# IN THE NATIONAL COMPANY LAW TRIBUNAL
## BENGALURU BENCH

**I.A.Nos.187& 195 of 2020 in**
C.P.(IB)No.305/BB/2019
U/s 60(5) (b) &(c) of the IBC, 2016

**Between:**

**M/s.Kotak Mahindra Bank Ltd.**
27 BKC, G Block, C 27,
BandraKurla Complex,
Bandra (East),
Mumbai– 400 051. - Applicant/Financial Creditor

**And**

**M/s.Arun Shelters Pvt. Ltd.**
*Through Mr. Pankaj Srivastava IRP of*
*M/s.Arun Shelters Pvt. Ltd.,*
#G-02, Kundur Park,
AmruthalliJakkur Main Road,
Jakkur,
Bangalore – 560 064. - Respondent/Corporate Debtor/RP

**Date of Order: 29th June, 2020**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels present (Through Video Conference):**

For the Applicant/Financial Creditor :Mr. V.J. Achalanand

For the Respondent/Resolution Professional :Mr. Susheel Shankar

## COMMON ORDER

**Per:** Rajeswara Rao Vittanala, Member (J)

1. I.A.Nos.187 &195 of 2020 are filed by M/s. Kotak Mahindra Bank Limited, (hereinafter referred to as 'Applicant/Financial Creditor') U/s 60(5)(b) & (c) of the IBC, 2016,by inter alia seeking to set aside unilateral action of the Interim Resolution Professional of the Respondent/Corporate Debtor in re-constituting the Committee of

Creditors and consequentially restore the Committee of Creditors as constituted on 2nd March 2020 in the interest of justice and equity.

2. Brief facts of the case, which are relevant to the issue in question, as mentioned in the Applications, are as follows:

(1) The main Company petition bearing C.P. (IB)No.305/BB/2019 was filed by M/s.Kotak Mahindra Bank Limited, a Financial Creditor, under Section 7 of the IBC, 2016, R/w Rule 4 of the I&B (AAA) Rules, 2016, was admitted by this Adjudicating Authority, vide order dated January 31st, 2020 by initiating CIRP, appointing Mr. Pankaj Srivastava (IBBI Registration No. IBBI/IPA-001/IP-P00245/2017-2018/10474 as IRP, imposing moratorium etc.

(2) Subsequently, the IRP got published a Public Announcement dated 4th February, 2020, in the newspapers calling for claims against the Corporate Debtor, in terms of Section 15 of the Code. Upon the receipt of claims, the IRP constituted a COC,limited to the real estate project 'Auroville' being developed by the Corporate Debtor in terms of thejudgement dated 4th February, 2020 passed by the Hon'ble NCLAT in the matter of *Flat Buyers Association, Winter Hills Vs. Umang Reality.*As a consequence, claims filed by two other creditors stood rejected, and the CoC constituted of the following three members:

**a.** Kotal Mahindra Bank Limited (the Applicant/Financial Creditor herein);

**b.** Mr. ShashidharMuniyappa, a home buyer; and

**c.** Mr. Manjunath B., a home buyer.

(3) The IRP has conducted three meetings of the CoC, viz 2nd March, 2020, 17th March, 2020 and 30th April, 2020. After the 2nd CoC meeting held on 17th March 2020, the IRP, for reasons known best to him, sought to renege on his decision and to

conduct a CIRP against the Corporate Debtor, as entity as opposed to a project-specific CIRP. The subject was raised by the IRP in the third meeting of the CoC on 30th April, 2020, and the Applicant/Financial Creditor's view were sought. In response, the Applicant/Financial Creditor placed on record its firm view that in conformity with the Hon'ble NCLAT's judgment as stated supra, it would aid faster resolution of the Corporate Debtor as it would lead to greater maximization of assets, which would be in keeping with the objective of the Code. However, it received email dated 15th May, 2020, from the IRP intimating his decision to reconstitute the CoC and allow claims filed by other Creditors. Furthermore, the IRP has proceeded to call for a 4th meeting of the newly reconstituted CoC on 19th May, 2020. The fourth meeting of the reconstituted CoC was scheduled to be held on 1st June, 2020. Moreover, the Promoters of the Corporate Debtor has also issued email dated 29th May, 2020, requesting the IRP to adjourn the meeting in light of the outbreak of COVID-19.

(4) It is contended that the action of the IRP in unilaterally re-constituting the CoC is invalid, illegal and without proper justification and in violation of the provisions of the Code. In terms of Section 18(1)(C) of the Code, it is the duty of the IRP to constitute the CoC after collation of claims submitted by the Creditors. However, the Code does not empower the IRP to reconstitute the CoC at his own accord. It is matter of record that the claims filed by all Creditors was tabled at the first CoC meeting held on 2ndMarch, 2020. Thereafter, the IRP proceeded with a project specific CIRP thereby rejecting the claims filed by two creditors.

3. The Resolution Professional/Respondent has filed Preliminary Reply dated 13.06.2020, to the instant Application, by inter alia contending as follows:

(1) In the judgement rendered by Hon'ble NCLAT on 4th February, 2020, in the matter of *Flat buyers Association, Winter Hills Vs. Umang Realty, it is interalia* devised the reverse CIRP, whereby, the CIRP for a real estate Company shall be initiated only against the project and not against the Company as a whole. The Respondent constituted the CoC of project 'ArunAuroville'. The process of reverse CIRP devised by the Hon'ble NCLAT wherein, the CIRP should be initiated against the project and not against the Company has been adjudicated by the Hon'ble NCLAT under its appellate jurisdiction after the considering the facts and circumstance in the matter of Flat buyers Association, as stated supra. The order of the Hon'ble NCLAT dated 4th February, 2020, as stated supra, is not as order passed by a Court of Records, which could have been taken as a judicial precedence unless adjudicated.

