

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, KOLKATA.**

IA(IB) No. 477/KB/2022

in

CP(IB) No. 302/KB/2021.

In the matter of

Yes Bank Limited

.... Financial Creditor.

-Versus-

M/S Sarga Hotel Private Limited

...Corporate Debtor

And

In the matter of

Abhishek Bhardwaj (Suspended Director)

.... Applicant.

Date of hearing: 10/06/2022.

Order pronounced on: 30/06/2022

Coram

Shri Rohit Kapoor, Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Counsel appeared physically/through video conference:

For Resolution Professional : Mr. Abhrajit Mitra, Sr. Adv.
Mr. Sourojit Dasgupta, Adv.
Mr. Souvik Majumdar, Adv.

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Ms. Mahima Singh, Adv.
Ms. Pooja Mahajan, Adv.
Ms. Jasveen Kaur, Adv.
Mr. Avishek Gupta, RP in person
For applicant in IA/477/2022 : Mr. Sudipto Sarkar, Sr. Adv.
Ms. Gauri Rishi, Adv.
Mr. Supriya Gole, Adv.
Ms. Srishti Juneja, Adv.
Ms. Garima Sehgal, Adv.
Ms. Avantika Sharma, Adv.
For SIDCL (Intervener) : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Sourav Jain, Adv.
For Yes Bank : Mr. Jishnu Chowdhury, Adv.
Mr. Sounak Ghosh, Adv.
Mr. Saptarshi Saha, Adv.

ORDER

Per: Rohit Kapoor, Member (Judicial)

1. The Court is convened through hybrid mode.
2. One Suspended Director of Corporate Debtor through the medium of instant Application IA(IB) filed under Rule 11 read with Section 60(5) of the Code of National Company Law Tribunal filed on 9-06-2022 before this Tribunal has sought the following reliefs; -
 - i. *Stay the operation of the Expression of Interest issued by the Resolution Professional under Regulation 36A (1) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 on April 28, 2022; and*

- ii. *Stay the Appointment of E & Y Restructuring LLP as the Support Service Partner of the Resolution Professional in view of the inherent conflict of interest; and*
- iii. *Restrain Mr. Avishek Gupta from acting as a Resolution Professional in Sarga Hotel Private Limited and exercising any rights in furtherance of the powers granted unto him by any of the Order dated February 11, 2022 and/or*
- iv. *Pass such other Order or Order (s) as may be deemed fit and proper in the facts and circumstances of the present case.*

3. Contentions of applicant in this IA may be summarised as under:

- 3.1 Company Petition filed by Financial Creditor namely Yes Bank, under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) came to be admitted by this Adjudicating Authority on 11th of February, 2022 and an IRP was appointed at the time of admission of this petition.
- 3.2 It is alleged by the applicant, the Resolution professional appointed by this Adjudicating Authority ignored directions of the Court including those of Hon'ble Apex Court while issuing Expression of Interest (EOI) on 28-04-2022. Ref: paragraphs II to VII.
- 3.3 It is further contended in this application the Interim Resolution Professional appointed by this Adjudicating Authority who later was appointed as the Resolution Professional by Committee of Creditors on 11th of March 2022, by 100% majority, appointed E & Y Restructuring LLP as the advisor and provider of support services to the IRP/RP for the duration of Corporate Insolvency Resolution process of the Corporate Debtor. The copy of the minutes of the meeting of the CoC held on 11th of March 2022 has been annexed as Annexure – A6 with the application. The Applicant is aggrieved of issuance of EOI and appointment of E & Y Restructuring LLP as the advisor and provider of support

services to the IRP/RP on various grounds as set out in this IA. The applicant has stated that he has reasonable apprehension that confidential and privileged information shared by the Corporate Debtor with the supports service provider can be misused by Resolution Professional.

3.4 There is *mala fide* and collusive action taken by Resolution professional. Ref: (Paragraph (3), xvii, xviii, xix and xx of this application.

3.5 Resolution Professional has acted in unfair and biased manner while appointing E & Y Restructuring LLP as the support service provider.

3.6 Resolution professional has himself mentioned in the meeting of CoC on 11-03-2022 that E & Y Restructuring LLP was internal auditor of the Company till financial year 2020-20121 and has ignored the fact Ernst and Young LLP and E & Y Restructuring LLP are both sister concerns.

3.7 Despite fee of Rs.1.5 lacs being charged, RP is assigning his services to third party leading to further CIRP cost.

4. We have Ld. Sr. Counsel appearing for parties and perused this application.

5. After hearing the Ld. Senior Counsel and perusal of record, *we find* that;

- i. Paragraph 11 of the order of admission passed by this Adjudicating Authority on 11th of February, 2022, contains reference to contentions with respect to alleged disputes and judgement of the Hon'ble Supreme Court. *No appeal has been filed challenging the order dated 11th of February, 2022 passed by this Adjudicating Authority.* Order of (CIRP) admission of application under Section 7 of the application was passed on 11th of February, 2022 and whereas this application was filed before this Adjudicating Authority on 9th of June, 2022. This application is an attempt for rehearing of order of admission after expiry of prescribed period of limitation of 45 days for filing appeal.

- ii. Applicant, a suspended Director in the garb of this application filed on 09-06-2022 is seeking review/recalling of order dated 11th of February, 2022 passed by this Adjudicating Authority while admitting an application under Section 7 of the Code. We of the considered view, this application is not maintainable as this Applicant in this present application cannot be permitted to re-argue/reopen order of admission passed in application under Section 7 on 11-02-2022 which has attained finality. It is not some error as such which can be corrected by this Adjudicating Authority while exercising powers under section 11 of NCLT Rules.
- iii. Ref: Review Application No. 13 of 2020 in Company Appeal (AT) (Insolvency) No. 379 of 2020, Decided On: 03.02.2021, in **Adish Jain vs. Sumit Bansal and Ors.** MANU/NL/0028/2021, paragraphs 5,14,13, & 18.

