



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

IA No. 534/JPR/2022
In CP No. (IB)- 79/9/JPR/2020

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

M/S PRIME IMPLEX

...Operational Creditor/Applicant

Versus

M/S SHALFEYO INDUSTRIES PVT. LTD.

...Corporate Debtor/Respondent

IA No. 534/JPR/2022:

MEMO OF PARTIES

Deepak Modi

S/o Ram Sharan Modi aged about [32] years presently
Residing at 250/47, RHB, Pratap Enclave Haldhighati Marg,
Pratap Nagar, Sanganer, Jaipur- 302017 (Rajasthan)

...Applicant

Versus

Shalfeyo Industries Private Limited

250/47, RHB Pratap Enclave Haldhighati Marg,
Pratap Nagar, Sanganer, Jaipur-302017 (Rajasthan)



through its Interim Resolution Professional
Mr. Umang Jain

...Respondent

For the Applicant : Naresh Kumar Sejvani, Adv.
For the Respondent : Nitesh Shrivastava, Adv.

Order Pronounced On: 11.08.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Interim Application ('IA') has been filed by Mr. Deepak Modi, one of the suspended directors of M/s Shalfeyo Industries Private Limited ('Corporate Debtor') under Section 60(5) read with Section 21 of Insolvency and Bankruptcy Code, 2016 (the 'Code'/ 'IBC'). The Adjudicating Authority *vide* Order dated 16.08.2022 ('CIRP Order') admitted the application under Section 9 of the IBC, filed by the Operational Creditor against the Corporate Debtor in the above-mentioned matter and Mr. Umang Jain was appointed as Interim Resolution Professional ('IRP').
2. The IRP issued the public announcement under Section 15 of the Code for inviting the claim. Axis Bank, the sole financial creditor of the Corporate Debtor filed its claim in Form – B. Accordingly, IRP had collated the claims and filed a list of creditors on the web portal of the Insolvency and Bankruptcy Board of India ('IBBI') on 05.09.2022 while duly constituting



the Committee of Creditors ('CoC'). A copy of the list of creditors as of 06.10.2022 is annexed as Annexure – 1 of the IA.

3. Consequently, on 09.09.2022, the IRP issued notice for the first CoC meeting to be held on 15.09.2022, which was attended by the Applicant and the official of Axis Bank Limited. However, the conduct of the IRP disregarded the guidelines and provisions of the Code, the financial creditor did not cast its vote despite extending the timelines thrice on 19.09.2022, 24.09.2022 and 30.09.2022. A copy of the notice of the first CoC meeting, minutes of the first CoC meeting and email communication regarding the first CoC meeting are annexed as Annexures – 2, 3 and 4 (Colly) of the IA, respectively.
4. In the notice of the second CoC meeting, the Applicant caught on the irregularities and contravention committed by the IRP of Regulation 12 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 ('CIRP Regulations') in excluding the sole financial creditor from the CoC. Accordingly, he filed the amended list of creditors which now includes an Operational Creditor as the only member of the CoC. A copy of the notice and minutes of the second CoC meeting is annexed as Annexures – 5 and 6 of the IA, respectively.
5. Further, the mere acceptance of withdrawal of the claim *via* email without obtaining any proof of payment of satisfaction or no objection certificate



violates Regulation 12A of the CIRP Regulations as the said regulations do not permit the withdrawal but for updating the claim. Resultantly, the Applicant served a Legal Notice on 12.10.2022 to the IRP seeking copies of the email dated 01.10.2022 and 06.10.2022. Despite this, the IRP convened the second meeting of the CoC defying Section 21 of the Code and the same was raised in the said meeting.

6. Moreover, upon the admission of the CIRP Order, the IRP failed not only to take custody of the limited assets of the Corporate Debtor but also to draw the *panchnama*, Hence, the Applicant wrote several emails dated 27.08.2022, 31.08.2022 and 09.09.2022, which were not responded. The IRP has been ineffective in carrying out its duties of filing statutory returns and favouring the original operational creditor of the Corporate Debtor breaching Section 25 of the Code. A copy of the aforesaid email communications is annexed as Annexure – 7 (Colly) of the IA.

