

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III**

IA/2054/2020 In C.P.(IB)/2092(MB)2018

*(Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016.)*

- 1. Amir Dodhia,**
C/1302, Kanti Apartment, Mount Mary
Road, Bandra (West), Mumbai-400050.
- 2. Zulekha Dodhia,**
C/1302, Kanti Apartment, Mount Mary
Road, Bandra (West), Mumbai-400050.
- 3. Hamida Dodhia,**
C/1302, Kanti Apartment, Mount Mary
Road, Bandra (West), Mumbai-400050.

.....Applicants

Vs

**Ritesh Prakash Adatiya, RP
of M/s. Calchem Industries (India) Limited**

.....Respondent

In the matter of

M/s. Gokul Fuelchem Private Limited

.....Operational Creditor

Vs

M/s. Calchem Industries (India) Limited

.....Corporate Debtor

Order Reserved on: 04.09.2023

Order delivered on: 20.10.2023

CORAM:

SHRI CHARANJEET SINGH GULATI

HON'BLE MEMBER (T)

SMT LAKSHMI GURUNG

HON'BLE MEMBER (J)

Appearances:

For the Applicants : Mr. Devanshu P. Desai, Advocate

For the Respondent : Mr. Aniruth Purusothaman, Advocate

ORDER

Per- Lakshmi Gurung, Member Judicial

1. It is an application filed by the Suspended Directors of the Corporate Debtor under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 ("**the Code**") against the Ritesh Prakash Adatiya, RP of M/s. Calchem Industries (India) Limited, seeking following reliefs:
 - i.) *To pass an order quashing and setting aside the approval of the resolution plan of Sadhana Nitro Chem Limited by the CoC in the meeting held on 13th October 2020.*
 - ii.) *To direct the Respondent to provide the Applicants with all the documents, copies of the resolution plan and valuation reports etc. and re-run the approval process of the resolution plan.*
 - iii.) *To restrain the Respondent from taking any further steps in relation to the approval of the resolution plan submitted by Sadhana Nitro Chem Limited which was purportedly approved by the CoC.*

Facts:

2. It is stated in the application that the Applicants received an email on 14.10.2020, in which the Respondent had forwarded the minutes of 9th CoC meeting held on 13.10.2020, wherein the CoC had approved the Resolution Plan with 100% voting. However, the Applicants being the suspended board of directors were not invited to the meeting.

Submission on the behalf of the Applicants:

3. The Applicants submit that even for the 8th CoC meeting held on 21.09.2020, the Applicants were not provided with the details of the video meeting initially. Thereafter, once the meeting ended, the Applicants were provided with the link and details to attend the video meeting, once all discussions had concluded, which clearly shows the same was provided only as a formality and to deprive the Applicants from a meaningful participation in the CoC meeting. During this CoC meeting, the resolution plan from a prospective resolution applicant was discussed and deliberated upon by the CoC.
4. The Applicants submit that Bank of Baroda is sole CoC member and in the past, the Applicants have given One Time Settlement (“OTS”) proposals to the Bank of Baroda. In April 2019, the Corporate Debtor had offered an amount of Rs. 16.50 crores towards One Time Settlement of Bank of Baroda’s dues, however, for reasons best known the Bank of

Baroda, the same was rejected. It is submitted that presently, the value of the resolution plan which has now been allegedly approved by the CoC is a meagre sum of Rs. 9.5 crores which is significantly lower than the value of the assets of the Corporate Debtor. This is clearly against the primary objective of the Insolvency and Bankruptcy Code 2016 being “maximisation of the value of assets of the Corporate Debtor”.

