

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOCHI BENCH

REPORT/28/2020
MA/15/KOB/2020
MA/143/KOB/2020
&
MA/144/KOB/2020
IN
TIBA/34/KOB/2019

Order delivered on 21.12.2021

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)

Hon'ble Mr. Anil Kumar B, Member(Technical)

In the matter of

Wittur Elevator Components India Pvt. Ltd : Operational Creditor

Vs.

Axiomata Elevators Pvt. Ltd. : Corporate Debtor

REPORT No: 28/KOB/2020

Shri. Sathiq Buhari : Resolution Professional

Wittur Elevator Components India Pvt. Ltd : Applicant/Operational Creditor

Vs.

Axiomata Elevators Pvt. Ltd. : Respondent/Corporate Debtor

MA/15/KOB/2020

Wittur Elevator Components India Pvt. Ltd : Operational Creditor

Vs.

Shri. Sathiq Buhari, Resolution Professional : Respondent

MA/143/KOB/2020

Wittur Elevator Components India Pvt. Ltd : Applicant/Operational Creditor

Vs.

Axiomata Elevators Pvt. Ltd. : Respondent/Corporate Debtor

MA/144/KOB/2020

Shri. Sathiq Buhari, Resolution Professional : Applicant

Vs.

Axiomata Elevators Pvt. Ltd. : Respondent/Corporate Debtor

Parties/Counsel present (through video conference)

For Applicants

Report No.28/KOB/2020 : Shri. Sathiq Buhari (RP);

MA/15/KOB/2020 : Shri. Kalyan Jhabak (Advocate for OC);

MA/143/KOB/2020 : Shri. Sathiq Buhari (RP), Shri. Kalyan Jhabak
(Advocate for OC)

MA/144/KOB/2020 : Shri. Sathiq Buhari (RP)

For Respondents:

MA/15/KOB/2020 : Shri. Sathiq Buhari (RP);

MA/143/KOB/2020 : Shri. Vinod P V (Advocate for CD);

MA/144/KOB/2020 :Shri. Vinod P V (Advocate for CD).

O R D E R

Per: Ashok Kumar Borah, Member (Judicial)

Since all these applications are inter-connected, they are disposed of by this common order.

A brief history of the initiation of CIRP in this matter is given below:

1. An application for the Corporate Insolvency Resolution process was filed under Section 9 of the Insolvency and Bankruptcy Code,2016 (hereinafter referred to as 'IBC'/'Code') by the Operational Creditor-Wittur Elevator Components India Pvt. Ltd against the Corporate Debtor- Axiomata Elevators Pvt. Ltd, Cochin, was admitted by this Tribunal on 26.11.20019 vide order in TIBA No.34/KOB/2019 wherein Mr. Sathiq Buhari was appointed as an IRP. Incompliance with the mandates under Sections 13 & 15 and other applicable Sections of IBC read with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations,2016, public announcement was made in the New Indian Express and Mathrubhoomi dailies on 29.11.2019.

2. Except for the Applicant-Operational Creditor, no other person has submitted any claim. Hence in compliance with Section 21 (1) of IBC,2016 read with Regulations 16 and 17 of IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016,Committee of Creditors (CoC) was constituted consisting of the

sole Operational Creditor. To keep the CD as an ongoing concern, IRP has taken symbolic possession of the registered office and the records of Corporate Debtor on 30.11.2019. The IRP has filed reports on List of Creditors under Regulation 13(1) & (2) (d) of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 and Certificate on the constitution of CoC under Regulation 17 (1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 before this Tribunal on 16.12.2019.

3. The 1st CoC meeting was convened on 20.12.2019, in which it was decided to continue with the IRP and fee of Rs. 40,000/- was fixed as the monthly fee of IRP. The 2nd CoC was convened on 14.01.2020. The Operational Creditors are the sole members of the CoC and suspended Managing Directors of Corporate Debtors were invited to attend the meeting. After several adjournments, the 3rd CoC meeting was convened on 06.02.2020 in the office of the Corporate Debtor. Because of the continued absence of the CoC member, RP concluded the meeting proceedings and decided to report the matter to this Tribunal.

