

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

**IA 427/2018 in CP(IB) 209/NCLT/AHM/2017**

Coram: **Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER JUDICIAL**  
**Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF  
THE NATIONAL COMPANY LAW TRIBUNAL ON 23.08.2019**

Name of the Company: Credit Suisse Funds AG & Anr.  
V/s.  
Sh. Kumar Kedia RP of B.P. Foods Ltd. & Anr.

Section of the Companies Act: Section 60(5) of the Insolvency and  
Bankruptcy Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	Mr. Naveen Pahwa, Sr. Adv. with Ms. Anshita Thakore, Adv.		Applicant	
2.	(ALM) Anshu Parth	PLA	Suspended mgt.	
	SANKET GUPTA	ADV	RP	
	ROHIT LALWANI	" <u>ORDER</u>	"	

The parties are represented through their respective Ld. Counsel(s).

- The present Interim Application is filed by the Applicants, viz., Credit Suisse Funds AG & Anr., under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, seeking for certain directions to be issued to the RP to collate and update the claim submitted by them as Corporate Guarantors and to be treated the Applicants as Financial Creditors.
- The relevant portion of the prayer clause of the aforesaid application is being reproduced hereinbelow:

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- a) ***“The Respondent No.1 being the Resolution Professional or in case being replaced by another Resolution Professional, then such Resolution Professional be directed to independently admit the claims of the Applicants and make them members of the Committee of Creditors; and***
- b) ***The claims of the Applicants be admitted by Resolution Professional.***

3. The brief facts of the case raising to the present IA are stated as under:

- 1 *Credit Suisse Funds AG (hereinafter referred to as the “Applicant No.1) is the fund manager of responsAbility Fair Agriculture Fund (formerly known as responsAbility Fair Trade Fund) (hereinafter referred to as the “Fund 1”). Fund is the ‘contractual investment fund’ established under the Swiss Collective Investment Schemes Act (CISA) of June, 2006. Applicant No.1 is a limited company registered under the laws of Switzerland and is the fund management company of the Fund 1 and therefore manages the Fund 1 in its own name but for the benefit of the investors of Fund 1. Copy of the prospectus of the Fund 1 along with integrated fund contract is annexed with the application.*
- 2 *responsAbility Management Company SA (formerly known as Credit Suisse Microfinance Fund Management Company) (hereinafter referred to as the “Applicant No.2” is the fund manager of responsAbility Micro and SME Finance Fund (formerly known as responsAbility Global Microfinance Fund) (hereinafter referred to as the “Fund 2”. Fund is registered as an undertaking for collective investment and qualifies as an investment fund in Luxemburg in accordance with Part 2 of the ‘law of December 17, 2010 on undertakings for collective investments’. Applicant No.2 is a joint stock company which is the ‘alternative investment fund manager’ (fund manager) of Fund 2. Copy of the prospectus of Fund 2 is annexed with the application. (Applicant No.1 and Applicant No.2 are collectively referred to as the “Applicants” and Fund 1 and Fund 2 are collectively referred to as the “Funds”).*
- 3 *B.P.Foods Products Private Limited (i.e. the Corporate Debtor) is a company incorporated under the Companies Act, 1956, inter alia, engaged in the business of milling wheat, gram, other gains other allied products and by-products and to manufacture food products. In the course of its business the Corporate Debtor approached responsAbility Investments AG, being Asset Manager of Fund 1 and Portfolio Manager*

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of Fund 2, (hereinafter referred to as "rA") and represented to the rA their requirement of monies in their business of trading of what related products. It was represented and informed by the Corporate Debtor that the facility shall be availed by their entity in UAE i.e. B.P. Foods Overseas F.Z.E. (hereinafter referred to as the "Principal Borrower"). Pursuant to several rounds of discussions between the rA and Mr. Ravi Prakash Bansal, Promoter and Director of the Corporate Debtor, the parties agreed to an arrangement whereby it was agreed that the Applicants shall extend loan facilities to the Principal Borrower being the Wholly Owned Subsidiary ("WOS") of the Corporate Debtor and that such facilities shall be secured by a guarantee issued by the Corporate Debtor. The said understanding was recorded vide a Term Sheet which was accepted by the Principal Borrower/Corporate Debtor vide their email dated September 12, 2014 (hereinafter referred to as "Term Sheet"). The said Term Sheet provided that the Corporate Debtor was an WOS of the Corporate Debtor and that the Corporate Debtor was to execute Corporate Guarantee (s) to the tune of 120% of the outstanding amount. A copy of the Term Sheet along with confirmation email dated September 12, 2014 addressed by Deepanshu Goyal (Asst. Manager, Corporate Office) is annexed with the application.