7. Thus, it has been prayed by the Applicant:

- I. *To allow the instant application;*
- II. *To hold the re-constitution of CoC as unlawful and illegal;*
- III. *To hold the second meeting of the CoC held on 17.10.2022 as null, void, and illegal as being illegally constituted and quash and set aside the resolution therein;*
- IV. *Since Axis Bank Limited had withdrawn the claim and decided not to claim therefore held the same as being relinquished;*
- V. *To hold the functioning of IRP contrary to law;*



- VI. *Till the disposal of instant application stay the re-constitution of the CoC and resolution passed in the second meeting of the CoC.*
8. The Applicant filed his Written Submissions *vide* Diary No. 1707/2023 dated 14.07.2023 reiterating his earlier submissions and has relied on the following:
- I. *Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited & Ors., Civil Appeal No. 8129 of 2019.*
 - II. *Union Bank of India v. Rajdeep Clothing & Advisory Pvt. Ltd., Company Appeal (AT)(Ins) No. 399 of 2021.*
 - III. *V. Duraisamy, IRP v. Jeyapriya Fruits & Vegetables Commission Agent, Company Appeal (AT)(Ch)(Ins) No. 25 of 2022.*
 - IV. *Rajnish Jain v. Manoj Kumar Singh, IRP & Anr., Company Appeal (AT)(Ins) No. 519 of 2020.*
 - V. *Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd., Company Appeal (AT)(Ins) No. 291 and 591 of 2018.*
 - VI. *STCI Finance Ltd. v. Bohra Industries Ltd., IA No. 319/JPR/2019 in CP No. (IB)–157/7/JPR/2019.*
9. The Hon'ble Supreme Court of India in *Ganashyam Mishra (Supra)*, had observed that '86. ... *RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit the necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held*



between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an ongoing concern.'

10. In the matter of *Union Bank of India (Supra)*, an appeal was filed by the Union Bank of India against the order passed by Learned NCLT, Ahmedabad Bench on 06.04.2021. In the said order the appointed Resolution Professional ('RP') was removed and a new RP was appointed. The RP informed the respondents that their claims have been rejected since they are related parties to the Corporate Debtor. This was done based on the findings of the Transactional Audit Report. It was held by Hon'ble NCLAT that the IRP/RP cannot, on its own, review and revise his own earlier decision without the approval of Adjudicating Authority. The IRP/RP does not have any power to review the status of a creditor. However, this does not mean that once a creditor is categorized, the category cannot be changed. For this purpose, the right approach would be to file an application before the Adjudicating Authority with relevant material for appropriate directions. Further, whether the constitution of CoC can be changed by RP and if so, under what circumstances and to what extent. The Hon'ble Appellant Authority observed that such a situation is subject to the decision of the Adjudicating Authority which can correct or modify the constitution of CoC if facts and circumstances of the



case demand so and an appropriate application is to be made by the RP for this effect.

11. In *V. Duraisamy (Supra)*, the order passed by the Adjudicating Authority observed that if the IRP has received the claim from only the Operational Creditor, he is required to constitute the CoC with the sole Operational Creditor. The Hon'ble NCLAT held that *'there is no provision in the Code for the Corporate Debtor to constitute the COC with a single Operational Creditor ... As the CoC itself is not constituted and in the light of the fact that not a single 'Claim' was received by the IRP even after the public announcement, as well as the fact that the Corporate Debtor Company has been struck off from the Registrar of Companies'*.
12. In *Rajnish Jain (Supra)*, important questions arose before the Hon'ble NCLAT were firstly, does the CoC has the power to determine who is a financial creditor or an operational creditor; secondly, can a RP reclassify the status of a creditor from 'Financial' to 'Operational Creditor'; and lastly, the role of the Adjudicating Authority in determining who is a financial creditor. The Hon'ble Appellant Authority held that the Adjudicating Authority has erred in letting CoC decide the status of the Creditor, the COC has no role in deciding the status of a creditor and such decision can never be treated as an exercise under its Commercial wisdom.
13. In the matter of *Prasad Gempex (Supra)*, the Hon'ble NCLAT has observed that the Resolution Professional has no authority to adjudicate the



claims, the Resolution Professional must vet and verify the claims made and ultimately determine the amount of each claim.

