

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

IA. 1742/ND/2021
IN
Company Petition No. (IB)-894(ND)/2019

IN THE MATTER OF:

Ram Niwas & Sons.

...Operational Creditor

Versus

M/s Palm Developers Pvt. Ltd.

...Corporate Debtor

AND IN THE MATTER OF:

**Insolvency and Bankruptcy Board of India,
2nd Floor, Jeevan Vihar Building
Parliament Street
New Delhi-110001**

...Applicant

Versus

**Mr. Manoj Kumar Singh, IRP
Palm Developers Pvt. Ltd.
203, 2nd Floor, 10 Sikka Complex
Community Centre, Preet Vihar
New Delhi-110092**

...Respondent

Order Delivered on: 13.07.2021

SECTION: 60(5) of IBC 2016 Read with Rule 11 of NCLT Rules 2016

CORAM :

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENTS:

For the Applicant : Mr. Abhishek Kumar, Advocate

For the Respondents : Mr. Barun Kumar Sinha, Advocate for IRP

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

The present I.A. No. 1742 of 2021 is preferred by the Applicant/Insolvency and Bankruptcy Board of India (hereinafter referred as **“Applicant/IBBI”**) under Section 60(5) of IBC, 2016 (for brevity, **“Code”**) read with Rule 11 of NCLT Rules 2016 for seeking appropriate direction for replacement of Mr. Manoj Kumar Singh, Interim Resolution Professional (hereinafter referred to as **“IRP/ Respondent”**) of the Corporate Debtor i.e., Palm Developers Pvt. Ltd. with another Insolvency Professional (IP).

2. That the Applicant/IBBI has made the following prayers in the application under consideration :

- “a) allow the application and Replace Mr. Manoj Kumar Singh as the Interim Resolution Professional with another Insolvency Professional from the list of panel Insolvency Professionals ; and/or*
- b) pass any such orders, which this Hon’ble Tribunal may deem fit and proper to pass in the circumstances of the case.”*

3. To put succinctly, facts of the case are that the Operational Creditor, M/s Ram Niwas and Sons had filed an application bearing no IB-894(ND)/2021 under Section 9 of IBC 2016 for initiation of CIR Process against the Corporate Debtor M/s. Palm Developers Pvt. Ltd. This Adjudicating Authority, vide Order dated 27.01.2019, had initiated the CIR Process against the Corporate Debtor and appointed Mr. Manoj Kumar Singh as the IRP of the Corporate Debtor.

4. It has been submitted by the Applicant/IBBI that it is a statutory body established under Section 188 of IBC 2016. It is added that the IBBI, being a regulatory body, frames regulations and thus regulates both the insolvency professionals as well as processes. It has regulatory oversight over the service providers under the Code namely, Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities and Information. It is further submitted that Section 196 of the Code entails various powers and functions of IBBI including regulation of the working and practices of Insolvency Professionals and other service providers and monitoring of their performance.

5. That the main grievance of the Applicant/IBBI is “...that Mr. Manoj Kumar Singh, IRP has neither made efforts in managing the operations of Corporate Debtor as a going concern nor performed the duties casted upon him under the Code to complete the CIR Process, nor complied with the directions of the Hon’ble Adjudicating Authority” (para 8 on page 13 of the Application). It is further added that that inspection has also been initiated against the IRP by the IBBI.

6. That the IBBI, vide para-5 of its Application, has submitted the following in support of its contention :

- (i) That vide order dated 28.02.2020, this Adjudicating Authority had observed, inter alia that “...where the COC was constituted with two Corporate Guarantors who do not have a cause of action, no further steps shall be taken in the meeting of the COC till the voting percentage is ascertained.” The order passed by the Adjudicating Authority on 28.02.2020 is reproduced overleaf :

NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI

COURT-II

(IB)-894(ND)2019

CORAM:

**PRESENT: MR. L.N. GUPTA
HON'BLE MEMBER(T)**

**MS. INA MALHOTRA
HON'BLE MEMBER (J)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE NEW
DELHI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON
28.02.2020**

**NAME OF THE COMPANY: Ram Niwas & Sons V/s. M/s. Palm Developers
Pvt. Ltd.**

UNDER SECTION 9 OF IBC, 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
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Present for the Petitioner :	Mr. Raghavendra Bajaj, for Mr. Mr. Abhinav Mukherjee, Advocate
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ORDER

IA 1610/2020 has been filed under Section 60(5) of the Code. The grievance of the applicant is that the claim of the two Corporate Guarantors has been considered by the RP which has caused prejudice to the claim of the Financial Creditor in terms of the percentage of their voting rights in the COC. Ld. Counsel has relied upon the decision of the Hon'ble Apex Court in Civil Appeal No. 8512-8527/2019 in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited V/s. Axis Bank Ltd., wherein it has been observed that a secured creditor need not necessarily fall within the category of a financial claimant.

The Corporate Guarantees have not been invoked as yet. As such the claim has not culminated in a debt. Till such time, a financial debt crystallizes, its claim is unsustainable, much less vest the Corporate Guarantors to be members of the COC.

In view of the aforesaid situation where the COC has been constituted with Corporate Guarantors who do not have a cause of action, no further steps

shall be taken in the meeting of the COC till the voting percentage is ascertained.

The IRP is restrained from holding a meeting of the COC or putting any agenda to vote physically or online, till the constitution of the COC is ascertained. Notice be issued to the IRP returnable on 5th March 2020. Dasti.

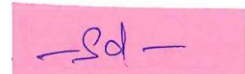
It is also brought to the notice of this Bench that the IRP has not taken any steps as mandated under the Code nor taken any steps to take over the assets of the Corporate Debtor till date.

Further, there is no report filed before this Bench as to how many units have been allotted and whether all allottees have been notified. This is required to ensure the appointment of the authorized representative of all flat owners in the COC. List of allottees be furnished by the IRP along with proof of intimation. Further, the names of the 3 IRPs proposed shall be given with the name of the IRP getting the highest number of votes to be appointed as the AR be filed by way of an affidavit along with the voting pattern.

IAs 1448/2020 and 1449/2020 be listed on the next date of hearing i.e. 5th March 2020.



(L.N. Gupta)
Member (T)



(Ina Malhotra)
Member (J)

- (ii) That the Adjudicating Authority, in the aforesaid Order had also noted that it is also brought to the notice of this Bench that the IRP has not taken any steps as mandated under the Code nor taken any steps to take over the assets of the Corporate Debtor till date.
- (iii) That further, vide its order dated 07.09.2020, the Adjudicating Authority modified its order dated 28.02.2020 to the extent that “the IRP is allowed to proceed in the matter in accordance with the provisions of the IBC”. The order dated 07.09.2020 is reproduced overleaf :

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI

COURT-II

**Item No. 209
(IB)-894(ND)2019
IA/3541/2020**

IN THE MATTER OF:

Ram Niwas & Sons

... Applicant/Petitioner

Vs.

M/s. Palm Developers Pvt. Ltd.

... Respondent

Under Section: 9 of IBC, 2016

Order delivered on 07.09.2020

CORAM:

**SHRI. CH. MOHD.SHARIEF TARIQ,
HON'BLE MEMBER (J)**

**SHRI. L. N. GUPTA,
HON'BLE MEMBER (T)**

PRESENT:

**For the Applicant : Mr. Abhijeet Sinha, Mr. Raghavendra Mohan
Bajaj, Mr. Nikhil Bimal, Mr. Avi Srivastava, Mr.
Sanskar, Advs. Ms. Anveena Sharma, Adv. for
Financial Creditor**

For the Respondent : None.

ORDER

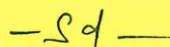
IA/3541/2020 : Counsel for the Financial Creditor present and prayed to list IA 1610/2020 for early hearing. The prayer is allowed.

