

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH AT AHMEDABAD
COURT 1

IA 89 of 2018 In TP 162 of 2019 [CP(IB) 18 of 2017]

Coram: Hon'ble Mr. MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE
NATIONAL COMPANY LAW TRIBUNAL , INDORE BENCH ON 22.10.2020

Name of the Company: Nitin Hasmukhlal Parikh RP of Bhatia Global Trading
Ltd.
V/s
IDBI Bank Ltd.

Section: 33 of IBC, 2016

ORDER

The case is fixed for pronouncement of order.

The Order is pronounced in the open court, vide separate sheet.


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 22nd day of October, 2020.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH at AHMEDABAD
COURT-1**

**IA 89 of 2018 in TP 162 of 2019 in
CP (IB) No.18/7/NCLT/AHM/2017**

[ORDER in REFERENCE under Section 419(5) of the Companies Act, 2013]

In the matter of:

Mr. Nitin Hasmukhlal Parikh,
Resolution Professional of
M/s. Bhatia Global Trading Limited,
737, Fortune Tower,
Sayajiganj,
Vadodara – 390007.

... Petitioner/ Applicant / Resolution Professional

V/s.

IDBI Bank Limited
Having its registered office at:
IDBI Tower, WTC Complex,
Cuff Parade,
Mumbai – 400005
Also having its corporate office at:
Specialised Corporate Branch,
Upper Ground Floor,
Captain CS Naidu Arcade,
Nr. Greater Kailash Hospital,
10-2, Old Palasia, Indore – 452001.

... Respondent/Corporate Debtor

Order delivered on 22nd October, 2020

Coram: Madan B. Gosavi, Member (Judicial)



Appearance:

Learned Sr. Counsel Mr. Navin Pahwa for the Applicant. Ld. Sr. Counsel Mr. Saurabh N. Soparkar for the Caviator. Ld. Counsel Mr. Bajju Bhagat for the Committee of Creditors.

[Per: Madan B. Gosavi, Member (Judicial)]

(Through Video Conferencing)

1. This reference under Section 419(5) of Companies Act, 2013 is forwarded to me by Honourable President, NCLT, New Delhi (H.O.) to decide points in controversy on which there was a difference of opinion between two members of the Bench. It is as follows:

“Whether Adjudicating Authority is empowered to replace the Resolution Professional (“RP”) appointing new professional as a liquidator upon passing orders of liquidation under Section 33 of the Insolvency and Bankruptcy Code, without resorting to provisions of Sections 34(4)(5)(6)(7) of the Insolvency and Bankruptcy Code, 2016 (“the Code” for short)?”

2. In the case on hand, while passing order under Section 33 of the Code dated 29.05.2020, the then Judicial Member of the Bench recorded the findings as:

“Considering such statutory provisions and keeping in view of the serious grievance made by one of the claimants/ objectors by raising doubt about impartiality and independence of the RP, without expressing our view on merits of such allegation/contention, we feel appropriate to consider

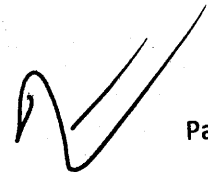
the paramount interest of the corporate debtor company proposed for liquidation and about the smooth conduct of its liquidation process. Therefore, it is expedient to ensure transparency and fairness in the proposed liquidation process to rule out possibility of any alleged partiality or discrimination with any claimant / stakeholder. Therefore, the CoC is legally expected to reconsider its decision for appointment of proposed liquidator in the above given circumstances and in the light of this order. Therefore, the CoC is directed so accordingly.

Further, in exercise of power conferred to it this Adjudicating Authority, a formal request is made with the IBBI to propose the name of two Insolvency Professionals who can be considered for appointment as Liquidator. Their candidature can be considered along with the candidature of the present RP, Mr. Nitin Hasmukhlal Parikh, in the light of the observation of this Adjudicating Authority. Thereafter, the CoC can take conscious and appropriate decision in the light of Honourable Supreme Court's decision in the matter of Committee of Creditors of M/s. Essar Steel Ltd. vs. Satish Kumar Gupta and K. Sashidhar Vs. Indian Overseas Bank to make fresh recommendation to the name more deserving and suitable person to act as Liquidator among from them."