14. In the matters of *STCI Finance Ltd. (supra)*, an application was filed for issuance of a No Dues Certificate in terms of the Resolution Plan approved by the Adjudicating Authority against the Financial Creditor therein. Earlier the same Financial Creditor had withdrawn its claim from the CIRP of the Corporate Debtor on 15.09.2020. Subsequently, the Resolution Plan was approved by the Adjudicating Authority on 13.10.2021. It was contended that the Resolution Plan contained a provision for the issuance of a No Dues Certificate by the Financial Creditor, which was denied without any reason. Also, the Financial Creditor presented the post-dated cheques of the Corporate Debtor which were dishonoured resulting in proceedings under the Negotiable Instruments Act, 1881. The Adjudicating Authority vide Order dated 12.04.2023 while relying on the Judgments of the Hon'ble Supreme Court directed the Financial Creditor to return the Post-Dated Cheques to the Corporate Debtor while holding “... .. *the main contention of the application for issuance of NOC cannot be accepted as Resolution Plan of Corporate Debtor/BIL would not ipso facto discharge the guarantor of the said Corporate Debtor.*”
15. Resolution Professional *vide* Diary No. 19/2023 dated 04.01.2023 filed its reply to the present IA, stating the following:



- I. The allegation that the RP has not followed the Code and allowed withdrawal of the claim. However, Axis Bank Limited has not relinquished its claim but has withdrawn provisionally for this the present IA has been filed on account of the non-joinder of Axis Bank Limited as the necessary party and is liable to be dismissed.
- II. As per the directions, *vide* Order dated 22.11.2022, the RP was directed to convene the meeting of CoC and record the view of Axis Bank Limited for withdrawing its claim. Consequently, RP *via* the Emails dated 26.11.2022 and 01.12.2022 requested Axis Bank Limited to share its final decision. Axis Bank Limited *vide* an Email dated 01.12.2022 has reiterated its earlier stand; the same is being reproduced for ease of reference:

'While the corporate insolvency resolution process (CIRP) was initiated in accordance with the Insolvency and Bankruptcy Code, 2016 (Code), and Axis Bank was the only Financial Creditor of the Corporate Debtor. However, due to the turn of events, the multiplicity and delay of litigation, and the strain on public money caused by the Corporate Debtor, we have addressed emails dated 01.10.2022 and 06.10.2022 informing that we withdrew submission under Form C filed before the interim resolution professional in accordance with Section 38(5) of the Code. We specified that such withdrawal was made due to the pending litigation before the NCLAT, Delhi; and that we reserve our rights to explore alternative remedies depending on the outcome of the NCLAT, Delhi and rights available for recovery of outstanding dues under Law.'



A copy of the aforementioned emails is annexed as Annexure – R1 (Colly) of the reply to the IA.

- III. Further, the RP is following the provisions of the Code in letter and spirit. RP e-voting on the agendas was scheduled to be from 17.09.2022 – 19.09.2022, but a verbal request was made by the Authorised Representative for extending the voting time limit as instructions were pending from the higher authorities. Afterwards, *then* Sole Financial Creditor *vide* email dated 21.09.2022 requested for further extension of three days on the earlier grounds. Given the delay, RP *vide* email dated 27.09.2022 instructed and apprised *then* Sole Financial Creditor of its mandatory duty of casting vote without any delay per the IBBI Circular dated 10.08.2018. However, Axis Bank Limited withdrew the claim *vide* email dated 01.10.2022. A copy of the Emails dated 17.09.2022, 19.09.2022, 21.09.2022, 27.09.2022, 01.10.2022 and 06.10.2022 are annexed as Annexure – R3 (Colly) of the reply to the IA.
- IV. Subsequently, Respondent convened a fourth CoC meeting dated 14.12.2022 *inter-alia* recording the detailed reasons for withdrawal of the claim by the Financial Creditor post admission. A copy of the notice and minutes fourth CoC meeting is annexed as Annexure R – 2 (Colly) of the reply to the IA. The RP does not have any control over the decision-making of the Financial Creditor(s) as the



commercial wisdom of CoC always prevails in the CIRP which includes the right to file and withdraw one's claim(s).

