

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 83/KB/2023
In
C.P. (IB) No. 1582/KB/2019

*An Application under Sub-Section 5 of the Section 60 of the Insolvency and
bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal
Rules, 2016*

IN THE MATTER OF:

P.M. COLD STORAGE PRIVATE LIMITED ... **Financial Creditor**

Verses

GOOKSHEER FARM FRESH PRIVATE LIMITED ... **Corporate Debtor**

And

IN THE MATTER OF:

MR. SANJEEV JHUNJHUNWALA, Resolution Professional of Gooksheer Farm
Fresh Private Limited, having his office at Siddha Weston, 9, Weston Street, Suite No.
134, 1st Floor, Kolkata – 700013

... Applicant

Verses

MR. BIMAL KANTI CHOUDHURY, Resolution Professional of PM Cold Storage
Private Limited (in CIRP) a company incorporated under the provisions of the
Companies Act, 1956 and having its registered office at 1A, Madan Mohan Burman
Street Kolkata- 700007, West Bengal, the sole member of the Committee of Creditors
of the Corporate Debtor

... Respondent No. 1

And

PM COLD STORAGE PRIVATE LIMITED (in CIRP) a company incorporated
under the provisions of the Companies Act, 1956 and having its registered office at 1A,
Madan Mohan Burman Street Kolkata- 700007, West Bengal, the sole member of the
Committee of Creditors of the Corporate Debtor

... Respondent No. 2

Date of Hearing: June 22, 2023

Date of Pronouncing the Order: September 01, 2023

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CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI BALRAJ JOSHI, MEMBER (TECHNICAL)

Ld. Counsels on Record Appeared Physically/ through Video Conferencing:

For Suspended Board:

1. Ms. A. Rao, Adv.
2. Ms. A. Basu, Adv.

For Resolution Professional of PM Cold Storage Pvt. Ltd.:

1. Mr. Pranit Bag, Adv.
2. Mr. Sumit Biswas, Adv.

For Resolution Professional:

1. Mr. Shaunak Mitra, Adv.
2. Ms. Shreya Choudhury, Adv.
3. Ms. Sanjeev Jhunjhunwala, RP

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court is congregated through hybrid mode.
2. This instant Applicant is filed under Sub-Section 5 of the Section 60 of the Insolvency and bankruptcy Code, 2016 (for brevity “**I&B Code**”) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (for brevity “**NCLT Rule**”) by **Mr. Sanjeev Jhunjhunwala**, Resolution Professional of Gouksheer Farm Fresh Private Limited, hereinafter referred as “**Applicant**”, against **Mr. Bimal Kanti Choudhury**, Resolution Professional of PM Cold Storage Private Limited (in CIRP), hereinafter referred as “**Respondent No. 1**” and against **P.M. Cold Storage Private Limited** (in CIRP), hereinafter referred as “**Respondent**”

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No. 2", seeking the following directions by an order passed by the Adjudicating Authority, as: -

- a) *Necessary directions upon the Respondent to immediately pay the CIRP cost incurred, as mentioned in Annexure L;*
- b) *An Order be passed appointing another person as the Resolution Professional for the Corporate Debtor and discharging the Applicant his duties as the Resolution Professional;*
- c) *Such other order/orders as this Hon'ble Tribunal may deem fit and proper;*

3. Brief submission of the Applicant

3.1. That, by an Order dated 13th December, 2019, passed by this Tribunal, an application under Section 7 of I&B Code, being C.P. (IB) No. 1582/KB/2019 was admitted for initiation of Corporate Insolvency Resolution Process (for brevity "**CIRP**") in respect of **Goouksheer Farm Fresh Private Limited**, the Corporate Debtor in the instant application. By the said order dated 13th December, 2019, the Applicant was appointed as the Interim Resolution Professional (in short "**IRP**") of the Corporate Debtor.

3.2. The Applicant of this IA, submits that pursuant to his appointment as the IRP of the Corporate Debtor, he has promptly made Public Announcement regarding the Corporate Debtor being admitted to CIRP in order to generate immediate public awareness of the commencement of the CIRP keeping in mind the interest of all the stakeholders of the Corporate Debtor.