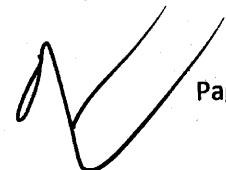
3. Whereas, Honourable Technical Member held that:

“Since allegations have been made against the Liquidator by some of the Creditors, it is made clear that Resolution Professional is only a Facilitator and he is not the deciding authority for the claims and it is only the CoC who decides the claim. Therefore, I do not find any reason to differ from the decision of the CoC (not) to appoint Mr. Nitin H. Parikh as the Liquidator of the Corporate Debtor. In case some of the Operational Creditors who have complained against the proposed Liquidator, they may refer the matter to the IBBI as IBBI is the Regulator for all Insolvency Professionals register with them for their investigations and doing the needful at their end.”

4. I.A. No. 89 of 2018 in CP(IB) No. 18 of 2017 filed by RP, Mr. Nitin Hasmukhlal Parikh, having Registration No: IBBI/IPA-002/IP-N00058/2017-18/10110 for passing order of liquidation under Section 33 of the I. B. Code of Corporate Debtor Company, M/s. Bhatia Global Trading Private Limited.
5. One of the creditors of the Corporate Debtor Company, M/s. Vitol S.A. filed Intervention Application in that proceedings and objected the appointment of Mr. Nitin Hasmukhlal Parikh as the Liquidator, raising dispute about his impartiality while discharging his duties as an RP of the Corporate Debtor. While disposing that application along with objection, both the Honourable Members of the Bench recorded different findings as noted.



6. Member (Judicial) was of the view that the Resolution Professional should not be allowed to continue as the Liquidator, whereas, Member (Technical) recorded that since the CoC passed resolution and appointed RP as the Liquidator, it is not proper to replace him. Hence, this reference.
7. I have gone through the orders passed by Learned Members (Judicial) as well as Learned Member (Technical). I heard the Ld. Senior Counsel Mr. Saurabh Soparkar for intervener / objector, Ld. Senior Counsel Mr. Navin Pahwa for the Resolution Professional and Learned Counsel Mr. Baiju Bhagat appearing for the Committee of Creditors.
8. Learned Senior Counsel Mr. Navin Pahwa for the RP submitted that an Adjudicating Authority can replace the RP but subject to provisions of Section 34(4) of the I.B. Code. This provision restricts the power of the Adjudicating Authority in matters of replacing the RP. He further submitted that Sub-Section (4) of Section 34 of the Code states that the Adjudicating Authority can replace the RP, if, a resolution plan submitted by RP is rejected on the ground as the plan does not meet requirement stated in Section 30(2) of the Code or the Board (IBBI) recommends such replacement for the reason recorded in writing or the RP fails to give his written consent for his appointment as the Liquidator.
9. Learned Sr. Counsel submitted that in this case, the RP did not receive the Resolution Plan. Hence, there was no



question of its rejection for any ground. The Board has not recommended replacement of RP hence the RP cannot be replaced only because one of the Creditors of the Corporate Debtor has objected his appointment as the Liquidator. Ld. Sr. Counsel further submitted that the allegations against the RP that he did not act impartially are baseless. In fact, the objector/creditor has not submitted its claim in time and it did not hand over the requisite papers as called by the RP, in time. According to the Ld. Sr. Counsel, considering the facts on record, this Adjudicating Authority may not replace the RP and appoint another professional as Liquidator.

10. Learned Senior Counsel, Mr. Saurabh Soparkar for the Intervener submitted that there are a number of instances on record to indicate that the RP did not discharge his duties impartially. He did not conduct the CIRP as per the provisions of the Code. His client M/s. Vitol S.A. has submitted its claim of U.S. \$ 68 Million against the Corporate Debtor The claim was submitted to the IRP in time but despite that the IRP did not take into consideration its claim on some technical grounds.
11. Learned Senior Counsel further submitted that the RP did not invite or inform the date of CoC meeting to the representative of M/s. Vitol S.A. According to him, M/s. Vitol S.A. is holding more than 10% of the total debt. Despite that, the representative was not called for the CoC meetings as contemplated under Section 24(3)(c) of the Code.