5. The Applicants further submit that the respondent has not provided the Applicants with copies of all the relevant documents, resolution plans or other documents that are important and pertinent to the insolvency resolution process of the Corporate Debtor. As such, the Applicants have not been given a chance to participate in the process and the discussions with the resolution applicant. The Applicants submit that being suspended directors of the Corporate Debtor, they are vitally interested in the resolution process of the Corporate Debtor. As a matter of right, the Applicants ought to have been provided with all the documents including the resolution plans and valuation reports to enable the Applicants to contribute and extend their views in the process.
6. The Applicants relied in the matter of **Vijay Kumar Jain vs. Standard Chartered Bank and Ors.**, wherein the Hon’ble Supreme Court of India vide its judgment dated 31.01.2019 have categorically held that all the resolution plans and documents must be made available to the suspended board of directors of the Corporate Debtor and that they shall be

permitted to effectively participate in the discussions with a resolution applicant.

7. In addition to this, the Applicants have submitted that the Respondent has with contrary and suspicious intentions kept the Applicants in the dark without even inviting them to the CoC meeting when the most crucial stage of the insolvency resolution process was being discussed and decided.
8. The Applicants submit that the purported resolution plan which has been approved by the CoC seeks to revive the Corporate Debtor at a throw away price of Rs.9.5 crores, whereas the total dues of the Bank of Baroda are approximately Rs.43 crores. The Applicants submit that they are reasonably confident that the value of the assets of the Corporate Debtor can fetch and yield a much higher value than Rs.9.5 crores only if the Applicants would have been granted an opportunity to address the CoC on these issues and discuss the resolution plan with the CoC. Further submitted that if the resolution plan as approved by the CoC is sanctioned by this Hon'ble Tribunal, it will defeat the very purpose of the Code i.e. "maximisation of value of assets of the Corporate Debtor".

Submission on the behalf of the Respondent:

9. The RP/Respondent has filed a detailed reply and has submitted that the Applicant No.1 sent an email Dated 20.10.2020, on behalf of Applicant Nos. 2 and 3 to the Respondent, relevant extracts are given below:

1. *We are in receipt of your email dated 14th October 2020 and to our utter shock and surprise we have learnt that a resolution plan in respect of the Corporate Debtor has been allegedly approved by the CoC in a CoC meeting held on 13th October 2020.*
2. *It is pertinent here to note that we were not given any notice of this CoC meeting held on 13th October 2020 despite being suspended Directors of the Corporate Debtor. We were also not permitted to be a part of the discussions between the CoC and the Prospective Resolution Applicant in the prior CoC meetings held.*
3. *You are aware that we have been in management and control of the business affairs of the Corporate Debtor until the commencement of the insolvency resolution process. As such, we are aware of the intricacies and also the value that the assets of the Corporate Debtor can yield/fetch.*
4. *You will appreciate that as recent a valuation of the assets of the Corporate Debtor was carried out by the Bank of Baroda itself, wherein, the total valuation was arrived to be approximately Rs. 17 to 18 crores. In the past, we have in fact giving various OTS proposals, the last one offering an amount of approximately Rs. 17 crores, however, for reasons best known the Bank of Baroda, the same was rejected. The purported value of the resolution plan which has now been allegedly approved is Rs. 9.5 crores which is significantly lower than the value of the assets of the Corporate Debtor. This is clearly against the primary objective of the Insolvency and Bankruptcy Code 2016 being “maximisation of the value of assets of the Corporate Debtor”.*
5. *You have not provided us with the relevant documents, resolution plan or any other documents that are important in the successful insolvency resolution process of the Corporate Debtor. You will appreciate that being a suspended director of the Corporate Debtor, we are vitally interested and as a matter of right you ought to have provided to us all the documents including the resolution plan and valuation reports to enable us to contribute and extend our views as regards the same. Further, you may be aware that the Hon’ble Supreme Court of India vide its judgment dated 31st January 2019 in the matter of Vijay Kumar Jain v/s Standard Chartered Bank and Ors. has categorically held that all the resolution plans and documents must be made available to the suspended board of directors of the Corporate Debtor and that they shall be permitted to effectively participate in the discussions with a resolution applicant. Clearly, you have, for reasons best known to you, obviated this entire process and kept us in the dark at all times.*

