

ROLE OF ADJUDICATING AUTHORITY IN APPROVING/ REJECTING A RESOLUTION PLAN

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Editor's Notes: A resolution plan submitted by a resolution applicant has to pass through various filters before being sent to the Adjudicating Authority for its approval. The plan has to comply with the conditions as laid down in section 30 (2) of the Code – the resolution professional shall examine each resolution plan received vis-à-vis the mandatory conditions. Only such resolution plans which fulfil the conditions are passed on to the CoC, which may approve a plan with 66% majority. The plan approved by CoC is submitted to the Adjudicating Authority for its sanction. A resolution plan so sanctioned becomes binding on all stakeholders involved in the resolution plan.

Now, questions arise as to the extent of discretion or mind which the Adjudicating Authority can exercise while considering approval/rejection of resolution plan – Shall it adopt “tick mark” approach? Can it go into commercial details and justness of the plan? Can it reject what the CoC, in its wisdom, has decided to approve by majority? The articles discusses some recent rulings in the context

The insolvency resolution process of Binani Cements have been through various ups- and downs. On 19.11.2018, the Hon'ble Supreme Court in the case of *Rajputana Properties Pvt. Ltd. v. UltraTech Cement Ltd. & Ors.* dismissed Dalmia Bharat's plea to seek stay on Ultratech's bid for Binani Cement, upholding the UltraTech Cement's bid for Binani Cement sale. Previously, on 14.11.2018, the NCLAT had also held UltraTech's offer for Binani Cement as valid, stating that Dalmia Bharat's offer was discriminatory against some creditors.

The primary question that arises out of all this chaos is whether Tribunals are allowed to intervene in the functions of the CoC and overturn their decisions in respect to resolution plans. The UK Insolvency Act, 1986 provides for remedies in case the voluntary agreement is either unfairly

Rajputana Properties Pvt. Ltd. v. UltraTech Cement Ltd.

- *Rajputana discriminated b/w FC who are equally situated & did not balance the interest of OC.*
- *NCLAT held that the plan of Rajputanawasdiscriminatory and hence, rejected it.*

prejudicial to the interests of creditors or there has been some material irregularity in relation to the relevant qualifying decision procedure. Despite no specific provision existing in the Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority has, in various cases, expanded the scope of its power under Section 31 in examining resolution plans and in a way, provided remedies for creditors whose interests have been affected. The article tries to answer the question, by analyzing the case in hand.

Facts of the Case:

The Tribunal noted that Rajputana Properties Private Limited in its resolution plan had discriminated between some of the financial creditors who are equally situated and did not balance

the interest of stakeholders such as operational creditors. The non-application of mind by the CoC and the discriminatory behaviour in approving the plan was apparent. The NCLAT held that the plan of Rajputana Properties Private Limited was discriminatory and contrary to the scheme of the Code. It further held that if the resolution plan is shown to be discriminatory against any one or other financial creditor(s) or operational creditor(s), such plan can be held to be against the provisions of the Code.

The Adjudicating Authority held that merely because a discriminatory plan has been placed before the CoC and has received their approval, does not mean that it should be approved by the Adjudicating Authority, as the same will be against the basic object of maximization of the assets of the corporate debtor on one hand and the object of balancing the stakeholders on the other hand.

The two major issues considered by the Tribunal was:

- Whether CoC has discriminated between the eligible resolution applicants, while considering the resolution plan of Rajputana Properties Private Limited?
- Whether the resolution plan submitted by Rajputana Properties Private Limited is discriminatory?

The Tribunal considered the financial terms of the plans to establish that the CoC has discriminated between the resolution applicants, which was evident from the fact that the proposal for negotiation and better proposal given by the Ultratech Cement Limited was not at all considered. The Tribunal also pointed out that the RP as well as the CoC are duty bound to ensure maximization of value within the time frame prescribed under the Code, and observed that the object in finding out a resolution applicant who can offer maximum amount so as to safeguard the interest of all stakeholders of the corporate debtor is lacking from the side of the CoC.

“with respect to a plan rejected by the CoC, considering that the AA cannot approve a plan unless approved by the requisite majority of CoC, the NCLAT held that the AA cannot revisit the decision of CoC to determine the viability and feasibility of a resolution plan”

Scope and Extent of Power Vested on the Adjudicating Authority:

Earlier, in [Bhaskara Agro Agencies v. Super Agri Seeds](#), with respect to a plan rejected by the CoC, considering that the Adjudicating Authority cannot approve a plan unless approved by the requisite majority of CoC, the NCLAT held that the Adjudicating Authority cannot revisit the decision of CoC to determine the viability and feasibility of a resolution plan, and in the case of [Darshak Enterprise Pvt. Ltd. v. Chhaparia Industries Pvt Ltd](#), NCLAT held that in absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or this Appellate Tribunal to modify the plan.