12. Learned Senior Counsel brought to my notice numbers of correspondences his client has made with the RP and submitted that the RP did not respond to them positively.
13. Learned Senior Counsel relied on some of the Rulings to point out that in fact, the reference is not properly made because point of difference in opinion has not been stated specifically in the reference. To substantiate his arguments, he relied on rulings reported in 1953(23) ITR 505 *Hanutram Chandanmal Vs. Commissioner of Income Tax B&O* and (2008) 304 of ITR 350 in case of *M/s. Dyna Vision Limited Vs. ITAT*.
14. Learned Sr. Counsel thereafter submitted that this authority has power to replace the RP by appointing another professionals as the Liquidator. To support his submissions he relied on two orders passed by the Hon'ble NCLAT, those are:
 - (i) (2017)SCC Online NCLAT 7537) *Devendra Padamchand Jain Vs. State Bank of India* and
 - (ii) (2018) SCC Online NCLAT 590 *Sandeep Kumar Gupta, RP Vs. Stewart & Lloyds of India Limited & Anr.* (Company Appeal (AT) (Insolvency) No. 263 of 2017).
15. According to the Larned Sr. Counsel, Mr. Soparkar, the material on record as produced by his client would indicate that the RP was not at all impartial while discharging his duties under the Code. His client's rights may get affected prejudicially during process of liquidation if the same RP is

allowed to continue as the Liquidator. He requested that the RP may be replaced by appointing another professional as the Liquidator.

16. Learned Sr. Counsel, appearing for the Committee of Creditors submitted that the CoC passed resolution by appointing RP as the Liquidator. However, he further submitted that the matter is left to discretion of this Adjudicating Authority and the Authority may take an appropriate decision in view of the facts on record.
17. From the material on record and submissions made at the Bar, I have framed the following points to record my findings.
 - (1) Whether this reference is maintainable under Section 419(5) of the Companies Act, 2013?
 - (2) Whether the material on record indicates that continuation of the RP as the Liquidator may prejudicially affect the interest of the Caviator in the process of liquidation?
 - (3) Whether the Adjudicating Authority has jurisdiction to replace the Resolution Professional with other professional while appointing the liquidator sans provisions of Section 34(4) of the Code?
18. According to the Learned Senior Counsel for the Caviator, this reference is not maintainable because no point relating difference of opinion in between two member of the Bench has been framed in this matter. To substantiate his arguments, he relied on two rulings (cited above). As

against this, the Learned Sr. Counsel for the RP pointed out that the separate orders are passed by both the members relating to point in controversy and submitted that it is necessary for this authority to record the findings on difference of opinion as appears on record.

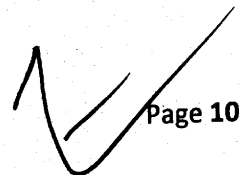
19. I have gone through both the rulings relied on by the Learned Sr. Counsel. I note that the rulings are relating to the reference under provisions of Income Tax Act. In those cases, third member had given independent findings and not a finding on the points in controversy. Nonetheless, it has been held consistently that the president ought to have formally framed the points of controversy, on which Ld. Members had a difference of opinion.
20. Be that as it may, in this case, I have been called upon by the Honourable President to give my findings on the point where the findings recorded by Hon'ble Technical Member considering facts and Law is correct or the findings recorded by the Hon'ble Judicial Member on the same point is to be upheld. It is not in dispute that on the point of appointment of the Liquidator Hon'ble Judicial Member observed that:

“Considering such statutory provisions and keeping in view of the serious grievance made by one of the claimants/ objectors by raising doubt about impartiality and independence of the RP, without expressing our view on merits of such allegation/contention, we feel appropriate to consider the paramount interest of the corporate debtor

company proposed for liquidation and about the smooth conduct of its liquidation process. Therefore, it is expedient to ensure transparency and fairness in the proposed liquidation process to rule out possibility of any alleged partiality or discrimination with any claimant / stakeholder. Therefore, the CoC is legally expected to reconsider its decision for appointment of proposed liquidator in the above given circumstances and in the light of this order. Therefore, the CoC is directed so accordingly.

