

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins) No. 1029 of 2020

IN THE MATTER OF:

Amit Suresh Bhatnagar

For Suspended Management of
Diamond Power Infrastructure Ltd.
6, Green Park,
Nizampura, Vadodara, Gujarat

....Appellant

Vs.

Bhuvan Madan

RP for Diamond Power Infrastructure Ltd.
11-a, SuchetaBhawan,
Vishnu Digambar Marg
New Delhi - 110002

.... Respondent

PRESENT

For Appellant: Mr. Manu Aggarwal, Advocate

For Respondent: Mr. Ravi Sharma, Advocate

**ORDER
(08th April, 2021)**

Jarat Kumar Jain: J.

The Appellant 'Amit Suresh Bhatnagar' Ex- Director of Corporate Debtor (Diamond Power Infrastructure Ltd.) filed Appeal against the Order dated 22.09.2020 passed by Adjudicating Authority (National Company Law Tribunal, Ahmadabad Bench) whereby dismissed the Appellant's Application I.A. No. 701 of 2019 in CP (IB)137/NCLT/AHM/2018.

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2. The Appellant filed an Application before the Ld. Adjudicating Authority with the following prayers:-

(a) To declare that the entire action of the Resolution Professional (RP) may be considered as void in the light of Section 24 and 25 (2) of the Insolvency and Bankruptcy Code and in view of law laid down by the Hon'ble Apex Court.

(b) To direct the Resolution Professional to call the Suspended Management in Committee of Creditors (CoC) meeting after giving the Agenda and to supply/provide the copy of Resolution Plan issued by the RP before taking any decisions of the Resolution Plan whether being accepted or not.

(c) During the pendency of this I.A.,

(i) Restrain the RP from acting on the Resolution Plans

(ii) Stay further proceeding of the Resolution process.

(d) Pass such other and further orders as this Hon'ble Tribunal may deem just and proper.

3. The matter was listed on 02.12.2019 before a Bench comprising of Learned Mr. Harihar Prakash Chaturvedi Member (Judicial) and Learned Mr. Prasanta Mohanty Member (Technical) after hearing the parties, vide order dated 02.12.2019 the Member (J) is of the opinion that the suspended management is to be given time for taking up the matter with CBI/Investigating Officer (I.O.) for their participation in CoC meetings. Member (T) differ from the opinion of member (J) and he is of the opinion that the prayer made by the suspended management in I.A No. 701 of 2019 in CP (IB) 137 of 2018 needs to be rejected and the I.A filed by the RP for liquidation

order as resolved by the CoC should be approved without further loss of time. Because, there was difference of opinion between the Members of the Bench, the matter was referred to Hon'ble President NCLT Delhi alongwith observations and related papers. He directed to list the matter before Ms. Manorama Kumari Member (J), who after hearing the arguments vide impugned order disposed of the Application. Operative part of the order is as under:-

3. On perusal of the records, it is found that Hon'ble Gujarat High Court has passed the order on 18.06.2019 on the Application so made by the Applicant, wherein certain conditions were imposed by the Hon'ble High Court. Out of (a) to (h) conditions, one of the condition i.e. (g) is reproduced herein below-

“(g) shall not contact any of the witnesses who are already forming the part of the papers of charge sheet and/or any of the Bank Officials from the consortium of the Banks since the CBI is still investigating further.”

That itself shows that the Applicant cannot meet the Bank Official since they are the consortium of Bank and CBI is still investigating further.

4. In view of such order passed by the Hon'ble High Court, Applicant again moved a modification Application for modification of the conditions. The said Application was disposed of by the Hon'ble High Court on 13.11.2019. However, by that time all the meetings of CoC was/were concluded.

5. Under such circumstances as narrated hereinabove in sequence, the instant Application is infructuous and is not maintainable. Accordingly, the instant Application is disposed of.