The Registry is directed to list IA 1610/2020 for the purpose of hearing. It is made clear that the order dated 28th February 2020 is hereby modified to the extent that the IRP is allowed to proceed in the matter in accordance with the provisions of the IBC. However, he is restrained from declaring the status of Respondent in IA 1610/2020 till further orders.

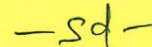
At this stage, Counsel for the Respondent in IA 1610/2020 is present. She is directed to file reply in the said IA within 10 days by giving an advance copy to the Counsel for the Applicant. The Counsel for the Applicant can file rejoinder, if any.

The Counsel for the Applicant is directed to send notice to the IRP for his personal appearance through video conferencing in the matter.

List the matter on 25th September 2020.



**(L. N. GUPTA)
MEMBER (T)**



**(CH. MOHD.SHARIEF TARIQ)
MEMBER (J)**

- iv) That despite the directions passed vide order dated 07.09.2020 by this Adjudicating Authority, the IRP did not proceed further in the matter.
- v) That the IBBI has received complaints against the IRP for his failure to initiate CIRP despite directions of this Adjudicating Authority and thereby defeating the purpose/object of the Code.

- vi) That in this regard, the Applicant/IBBI sought response from the IRP, who vide email dated 01.03.2021 replied that one meeting of CoC has taken place. He further stated that to convene a meeting of CoC, it is necessary to constitute CoC for which he needs to finalise the status of respondents - Edelweiss & IDBI, a matter which is pending adjudication in IA No. 1610/2020 before the Adjudicating Authority.
- vii) That the CoC could have been constituted with the members, whose claims were verified (i.e., the creditors in class). The issue of claims of the Corporate Guarantors is a separate issue, which cannot be a reason for the IRP to stall the entire CIR Process.
- viii) That the IRP could have functioned with the remaining members of CoC instead of delaying the CIR process despite the order dated 07.09.2020 of the Adjudicating Authority to proceed in the matter in accordance with the provisions of the Code. The CIR process has been delayed by 175 days.

7. That the Respondent/IRP has filed its Reply & Written Submissions and opposed the prayers made by the IBBI by submitting the following :

- (i) That the present Application filed under Section 60(5) of IBC 2016 is not maintainable since the aforesaid Application is preferred against the IRP and not against the Corporate Debtor, which is not the purport of Section 60(5) of the Code. Further,

IBBI herein is not a party to the CIR proceedings and is making submissions as an 'intervener'.

- (ii) That the replacement of IRP sought by the IBBI is contrary to the provisions of Section 16(5) of IBC 2016. It is added that the tenure of the IRP can be cut short only by procedure established by law. The proceeding for inspection initiated under IBBI (Inspection and Investigation) Regulations, 2017 is underway.
- (iii) That the Covid -19 Pandemic has been the root cause for delay in disposal of IA No. 1610 of 2020 and other Applications filed by the IRP. Therefore, the delay in disposal of the IA No.1610 of 2020 and the consequent delay in the CIRP cannot be attributed to the IRP by the IBBI for seeking his removal.
- (iv) That as per the timelines prescribed in the Code, the CIRP is to be concluded within a period of 330 days including any litigation period. In the present matter, the CIRP was initiated on 27.01.2020 and further progress was stayed on 28.02.2020 by this Tribunal. IRP has moved an application before this Tribunal praying for extension of time vide IA No. 1468 of 2021.
- (v) That the respondent/IRP has been performing his statutory duties after the Order date 07.09.2020 of this Tribunal, viz.,
 - a. Visiting project site on regular basis to preserve and protect the assets of the corporate debtor.