Now we are analysing each matters separately.

REPORT No.28/KOB/2020

4. This Report has been filed by Shri Sathiq Buhari, Resolution Professional in the matter of Wittur Elevator Components India Pvt. Ltd. Vs. Axiomata Elevators Pvt. Ltd. While filing Report, the RP has in addition to submission of report, prayed for the following reliefs:

- a). directing the managing Directors of Operational Creditor Mr. Samudrala Chandramouli Sai Narayanan, Mr. Johann Koenigshofer, and Mr. Suraj Thodimarath to appear before this Honourable NCLT in person to ascertain whether the Board of Directors of the Operational Creditor Company resolved to permit their representative Mr. Rammohan to raise allegations against the RP and sent threatening Annexures- 10,12,14,29 and 33 Emails to the RP and instructed him to prosecute the RP by passing an illegal Annexure-34 resolution.
- b). directing Mr. Rammohan, who is the representative of the Operational Creditor, to appear in person before this Honourable NCLT and show cause under which authority he has passed Annexure-34 resolution against the RP who is an officer of the Court.
- c). initiate contempt proceedings against Mr. Rammohan and Mr. Aashish Jain Lunia, Advocate (Surana & Surana International Attorneys, Dr. Radhakrishnan Salai, Mylapore, Chennai - 600 004) who misbehaved, annoyed, and threatened the RP in the 2nd CoC meeting held on 14.01.2020 and also obstructed the RP to convene the 3rd CoC meeting by sending misleading Annexures- 18, 19,21,23,25,28 & 30 Emails.
- d). Set aside the resolutions passed by the single CoC member Mr. Rammohan on 08.02.2020 which were intimated to the RP under Annexure-34 Email as invalid and illegal.
- e). directing the Directors of Operational creditor to remove Mr. Rammohan from the post of its authorized representative as he had contravened and breached the mandates of the Code and Regulations.

- f). Order Rs.2500000/ (Twenty-five lakh) as costs against Mr. Rammohan who breached the mandates of the Code and Regulations and abused the process of this Honourable NCLT.
- g). Impose penalty under Section 65 of the Code against the Operational Creditor who has maliciously and fraudulently initiated the resolution process for recovery of money instead of resolution as contemplated under the Code.
- h). Permit the RP to relieve from his duties as a resolution professional in view of the inimical attitude and non-cooperation of CD and CoC member to work out practical resolutions within the framework and time limits stipulated under the Code and Regulations and
- i). Such other orders which this Honourable NCLT may deem fit and proper in the interest of justice and which may be prayed for the hereafter.

5. The learned RP stated that taking undue advantage of the constitution of CoC with a sole member Operational Creditor, the CoC took several observations and decisions and compelled him to record them in the Minutes. He has further stated that the observations and decisions taken in the 2nd CoC meeting are not correct and proper. He has in his report extensively explained the reason for stating that the decisions taken in the CoC meeting are not correct and proper.

6. In view of this he decided to convene the 3rd CoC meeting on 30.01.2020 as decided by the 2nd CoC meeting, but it was adjourned to 31.01.2020 due to Hartal and thereafter, the CoC member requested to convene it on 08.02.2020. RP sent a reply mail on 27.01.2020 alerting the CoC members that the last date to publish Expression of Interest (EoI) in Form-G is 08.02.2020 and requested to confirm

either 31.01.2020 or any day from 01.02.2020 to 03.02.2020 for the adjourned CoC meeting. The CoC member on 28.01.2020 agreed to attend the meeting on 01.02.2020. However, they sent an email on 31.01.2020 for adjournment of the meeting from 01.02.2020 to any other date.

7. In reply, the RP issued an email notice on 03.02.2020 informing the CoC member that the adjourned meeting will be convened on 05.02.2020. The CoC member again issued a reply email to adjourn the meeting to 08.02.2020 with an additional agenda. However, in order to comply with the timelines of the CIRP, the RP convened the 3rd CoC meeting on 06.02.2020. It is further submitted that on 08.02.2020, the CoC member stated that they have *suo motu* convened the meeting and took several decisions.

