NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI

ORDER SHEET OF THE HEARING ON 9TH NOVEMBER, 2023, 11.00 A.M.

IA(IBC)/65/GB/2023
CP(IB)/24/GB/2019

Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad

Name of the Company	Amit Pareek, RP Vs. North Eastern Development Finance Corporation Ltd. (NEDFi), 2. Punjab National Bank
Under Section	U/s 60(5) of IBC, 2016

For Petitioner (s) :

For Respondent (s) : Mr. S. Dutta, Adv.

ORDER

Order Pronounced through VC *vide* separate sheets.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
H.V. Subba Rao
Member (Judicial)

NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI

<u>I.A. (IBC)/65/GB/2023</u>
in
<u>CP (IB)/24/GB/2019</u>

In the matter of:

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016;

-And-

In the matter of:

An application under Rule 11 of the NCLT Rules, 2016;

-And-

In the matter of:

Mr. Amit Pareek, Resolution Professional of Shree Sai Prakash Alloys Private Limited (Corporate Debtor) having address 4th Floor, K C Choudhury Road, Ram Prasad Complex, Chatribari, Guwahati, Assam- 781001; **…. Applicant**

-Versus-

North Eastern Development Finance Corporation Ltd. (NEDFi), Financial Creditor and Member of Committee of Creditors of the Corporate Debtor having registered office at NEDFi House, Dispur, G.S. Road, Guwahati-6, Kamrup District, Assam;

…Respondent No. 1

-And-

Punjab National Bank, Financial Creditor and Member of Committee of Creditors having registered office at Fancy Bazar Branch, Fancy Bazar, Guwahati, Assam-781001.

…Respondent No. 2

Coram:

Shri H. V. Subba Rao	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

Appearances (through video conferencing):

For Petitioner	:	Mr. A. Pareek (RP)

For Respondent : Mr. S. Dutta (Adv.)

Order pronounced on: 09.11 .2023

ORDER

1. The instant Interlocutory Application (**IA**) has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 by Mr. Amit Pareek, appointed as Interim Resolution Professional by this Tribunal *vide* Order dated 30.09.2022, and continued as Resolution Professional in the instant matter under Section 22(3)(a) of the Insolvency and Bankruptcy Code, 2016 (hereinafter "IBC") as appointed by the Committee of Creditors (hereinafter referred to as "CoC") in the 2nd CoC meeting with 100% votes, ppraying for the following reliefs:
   a) *To issue necessary direction to the Respondent No. 1 to remit the CIRP cost for the period commencing from 30.09.2022 to 02.05.2023 with voting share & claim amount @ 4.53% of CIRP;*
   b) *If prayer in clause (a) not allowed then issue necessary direction to Respondent No. 2 to remit the CIRP Cost incurred from 30.09.2022 to 02.05.2023 @ 99.80% ;*
   c) *Pass any further order(s)/direction(s) as this Tribunal may deem fit and necessary in the facts and circumstances of the present case.*

2. The reasons mentioned in the above application are as follows:
   2.1 The application filed by Punjab National Bank under Section 7 of the IBC, 2016 read with Rule 4 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 is reinstated from 30.09.2022 by Guwahati Bench *vide* order dated 30.09.2022, which was originally admitted on 23.08.2019 and legal proceedings from 23.08.2019 to 29.09.2022 were excluded. Mr. Amit Pareek having IBBI registration No. IBBI/IPA-002/NP-N00413/2017-2018/11205 was appointed initially as Interim Resolution Professional, by replacing ex-RP Mr. Anil Agarwal who was released from this assignment, and then as Resolution Professional (RP) for CD under Section 22 (3) (a) of IBC, 2016 *vide* Agenda Item No. B4 with

100% votes in favour of the resolution during the 2nd CoC meeting held on 07.11.2022.

2.2 Pursuant to that, public announcement was made in two widely circulated newspaper namely, “The Shillong Times” and “Rupang” on 07.10.2023 inviting claims from the creditors of CD following which only one claim, by Punjab National Bank was received claiming an amount of Rs. 119,60,47,376/- till cutoff date which was then vetted, verified and admitted as Rs. 119,58,44,533/- . On the basis of such claim, RP constituted the CoC on 21.10.2022 with only one Financial Creditor, Punjab National Bank with 100% voting right.