6. *In view of the above, you are requested to immediately provide us with all the documents, valuation reports, resolution plans in respect of the Corporate Debtor to enable us to express our views and would request you to re-run the process of approval of the resolution plan after allowing us to effectively participate in the resolution process and be made a part of the discussions and permitted to express our views and observations, which would be vital and essential keeping in mind a maximisation of the valuation of the assets of the Corporate Debtor. We are ready and willing to furnish any confidentiality undertaking in this regard as may be required by you. Needless to state, the purported approval of the resolution plan submitted by the Resolution Applicant is non-est and void in view of us being denied participation in the whole process.*

10. The RP replied vide email dated 23.10.2020 as follows:

- i. *The meeting of the CoC dated 13.10.2020 was not for discussion of the Resolution Plan but for communicating the final decision by the CoC.*
- ii. *In all the meetings of the CoC held earlier, when the Resolution Plan for the Corporate Debtor was discussed, Applicant No.1 was part of the meetings.*
- iii. *As to the point of the Applicants that the valuation of the assets of the Corporate Debtor was higher than the amount provided by the approved Resolution Plan, the Respondent stated that the Applicants could have participated in the resolution process themselves and could have offered the proper value for the Assets of the Corporate Debtor.*
- iv. *The Respondent stated that they were very much involved in the discussion of the Resolution Plan and the offer made by the RA. The Respondent stated that in case the Applicants were willing to offer Rs.17 to Rs.18 Crores for the assets of the Corporate Debtor, they could approach the CoC/Hon'ble NCLT and offer their Resolution Plan.*
- v. *As to the point raised by the Applicants that they had not been provided relevant documents and information, the Respondent stated that the Applicants had never asked for the same in the past.*

vi. The Applicant No.1 was part of the discussion in all meetings of the CoC when the Information Memorandum, Valuations and the Resolution Plan was discussed and never sought documents in the meeting.

11. The Respondent submits that the 9th CoC meeting was called on 13.10.2022 only for consideration of the Approval or rejection of the Resolution Plan. Therefore, the notice of the meeting was sent to only Bank of Baroda and not to the Applicants, who are the Suspended Directors of the Corporate Debtor.

12. In relation to the 8th CoC meeting, the Respondent states that the notice for the 8th meeting of the CoC held on 21.09.2020 was sent to Applicant No. 1 vide email dated 13.09.2020. The Respondent states that after the discussion between the RA, the CoC, the Respondent invited the Promoter (i.e., Applicant No.1) of the Corporate Debtor into the meeting in order to brief him about the Resolution Plan submitted by the RA and the procedure that had been followed.

13. In relation to the contention of the Applicants that the Corporate Debtor had offered an amount of Rs. 16.50 crores towards OTS which is much higher than the Resolution Plan value of Rs. 9.5 Cr. The Respondent submitted that Applicants could have participated in the resolution process themselves and could have offered the proper value for the Assets of the Corporate Debtor and submitted a Resolution Plan, but they did not do so.

14. The Respondent denies that the Applicants were not given a chance to participate in the process and discussions with the RA. It is submitted that, Applicant No. 1 was part of the meetings of the CoC when matters relating to the CIRP of the Corporate Debtor and the Resolution Plan were discussed and Applicant No.1 was informed about the discussion held with the RA in the 8th CoC meeting held on 21.09.2020. The Respondent reiterates that the Applicants had never asked for documents prior to 20.10.2020 and Applicant No. 1 was part of the all the meetings of the CoC when the IM, Valuations and the Resolution Plan were discussed.

Findings:

15. Heard the Counsel for parties and perused the material on record. Before arriving at any conclusion, it is important to examine the provisions of the Code and the Regulations, which are given below:

24. Meeting of committee of creditors:

(1)...

(2)....

