

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

IB No. 323/ND/2019 (IA/2171/2020)

In the matter of:

RATAN SINGH

...Operational Creditor

Versus

Theme Exports Pvt. Ltd.

...Corporate Debtor

Memo of Parties

Mr. Vikram Bajaj
Resolution Professional
For Theme Exports Pvt. Ltd.
Having its Registered Office at, 308, 3rd Floor,
Pearls Busines Park,
Netaji Subhash Place,
Pitampura,
Delhi-110034

.... Applicant

VERSUS

Ratan Singh
B-219, Gali No. 8, Ajay Colony,
Surya Vihar-III, Sehatpur,
Faridabad-121003

.... Respondent No. 1

Bank of Baroda
Having Its Registered office at:-
Boroda Bhawan, R C Dutt Road,
Alakpuri, Baroda-390007
Gujrat

And Also At:-
Having Its Branch Office at:-
55, MADhuban Building, Nehru Place,
New Delhi-110019

.... Respondent No. 2



IDFC First Bank
Having its Registered office At:-
11, Prem Dohil, Sadan,6th Floor,
Rajendera Place, New Delhi-110008

.... Respondent No. 3

Equitas Small Finance Bank
Having its Registered office At:-
F-39, Spencer Plaza, No. 789, 4th Floor,
Phase-I, Anna Salai, Chennai-600002

.... Respondent No. 4

SECTION: U/S 60(5) of IBC, 2016

Order delivered on:. 30.9.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant: Mr. Abhishek Anand, Mr. Tushar Tyal & Mr. Viren
Sharma advocates for RP with Mr. Vikram Bajaj, RP

For the Respondent: Mr.Pankaj Vivek & Mrs. Bidyarani for Respondent no.-2

ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

IA-2171/2020: -

1. The present IA has been filed on behalf of IRP praying therein to approve the fee of Applicant as the Interim Resolution Professional on similar terms as fee of Rs. 1,75,000/- p.m. plus taxes as approved for

Resolution Professional by the CoC and approve the expenses of Rs. 54,520/- incurred by the IRP towards, public announcement, website, public inspection.

2. We have heard the Ld. Counsel for the IRP as well as respondent no. 2(Bank of Baroda).
3. None appeared on behalf of respondents no. 1, 3 & 4.
4. The facts mentioned in the application filed on behalf of IRP in short are that vide order dated 29.08.2019, this Adjudicating Authority was pleased to admit the Company Petition (IB) No. 323(ND)/2019 filed on behalf of the Operational Creditor and appointed the applicant as IRP. Further, by the same order, the OC was directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP, which shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIRP costs. Further, on 16.09.2019, the applicant wrote a letter to respondent no. 1 to pay Rs. 2 lakhs in view of the direction given by this Adjudicating Authority but the OC has failed to deposit the said amount. Further, as per Regulation 33 (3) & (4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016, the applicant who initiates the CIR process has to bear the expenses, which shall be reimbursed by the Committee of Creditors. Further, first meeting of the Committee of Creditors was convened on 28.09.2019, wherein, the agenda for ratifying the cost of the IRP was placed before the CoC and the same was deferred to the next CoC meeting. Further, the second meeting of the Committee of Creditors was convened on 04.11.2019, the resolution placed before the CoC with rectification of the cost of IRP including the fee and expenses incurred towards the public announcement was not approved by the CoC,



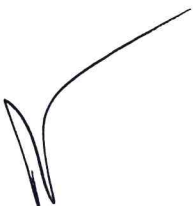
whereas, a resolution was also placed for the appointment of IRP as Resolution Professional, which was approved and the fixation of fee of the Resolution Professional was delegated to the Bank of Baroda and the Bank of Baroda vide its email dated 02.03.2020, confirmed a fee of Rs. 1,75,000/- per month for the Resolution Professional and a resolution for liquidation of the Corporate Debtor was also approved in the Second COC meeting. Further, in view of the fee fixed by the CoC for the RP, the applicant claimed fee for the period starting from 29.08.2019 till 04.11.2019. Further, since the CoC has not ratified the cost of IRP, therefore, the respondent no. 1 may be directed to pay the cost of IRP including his fee and expenses or the applicant may be permitted to receive the same from the funds/assets of the CD.