4. Being aggrieved with this order, the Applicant has filed this Appeal.

5. Ld. Counsel for the Appellant submitted that Ld. Adjudicating Authority in the impugned order has proceeded on the basis that the conditions of bail imposed upon the Appellant by the Hon'ble Gujarat High Court on 18.06.2019 were modified for the first time on 13.11.2019. it is factually incorrect. The Hon'ble Gujarat High Court had vide its order dated 20.09.2019 specifically permitted the Appellant to attend the meetings of CoC. For this purpose, drew our attention towards the condition (f1) of the order dated 20.09.2019. It is undisputed fact that no notice for the 9th meeting of CoC which took place on 10.10.2019 i.e. after passing of the order dated 20.09.2019 was given to the Appellant. This was in direct contravention of the Judgment of Hon'ble Supreme Court in the Case of Vijay Kumar Jain Vs. Standard Chartered Bank and Ors. (2019) 20 SCC 455.

6. Ld. Counsel for the Appellant further submitted that it is undisputed fact that copies of the Resolution Plans were never provided to the Appellant. This was despite the fact that the Appellant specifically requested for the documents vide email dated 30.10.2019.

7. It is pointed out that there is a proviso to Section 24 (4) of the I&B Code providing inter alia that absence of any member of the suspended board of directors would not invalidate proceeding of a CoC meeting, there is no such proviso to Section 24(3) of the I&B Code requiring notice of each meeting to be

given inter alia to such persons. It means in the absence of such notice having been given, the meeting itself would not be valid.

8. The Respondent (RP) has admitted in his Reply that the physical meeting took place at Ahmadabad, while the Appellant had been restrained from leaving Vadodara. As such the Respondent was clearly aware that in the absence of video conference link the Appellant would not be able to attend the CoC meetings.

9. It is also undisputed that the link of video conferencing was refused to the Appellant despite specific request though provided to other participants. This was in direct contravention of Regulation 23 of Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016. (In brief 'IBBI Regulations') Which mandates that notice convening the meetings of the Committee shall provide the participants an option to attend the meeting through video conferencing or other audio and visual means. The Respondent has not furnished any explanation as to why the link of video conferencing was refused to the Appellant.

10. It is submitted that the Respondent has not dealt with the Appellant's contention that there were two members of the erstwhile Board of Management of the Corporate Debtor and there was no restriction on one of the Member Sumit Suresh Bhatnagar at any point of time to attend the meetings of CoC despite which he was not served any notice of meetings of the CoC.

11. It is also submitted that Corporate Insolvency Resolution Process (CIRP) was commenced on 24.08.2018 however, more than one year was taken to receive the Resolution Plans. The haste to complete the CIRP started after the respondent received a legal opinion that the Appellant ought to be provided notice for the CoC meetings. The Respondent has not complied the mandatory provisions of Section 24 (3) of the I&B Code. The impugned order is contrary to the law laid down by the Apex Court in the case of Vijay Kr. Jain (Supra). Therefore, the impugned order is liable to be set aside.

12. Per Contra, Ld. Counsel for the Respondent representing the RP submits that the Appellant was arrested and remanded into judicial custody on 18.04.2018 i.e. even before the initiation of CIRP. CIRP was commenced on 24.08.2019. The Respondent has duly served the notice of 10th and 11thCoC meeting alongwith the detailed Agenda to the Appellant vide emails dated 04.11.2019 and 07.11.2019 respectively. Therefore, the allegation of the Appellant that he was not served notice of the CoC meeting is baseless and the ratio of the Judgment of Hon'ble Supreme Court in the Case of Vijay Kr. Jain (Supra) is inapplicable in this case. The Respondent vide email dated 05.11.2019 expressed his inability to provide video conferencing link until firm clarity on the same is received from his legal team and the CBI. This demonstrates that the RP was cooperating with the suspended management at every level. The CIRP could not be postponed as per the convenience of the

suspended management. It is the responsibility of the Respondent to compete the CIRP in a time bound manner. In the present case, the upper limit of 330 days was already breached and further delayed in completion of CIRP would serve as going against the mandate of law. The Resolution Plans were duly discussed and considered by the CoC members and after due deliberation the members of the CoC have rejected both the plans with overwhelming majority of 96.94 % and approved the liquidation of the Corporate Debtor by a majority of 82.48 %. The Respondent is bound by the decision of the CoC and cannot question the rationality of the decision taken by the CoC. The impugned order is well reasoned, therefore, the present Appeal deserves to be dismissed.

13. After hearing Ld. Counsel for the parties, we have minutely examined the record.

14. In this Appeal, following issues arose for our consideration:

(i) Whether the RP has given notice of each meetings of the CoC to all members of suspended board of directors (As per Section 24(3) (b) of the I&B Code)?

