

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

Comp. App. (AT) (Ins) No. 645 of 2023

&

I.A. No. 2602, 2141 of 2023

IN THE MATTER OF:

**Vinay Kumar Singhal Resolution Professional for PG ...Appellant
Advertising Pvt. Ltd.**

Versus

Mahesh Bajaj

...Respondent

Present:

**For Appellant : Mr. Abhishek Anand, Mr. Karan Kohli, Mr. Sajal
Jain, Lubhanshe Rai, Advocates**

For Respondents : Mr. Harish Taneja, Mr. Aman Raj Singh, Advocates

O R D E R

Per: Justice Rakesh Kumar Jain: (Oral)

10.10.2023 This appeal has arisen from the order dated 03.05.2023, passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court II) by which an application bearing I.A. No. 2460 of 2023 filed in (IB)-996 (ND)/2020 by the Respondent (Mahesh Bajaj) for the issuance of directions to the Resolution Professional to provide information memorandum (IM) and other relevant documents to the Operational Creditor being a participant of Committee of Creditors (in short 'CoC') has been allowed and direction has been issued to the Appellant herein to deliver a copy of the Information Memorandum as also other documents considered in the meeting of CoC to the Respondent, irrespective of the fact that the Respondent is a participant in the CoC.

2. At the time of preliminary hearing held on 19.05.2023, the following order was passed: -

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“Learned Counsel for the Appellant submits that the Adjudicating Authority by the impugned order has directed that Operational Creditor be given Information Memorandum whereas under Regulation 26(4) of CIRP Regulations, 2016 the Information Memorandum can be shared only with the Members of Committee of Creditors whereas Operational Creditor is only participant and not a Member. It is submitted that the Judgement of the Hon’ble Supreme Court which has been relied on by the Adjudicating Authority was a case where Hon’ble Supreme Court has held that former directors are entitled for copy of the Resolution Plan as well as the Operational Creditor which judgment was distinguishable in the facts of the present case.

2. Submissions need scrutiny. Issue notice to the Respondent through Speed Post as well as Email. Requisites along with process fee, if not filed, be filed within two days.

3. Respondent to file Reply-Affidavit within three weeks. Rejoinder, if any, may be filed within two weeks, thereafter. List this Appeal on 05th July, 2023.

In the meantime, the Appellant shall not be obliged to share the Information memorandum with the Operational Creditor.”

3. The order of stay dated 19.05.2023 is continuing till today.

4. The brief facts of this case are that Tulsi Nandan Kant Bansal (Financial Creditor) filed an application i.e. (IB) – 996(ND)/2020 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) against M/s P.G. Advertising Pvt. Ltd. seeking resolution of an amount of Rs. 1,05,00,000/-. The said application was admitted on 18.10.2022. Moratorium was imposed and Vinay Kumar Singhal was appointed as Interim Resolution Professional (In short ‘IRP’).

5. During the pendency of the CIRP proceedings, the Respondent, one of the Operational Creditor, allegedly representing 10% debt of the Corporate Debtor filed I.A. No. 2460 of 2023 for the direction, already mentioned hereinabove, which has been allowed by the impugned order dated 03.05.2023. Hence, the present appeal has been filed by the RP.

6. Counsel for the Appellant has submitted that the issue involved in this case is as to whether copy of information memorandum can be ordered to be given to the Respondent (Operational Creditor) who is merely a participant in the CoC and not a member?

7. Counsel for the Appellant has submitted that the term member is not defined either in the Code or Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'Regulations'). At the first instance, he has referred to Section 21 of the Code which deals with the CoC. As a matter of fact, he has referred to Section 21(2) of the Code which is reproduced as under:-

“21(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a ¹[financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares ³[or completion of such transactions as may be prescribed], prior to the insolvency commencement date.”

8. He has submitted that the CoC has to be essentially comprised of all the financial creditors of the Corporate Debtor and the Operational Creditor is not the member. He further refer to Section 24 of the Code which deals with the meeting of CoC which is reproduced as under:-

“(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to-

(a) members of ¹[committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) ²[Subject to sub-sections (6), (6A) and (6B) of section 21, any creditor] who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.”

