

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 583 of 2022

[Arising out of order dated 09.05.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Special Bench (Court-II) New Delhi in IA No. 2127/2022 in CP(IB) No708(ND)/2021]

IN THE MATTER OF:

**Edelweiss Asset Reconstruction Company Ltd.
Edelweiss House,
Off C.S.T. Road, Kalina,
Mumbai – 400 098**

...Appellant

Versus

**Mohit Goyal
17, LGF, Defence Enclave,
Near Preet Vihar,
New Delhi – 110 092**

...Respondent

Present:

**For Appellant: Mr. Krishnan Venugopal, Sr. Advocate with Mr. K. Mishra, Ms. Pallavi Srivastava, Advocates
Mr. Abhinav Sharma, Mr. Himanshu K., Advocates for Applicants.**

For Respondent: Mr. Aditya Madaan, Mr. GP Madaan, Aishwarya A. and A. Bansal, Advocates for RP

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

1. The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('IBC' in short) by the Appellant arises out of order dated 09.05.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Special

Bench, Court-II) in IA 2127/2022 in CP(IB) No.708/ND/2021. By the impugned order, the Adjudicating Authority had held the application filed by the present Appellant/Financial Creditor against the Interim Resolution Professional (**IRP** in short) for their non-inclusion in the Committee of Creditors (**CoC** in short) as infructuous. Aggrieved by this impugned order, the present appeal has been filed by the Appellant, inter-alia, for the reason of the Adjudicating Authority having not set aside the decisions taken by the CoC in respect of Corporate Insolvency Resolution Process (**CIRP** in short) initiated against the Corporate Debtor.

2. The brief facts of the case necessary to be noticed for deciding the appeal are:

- On a Section 9 application filed by the Operational Creditor-M/s Aadi Best Consortium Private Limited, the Corporate Debtor was admitted for CIRP vide orders of the Adjudicating Authority in CP(IB)-708 (ND) 2021 dated 31.03.2022. Vide this order, the Adjudicating Authority had appointed an IRP to take steps under IBC for completion of CIRP of the Corporate Debtor.
- In terms of Section 18(1) (c) of the IBC, the IRP made a public announcement under Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations** in short) and called for claims with the last date of submission as 15.04.2022.

Edelweiss Asset Reconstruction Company Ltd., the Financial Creditor-present Appellant filed its claim in Form C on 21.04.2022.

- Thereafter, the IRP went ahead and constituted the CoC and the report certifying constitution of CoC was filed before the Adjudicating Authority without including the Appellant in the CoC.
- The first CoC meeting was convened on 28.04.2022 comprising only of the Authorised Representative of the Home Buyers with 100% voting power. The Appellant being aggrieved on having been excluded from the first CoC meeting filed IA No.2127/2022 before the Adjudicating Authority, praying for the following relief:
 - (a) Quash/set aside the decisions taken by the CoC during its meeting dated 28.04.2022;
 - (b) Direct IRP not to call for any further CoC meeting without making them a part of the CoC;
 - (C) Stay the operation/implementation of the decisions taken by the CoC during its meeting dated 28.04.2022.
- Adjudicating Authority dismissed IA No.2127/2022 on 09.05.2022 and passed the Impugned Order stating that the above application seeking relief has become infructuous since the Appellant has been provisionally accepted on 27.04.2022 and now made a member of the CoC.

- Aggrieved by this impugned order, the present appeal has been preferred.

3. Making his submissions, the Learned Counsel for the Appellant has submitted that the Corporate Debtor had taken a project term loan from ECL Finance Limited which loan had been assigned to the Appellant vide Assignment Deed dated 31.12.2021. Section 9 application filed by the Operational Creditor, on being admitted by the Adjudicating Authority, the Corporate Debtor had come under CIRP on 31.03.2022. The IRP, thereafter, published public announcement on 03.04.2022 under CIRP Regulation 6 calling for submission of claims on or before 15.04.2022. On 13.04.2022, which date preceded the last day fixed for submission of claim, the Appellant had sent an e-mail to IRP intimating that they were in the process of filing their claim and sought the contact details of the IRP for this purpose. A reminder e-mail to this effect was again sent on 16.04.2022 and finally the claim along with proof in Form C was sent to the IRP by email dated 21.04.2022. However, this communication was acknowledged by the IRP on 27.04.2022 stating that since the complete book of accounts had not been received from the Corporate Debtor, the verification process is not completed and would be verified only after receipt of the documents/information from the Corporate Debtor.