(ii) Whether the RP has given not less than five days' notice to every participant (As per Regulation 19 of IBBI Regulations)?

(iii) Whether the RP has provided copies of all relevant documents to the participants. (As Per Regulation 21 (3) (iii) of IBBI Regulations)?

(iv) Whether the RP has provided the participants an option to attend the meetings of CoC through video conferencing or other audio and visual means. (As per Regulation 23 of IBBI Regulations)?

15. In the light of the submissions we have examined the impugned order. In Para 4 of the impugned order it is mentioned that Hon'ble High Court of Gujarat on 13.11.2019 modified the earlier bail order dated 18.06.2019. Actually, Hon'ble High Court of Gujarat allowed the Criminal Miscellaneous Application No. 16569 of 2019 filed by the Appellant and vide order dated 20.09.2019, modified the condition of interim bail as under:-

“(f1) for the purpose of attending any meeting, as may be scheduled by the Resolution Professional on intimation to the I.O and on receiving the official communication from the RP, the Applicant shall be permitted to attend the same. The I.O shall be at liberty to depute one of his officers of his confidence at the time of such meeting.”

16. The Respondent (RP) has also filed an Application Criminal Miscellaneous Application No. 01 of 2019 for modification of the order dated 18.06.2019 passed in Criminal Miscellaneous Application No. 8435 of 2019. Hon'ble High Court of Gujarat vide order dated 13.11.2019 allowed the Application of modification, operative part is as under:-

“6. By way of this application, it has been urged that the earlier application was in relation to only one person Mr. Amit Suresh Bhatnagar. So as not to create any kind of confusion in future, this Application for modification has been moved seeking to incorporate his brother Mr. Sumit Suresh Bhatnagar also. This is more a technical correction since this Court has already named both the persons in the earlier order.

6.1. There is a need also for the Court to refer to the order dated 20.09.2019, wherein the condition No. (F1) has been added, which reads as follows:-

“(f1) for the purpose of attending any meeting, as may be scheduled by the Resolution Professional on intimation

to the I.O and on receiving the official communication from the RP, the Applicant shall be permitted to attend the same. The I.O shall be at liberty to depute one of his officers of his confidence at the time of such meeting.”

7. The confusion with regard to the attendance of both brothers in the Committee of Creditors meeting/proceedings as may be scheduled by RP, in wake of this additional condition (F1) should not continue.

8. it is being clarified by Id. Special Public Prosecutor Mr. Kodekar on instructions received from the Investigating Officer of the CBI present before this Court that there is no objection with regard to both these brothers attending the Committee of Creditors meeting/proceedings as may be scheduled by the RP in relation to the proceedings which have been undertaken before the NCLT in the Insolvency Application being CP(IB) NO. 137/NCLT/AHM/2018.

9. The Application is allowed it is being clarified that in wake of condition (F1) and also since the Investigating Officer, CBI is to be intimated of the proceedings at every stage as undertaken by the RP, the Participation of both the brothers Mr. Amit Bhatnagar and Mr. Sumit Bhatnagar as may be required under the law shall continue at the end of the RP. The intimation, as far as possible, to the investigating Officer be at least 48 hours prior to any vital event taking place, so that he can meet with the time line. In the event of extreme urgency, however, the Investigating Officer may not object to the intimation which may come his way in less than this stipulated time of 48 hours.

10. Let the order of this Court be observed in letter and spirit.

11. Application of modification is allowed in the above terms.”

17. In such a situation, in the impugned order Ld. Adjudicating Authority inadvertently mentioned that the bail order modified vide order dated 13.11.2019. Actually, it was modified vide order dated 20.09.2019. Due to this confusion, in the impugned order it is mentioned that when the order was modified by that time meetings of CoC was/were concluded. In fact, after

modification of the order on 20.09.2019, 9th, 10th and 11th CoC meetings were convened on 10.10.2019, 05.11.2019 and 08.11.2019 respectively.