Further, in exercise of power conferred to it this Adjudicating Authority, a formal request is made with the IBBI to propose the name of two Insolvency Professionals who can be considered for appointment as Liquidator. Their candidature can be considered along with the candidature of the present RP, Mr. Nitin Hasmukhlal Parikh, in the light of the observation of this Adjudicating Authority. Thereafter, the CoC can take conscious and appropriate decision in the light of Honourable Supreme Court's decision in the matter of Committee of Creditors of M/s. Essar Steel Ltd. vs. Satish Kumar Gupta and K. Sashidhar Vs. Indian Overseas Bank to make fresh recommendation to the name more deserving and suitable person to act as Liquidator among from them."

21. Whereas Hon'ble Technical Member in a separate order sheet recorded his findings as:



“Since allegations have been made against the Liquidator by some of the Creditors, it is made clear that Resolution Professional is only a Facilitator and he is not the deciding authority for the claims and it is only the CoC who decides the claim. Therefore, I do not find any reason to differ from the decision of the CoC (not) to appoint Mr. Nitin H. Parikh as the Liquidator of the Corporate Debtor. In case some of the Operational Creditors who have complained against the proposed Liquidator, they may refer the matter to the IBBI as IBBI is the Regulator for all Insolvency Professionals register with them for their investigations and doing the needful at their end.”

22. It appears from the above findings recorded by both the Learned Members of the Bench that they have differed on the point of replacement of RP while appointing the Liquidator. I hold that, in view of this, the reference as sent to me by the Honourable President to be maintainable. It is not out of place to mention that there is no procedure laid down in NCLT Rules, 2016 or under the Companies Act, 2013 for sending such reference. In view of the facts on record I hold that the reference is maintainable and I answer point No.1 in the affirmative.
23. It is brought to my notice that on 25.05.2017, the Corporate Debtor was admitted to CIRP. On 09.06.2017, the Caviator submitted its claim to the IRP. The IRP did not take the same on record but instead the RP placed the said claim of the Caviator before the Committee of Creditors in

its meeting dated 20.06.2017. It is not in dispute that the claim was submitted within the timeline as set out by the IRP by way of public announcement. I fail to understand as to why the IRP (who is also the RP now) did not accept that claim at least provisionally. Section 18(1) of the Code mandates the IRP to receive and collate all the claims submitted by the Creditors to him pursuant to public announcement. The Code does not contemplate that IRP to put the claim of any creditor for the CoC's consideration for simple reason that by that time CoC could not have been formed. Even, Section 25 and Regulation 7-14 of IBBI (Insolvency Resolution of the Corporate Person) Regulations, 2016 do not require even RP to put such claims before the CoC for its consideration.

24. According to the RP, the Caviator's claim was supported with more than two thousand documents, so he was not in a position to consider the claim. It is difficult for me to accept this reason of the RP for not considering the claim of the Caviator. It is not that the Caviator's claim was not substantiated by the proper documents. It was substantiated. Then the IRP could have accepted the claim provisionally; making note thereunder that subject to verification and he would have referred the matter to the Adjudicating Authority. The RP had no reason to take this issue before the CoC. Admittedly, the Caviator was not invited to attend any CoC meeting though its claim was much more than 10% of the total debt of the Corporate Person. The RP ought to have invited the representative of the Caviator to attend the CoC meeting as contemplated

under Section 24(3)(c) of the I.B. Code. Hence, without going into other allegations against the RP as made by the Caviator, and in view of the above admitted facts as appear on record, I hold that the continuation of the RP as the Liquidator may affect the rights of the Caviator prejudicially during the process of liquidation. I answer point No.2 in the affirmative.