8. The learned RP submitted that the resolutions passed by the sole CoC member in the absence of RP were illegal and against the mandates of the Code and regulations. To conclude, the RP stated that by raising unfair, baseless, and illegal allegations against RP, the CoC member has breached the mandates of the Code and Regulations and is guilty of Contempt of Court.

Objection filed by OC against REPORT/28/2020:

9. The Operational Creditor filed an objection to the Report stating that any relief that is being sought under Section 60 read with Rule 11 of National Company

Law Tribunal Rules, 2016 has to be made by way of a Miscellaneous Application and not in the form of a report. The RP herein has sought specific reliefs from this Tribunal in the guise of filing a report and the same is invalid in law.

10. When the 2nd CoC Meeting was convened on 14.01.2020 at the office of the Corporate Debtor, it was found that the possession of the registered office of the Corporate Debtor and its assets were still with the defunct Directors and that the bank accounts of the Corporate Debtor were still being operated by the said Directors. Accordingly, Resolution Professional has failed in his statutory duties to take immediate possession and custody of the Corporate Debtor as required under Section 25(1) and Section 25(2)(a) of the Insolvency & Bankruptcy Code, 2016.

11. Their contention is that in spite of multiple emails, phone calls, and circulation of the notice and the proposed agenda, the Resolution Professional did not attend the 3rd CoC Meeting held on 08.02.2020. The failure of the Resolution Professional to attend the meeting of the committee of creditors violates Section 25(2)(f) of the Code.

12. On an application filed by the RP, this Tribunal's vide order dated 28.01.2020, specifically directed the Corporate Debtor to issue necessary instructions to its service providers to furnish documents as sought by the Resolution Professional.

However, the RP was sitting idle even after receipt of the orders from this Tribunal.

13. The Operation Creditor further alleged that the CIRP of the Corporate Debtor was initiated on 26.11.2019, payments were made to a creditor Bajaj Finance Limited by way of monthly instalments on 02.02.2020, i.e., well after the appointment of the Resolution Professional and constitution of the CoC, which is in specific violation of Section 28(1)(e) of the IBC. The Resolution Professional has thus failed in his duties to preserve and protect the assets of the Corporate Debtor as required under Section 25(1) of the IBC. Such payments were authorized by the Resolution Professional without prior consent or approval of the CoC and as such his actions violate Section 28 of the IBC.

14. The learned senior counsel for the Respondents argued that the conduct of the Resolution Professional is also in blatant violation of Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as he has failed to form an opinion as to whether the Corporate Debtor has been subjected to any transaction covered under Sections 43,45,50 or 66 of the Code within 75 days of the insolvency commencement date. He has also failed to prepare and submit the Information Memorandum to the CoC within two weeks of his appointment, under Section 25(2)(g) and Regulation 36 of the IBBI (Insolvency

Resolution Process for Corporate Persons) Regulations, 2016, despite specific queries from the CoC regarding the status of the same during the 3rd CoC Meeting dated 08.02.2020. The Resolution Professional failed to take steps to recover dues from the debtors of the Corporate Debtor to the tune of Rs.92,30,562/- arising out of 13 projects undertaken by the Corporate Debtor across various locations in Kerala.

MA/15/KOB/2020

15. This MA/15/KOB/2020 has been filed by the sole member of Committee of Creditors/ Operational Creditor- M/s Wittur Elevators against Shri. Satiq Buhari, Resolution Professional with the following prayers:

- a) Permit the Applicant to change the Resolution Professional and refer the case to the Insolvency & Bankruptcy Board of India (IBBI) for proposing the name of a new Resolution Professional in place of the Respondent herein.
- b) Direct stay of functioning of CIRP till the appointment of a new Resolution Professional and handing over of processes by the existing Resolution Professional/Respondent.
- c) Direct the Respondent to pay nominal damages of Rs.10,00,000/- to the Applicant for the loss caused to the CIRP owing to his professional misconduct.
- d) Direct the Respondent to pay the unnecessary CIRP costs incurred to the account of the Corporate Debtor.

e) Direct the Respondent to be imprisoned for 6 months and impose a fine of Rs. 5,00,000/- on the Respondent for deliberate contravention of various provisions of Insolvency & Bankruptcy Code, 2016.