18. Before dealing with the issues we would like to refer the Judgment of Hon'ble Supreme Court in the case of Vijay Kr. Jain (Supra). In which Hon'ble Supreme Court held that:

“15. The statutory scheme of the Code, insofar as the former members of the Board of Directors are concerned, is as follows: A committee of creditors is first constituted under Section 21 consisting only of all the financial creditors of the corporate debtor. Under Section 24, all meetings of this committee are to be conducted by the resolution professional who, however, does not happen to be part of this committee. Section 24(3)(b) is important in that, the resolution professional has to give notice of each and every meeting of the committee of creditors, inter alia, to members of the suspended Board of Directors. Like operational creditors who may attend and participate in such meetings, provided the aggregate dues owing to them are not less than ten per cent of the total debt, both such operational creditors and erstwhile members of the Board of Directors have no vote. Section 25(2)(f) and (i) are also important in that, once the resolution professional convenes meetings of the committee of creditors, he is to present all resolution plans at these meetings. Under Section 30, the resolution professional shall examine each resolution plan received by him in which he must confirm, inter alia, that such plan provides for the repayment of the debts of operational creditors which shall not be less than the amount to be paid to them in the event of liquidation of the corporate debtor. This plan is then submitted to the Adjudicating Authority if it is approved by the requisite majority of the committee of creditors. The Adjudicating Authority under Section 31(1), if satisfied that the plan passes muster, shall then, by order, approve such plan, which shall be binding on all stakeholders involved in the resolution plan, including guarantors.

16. This statutory scheme, therefore, makes it clear that though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2)(i).....

”

19. Hon’ble Supreme Court held that under Section 24 of the I&B Code all meetings of CoC are to be conducted by the RP who, however, does not happen to be part of this committee. Section 24(3) (b) is important in that, the RP has to give notice of each and every meeting of the Committee of Creditors, inter alia to members of the suspended board of directors.

20. In the present case, there were two directors of the Corporate Debtor, Appellant Amit Suresh Bhatnagar and Sumit Suresh Bhatnagar. The RP was required to give notice of each and every meeting of CoC to both the ex-directors. There is nothing on record to show that RP has served notice of any meetings of CoC on ex-director Sumit Suresh Bhatnagar. The RP has not offered any explanation as to why the notice has not been served on Sumit Suresh Bhatnagar ex-director of Corporate Debtor.

21. So far as the service of notice on Appellant Amit Suresh Bhatnagar ex-director of the Corporate Debtor is concerned, Hon’ble High Court vide its order dated 20.09.2019 modified the order as aforesaid and thereafter, 9th CoC

meeting was convened on 10.10.2019. However, no notice has been served on the Appellant for that meeting.

22. 10th CoC meeting was scheduled on 05.11.2019 at 11:00AM and the notice of this meeting was given to Appellant on 04.11.2019 at 03:18 PM.

23. After receiving the notice the Appellant sent three emails to the RP, which are as under:

First email

“Date Mon. 04.11.2019 at 18:07

Dear Sir,

This is the first meeting in which we have received invitation to attend CoC till date.

The notice given to us is extraordinarily short, its mandated by order of Hon’ble Supreme Court that our presence is must but on the other had there is order which governs our bail in which we are not permitted to meet any bank officials.

We have extended all possible cooperation in the matter whenever you have requested we have travelled on two occasions to meet investors, but their no banker was present.

We desire to move the Hon’ble Court and seek modification of terms in the bail condition ill then the meeting should be postponed or we need to have permission of investigation officer to attend such a meeting

Regards

Second email.

Date Tue, 05.11.2019 at 01:11

Dear Sir,

Wrt to CoC meeting on 5th Nov, 2019 we would be happy to attend the coc meeting through a video conference as offered to all members

We had requested to Mr. Sumit Duggal for video link which he has promised to provide, we are yet to receive the coordinates.

We can go to pwc Ahmadabad office to attend the meeting vide video

Regards

Amit Bhatnagar

Third email.

Date Tue, 05.11.2019 at 07: 26

Dear Sir

This refers to your invitation to attend meeting & our subsequent call seeking copies of resolution plans, we were advised that copies cannot be provided to us, we draw your attention to legal opinion of DSK legal attached with the agenda which clearly states in view of Section 25(2) of the IBC copies of plan have to be provided to us as have been provided to creditors.

