

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

I.A.No.159/KOB/2020 in IBA/31/KOB/2020

(Under Section 60(5) of the IBC, 2016 read with Rules 11 and 32 of the
NCLT Rules, 2016)

Date of decision: 8th October, 2020

CORAM

HON'BLE MR. ASHOK KUMAR BORAH, MEMBER (JUDICIAL)

Applicant/Corporate Debtor:

M/s The Kerala Chamber of Commerce and Industry

Versus

Respondents/Financial Creditors:

Adv. Tom K Thomas & 7 others

Appearance (through Video conferencing)

For Applicant/CD : Shri Shivshankar R. Panicker, Advocate

For Respondents/FC : No representation

ORDER

This IA has been filed by the Corporate Debtor in IBA/31/KOB/2020 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rules 11 and 32 of the NCLT Rules, 2016 for the following reliefs:

- (i) To dismiss the proceedings in the instant matter since no quorum has been reached in accordance with Section 408 and 410 of Companies Act, 2013
- (ii) To grant any other equitable relief(s) as the Tribunal deems fit and proper.

IA/159/KOB/2020 in IBA/31/KOB/2020

2. IBA/31/KOB/2020 has been filed under Section 7 of IBC by Advocate Tom K.Thomas and 7 others for recovery of an amount of Rs. 23,21,69,637/- with interest from the Corporate Debtor M/s Kerala Chamber of Commerce and Industry. On 16.9.2020 when the matter came up for admission, Shri Shivsankar R Pancker appeared and took notice for the respondent and objected to the admission of this application raising the question of maintainability. He sought time to file an application to question the maintainability of the IBA 31/KOB.2020.

3. Now the aforesaid IA has been filed stating that the Single Member Bench cannot hear the IBC matters. He has stated that the constitution of Division Bench is mandated under the statute. He has stated that Section 419(3) of Companies Act, 2013 provides as follows:

“The powers of the Tribunal shall be exercisable by Benches consisting of two members out of whom one shall be a judicial Member and the other shall be a Technical Member.”

4. The word “shall” has been given in the section, to say that it is mandatory, but the court may ascertain the real intention by analysing the object of the enactment. The object of Section 419(3) is to bring forth a range of skills in the adjudication of intricate corporate insolvency proceedings. Since the Tribunal is intended to serve the complex area of insolvency, revival and restructuring of the company, which requires specialised knowledge and expertise, it is of crucial importance that the decision is made jointly by a panel of at least two members who pool legal and relevant expert knowledge respectively. Learned counsel for applicant has referred to the decision of the Constitution Bench of the Hon'ble Supreme Court in its judgment in Union of India Vs R.Gandhi, Civil Appeal No.3067 of 2004 and the decision in Madras

IA/159/KOB/2020 in IBA/31/KOB/2020

Bar Association Vs. Union of India, WP© No.1072 of 2013 in which it has been held “the constitutional validity of specialised NCLT is concerned comprising both Judicial and Technical Members. Unless a Technical Member is not in the Bench, it is not possible for the Judicial Member alone to effectively discharge functions and fulfil the objects of the statutory provision”. He has further referred to the decision in Indison Agro Foods Ltd Vs. Registrar, Company Appeal (AT) Insolvency No.726-727 of 2020 of the Hon’ble NCLAT in which it was ordered to constitute a Bench comprising Judicial and Technical Members in the Indore Bench for disposal of the matter. Another decision cited is in the case of Sonu Cargo Movers (I) P. Ltd. V. Union of India W.P(Civil) No.722/2019 with SLP © No.13402/2019 (III) in which there was a direction to dispose of the matter by the two Members one Judicial and Technical each. In addition to that, Section 419(5) of the Companies Act, 2013 states that in case of a difference in opinion among Members, the decision will be according to the majority. This gives the picture that there should ordinarily be more than one Member constituting the Bench at the Tribunal. Learned counsel for applicant has further stated that this Tribunal has jurisdiction in respect of a matter under Section 60(5) of the Code to pass orders as may be necessary for meeting the ends of justice. He has raised the following issues:

- (a) Whether the appointment of a Technical Member in constitution of Bench is obligated under the Companies Act, 2013;
- (b) Whether the word “shall” employed in Section 419(3) of the Companies Act, 2013 mandatory in nature; and
- (c) Whether the adjudication and decision making of the Tribunal in intricate corporate insolvency proceedings be effective with the Bench comprising of a Member (Judicial) and a Member (Technical).