16. In the application, the Applicant stated that the 2nd CoC Meeting was convened on 14.01.2020 at the office of the Corporate Debtor wherein it was found that the possession of the Registered Office of the Corporate Debtor and its assets was still with the defunct Directors and that the bank accounts of the Corporate Debtor were still being operated by the said Directors. The Auditor also stated that the documents found in the bureau on 13.01.2020, keys of which are still in the possession of one of the Directors. The CoC directed the RP to immediately change the lock of the Registered Office of the Corporate Debtor and to transport the computer hard disks/CPU, etc, and take possession of all financial and other records. He was also directed to hand over the Digital Signature of the suspended Directors to the Auditor.

17. The 2nd CoC meeting concluded with the CoC deciding that action under Section 19 and Sections 43-51 of IBC, 2016 would be taken against the suspended Directors in the event they carry out any unauthorized or fraudulent transactions.

18. The learned counsel for the applicant argued that due to certain events, the representative of the Applicant herein was not in a position to attend the meeting

scheduled for 31.01.2020, 01.02.2020, and 05.02.2020. Applicant vide email dated 31.01.2020 requested the Respondent to reschedule the 3rd CoC meeting to 05.02.2020 and later on to 08.02.2020. The RP replied to the same stating that it would not be possible to reschedule the meeting as he was required to make the Form-G publication by 08.02.2020 and that the meeting would be held as scheduled on 05.02.2020.

19. The 3rd CoC meeting can be held on 08.02.2020, in the light of the fact that the Regulation pre-requisites with respect to publishing the Form-G had not yet been completed and also the timelines being directory and not mandatory. 10 agenda items were also requested to be included in the Notice and emailed 10 points to be addressed immediately to facilitate smooth progress of the CIRP in the 3rd CoC Meeting to be held on 08.02.2020.

20. The learned counsel for the applicant argued that as the email was not replied to by the respondent, on 05.02.2020 another email was sent by the applicant stating that they had not received the revised Notice for the 3rd CoC Meeting dated 08.02.2020. As several emails went unanswered, another email was sent to Respondent on 06.02.2020 stating that owing to non-response, the CoC Meeting is to be held on 08.02.2020 at 09.00 am, which was deemed to stand confirmed. By the deemed confirmation, the sole member of CoC, i.e., the applicant

herein forced to pass the resolutions in the meeting conducted on 08.02.2020 in the absence of the Respondent/RP, and the resolution was intimated to the RP.

21. The learned counsel concluded his arguments stating that the non-cooperation of the Respondent and failure to cooperate in the 3rd CoC meeting held on 08.02.2020, has completely delayed the CIRP. The Respondent has consistently failed in his duties as an IRP/RP and has also stalled the CIRP by his illegal and self-motivated acts.

22. To fortify the argument to replace the Resolution Professional, the applicants quoted the judgment of Hon'ble NCLAT in *State Bank of India V Ram Dev International Limited, Company Appeal (AT) (Insolvency) No. 302 of 2018 dated 16.07.2018*, wherein it is observed that:

"10. From the aforesaid provision it is clear that during the Corporate Insolvency Resolution Process, at any time, if the Committee of Creditors 'is of opinion' that the Resolution Professional appointed under Section 22 is required to be replaced, it may replace him with another Resolution Professional in the manner provided under said section. In terms of Section 27(2), the Committee of Creditors at a meeting by vote of 75% of voting share (as per un-amended

provision) can propose to replace the Resolution Professional appointed under Section 22 with another Resolution Professional.”