Kindly provide to us copies of plan urgently

We also await link for attendance video link

Amit Bhatnagar”

24. RP Replied as under:-

“Date Tue, 05.11.2019, 10:45

Dear Sir,

VC Link cannot be shared till we get a firm clarity of same from our legal and CBI

Regards

Bhuwan Madan”

25. The Appellant in his first email dated 04.11.2019 at 18:07 pointed out that the notice given to the Appellant is extraordinarily short i.e. less than 24 hours' notice. Regulation 19 of IBBI Regulations provides that:

“A meeting of CoC shall be called by giving not less than five days' notice in writing to every participants.”

26. In the second email dated 05.11.2019 the Appellant requested to attend the CoC meeting through a video conference as offered to all members. But, RP through his aforesaid email dated 05.11.2019 declined to share video conference link to the Appellant for want of legal opinion. Surprisingly, before this email RP has already obtained the legal opinion of DSK legal (Legal Counsel to RP) (Please see Page 132 of Appeal Paper Book) which is as under:

“In light of the above provisions of law and the Judgment of the Hon'ble Supreme Court it is clear that the erstwhile board of directors has the right to attend the CoC meetings and to have a copy of the Resolution Plan further, the Hon'ble Supreme Court has also clarified that the intend behind the said right is not only so that the erstwhile board of directors can address the members of the CoC in respect of causes default and whether the same has been addressed in the Resolution Plan, but also because the erstwhile board of directors would also be vitally interested in the Resolution Plan where the default is not because of default of directors.”

27. With the aforesaid, it is clear that on false ground RP has declined to share video conference link to the Appellant. Thus, the RP has contravened the Regulation 23 of IBBI Regulations which provides that:

“The notice convening the meetings of committee shall provide the participants an option to attend the meeting through video conferencing”

28. The Appellant in his third email dated 05.11.2019 requested the RP to provide the copies of Resolution Plans in view of Regulation 21(3) (iii) of the IBBI Regulations but RP has not provided copy of Resolution Plans to the Appellant. In this regard, it is useful to refer the Judgment of Hon'ble Supreme Court in the Case of Vijay Kr. Jain (Supra) in which it is held that:

“20. 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.”

29. Admittedly, the RP has not provided the copy of Resolution Plans to the Appellant. Thus, he has contravened the mandatory provision provided in Regulation 21(3) (iii) of the IBBI Regulations.

30. It is pertinent to note that the 11th CoC meeting convened on 08.11.2019 at 03:00 PM and notice of that meeting was sent to the Appellant on 07.11.2019 at 08:15 PM i.e. less than 24 hours' notice was served, which is against the Regulation 19 of IBBI Regulations.

31. Ld. Counsel for the Respondent (RP) unable to convince us as to why the RP has not provided the copy of Resolution Plans, not served the notice for 9th CoC meeting and has given less than 24 hours' notice for 10th, 11th CoC meeting and as to why refused to provide link of VC to Appellant for 10th CoC meeting. The RP has not furnished any explanation as to why notice has not been served on the other ex-director i.e. Sumit Suresh Bhatnagar, thus, the RP has contravened the mandatory provisions provided in Section 24 (3) (b) of the I&B Code and Regulations 19 (1), 21(3)(iii) and 23 of the IBBI Regulations.

32. We are of the considered view that without affording opportunity to the ex-directors of the Corporate Debtor, 9th 10th and 11thCoC meetings were convened and Resolution of Liquidation of Corporate Debtor has been passed. Which is in contravention to Section 24 (3) (b) of I&B Code and Regulations 19(1), 21 (3) (iii) and 23 of the IBBI Regulations. Thus, the RP has failed to perform the duties of Resolution Professional as provided under Section 25 of the I&B Code.

33. With the aforesaid, it is apparent that there has been material irregularity in exercising of powers by the RP during the Corporate Insolvency Resolution Period. Therefore, the Impugned order as well as the Resolution Passed in 9th 10th and 11thCoC meetings are not sustainable in law. Hence, they are hereby set aside.

34. The Respondent (RP) is directed to provide all the documents relevant to the matters including Resolution Plans to suspended directors (Appellant and Sumit Suresh Bhatnagar) of the Corporate Debtor and the meetings of CoC called by giving not less than five days' notice in writing to every participants and they shall provide an option to attend the meetings even through video conferencing. We make it clear that alongwith the aforesaid directions the parties have to comply the orders passed by Hon'ble High Court of Gujarat in this matter.

The Appeal is allowed as indicated above, however, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

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