

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

**IA No.529/KB/2021
in
CP (IB) No.1568/KB/2019**

In the matter of:

Application under section 60(5) of the Insolvency and Bankruptcy Code, 2016.

and

In the matter of:

Onemax Yarn Merchants Private
Limited

...Financial Creditor

Versus

Nandlal Kamal Kishore Vyapaar
Private Limited

...Corporate Debtor

And

In the matter of:

Ajay Kumar Agarwal (*RP of
Nandlal Kamal Kishore Vyapaar
Private Limited*)

...Applicant

Date of hearing: 06.07.2021

Date of pronouncement: 03.08.2021

Coram:

Shri Rajasekhar V.K. : Member (Judicial)

Shri Harish Chander Suri : Member (Technical)

Appearances (through video conference):

For the Applicant : 1. Mr. Sourojit Dasgupta, Advocate
2. Mr. Ajay Kumar Agarwal, RP in
person

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. **IA/529/KB/2021** is an application filed by the Resolution Professional (RP) under section 60(5) for exclusion of period starting on the date of

commencement of CIRP till the availability of books of accounts and details from the personnel of the Corporate Debtor.

2. Learned counsel appearing for the RP submits that the RP had placed the agenda for appointment of transaction auditor before the Committee of Creditors (CoC) in its second and third meeting held on 09.04.2021 and 16.04.2021, respectively. However, the CoC suggested that the RP first to form an opinion under regulation 35A of Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution for Corporate Persons) Regulations, 2016 (***CIRP Regulations***).
3. Due to the non-availability of information and books of accounts of the Corporate Debtor, the RP is unable to form an opinion and come to a determination under the said regulation. Therefore, on the suggestion of the CoC, the RP has filed the present application praying for exclusion of period starting on the date of commencement of CIRP till the availability of books of Accounts and details from the Corporate Debtor, so that the RP gets sufficient time to form an opinion and determination under the said regulation.
4. We have heard the learned counsel appearing for the Resolution Professional.
5. The reason advanced for seeking exclusion of time is flippant, to say the least. The Insolvency and Bankruptcy Code, 2016 (***the Code***) and the CIRP Regulations provide for a procedure for formation of opinion and determination towards transactions being preferential, undervalued, extortionate or fraudulent, or any combination thereof, by the RP. However, it is the RP's case that he was asked by the CoC to form an opinion concerning the transactions being of any nature as aforesaid before appointing the transaction auditor. While the CoC is correct in so far as following the procedure is concerned, we have time and again held that it is a duty bestowed upon the RP to form an independent opinion and determination and not for the CoC to suggest or advise the RP whether an opinion is to be formed or an application praying for reliefs against the transactions of such nature.

6. If an independent opinion or determination is not formed by the RP within the stipulated time-period for whatsoever reason, he is under liberty to approach this Adjudicating Authority for appropriate relief under the applicable provision of law. However, an application for exclusion of time to form an opinion, in our considered view, is not the appropriate course to adopt.
7. The Learned counsel for the RP submits that since 02.02.2021, *i.e.*, the date of commencement of CIRP, the RP has been the member of the suspended board of directors through “email” and “speed post,” however they have “failed” to provide the possession of assets, books of accounts and other required details to the RP. It was, therefore, not possible for the RP to form an opinion. Learned counsel further submits that an application under section 19(2) has been filed by the RP before the Adjudicating Authority on 23.03.2021.
8. Section 19 provides for the personnel of the Corporate Debtor to cooperate with the interim resolution professional and if they do not cooperate, an application may be preferred under sub-section (2) thereof. Although the application under section 19(2) has been filed in the present case, it has not been pressed for hearing so far. Filing an application does not absolve the RP of his duties but he also has to pursue the application diligently, which has not been done in the present case.
9. Moreover, although a provision for filing of application against the non-cooperating members has been provided for in the Code, the same shall not be resorted to unless the professional has discharged his duties proactively and diligently. The duty cast upon the IRP and the RP under sections 18 and 25 of the Code are not empty formalities that the professionals have to discharge just for the sake of doing it. Section 25(2) provides, *inter alia*, for the RP to take custody and control of all the assets of the Corporate Debtor, including the business records of the Corporate Debtor. In the present case, all that the RP has done is contact the member of the suspended board through email and

speed post. The utter lack of seriousness on the part of the RP in discharging his duties under the Code is appalling.

10. It is not so much for the members of the suspended board of directors to “give” the custody and control of assets and documents of the Corporate Debtor as much it is the responsibility of the RP to “take” it. We, however, are not suggesting that the member of the suspended board should not give the custody and control of the assets and documents of the Corporate Debtor and wait for the RP to take it from them. Our only point is this: the RP has to demonstrate that he has discharged his duties and yet failed in getting the custody and control of assets and documents of the Corporate Debtor.
11. Coming back to the point of exclusion, although a discretion has been provided to the Adjudicating Authority to enlarge the time for completion of CIRP, the discretion is to be used sparingly and judiciously in cases where the Applicant demonstrates that the Corporate Debtor is only a few days short of achieving a resolution by way of a resolution plan and that it would be in the interest of all stakeholders that the Corporate Debtor be put back on its feet instead of being sent into liquidation.¹
12. In the matter at hand, however, it is not the case of the Applicant that the Corporate Debtor is on the verge of resolution. In fact, as per the application, the RP has only issued the final list of prospective resolution applicants on 17.05.2021. The Corporate Debtor is far from resolution at this point of time.
13. Even if we are to enlarge the time period for conduct of CIRP, the ground adduced by the RP in the present application borders ludicrousness. We are not convinced that prayer for exclusion of time that too for an uncertain period (*starting on the date of commencement of CIRP till the availability of books of Accounts and details from the Corporate Debtor*) can be allowed in order to facilitate the RP to form an Opinion under regulation 35A of the CIRP

¹ *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.*, 2019(16)SCALE319.

regulations. Therefore, the present application is not only incomplete but is also farcical considering the ground on which it has been filed. We are not inclined towards granting the prayer made in the application.

14. We, therefore, reject the prayer made by the RP. The result is that **IA/529/KB/2021 shall stand dismissed as misconceived and devoid of merit.**
15. The Registry is directed to send a copy of this order to the IBBI for examination of the actions of the RP and for issue of appropriate directions to the insolvency professionals, if deemed necessary.
16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

03.08.2021

SR(LRA)