He further quoted the following judgments in this connection:

- a. Axis Bank V. Sixth Dimension Project Solutions Limited, Company Appeal (AT) (Insolvency) No. 356 of 2019 dated 16.08.2019;*
- b. Punjab National Bank V Kiran Shah, Company Appeal (AT) (Insolvency) No. 749 of 2019 dated 06.08.2019;*
- c. Bank of India V. Nithin Nutritions, Company Appeal (AT) (INS) Nos. 497 to 501 of 2020 dated 03.06.2020.*

23. The RP filed an objection to the MA stating that the applicant who is an Operational Creditor was included in the CoC under Regulation 16 due to the absence of claim from any Financial Creditor. Later M/s Bajaj Finance Ltd in their status as Financial Creditor of Corporate Debtor submitted their claim in Form-C dated 12.02.2020 under Regulation 8. The claim of the Financial Creditor was admitted on 15.02.2020 and CoC was re-constituted with the sole Financial Creditor. The applicant (OC) was removed from the CoC with effect from 13.02.2020. A report on the reconstitution of CoC was filed before this Tribunal on

26.02.2020. Hence the application under Section 27 of IBC, 2016 filed by the applicant (Operational Creditor) who is not a member of CoC with a prayer to remove the RP is quite unsustainable in law and liable to be dismissed in limine.

24. The learned RP further submitted that the signatory of the MA is by one Raammohan as the authorized representative of Wittur Elevator Companies India Pvt.Ltd. There is no specific authorization or Resolution by the Board of Directors of the Company to institute the above MA against the RP. No authorization or Resolution by the Board entrusting Raammohan to institute the MA is filed or produced.

25. It is further stated that as provided under the IBC, 2016 to keep the Corporate Debtor as an ongoing concern, the RP took symbolic possession of the registered office and records of Corporate Debtor on 30.11.2019. The CD has provided certain documents including balance statements for the financial year 2016-2017, 2017-2018, and provisional balance statements for the financial year 2018-2019 along with bank statements on 30.11.2019. By taking undue advantage of the constitution of CoC with a sole member, i.e., Operational Creditor (applicant), the CoC took several decisions and intimidated the RP to record it in Minutes. The delay in conducting the 3rd CoC Meeting was intentional and they conducted the meeting without the presence of RP, when they are not the CoC members. The CoC

member who transgressed all the mandates within the framework of IBC,2016, and Regulations, issued additional agenda to be placed on the CoC meeting, which is directed to be held on 08.02.2020 by the CoC member.

26. Resolution Professional contended that he is an independent person acting as the Officer of the court and has the absolute discretion to decide who has to be engaged as his Counsel to represent him before this Tribunal especially a petition under Section 19 of the Code. As the Corporate Debtor and his service providers failed to provide required accounting data to the Resolution Professional or Accountant to complete and prepare financial statements of the Corporate Debtor, he personally filed a compliance petition under Section 19 of the Code on 27.01.2020 before this Tribunal.

27. Per contra, the submission of the Resolution Professional is that he convened the 3rd CoC meeting on 05.02.2020 at 11 am in the office of the Corporate Debtor at Ernakulam as scheduled. Suspended Directors Mr. Aneesh and Shebin were present and nobody appeared to represent the applicant in the CoC. As such CoC meeting was adjourned to 06.02.2020 owing to the absence of quorum as provided under Regulation 22 (2). The adjourned CoC meeting was convened on 06.02.2020 at 11 am in the office of the Corporate Debtor. Neither the suspended Directors nor any person representing the applicant in the CoC attended the

meeting on 06.02.2020. In view of the deliberate absence of a representative of the applicant as a CoC member, the RP concluded the meeting proceedings and decided to report the matter to this Tribunal for further action. RP has filed a detailed Report before this Tribunal on 10.02.2020 as Report No.28/KOB/2020.

28. The RP concluded his arguments stating that the one man CoC meeting alleged to have been held by the representative of the applicant and the resolutions passed by him in the absence of the Resolution Professional are illegal and against the mandates of the Insolvency and Bankruptcy Code and Regulations. There are no enabling provisions under IBC, '2016 or Regulations to suo motu prepare an Agenda and suo motu convene a CoC meeting by the whims and fancies of any CoC member in the absence of a Resolution Professional. It is manifestly clear from Section 24(3) of the Code and Regulation 24 (1) that in the absence of the Resolution professional, no CoC meeting shall be conducted.

MA/143/KOB/2020

29. This MA/143/KOB/2020 has been filed by Shri Sathiq Buhari, Resolution Professional with a prayer to liquidate the Corporate Debtor under Section 33 (2) of IBC, 2016.