25. Section 34(4) of the IB Code deals with the aspect as to when the Adjudicating Authority can replace the RP while making appointment of the Liquidator. three eventualities are contemplated. They are,

- (i) Resolution plan submitted by RP is rejected holding that it does not meet the requirements stated under Section 30(2) of the I.B. Code
- (ii) the Board recommends the replacement of RP and
- (iii) The RP fails to submit consent in writing to act as the Liquidator.

26. In this case, none of the above eventuality does exist and hence the question before me whether the Adjudicating Authority can replace the RP *sans* the provisions of Section 34(4) of the I.B. Code and for some other grounds?

27. To impress upon me that the Adjudicating Authority has power and jurisdiction to replace the RP, the Learned Sr. Counsel of the Caviator relied on two orders passed by the honourable NCLAT. They are:



- i. Mr. Devendra Padamchand Jain Vs. State Bank of India & Anr. (Co. Appeal (AT) (Insolvency) No. 177 of 2017).
 - ii. Sandeep Kumar Gupta, RP Vs. Stewart & Lloyds of India Limited & Anr. (Company Appeal (AT) (Insolvency) No. 263 of 2017).
28. In case of Mr. Devendra Padamchand Jain Vs. State Bank of India & Anr, honourable NCLAT was pleased to hold that:
- “21. In view of the aforesaid provisions, we hold that the Adjudicating Authority is also empowered to remove the resolution professional, apart from the Committee of Creditors, but it should be for the reasons and in the manner as provided under the relevant provisions.”*
29. In the case of Mr. Sandeep Kumar Gupta, RP Vs. Stewart & Lloyds of India Limited & Anr, the facts were that the plan submitted by RP was rejected and hence, the RP was ordered to be replaced. So, both the orders relied on by Ld. Sr. Counsel for the Caviator are of no use to decide the controversy at the end.
30. In this case, the material on record is enough to hold that the RP by not considering the claim of the Caviator acted against the interest of the Caviator, who is one of the major stakeholders in the process. In liquidation process, the role of every stakeholder is important because as per the Section 35(2) of the Code, the Liquidator has power to consult to every stakeholder. The Caviator, being a major

stakeholder in the process of liquidation, I hold that the situation may arise that the present RP and Caviator may enter into confrontation in view of past conduct of the RP. So considering peculiar facts on record, I hold that in this case, the RP required to be replaced by appointing some another professional as the Liquidator.

31. The Insolvency and Bankruptcy Code, 2016 is basically a procedural Law, enacted to regulate Resolution of the Insolvency of the Corporate Person and to regulate the process of liquidation of such Corporate Person. The Code does not confer on RP indefeasible rights to act as the Liquidator. The Insolvency and Bankruptcy Code, being procedural in nature some of its provisions have to be held as not mandate of the Law but the directions of Law and Section 34(4) of the I.B. Code is one amongst them. I hold that Section 34(4) of the Code is not mandatory provision but it is directory because eventualities are provided for replacement of RP and cannot be read in restricted manner as argued by Learned Senior Counsel for the RP.
32. Even if one goes through the Scheme of the Code, one will certainly gather that the Adjudicating Authority has the supervisory powers on functions of RP. For example, Section 16(1) gives the power to the Adjudicating Authority to appoint an IRP in consultation with IBBI. As per the Section 22(2), if the CoC replaces the IRP, such decision has to be informed to the Adjudicating Authority for its approval. Section 27 again requires the CoC to inform the Adjudicating Authority its decision of replacing RP. Section

30 and 31 require the RP to submit the plan for approval of the Adjudicating Authority. In short, RP cannot claim as matter of right to be confirmed and allowed to continue as the Liquidator. In my considered opinion, the Adjudicating Authority can replace the RP without resorting to the provision of Section 34(4) of the I.B. Code and this provision cannot be said to be mandatory in nature. In this case, the material on record is sufficient to indicate that some of the decisions of the RP were contrary to the provisions of the I.B. Code and they were prejudicial to the interest of the Caviator, who is one of the major stakeholders. In such a situation, it is not proper to allow the RP to continue the process of Liquidation.

