



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER**

MA(IBC) No. 05/JPR/2022
IA (IBC) No. 355/JPR/2022
In CP No. (IB)- 43/9/JPR/2020

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

**RAJESH KUMAR SHARMA, PROPRIETOR OF M/S SHARMA
ART & COMPUTER**

...Operational Creditor/Applicant

Versus

GUMAN BUILDERS & DEVELOPERS PRIVATE LIMITED

...Corporate Debtor/Respondent

MEMO OF PARTIES

**RAJESH KUMAR SHARMA, PROPRIETOR
OF M/S SHARMA ART & COMPUTER**

R/o Opp. Panchayat Samiti,
Nr. Old Water Tank Pankha,
Jhotwara, Jaipur, Rajasthan- 302012

...Operational Creditor/Applicant

VERSUS

**GUMAN BUILDERS & DEVELOPERS PRIVATE LIMITED**

R/o 171 Officers Campus Exten.,
Jaipur, Rajasthan- 302021

...Corporate Debtor/Respondent

MA(IBC) No. 05/JPR/2022:**MEMO OF PARTIES****CANARA BANK, ARM BRANCH**

R/o B-6, Sethi Colony,
Jaipur, Rajasthan- 302004

...Applicant/Secured Creditor/COC Member

IA (IBC) No. 355/JPR/2022:**MEMO OF PARTIES****LALIT MOHAN SHARMA**

R/o 46, Mahadev Nagar Gandhi Path,
Near Akshar Dham Mandir, Vaishali
Nagar, Jaipur, Rajasthan- 302021

...Applicant/Interim Resolution Professional

Versus

CANARA BANK, ARM BRANCH

R/o B-6, Sethi Colony,
Jaipur, Rajasthan- 302004

...Respondent No. 1/COC Member

RAJASTHAN FINANCIAL CORPORATION

R/o C-96, Jaganpath, Chomu House Circle
C-Scheme Jaipur, Rajasthan- 302001

...Respondent No. 2 /COC member

For the Canara Bank

: Alok Garg, Adv.
Sonal Singh, Adv.



For Operational Creditor : Shretima Bagri, Adv.
For the Rajasthan Financial Corporation : Manjeet Kaun, Adv.
For the Interim Resolution Professional : Nitesh Shrivastava, Adv.

Order Pronounced On: 19.04.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The parties in the aforementioned matters have filed a cross-application seeking directions for proper adjudication and disposal of necessary issues. As the facts of both applications are similar, the issues at hand are intertwined, and the relief prayed in the aforementioned applications is mutually exclusive. Therefore, both applications are being considered simultaneously for proper and effective adjudication of the issues and reliefs prayed for.
2. The Miscellaneous Application No. 05/JPR/2022 ('MA/ Withdrawal Application') has been filed by Canara Bank, one of the secured creditors ('Applicant'), of M/s Guman Builders & Developers Pvt. Ltd. ('Corporate Debtor') under Section 12A of Insolvency and Bankruptcy Code, 2016 (the 'Code'/ 'IBC') read with Rule 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 ('CIRP Regulations') praying approval of the withdrawal application and other ancillary directions.



3. Whereas the Interim Application ('IA/ Application for CIRP Cost') has been filed by the interim resolution professional ('IRP'), Mr. Lalit Mohan Sharma ('Applicant'), of M/s Guman Builders & Developers Private Limited ('Corporate Debtor') under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 (the 'Code'/'IBC') read with Rule 11 of National Company Law Tribunal Rules, 2016 ('NCLT Rules') seeking directions to be issued to the secured creditors of Corporate Debtor *viz.*, Canara Bank ('Respondent No. 1') and Rajasthan Financial Corporation ('Respondent No. 2'), who are also being a part of the Committee of Creditors ('CoC') for appointment of resolution professional, approval of Corporate Insolvency Resolution Process' ('CIRP') cost and other necessary directions.
4. This Adjudicating Authority *vide* Order dated 28.04.2022 admitted the application under Section 9 of the IBC, filed by Shri Rakesh Kumar Sharma, Proprietor of M/s Sharma Art & Computer ('Operational Creditor') against the Corporate Debtor in the matter mentioned above and Mr. Lalit Mohan Sharma was appointed as the Interim Resolution Professional ('IRP') *vide* Order dated 28.04.2022.