3.3. It is further submitted that on 8th January, 2020, in the First Meeting of the Committee of Creditors (hereinafter referred to as the "**COC**"), the COC was pleased to appoint the Applicant as the Resolution Professional (hereinafter referred as "**RP**") of the Corporate Debtor and finalize the fees of the RP to be Rs. 50,000/- per month. **Copy of the Minutes of the Meeting dated January 8, 2020 is annexed as "Letter C" at Page 48-61.**

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The Respondent was the sole member of the COC. The Respondent had promised to pay of **Rs. Two Lakh** towards **CIRP expenses** and had resolved that RP should obtain OD against the fixed deposit maintained with HDFC Bank. Respondent failed to pay the committed amount and OD could not be obtained due the reason the lien was remarked by the sales tax department.

- 3.4.** Further, it is stated that **Form G** publication inviting EOI was done twice however, no resolution plan was received and since the period of CIRP had expired the application for liquidation of the corporate debtor was filed on July 29, 2020.
- 3.5.** It is contended further that the CD does not have any line of operation and does not have any material asset except for certain fixed deposits.
- 3.6.** Further, the Applicant contends that from the very inception of the CIRP of the Corporate Debtor, there was paucity of funds in the coffers of the Corporate Debtor and the Applicant had from time to time intimated through notice to the COC about the same and that he was incurring expenses from his personal resources to fund the CIRP cost of the Corporate Debtor. However, the COC had failed and neglected to consider the said issue faced by the Applicant which has severely affected the chances of successful resolution of the Corporate Debtor.
- 3.7.** It is further contended that the Applicant in the 6th Meeting of the COC convened on July 04, 2020, expressed his concern that despite the fact that he had been carrying out his duties diligently, however, the Financial Creditors were not paying/ reimbursing the amount incurred by him towards CIRP expenses. Although the Respondent had given an undertaking regarding payment of fees of the Applicant, the Respondent failed to meet its commitments.

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- 3.8.** Further, it is stated that in the said meeting Applicant had also proposed for the Financial Creditors to fund the CIRP Expenses as per their voting share, however, no reply was received from the said financial creditors with regards to the said proposal.
- 3.9.** It is contended further that, a complaint was filed against the Applicant with IBBI and after examining all the records placed before IBBI, the complained was dismissed vide an order dated 05/01/2021. **Copy of the order is annexed as Letter “H”.**
- 3.10.** Further, it is stated that to meet CIRP costs, the applicant has filed an application before this Bench being I.A. No. 930/KB/2021 which is presently pending.
- 3.11.** By an order dated **14th September, 2022**, passed in the matter of: ***P.M. Cold Storage Pvt. Ltd v. Goouksheer Farm Fresh Pvt. Ltd & Anr.,*** in Company Appeal (AT) (Insolvency) No. 615 of 2020, the Hon’ble National Company Law Appellate Tribunal, Principle Bench, New Delhi, rejected the claim of another financial creditor of the Corporate Debtor. Pursuant to the said order passed by the Hon’ble National Company Law Appellate Tribunal, the Respondent became the sole member of the Committee of Creditors.
- 3.12.** It is contended that thereafter, in the 8th Meeting of the COC held on 26th September, 2022, the Applicant had once again placed the detail of expenses incurred by him and the outstanding dues. Such expenses were *inter alia* incurred for statutory compliances and are required to be reimbursed as per the provisions of I&B Code, 2016. The Applicant states the sum of **Rs. 20,51,168/-** (Rupees Twenty Lakh Fifty-One Thousand One Hundred and Sixty-Eight Only) for conducting the CIRP of the Corporate Debtor which is incurred after the liquidation application was filed in July

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2020 and 7th COC meeting was held, till date is pending. Details of the Total Amount Outstanding as follows: -

SN	Particulars	Amount
1.	Total expenses outstanding as on 13/12/2022	4,36,600.00
2.	Outstanding to RP for payment made towards legal fees and other put pocket expenses	2,14,568.00
3.	RP fees from 14/08/2020 to 13/12/2022 @ Rs. 50,000 per month	14,00,000.00
TOTAL		20,51,168.00