33. IBBI, by its letter dated 07.10.2019 had informed the Caviator that its complaint against the RP is disposed of as the matter is subjudice before this authority. The IBBI, vide its guidelines issued vide ***“Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2019”*** dated 28.11.2019, informed this Adjudicating Authority to appoint IRP/RPs/Liquidators from the penal prepared and circulated for this Bench.
34. So, in view of the reasons as stated above, I hold that the Adjudicating Authority has jurisdiction and power to replace the RP while appointing a Liquidator without taking recourse of the provisions of Section 34(4) of the I.B. Code, 2016. I answer point number 3 as affirmative.

35. I, hereby endorse findings recorded by Honourable Judicial Member, whereby and where under, he decided to replace a Resolution Professional and sought the name of another professional from the IBBI for making appointment as the Liquidator and IBBI by separate list has allowed this authority to choose any professional from. Hence, I pass following order:

ORDER

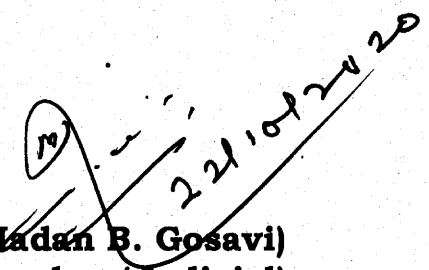
1. The Corporate Debtor, M/s. Bhatiya Global Trading Limited to be liquidated as per Chapter III and under Section 34(1) of the I.B. Code, 2016. The Resolution professional, Mr. Prawincharan Prafulcharan Dwary (Registration No. IBBI/IPA-002/IP-N00331/2017-2018/10937) is hereby appointed as a Liquidator of the Corporate Debtor.
2. All the powers of the Board of Directors, key managerial persons, the partners of the Corporate Debtor hereafter ceased to exist. All these powers henceforth vest with the Liquidator.
3. The personnel of the Corporate Debtor are directed to extend all co-operations to the Liquidator as required by him in managing the liquidation process of the Corporate Debtor.
4. The Liquidator will charge fees for conduct of the liquidation proceedings in proportion to the value of the liquidation estate assets as specified by IBBI and the same

shall be paid to the Liquidator from the proceeds of the liquidation estate under Section 53 of the Code.

5. That once having liquidation process initiated, subject to Section 52 of the Code, no suit or other legal proceedings shall be instituted by or against the Corporate Debtor save and except the liberty to the liquidator to institute suite or other legal proceeding on behalf of the corporate debtor with prior approval of this Adjudicating Authority as mentioned in Sub-Section 6 of **Section 33** of the I.B. Code.
6. The Liquidator shall co-ordinate with all the authorities and the respected Government Authorities and shall provide complete information to facilitate the process of Liquidation.
7. The Liquidator is at liberty to seek any directions, if need be from this Tribunal during the Liquidation Process.
8. The Liquidator shall take necessary legal action to recover the trade receivables and other credits such as loans and advances from the parties which are reflected in the latest balance sheet of the Corporate Debtor, if any. This direction is hereby given in concurrence of the jurisdiction prescribed under Section 33(5) of the Code.
9. This liquidation order shall be a deemed to be notice of discharge to the officers, employees and workmen of the Corporate Debtor except to the extent of the business of

the Corporate Debtor continued during the liquidation process by the Liquidator.

10. The Moratorium declared vide order dated 23.05.2017 in CP (IB) No.18/7/NCLT/AHM/2017, henceforth cease to exist.
11. The present I.A. No. 89 of 2018 is allowed directing the appointed Liquidator to initiate liquidation process as envisaged under Chapter – III of the Code by following the liquidation process given in the Insolvency and Bankruptcy Board of India (liquidation process) Regulations, 2016.
12. Copy of this order be sent to the Registrar of Companies, Gujarat, Ahmedabad within 07 days for information and necessary action.
13. Accordingly the present I.A. No.89 of 2018 in TP 162 of 2019 [CP (IB) No.18 of 2017] stands disposed of.


(Madan B. Gosavi)
Member (Judicial)

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