- b. Continuing security services without finance. Now, Security agency has given termination notice to not to provide security services w.e.f. 17.05.2021.
- c. Liaising with electricity department for restoration of electricity connection but they are demanding their previous payment.
- d. Regularly updating the creditors about the CIRP process, responding their query/concern, receiving and collating the claims submitted by creditors.
- e. Continuing CIRP since 27.01.2020 without any finance especially when IRP is not allowed to give instruction to financial institution for debit balance, raise interim finance, change the term of auditor to conduct audit for the period from April 1, 2019 to 27.01.2020 and from 28.01.2020 to March 31, 2020 and so on, and change in management.

(vi) That the he IBBI has failed to point out and plead any specific provision of the Code or the regulations of which the IRP has been guilty of allegedly violating. Pleadings are the cornerstone of submissions and without having specifically pleaded any violation, the IRP cannot reply to the same.

8. We have perused the averments made by the Applicant/IBBI in its Application and the reply & written submissions filed by the IRP. We have also heard the Ld. Counsels of both the parties at length on 04.06.2021.

9. That the issue raised by the Respondent/IRP regarding the maintainability of the present Application filed under Section 60(5) of IBC

2016 needs to be examined first. For this, we feel it necessary to visit the provisions of Section 60(5) of IBC 2016. The same are reproduced below :

“Section 60 : Adjudicating Authority for Corporate Persons -

(1)
(2)
(3)
(4)
(5) *Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal **shall have jurisdiction** to entertain or dispose of -*

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

*(c) **any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution** or liquidation proceedings of the corporate debtor or corporate person under this Code.”*

10. That from the plain reading of the contents of Section 60(5)(c) of IBC 2016, it is evident that this Adjudicating Authority is empowered to decide any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor. That the scope of Section 60(5)(c) of IBC 2016 has been discussed by Hon’ble Supreme Court in its Judgement dated 08.03.2021 in the matter of **Gujarat Urja Vikas Nigam Limited Vs Mr. Amit Gupta & Ors in Civil Appeal No. 9241 of 2019**. The relevant paragraph of the same is reproduced below :

87. *The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to*

*adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a 'going concern'. We hasten to add that our finding on the validity of the exercise of residuary power by the NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by the NCLT. However, it is pertinent to mention that the NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in **Satish Kumar Gupta** (supra)."*

11. That in the light of the aforesaid Judgement of the Hon'ble Apex Court, it is observed that this Adjudicating Authority can exercise its powers under Section 60(5)(c) of the Code to adjudicate any question of law or fact arising from or in relation to the insolvency resolution proceedings only. That the context and prayer made out in the present Application raises a question which will result in deciding "whether the current IRP or some other Insolvency Professional will manage the affairs of the Corporate Debtor and carry forward the CIR process". That in the normal scenario, only the CoC is empowered to consider and recommend change of the IRP under Section 22 and 27 of IBC 2016. However, in the

present case when the meeting of CoC has not been convened subsequent to its first meeting held as back as on 26.02.2020, keeping this unusual situation in mind, we observe that the prayer made by the Applicant/IBBI raises a question of priority in relation to the CIR Process of the Corporate Debtor, which deserves to be decided on merits and the same is in line with Section 60(5)(c) of the Code. Further, the issue raised by the IRP that the present Application filed under Section 60(5) of IBC 2016 against him is not maintainable does not merit consideration as the IBC Proceeding is a proceeding in rem. If the prayer made in the current IA is allowed, it will have a direct impact on preserving the value of the corporate debtor, its status as a 'going concern' and the CIR Process of the Corporate Debtor as a whole. Therefore, we are of the view that the present Application is maintainable.

12. Now, we visit the order of this Adjudicating Authority dated 28th Feb, 2020 and find that *inter alia* this Bench had observed the following :

"It is also brought to the notice of this Bench that the IRP has not taken any steps as mandated under the Code nor taken any steps to take over the assets of the Corporate Debtor till date.

Further, there is no report filed before this Bench as to how many units have been allotted and whether all allottees have been notified. This is required to ensure the appointment of the authorized representative of all flat owners in the COC. List of allottees be furnished by the IRP along with proof of intimation. Further, the names of the 3 IRPs proposed shall be given with the name of the IRP getting the highest number of votes to be appointed as the AR be filed by way of an affidavit along with voting pattern."