4. The Learned Counsel for the Appellant has further submitted that without verifying any claim including their claim, the IRP illegally constituted

the CoC and filed a report before the Adjudicating Authority and convened the first meeting of the CoC on 28.04.2022 without including the Appellant in the CoC. The Learned Counsel for the Appellant referred to the minutes of the first CoC meeting on Agenda Item No. A3 at page 292 of the Appeal Paper Book (**'APB'** in short) in which it is clearly recorded that the IRP had informed the CoC that all claims have been accepted provisionally as papers/documents from the Corporate Debtor are yet to be received. That being the case, the Learned Counsel for the Appellant expressed surprise as to why the Appellant was kept out of the CoC by the IRP on the ground that his claims were not yet verified at a time when none of the other claims were verified either.

5. Quite apart from the fact that the action of the IRP constituting the CoC without verification of claims was in violation of Regulation 17 of CIRP Regulations, it was further contended by the Learned Counsel for the Appellant that Section 21 of IBC provides that the CoC shall comprise of all financial creditors of the Corporate Debtor. However, the Appellant inspite of being a secured financial creditor in the category of lenders was excluded from the CoC. It was emphasized that the IRP is bound by Section 21 of the IBC read with Regulation 17 of the CIRP Regulations to collate and verify the claims received by him before constitution of the CoC and the non-compliance thereto by the IRP in the present case was misuse of power and an action in the teeth of the law.

6. It has been further contended that if the Appellant's claim had been provisionally accepted by the IRP on 27.04.2022 as has been noted by the Adjudicating Authority in the Impugned Order dated 09.05.2022, then the meeting of the CoC held on 28.04.2022 would not have been possible on grounds of quorum in the absence of the Appellant. Hence, it was submitted that the above CoC meeting was not in consonance with law and the decisions taken in the said CoC meeting are without any legal basis and should be quashed. Advancing his arguments further, it was argued that the application before the Adjudicating Authority was not only for inclusion in the CoC but also for quashing the decisions taken by the CoC having been illegally constituted and therefore having no locus to take decisions for the corporate debtor. Hence it was pressed hard that the dismissal of their application as infructuous was an error on the part of the Adjudicating Authority.

7. The Learned Counsel for the Resolution Professional/Respondent giving his version stated that in pursuance to the public announcement made, a total of 235 claims had been received by IRP as on 15.04.2022 being the last date for submission. It has been submitted that the IRP proceeded to verify the said claims from the records of the Corporate Debtor available with him within 7 days in terms of Regulation 13(1) of the CIRP Regulations. On the basis of verified claims received up to 15.04.2022, the CoC was constituted by the IRP in compliance with Section 21 of the IBC which comprised only of financial creditors in Class (Home-Buyers) acting through the Authorised Representative as their claims were found complete in all

respect. Since Regulation 17(1) of the CIRP Regulations mandated the IRP to constitute the CoC within 2 days of the verification of the claims, it has been submitted that the IRP filed an application bearing IA No. 2188/2022 on 19.04.2022 before Adjudicating Authority with a Report certifying constitution of CoC. This Report was taken on record by Adjudicating Authority vide order dated 29.04.2022. Further in compliance of Regulation 19(3) of CIRP Regulations, the notice and agenda of the first CoC was circulated on 22.04.2022 and the first CoC meeting convened on 28.04.2022 and the meeting did not suffer from quorum infirmity in terms of Regulation 22 of CIRP Regulations.

8. Refuting the submissions made by the Appellant regarding their wrongful exclusion from CoC, it has been contended that the claim of the Appellant was received on 21.04.2022 and that on the date of filing of the Report under Regulation 17(1) before the Adjudicating Authority regarding constitution of the CoC, the IRP was not in receipt of the claim of the Appellant. Since the Appellant had submitted claim after a delay of 6 days from the last date of submission of claims and the CoC had already been constituted by then and the report in terms of the Regulation 17(1) of the CIRP Regulations had already been filed before the Respondent with the Adjudicating Authority, the Appellant could not be made a part of first CoC meeting. It has been argued by the Learned Counsel for the Respondent that the IRP could not have delayed the constitution of CoC in view of the timelines provided by the CIRP Regulations. Further, it was the fault of the Appellant