IA/159/KOB/2020 in IBA/31/KOB/2020

5. I have heard the arguments advanced by the learned counsel for the applicant/corporate debtor and have gone through the decisions referred to hereinabove. The order in the case of *Indison Agro Foods Ltd.* (supra) reads as under:

“After hearing Mr. Abhijeet Sinha, learned counsel for the Appellant for a while, we find that the appeal has turned infructuous in-as much-as the matter, in terms of impugned order, stood adjourned to 18th August, 2020 and that date is over. We are informed by learned counsel representing the Appellant that the matter is now posted for 27th August, 2020 before a Single Bench of the National Company Law Tribunal, Indore Bench at Ahmedabad. He invites our attention to an order passed by Hon’ble Apex Court in Writ Petition No. 722 of 2019 dated 20th June, 2019, wherein the Hon’ble Apex Court, in a case of identical nature directed it to be heard by a Bench comprising of a Judicial Member and a Technical Member. This appeal is accordingly disposed of with request to the President, National Company Law Tribunal, New Delhi to constitute a Bench comprising of a Judicial Member and a Technical Member **for disposal of the matter in hand** in conformity with and compliance with the direction passed by Hon’ble Apex Court in the Writ Petition No. 722 of 2019.” (emphasis supplied)

A bare reading of the above order makes it clear that when a matter is posted on 27th August, 2020 before a Single Bench of the NCLT, Indore Bench at Ahmedabad, the learned counsel drew attention of the order passed by the Hon’ble Apex Court in Writ Petition No.722 of 2019, wherein the Hon’ble Apex Court has directed it to be heard by a Bench comprising of a Judicial Member and a Technical Member. That appeal was disposed of requesting the President of NCLT, New Delhi to constitute a Bench comprising of Judicial and Technical Members. That order pertains to the case before the Hon’ble NCLAT and it relates to the particular case and is not a general order applicable to all cases pending before the NCLT Benches. The circumstances therein were different.

IA/159/KOB/2020 in IBA/31/KOB/2020

6. As far as the decision in Writ Petition (C) No.722/2019 with SLP © No.13402/2019(III) is concerned, when there was no Technical Member, the matter was heard by a Single Member Bench. However, when the Ministry of Corporate Affairs stated before the Hon'ble Apex Court, they have issued orders appointing a Technical Member in the Ahmedabad Bench, the Hon'ble Apex Court disposed of the WP© with a direction that the case of the petitioners be heard by a Bench comprising of Judicial as well as Technical Members. That case arose because of non-availability of a Technical Member at Ahmedabad Bench and that too the Hon'ble Apex Court did not held that the order in W.P © No. 722/2019 will be applicable to all the cases pending before the NCLT Benches.

7. As far as the Judgments in Union of India Vs. R.Gandhi and Madras Bar Association Vs. Union of India (supra) is concerned, it deals with the constitution of the NCLT and NCLAT Benches in the Country and who should be appointed as President/Members etc and their qualification, age, selection criteria etc.. The constitutional validity of Chapters IB and IC of the Companies Act has been challenged in those cases. The Hon'ble Apex Court upheld the decision of the High Court that creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional and the Hon'ble Apex Court declared that Chapters 1B and 1C of the Act as presently structured, are unconstitutional for the reasons stated in the preceding para. However, Parts IB and IC of the Act, may be made operational by making suitable amendments, as indicated above, in addition to what the Union Government has already agreed in pursuance of the impugned order of the High Court providing for constitution of National Company Law Tribunal ('NCLT' or 'Tribunal') and National Company Law Appellate Tribunal

IA/159/KOB/2020 in IBA/31/KOB/2020

(`NCLAT' or `Appellate Tribunal'). In those cases, even though the constitution of the Bench has been referred to as Judicial and Technical, the issue raised by the applicant herein that Judicial Member alone cannot hear the case is not mentioned anywhere in the judgment. The facts and circumstances of the instant case is not similar to the facts and circumstances of the cases cited by the learned counsel for the applicant.

8.; In this connection, it may also be pointed out here that on the transfer of the then Technical Member to Hyderabad Bench of NCLT, the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi issued an order dated 1st June, 2020 with the approval of the President, which states:

“Consequent to order No.10/36/2016 dated 30.4.2020 the NCLT Kochi Bench is hereby reconstituted as under:

Single Bench at NCLT Kochi Bench:

Shri Ashok Kumar Borah, Member (Judicial) .

The constitution of Bench is as per Section 419(3) of the Companies Act, 2013.

This issues with the approval of Hon'ble President, NCLT.”

Section 419(3) of the Companies Act is quoted as under:

419(3): *The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member;*

Provided that it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench consisting of a single Judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify;

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President,

IA/159/KOB/2020 in IBA/31/KOB/2020

or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

9. A bare reading of the aforesaid provisions of law as well as the order of the NCLT, Principal Bench, which has been issued with the approval of Hon'ble President, makes it clear that even though the Bench of NCLT consists of two members, it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench, by a Single Judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may by general or special order specify. In regard to constitution of special Bench for NCLT, Kochi the Hon'ble President has issued the order under Section 419(3) of the Companies Act, 2013 authorising the Judicial Member to function as such. It may also be mentioned that by the aforesaid order, no direction is issued that the Special Bench of Member (Judicial) is not empowered to take up cases under the I.B.Code, 2016. Hence, in my considered view, the contentions raised by the applicant herein that a Single Member Bench cannot hear the IBC matters has no foots to stand and is liable to be dismissed. Hence, I do not find any reason to entertain the present IA filed by the Corporate Debtor, as it may further delay the CIR Process. Hence the **I.A. No. 159/KOB/2020 stands dismissed**, however without costs.

Dated the 8th day of October, 2020

Sd/-

(Ashok Kumar Borah)
Member (Judicial)