From the aforesaid observation in the order dated 28.02.2020, it is evident that on that occasion too, inadequacies/lapse on the part of IRP were noticed by this Adjudicating Authority. Further, the IRP has neither placed anything on record nor stated anything in his reply in compliance of the aforesaid observation/directions.

13. That on a specific query raised by this Bench regarding furtherance of the CIR process or convening CoC meetings after the order of this Adjudicating Authority dated 07.09.2020, Ld. Counsel appearing for the IRP submitted that no meeting of CoC has been convened post the order dated 07.09.2020. He further submitted that there was an ambiguity in the order dated 07.09.2020. On a further query raised by this Bench whether they had preferred any application before this Adjudicating Authority for seeking clarification on the so-called ambiguity in the order 07.09.2020, the Ld. Counsel for the IRP replied that no such step was taken.

14. That in the light of the above submission, we go through the order of this Adjudicating Authority dated 07.09.2020, which inter alia, records the following:

“The Registry is directed to list IA 1610/2020 for the purpose of hearing. It is made clear that the order dated 28th February 2020 is hereby modified to the extent that the IRP is allowed to proceed in the matter in accordance with the provisions of the IBC. However, he is restrained from declaring the status of members of Respondents in IA 1610 of 2020.”

Thus, vide order dated 07.09.2020, this Adjudicating Authority has made it clear that the order dated 28th February 2020 is hereby modified to the extent that the IRP is allowed to proceed in the matter in accordance with the provisions of the IBC. We, therefore, find no ambiguity in the order.

15. That further, we are of the firm view that the dispute about the status of two Corporate Guarantors cannot be taken as ground to stall the entire CIR Process especially when (a) there are other Financial Creditors present, who have filed their claims, whose claims are verified and who have been found eligible to be part of the CoC, and (b) this Adjudicating Authority vide its order dated 07.09.2020 has made it clear to allow the IRP to proceed in the matter in accordance with the provisions of the IBC.

16. That the Respondent/IRP has not been able to give any cogent reasons for not being able to carry forward the CIR process and as to why no meeting of CoC with the remaining Financial Creditors could be convened after the order dated 07.09.2020.

17. That the CIR Process is a time bound process involving certain common steps those need to be performed by every IRP/RP like Appointment of valuers, Issuance of Form-G, Evaluating and placing Resolution Plan before CoC etc and for performing such mandated tasks, it is necessary that the CoC is in operation. The non-performance of the aforesaid steps within the prescribed time lines will make the entire CIR Process infructuous, which per force will drive the Corporate Debtor into Liquidation eventually.

18. Further, the defence taken by the Respondent/IRP that he cannot be removed by virtue of the immunity granted to him under Section 16(5) of IBC, 2016 will not support the case of IRP. Since the IRP himself has made the CoC inoperative by not convening its meeting post 07.09.2020. Further, by not allowing CoC to function, the Respondent/IRP has effectively prevented the COC to consider and take decision either for his confirmation as RP or replacing him by another Resolution Professional.

19. In view of the above and in an extra-ordinary situation, where the Respondent/IRP has neither conducted any meeting of CoC despite clear direction and vacation of stay on functioning of CoC by this Adjudicating Authority vide order dated 07.09.2020 nor taken concrete steps for carrying forward the CIR Process in accordance with the provisions of the IBC though a period of 309 days have elapsed in the meantime against the statutory initial timeline of 180 days, we are of the opinion that this a case of abuse of the process of the IBC/Tribunal and in order to protect the interest of the Corporate Debtor and its stakeholders, and for furtherance of the CIR Process, it has become inevitable to grant the prayer of IBBI for replacement of the present IRP.