that he was not diligent in pursuing his claim against the Corporate Debtor on time and therefore has no grounds to complain that he was not been included in the first CoC meeting. Emphasising that the first CoC meeting has been held in adherence to the provisions of the IBC and regulations framed thereunder and that there has been no irregularity in holding the first CoC meeting, it was asserted that the Appellant has no convincing grounds to seek the setting aside of the CoC decisions. It was also asserted that as no substantial decisions were taken in the first CoC meeting, no prejudice has been caused to the interests of the Appellant. Furthermore, now that the claim of the Appellant has been provisionally accepted by the IRP on 27.04.2022, the Adjudicating Authority has rightly noted that the Appellant having already become a member of the CoC, there is nothing erroneous in dismissing the application of the Appellant as infructuous.

9. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

10. The broad points for our consideration are the following: -

- (i) *whether in the facts of the present case, the decision of the IRP to constitute the CoC without including the Appellant and holding the first CoC meeting without the Appellant is sustainable in terms of the IBC and CIRP regulations framed thereunder; and*

(ii) whether the decisions taken in the first CoC meeting are substantive decisions and, if so, whether they deserve to be set aside as they were taken without the presence of the Appellant in the CoC.

11. To examine the first issue, it may be useful to glance through the main provisions of IBC and the relevant CIRP regulations which guide the process of constitution of CoC and then find out if the IRP has been able to meet the compliances mandated.

12. Section 18 enjoins upon the IRP the duty to constitute the CoC and for this purpose Section 18(1)(b) provides that the IRP shall receive and collate all the claims submitted by the creditors to him, pursuant to public announcement made by him. Section 13 (2) lays down that the public announcement calling for submission of claims under Section 15 shall be made immediately after appointment of the IRP. Further, CIRP Regulation 6 prescribes that the IRP shall make a public announcement calling for claims not later than 3 days from the date of his appointment and shall provide the last date for submission of proof of claims, which shall be 14 days from the date of appointment of IRP. CIRP Regulation 12(1) enables the creditor to submit claim with proof on or before the last date mentioned in the public announcement. However, Regulation 12(2) permits a creditor to avail extended time period to submit such claims on or before the ninetieth day of the insolvency commencement date. Regulation 12(3) specifically provides

that a financial creditor shall be included in the CoC from the date of admission of such claim.

13. The modalities of the constitution of CoC and holding of the first meeting is provided for in Section 21 of the IBC read with Regulation 17. Section 21(1) of the IBC imposes a pre-condition that the IRP shall only after collation of all claims received against the Corporate Debtor and after determination of the financial position of the Corporate Debtor constitute a CoC. The word “collation” ordinarily means verification of claim. The procedure for verification of claims is outlined in Regulation 13. This regulation mandates the IRP that he shall verify every claim, within seven days from the last date of the receipt of the claims. More importantly, Section 21(2) provides that the CoC shall comprise all financial creditors of the Corporate Debtor. Section 21(7) specifies the manner of voting and determination of the voting share to be assigned to each creditor.

14. Regulation 17 lays down that the IRP shall file a report certifying constitution of CoC to the Adjudicating Authority within two days of verification of claims and that the IRP shall hold the first meeting within seven days of filing the report before the Adjudicating Authority. It is also important to note that Section 24(6) provides that each creditor shall vote by the voting share assigned to him based on financial debts owed to such creditor. A duty is also imposed on the Resolution Professional to determine the voting share assigned to each creditor.

15. Coming to the facts of the present case, we find that the Adjudicating Authority had ordered the insolvency commencement of the Corporate Debtor on 31.03.2022. The IRP had issued public announcement on 03.04.2022 inviting claims with the last date for inviting claims as 15.04.2022. Both these timelines followed by the IRP are in conformity with Sections 13 and 15 of IBC and Regulation 6. IRP cannot be faulted for his conduct on this score. The IRP has submitted that he had received 225 claims till 15.04.2022 being the last date of submission of claims and it is an undisputed fact that till that date, the Appellant had not submitted his claims. Be that as it may, we also find that the Appellant had sent two emails to the IRP on 13.04.2022 and 16.04.2022 stating that they were in the process of filing claims. Though these two emails were not acknowledged by the IRP, however their receipt has not been denied in the submissions made by the Respondent. Coming to the collation of claims by the IRP, we note that by his own admission, the IRP had filed a report certifying constitution of COC before the Adjudicating Authority on 19.04.2022 on the ground that he was required to do so within two days of the verification of claims in terms of Regulation 17(1). At this stage also we therefore do not notice any breach of the CIRP timeline on the part of the IRP.