MA(IBC) No. 05/JPR/2022:

5. The Applicant has moved the present application on the following set of facts:



5.1 That as per the directions, the IRP constituted a Committee of Creditors ('CoC') under Section 21 of the Code and convened the first CoC meeting on 04.06.2022, wherein the IRP admitted a claim of Rs. 27,87,60,478/- (Rupees Twenty-Seven Crores Eighty-Seven Lakhs Sixty Thousand Four Hundred and Seventy-Eight Only) of the Applicant constituting 60.98% of the voting share in the CoC. The admitted claim of the Applicant with the Rajasthan Financial Corporation ('RFC'), one of the members of the CoC, adds up to 95.78% of the total voting share in the CoC. The admission of the claim of the Applicant by the IRP is taken on record *vide* Order dated 05.07.2022 *via* IA No. 256/JPR/2022 placing minutes of the first CoC meeting.

5.2 Further, the Applicant has a secured charge over the assets of the Corporate Debtor which are attached by the Directorate of Enforcement ('ED') with pending Central Bureau of Investigation ('CBI') cases against it, thus it is not practical for incurring any other additional expenses in such scenario. Furthermore, in the first CoC meeting, the IRP put forth resolutions before the CoC for ratifying and approving the remuneration of the IRP; consequently, his appointment as Resolution Professional. These resolutions were voted against by the Applicant and representative of the RFC in the first meeting of the CoC. A copy of the report of the first CoC meeting is annexed as Annexure – 1 of the IA.



5.3 It *vide* Emails dated 10.06.2022 and 16.06.2022 requested the IRP to take necessary action for withdrawal under Section 12A of the Code. However, the IRP *vide* Email dated 20.06.2022 refused to take any action(s) and stated that as per Section 12A of the Code, the original operational creditor alone is competent to get a such application filed through IRP after seeking requisite threshold approval of CoC. In addition, it was implored on the Applicant to either continue the CIRP or choose the winding up of the Corporate Debtor. These conditions were not agreeable to most of the secured creditors.

5.4 Subsequently, the IRP convened a second CoC meeting on 01.07.2022, wherein the agendas of the first meeting were redeliberated and voted against by the majority. Given the commercial wisdom of the CoC, its decision should be given paramount importance especially when all the operations of the Corporate Debtor are suspended since 2015 with no records being available owing to a fire at the workplace premises and the seizure by the official of the government. Thus, there exists no mechanism to verify the claims of the creditors and the valuation of the Corporate Debtor

5.5 It filed its Written Submission *vide* Diary No. 201/2023 dated 23.01.2023 and relied on *V. Navneetha Krishnan v. Central Bank of India, Company Appeal (AT) (Insolvency) No. 288 & 289 of 2018* wherein the



Hon'ble NCLAT has given the commercial wisdom of the CoC and has observed that *'if by 90% voting share of the committee of creditors, accept the offer and decide for withdrawal of the application under Section 7 of the I&B Code, the observation as made above or the order of liquidation passed by the Adjudicating Authority will not come in the way of Adjudicating Authority to pass appropriate order.'*

6. The IRP filed its reply *vide* Diary No. 588/2023 dated 03.03.2023 and stated:

6.1 That the major stakeholders in CoC have taken a stand of not continuing CIRP from the first CoC meeting till the fifth CoC meeting, held on 28.11.2022, as the Corporate Debtor does not have assets other than those charged to secured financial creditor and being attached by the ED. It has received claims from twenty-seven financial creditors, of which sixteen are home buyers, and seven are related parties. In total, he received thirty-three claims which are further inclusive of claims from six operational creditors.

6.2 The ED has also informed that Plot No. GH – 1, Gokul Nagar, Gokulpura, Kalwar Road, Jaipur in the name of the Corporate Debtor and mortgaged to the RFC is currently under attachment and the matter is *sub-judice* before Hon'ble High Court, Rajasthan. Further, the IRP has taken the market reference of the mortgaged property for valuation purposes and



such valuation is significantly higher than the deal entered by the RFC with M/s V.B. Jaipur Heights Private Limited.

6.3 As per Section 12A of the Code, a withdrawal application is required to be filed before CoC by the Operational Creditor who filed the application for admission of CIRP of the Corporate Debtor and the same is required to be placed before CoC for approval with a 90% voting share. Besides, in the instant case, the Operational Creditor has not been paid his dues nor his consent has been taken regarding the withdrawal of the CIRP. Consequently, there is no application for withdrawal from the original applicant of the petition. Moreover, due to the reconstitution of the CoC, the applicant and RFC hold 78.58% voting rights in the CoC.