V. Furthermore, the RP has to collate and update the claims as per Sections 25 (1)(e) of the Code read with Regulation 14 (2) of the CIRP Regulations and duly filed the report on the first reconstitution of CoC which has been taken on record *vide* Order dated 03.11.2022. Therefore, RP re-constituted the CoC with the sole Operational Creditor as per Section 21 of the Code read with Regulation 16 of the CIRP Regulations.

VI. The Legal Notice dated 12.10.2022 was duly responded to by the Financial Creditor *via* Reply to Legal Notice dated 29.11.2022 wherein the Financial Creditor categorically cleared its stand of withdrawal of claim. A copy of the Legal Notice and Reply to the Legal Notice is annexed as Annexure – R4 of the reply to IA. Hence, the present IA is filed with the ulterior motives of derailing the CIRP of the Corporate Debtor given Hon'ble NCLAT has not granted any stay over the CIRP *vide* its Order dated 26.09.2022 and pending application under Section 19(2) of the Code by reason of non-cooperation of *suspended* directors. A copy of the Order of Hon'ble NCLAT is annexed as Annexure – R5 of the reply to IA.

16. Considering arguments advanced, submissions put forth and documents placed on the record along with consideration of the foregoing narrative



leads to the inference that the actions of the Non-Applicant are not in violation of the letter and spirit of IBC, 2016. The RP has taken actions that were *intra vires*, conformant to the rules and regulations under the Code.

17. However, the RP cannot allow the withdrawal of the claim of the Financial Creditor as the Code does not provide for such an event. Further, the Hon'ble NCLAT in the case of *Mr. K. N. Rajakumar Suspended Director, Aruna Hotels Limited v. V. Nagarajan Resolution Professional, M/s Aruna Hotels Limited, Company Appeal (AT)(CH)(Ins) No. 48 of 2021* wherein certain financial creditors, who were part of the original CoC of the Corporate Debtor, withdrew their claims entirely during the CIRP. It was held that '*the 'Resolution Professional' has no 'Adjudicatory Power' under the I & B Code, 2016 and further that when once the 'Committee of Creditors' is/was formed, the 'Resolution Professional' cannot change the 'Committee of Creditors'*'. Accordingly, the Hon'ble NCLAT ordered that Resolution Professional *cannot constitute a 'Committee of Creditors' afresh, in the negation of the earlier constituted 'Committee of Creditors'*. Hence, we proceed to dispose of the IA under consideration.

18. The Resolution Professional shall restore the composition of the *erstwhile* CoC to its original composition to effectively ascertain the resolution of the Corporate Debtor. The IRP shall make a list of the requisite agendas necessary for the successful resolution of the Corporate Debtor and place it before the CoC in accordance with the rules and regulations thereon. The



Sole Financial Creditor, Axis Bank Limited, of the Corporate Debtor is directed to participate in the meeting and decide on the agenda items placed before the CoC including the appointment and payment of fees and costs of the IRP. Under Regulation 33 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, the CoC is to ratify the expenses of the IRP. The IRP is therefore directed to convene the meeting of the CoC within 15 days of this order, and the Financial Creditor is to participate in the same and ratify the costs based on the evidence produced by the IRP before the CoC in this regard.

19. Correspondingly, the present IA is allowed to this limited extent. Accordingly, IA No. 534/JPR/2022, stands disposed of with the aforesaid observations and a copy of this Order may be placed in the file of the said IA. A copy of this Order is to be furnished to the parties including the Sole Financial Creditor of the Corporate Debtor.

-Sd-
DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

-Sd-
ATUL CHATURVEDI,
TECHNICAL MEMBER