9. While referring to aforesaid Section 24, it is submitted that it also talks of the meeting of the members of the CoC but at the same time Section 24(3) provides for the issuance of notice of each meeting of the CoC and Section 24(3)(c) deals with the notice to the Operational Creditors or their representatives. It is further argued that Section 24(4) provides that the Operational Creditor or their representative may have a right to attend the meeting but do not have a right to vote in such meeting. He has also pointed out that Section 24(6) provides for voting right to each of the creditors based on the financial debts owed to such creditor. He has further referred to Section 24(8) of the Code to contend that the meeting of the CoC has to be conducted in such manner as may be specified. It is submitted that the manner has been specified in the Regulations and in this regard, he has now referred to Regulation 2(d) and 2(l) which deals with the definition of ‘committee’ which means a committee of creditors established under Section 21 and 2(l) which provides for the definition of the ‘participant’ which means a person entitled to attend a meeting of the committee under Section 24 or any other person authorised by the committee to attend the meeting. He further referred to Regulation 18 which is a part of Chapter VI and deals with the meeting of the committee. Regulation 18(2) provides that RP may convene a meeting if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the request is made by members of the committee representing at least thirty-three per cent of the voting rights. According to the Appellant, the quorum of the meeting is provided in Regulation 22 which also says that a meeting of the committee shall quorate

if members of the committee representing at least thirty-three per cent of the voting rights are present either in person or by video conferencing or other audio and visual means.

10. The sum and substance of the argument is thus that everywhere the word member has been used either in the Code or Regulations. He has argued that the Adjudicating Authority has passed the order for providing the information memorandum which is prepared in terms of Section 29 of the Code. Section 29 of the Code is reproduced as under:-

“29. (1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information^{1A} with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation.—For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.”

11. It is further submitted that Regulation 36 says that a copy of the information memorandum has to be submitted either to the member or to the resolution applicant and none else. Regulation 36 is reproduced as under:-

“36. Information memorandum.

(1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.]

(2) The information memorandum shall contain the following details of the corporate debtor-

(a) [assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: ‘Description’ includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.]

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

(j) 48[***] (k) 49[***]

(l) other information, which the resolution professional deems relevant to the committee.

(3) A member of the committee may request the resolution professional for further information of the nature described in this Regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.

(4) 50[The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee 51[***] to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.]”

12. He has highlighted that as per Regulation 36(4) the RP has to share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29. He has then referred to 35(2) which provides that after the receipt of resolution plans in accordance with the Code, the RP shall provide the fair value and the liquidation value to every member of the committee.

13. He has also submitted that since there is no provision either in the Code or Regulations for giving information memorandum to the participants in the meeting of the CoC, the Adjudicating Authority has committed an error in passing the impugned order on the ground that there is no such prohibition. He has further submitted that the Adjudicating Authority has further erred in relying upon the decision of the Hon'ble Supreme Court in the case of Vijay Kumar Jain Vs. Standard Chartered Bank & Ors. Civil Appeal No. 8430 of 2018 which is altogether on different facts as it deals with the supply of

resolution plan to the erstwhile member of the board of director as a participant of the CoC.

14. On the other hand, Counsel appearing on behalf of the Respondent has vehemently argued that there is no error in the impugned order which calls for any interference by this Tribunal. It is further submitted that though the definition of member is conspicuous by its absence in both the Code and the Regulations and the definition of participant has been given only in Regulations but it does not mean that information memorandum and other documents cannot be supplied to the Respondent. In this regard, he has drawn our attention to Regulation 21 which provides for the contents of the notice for the meeting. Regulation 21 is reproduced as under:-

“21. Contents of the notice for meeting.

(1) The notice shall inform the participants of the venue, the time and date of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the necessary information to enable participation through video conferencing or other audio and visual means.

(2) The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative:

Provided that such participant shall inform the resolution professional, in advance of the meeting, of the identity of the authorised representative who will attend and vote at the meeting on its behalf.

[(3) The notice of the meeting shall contain the following- (i) a list of the matters to be discussed at the meeting; (ii) a list of the issues to be voted upon at the meeting; and (iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.]

(4) The notice of the meeting shall (a) state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be cast; (b) provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and (c) provide contact details of the person who will address the queries connected with the electronic voting”

15. He has referred to Regulation 21(2) and (3)(iii) to contend that it provides for supply of copies of all the documents which are relevant for the matter to be discussed and issues to be voted upon at the meetings.

