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NCLAT RULES THAT SUPERSEDED MEMBERS HAVE NO RIGHT OF PARTICIPATION IN COC MEETINGS

9 February 2022

The National Company Law Appellate Tribunal, New Delhi Bench (NCLAT) in *Dheeraj Wadhawan v The Administrator, Dewan Housing Finance Corporation Ltd.* held that 'supersession of directors' under the Reserve Bank of India Act, 1934 (RBI Act) is different from 'suspension of directors' under the Insolvency and Bankruptcy Code, 2016 (Code), and that a 'superseded director' on the vacation of office pursuant to supersession is neither entitled to the notice of the meeting of the committee of creditors (CoC) nor has a right to participate in such meeting.

Background

In November 2019, the Reserve Bank of India (RBI) exercised its powers under Section 45-IE of the RBI Act and superseded the Board of Directors (Board) (appellants Dheeraj Wadhwan and Kapil Wadhwan (Appellants) were the directors of Dewan Housing Finance Limited (DHFL)) on the grounds that the manner in which the business of DHFL was being carried out was detrimental to the interest of its creditors and depositors. Subsequently, the powers of the Board stood transferred to the administrator, who then initiated corporate insolvency resolution process (CIRP).

Post initiation of CIRP, the administrator proceeded with the CoC meetings without furnishing due notice of the CoC meetings along with documents and agenda to the Appellants. Aggrieved by the same, the Appellants approached the National Company Law Tribunal, Mumbai (NCLT). However, the NCLT, by passing relevant orders refused the request of the Appellants (i) to be allowed to attend meetings of the CoC as a member of the erstwhile Board; and (ii) to be furnished with a copy of the resolution plan.

Aggrieved, the present appeals, *Company Appeal (AT) (Insolvency) No. 785 of 2020* (Dheeraj Wadhawan v The Administrator, Dewan Housing Finance Corporation Ltd.) and *Company Appeal (AT) (Insolvency) No. 647 of 2021* (Kapil Wadhawan v The Administrator, Dewan Housing Finance Corporation Ltd. & Anr.) were respectively filed.

Submissions before NCLAT

Submissions of Appellants: The Appellants contended the following:

- The Code provides for the right of an erstwhile Board to participate in the meeting of the CoC and be provided with the relevant documents. The fact that

the Board was superseded before the initiation of CIRP will have no impact on such a right.

- The reliance upon a literal difference between 'suspension' and 'supersession' and the understanding of the NCLT that suspension is a temporary eclipse and supersession is a permanent eclipse is wholly misconceived. NCLT has ignored the change in position brought by insertion of Section 29A of the Code which bars the erstwhile Board from reappointment which places them in the same position as a superseded Board.

Submissions of Respondent: The Respondent contended the following:

- On a plain reading of Section 45-IE(4) of the RBI Act, it is clear that upon exercise of the powers under Section 45-IE(2), the Board, including the Appellants, vacated their office and all power were vested with the administrator. Therefore, there was no Board existing on the date of admission of the company petition.
- Under Section 24(3)(b) of the Code, notice of each meeting of CoC is required to be given to the "suspended" directors and it is a clear intent of the Code that those directors who hold office on the date of commencement of the CIRP and whose powers stand "suspended" on appointment of the interim resolution professional as per Section 17(1)(b) are entitled to receive notice of the meeting of CoC. However, the same does not extend to the directors who have already been removed, dismissed, deemed to have vacated office, or suspended by reasons of any other act and who do not hold office prior to the CIRP commencement date.

Findings and Observations (Judgment)

'Supersession of directors' under the RBI Act v. 'Suspension of directors' under the Code

The NCLAT observed that upon exercise of the powers under Section 45-IE of the RBI Act by the RBI, the Board vacates their office, and such vacation has finality attached to it. Further, if at a subsequent stage, such persons of the Board are appointed, then it shall be treated as a fresh/new appointment and not a continuation of the original offices as directors of the company. In such a scenario, the Appellants' contention that suspension of powers of the Board under Section 17(1)(b) of the Code may also have the 'legal effect' of the said directors vacating office is irrelevant and a mere red herring since 'suspension' and 'supersession' are distinct concepts in law.

It was further noted by the NCLAT that the Hon'ble Supreme Court in *Vijay Kumar Jain v Standard Chartered Bank (2019 SCC Online SC 13)* (Vijay Kumar) has clearly laid down that a director simpliciter can participate in the CoC of the corporate debtor. However, as the 'superseded' directors are those directors who have been removed or deemed to have demitted office and who are not holding the position of director on the CIRP commencement date, they cannot be considered a director simpliciter to benefit from participating in the meeting of CoC. Therefore, the 'superseded' Board cannot claim parity with the 'suspended' Board as the former has vacated the office, while the latter always remains on the Board to assist in the CIRP as per the requirements of the Code.

Further, the NCLAT held that in *Vijay Kumar* no view was expressed on whether persons who have already vacated their offices as directors before the appointment of the interim resolution professional are entitled to notice and participation in CoC meetings.

Additionally, given the above reasoning, the 'superseded' Board is not entitled to a copy of a resolution plan. However, the NCLAT also noted that the copy of the resolution plan after approval from the adjudicating authority cannot be treated as a confidential document. Therefore, after final approval of the resolution plan, its certified copy can be issued in accordance with the relevant rules.

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