

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

COURT III

Intervention Petition. 38/2023

IN

Interlocutory Application 3628/2023

IN

Company Petition 4135/2018

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

Darshan Gandhi **Intervener**

V/s.

Hemant J Mehta & Anr **Respondents**

IN

Interlocutory Application No. 3628/2023

Hemant J Mehta,

Resolution Professional

Lok Housing and Constructions Ltd. **Applicant**

In the matter of

USA Private Limited **Financial Creditor**

V/s.

Lok Housing & Construction Limited. **Corporate Debtor**

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati, Member (Technical)

Order Pronounced on: 20.11.2023

Appearance:

For the RP : Adv. Harsh Kesharia a/w Hemant Mehta

For the Intervener : Adv. Rohul Hakani a/w Adv. Advit Dalvi,
Adv. Yachika Jain

Per: Ms. Lakshmi Gurung, Member (Judicial)

ORDER

I.A. 3628/2023 & Intervention Petition No. 38/2023

1. I.A. 3628/2023 is an application filed by Resolution Professional of Lok Housing and Construction Limited (**RP/Applicant**) seeking exclusion of 936 days in computation of 270 days of insolvency process period. Intervention Petition No. 38/2023 has been filed by one of the ex-directors (**Intervener/Ex-Director**) opposing the prayer to grant extension on the ground that RP is not doing his duty properly. Both the above applications are connected, therefore, with the consent of the parties they were taken up together for hearing and are being disposed of by this common order.

2. The RP has sought the exclusion of 936 days in CIRP period stating as follows:-
 - 2.1. Applicant was appointed as the Interim Resolution Professional of the Corporate Debtor vide order dated 03.06.2019 of the Hon'ble Tribunal and later confirmed as Resolution Professional.
 - 2.2. The Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 644 of 2019 (First Appeal) vide order dated 19.06.2019 directed Applicant not to constitute Committee of Creditors ('COC').
 - 2.3. The said interim order was vacated by the Hon'ble NCLAT vide order dated 28.08.2019.
 - 2.4. The suspended Director, thereafter, approached the Hon'ble Supreme Court and vide order dated 25.10.2019, Hon'ble Supreme Court directed that the decision of COC not to be implemented pending final decision of the Hon'ble NCLAT.
 - 2.5. Applicant approached this Tribunal, for extension and vide order dated 05.12.2019, this Tribunal extended the CIRP period

ending on 01.12.2019 by 90 days to 28.02.2020 in M.A. 3877 of 2019.

- 2.6. This Tribunal vide order dated 10.12.2020 granted exclusion of 271 days in computation of 270 days from the CIRP period in I.A. 779 of 2020.
- 2.7. Subsequent to appeal pending before the Hon'ble NCLAT, the Applicant issued Form G on 04.01.2021 and the Suspended Director filed another Appeal, being Company Appeal (AT) (Ins) No. 79 of 2021 (Second Appeal). The Hon'ble NCLAT vide order dated 12.02.2021 directed the Applicant to maintain Status-Quo with respect to the CIRP of the Corporate Debtor.
- 2.8. Thereafter, the Hon'ble NCLAT vide order dated 16.11.2022 dismissed the First Appeal being Company Appeal (AT) (Ins) No. 644 of 2019.
- 2.9. Despite dismissal of the said Company Appeal, the Status-quo order dated 12.02.21 in the Second Appeal was in existence and the same was vacated by the Hon'ble NCLAT vide its order dated 19.06.2023.
- 2.10. Finally, vide order dated 19.06.2023 the Hon'ble NCLAT vacated the Status Quo order dated 12.02.2021 and disposed of the Second Appeal filed by the Ex-Director directing the Adjudicating Authority to decide the main Petition on merit. Therefore, the RP urges that the entire period lost in litigation which began at the behest of the ex-director, has to be excluded.
- 2.11. After dismissal of the Second Appeal, the CoC in its 11th meeting held on 27.06.2023 decided to approach NCLT for exclusion of 936 days and the same was approved by the COC holding 97.34% voting rights in the CoC.

2.12. The breakup of 936 days is depicted in the table as under:

Particulars	Date	No. of days
Admission	03.06.2019	
CIRP Period		180 days
Last day of CIRP	30.11.2019	
Extension under order dated 05.12.2019		90 days
Last date extended to	28.02.2020	
Exclusion as per order dated 10.12.2020		271 days
Last date of CIRP extended	25.11.2020	
Stay of SC on 25.10.2019 vacated on 16.11.2022		
Status Quo order pass by NCLAT on 19.06.2019		936 days exclusion totally

2.13. The Applicant has relied on the judgment of **Quinn Logistics India Pvt. Ltd.** and submits that the aforesaid judgments is squarely applicable to the present case and therefore prayed to permit exclusion of 936 days in computation of 270 days from the insolvency process.