6.4 Furthermore, given the non-cooperative behaviour of the secured financial creditors viz., Canara Bank and RFC; the IRP filed IA No. 355/JPR/2022 under Section 60(5) of the Code seeking directions to CoC members to take a decision as per the Code.

IA (IBC) No. 355/JPR/2022:

7. The IRP has submitted the following, reiterating, controverting, or adding to, what is stated beforehand in MA No. 05/JPR/2022 and has moved the present application on the following set of facts:

7.1 That as per the directions, the IRP constituted a Committee of Creditors ('CoC') under Section 21 of the Code and convened the first CoC



meeting on 04.06.2022. The admitted claim of the Canara Bank with the Rajasthan Financial Corporation ('RFC') adds up to 95.78% of the total voting share in the CoC. A copy report of the first CoC meeting is annexed as Annexure – 1 of the IA.

7.2 Respondent No. 1 *vide* Email dated 10.06.2022 ('Withdrawal Email') requested the IRP for filing of withdrawal application. A copy of the Withdrawal Email dated 10.06.2022 is annexed as Annexure – 2A of the IA. The IPR *vide* Email dated 10.06.2022 ('Response to Withdrawal Email') stated his incapability to file such application as a such application for withdrawal ought to be moved by the Operational Creditor as per the provisions of Section 12A of the Code. A copy of the Response to Withdrawal Email is annexed as Annexure – 2B of the IA.

7.3 Subsequently, Respondent No. 1 requested the IRP *vide* Email dated 16.06.2022 ('First Email for Dissolution Agenda') for fixing a voting agenda in the next CoC meeting for the dissolution of the Corporate Debtor. A copy of the First Email for Dissolution Agenda is annexed as Annexure – 2C of the IA. Moreover, Respondent No. 1 *vide* Email dated 20.06.2022 ('Second Email for Dissolution Agenda') informed the IRP that the liquidation of the Corporate Debtor is possible when the resolution professional found some realisable assets. In the first CoC meeting, it was explored that the Corporate Debtor has no assets available and again



requested a voting agenda in the next CoC meeting. A copy of the Second Email for the Dissolution Agenda is annexed as Annexure – 2D of the IA.

7.4 The IRP *vide* Email dated 20.06.2022 (‘Response to Dissolution Agenda’) stated that without the appointment of a Resolution Professional (‘RP’) and permission to incur CIRP expenses, the IRP is unable to start the process. In addition, direct dissolution of the Corporate Debtor is not permissible under the Code. Currently, the company is under CIRP and the possibility of any resolution plan is thin, the CoC may approve for liquidation under Section 32 of the Code, subject to the approval of Adjudicating Authority, without calling for expression of interest (‘EOI’). As the ED has attached the assets of the Corporate Debtor, the Financial Creditors cannot provide clear titles to the home buyers without undergoing the IBC process as IBC overrides all other acts.

7.5 In view of the aforementioned email exchanges, the IRP put forth notice and agenda dated 25.06.2022 and convened a second CoC meeting on 01.07.2022, wherein approval of CIRP cost and appointment/replacement of IRP remained unapproved. Thus, both the respondents are not extending their assistance and cooperation for the completion of CIRP. A copy of the notice & agenda and report of the second CoC meeting is annexed as Annexures – 3 and 4 of the IA, respectively.



7.6 Meanwhile, the IRP has written to ED for obtaining available details with respect to the financial status of the Corporate Debtor; consequently, preparing and keeping the books of accounts in accordance with IBC. A copy of the Letter dated 07.07.2022 is annexed as Annexure – 5 of the IA. The ED *vide* Letter dated 25.07.2022 responded, stating that the Corporate Debtor was beneficiary of proceeds of crimes generated out of Syndicate Bank fraud to the tune of Rs. 76.61 Crores. The Corporate Debtor through its *then* director Mr. Shankar Lal Khandelwal was used for receiving proceeds of crimes from the bank accounts of the fictitious firms controlled by one Mr. Bharat Bumb. Therefore, ED has attached various properties of the Corporate Debtor as such Plot No. GH – 1, Gokul Nagar, Gokulpura, Kalwar Road, Jaipur *vide* PAO No. 02/2018.

7.7 The aforementioned attachment was further confirmed by PMLA’s Adjudicating Authority *vide* its Order dated 09.11.2018 in OC No. 984/2018 (‘PMLA Order’). The PMLA Order was challenged before the Appellate Tribunal, wherein the learned Appellate Tribunal *vide* Order dated 27.06.2019 (‘PMLA Appellate Order’) quashed the PAO No. 02/2018 on the appeal of mortgagor Corporate Debtor and mortgagee RFC. Being aggrieved, ED has filed DB Civil Misc. Appeal No. 5318/2019. Besides, it has filed a prosecution complaint against the Corporate Debtor



before the Special PMLA Court, Jaipur on 06.02.2019. A copy Response Letter from ED dated 27.07.2022 is annexed as Annexure – 6 of the IA.

