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**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD
Court 2**

IA 402 of 2020 in CP(IB) 468/NCLT/AHM/2018

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 12.02.2021**

Name of the Company: Santosh Rajput
V/s
Gordhan Godhani

IA For Directions

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.				
2.				

ORDER
(through video conferencing)

None appeared on behalf of parties.

The order is pronounced in the open court vide separate sheet.


CHOCKALINGAM THIRUNAVUKKARASU
MEMBER TECHNICAL


MANORAMA KUMARI
MEMBER JUDICIAL

Dated this the 12th day of February, 2021

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

I.A. No. 312 of 2020

&

I.A. No. 402 of 2020

in

CP(IB) No. 468 of 2018

In the matter of:

Shri Gordhanbhai Godhani

Resolution Professional of

S. K. Masala & Foods Limited

... Applicant

Versus

Punjab National Bank & Ors.

... Respondent

AND

In the matter of:

Sanjay Rajput

... Applicant

Versus

Gordhan Godhani

... Respondent

Order delivered on 12th February, 2021

Coram:

Hon'ble Ms. Manorama Kumari, Member (J)

Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)

Appearance:

Mr. Atul Sharma, Advocate for Resolution Professional and Mr. Dhiren Dave, PCS for the Respondent.

Mr. Dhiren Dave, PCS for the Applicant and Mr. Atul Sharma, Advocate for the Respondent.

Shoema Inayat

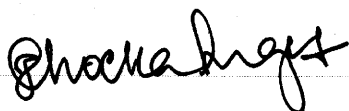
Chockalingam

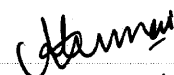
COMMON ORDER

[Per se: Ms. Manorama Kumari, Member (J)]

IA 312 of 2020

1. The Applicant, Resolution Professional (hereinafter referred as "RP") of the Corporate Debtor filed the instant IA No. 312 of 2020 in the aforesaid Company Petition (IB) No. 468 of 2018 for liquidation of the Corporate Debtor under section 33(1), 33(2) & 34(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IB Code").
2. The facts of the case are stated herein:
 - 2.1 CP (IB) No. 468 of 2018 was filed by Operational Creditor, namely C. Girdharlal Gheewala, against the Corporate Debtor viz., S. K. Masala & Foods Limited under Section 9 of the IB Code, seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred as "CIRP"), which was admitted by this Adjudicating Authority vide its Order dated 17.09.2019 and appointed Shri Bhupendra Singh Narayan Singh Rajput as Interim Resolution Professional (hereinafter referred as "IRP") of the Corporate Debtor.
 - 2.2 It is stated in the application that Committee of Creditors (hereinafter referred as "CoC") in its First Meeting held on 15.10.2019 resolved for replacement of the IRP with new RP namely Shri Gordhanbhai Godhani. The application for the same was filed by the CoC before this Adjudicating Authority and the order in the said application was passed on 27.01.2020.
 - 2.3 It is stated by the Applicant that in the Fourth CoC meeting held on 06.03.2020, CoC resolved with majority of 97.04% voting





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share to go for Liquidation of the Corporate Debtor as the Corporate Debtor is not a going concern and there is no scope of receiving any viable Resolution Plan. Hence, CoC decided to file an application for Liquidation of the Corporate Debtor through RP under section 33(1), 33(2) & 34(1) of the IB Code.

3. Heard the Applicant and also seen the records, it is found that Corporate Debtor is not a going concern and there is no scope of receiving any viable Resolution Plan. Therefore, the CoC has resolved for liquidation of the Corporate Debtor vide its Fourth meeting dated 06.03.2020. It is also to be noted that this Adjudicating Authority has no jurisdiction to interfere in the commercial wisdom of the CoC as observed in **K. Sasidhar's** case and it is also reiterated by Hon'ble Supreme Court of India in its judgement passed in Civil Appeal No.8766-67 of 2019- **Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta & Ors** observed as follows:

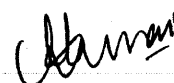
"The commercial wisdom of the Committee of Creditors cannot be interfered into by the Adjudicating Authority. The Hon'ble Supreme Court affirmed K. Sashidhar's judgement that neither the Adjudicating Authority nor the Appellate Authority has been endowed with the jurisdiction to reverse the commercial wisdom of the CoC."