3. The Intervener has filed Intervention Petition No. 38/2022_ seeking a prayer for dismissal of I.A. 3682/2023 on the following grounds:

3.1. The Intervener is a shareholder and Ex-Director of the Suspended Board of the Corporate Debtor. The efforts of RP in inviting EOI in the past has failed and the maximum limit available for completion of Corporate Insolvency Resolution Process ('CIRP') has already expired. According to second proviso

to Section 12(3) provides a maximum time limits of 330 days for completing CIRP including time taken for legal proceedings.

- 3.2. The present Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor has hurt the Corporate Debtor and its creditors more than providing any resolution by the conduct of the RP. The RP has raised a bill of more than Rs. 3 Crore even though the CIRP has not moved an inch even after four years of its commencement. The RP has misused his position as nothing much was done as a going concern. RP has failed to perform his duty professionally and have not complied with the provisions of Section 25 of the Code.
- 3.3. Further RP due to his negligence and greed has deteriorated value of the Assets and now even if the RP goes for the new resolution plan then also there would be less possibility that much value would be fetched. RP is running the CIRP of the Company by exploiting stakeholder's money and un-necessarily increasing the CIRP cost. Exclusion of huge period of more than 900 days will further result in deterioration of CD's value and incur higher CIRP cost which will affect the Intervener in distribution of amount u/s 53 of the Code.
- 3.4. The Intervener relies on the judgment of Vijay Kumar Jain vs. Standard Chartered Bank & Ors. [2019] ibclaw.in 24 SC to contend that the Suspended Board is part and parcel of the CIRP Process and would have the locus to oppose the exclusion of time period.

Analysis and Findings

4. Heard Ld. Counsel for the parties, considered their submissions and perused the record.

5. The parties were given liberty to file brief written submission. The RP did not file the reply but opposed the intervention application by making oral arguments and submitted the written submissions. The Intervener has also **filed written submission which runs into 68 pages** along with the annexures but without any index. Having filed the detailed application along with annexure there was no need to now file the annexures as any new documents cannot be submitted with the written submissions.
6. Though the CIRP of the Corporate Debtor commenced on 03.06.2019, but the process was stalled at the behest of the Intervener/Ex-Director as seen from the various orders passed by the NCLAT and the Hon'ble Supreme Court. On an appeal filed by Intervener against the CIRP order, the Hon'ble NCLAT in Company Appeal (AT) Insolvency No. 644/2019 (**First Appeal**) vide order dated **19.06.2019** noted that the Ex-Director is ready to settle the matter with the Financial Creditor by making the payment of Rs.52,07,403/- by 31.07.2019 and to pay interest by 15th of each month starting form 15.08.2019 upto 15.04.2020 and ordered as follows:-

*“the Resolution Professional **will not constitute the Committee of Creditors** and will ensure that the company remains going concern and will take assistance of the (suspended) board of Directors. The persons who are working will perform their duties including the paid Directors. The person who is authorised to sign the bank cheques may issue cheques only after authorisation of the ‘Interim Resolution Professional’.”*

Emphasis provided

7. Despite its offer to make payments, the ex-director failed in its commitment and therefore after two months, on **28.08.2019** Hon'ble NCLAT noted that Intervener has not made the settlement payment as suggested by him on earlier occasion therefore, the said interim order was vacated, stating as follows:

*“The interim order restraining constitution of the “Committee of Creditors” **passed on 19th June, 2019 is vacated.** The Interim Resolution Professional is to perform its functions in accordance with law and to ensure that the company remains going concern and will take assistance of the (suspended) Board of Directors and the officers/ Directors/employees and the appeal was pending.*

Emphasis provided

8. This order was challenged by the Intervener/Ex-Director before the Hon’ble Supreme Court in Civil Appeal No. 8068/2019 in which Hon’ble Supreme Court disposed of the appeal on **25.10.2019** directing that the COC has been constituted and shall proceed with the matter but **its decision not to be implemented till the appeal is decided by NCLAT.** Thus CoC’s decisions could not be implemented which again stalled the insolvency process in its full swing.
9. When the RP issued Form G on 04.01.2021 the Intervener filed another appeal being Company Appeal (AT) 79/2021 (**Second Appeal**). The Hon’ble NCLAT vide order dated 12.02.2021 directed the RP to maintain “**Status-Quo**” with respect to the **CIRP of the Corporate Debtor**. Though the First Appeal was dismissed by NCLAT on 16.11.2022 but the status quo order dated 12.02.2021 subsisted and the same was vacated by the Hon’ble NCLAT only on **19.06.2023** when the second appeal was disposed of.
10. The Intervener’s primary objection to the exclusion is that the exclusion will result in deterioration of the value of the CD and higher CIRP cost and both these factors will directly affect the Intervener as Section 53 of the Code provides that CIRP cost has to be appropriated first and shareholders claim has to be appropriated the last. When the CoC in its commercial wisdom has passed resolution to file an exclusion application before Adjudicating Authority then the Adjudicating Authority cannot ignore the commercial wisdom of the

CoC. The Adjudicating Authority cannot substitute its own decision in place of the commercial wisdom of the CoC as held by the Hon'ble Apex Court in **Committee of Creditors of Essar Steel (Civil Appeal No. 8766-67 of 2019)** and in **K Sashidhar v. Indian Overseas Bank & Others (in Civil Appeal No.10673/2018)**.