5. Bank of Baroda filed its reply and the facts of the reply in short are that since the OC has not deposited the amount which shows that the OC did not have sufficient funds for paying the IRP, therefore, this litigation was a collusive and proxy litigation at the behest of the corporate debtor. Further, since the cost of IRP for the first month w.e.f. 29.08.2019 to 28.09.2019 were fixed by this Hon'ble Tribunal, hence, Operational Creditor is required to bear these costs as the same have not been ratified by the Committee of Creditors. Further, the fee has been claimed for period of 28.09.2019 to 04.10.2019. The amount of Rs. 6,49,000/- claimed by the IRP in the 2nd COC for the period of 28.09.2019 to 04.10.2019 (or for any period, which he has acted as IRP) is not justifiable. Further, the CoC in its second meeting held on 04.11.2019 voted against the Agenda Item No. 4 relating to the cost of IRP. Further, the fee claimed for the period starting from 29.08.2019 till 04.11.2019 is not justifiable because the IRP has not taken any steps for resolution and CoC in its second meeting held on 04.11.2019



resolved to liquidate the corporate debtor and accordingly, the RP filed the application under Regulation 33 (2) of the IBC. Further, the cost of IRP cannot be treated as the cost of CIRP and cannot be allowed to be recovered from the funds/assets of corporate debtor.

6. We have heard the Ld. Counsels for both the parties.
7. Ld. Counsel for the applicant in course of his arguments submitted that in view of Regulation 33 (2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, if the applicant has not fixed the expenses, which are to be incurred on or by the IRP then this Adjudicating Authority shall fix the same. He further submitted that in view of Regulation 33 (3), the application shall bear the cost, which shall be reimbursed by the CoC to the extent it ratifies. He further submitted that vide order dated 29.08.2019, this Adjudicating Authority while admitting the application also directed the applicant to deposit Rs. 2 lakhs, which shall be reimbursed by the CoC but the applicant has not deposited the said amount. He further submitted that in view of Section 5 (13) of the IBC, the Insolvency Resolution Process Costs means the amount of any interim finance and the costs incurred in raising such finance, the fees payable to any person acting as a resolution professional, any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. He further submitted that since the fee has not been fixed by the CoC and the CoC has also not approved the cost, so, this Adjudicating Authority may fix the fee as well as expenses incurred on or by the IRP. He further submitted that the CoC has approved the fee of Rs. 1.75 Lakhs and the same may be given to the IRP also.
8. On the other hand, Ld. counsel for the Respondent No. 2 opposed the prayer on the ground that since the fee/cost has not been approved by the



CoC, therefore, the CoC is not liable to pay the cost and fee of the IRP. He further submitted that even if the fee claimed by the IRP is excessive and unreasonable because no work was done by the IRP. He further submitted that in the second meeting of CoC, the resolution to liquidate the CD shows that no work has been done by the IRP during that period. He further submitted that this Adjudicating Authority directed the applicant to pay the fee but the applicant fails to deposit the same, therefore, the applicant may be directed to pay the said amount. He further submitted that the fee and cost incurred by the IRP is not liable to be included as IRP cost because in view of regulation 33 (4), the amount of expenses ratified by the committee shall be treated as Insolvency Resolution Process Costs.

9. Now, in the light of the submissions raised on behalf of the parties, before considering the submissions made on behalf of the parties, we would like to refer Regulation 33 upon which both the parties have placed reliance and the same is quoted below:-

33. Costs of the interim resolution professional.

- (1) The applicant shall fix the expenses to be incurred on or by the Interim Resolution Professional.***
- (2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).***
- (3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.***
- (4) The amount of expenses ratified by the committee shall be treated as Insolvency Resolution Process Costs.***

Explanation. - For the purposes of this regulation, "expenses" include the fee to be paid to the Interim Resolution Professional,



Fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the Interim Resolution Professional.

10. Mere plain reading of the Regulation 33 (2) shows that The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1) and here in the case in hand, it is admitted fact that the applicant has not fixed the fee and expenses of the IRP rather while admitting this application this Adjudicating Authority directed the applicant to deposit Rs. 2 Lakhs to meet the the immediate expenses of the IRP, which shall be reimbursed by the CoC but from the perusal of the records, we find that the applicant has not deposited the said amount. We further find that even the CoC has not ratified the fee and the expenses of the IRP and that is the reason, the petitioner approached to this Adjudicating Authority. We further find that both the parties have placed reliance on Regulation 33. We have carefully examined the Regulation 33 and we find that as per regulation, the applicant shall bear the expenses, which shall be reimbursed by the CoC to the extent, it ratifies and Regulation 33 (4) says that “The amount of expenses ratified by the committee shall be treated as Insolvency Resolution Process Costs”. Therefore, in our considered view, it is the applicant, who shall bear the cost, which includes the fee as well as expenses as per the explanation of Regulation 33.

