Insights

[2019] 2 IBJ (Art.) 19

Positive Committee of Creditors Voting – An Absolute must

In this article, the Author analyses ruling of the Supreme Court in K Sashidhar v. Indian Overseas Bank [2019] 2 IBJ (JP) 161, *wherein it has ruled on the power of abstinence and has also upheld the commercial wisdom of the Committe of Creditors.*

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Background

While the insolvency proceedings are guided and supervised by several layers of authorities, viz., the Committee of Creditors ('CoC'), the resolution professional, the adjudicating authority, appellate authority and the Supreme Court, role of CoC is vital in deciding the fate of the ailing corporate debtor. To enforce the objective of the Code provided in its long heading i.e. resolution before liquidation, the threshold of voting percentage required for taking majority decisions by the CoC, such as approval of resolution plan has been reduced from 75 percent to 66 percent vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

Inspite of the reduced threshold, the county has witnessed several liquidation happening for lack of consensus among the CoC. CoC members come to meeting, however without a mandate to take decision and subsequently abstain from voting. This scenario is persisting inspite of the IBBI Circular dated 10th August, 2018, requiring the CoC members to be represented only by such person at the meeting who has the mandate to take decision.

There have been a lot of ambiguity regarding consideration of the vote of an abstaining CoC member, until the recent order of the Supreme Court in the matter of *K. Sashidhar v. Indian Overseas Bank*[1]. As per this ruling, a financial creditor who is present at the CoC meeting but neither says yes, nor says no, and, therefore, remains neutral by abstaining to vote, will still hold as much strength as the CoC member who says no.

While the question on whether or not to consider the votes of those who choose to "abstain" from voting is settled that ruling, however the open point that still remains is – what about the CoC member who "absents" himself from the CoC meeting altogether (neither present in person nor via video conferencing), and does not cast vote even on e-voting?

Question is if abstention also have the same weight as abstinence?

While the Supreme Court in *K. Sashidhar* (supra) has not dealt with this point, NCLAT in *Tata Steel Ltd. v. Liberty House Group Pte Ltd.*[2] answers question on treatment to absenting CoC members. NCLAT rules that votes of only such financial creditors shall be considered as "total voting shares" who are present

1. https://www.sci.gov.in/supremecourt/2018/39315/39315_2018_Order_05-Feb-2019.pdf

2. https://nclat.nic.in/Useradmin/upload/19807396735c58251eedb58.pdf Order 04-Feb-2019

in the meeting. Ones who do not participate in the meeting at all i.e. neither in person nor through video conferencing, voting share of such members shall not be counted at all.

Supreme Court Ruling in *K. Shashidhar's* case (*supra*)

In this ruling, the Supreme Court has finalised the validity of rejection of resolution plan by CoC under section 30(2) of Insolvency and Bankruptcy Code ('IBC') for two matters, viz., *Kamineni Steel & Power India Pvt. Ltd.* [NCLT Hyderabad] and *Innoventive Industries Ltd.* [NCLT Mumbai].

Both in *Kamineni* and *Innoventive*, the resolution plan was rejected since approved by only 66 per cent of the financial creditors, when the requisite votes in affirmation was 75 per cent. It is pertinent to note here that in Kamineni, even if the abstaining financial creditors were excluded from voting altogether, yet the voting was not meeting the 75 per cent strength, since there was explicit rejection by more than 25 per cent of the financial creditors.

'Dissenting Financial Creditor' – Omitted or Still Exists?

The Supreme Court's ruling in *K. Shashidhar's* (*supra*) *case* seems to have been inspired, at least it appears on reading of para 24, by the amendment of erstwhile definition of "dissenting financial creditor", though it is not clear whether the apex court considered the fact that firstly, the definition currently stands omitted vide IBBI Notification dated 5th October, 2018 and secondly, even when it was present, it was only for the limited purpose of erstwhile regulation 38 of IRP-CP Regulations mandating priority of payment of liquidation value in the resolution plan to such dissenting financial creditors. It is to be noted that the definition of dissenting financial creditor and the priority to the same was deleted pursuant to the ruling of NCLAT in *Central Bank of India v. Resolution Professional of Sirpur Papers Mills Ltd.*[3].

66 per cent Affirmative Votes 'At Any Rate' – A Strict Litmus Test

In the ruling, Supreme Court in *K. Shashidhar's* case (*supra*) has made a clear remark with respect to fulfilment of mandatory 66 per cent percent of affirmative votes in all situation. In para 29 of the ruling, SC says:

> *'Concededly, regulations 25 and 39 must be read in light of Section 30(4) of the I&B Code, concerning the process of approval of a resolution plan. For that, the "percent of voting share of the financial creditors" approving vis-à-vis dissenting is required to be reckoned. It is not on the basis of members present and voting as such.* At any rate, the approving votes must fulfill the threshold percent of voting share of the financial creditors. *Keeping this clear distinction in mind, it must follow that the resolution plan concerning the respective corporate debtors, namely, KS&PIPL and IIL, is deemed to have been rejected as it had failed to muster the approval of requisite threshold votes, of not less than 75 per cent of voting share of the financial creditors. It is not possible to countenance any other construction or interpretation, which may run contrary to what has been noted herein before.'*

If there were abstaining financial creditors, and excluding them from the voting altogether, if the plan was approved, would the decision have been different? One does not get that clear answer from the Apex court. However, it seems that the arithmetic to be done is to apply the percentage of affirming creditors to the total of the voting shares, including those who have not voted at all, or even after giving the chance to vote by e-voting, those who did not come forward.