2.3 On 30.11.2022, RP received another claim from financial creditor namely, NEDFi claiming an amount of Rs. 5,67,14,461/- which was then admitted after vetting and verification. Accordingly, CoC was re-constituted by the RP on 12.12.2022.

2.4 Post re-constitution of CoC, 3rd CoC was called on 14.12.2022 and all CoC members were present including NEDFi and voted on the Agenda of said meeting including the agenda related to the ratification of CIRP cost. NEDFi was also present and voted in other subsequent CoC meetings held on 10.01.2023, 14.02.2023, 21.03.2023 and 23.03.2023 with 4.53% voting rights.

2.5 On 11.04.2023, letter was received from NEDFi relating to the revision of their claim amount from Rs. 5,67,14,461/- to Rs. 24,34,461/- as they claimed to have recovered a sum of Rs. 5,42,80,000/- through sale of securities exclusively mortgaged to NEDFi. Further, a request was also made for revision of voting share and NEDFi’s share for the ongoing CIRP costs.

2.6 On direction of RP, NEDFi submitted their revised claim form on 02.05.2023, following which CoC was reconstituted as under:

SL.No.	Name of the Creditor	Amount of claim	Voting Right in percentage

1.	Punjab National Bank	119,58,44,533/-	99.80%
2.	NEDFi	24,34,461/-	0.20%
TOTAL		**1,19,82,78,994/-**	**100%**

2.7 On 23.03.2023, 7th CoC was held and RP informed the CoC members that at the time of initiation of CIRP the CD had negative bank balance and as on 10.03.2023 it had negative bank balance of Rs. 13,880.90 in its bank account no. 50200004746573 with HDFC Bank Fancy Bazar Branch, Guwahati and to meet the urgent CIRP cost the bank balance of other group companies under CIRP was utilized. Since, the bank balance of other group of companies were exhausted, hence, a request for CoC members to make the necessary payments was made by the RP for the purpose of repayment to other group companies and settling the payment of pending CIRP cost. *Vide* Agenda Item No. B11, RP had placed the CIRP Cost incurred since commencement of CIRP till Feb 2023 and also asked the CoC members to remit the CIRP cost incurred till Feb 2023 as per their respective voting right and claim amount i.e., Punjab National Bank (95.43%) & NEDFi (4.53%). Both the CoC members agreed approved the Agenda with 100% votes in favor.

2.8 NEDFi remitted the CIRP cost in the current account of CD on 05.05.2023 with their revised voting rights and claim amount i.e., 0.20% to the CIRP cost incurred from initiation of CIRP commencement date to February 2023 in contrary to what NEDFi had voted in 7th COC meeting in this regard, and this was intimated to RP *vide* e-mail dated 08.05.2023. The relevant extract of the e-mail reproduced as under:

> *"NEDFi has recently recovered a sum of Rs.5,42,80,000/- through sale of security exclusively mortgaged to NEDFi. Thus, NEDFi's revised claim amount stands at Rs.24,34,461/- and then NEDFi's share was revised from 4.53% to 0.20%. Thus, the ongoing CIRP cost will be shared according to revised share of 0.20%, as the same was followed by NEDFi in other ongoing CIRP cases in which PNB is also one of the COC members*

and followed the same. Further, NEDFi will be entitled to receive only 0.20% of Resolution Plan amount or liquidation amount (in case of liquidation) and not 4.53% share as per IBC rules. Thus, on revision our voting share from 4.53% to 0.20%, our share for the ongoing CIRP costs has worked out to be Rs.2,903 (0.20% of Rs. 14,51,600/-) till February 2023. Accordingly, NEDFi's share of CIRP cost amounting to Rs.2,903/- from October 2022 to February 2023 has been remitted on 05/05/2023."

2.9 Upon receipt of the aforesaid e-mail, reply was given by the RP *vide* e-mail dated 10.05.2023, relevant extract of the said email is reproduced hereunder:

"This is in your reference to your E-mail dated 08-05-2023 related to the Payment of CIRP Cost till 28/02/2023 for the ongoing CIRP of Shree Sai Prakash Alloys Pvt. Ltd. In your E- mail you have mentioned that you have contributed Rs. 2,903/- towards the CIRP Cost for the period from October 2022 to February 2023.We would like to bring to your kind notice that:

1) Your revised claim FORM was received on 02/05/3023 & accordingly COC reconstituted and voting share revised from 4.53% to 0.20%. w.e.f. 02/05/2023 and necessary submission has been made at NCLT & IBBI

2) That your revised voting share is effective from the date of reconstitution of COC ie 2/5/2023 after receipt of your revised claim.