- 3.13.** Also, it is stated that the RP has made the payment of **Rs. 2,14,568/-** from his own fund. However, the COC has not yet provided the means of further payments even in the 8th COC meeting. The applicant has also not received any fees for more than two years since August 2020.
- 3.14.** Further, it is contended that the Applicant as an insolvency professional has performed his duty and accordingly, he is entitled to receive fees, approved by the COC.
- 3.15.** It is further submitted that the Applicant is not ready and willing to continue as the Resolution Professional of the Corporate Debtor any further.
- 3.16.** The Applicant also submits that it is also necessary that an order is passed appointing another person as the Resolution Professional of the Corporate Debtor and hence discharging the Applicant from his duties as the Resolution Professional.
- 4. Reply to the Application filed by the Respondent:**
- 4.1.** The Ld. Counsel for the Respondents denies that the Respondent No. 2 had agreed or consented to the fees of **Rs. 50,000/-** and the testimony provided by the Applicant sustaining his claim is not sufficient.

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- 4.2.** The Ld. Counsels for the Respondent further alleges that due to personal difficulty, the Director of Respondent No. 2 was unable to attend the 1st COC meeting held on January 08, 2022 and instead authorized a staff member to attend and take note of the proceedings. Taking advantages of the Respondent No. 2 Director's absence, the Applicant deceitfully obtained consent from the representative of Respondent No. 2 on exorbitant figures for Rs. 50,000/- per month, unnecessary expenses, and other important matters, as the Directors was unreachable and the representative had no authority to object. The decision to pay of Rs. 2 Lakh towards CIRP expenses and resolution that RP should obtain OD against the fixed deposit maintained with HDFC Bank was also pressured by the RP in the absence of the Director of Respondent No. 2. The applicant has also concealed the fact that Respondent No. 2 immediately on becoming aware of the exorbitant fee structure and huge expected CIRP cost raised serious dispute and requested the RP to reduce the costs. When the RP did not pay any heed to the requests of Respondent No. 2, Respondent No. 2 also made an application before this tribunal to change the RP.
- 4.3.** Further, it is alleged that due to nationwide lockdown declared on 24/03/2020, all the legal proceedings were stayed and subsequently, the time period for Form G should have been extended. Further, the decision to proceed for liquidation was taken in the 6th COC meeting dated July 04, 2020 by the majority vote of NHSH, while Respondent No. 2 vote against the motion. It is submitted that RP is the sole reason for the situation that has led the corporate debtor to brink of liquidation as he has only misused his position and power under the I&B Code, colluded with NHSH to gain undue personal benefits and prejudice the interest of the corporate debtor and Respondent No. 2.

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- 4.4. It is indicated that having knowledge of the fact that the Corporate Debtor does not have any business or any assets and the only asset being the fixed deposit with the HDFC Bank, RP still burdened the Corporate Debtor with exorbitant fees, unnecessary expenses, legal costs for himself in defending litigations arisen due to his own misconducts, etc. Moreover, RP along with NESH prematurely cashed the fixed deposit which is the only asset of the Corporate Debtor on pretext of the resolution passed by NESH in the 6th COC meeting dated July 04, 2020. Pertinently, the Respondent No. 2 had voted against the invalid resolution passed by the wrongly constituted COC, for encashment of the fixed deposit. Further, the Respondent No. 2 has filed I.A. bearing no. 1087/KB/2020 seeking stay on CIRP to secure the only assets of Corporate Debtor.
- 4.5. Further, it is alleged that RP continued his approach by inducting NESH to the COC, based on incomplete and forged documents, with a 74.93% voting share. This reduced the voting percentage of Respondent No. 2 to 24.07% allowing the RP to obtain the necessary approvals for his exorbitant fees and expenses through the majority vote of NESH on the COC meetings. NESH, who was allegedly a member of the COC and whose claims were time-barred, voted in favour of the motion for personal gain of RP. The Ld. Counsels submits that Hon'ble NCLAT by its order dated 14.09.2022 (*P.M. Cold Storage Pvt. Ltd. v. Goouksheer Farm Fresh Pvt. Ltd. and Mr. Sanjeev Jhunjunwala, Company Appeal (AT) (Insolvency) No. 615 of 2020*) has held that the RP made a gross error in accepting the claims of NESH and inducting it as a member of the COC. It is further submitted that since the constitution of the COC was invalid from the 4th COC meeting until the 7th COC meeting, all the resolutions decisions, reifications, approvals, discussions etc. passed in these COC meetings dated 11.03.2020, 03.06.2020, 04.07.2020 and 14.08.2020