16. The root cause of the present dispute stems from the fact that the report sent by the IRP to the Adjudicating Authority certifying the constitution of CoC did not include the Appellant thereon. This exclusion has been challenged by the Learned Counsel for the Appellant holding it as illegal

constitution of the CoC. We note the rebuttal from the submissions made by the Learned Counsel of the Respondent in that the Appellant was not made part of the CoC because he did not show due diligence in filing his claim on time. Secondly, the IRP having already completed the verification of claims received by him till the last date of submission of claims, he was under mandate of Regulation 17 to certify the constitution of COC within two days and hold the first meeting of the CoC within seven days of filing of the report.

17. A close scrutiny of the material on record however does not lend support to the aforesaid twin defence raised by the IRP. It is clear from the email sent by the Appellant to the IRP on 13.04.2022, which was before the last date of claim-submission that they were in the process of filing their claims as a financial lender. This was followed by another email reiterating the same on 16.04.2022 which date was also before the IRP completed the verification of claim of other creditors. Both these emails have been placed on record at page 47 of the APB and we find that the veracity of these emails have not been challenged by the Respondent. Thus while it is true that the claims were not submitted by the Appellant before the last date, it cannot be discounted that he had in clear terms stated that he was in the process of submitting his claims as a financial lender. This was therefore not a case where the Appellant/Financial creditor was sleeping over his rights. Therefore, we are of the considered view that it may not be fair to raise question marks on the conduct of the Appellant as Financial creditor from the diligence point of view.

18. This brings us to the second plea taken by the IRP that he was bound by the timelines laid down by Regulation 17 to send a report to the Adjudicating Authority certifying the constitution of the CoC. We entirely agree with the IRP that he was bound by the time-bound provisions of CIRP as laid down under the IBC. However, in the same breath, we must add that while it is a well settled proposition that time is of essence under IBC, overzeal shown as in the present case, carries with it the risk of stifling the basic canons of fairness and justice, which must be obviated. We also find sufficient substance in the plea taken by the Appellant that there was impropriety in the manner in which the IRP had excluded the Appellant from the CoC but included the others who had submitted their claim by 15.04.2022 when the IRP during the process of collation had only been able to provisionally accept both set of claims. To substantiate his contention, he has placed on record at page 280 of APB, that the IRP while acknowledging receipt of the claim of the Appellant as a financial creditor on 27.04.2022, has stated that: *“We provisionally verify your claim as per the documents enclosed by you in the email. We have not received the complete books of accounts from CD, hence, we will cross verify the amount claimed after receipt of documents/information and if any change will communicate to you.”* The Learned counsel for the Appellant has also referred to the minutes of the first COC meeting at agenda item A3 at page 292 of the APB wherein the IRP has recorded that: *“All the claims have been accepted provisionally as papers/documents from the CD are yet to be received and will be revised accordingly if required.”* Thus, we find force in the contention of the Appellant

that when the IRP had only accepted provisionally the claim of all creditors including that of the Appellant, then why the Appellant was kept out of the CoC inspite of being a secured financial creditor in the category of lenders. The argument of the Appellant gains more credibility as we find that the IRP was well aware that the Appellant had submitted his claim and was staking his inclusion in the COC since 21.04.2022 and this fact has been recorded by the IRP himself in the minutes of the first COC meeting held on 28.04.2022 in respect of agenda at item number A1, that *“The FC Edelweiss is sending email and calling IRP allowing him to be included in the first COC or postpone the COC”*.

19. The need to have a properly constituted CoC needs no special emphasis for the CoC plays a pivotal role in the insolvency regime being the supreme decision making body in the CIRP of the Corporate Debtor. In the IBC scheme of 2016, the creditors of the corporate debtor have been granted vast powers, and responsibilities and have in fact been put in the driver’s seat. The creditors are to take absolute control of the management of the corporate debtor and have been endowed with the authority to take key decisions. With a creditor-in-control management, the CoC is expected to apply their commercial wisdom for the benefit of the corporate debtor. And with this in view, the IRP is saddled with the crucial responsibility of properly constituting the CoC and also to assign voting share to each creditor based on the financial debts owed to such creditor and without that done, there cannot be a meeting of the CoC. We cannot lose focus that the Interim Resolution