CoC's Wisdom is Paramount

The Supreme Court has clearly held that the approval by the CoC is mandatory, and use of the word "*may*" in section 30(4) does not mean the provision

3. http://ibbi.gov.in/webadmin/pdf/order/2018/Sep/12th%20Sept%202018%20in%20the%20matter%20of%20Central%20Bank%20of%20India%20Vs%20RP%20of%20The%20Sirpur%20Paper%20Mills%20Ltd_2018-09-26%2010:52:19.pdf

is directory. In para 26 of the ruling, Supreme Court in *K. Shashidhar's* case (*supra*) says :

"…. In that, the word "may" is ascribable to the discretion of the CoC to approve the resolution plan or not to approve the same. What is significant is the second part of the said provision, which stipulates the requisite threshold of "not less than seventy five percent of voting share of the financial creditors" to treat the resolution plan as duly approved by the CoC. ***That stipulation is the quintessence and made mandatory for approval of the resolution plan.*** *Any other interpretation would result in rewriting of the provision and doing violence to the legislative intent."*

Further in para 33, that ruling observed:

"…. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by th I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable."

Role of NCLT with reference to Approval of Resolution Plans

Very importantly, the Supreme Court has commented on the powers of the adjudicating authority. On receipt of a CoC approved resolution plan, the NCLT is only required to satisfy itself that such plan meets the requirements specified in Section 30(2). No more and no less. This is explicitly spelt out in Section 31 of the Code. NCLT cannot turn down a CoC approved plan for any reason beyond non-compliance of section 30(2). In para 33, Supreme Court commented:

"…..The Legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors….."

In Vinod Kothari & Sikha Bansal Guide to Insolvency Law, it is commented as follows as regards the role of NCLT with respect to resolution plans:

"….Once the committee has decided to approve a plan, the scope for discretion of the adjudicating authority is very limited.

….. the spirit of the Code is largely to vest discretion with the creditors in the process of resolution. There is a limited role that the adjudicating authority has. In many of the sections, there are mandatory provisions for orders of the adjudicating authority, indicating that the scheme of the law is to put the process in an auto-pilot, credit-driven mode."

As regards the amendment in section 30(4) made effective from 23rd November, 2017 requiring financial creditors to consider "feasibility and viability" of the revival plan, the apex court clarifies that the intent of the amendment is merely to list out the factors that financial creditors are expected to bear in mind while taking their decisions on resolution plans. The intent of this amendment is not allow adjudicating authorities to call to question the decisions. Also, it is to be noted that, this amendment, being in the nature of clarification, is prospective in implementation.

Role of NCLAT as Appellate Body

The Supreme Court has also clarified the scope

of the Appellate jurisdiction of the NCLAT.A NCLT approved plan can be challenged only on the grounds mentioned in 61(3). However, its rejection by NCLT can be challenged under any ground as mentioned in 61. In para 37, the Supreme Court in *K. Shashidhar's* case (*supra*) observed:

> "....*Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable*."

Wednesbury Principle of Unreasonableness and Doctrine of Proportionality Applied by NCLT, Ahmedabad Bench

While the Supreme Court has upheld the commercial wisdom of CoC, NCLT, Ahmedabad, in the matter of *Standard Chartered Bank and State Bank of India v. Essar Steel India Ltd.*, advised the RP and the CoC to relook into its decision and consider for making apportionment / distribution of amount on pro-rata basis on all admitted claims of all financial creditors and workout a reasonable formula for percentage of payment so as to avoid any discrimination in the treatment of any stakeholder. While giving this suggestion, NCLT, Ahmedabad Bench took cognizance of the Supreme Court ruling in *K. Sashidhar* (*supra*) regarding the commercial wisdom of CoC and commented that it is only supplementing the view of the CoC and not supplanting the same. NCLT's suggestion is for better and effective implementation of the resolution plan in a more workable and effective manner, so as to avoid multiple proceedings in the present CIRP.

Power and Duties of Resolution Professional with reference to Section 30(2)

In para 44 the Supreme Court in *K. Sashidhar's case* (*supra*) has given a detailed account of what are the powers of the RP, the powers of the coc and the powers of the NCLT :

> "Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code...."

Concluding Remarks

While the Supreme Court has upheld the commercial wisdom of CoC and have drawn a clear lines of duties and rights of the CoC, Resolution Professional and judiciary wrt the approval of resolution plan, however, NCLT, Ahmedabad Bench, rightly erased the scope of any open window to the CoC to approve any unreasonable or discriminatory resolution plan.