30. The Learned Resolution Professional stated that all the proceedings and developments commencing from the 1st CoC Meeting held on 20.12.2020 to the 3rd CoC Meeting held on 06.02.2020 were detailed in his Report No. 28/2020 filed before this Tribunal on 10.02.2020. In the report, it is stated that due to non-cooperation and negligence of Corporate Debtor and CoC member (Operational Creditor), Form-G could not be published within the time limit (75th day) as prescribed under Regulation 36. A Financial Creditor (Bajaj Finance) of the Corporate Debtor filed a claim petition on 12.02.2020, which was accepted, and CoC was re-constituted on 13.02.2020.

31. The 4th CoC Meeting was held on 07.03.2020 after issuing notice to Financial Creditor, Operational Creditor, and suspended Directors of Corporate Debtor. The CoC member (FC), a representative of OC, and suspended Director attended the meeting and after elaborate evaluation of the current situation, CoC by 100% voting right resolved to liquidate the Corporate Debtor and instructed the RP to file an application before this Tribunal for orders of liquidation. The resolution passed on 07.03.2020 before the expiry of 180 days as stipulated in Section 12 of IBC, 2016 has been produced.

MA/144/KOB/2020

32. This application has been filed by Shri Sathiq Buhari, Resolution Professional with a prayer to conduct an inquiry and on satisfaction refer the matter for prosecution against the Corporate Debtor.

33. The learned Resolution Professional stated that on verification of bank Statements of CD, it was found that after the moratorium order of this Tribunal, the CD had effected certain debit transactions from 27.11.2019 to 09.01.2020 amounting to Rs.7,56,006/- from its bankers IOB, Federal Bank, and IDBI at Ernakulam. On 15.01.2020 the RP issued an Email to the CD directing to credit all the aforesaid money debited from its Bank accounts within seven days.

34. To fortify his argument, the RP referred to a decision of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 219 of to 2019 dated 16.08.2019 in which it was observed that though the Tribunal has no jurisdiction to initiate prosecution proceedings under IBC, if satisfied with the allegations, this Tribunal may request the Central Government to investigate the matter by an Inspector or Inspectors and then to decide as to whether to refer and lodge any case before the Special Judge for trial under Section 236 of the Code for an alleged offence under Section 74 of the Code.

Findings:

35. All these applications have been jointly heard. We have heard the learned Resolution Professional, the learned counsel for the Operational Creditor Shri. Kalyan Jhabakh and learned counsel for the Corporate Debtor Shri. Vinod P V, through video conferencing and have also perused the case records including the Minutes of 2nd and 3rd CoC meetings, all the communication emails between the Resolution Professional and Operational Creditor and the resolution passed by the CoC for liquidation of the Corporate Debtor.

36. On hearing the parties, it comes to light that Section 17 has confused Corporate Debtors and practitioners. It may be stated that from the date of appointment of Interim Resolution Professional, “the powers of the Board of Directors or the partners of the Corporate Debtor, as the case may be, shall stand suspended and be exercised by the Interim Resolution Professional”. **From a careful reading of this provision, this can be interpreted as suspension of powers of the board of directors and not their duties and responsibilities.** The Board is fastened with the responsibility of running and managing the company’s affairs. If the powers of the board are suspended and the management of the affairs of the Corporate Debtor vests with the Interim Resolution Professional after his appointment, then the responsibility also lies with the Interim Resolution

Professional. The suspension of the powers of the Board of Directors means suspension of the role of directors, and responsibilities emanating from such role.

37. Here, the main allegation was that the Respondent/ Resolution Professional has failed to take over the affairs of the Corporate Debtor and to immediately take over custody and control of the assets without taking necessary steps to ascertain the financial position of the Corporate Debtor. To this, the contention of the Resolution Professional is that he has taken symbolic possession of the Registered Office and records of the Corporate Debtor. For the purpose of the resolution, the control and custody of the assets from the corporate debtor is taken over by the resolution professional as per Section 18 (f). At this point, it is important to quote the relevant portion of Section 18 of the code which refers to the duties of Interim Resolution Professional, which is as follows:-

“18. Duties of interim resolution professional. –

(1) The interim resolution professional shall perform the following duties, namely: -

(a) collect all information relating to the assets, finances, and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

