IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH III(IN REFERENCE)
NEW DELHI

CA.495(PB)/2019
With
CA No.223/ALD/2018
& CA.No.266/ALD/2018 in
CP No.(IB)77/ALD/2017

IN THE MATTER OF SECTION under Section 60(5)(c) of Insolvency and Bankruptcy Code, 2016).

In the matter of:

IDBI Bank Limited

...Financial Creditor

Versus

Jaypee Infratech Limited

....Corporate Debtor

Coram:

R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)

Counsel for the Applicant In CA.No.223/ALD/2018	**: Mr. Rahul Agarwal, Mr. Bishwajit Dubey, Mr. Uday Khare, Mr. Sharajit Banerji, Mr. Aditya Marwah,Advocates**

16.4.2019

Counsel for Respondent / Applicant in CA No.495/PB/ 2019 & CA No.266/ALD/2018 : **Mr. Sumit Batra, Mr. Sanjay Bhatt, Ms. Srishti Kapoor, Advocates.**

ORDER

1. Upon reference made by the Hon'ble President vide order dated 19.03.2019, in exercise of the powers under Section 419(5) of the Companies Act, 2013 in view of the difference of opinion expressed by Hon'ble Members, Allahabad Bench, NCLT between themselves, this Single Bench is seized of the above noted applications in CA No.223 of 2018 and CA No.266 of 2018 filed under Section 60(5)(c) of Insolvency & Bankruptcy Code, 2016 (IBC,2016) and the question framed by the Hon'ble Members over which they have expressed their differing opinion is as follows, as given in paragraph 1 of their Common Order dated 13.12.2018.

1.The question of law that has been raised in both applications, one by Nine Home Buyers Association and other by eight Financial Creditors, all of them being the members of Committee of Creditors (CoC) is whether the various threshold voting share fixed for the decision of the CoC under various sections of the I & B Code needs to be followed literally or whether they are only directory, and if so, what procedure has to be followed in determining the voting percentage among the CoC to pass a particular resolution.

2. The short facts as can be gleaned from the order itself for the above question being raised and which it had endeavored to answer based on the above two applications has been succinctly explained in the Common Order itself in view of a virtual stalemate encountered by the Financial Creditors comprising of three classes, namely, Home Buyers, Lenders and Fixed Depositors having the following voting percentages to the total debt of the Corporate Debtor which is not in dispute, viz.

Lenders	41.8%
Home Buyers	58.10%
Fixed Depositors	0.01%
Total	100%

3. The Common Order at paragraph 8 goes on to detail the ~~voting prescribed under the different provisions of IBC,2016~~

राष्ट्रीय कम्पनी विधि अधिकरण National Company Law Tribunal नई दिल्ली बेंच New Delhi Bench w.e.f. 06.06.2018 in the form of a table which is extracted as below for ready reference:-

S. No.	Subject	Percentage of vote of CoC after amendment
1	Withdrawal of applications admitted U/s 7,9 or 10 (Section 12A)	Section 12A Withdrawal of ongoing CIRP applications with 90% approval of CoC
2	Section 12(2) Application for extension of CIRP period 90days beyond 180 days	66% voting of CoC
3	Section 22(2) Appointment of IRP as RP	66% voting of CoC
4	Section 27(2) Replacement of RP	66% voting of CoC
5	Section 28(3) Approval of Committee of Creditors for certain action	66% voting of CoC
6	Section 30(4) Approval of Resolution Plan by CoC	66% voting of CoC
7	Section 33(2) Decision of the CoC to liquidate the Corporate Debtor	66% voting of CoC
8	Section 21(8), Voting threshold reduced to 51% for routine decisions from 75%	

4. Again the Common Order taking into consideration the above noted percentages of the different classes of Financial Creditors in the Corporate Debtor and the voting share prescribed under the different provisions of IBC,2016 goes on to detail the impasse encountered in the CIRP of the Corporate Debtor in the two CoC meetings held on 12.09.2018 and 17.10.2018 at paragraph 3 (a) and 3(b)of the Common Order which is to the following effect:-

3. (a) In the first meeting, six voting items were placed by the IRP before the CoC, out of which four voting items have been held to be rejected by the CoC on account of not having met the minimum voting threshold under the IBC, whereas two voting items were deferred. The table hereunder is illustrative of the result of the First CoC meeting:-

Voting Item No.	Voting item	Voting percentage required	Voting percentage achieved	Decision
1	Voting on appointment of Mr. Anuj Jain, IRP as RP and ratification of professional fees and IRP insurance	66%	5.58%	Rejected
2	Voting on reimbursement/Ratification of appointment of advisors/consultants and expenses incurred on or by IRP	51%	45.24%	Rejected
3	Voting on delegation of Authority by IP/RP-Section 28 Item	66%	44.66%	Rejected
4	Voting on approval of elated party transactions- Section 28 Item.	66%	45.79%	Rejected
5	Voting on acceptance of resignation of 5 Independent Directors – Section 28 Item	-	-	Deferred
6	Shortening of notice period from 5 days to 3 days	-	-	Deferred

