

**IN THE NATIONAL COMPANY LAW TRIBUNAL
Kolkata Bench
Kolkata**

**IA(IB) No. 392/KB/2020
In
CP(IB) No. 1582/KB/2019**

In the matter of:

An application u/s. 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

And

In the matter of:

An application u/s. 22(3) of the Insolvency and Bankruptcy Code, 2016;

And

In the matter of:

P.M. Cold Storage Pvt. Ltd., having its registered office at 1A, Madan Mohan Burman Street, Kolkata 700007, West Bengal India;

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Applicant/Financial Creditor

Versus

Goouksheer Farm Fresh Pvt. Ltd., having its registered office at 63/3B, Sarat Bose Road, Kolkata 700025, West Bengal, India;

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Respondent/Corporate Debtor

And

In the matter of:

P.M. Cold Storage Pvt. Ltd., having its registered office at 1A, Madan Mohan Burman Street, Kolkata 700007, West Bengal India.

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Applicant/CoC Member

Counsels appeared:

1.Ms. Manju Bhuteria
2.Mr. A.Mookherji

] For the applicant

3. Mr.Chayan Gupta]
1.Mr. Akash Sharma] For the RP
2.Mr. Sanjeev Jhunhunwala] Resolution Professional.

Coram: Shri Jinan K.R., Hon’ble Member (Judicial)

Date of hearing : 26th May, 2020.

Order pronounced on : 26th May, 2020.

O R D E R

Per Shri Jinan K.R., Hon’ble Member (J)

1. IA(IB) No. 392/KB/2020 in CP(IB) No. 1582/KB/2019 is an application filed by one of the CoC members/P.M.Cold Storage Pvt. Ltd, who is the Financial Creditor in the main C.P. for the replacement of the Resolution Professional (in Short, **RP**), which came up for consideration before Bench No. 2 of this Tribunal on 12/03/2020. The copy of the order passed by the Bench is annexed with the supplementary affidavit filed through E-mail as **annexure “B”**. : The relevant extract of the order read as follows:

“IA(IB) 392/KB/20 is filed by one of the creditors of the corporate debtor. Resolution was passed earlier by 100% vote share for change of RP while this application is being moved, RP received one more claim from the creditor, due to which voting percentage of the applicant reduced to 25% only. We require more than 66% of the CoC members to change RP. Issue notice to the RP. He did not appear in person. If he does not appear, this application shall be heard and disposed off without his presence. Matter to appear on 13/04/2020”

2. The then sole financial creditor(FC) filed an application praying for urgent hearing of the **IA(IB) No. 392/KB/2020** through **E-mail** because of pandemic COVID 19, locked down was declared and is still continuing, the matter could not be taken up for further consideration on 13/04/2020. The urgency set out in the application being found satisfactory this matter was listed for hearing on today after giving advance notice from the Registry of Kolkata Bench to the applicant as well as the Resolution Professional, Mr. Sanjeev Jhunjhunwala.

3. The corporate debtor (CD) is undergoing CIRP vide order dated 13/12/2019 of the Bench No. 2 of this Tribunal appointing Mr. Sanjeev Jhunjhunwala as Interim Resolution Professional. The 1st CoC meeting was held on 08/01/2020, wherein the applicant alone was the member of the CoC. In the said meeting the IRP was appointed as RP with 100% voting share is an admitted fact.

4. In the meanwhile on 11th March the RP was in receipt of a claim lodged by a financial creditor by name New Hind Silk Pvt. Ltd for an amount of Rs. 1.96 crore against the Corporate Debtor (CD), and the same was admitted by him on 12.03.2020 thereby the voting share hold by the applicant has come down from 100% to 24.07%.

5. It is in the said background this application was moved for urgent hearing on the side of the applicant praying for replacement of the RP whose appointment was approved by the applicant as per section 22(3) (a) for continuing the CIRP by its 100% vote share in the 1st CoC meeting wherein the applicant was the sole member.