(3) The resolution professional shall give notice of each meeting of the committee of creditors to-

(a) members of [committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

16. Regulation 21 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for corporate persons) Regulations, 2016 read as under:

21. Contents of the notice for meeting.-

(1) The notice shall inform the participants of the venue, the time and date of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the necessary information to enable participation through video conferencing or other audio and visual means.

(2)....

(3) the notice of the meeting shall contain the following-

(i) a list of the matters to be discussed at the meeting;

(ii) a list of the issues to be voted upon at the meeting; and

(iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

(4).....

17. We observe that, as per Section 24(3) of the Code, the Resolution Professional shall give notice of each meeting of the CoC to the members of the suspended Board of Directors or the partners of the corporate persons. Further, Section 24(4) gives the right to the Suspended Directors, partners and one representative of operational creditor to attend the meeting, although they shall not have the voting right.
18. From the plain reading of the Section 24, it is evident that RP is duty bound to send a notice to the suspended Board of Directors for each meeting of the CoC. There is no doubt that they shall not have voting right in such a meeting, but they have all the right to receive notice about any such meeting of the CoC and to attend them. In the present case the RP failed to give notice of the 9th CoC meeting in which the Resolution Plan was approved.
19. Further, Regulation 21 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly defines the contents of the notice for meeting which includes copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting. In other words, the Resolution Plan, which is relevant document for the discussion of Plan approval must form part of the notice and should have been provided to Suspended Board of Directors.
20. Reliance is also placed on the Judgement of Hon'ble Supreme Court passed in **Vijay Kumar Jain Vs. Standard**

Chartered Bank & Ors. 2019 SCC OnLine SC 103. In which the relevant paras are extracted below: -

8. The statutory scheme of the code, insofar as the former members of the Board of Directors are concerned, is as follows:

A committee of creditors is first constituted under Section 21 consisting only of all the financial creditors of the corporate debtor. Under Section 24, all meetings of this committee are to be conducted by the resolution professional who, however, does not happen to be part of this committee. Section 24(3)(b) is important in that, the resolution professional has to give notice of each and every meeting of the committee of creditors, inter alia, to members of the suspended Board of Directors. Like operational creditors who may attend and participate in such meetings, provided the aggregate dues owing to them are not less than ten per cent of the total debt, both such operational creditors and erstwhile members of the Board of Directors have no vote. Section 25(2)(f) and (i) are also important in that, once the resolution professional convenes meetings of the committee of creditors, he is to present all resolution plans at these meetings.

9. This statutory scheme, therefore, makes it clear that though the erstwhile Board of directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2)(i). ...

13. It is also important to note that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting vide Regulation 21(3)(iii). Obviously, resolution plans are “matter to be discussed” at such meetings, and the erstwhile Board of Directors are “participants” who will discuss these issues. The expression “documents” is a wide expression which would certainly include resolution plans.

21. In view of the the clear provisions of Code, Regulations and judgement of Hon'ble Supreme Court, we are of the considered opinion that the RP has failed to send notice of 9th CoC meeting in which Resolution Plan was approved, to the suspended Directors of the Corporate Debtor, which is mandatory under Section 24(3)(b) of the Code. As, the RP has admitted in his reply that he has not given the notice of 9th CoC meeting to be held on 13.10.2020. Moreover, the RP nowhere in his reply stated that the copy of resolution plan and copy of other relevant documents were provided to the Applicants. Therefore, we declare the CoC meeting held on 13.10.2020 as void, and the RP is directed to conduct such meeting again following the proper procedure of law.

22. The RP is directed to convene a meeting of CoC after providing the notice of the meeting with relevant documents along with the copy of Resolution Plan after taking an undertaking from the Applicants, to maintain confidentiality.

The CoC will be at liberty to reject or to approve the Resolution Plan with the requisite majority.

23. Accordingly, the present Application IA/2054/2020 is allowed.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Sd/-

LAKSHMI GURUNG
(MEMBER JUDICIAL)

Arpan, LRA