18. “We observe that there is no 'mistake apparent from the record' and the Applicant cannot be permitted to seek re-hearing of the Appeal in regard to any finding which would amount to sitting in an Appeal in disguise. In the garb of this Review Application, the Applicant seeks to re-argue the matter. For all the aforementioned reasons, this Review Application is dismissed as impermissible in Law and as no mistake apparent from the record is made out. No order as to costs.”

We also seek to rely on, NCLAT, New Delhi Company Appeals (AT) (Insolvency) 294-295 of 2020 Decided On: 15.03.2021 Appellants: State Bank of India Vs. Respondent: Visa Steel Ltd. MANU/NL/0085/2021, paragraph 3.

- iv. Committee of Creditors (“COC”) in its second meeting held on 25-04-2022 took various decisions relating in furtherance to resolution process initiated including fixing the following dates:
- a) 28-04-2022: EOI was issued inviting bids.
 - b) 18-05-2022: Last date of receipt of EOI.

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c) 06-06-2022: Date of issue of final list of prospective resolution applicants.

Besides the above, schedule for completion of bidding process for was also fixed.

The minutes of meeting of CoC wherein decision regarding appointment of support provider was taken extracted and attached herein below:

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	Fee of INR 1.25 Cr payable upon approval of resolution plan by the CoC (Fee does not include Out of Pocket Expenses and applicable taxes)
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Independence criteria as defined under 27(3) of IBBI Regulations, 2016	Is EYR LLP compliant
Not a relative of the resolution professional	Yes
Not a related party of the corporate debtor;	Yes
Not an auditor of the corporate debtor at any time during the period of five years preceding the insolvency commencement date	Yes*
Not a partner or director of the insolvency professional entity of which the resolution professional is a partner or director	Yes

*Ernst & Young LLP which is independent of EYR LLP was internal auditor for SHPL till financial year 2020-21.

Mr. Sunil Jha (director of SHPL) enquired from the Chairman whether appointment of EY, which is also the internal auditor of the Company is permitted. The Chairman clarified that necessary disclosures of independence as required under the Regulations have been made by EY Restructuring LLP and there does not appear to be any conflict of interest given that they were not the statutory auditor of the Company. Mr. Sunil Jha and representative of Yes Bank requested for views of the legal counsel on this issue. Ms. Pooja Mahajan from C&M clarified that the internal auditor was a different EY entity, while the support services to IRP/ RP are being provided by EY Restructuring LLP, which is an IPE registered with the IBBI. Hence, from a Regulations perspective, EY Restructuring LLP is not a non-independent entity. IRP team added that necessary conflict and independence checks have been carried out.

Voting Item 3: Approval of fees for Chandhiok & Mahajan appointed as legal counsel to IRP/RP

Approval is sought for fees of Chandhiok & Mahajan appointed as legal counsel to IRP/RP

Particulars	Fee amount
Legal counsel: Chandhiok & Mahajan, Advocates & Solicitors (C&M)	<ul style="list-style-type: none"> • Monthly Retainership fees of INR 2 lacs per month (for first 5 months of CIRP) and INR 2.5 lacs per month thereafter. • INR 35,000 per appearance • Filing of applications: INR 80,000- 1.5 Lakh • INR 20,000 – briefing senior counsel (Fee does not include Out of Pocket Expenses and applicable taxes)

Independence criteria as defined under 27(3) of IBBI Regulations, 2016	Is C&M compliant
Not a relative of the resolution professional	Yes
Not a related party of the corporate debtor;	Yes

[Handwritten Signature]

From the minutes of CoC it emerges that:

- a. It is the CoC that has eventually engaged support service provider and not the RP, therefore, contention of applicant the resolution professional appointed the support service provider (Paragraph xvii of IA) is factually in-correct.
- b. CoC has taken an informed decision by 100 % voting while appointing EY Restructuring LLP as support service provider to Resolution Professional and after taking into consideration there was no conflict of interest. We are of the considered view; it is the commercial wisdom of the CoC what to do best in the interest of the resolution process. Also, this Adjudicating Authority cannot be called to sit in appeal over decision of CoC.
- c. It is also not understood as to how the applicant who is a suspended Director of the Corporate Debtor is concerned about the fee payable as determined by the CoC for carrying out CIRP in an effective manner.
- d. As noted above, we cannot ignore the time of filing of this I.A. when the substantial part of process inviting bids was completed. The application does not appear to have been filed with any proper cause or intent.
- v. *Section 60 (5) of the Code*, the residuary jurisdiction of the NCLT under Section 60(5) of the IBC though, provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings, however, cannot be invoked or exercised to review/recall order dated 11-02-2022 of this Adjudicating Authority upon the grounds raised in this application.
- vi. Suffice it to say, this application filed by a suspended Director at such a belated stage, from various angles looks to be merely an attempt to thwart what has been settled position; *“timely resolution of stressed assets is a prime factor in the successful working of the Code, the interest of the*

'Stakeholders' including the 'Creditor(s)', effectively balancing within the four corners of 'Law', and as per 'I&B' Code, 2016 and 'Regulations' without any further loss of time'."

- vii. For the forgoing reasons and also keeping in view the object of the Code and principle of minimum judicial interference by this Adjudicating Authority reiterated by Hon'ble Supreme Court of India in its recent judgement on **05-06-2022** in **Civil Appeal nos. 1811-1812 of 2022 Vallal RCK versus Siva Industries and holdings limited and others**, paragraph 27, this **IA (IB) 477/KB/2022** is hereby rejected.
- viii. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- ix. Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 30th day of June, 2022