8. The Respondent No. 1 filed its Written Submission *vide* Diary No. 557/2023 dated 01.03.2023 and reiterated its contentions as taken in MA No. 05/JPR/2022, in addition to the following:

8.1 The delay caused by the IRP is not explained on reasonable grounds, more so, when the claims of the creditors cannot be scrutinized documentarily in absence of the financial records as it is seized by the ED. Moreover, the acceptance of further claims of the other financial creditors (*home buyers*) is done deliberately for bringing down the voting share ratio of the Respondents who have time and again asked for the filing of the Withdrawal Application. In addition, MA No. 05/JPR/2022 is filed before IA No. 355/JPR/2022 which shows that the latter application was filed to derail the commercial wisdom and decision of the majority and to unnecessarily proliferate his remuneration.

8.2 The closure of CIRP through the withdrawal process is necessary for the interest of justice as the secured financial creditors will be entangled in the recovery of dues given the lengthy legal battles. The closure of CIRP is substantiated further by the actions of the IRP by filing IA No. 569/JPR/2022 for liquidation of the Corporate Debtor in light of no revival chances.



9. We have heard the Learned Counsels for the parties and perused the averments made in the application, reply, written submissions and the documents enclosed with their respective application(s). The main issue for consideration is whether the majority of the voting shareholder can file a withdrawal application under Section 12A of the Code without the explicit consent of the original applicant.
10. Pursuant to the public announcement in accordance with Section 15 of the IBC read with Regulation 6 of CIRP Regulations, the last date for submission of proof of claims was 24.05.2022. The IRP initially received a total of seven claims from two secured creditors and the rest of the claims were received from the class of creditors (home buyers). Thereafter, further fifteen more claims were received from the home buyers as portrayed in the fifth CoC meeting; however, the aforementioned class of home buyer creditors never proposed any insolvency professional to act as authorised representative despite numerous requests, agendas and follow-ups.
11. In addition, when the resolution for approval of the CIRP cost was placed before the CoC across all CoC meetings, especially the fifth CoC meeting, none of the CoC members was inclined to incur the CIRP cost which include the fees of the resolution professional, publication of public announcements, the expense for conducting CoC meetings, travelling expenses, advocate's



fee for vetting of IA(s) and incidental fees without assigning any cogent reasons.

12. In the instant case, the application for Withdrawal is filed by the Canara Bank which has the major voting share in the CoC. However, the Withdrawal Application is not accompanied by Form FA and the bank guarantee as stipulated under Regulation 30A (2) of CIRP Regulations; the Hon'ble NCLAT in the case of *Francis John Kattukaran v. The Federal Bank Ltd. & Anr., Company Appeal (AT)(Insolvency) No. 242 of 2018* wherein the Committee of Creditors by a majority vote of 100% has approved the proposal and the resolution professional has moved an application under Section 12A of the IBC. The Hon'ble Appellate Authority observed that the resolution professional cannot file an application for withdrawal of an application under Section 7 or 9 or 10 of the IBC and has stated that *the application for withdrawal can be filed only by the applicant, who initially filed application under Section 7 or 9*. It further held that *Regulation 30A cannot over-ride the substantive provisions of Section 12A according to which the 'applicant' can only move application for withdrawal of the application before the Adjudicating Authority*.

13. Nonetheless, an application under Section 12A can be moved by a person other than the original applicant as held by Hon'ble NCLAT in the case of *Shwetha Vishwanath Shirke v. The Committee of Creditors, Company*



Appeal (AT)(Insolvency) No. 527 of 2019. Moreover, the Hon'ble Supreme Court of India in Vallal RCK v. Siva Industries and Holdings Limited & Ors., Civil Appeal Nos. 1811-12 of 2022 has categorically observed that '24. When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, in our view, the adjudicating authority or appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and dehors the provisions of the statute or the rules.'