The Hon'ble Supreme Court took the view that the commercial wisdom has been exercised by the CoC after taking into count all the factors leading to maximisation of asset value of the Corporate Debtor, but the ultimate discretion of what to pay and how to pay each class or sub-class of creditors lies with the CoC."

4. Under the facts and circumstances as narrated herein above, the application so filed is allowed with the following orders:

- a) The moratorium declared under Section 14 of the IB Code shall cease to have effect from the date of the order of liquidation.

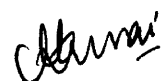




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- b) The Liquidator is further directed to issue public announcement stating that the Corporate Debtor is in liquidation.
- c) The Liquidator is required to send certified copy of this order to the authority with which the Corporate Debtor is registered.
- d) Subject to Section 52 of the IB Code, no suit or other legal proceedings shall be instituted by/or against the Corporate Debtor. However, a suit and other legal proceedings may be instituted by the Liquidator, on behalf of the Corporate Debtor, with the prior approval of this Authority.
- e) This Authority makes it clear that para (d) hereinabove shall not apply to legal proceedings in relation to such transactions as notified by the Central Government in consultation with any financial sector regulator.
- f) The Order shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.
- g) All the powers of the Board of Directors, Key Managerial Personnel and the Partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be vested with the Company Liquidator. In addition to this, the Company Liquidator shall exercise the powers and duties as enumerated in Sections 35 to 50, 52 to 54 of the IB Code, 2016, read with Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
- h) The personnel of the Corporate Debtor shall extend all assistance and co-operation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor.
- i) The Company Liquidator shall be entitled to charge such fee for the conduct of the liquidation proceedings in such a proportion to the value of the liquidation estate assets as may be specified by the Board.
- j) The Registry is directed to communicate this order with immediate effect to the concerned Registrar of Companies, registered office of the Corporate Debtor and Company Liquidator for information and compliance





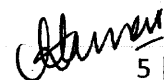
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5. Hence, the IA 312 of 2020 in CP(IB) 468 of 2018 so filed by the RP under Section 33(1), 33(2) & 34(1) of the IB Code, 2016 is allowed and the Adjudicating Authority passes an order for initiation of liquidation of the Corporate Debtor viz., S. K. Masala & Foods Limited. The RP i.e. Shri Gordhanbhai Godhani, shall act as the Liquidator for the purpose of liquidation of the Corporate Debtor.
6. Accordingly, the instant IA is allowed and stands disposed of with the above observations.

IA 402 of 2020

7. The instant application is filed by the Applicant Namely, Santosh Rajput, claiming himself to be a Financial Creditor. The fact of the case is that CP(IB) 468 of 2018 was admitted on 17.09.2019 whereby CIRP was initiated by appointing IRP, thereafter, RP was appointed. It is submitted that IRP/RP convened 3rd meetings of the CoC, in all the three meetings, Applicant has been invited. However, in the 4th meeting held on 11.03.2020 Applicant was not invited as the member of CoC. In the said meeting, CoC adopted the resolution that Applicant is not eligible to be the member of CoC as the claim of the Applicant does not fall under the category of Financial Creditor.
8. It is submitted that once the claim is admitted and CoC is constituted and to that effect necessary report is filed before the Adjudicating Authority, under such circumstances the Applicant cannot be removed from CoC. They need to take approval of Adjudicating Authority and reconstitute the COC. It is alleged that





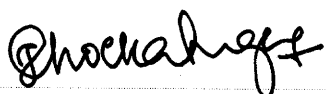
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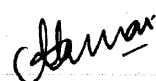
the said act of CoC of removing the Applicant and rejecting his claim in the Fourth CoC meeting is against the law. To this effect Applicant has informed RP, however RP has not responded. In view of the above, the instant application is filed by the Applicant with following prayers:

- Decision of Resolution Professional to remove name of Santosh Rajput be cancelled as illegal.
- 4th CoC meeting held on 11th March, 2020 be declared as illegal and irregular.
- Decision of liquidation taken at the meeting is without giving an opportunity to applicant to file Resolution Plan before CoC.
- Applicant be allowed to submit resolution within 30 days from the date of disposal of this IA.

9. On receipt of notice the RP appeared and filed his reply and denied all the allegations/averments made in the application. The RP submitted that IRP has conducted 1st and 2nd meeting of the CoC wherein the Applicant was taken on record as Financial Creditor. The RP has taken over the assignment vide order dated 27.01.2020. In view of that, RP conducted 3rd meeting of the CoC and invited Applicant in the meeting as per the detail provided by the IRP.