3) The total CIRP Cost for the period Oct 2022 to Feb 2023 is Rs. 14,51,600/- and till Feb23 your voting share was 4.53% till 02/05/2023. In most of the CoC you have actively participated and voted with a voting share of 4.53% till 02/05/2023.

4) Hence, your contribution for the CIRP cost incurred till Feb 2023 is 65,757/- ie. 4.53% of Rs. 14,51,600/-. Hence unreasonably & arbitrarily reduction of 20% of total CIRP cost is not acceptable and being a responsible member of CoC you are requested to make the CIRP cost at 4.53% of total CIRP cost till 02/05/2023 to avoid unnecessary delay in completion of CIRP Process."

2.10 Both the aforementioned emails, dated 08.05.2023 and 10.05.2023 respectively were placed before the 9th CoC meeting for discussion and necessary approval wherein despite deliberate discussions, no conclusions were reached and hence, the same agenda was again placed before the CoC in 10th Adjourned Meeting held on 02.06.2023. PNB, the other financial creditor holding 99.80% voting Right w.e.f. 02.05.2023 had placed the clarification as submitted by its Law Division H.O. the relevant extracts are as under:

> *"We refer to your trailing mail, whereby you have sought our guidance on whether reduction of voting share tantamount to retrospective reduction of the share of expenses in CIRP Cost In this context, we would like to quote here Regulation 12A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations which reads as "A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date."*
> *Upon perusal of the above provision, we are of the opinion that, claim of any creditor is updated on as and when basis and is not having retrospective effect. In the instant case, CIRP expenses can't be reduced retrospectively, as it is done & borne by the CoC members on actual basis."*

Since, Respondent No. 1, NEDFi, the financial creditor does not agree with the opinion of RP as well as the submissions made by Respondent No. 2, hence in absence of any relevant provision under IBC application before this Bench filed to seek necessary direction. CoC has authorized RP to file necessary application for the same.

2.11 As per section 21(3) of IBC 2016 the financial creditor shall be part of CoC and their voting share shall be determined on the basis of the financial debts owed to it. Further Section 21(4) of IBC 2016 a financial creditor shall be included in the CoC with voting share proportionate to the extent of financial debt owed to such creditor. In the instant matter Respondent No.1 have admitted debt claim amount and voting share in the CoC was 4.53% till 02.05.2023 hence, it is just and equitable that it should contribute towards the CIRP cost @4.53% of the total CIRP cost till 02.05.2023 as approved and ratified by the CoC as per regulation 33 and 34 of the Insolvency Resolution Regulation 2016.

3. The Respondents in their reply submit that:

3.1 The statements made in paragraphs 1(i) to 3 of the matters of records and the deponent does not admit anything which are not consistent with the records of the case and the onus is on the Applicant to prove the statements made in paragraphs 2 and 3 of the Application to the full satisfaction of this Tribunal. Further, the statements made in paragraphs 4.1 to 4.8 of the matters of records and the deponent does not admit anything which are not consistent with the records of the case.

3.2 With regards to the statements made in the paragraphs 4.9 to 4.13 of the application, the Deponent states that the applicant himself is not clear about the mode of calculation of CIRP cost to be shared between the CoC members. The yardstick for calculation used by the RP cannot be complemented for sharing of CIRP cost as per Bill raised by the RP. Further, the same is not sustainable at all for the reason that it does not at all create any parity towards sharing of such cost amongst the CoC members. The reasons are obvious and practical, also followed by different other RPs for instance in a "*current CIRP proceeding in CP(IB) No.10/GB/2021 (SBI -vs- Nayak Infrastructure Pvt. Ltd.), wherein one of the CoC member under the name and style of SREI Equipment Finance Ltd. which had initial voting share of 4.53% and subsequently got revised to 10.44% resulting in the increase of the voting share of SREI Equipment Finance Ltd. and proportionately decreasing of voting share of other CoC members including SBI, Indian Bank(erstwhile Allahabad Bank), PNB, Bank of India and NEDFI respectively. The formula for CIRP cost sharing was implemented in the following manner: Till revision of the voting shares the RP raised his Bills on the basis of pre-revised voting shares of each CoC members. However, after revision of the claim resulting into change in voting* *share of each CoC members the same was given retrospective effect from the date of initiation of the CIRP under the revised voting share and during the subsequent Bills raised by the RP, the excess amount which was already released by the other CoC members excluding SREI Equipment Finance Ltd. stood adjusted with the revised claim of SREI Equipment Finance Ltd."*