6. According to the Ld. Counsel Ms. Manju Bhuteria, the applicant is under tremendous financial crisis and its request to reduce the expenses including expenses for appoint of Transaction Auditor, has not been taken care by the RP and he failed and/or neglected to consider the said request. Moreover, the Corporate Debtor

Company had already been struck off and as such there are various additional expenses to be incurred during the CIRP period. She also would submit that adding one another claim of the financial creditor on the strength of CD financial statement is doubtful and that he relied upon an un stamped financial statement which was then corrected with impression of seal of the auditor with different color so as to doubt the conduct and working of the RP. According to her the claim of the newly inducted financial creditor is barred by limitation. To sum up the applicant challenges the integrity of the RP, illegal admission of claim of the financial creditor and fabricated audit report for adding the new financial creditor in the CoC, without supporting proof. Upon the above facts and circumstances the applicant is praying for replacement of the present RP with Mr. Ajay Goyal. She also would submits that on the day of filing this application the applicant was holding 100% vote share and there fore even if no resolution was passed under section 27(2) this AA is empowered to exercise its inherent power by replacing the RP with the RP proposed by the applicant.

7. The Ld. RP was represented by Advocate Mr. Akash Sharma. The Ld.RP also filed written submission. Firstly he did not raise any objection in replacing him with new RP upon clearing his fees and expenses which according to him already approved by the COC. However he defended this application challenging its maintainability. According to him no resolution was moved for his replacement before any of the CoC constituted by him. Without obtaining required majority of vote share as provided under section 27(2) of the Code for replacement of him appointed u/s.22 an application of this nature is not maintainable. All the allegations in regards admitting the claim of one another financial creditor were denied by him. According to him he had verified the claim in accordance with Regulation 13 of the IBBI (IRP For Corporate Persons) Regulations,2016, and there is no illegality in admitting the claim and reconstituting the CoC.

8. The Id. Counsel for the applicant and the RP was heard at length. Upon hearing the arguments on both sides, and upon perusal of the documents, the short point that arises for determination is whether this application without supporting any resolution for removal/replacement of the RP is maintainable u/s 22(2) or 27(2) of the Code?

9. Admittedly the applicant had never moved any resolution in the CoC as per section 22(2) or u/s.27(2) of the Code, and therefore, there was no resolution being adopted for such replacement. It appears to me that in the said circumstance this Adjudicating Authority could not entertain an application of this nature. It is significant to note that this application was heard by the Bench No 2 and Ld. Bench vide its interim order dated 12/03/2020 observed that “we require more than 66% of CoC members for changing the Resolution Professional” and for want of proof of passing a resolution for replacement of the RP the Bench has not granted the relief asked for and adjourned the application for hearing the RP and listed on 13.04.2020. Since there was no regular court sitting due to disruption of judicial work due to COVID-19 pandemic, this application was not taken up for hearing on 13.04.2020 and taken up on today at the request of the applicant. Admittedly the CoC was reconstituted. After reconstitution, the applicant holds only 25.07% voting share while the other financial creditor is holding 74.93% voting share.

Whether the reconstitution is proper or legal is not at all to be determined in this application. The applicant also challenged the admission of claim mainly alleging fraud played by the RP and that the claim is barred by limitation. In an application filed for replacement of RP u/s.22(2) and 27(2) the above said contentions not at all worth consideration. If the applicant is disputing the integrity of the RP, it can approach IBBI. It can also moves resolution before the CoC for replacement of the RP at any time during the CIRP, and can file appropriate application for removal if the applicant succeeds in getting required vote share for his removal. This application being found

not maintainable for want of passing a resolution by the CoC for the replacement of the RP, is liable to be dismissed, with a liberty to move fresh application if applied for in accordance with the provisions of the Code and Regulations.

In the result IA(IB) No. 392/KB/2020 is dismissed. No order as to cost.

Copy of this order is to be sent to the IBBI.

The Registry is directed to send e-mail copies of the order forthwith to all parties.

**(Jinan K.R.)
Member (J)**

Signed on this, the 26th day of May, 2020.

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