- (c) constitute a committee of creditors;
- (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
- (e) file information collected with the information utility, if necessary; and
- (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –**
 - (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
 - (ii) assets that may or may not be in possession of the corporate debtor;
 - (iii) tangible assets, whether movable or immovable;
 - (iv) intangible assets including intellectual property;
 - (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
 - (vi) assets subject to the determination of ownership by a court or authority;
- (g) to perform such other duties as may be specified by the Board. Explanation. – For the purposes of this 1 [section], the term “assets” shall not include the following, namely: –
 - (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
 - (b) assets of any Indian or foreign subsidiary of the corporate debtor; and
 - (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”

38. A plain reading of the above Section makes it clear that the Code empowers the Resolution Professional to take control and custody of any property which the Corporate Debtor has complete ownership. This power of the Resolution Professional extends to properties that are part of the court proceedings. Section

20 mandates the IRP to preserve and protect the value of the property and to manage the operations of the corporate debtor as a going concern. But in this case, even though the RP is empowered to take possession of the Registered Office and records of the Corporate Debtor, he has taken only symbolic possession of the same and allowed the suspended Directors to enjoy for their benefits. This is against the provisions of the Code.

39. With the concept of Creditors in Control under IBC, after the initiation of the Corporate Insolvency Resolution Process (CIRP), the CoC assumes decision-making powers for the management of the CD. IRP/ RP is an independent professional to take care of the interests of all the stakeholders. Thus both IRP/RP and CoC have to work in tandem and the overall interest of resolution while balancing the interests of all stakeholders. But here there is a clash of interest among the member of CoC and the Resolution Professional. In its first meeting of the CoC, it appointed the Resolution Professional, who was then convening and conducting the meetings of the committee. Further, as per Section 24(2), the resolution professional conducts all the meetings of the Committee of Creditors. Whereas, in this matter neither 2nd CoC nor 3rd CoC meetings were conducted by the Resolution Professional as the Chairman or even not attended the meeting. The meeting which was said to be convened was without his knowledge. As per the annexures submitted by the applicant (M/s. Wittur Elevator Components India

Private Limited) in M.A. No./15/KOB/2020, only in the minutes of the 1st CoC Meeting, the RP has signed. It is also found that Applicants themselves issued agendas for the 3rd CoC Meeting and passed resolutions by themselves, even for change of the Resolution Professional.

40. As regards the allegation raised by the applicant/Operational creditor against the RP, we place reliance on the judgment of Hon'ble NCLAT in In *Dinal Shah v. Bharti Defence Infrastructure Ltd Company Appeal (AT) (Insolvency) No. 175 of 2019* dated 29.03.2019, in which the Hon'ble NCLAT observed:

"If there was any lapse on the part of Resolution Professional which has come to the notice of the Adjudicating Authority, he should have referred the matter to the 'Insolvency and Bankruptcy Board of India' (IBBI) for taking appropriate action in accordance with law, which is the competent authority to take any action, after seeking explanation from the Resolution Professional."

41. On verification of records of this case, it is seen that only one meeting of Committee of Creditors took place with the presence of Resolution Professional, and without making any endeavour for inviting Expression of Interest, the CoC unanimously resolved to liquidate the Corporate Debtor.

42. The submission of the RP is that the 4th CoC Meeting was convened on 07.03.2020, after issuing notice to Financial Creditor, Operational Creditor, and

suspended Directors of Corporate Debtor. The CoC member (FC), a representative of OC, and suspended Director attended the meeting and after elaborate evaluation of the current situation, CoC by 100% voting resolved to liquidate the Corporate Debtor and instructed the RP to file application before this Tribunal. It is also stated that the resolution passed for liquidation is before the expiry of 180 days as stipulated in Section 12 of IBC, 2016.

43. Section 33 of the Code enables that only after a resolution fails to yield Resolution Plan, the CD is ordered into liquidation, by an application filed by the Resolution Professional.

For further clarification, we have considered the following case laws:

- i. The Hon'ble Supreme Court in the matter of *Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta & Ors.*, it is observed that:

"83. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debt or otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible."