10. It is further submitted that RP has made his due diligence and on perusal of books of account, it was observed by the RP that there was a huge difference in debt amount claimed by the Applicant and

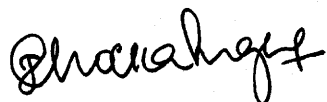




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the amount outstanding in the books of Corporate Debtor. The Applicant lodged his claim to the tune of Rs. 1,27,00,000/- (Rupees One Crore Twenty Seven Lakhs Only) and from books of account of the Corporate Debtor, RP has only been able to verify an amount of Rs. 17,50,000/- (Rupees Seventeen Lakhs Fifty Thousand Only) which said claim is in respect of Agreement to Sale dated 17.09.2019 of the premises of the Corporate Debtor situated at plot no. 5921 admeasuring 1008.00 sq. meters with lease hold rights in land/plot and super structure at Sachin Industrial Estate situated on land bearing block nos. 278/P & 288/P within the village limits of Sachin Taluka Choryasi, District Surat, Gujarat.

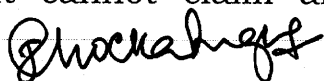
11. It is further submitted that in the said agreement in Para 1, it is stated that total amount of Rs 1,27,00,000/- shall be paid by the Applicant to the Corporate Debtor and mode of payment will be cash for the alleged amount Rs. 1,09,50,000/- (Rupees One Crore Nine Lakhs Fifty Thousand Only). Respondent further submitted that the amount mentioned in the agreement does not reflect any cash received in books of account of the Corporate Debtor. For that Respondent has made several communications by way of email and requested the Applicant to serve the additional documents so as to verify the claim but Applicant has not responded to the queries of the RP. It is also important to note that the said property has already been mortgage to Punjab National Bank on 28.03.2016. The copy of the same is annexed as **Annexure-E** in the application.





12. The RP further submitted that the Applicant does not fall under the category of the Financial Creditor as specified under section 5(7) of the IB Code as such it is not a financial debt mentioned under section 5(8) of the IB Code and accordingly, the Respondent has informed the Applicant after examining the provisions of the Code by way of the email dated 07.03.2020, 09.03.2020 & 12.03.2020 and further requested to furnish documents as against his claim, so as to classify him as Financial Creditor. Copy of these emails is annexed as **Annexure-F** in the application. The Respondent has also cited various judgements along with his reply.

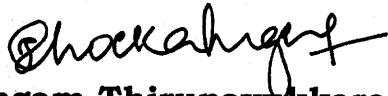
13. Heard both sides and gone through the record, it is a matter of record that the agreement so filed is an unregistered Agreement, executed on 07.09.2019. However as per documents, so verified by the RP, it is found that the said property has been mortgaged to Punjab National Bank on 20.03.2016. Prima facie the said agreement to sale by Corporate Debtor to the Applicant is not only bad in the eyes of law but is also *void ab initio*, as the property is already mortgaged to Punjab National Bank on 28.03.2016 i.e. much prior to sale agreement dated 07.09.2019, under such situation how can a Corporate Debtor enter in to any agreement for sale dated 07.09.2019, when the property is not free from encumbrances. In support of the contention, the Applicant has not filed any documents save and accept copy of emails exchanged with RP. It is the Punjab National Bank who is having the charge over the property hence, the sale agreement without their knowledge is bad. Prima facie the Applicant cannot claim any right over the property under sale



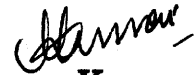
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agreement as the first right accrues upon Punjab National Bank on the property. Also, it is a established principle of law that 'Buyers Beware'. Under such circumstances, there is no substance in the application and the application is bad for want of proper documents/evidences so as to establish the claim of the Applicant as Financial Creditor. However, the prayer so made as stated herein above i.e. for cancellation of 4th meeting of the CoC and allow the Applicant to submit the Resolution Plan is something beyond the purview of IBC. Hence, the application so filed is dismissed as not maintainable and stands disposed of.

14. No order as to cost.



**Chockalingam Thirunavukkarasu
Adjudicating Authority
Member (Technical)**



**Manorama Kumari
Adjudicating Authority
Member (Judicial)**

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