20. That in a similar situation, this Bench has exercised its power under Rule 11 of NCLT Rules, 2016 for appointing the IRP vide order dated 05.04.2021 in the matter of **Indu Kumar & Ors Vs Saha Infratech Pvt. Ltd. : IA 3896, 3898, 3371, 3912 of 2020 in IB-1781/(ND)/2018.**
The relevant extract of the order is quoted overleaf :

“45. Of course, neither under Section 22 nor under Section 27 of the IBC, there is a provision for replacement of the IRP on the prayer made by a person, who is not a party to the proceedings. As we noticed earlier that even the applicants on whose application the CIRP was initiated did not take any steps for the replacement of the IRP.

46. Considering the peculiar facts and circumstances of this matter and specifically in the light of the directions given the Hon'ble NCLAT in the Company Appeal No. 166/2020, which states that:

"We request the Adjudicating Authority to urgently appoint another IRP (in place of earlier IRP Mr. Arun Jain who has not taken charge it appears) within 10 days, if required by taking name from the IBBI, on urgent basis"

47. We think it proper to exercise our inherent power under Rule 11 of the NCLT Rules, 2016. Therefore, in sequel to the above, by exercising the power under Rule 11 of the NCLT Rules, 2016 read with directions given by the Hon'ble NCLAT in the Company Appeal No. 166/2020 in para 7 of the order, we hereby appoint Mr. Shiv Nandan Sharma, Registration No.- IBBI/ IPA-001/ IP-PO0384/2017-18/10641, Email Id: sharmasn@gmail.com, Mobile No. 9540000212 as an IRP from the panel communicated to this Adjudicating Authority by IBBI and order that :

48. Mr. Shiv Nandan Sharma is directed to take the charge of the CIRP of the CD with immediate effect. The Court Officer will inform The IRP so appointed by all modes.”

21. Therefore, in the peculiar circumstances of the present case as narrated above, while utilising our jurisdiction under Section 60(5)(c) of IBC, 2016 we exercise the inherent power under Rule 11 of the NCLT Rules 2016 and we hereby appoint Mr. Krit Narayan Mishra IP, having IBBI Registration No. IBBI/IPA-001/IP-P00441/2017-18/10784 (Email id: kritmassociates@gmail.com) as IRP of the Corporate Debtor with immediate effect from the Panel communicated to this Adjudicating Authority by IBBI and order that :

Mr. Krit Narayan Mishra, having IBBI Registration No. IBBI/IPA-001/IP-P00441/2017-18/10784 (Email id: kritmassociates@gmail.com) is directed to take the charge of the CIRP of the Corporate Debtor with immediate effect. The Court Officer shall inform the IRP so appointed immediately by all modes.”

The Respondent/Mr. Manoj Kumar Singh IRP is directed to hand over all the documents and records of the CIR proceedings to Mr. Krit Narayan Mishra, having IBBI Registration No. IBBI/IPA-001/IP-P00441/2017-18/10784 (Email id: kritmassociates@gmail.com), within 05 days of passing of this order.

22. Since Mr. Manoj Kumar Singh, IRP has failed to give any cogent reasons that as to why no steps were taken by him to carry forward the CIR process of the Corporate Debtor in accordance with the provisions of the IBC, 2016 despite the Order of this Bench dated 17.09.2020, and accordingly, this Bench issues show cause notice to him as to why the Contempt Proceedings shall not be initiated against him. Let the reply be

filed by him within 02 weeks from today. List the matter on 02.08.2021. The Registry is directed to allot the case number to the Contempt Proceedings. The Bench Officer is directed to communicate the copy of this Order to Mr. Manoj Kumar Singh, IP immediately.

23. However, it is made clear that nothing expressed in this order shall be construed as an opinion for the purpose of the Investigation undertaken independently by the Applicant/IBBI against Mr. Manoj Kumar Singh, IP.

24. **The Application is accordingly Allowed.**

Sd/-
(L. N. Gupta)
Member (T)

Sd/-
(Abni Ranjan Kumar Sinha)
Member (J)