- 4 In terms of aforesaid arrangement, the Principal Borrower issued a Promissory Note dated October 24, 2014 to the Fund 1, being managed by the Applicant No.1 for an amount of USD 2,250,000.00 (Two Million Two Hundred and Fifty Thousand United States Dollars only) (hereinafter referred to as the "1<sup>st</sup> Promissory Note"). Accordingly, Fund a disbursed the principal amount to the Principal Borrower on October 24, 2014 which was repayable by the Corporate Debtor on March 31, 2015 (hereinafter referred to as the "Maturity Date") along with an interest of 7.25% per annum. A copy of the 1<sup>st</sup> Promissory Note dated October 24, 2014 executed in favour of Fund 1 by the Principal Borrower, is annexed with the application.
- 5 The Principal Borrower above named issued another Promissory Note dated November 28, 2014 to the Applicant No.2 for a principal amount of **USD 1,250,000.00 (One Million Two Hundred and Fifty Thousand United States Dollars only)** (hereinafter referred to as the "2<sup>nd</sup> Promissory Note"). Accordingly, the Applicant No.2 disbursed the principal amount to the Principal Borrower on November 28, 2014 which was repayable by the Corporate Debtor on March 31, 2015 along with an interest of 7.25% per annum. A copy of the 2<sup>nd</sup> Promissory Note

*dated November 28, 2014 executed in favour of the Applicant No.2 by the Principal Borrower is annexed with the application.*

- 6 *As formerly agreed between the Applicants and the Corporate Debtor and in terms of the Term Sheet, the Principal Borrower provided collateral security in the form of **Corporate Guarantees executed by the Corporate Debtor to secure the repayment of aggregate amount of USD 3,500,000.00 (Three Million Five Hundred Thousand United States Dollars only)**. The Corporate Debtor secured the 1<sup>st</sup> Promissory Note, as issued by the Principal Borrower, vide execution of a Corporate Guarantee dated October 21, 2014 in favour of Fund 1, being managed by the Applicant No.1. **A copy of the Corporate Guarantee dated October 21, 2014 is annexed with the application.** The Corporate Debtor secured the 2<sup>nd</sup> Promissory Note, as issued by the Principal Borrower, vide execution of a Corporate Guarantee dated **November 27, 2014** in favour of Applicant No.2, being fund manager of the Fund No.2. **A copy of the Corporate Guarantee dated November 27, 2014 is annexed with the application.***
4. In response to the above stated IA, the present RP, Mr. Sunil Kumar Kedia, has filed its reply seeking for a direction from this Court on the issue of admission of the claim submitted by the applicants as Financial Creditors, in the light of corporate guarantee documents and new guarantee documents executed on its favour, which were submitted as fresh documents pursuant to clarification sought for by the RP. The Resolution Professional now seems to have been convinced with such clarifications given by the present applicants. Hence, he proposes to include their claim on the strength of corporate guarantees executed in their favour, i.e. Credit Suisse Funds AG & Anr. as Financial Creditors. However, the difficulty as being felt by him is that the period of the Corporate Insolvency Resolution Process period of 270 days is already over. Hence, such claim cannot be considered or to be included in the list, after the expiry of the statutory period of the Corporate Insolvency Resolution Process.

