not neutral and that apart the 'Disciplinary committee of ICSI Institute of Insolvency Professional' had rendered a finding against him.

25. The Learned Counsel for the 1st Respondent submits that the Company is not in operation and there is no business from 2017 till today and that Aruna Hotel is not running i.e. not in operation and that the 3rd Respondent/Bank will have first charge.

26. It is to be pointed out that when once the 'Committee of Creditors' is/was formed, the 'Resolution Professional' cannot alter the same. A 'Resolution Professional' has no 'Adjudicatory Power' under the I & B Code. In fact, the 'Corporate Debtor' was admitted into CIRP by the Tribunal on 17.11.2017. However, the Appellate Tribunal on 16.07.2018 had set-aside the Order of the Tribunal. On 03.03.2021, the Hon'ble Supreme Court of India had set-aside the Judgment of the Appellate Tribunal. On 19.03.2021, the Hon'ble Supreme Court in Miscellaneous Application No.480/2021 in CA 187/2019 in the matter of N.Subramanian v Aruna Hotels Ltd. & Anr. (IA 37894/2021) had granted liberty to withdraw the application with liberty to approach the 'CoC' for settlement under Section 12A of the IBC.

27. It comes to be known that the 1st Respondent/Resolution Professional on 07.03.2021 had demanded action from the Suspended Directors and the Statutory Auditors by sending messages through *E-mail* and *Whatsapp* modes, but there was no response. The 'CIRP' is more than three years old.

28. On a careful consideration of the respective contentions advanced on either side, this Tribunal is of the considered view that the 'Resolution Professional' has no 'Adjudicatory Power' under the I & B Code, 2016 and further that when once the 'Committee of Creditors' is/was formed, the 'Resolution Professional' cannot

change the 'Committee of Creditors'. Suffice it for this Tribunal to make a pertinent mention that the Resolution Professional/1st Respondent cannot constitute a 'Committee of Creditors' afresh, in negation of the earlier constituted 'Committee of Creditors'.

29. Be that as if may, in the light of foregoings, and also this Tribunal on going through the Impugned Order dated 22.04.2021 in I.A./361/CHE/2021 in M.A.6/2021 in CO/IB/CHE/597 of 2017 passed by the Adjudicating Authority comes to a consequent conclusion that the observation made inter-alia to the effect that 'CoC' constituted presently by the IRP/RP in derogation of the order passed by it shall stands suspended and shall not exercise any of the powers as provided under the Provisions of IBC, 2016 and the directions issued to the IRP/RP to comply with the directions therein within a period of 10 days from the date of the order and to report before it about the outcome of the CoC meeting required to be called and convened are free from legal infirmities. Consequently, the instant Appeal fails.

30. In fine, the present Company Appeal AT (CH) (INS) 48 of 2021 is dismissed. No Costs. I.A.106/2021 (Stay Application) is dismissed.

**[Justice Venugopal M]
Member (Judicial)**

**[V.P. Singh]
Member (Technical)**

**30.04.2021
SE**