14. In the present set of circumstances, the Applicant was initially holding 60.98% of the voting share in the CoC, and with RFC the total voting shareholding was 95.78%. The Applicant requested the IRP *vide* Withdrawal Email to file an application for withdrawal under Section 12A of the Code as none of the CoC members were inclined to bear the cost of the CIRP, however the IRP refused to undertake such actions. Subsequently, the majority voting shareholder of the CoC moved a Withdrawal Application. Later, during the course of hearing the IRP filed a modified list of CoC which appears to have been done in order to frustrate the withdrawal/ termination proceedings of the Corporate Debtor as none of the subsequently added



financial creditors (*home buyers*) were present in the following CoC meetings. Thus, it cast a shadow of doubt on the actions of the IRP.

15. The coordinate bench of the National Company Law Tribunal, Hyderabad Bench in the case of *Energy Infraconsulting India (P.) Ltd. v. Athena Chhattisgarh Power Ltd.*, CP (IB) No. 54/9/HDB/2017 where the IRP could not pursue the CIRP due to the failure by the operational creditor to bear the cost of public announcement and professional fees of IRP. The Bench revoked and terminated the process of CIRP for non-payment of IRP's professional fees.

16. Considering the peculiar circumstances of the case herein, we are inclined to terminate the CIRP of the Corporate Debtor as none of the members of the CoC is interested to continue the CIRP of the Corporate Debtor. It is seen that the majority of CoC members, since inception, were reluctant to continue the CIRP given the various instances such as non-appointment of IRP as the resolution professional, non-approval of CIRP cost, non-responsive behaviour of the CoC in taking time-bound steps, the attachment of property by the ED, it being *sub-judice* before the Hon'ble High Court of Rajasthan, and the failure to proceed promptly for the result-oriented process of the Corporate Debtor.



17. It is found that the IRP / the Applicant has submitted a chart of CIRP costs, showing the CIRP cost of Rs. 13,15,340/- while placing minutes of the fifth CoC meeting on record, which is categorized as follows:

- A. IRP fees amounting to Rs. 10,00,000/-.
- B. Advocate fees amounting to Rs. 70,000/-.
- C. Filing, Printing, and Publication charges amounting to Rs. 35,340/-.
- D. RP conveyance and other expenses amounting to Rs. 10,000/-.

18. In the said amount of Rs. 13,15,340/-, the IRP has already received an amount of Rs. 2,00,000/-. Therefore, the total pending CIRP cost to be paid to the IRP is Rs. 11,15,340/-. Against the claimed amount of Rs. 11,15,000/- as the CIRP cost, the list of CIRP Cost's expenses as mentioned in B, C and D amounting to a total of Rs. 1,15,340/- shall be placed before the CoC with the requisite bills. The CoC shall upon scrutiny, on a *pro-rata* basis, reimburse the expenses, against which bills have been produced, in the bank account of the IRP. The IRP is directed to file an affidavit along with the invoices including his fees, engaged professional's fees, legal and other expenses, *etc.* before this Adjudicating Authority as well.

19. Considering the job undertaken by the IRP, submissions of both sides and the papers submitted before us, we find it reasonable to fix the IRP fees of Rs. 35,000/- per month. In the current set of circumstances, the IRP after the publication of the invitation of claims had thrown the ball in the court of the



CoC and has not taken any substantial steps towards the successful completion of the CIRP of the Corporate Debtor. Thus, the IRP cannot benefit and profit from the non-actions of the CoC, as he was not able to justify his lackadaisical attitude. The total IRP fees would be payable from the admission of the CIRP till the filing of the Withdrawal Application i.e., four months and nine days from 28.04.2022 to 06.09.2022 is Rs. 1,50,740/- without applicable GST. Amount, if any, paid to the IRP shall be adjusted towards the professional fees of Rs 1,50,740/- and the balance shall be adjusted towards expenses incurred by the IRP against which invoices shall be placed before the CoC. Hence, the actual invoiced amount is to be paid by the Financial Creditors on a *pro-rata* basis.

20. The Financial Creditors are required to pay the difference amount, if any, into the account of the IRP and file a compliance report before this Authority by 22.05.2023. In view of the foregoing, the Interim Application bearing *MA No. 05/JPR/2022* and *IA No. 355/JPR/2022* stands disposed of with the abovesaid directions for compliance.

21. The Order in the present matter is made on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority. The parties and members of CoC shall be at



liberty to pursue their respective available legal remedies before other forums, if any.

22. The CIRP of the Corporate Debtor stands terminated *vide* this Order and no proceedings shall remain pending. Further, any IAs, if pending, shall stand disposed of. The Registry is directed that the case file be consigned to records.

23. Let the copy of the Order be served to the parties, members of CoC, Registrar of Companies, Enforcement Directorate, relevant authorities, and IBBI for their records.

DEEP
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JOSHI

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**