Professional/Resolution Professional is an administrator of the IBC and is expected to function under the guidance and directions of a validly constituted CoC that control the Corporate Debtor. In the present case, the IRP constituted the CoC on the basis of provisional list of claims and yet chose to exclude the Appellant/Financial creditor from the CoC on the ground that there was a need to verify the provisional claims submitted by him. This conduct is unjustified in that the exclusion of Financial Creditor from the CoC or delayed inclusion of the Financial Creditor on the CoC is prejudicial to the best interests of the Corporate Debtor. In our considered view, the undue haste shown by the IRP in certifying the constitution of the CoC; excluding a secured financial creditor therefrom on a flimsy pretext and also proceeding ahead with a meeting of an invalidly constituted CoC is not in sync with the form and spirit of the IBC and therefore cannot be countenanced.

20. This brings us to the next issue for our consideration which is to determine whether the decisions taken by this CoC which was not validly constituted deserves to be set aside. Under the IBC, the role assigned to the CoC is of critical significance. Section 28(1) of the IBC clearly enunciates that the Resolution Professional, prior to taking various actions in the CIRP process, needs the prior approval of the CoC and is required to seek the vote of the creditors. The success of CIRP of the Corporate Debtor therefore largely depends upon a validly constituted CoC. For putting in place a validly constituted CoC, the IRP after due collation of claims has to form the CoC from among the financial creditors and each creditor has to be assigned the

voting share on the financial debts owed to such creditor. Section 21(2) of the IBC provides that the CoC shall comprise all financial creditors of the Corporate Debtor. In the present case, the non-inclusion of the Appellant/Financial Creditor on the CoC before holding the first meeting was thus an infraction of the IBC. The CoC, therefore not having been validly constituted, the logical corollary is that decisions taken in the first meeting of the CoC stood vitiated.

21. We are also not inclined to agree with the Respondent that the decisions taken in the first CoC meeting were not substantive decisions. This meeting had taken decisions to confirm the appointment of the IRP as the Resolution Professional including determination of his fees as IRP (Item B16); appointment of other staff like Process Advisor, Project Manager and Legal Advisor including their fees (Items No. B17, 19, 21). More importantly, a decision was taken to raise interim finance of Rs.50 lakhs with an interest of 15% to meet the CIRP costs by the IRP alongwith authorization to negotiate terms and conditions (Item B20). Appointment of CIRP related functionaries and raising of finances have financial implications on the corporate debtor and squarely fall in the bracket of major decisions. These are crucial decisions and IRP/Resolution Professional is expected to take such decisions under the guidance and directions of a properly constituted CoC. In the present case, the CoC has been improperly constituted without including the secured financial creditor having substantive voting share. We also note that the Appellant had insisted before the CoC meeting fixed on 28.04.2022 that

he may be included in the first CoC or the first meeting of CoC should be postponed. We find both these requests to be reasonable but note that they were not acceded to by the Respondent. We, therefore hold that the Adjudicating Authority committed an error in not taking cognizance of the fact that the IRP having denied the Appellant the benefit of being a part of CoC and thereby depriving them from participation in the first CoC meeting, the decisions taken in the said meeting lack legal sustenance.

22. The Adjudicating Authority has grossly erred in overlooking the fact that allowing membership of the Appellant on the CoC post the first CoC meeting does not wipe out the deliberations and decisions taken in the first CoC meeting. In the given circumstances, we are therefore of the clear view that the Appellant was justified in moving an application before the Adjudicating Authority for setting aside the decisions of the first CoC and staying their implementation. However, the Adjudicating Authority has erred in holding this application as one having become infructuous on the provisional acceptance of the Appellant's claims by the IRP and by providing him membership on the CoC with effect from 27.04.2022.

23. For the foregoing reasons, the appeal is allowed and impugned order is set aside with the following directions: -

- (i) The prayer made in IA No.2127/2022 to quash the decisions taken in the CoC meeting dated 28.04.2022 is not acceded to, but the decisions taken therein shall not be implemented unless they are

ratified / modified in the next meeting of CoC convened for above consideration.

- (ii) The above direction is being issued in view of the peculiar facts and circumstances of the case.
- (iii) The intervention application No.3054/2022 is also disposed of with the direction that the applicants shall have the liberty to file appropriate application before the Adjudicating Authority.
- (iv) No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Mr. Barun Mitra]
Member (Technical)**

New Delhi

10.11.2022

PKM