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## CAN A MEMBER OF COMMITTEE OF CREDITORS (OR ITS PROMOTERS) FILE A RESOLUTION PLAN AND ALSO VOTE ON THE RESOLUTION PLANS OF OTHER APPLICANTS? - HIGH COURT OF DELHI TO DECIDE.

31 January 2022

### CONSTITUTIONAL VALIDITY OF PROVISIO TO SECTION 30(5) OF THE IBC UNDER CHALLENGE

In a writ petition titled *M/s Experion Developers Pvt. Ltd. v. Union of India & Ors.*<sup>1</sup> (“**Writ**”) filed before the Hon’ble High Court of Delhi (“**DHC**”), the constitutional validity of the proviso to Section 30(5)<sup>2</sup> of Insolvency and Bankruptcy Code, 2016 (“**Code**”) has been challenged as being arbitrary, unreasonable, and contrary to the ethos and prime objective of the Code.

#### **Background**

The Petitioner, Experion Developers Private Limited (“**Experion**”), is one of the prospective resolution applicants (“**PRAs**”) in the Corporate Insolvency Resolution Process (“**CIRP**”) of Dignity Buildcon Private Limited (“**Dignity/ CD**”) which is the Corporate Debtor in proceedings pending against it before the Hon’ble National Company Law Tribunal, New Delhi (“**NCLT**”).

During the insolvency process, multiple resolution plans were submitted. One such plan was also submitted by the promoters of one Alchemist Asset Reconstruction Company Limited (“**Alchemist**”) namely, Alok and Madhav Dhir (“**Dhirs**”). Alchemist was a financial creditor as well as one of the members of Committee of Creditors in the CIRP of

<sup>1</sup> W.P (C) 1107/2022

<sup>2</sup> Section 30. Submission of resolution plan-

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(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered: Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

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Dignity. Subsequently, plans submitted by four Prospective Resolution Applicants, viz, Dhirs, Experion, Sattva and M3M were put to voting before the CoC, but none of them received the stipulated 66% votes, mandatorily required for the approval of any resolution plan. In fact, both Experion and Sattva received 64.66% votes and fell marginally short of the requisite 66% votes on account of Alchemist not voting in favour of their resolution plans. Hence, the resolution professional moved the NCLT for liquidation of Dignity.

Simultaneously, Experion moved an application<sup>3</sup> before the NCLT praying that since Alchemist has 35.36% of voting rights in the CoC, it is ensuring that no resolution plan is approved other than that of Dhir's, who are its promoters and therefore, Alchemist should be precluded from voting. While disposing of this application, the NCLT vide order dated 01.10.2021 directed the CoC to reconsider resolution plans of two PRAs but failed to mention the name of these two PRAs. The RP sought clarification in this regard by way of a clarification application and the NCLT vide order dated 25.11.2021 stated that no clarification of its order dated 01.10.2021 is required as the two PRAs are Experion and another one which has received 64.66% of voting shares, i.e., Sattva. With this observation, the NCLT disposed of the clarification application.

Aggrieved by the order dated 25.11.2021 read with earlier order dated 01.10.2021 ("**Impugned Orders**"), Alchemist and Dhirs preferred two appeals before the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") contending that the order dated 25.11.2021 is virtually a review of the order dated 01.10.2021 and not a clarification order. The appellants contended that vide order dated 01.10.2021, the two PRAs whose resolution plans were to be considered by the CoC, were Experion and Dhirs and not Experion and Sattva as was held in the order dated 25.11.2021 Contextually, it was submitted that the NCLT vide order dated 25.11.2021 had made improvements in its order dated 01.10.2021, due to which no other plan can be put to vote. It was also contended that Sattva had withdrawn its plan on 07.05.2021 and therefore, the NCLT could not have directed the CoC to consider Sattva's plan. The NCLAT vide order dated 21.12.2021<sup>4</sup>, directed all the four resolution applicants viz, Dhirs, Experion, Sattva and M3M to submit their revised plans within 15 days which would then be put to voting before the CoC.

### ***Proceedings before the Supreme Court***

Thereafter, Experion appealed against the said order of NCLAT before the Hon'ble Supreme Court ("**SC**"), but the SC did not interfere with the order of NCLAT and dismissed the said appeal, granting further extension of 15 days to Experion to file its revised plan as per the order of NCLAT.

### ***Proceedings before the DHC***

Having exhausted all its statutory remedies of appeal, Experion has now challenged the constitutional validity of proviso to Section 30(5) of the Code before the DHC. It is essential to note that during the proceedings before NCLAT, Experion had duly pointed out that owing to Alchemist's vested interest in the resolution plan put forth by the Dhirs (its Promoters), Alchemist did not vote for Experion's resolution plan although it had the best plan to maximize the value of Dignity. The NCLAT, however, made no observations upon the same.

It was submitted before the DHC that where a member of the CoC votes on a resolution plan wherein it has a direct or an indirect personal interest, such member is bound to take a biased decision, even if any other plan is better in terms of payment, viability and feasibility. Therefore, Alchemist being one of the members of CoC had a personal interest in

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<sup>3</sup> I.A. No. 1342/2021 in CP No. (IB)/1689/2018

<sup>4</sup> Comp. App. (AT) (Ins.) No. 1026 of 2021

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the approval of resolution plan submitted by its own promoters, Dhirs. Further, it was contended before the DHC that especially in cases where such member of CoC has a substantial voting right, such member could vote against any other resolution plan and force the corporate debtor into liquidation which could defeat the entire objective of the Code.

After hearing the parties, the DHC vide order dated 18.01.2022 has issued notice to all parties and restrained the CoC from voting on any resolution plan till the next date of hearing. The writ is next listed on 18.02.2022.

- ***Shubham Saxena (Senior Associate), Srishti Gupta (Associate) and Priyanka Gupta (Associate)***