3 (b) In the second meeting, total six voting items were tabled before the CoC. In the second meeting, barring one all other voting items were held to be rejected by the CoC on account of not having met the required voting threshold under the IBC. The table hereunder is illustrative of the result of the Second CoC meeting:-

Voting Item No.	Voting item	Voting percentage required	Voting percentage achieved	Decision
1	Appointment of Mr. Vijaykumar V.Iyer as RP	66%	57.2%	Rejected
2	Appointment of Deloitte Touche Tohmatsu India LLP("DTTILLP") to assist the RP	66%	57.3%	Rejected
3	Approval of fee of RP	66%	54.9%	Rejected
4	Approval of related party transactions- Section 28 Item	66%	37.8%	Rejected
5	Acceptance of resignation of 7 Independent Direct ors - Section 28 Item	66%	28.6%	Rejected
6	Approval of Form G (Invitation for expression of interest)	51%	53.3%	Passed

5. The common order brings out the fact that 9 out of 10 resolutions proposed seem to have been rejected in view of the poor response in voting by the Home Buyers as compared to the en masse participation by the Lenders which has lent to canvassing differing proposition by the Lenders as Financial Creditors on the one hand and Home Buyers on the other as opposed to IRP taking a differing view as extracted in paragraph 16,18,21 and 22 of the Common Order which is as follows:

> 16. It is stated by the Financial Creditors that the percentage of votes cast in favour or against a particular voting item ought to be calculated by taking into account only those votes that are actually cast and accordingly abstained votes should be disregarded.

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National Company Law Tribunal
सत्यमेव जयते
नई दिल्ली बैंच
New Delhi Bench

18. It is stated by the home buyers that in response to the representation made before the Authorized Representative, the IRP stated in the meeting the abstention in voting process would be counted as negative vote.

21. It is contended by the Home Buyers Association, the approach adopted by the IRP will militate against the very object and purpose of the Code. It is stated that in a situation like the present one wherein thousand of common people have invested their life's savings to procure a home for themselves, the Corporate Debtor's liquidation would be all the more undesirable. The Hon'ble Supreme Court in its decision dated 9.8.2018 while reviving the CIRP against the Corporate Debtor in Chitra Sharma v. Union of India, observed that:

> "During the course of hearing, there has been an unanimity of opinion that the liquidation of JIL will not subserve the interests of the home buyers".

22. The contention of the learned counsel appearing for the home buyers is that the home buyers are to be considered as a separate class of creditors as they have same goal and similar agenda, thereby forming a homogenous group amongst themselves, and the rule of majority in cases of voting by creditors in class should be made applicable for the purpose of CIRP of the Corporate Debtor.

6. The Hon'ble Allahabad Bench, NCLT after taking into consideration the relevant provisions of IBC,2016 in relation to voting share goes on to state at paragraph 30 of the Common Order and further seeks to break the impasse in the subsequent paragraphs as per the opinion of Hon'ble Judicial Member, as follows:-

30. The various provisions in the I & B Code prescribes particular percent of voting share of Financial Creditors for passing resolutions in COC. The concept of present and voting is neither expressly nor impliedly stated in any of the provisions of the I&B Code that

contemplated a particular percent of voting share of Financial Creditors is required for passing the resolutions. Therefore, it is necessary to examine, whether the concept of present and voting can be introduced by this Authority by way of purposive of interpretation.

41.In the case on hand, the home buyers as a class constituted 58.1% of voting share. The IRP so far conducted two CoC meetings, the first meeting on 7.9.2018 and the second meeting on 17.10.2018. The resolutions passed/rejected in the said meetings have been displayed in para3(a) and 3(b) of this order. A perusal of those tables goes to show that the majority of the resolution have not been passed because the percentage of total votes polled are not even meeting the required threshold percent of voting share for that particular resolution.

42.The Hon'ble NCLT, Principal Bench in M/s AMR Infrastructure Limited held that, in case where the CoC consist of only one class of creditors namely 'Real Estate', then the majority vote in favour of Resolution has to be taken into consideration irrespective of threshold of 66% provided in Section 22(2) of the Code. In the instant case there are multiple class of Financial Creditors in CoC.But more than 50% of the total voting share constitute a class of creditors namely 'Home Buyers/Allottees of Flats and Plots of Corporate Debtor. In the process of voting, each home buyer has got a vote, but the value of vote is based on value of verified claim due to him. Due to non-participation of majority of Home Buyers deadlock has been created in CIRP that may invariably lead to liquidation of Corporate Debtor. To avoid liquidation and to see that CIRP to proceed, following the rationale adopted in the decision in M/s AMR Infrastructure Ltd. a procedure need to be evaluated to further the objectives of I&B Code balancing the interests of various stakeholders in the Code.