*(2)* After analysing the aforementioned, the Resolution Professional believes that the CoC must be constituted for M/s. Arun Shelters Pvt. Ltd. (hereinafter referred to as the Company), unless otherwise adjudicated. The Resolution Professional has proposed the constitution of the CoC of M/s.Arun Shelters Pvt. Ltd. (hereinafter referred to as the Company) in the third meeting of the CoC dated 30th April, 2020. In the third meeting of the CoC held on 30th April, 2020 it was decided *"in the light of the views of the Committee of Creditors, the Resolution Professional may take a position in the interest of all the stakeholders. Kotak Mahindra bank may place its views in the event, existing Committee of Creditors constituted has changed, and if required, before the Hon'ble Adjudicating Authority and seek appropriate relief"*.

(3) In the interest of all Stakeholder of M/s.Arun Shelter Pvt. Ltd, the RP has constituted the CoC of M/s.Arun Shelters Pvt. Ltd. on 02.05.2020. The RP has issued the notice dated 14.05.2020, for convening the 4th meeting of the CoC of M/s.Arun Shelters Pvt. Ltd on 19.05.2020. After reverting to the notice dated 14.05.2020 on 19.05.2020, by the Applicant, the RP had further issued a notice dated 24.05.2020 to convene the 4th meeting of the CoC of Arun Shelters Pvt. Ltd.on 01.06.2020. Again, the Applicant reverted to the notice dated 24.05.2020 on 29th May, 2020 to defer the meeting of the CoC of Arun Shelters Pvt. Ltd.scheduled on 01.06.2020.

(4) The Resolution Professional believes that he has commissioned an inadvertent mistake by constituting the CoC of Project 'ArunAuroville' and not constituting the CoC of M/s.Arun Shelters Pvt. Ltd.taking reliance on a legal opinion in this regard. The RP rectified his mistake by constituting the CoC of M/s.Arun Shelter Pvt. Ltd. on 02nd May, 2020. The Resolution Professional has scheduled the 4th meeting of the CoC of M/s.Arun Shelters Pvt. Ltd on 19.05.2020 and 01.06.2020 with an agenda to rectify the resolution passed in the first meeting of the CoC appointing the Respondent as the Resolution Professional of M/s.Arun Shelters Pvt. Ltd.

4. Heard Mr. V.J. Achalanand, learned Counsel for the Applicant/Financial Creditor and Mr. Susheel Shankar, learned Counsel for the Respondent/Resolution Professional, **through video conference**. We have carefully perused the pleadings of the Parties and extant provisions of the Code and Rules made thereunder.

5. In this issue, there are some fundamental issues touching upon conducting of CIRP by IRP/RP and furnishing conflicting legal Opinions by same Counsel. The RP, after due process of law and

after taking legal opinion from his Counsel, has constituted COC and submitted the same to the Adjudicating Authority. However, both the RP and his Legal Counsel, suo moto changed the same, in utter violation of Principles of natural and extant provisions of Code and the Rules made under.

6. In view of time lines prescribed under the provisions of Code and the rules made thereunder, CIRP/Liquidation should be conducted strictly following extant provisions of Code and the Rules made thereunder. And decision(s) should be taken on issues arise during CIRP, after fully analysing the issue in proper perspective, and once decision taken by IRP/RP and COC, it cannot be changed unilaterally without valid justification. Similarly, same Legal Counsel cannot give furnish two contrary opinions, as and when IRP/RP seeks opinion suitable to him.

7. In the instant case, as detailed supra, the IRP/RP, after receiving all claims from the Parties and collating them, has constituted COC in question, which was duly ratified by subsequent COC and the same was submitted to the Adjudicating Authority. The Party, who is not taken on COC, has not raised any dispute before any Court of law. However, for the reasons best known to the IRP/RP, he has changed the constitution of COC, by taking legal opinion suitable to his views, from the same Counsel, namely Mr. Susheel Shankar, who has furnished two contrary legal opinions dated 24.02.2020 and 24.04.2020 by changing his version. We have perused two legal opinions given by same Counsel and found changing legal opinions is against the principles of natural justice. The IRP and RP is same in the instant case.

8. It is relevant to point out here that Section 18 of Code deals with duties of Interim Resolution Professional. And one of his duties are

constitution of Committee of Creditors. Accordingly, the Respondent being IRP initially constituted COC as per law. It is not the case of Respondent that COC was constituted provisionally subject to further verification of claims. Section 25 of the Code prescribes duties of Resolution Professional, which do not contain constitution of Committee of Creditors or to review it as per wishes of RP, after getting convenient legal opinion from his Legal Counsel.

9. For the aforesaid reasons and circumstances of the Case, we are of the considered opinion that the action of Resolution Professional in changing the COC and the legal opinions furnished, are arbitrary and un-tenable, and thus the impugned action is liable to be set aside.

10. In the result, both **I.A Nos. 187 & 195 of 2020** in C.P. (IB)No.305/BB/2019 are hereby allowed as prayed for. Post the main Company Petition on 20.07.2020.

**ASHUTOSH CHANDRA**
**MEMBER TECHNICAL**

**RAJESWARA RAO VITTANALA**
**MEMBER, JUDICIAL**

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