5. Considering such situation, the Resolution Professional has indirectly/impliably sought for exemption/exclusion of time of the period consumed in the pending litigation including in the present IA, wherein the applicants have claimed to have invoked a corporate guarantees issued in their favour by the corporate debtor, viz., M/s. B.P. Food Products Pvt. Ltd. on alleged default committed by it. Thus, the applicants have sought such direction from this Adjudicating Authority to be issued to the RP to consider their claim as Financial Creditors and to treat them as the members of the Committee of Creditors (CoC).
6. It is the case of the applicants that the Resolution Professional did not properly consider their claims due under the corporate guarantees executed in their favour by the corporate debtor company. It is further alleged that such claim has been arbitrarily rejected by the RP on such ground of improperly/insufficiently stamped and for some other technical reasons, which are not sustainable in the eye of law. It is contended that the RP is not empowered to ignore their claim as Financial Creditors for such reason and not treating them as members of CoC in terms of the provisions of the Insolvency and Bankruptcy Code, 2016, (I & B Code).
7. We duly considered the above stated submissions made by the parties, as we have already discussed in the preceding paragraphs that the Resolution Professional in its reply, dated 17.08.2019, has explained the reasons for not considering the applicants' claim

contending, inter alia, that the applicants' claim was not found to be in order. Hence, he sought necessary details/particulars from the present applicants, which were prerequisite to consider the claim of the applicants as Financial Creditors; such clarifications are described in detail in its reply affidavit.

8. Irrespective of the above stated pleas, the Resolution Professional, in the same reply, has further submitted that the applicants in IA No.427 of 2018 have now clarified the issue and they have clarified that the new guarantee, dated 23.07.2015, was not additional guarantee, but it was subsequent to the earlier one (corporate guarantee dated 21.10.2014 and 27.11.2014), because some more funds were advanced to the corporate debtor against such guarantee(s). The RP, after considering such clarifications, has formed his view on the basis of above stated fresh documents (guarantee documents) dated 23.07.2015 that the claim submitted by the applicants is found to be in order and can be admitted as **Financial Debts**. However, it is further submitted since the period of 270 days of Corporate Insolvency Resolution Process is already over on 21.05.2019 during the pendency of the present IA, i.e. IA No. 427 of 2018 before this Adjudicating Authority, **such claim of the applicants can be admitted/approved with the permission of the Adjudicating Authority**, provided that such period of pendency of litigation be exempted/excluded for the purpose of counting the period of the Corporate Insolvency Resolution Process.
9. It is also pointed out that meanwhile, during the period of Corporate Insolvency Resolution Process, the CoC has already approved a

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Resolution Plan of the Resolution Applicant with requisite majority in its meeting dated 16.05.2019. Further IA No. 299 of 2019, is pending seeking for approval of the Resolution Plan before this Adjudicating Authority. Further, the maximum period that can be extended only up to 330 days. Hence, such aspect also needs to be considered while issuing appropriate direction.

10. We considered the present aspects of the IA, in the light of the statutory provisions, and we are of the view that it is now a well settled legal position about the power and jurisdiction conferred to the Resolution Professional, under the I & B Code, and he has not been vested with such power to adjudicate the claim filed by a party. His duty is described in the Code is to collate the claim and update the list of claim submitted before it, after making scrutiny and proper verification and even the disputed claims needs to find place in the category of claim (under dispute) in the list of claims and in the Memorandum of Information, etc., so as to appraise of properly to a prospective Resolution Applicant. The RP, in case feels or needs some clarification, then he is at liberty to consult with the CoC about such issue or can move an appropriate application before the Adjudicating Authority for appropriate direction.
11. Our above stated observation finds legal support from the decision of the Hon'ble Supreme Court in the matter of **Swiss Ribbons (P) v. Union of India [2019] 148 CLA 419 (SC)**, wherein it has been held that the RP has no adjudicating power. The relevant portion of the decision/judgment of the Hon'ble Supreme Court in the above stated decision is reproduced hereinbelow:

**“RESOLUTION PROFESSIONAL HAS NO ADJUDICATORY POWERS”**

58 It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows: —

18. Duties of interim resolution professional.—(1) The interim resolution professional shall perform the following duties, namely—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified; 106

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this section, the term —assets|| shall not include the following, namely—



- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment; 107
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

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Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows: —

10. Substantiation of claims.—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim."

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12. Submission of proof of claims.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. Verification of claims.—(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be —

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. Determination of amount of claim.—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution

*professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him. (2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."*

*It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial 109 powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination made as follows:*

*"35A. Preferential and other transactions.—(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66. (2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board. (3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date".*