47.Therefore, in order to advance the object of I&B Code and the Amendment Act 2 of 2018 and with a view to safeguard the interests of all classes of creditors and all stakeholders, I am of the considered view, " That in case where the CoC comprise Real Estate class of creditors up to 50 per cent of voting share or more than when there is a dead lock in passing the resolutions, the highest number of voting share in favour of resolution has to be taken into consideration without looking into the threshold limit provided under the various provisions of the I&B Code, except for the purpose of withdrawal of the petition, the approval of the resolution plan, and liquidation i.e under Section 12A,30(4) and 33(2) respectively, so that CIRP would continue for the time being in the meanwhile Central Government may bring amendment to the relevant provisions of I&B Code and CIRP regulations prescribing the procedure to be followed in determining the voting share for passing various resolutions where

> CoC comprise of Real Estate class of creditors 50% or more and when there is dead lock in passing the resolutions, or else the CIRP which remained static continue to be the same not only in this case, but in the cases of similar nature where Real Estate/ Home Buyers as a class that comprise majority percent voting share abstain from voting."

7. On the other hand the Hon'ble Member–Technical of Allahabad Bench has expressed opinion at paragraph 55 of the Common Order to break the impasse created in CIRP as follows:-

> 55. In the case on hand, even if all Banks and 17% of Home Buyers vote in favour of Resolution Plan, it will still not sail through as it would not receive mandatory voting percentage of 66%. Therefore, required important/crucial decisions will still fail U/s 12A, 30(4) and 33(2), bringing CIRP to a halt at these crucial stages. Therefore, the lasting solution to the problem of dead lock can only be found by treating Home Buyers as a class and their voting pattern taken with reference to total voting share of the class, to reflect the will of the class.

8. The differing opinions expressed has led the Hon'ble Members, Allahabad Bench to frame the question of difference of opinion being referred to the Hon'ble President, NCLT and thereby upon reference to this Single Bench. It is required to note that the main Company Petition filed by IDBI against Jaypee Infratech Limited led to the initiation of CIRP against the Corporate Debtor which led to the Home Buyers approaching the Hon'ble Supreme Court in the matter of

Chitra Sharma vs. Union of India in W.P (Civil) No.744 of 2017 as well as other connected Writ Petitions and reported in 2018 SCC Online SC874 and during the pendency of the Writ Petition, Insolvency and Bankruptcy (Amendment) Ordinance, 2018 came into effect from 06.06.2018 which was also taken note of by the Hon'ble Supreme Court while delivering the judgement dated 9.8.2018 and its apposite to note the directions issued by the Hon'ble Supreme Court at paragraph 42 of its judgement in Chitra Sharma's case, as follows:-

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42 We, accordingly, issue the following directions:

(i) In exercise of the power vested in this Court under Article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC;

(ii) We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors";

(iii) We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered;

(iv) JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29A;

(v) RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;

(vi) The amount of Rs 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT.

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In the above Writ Petition No. 744 of 2017 both the Central Government through Ministry of Corporate Affairs through its Secretary and the Regulator, namely, Insolvency and Bankruptcy Board of India, Chairperson were party respondents and pre-dominantly at whose instance the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 prior to Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 and the Amendment to the Regulations, namely, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 were effected and subsequently brought into force on and from 06.06.2018 and 03.07.2018 respectively.

राष्ट्रीय कम्पनी विधि अधिकरण National Company Law Tribunal सत्यमेव जयते नई दिल्ली बेंच New Delhi Bench

9. As evident from the above discussion, it is material to note that taking into consideration the purposive interpretation sought to be given in interpreting the relevant provisions of IBC,2016 and the relevant Regulations framed thereunder by Insolvency and Bankruptcy Board of India (IBBI) and opinion expressed by the Hon'ble Members, Allahabad Bench, this Reference Bench is of the considered view that a notice is required to be issued to the Central Government through Union of India, Ministry of Corporate Affairs, Secretary, 5th Floor, Shastri Bhawan, Dr. R.P.Road, District, New Delhi, Delhi as well as to Insolvency and Bankruptcy Board of India, Chairman, Union of India, 7th Floor, Mayur Bhavan, Shankar Market, District, Connaught Circus, New Delhi, Delhi to obtain their view taking into consideration the larger public interest involved and interpretation of the provisions having wider ramifications not only in relation to the present case but also extending beyond to other matters as well whether pending or in future under IBC,2016.

राष्ट्रीय कम्पनी विधि अधिकरण National Company Law Tribunal सत्यमेव जयते नई दिल्ली बेंच New Delhi Bench

Issue notice to authorities of the Application returnable by 22.04.2019 at the below mentioned addresses:-

(i) Union of India, Ministry of Corporate Affairs, Secretary, 5th Floor, Shastri Bhawan, Dr. R.P.Road, District, New Delhi, Delhi

(ii) Insolvency and Bankruptcy Board of India, Chairman, Union of India, 7th Floor, Mayur Bhavan, Shankar Market, District, Connaught Circus, New Delhi, Delhi

Process by Dasti permitted.

FREE OF COST COPY

Sd

(R.VARADHARAJAN)
MEMBER (JUDICIAL)

U.D.Mehta
15 /04/2019

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National Company Law Tribunal
नई दिल्ली बेंच
New Delhi Bench

16/4/19.

NIRMALA VINCENT
Court Officer
National Company Law Tribunal
Govt. of India, New Delhi