3.3 But in the present CIRP, the Applicant had followed his own formula while claiming the cost of CIRP which puts the Respondent No.1 at a financial loss as because as per the revised voting share (0.20%) of the Respondent No.1, the Respondent No.1 will end up paying at an average of 4.05% of the CIRP cost w.e.f October, 2022 till February, 2023 at the voting share of 4.53% and for the subsequent period from March, 2023 to April, 2023 at the voting share of 4.53%, and further for the period from May, 2023 onwards till date at the voting share of 0.20%. Meaning thereby the Respondent No.1 will end up paying the CIRP cost under the ratio of 4.05% at an average (calculated up to May,2023) and the total amount thus to be paid will exceed the amount that the Respondent No.1 will receive on conclusion of successful resolution or liquidation as the case may be. Again, the Applicant is contradicting himself by shifting the goalpost while insisting that the Respondent No.1 should pay CIRP cost from October, 2022 with retrospective effect when the Respondent No.1 had joined the CoC on November, 2022 and the Applicant had contradicted his own stand by deciding to raise the Bill for the period from October, 2022 to February, 2023 instead of calculating from the date of the Respondent No.1 actually joining the CIRP with effect from November, 2022 while asking the Respondent No.1 to pay at the rate of 4.53%, However, the Respondent No.1 had already released its share which the Applicant had already acknowledged from October, 2022 to February, 2023 at the rate of 0.20%. In other words, the action of the Applicant appears to be more on the aspect of extracting the maximum from the Respondent No.1 so far the CIRP cost is concerned without following the pro-rata norms as is followed in other CIRP proceedings. Such contradictory approach does not commensurate with fair practice on the part of the Applicant.

3.4 If the Application is allowed as it is and the reduction of cost share is not given the retrospective effect, then such order shall have a rippling effect on other/ future CIRP Proceedings as Financial Creditors who have initiated CIRP and have to bear 100% expenses till completion and the other Financial Creditors with more claim amount resulting into majority voting share may join the CIRP at the fag end of the CIRP proceedings in order to cut cost but will be in a position to take away the lion share of the Resolution plan amount leaving the Financial Creditor initiating the CIRP ending up paying the maximum portion of the CIRP cost yet receiving the minimum share of the Resolution plan amount.

3.5 This Tribunal to consider this aspect as stated above and to direct the Applicant to revisit/recalculate the CIRP cost as against the Respondents in accordance to that which are generally and practically followed by other Resolution Professionals while distributing the CIRP cost of the Financial Creditors and also in the CIRP proceedings initiated within the jurisdiction of the Tribunal.

4. We have heard the submissions made by the Ld. Counsel for the Applicants along with the Ld. Counsel for the Respondent and have meticulously gone through the documents produced on record.

5. We are of the considered view that in the interest of justice, equity and good conscience, the RP is directed to recalculate the CIRP cost as against both the Respondents by following percentage as given hereunder:

SL. No.	Name of the Respondents/ Creditors	Voting right in percentage	Period
1.	NEDFi	4.53%	30.11.2022-02.05.2023
		0.20%	03.05.2023-Till Date
2.	PNB	100%	30.09.2022-29.11.2022
		95.43%	30.11.2022-02.05.2023
		99.80%	03.05.2023-Till Date

6. The RP is further directed to submit the revised CIRP cost as against the Respondents within 3 weeks from the date on which this order is uploaded on the e-portal. The Respondents are directed to remit the CIRP cost within 2 weeks thereafter.

7. The Registry is directed to send email copies of the order forthwith to all the parties and their Learned Counsels for information and for taking necessary steps.

8. Certified copies of this order maybe issued, if applied for, upon compliance of all requisite formalities.

9. Thus, the present application i.e., I.A. (IBC)/65/GB/2023 filed under Section 60(5) of the IBC, 2016 stands disposed of with the above orders and directions.

Sd/-	Sd/-
Satya Ranjan Prasad	**H.V.Subba Rao**
Member (Technical)	**Member (Judicial)**

Signed this on 9th day of November 2023.