12. By placing reliance on the above stated decision, this Bench also in its previous decision in the matter of **Reliance Industries Ltd. Vs. Satish Kumar Gupta**, [reported in Corporate Law Adviser, Volume 150/1] has already observed and held as such:

"15 *It is now settled legal position under the provisions of the Insolvency & Bankruptcy Code, 2016, and as this Bench held previously that the RP has not been vested any adjudicatory power. He is legally expected to collate and verify the claim submitted before him and to place the same before the CoC for its proper consideration under the provision of Section 21 of the Code. In case there arise need for some clarification / direction, then he is expected to approach this Adjudicating Authority, under the relevant provision of the Code. The relevant provisions of Section 21, 25 and 29 of the Code,*

*stipulate the duties and functions of the RP. Section 21 of the Code speaks as under;*

.....

17 *Moreover, the RP's duty and responsibility, being an appointee of this Code are of a deemed public servant. Therefore, he is expected to follow the principles of natural justice, even in administrative action, like CIRP, as held in our previous decision in Numetal vs. Satish Kumar Gupta & Ors. dated 19.04.2018, which has now been confirmed by the Hon'ble Supreme Court in ArcellorMittal vs. Satish Kumar Gupta & Ors.*

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19 *Therefore, by placing reliance on the above stated judgment, we are of the considered opinion that the RP has not been empowered by the I & B Code to adjudicate a claim. Hence, the present application succeeds on this limited legal ground alone, because it is found that the RP has rejected/non-admitted claim of the Applicant without showing any reason in the impugned communication. Hence, such communication dated 14.05.2018 is not legally sustainable and liable to be set aside.....*

21 *The RP is directed to update the total claim of the present Applicant, as being an Operational Creditor, submitted before him, in the relevant documents, i.e. List of Creditors and Memorandum of Information, as per the norms and criteria adopted for the purpose of consideration of a Resolution Plan for other related proceedings, so that proper apportionment of the payable amount can be made".*


13. By following through the above stated judicial precedent, we again reiterate that the Resolution Professional has been vested with no adjudicatory power or reject any claim as submitted by the Financial Creditor(s). His duty is to collate all claims and update the list of claim with his remark/comments, if any, on a particular claim and, thus, to determine the financial position of a corporate debtor, but he is not expected to exclude or reject any claim in its Memorandum of Information, list of claims and other documents relating to the Corporate Insolvency Resolution Process of the corporate debtor. Hence, such action/decision of the Resolution Professional is found to be bad in law, in view of the settled legal position. Hence, the same is hereby set aside to such extent.


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14. Notwithstanding the above, it is matter of record that the Resolution Professional, in his reply, has now stated that he has received requisite information from the present applicants and now formed his opinion to admit their claim as **Financial Debts** and to treat them as Financial Creditors and to reconstitute the CoC by including the present applicants as members of the CoC. Hence, by looking to such, the present application deserves to be allowed, hence, it is allowed.
15. By taking into consideration of the above stated facts and circumstances of the case, we feel just and appropriate to exempt/exclude the period consumed in filing the IA i.e. IA No.427 of 2018 filed on 19.11.2018, from the date, i.e. 23.08.2019, of disposal of the present IA and the date of receipt of an authentic copy of this order, for the purpose of counting the CIRP period (270 days), in the light of the previous decision of this Bench in the matter of **Numetal Ltd. v. Satishkumar Gupta**, which has been confirmed by the Hon'ble Supreme Court in the matter of **Arcelormittal v. Satish Kumar Gupta**. Therefore, such period is to be excluded from counting of 270 days.
16. The Resolution Professional is directed to do the needful exercise for updating the claim of the applicants, collation of claims and preparation of Memorandum of Information and to update other documents of the CIRP and to reconstitute the CoC, in terms of the provisions of the I & B Code and to act accordingly.

17. With the aforesaid observation, the present IA, i.e., IA No. 427 of 2018 in CP (IB) 209 of 2017 is allowed and accordingly stands disposed of.

  
**(Prasanta Kumar Mohanty)**  
**Member (Technical)**

  
**(Harihar Prakash Chaturvedi)**  
**Member (Judicial)**

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