However, it failed to note that one of the conditions precedent to the approval of a plan by the Adjudicating Authority is “satisfaction”. This implies that for a resolution plan to receive the approval of the Adjudicating Authority, it must be “satisfied” that the resolution plan approved by the CoC meets the requirements of Section 30(2). This principle was applied by the Hon’ble Supreme Court, wherein it examined certain extracts of the resolution plan to ascertain the eligibility of the resolution applicant, in [Arcelor Mittal India Private Limited v. Satish Kumar Gupta](#)⁴⁰. The Apex Court

⁴⁰ Ibid

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deliberated on the extent to which the Adjudicating Authority can exercise the power under the provisions of Section 31, and the following observations were made:

- Once a plan is approved by the CoC, it is to be submitted to the Adjudicating Authority; and at that stage, a judicial mind is applied by the Adjudicating Authority, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan.
- The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan violates the provisions of any law, including Section 29A of the Code, after hearing arguments from the resolution applicant as well as the CoC.

In [Pratik Ramesh Chirana v. Trinity Auto Components Ltd](#) as well, NCLT, Mumbai Bench interpreted the phrase “if the adjudicating authority is satisfied...” under Section 31, observed that “satisfaction” must be objective, subjective or both, and to form an opinion, thorough study of a resolution plan is required.

- **Objective Satisfaction:** The objective satisfaction revolves around the object of enactment of the Code, enshrined in the Preamble.
- **Subjective Satisfaction:** This depends upon logical analysis of the financial data supplied, where a methodical scrutiny of the financial statement is expected before concurring with approval of the CoC.

Again, in the case of [J.R. Agro Industries P Limited v. Swadisht Oils Pvt Ltd.](#), it was observed that the pros and cons of the resolution plan must be studied and if the Tribunal approves the plan, it should record in writing its satisfaction, in the judgement approving the resolution plan.

Global Provisions:

In countries like UK and US, there are provisions which provide remedies to creditors against unfair prejudice. [Section 6](#) of the UK Insolvency Act, 1986 provides that an application can be filed by any aggrieved person, on the following grounds:

That the voluntary arrangement **unfairly prejudice** the interests of a creditor, member or contributory of the company; and/ or

That there has been some **material irregularity** at or in relation to either of the meetings, the meeting of the company or in relation to the relevant qualifying decision procedure.

If the court is satisfied as to either of the grounds mentioned above, it may either revoke or suspend the decision approving the voluntary agreement or give directions to summon further meetings, to consider any revised proposal or reconsider the original proposal.

In the case of **Daewoo Singapore Pte Ltd. v. CEL Tractors Pte Ltd.** [2001] SGCA 53, Singapore Court of Appeal held that:

“After a scheme is accepted by the creditors, an objecting creditor can persuade the court to withhold its approval, or to approve it subject to such alternatives or conditions as it thinks fit. The objecting creditor would succeed if he can show that the creditors did not vote bona fide for the benefit of the creditors or the company as a whole, or that the scheme is not fair and reasonable.”

US courts follow a cramdown test, wherein the court approves the plan over the objections of the creditor(s), if the plan does not discriminate unfairly, and is “fair and equitable”. The principle requires that the plan meet certain standards of fairness and is in best interest of creditors. The court may confirm over a dissent if the members of the class are unimpaired. Subsection 1129(a) of US Bankruptcy Code enumerates the requirement governing confirmation of a plan. The court is required to confirm a plan if and only if all of the following requirements are met:

- (i) plan comply with the applicable provisions of chapter 11, governing contents of the plan; and
- (ii) plan have been proposed in good faith, and not by any means forbidden by law⁴¹.

The criterion of unfair discrimination is not derived from the fair and equitable rule or from the best interests of creditors test; rather it preserves just treatment of a dissenting class from similarly placed class. Though different courts employ different tests in determining whether a plan is discriminates unfairly. In essence, a plan does not discriminate unfairly with respect to a dissenting class if the plan protects the legal rights of a class in a manner inconsistent with the treatment of other classes that hold similar rights. Again, no plan is approved if the principal purpose of the plan is the avoidance of taxes, or if the court determines that the plan is not feasible.

Concluding Remarks:

The present case of Binani Cements clarified one thing that the approval of the Adjudicating Authority is not a mere requirement/ formality, although the Adjudicating Authority is not permitted to alter the terms of the plan, the ultimate authority to approve or reject a plan vests with the Adjudicating Authority, and for that it should consider the following aspects:

- (i) whether the plan complies with the requirements of Section 30(2)?
- (ii) whether the plan is fair and equitable or there is any unjust discrimination not envisaged in law?
- (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 in satisfactory, the plan is confirmed, if not the Adjudicating Authority may deny its confirmation.

⁴¹<https://www.law.cornell.edu/uscode/text/11/1129>

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Know More . . .

The Hon'ble Supreme Court in the matter of *K Sashidhar v. Indian Overseas Bank and Ors.* laid down that National Company Law Tribunal has no jurisdiction and/ or authority to analyse or evaluate the decision of the Committee of Creditors (CoC) to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. It is at this stage that a judicial mind is applied by the Adjudicating Authority to the resolution plan so submitted, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan. An appeal from an order approving such plan is only on the limited grounds laid down in Section 61(3).

Upon receipt of a "rejected" resolution plan the Adjudicating Authority is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the Adjudicating Authority 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.