11. In the case of **Quinn Logistics India Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 185/2018)** the Hon'ble NCLAT has referred to its own judgment in **"M/s Shilpi Cable Technologies vs. Macquarie Bank Ltd – I.A. No. 30 of 2018 in Company Appeal (AT) (Insolvency) No. 101 of 2017** wherein it passed the following order:

“Taking into consideration the fact that because of the order passed by this Appellate Tribunal on 1st August, 2017, the ‘Resolution Professional’ could not function. Now, pursuant to the Hon'ble Supreme Court order as the ‘Resolution Professional’ has resumed the office on 3rd January 2018 and allowed to function pursuant to this Appellate Tribunal’s interim order dated 15th January, 2018m we hold that the period from 1st August, 2017 to 14th January, 2018 will not be counted for the purpose of counting total period of 180 days for completing the ‘Resolution Process’. In case the ‘Resolution Process’ is not completed within 180 days, even after excluding the period aforesaid, it will be open to the ‘Committee of Creditors’/ ‘Resolution Professional’ to request the Adjudicating Authority for more time.”

12. Thereafter, The Hon'ble NCLAT, in Para 9 & 10 is held as follows:

“9. From the decisions aforesaid, it is clear that if an application is filed by the ‘Resolution Professional’ or the ‘Committee of Creditors’ or ‘any aggrieved person’ for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to ‘exclude certain period’ for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances.

10. For example, for following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:

- (i) If the corporate insolvency resolution process is stayed by a court of law or the Adjudicating authority or the Appellate Tribunal or the Hon'ble Supreme Court.
- (ii) If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal....”

13. As can be seen from the various orders of Hon'ble NCLAT & Hon'ble Apex Court, the Intervener/Ex-Director tried to stall the Insolvency Resolution Process at every possible steps and obtained orders (i) restraining the constitution of CoC or (ii) Not to implement decisions of CoC or (iii) Status Quo with respect to CIRP of the Corporate Debtor.
14. There is no quarrel that the suspended board is part of the CIRP process and is entitled to receive copy of resolution plan as and when the same is received for deliberation by CoC as held in the case of *Vijay Kumar Jain (Supra)*.
15. The CoC in its 11th meeting held on 27.06.2023 extended to 11.07.2023 deliberated on proposed resolution to move the Adjudicating Authority for exclusion of the days lost in litigation. CoC, with 97.34% votes resolved that the exclusion application be filed before the Adjudicating Authority. The Intervener is not the only stakeholder but the larger group of stakeholders represented by the CoC have deliberated and decided to file exclusion application and give the corporate debtor a chance to come back on its feet rather than allow its death. In case the Exclusion Application is rejected then the natural consequences would be liquidation of the Corporate Debtor without even giving a chance to consider the Resolution Plans. This is

not the objective of the IBC. The prime objective of the IBC is resolution of Corporate Debtor instead of liquidation of Corporate Debtor.

16. In view of the above discussions, we are of the opinion that the Insolvency Process was delayed due to various litigations initiated by the Intervener himself and the stay orders by higher Courts. Therefore, he cannot entirely blame the RP for the delay in CIRP process. We therefore, **reject** the Intervention Petition.
17. The Hon'ble Supreme Court in **Committee of Creditors of Essar Steel (Civil Appeal No. 8766-67 of 2019)** has held that the time line of 330 days given U/s 12 of IBC is directory and not mandatory. It is open to the Adjudicating Authority/Appellate Authority to extend the time beyond 330 days in exceptional cases. Relevant extract of the judgment is reproduced below:

However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code and that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extended time keeping the

aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

18. As already mentioned that from the day of order admitting the CD into CIRP there are various litigations which did not allow the smooth running the CIRP process. In view of the facts of the present case we are of the considered view that this is a fit case for allowing the exclusion period as prayed by the Resolution Professional.
19. Accordingly, we **allow** the Exclusion Application in terms of the prayers sought in the Application and **reject** the Intervention Petition.

Sd/-

Shri Charanjeet Singh Gulati
Member (Technical)

Sd/-

Ms. Lakshmi Gurung
Member (Judicial)