11. At this juncture, we would like to refer Section 5 (13) of the IBC and the same is quoted below:-

“insolvency resolution process costs” means—

(a) the amount of any interim finance and the costs incurred in raising such finance;



(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

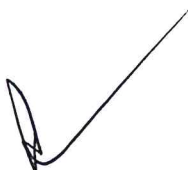
(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board;

12. Mere plain reading of the provision shows that IRP cost means “*the fees payable to any person acting as a resolution professional and running the business of the corporate debtor as a going concern*”. Therefore, in view of the aforesaid provision, we are of the considered view that IRP Cost shall include fee as well as the cost incurred by the RP. At this juncture, we would also like to mention that in Section 5 (13) the word IRP is not mentioned rather word RP is mentioned, therefore, at this juncture, we would like to refer Section 5 (14) and the same is quoted below:-

“Insolvency Resolution Process Period” mean the period of one hundred and eighty das beginning from the insolvency commencement date and ending on one hundred and eightieth day”

13. Mere plain reading of the provision shows that “*Insolvency Resolution Process Period*” means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day”. When we shall consider the case in hand in the light of that provision then we are of the considered view that commencement of Insolvency Resolution Process Period begins from date of commencement of the insolvency and sub-section 6 of Section 9 says that “*The corporate*



insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section” and admittedly, in this case the application was admitted on 29.08.2019 and on the same day, the IRP was appointed, therefore, the date of commencement of CIRP was 29.08.2019. If we shall read Section 5 (13) and 5 (14) of the IBC together then we are of the considered view the Insolvency Resolution Process Cost includes all the cost, which incurred during the Insolvency Resolution Process period and here in the case in hand, the Insolvency commences from 29.08.2019, hence, we are of the considered view that any expenses and fee incurred during that period shall includes as Insolvency Resolution Process cost even if the IRP is not referred in Section 5 (13) but it includes the fee of IRP as well.

14. Now, coming to the Regulation 33 (4) the amount of expenses ratified by the CoC shall be treated as Insolvency Resolution Process Cost. Here in the case in hand, we find that neither the applicant has deposited the costs nor the CoC has ratified the cost, whereas the IRP has performed his duties and also take steps to make a public announcement in FORM A on 07.09.2019 in Business Standard (English) Edition, on 09.09.2019 in Business Standard (Hindi) Edition in Delhi – NCR, therefore, the IRP is entitled to get the fee as well the expenses and towards the expenses IRP has claimed Rs. 54,520/- and in view of the approval of IRP fee, he has claimed Rs. 1.75 lakhs plus taxes per month from the period 29.08.2019 till 04.11.2019.

15. At this juncture, we would also like to refer para 3 of the application filed by the IRP. In para 3 of application, the applicant mentioned that he has received the order dated 29.08.2019 on 06.09.2019 and thereafter, he made a public announcement on 07.09.2019, therefore, the claim of the fee of IRP from 29.08.2019, in our opinion, is not liable to be accepted because he was



appointed on that day but he had started functioning after receiving the order on 06.09.2019. Under such circumstances, we are of the view that IRP is entitled to get the fee from 06.09.2019 till the appointment of RP on 04.11.2019. Hence, we find and hold that IRP is entitled to get the fee for the period starting from 06.09.2019 till 04.11.2019. So far the amount of fee is concerned, we find that CoC has fixed the fee RP as Rs. 1.75 lakhs but we have directed the applicant to deposit Rs. 2 lakhs towards the immediate expenses, which includes the fee as well as expenses incurred during the period the period. Hence, we hereby fixed the fee of IRP Rs. 1.50 Lakhs for the period starting from 06.09.2019 till 04.11.2019.

16. Therefore, for the reasons discussed above, we hereby modify the claim of fee of IRP for the period starting from 29.08.2019 till 04.11.2019 to 06.09.2019 till 04.11.2019 @ Rs. 1.50 lakhs and we hereby approved the expenses of Rs. 54,520/- which incurred towards the public announcement. We further direct the CoC to reimburse the aforesaid amount and if the CoC fails to reimburse the said amount then that amount shall be treated as CIRP cost as per 5 (13) of IBC. **With this the present application stands disposed off.**

-Sd-

K. K. VOHRA
Member (T)

-Sd-

ABNI RANJAN KUMAR SINHA
Member (J)