16. He has further referred to Regulation 24 in regard to the conduct of the meeting. Regulation 24 is also reproduced as under:-

“24. Conduct of meeting. (1) The resolution professional shall act as the chairperson of the meeting of the committee.

(2) At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following, -

(a) his name;

(b) whether he is attending in the capacity of a member of the committee or any other participant;

(c) whether he is representing a member or group of members;

(d) the location from where he is participating;

(e) that he has received the agenda and all the relevant material for the meeting; and

(f) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

(3) After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.

(4) The resolution professional shall ensure that the required quorum is present throughout the meeting.

(5) From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video conferencing or other audio and visual facility, without the permission of the resolution professional.

(6) The resolution professional shall ensure that minutes are made in relation to each meeting of the committee and such minutes shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or other audio and visual means.

(7) The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting.”

17. It is submitted that the agenda has to be given with all relevant material for the meeting. He has specifically referred to Regulation 24(2)(e) to contend that the meeting cannot be convened without supplying agenda with all the relevant material for the said meeting.

18. However, he has been candid enough to concede that he is a participant not a member and also conceded that participant has been defined in Regulation 2(l). However, he strongly relied upon the decision of the Hon'ble Supreme Court in the case of Vijay Kumar Jain (Supra) and referred to Para 9, 13 and 15 which are reproduced as under:-

“9. 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). It cannot be gainsaid that operational creditors, who may participate in such meetings but have no right

to vote, are vitally interested in such resolution plans, and must be furnished copies of such plans beforehand if they are to participate effectively in the meeting of the committee of creditors. This is for the reason that under Section 30(2)(b), repayment of their debts is an important part of the resolution plan qua them on which they must comment. So the first important thing to notice is that even though persons such as operational creditors have no right to vote but are only participants in meetings of the committee of creditors, yet, they would certainly have a right to be given a copy of the resolution plans before such meetings are held so that they may effectively comment on the same to safeguard their interest.

13. 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.

15. As a result of the aforesaid discussion, the arguments of the respondents that “committee” and “participant” are used differently, which would lead to the result that resolution plans need not be furnished to the erstwhile members of the Board of Directors, must be rejected. Equally, the Regulations, far from going beyond the Code, flesh out the true intention of the Code that is achieved by reading the plain language of the Sections that have already been adverted to. So far as confidential information is concerned, it is clear that the resolution professional can take an undertaking from members of the erstwhile Board of Directors, as has been taken in the facts of the present case, to maintain confidentiality. The source of this power is Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, read with paragraph 21 of the First Schedule thereto. This can be in the form of a non-disclosure agreement in which the resolution professional can be indemnified in case information is not kept strictly confidential.”

19. In rebuttal, Counsel for the Appellant has submitted that the Regulations referred to by the Respondent are only in regard to the procedure

of holding the meeting and has nothing to do with the substantive provision of supply of information memorandum to the Operational Creditor or the participant. He has also submitted that the decision in the case of Vijay Kumar Jain (Supra) is entirely in its own facts and has nothing to do with the information memorandum. In this regard, he has referred to Para 12 of the said judgment which is reproduced as under:-

“12. There is no doubt whatsoever that Notes on Clauses are an important aid to the construction of Sections of the Code as they show what the Drafting Committee had in mind when such provisions were drafted. However, a closer look at the Notes on Clause 24 makes it clear that the third sentence of the Notes on Clause 24 is itself problematic. First and foremost, it speaks of the resolution professional seeking information. The resolution professional does not seek information at a meeting of the committee of creditors, which is what Section 24 is all about. The resolution professional only seeks information from the erstwhile Board of Directors under Section 29 before preparing an information memorandum, which then includes the financial position of the corporate debtor and information relating to disputes by or against the corporate debtor etc. All this has nothing to do with Section 24 of the Code which deals with meetings of the committee of creditors. Secondly, the resolution professional does not prepare a resolution plan as is mentioned in the Notes on Clause 24; he only prepares an information memorandum which is to be given to the resolution applicants who then submit their resolution plans under Section 30 of the Code. The committee of creditors, in turn, gets information so that they can assess the financial position of the corporate debtor from various sources before they meet. It is, therefore, difficult to understand the Notes on Clause 24. Even assuming that the Notes on Clause 24 may be read as being a one-way street by which erstwhile members of the Board of Directors are only to provide information, we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain

debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The Regulations also make it clear that these persons are vitally interested in resolution plans as they affect them. Thus, under Regulation 36 of the CIRP Regulations, the information memorandum that is given to each member of the CoC and to any potential resolution applicant, will contain details of guarantees that have been given in relation to the debts of the corporate debtor (see Regulation 36(2)(f) of the CIRP Regulations). Also, under Regulation 37(d) of the CIRP Regulations, a resolution plan may provide for satisfaction or modification of any security interest. Security interest is defined by Section 3(31) of the Code as follows:

“3. Definitions.—In this Code, unless the context otherwise requires,— xxx xxx xxx (31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee; xxx xxx xxx”

This would certainly include a guarantor who may be a member of the erstwhile Board of Directors. Further, under Regulation 37(1)(f), a resolution plan may provide for reduction in the amount payable to the creditors, which again vitally impacts the rights of a guarantor. Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to “participants” which would include members of the erstwhile Board of Directors – vide Regulation 39(5) of the CIRP Regulations. Obviously, such copy can only be sent to participants because they are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the Adjudicating Authority’s order to the Appellate Tribunal under Section 61 of the Code. Quite apart from this, Section 60(5)(c) is also very wide, and a member of the erstwhile Board of Directors also has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code.”

20. We have heard Counsel for the parties and perused the record with their able assistance.

21. We have framed the issue involved in this case in the beginning of this judgment which we will answer on the basis of the provisions of the Code and the Regulations and also with the help of the judgment of the Hon'ble Supreme Court which has been relied upon by Counsel for the parties.

22. The Respondent has admitted that he is only a participant. It is also an admitted fact that there is no definition of member provided in the Code or the Regulations which has been repeatedly used in the Code as well as Regulations. Section 21 deals with the composition of CoC and Section 21(2) provides that member shall be the financial creditors of the Corporate Debtor. Section 25 is in regard to the preparation of information memorandum. Section 29(2) says that the information memorandum has to be provided to the resolution applicant whereas Regulation 36 provides that it has to be given to each of the member of the committee and Regulation 36(4) provides that it shall be given to the resolution applicant.

23. From the aforesaid two provisions and the fact that the Code and Regulations are totally silent about the supply of the information memorandum to the participant, it has to be inferred that the legislature has made a provision for providing a copy of the information memorandum to the member of the CoC and the Resolution Applicant but not to the participant of the meeting of the CoC such like the present Respondent. Therefore, the finding recorded by the Adjudicating Authority that since there is no prohibition in the Code or the Regulations for providing the information memorandum to the Operational Creditor as a participant is totally erroneous and unsustainable.

24. In so far as, the decision of the Hon'ble Supreme Court is concerned, we will first refer to the facts of the said case. In that case, the Appellant was the member of the suspended board of director. He was aggrieved because he was not given the copy of the resolution plan and was denied even participation in the meeting of the CoC. In this background, the Hon'ble Supreme Court has held, in Para 9 of the Judgment, that in view of Section 30(2)(b) of the Code since repayment of debts is an important part, therefore, the resolution plan has to be given to the participant of the CoC. In para 13 of the said Judgment, it has been held that the expression "documents" is a wide expression which would certainly include resolution plans but the information memorandum which is one of its own kind cannot be referred to as a document which has to be given to the participant of the meeting especially when there is no such provision.

25. As far as Para 12 of the said judgment is concerned, it talks about the information memorandum which is to be given to the resolution applicant so that he may submit the resolution plan in terms of Section 30 of the Code and the CoC get the information memorandum so that they can assess the financial position of the Corporate Debtor before the meeting. There is no reasonable nexus attached with the supply of information memorandum to the participant such like the Operational Creditor.

26. In such circumstances, the judgment in the case of Vijay Kumar Jain (Supra) which is on its own facts has wrongly been relied upon by the Adjudicating Authority while passing the impugned order.

27. Thus, in view of the aforesaid discussion, the question framed in the beginning is hereby answered to the effect that the Operational Creditor being a participant in the meeting of the CoC has no right to seek a copy of the information memorandum.

28. In view of the aforesaid discussion, we find merit in the appeal, the same is hereby allowed and the impugned order is set aside. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sheetal/Ravi