- ii. The Hon'ble Supreme Court in the matter of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. Writ Petition (Civil) No.99 of 2018 dated 25.01.2019*, it is observed that:

"What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to

the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. ... It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its management and from a corporate death by liquidation."

iii. *The Hon'ble NCLAT* in the matter of *Jayanta Banerjee v. Shashi Agarwal and another, Company Appeal (AT) (Insolvency) No. 348 of 2020 dated 4th June 2021*, it is observed that:

"80. It is important to mention that all the statutory provisions for the conduct of CIRP are interlinked; it doesn't leave any scope to the IRP/RP to skip any of the provisions. CIRP regulations are exhaustive and include a provision to deal with all the eventualities that may arise in the conduct of the CIRP."

44. The aforementioned case laws depict that, this Tribunal is firmly rooted in the jurisprudence of *'Actus curiae neminem gravat'*- the act of the Court shall harm no man. We also noticed that M/s Bajaj Finance Ltd, who is a Financial Creditor of the Corporate Debtor came with their claim belatedly filing Form-C dated 12.02.2020 under Regulation 8. The claim of the Financial Creditor was admitted on 15.02.2020 and CoC was re-constituted with a sole Financial Creditor. Before that the CoC was constituted by the RP with the Operational Creditor. Without informing the Operational creditor and discussing the entry of new Financial creditor, the RP unanimously took a decision to accept the claims of Financial Creditor -M/s Bajaj Finance Limited on 15.02.2020 reconstituting the CoC. No earlier meetings were attended by M/s. Bajaj Finance Limited and we could not understand, from where the Financial Creditor came and took over the CoC and unanimously decided to liquidate the Corporate Debtor before completion of 180

days. Even if such a decision is taken, the Resolution Professional should have objected to the same, as there is no expression invited and any resolution failed. This, in our opinion, is done in connivance with the Financial Creditor and to see that the Operational Creditors are put to trouble. It appears from the records that M/s Bajaj Finance Limited did not attend any of the CoC Meetings except the 4th Meeting in which the resolution for liquidating the Corporate Debtor was passed.

46. The above discussions show that in the interest of justice the time spent till now before the Adjudicating Authority from the 2nd CoC Meeting till the date of this order should be excluded from calculating the period under Section 12 (1), (2) &(3) of the IBC. Parties need not suffer for the time spent during this period before the Adjudicating Authority.

ORDER

In view of the aforesaid facts and circumstances, we dispose of the above report and application as under:

- a. The Report No. 28/KOB/2020 is taken on record, except the allegations made against the Operational Creditor and the reliefs sought for in the report.
- b. Since, the Committee of Creditors is reconstituted with the Financial Creditor M/s Bajaj Finance Limited and the Operational Creditor is not

having any voting right in the CoC, the main prayer in MA/15/KOB/2020 to permit them to change the Resolution Professional and refer the case to Insolvency and Bankruptcy Board of India (IBBI) for proposing the name of a new RP cannot be entertained, since they have no *locus standi* to do so. Hence, other prayers also cannot be granted by this Tribunal.

- c. In view of the fact that the Resolution Professional has without calling the Expression of Interest (EoI) and without following the mandates, accepted the approval of a CoC member to liquidate the Corporate Debtor and file this application hurriedly, this application for liquidation cannot be entertained now. The Resolution Professional is allowed to continue with the CIRP from the stage of reconstitution of CoC and proceed with the CIRP as per the Regulations. However, the fee of the Resolution Professional is to be restricted during the period of litigation before this Tribunal and the Hon'ble High Court of Kerala.
- d. As we have directed to continue the CIRP with the present Resolution Professional following the mandate under the Regulations, this Tribunal is of the view that the application for the prosecution of Corporate Debtor and its Directors need not be considered at this juncture. Hence, IA/144/KOB/2020 is dismissed. It is hereby made clear

that the officer/ erst-while Directors of the Corporate Debtor shall fully
co-operate for the completion of the Corporate Insolvency Resolution
Process.

Dated this the 21st day of December, 2021

Sd/-
Anil Kumar B
Member (Technical)

Sd/-
Ashok Kumar Borah
Member (Judicial)

Cimy