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respectively, regarding fees and other expenses are invalid, infructuous and not sustainable in the eye of law as they were taken by a wrongly constituted COC.

- 4.6.** Further, the Ld. Counsel for the Respondent claims that alleging contravention of the provisions of Regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016, of accepting the purported claim of New Hind Silk House Private Limited sans proper verification and intimation to the COC, a compliant was lodged before the IBBI on October 22, 2020. The IBBI vide its **Order dated January 05, 2021** rejected and closed the compliant, on the basis of “*not found actionable material in the complaint.*” (**Annexed to the Reply Petition being Annexure “L” Page 122.**)

Being aggrieved by the order passed by IBBI, a writ petition has been filed before the Hon’ble High Court, Delhi in **Writ petition (C) 3293 of 2021** which is currently under consideration.

- 4.7.** Further to allege that the Applicant had already filed an application being I.A. No. 930/KB/2021 which is presently ending before this Tribunal, filing another (instant I.A.) with the similar prayer, is a gross violation of the procedure established by the law. That Respondent No. 2 has already filed its affidavit in opposition to the I.A. 930/KB/2021, which is on record, objecting to all the averments and prayers of the Applicant. Respondent No. 2 craves leave of this tribunal to refer to its reply in I.A. 930/KB/2021 as when required.

5. Rejoinder to the Reply filed by the Applicant:

- 5.1.** The Ld. Counsel for the Applicant argues that after receiving an email regarding a claim from another Financial Creditor, New Hind Silk House Private Limited (“New Hind”) the applicant had admitted the claim of New Hind and pursuant thereto, the “New hind” had become majority in the

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COC. PM Cold Storage Pvt. Ltd. (Financial Creditor) had maliciously initiated and pursued proceedings for removal from the post of IRP and such application filed by the PM Cold Storage Pvt. Ltd. was dismissed vide order dated 26/05/2020. Further, PM Cold Storage had challenged New Hind's induction in the COC by filing an application which came to rejected by an Order dated 17/06/2020 passed by this Tribunal.

5.2. It is further argued that the Financial Creditor had also made a frivolous complaint with IBBI against RP which was closed and against that order, a writ petition has been filed before the Hon'ble High Court, Delhi which is under consideration. The RP alleges that the Financial Creditor has: -

- a) Obstructed the CIRP at every stage after the first COC meeting;
- b) Obstructed all attempts to source adequate finance to meet CIRP expenses;
- c) Blocked timely issuance of Form G;
- d) Obstructed the appointment of Transaction Auditors;
- e) Prevented actual CIRP expenses even approved by itself at the first COC meeting;
- f) Acted malafide intention and geared to only unduly benefit itself at the cost of others,
- g) Opposed the application for replacement the RP.

Copy of Analysis sheet of all voting items placed before COC for approval and the voting done by COC members is attached as **Annexure – “G”**.

6. Analysis and Findings:

6.1. We have considered the rival contentions and perused the records placed before us. After preliminary examination, we would discern the followings:

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6.2. The Hon'ble National Company Law Appellate Tribunal (NCLAT) directed vide **Order dated 14.09.2022 in Company Appeal (AT) (Insolvency) No. 615 of 2020** as under:

- i.** *“the Insolvency and Bankruptcy Board of India to investigate this matter further regarding the conduct of RP and take necessary action under the regulations’; (Emphasis added, Para 21)*
- ii.** *“that documents on which the RP relied on in accepting and admitting the claim of NSHH and inducting it as a member of COC does not inspire confidence and should not have relied upon by the RP in admitting the claim of the NSHH being within limitation. The Adjudicating authority has, therefore, committed an error in uploading the admission by RP of claim of NSHH. Accordingly, we set aside the Impugned Order and direct that NSHH shall not be a member of COC in the CIRP of Gouksheer Farm Fresh Pvt. Ltd. The appeal is disposed of with these directions.” (Emphasis added, Para 22)*

6.3. The Order above exemplifies that the conduct of Resolution Professional was questionable and it was directed to be investigated. However, no records of any subsequent investigation are initiated and taken up by the IBBI except issuing a notice by email dated November 07, 2022 to the Applicant. The Applicant has given his reply to the notice issued by the IBBI by email dated November 18, 2022.

6.4. It is evident that the Hon'ble NCLAT while setting aside the order passed by this Adjudicating Authority has not directed the Resolution Professional to be penalized by the COC by withdrawing his due payments and CIRP Costs including costs incurred by the RP to defend himself in the prosecution initiated by the COC itself. However, the fact remains that the observation of the Hon'ble NCLAT as above stares at us.

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6.5. In our view that an Insolvency Professional who is engaged to perform his/her duty as a Resolution Professional is entitled to be remunerated by way of paying fees for his labour and work and accordingly the fees and expenses are to be approved by the COC.

6.6. Further, **Regulation 34** of the **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**, envisages that:

“The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.”

“[Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.]”

6.7. It is evident from the Minutes of the First Meeting of Committee of Creditors of Corporate Debtor held on Wednesday, the 8th Day of January, 2020 at Kolkata 700 013, that the COC proposed and approved the fees of RP as:

“5) The IRP had brought to the notice of the COC that as per the terms of consent the fees of IRP were fixed at Rs. 50,000 per month and part thereof. It was placed that the IRP has to and may have to appear before NCLT from time to time for which the IRP had proposed a fee of Rs. 10,000 plus applicable GST. Both the fees were ratified by the COC.”

“7) The Proposal for consideration and approval of the fees of the Resolution professional for remaining period of the CIRP was considered and it was approved that the fee would be Rs. 50,000 per month and part thereof. The fees were ratified by the COC.”

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6.8. We would rely upon the judgment passed by the Hon'ble NCLAT in *Jayesh N. Sanghrajka, R.P. of Aristo Developers Pvt. Ltd. v. The Monitoring Agency nominated by the Committee of Creditors of Aristo Developers Pvt. Ltd.* reported in MANU/NL/0401/2021, that

“32. ... The fee has to be related to acts performed or to be performed for furtherance of the CIRP, for dues or expenses actually incurred. It has to be directly related to acts done or expenses incurred which are necessary for the CIRP. The role of the Resolution Professional has to be like a dispassionate person concerned with performance of his duties under the Code for reasonable fees and it cannot be result oriented.”

(Emphasis Added)

6.9. We would further rely upon the order passed by the Learned NCLT, Mumbai Bench in the matter of: *Mr. Mukesh Verma, for SAB Global Entertainment Media Private Limited*, in IA 1917/2020 in CP (IB) 2731/MB/2019 that:

“22. The Applicant has rightly placed reliance on Regulation 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in accordance of the same the fees to be paid to the Resolution Professional was fixed by the Committee. **Once the fees has been approved it cannot be reduced without the consent of the Resolution Professional.**”

(Emphasis Added)

6.10. Hence, in our considered opinion, it would not be prudent on our part to reduce the fees already fixed and approved at the First meeting of the COC on January 08, 2020. Hence, we do not propose to reduce the fees that was approved by the COC in its **First Meeting, dated January 08, 2020.**

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- 6.11.** Further, in regard to the fees paid to the Advocates and/or Counsels and /or Professionals appointed by the RP for defending himself, whether the same can be construed as “*directly related to acts done or expenses incurred which are necessary for the CIRP*” should be decided by the COC, and being its commercial wisdom , we do not intend to interfere with the same. Thus, we leave it upon the COC to take a holistic view of the matter and address the issue at hand pragmatically.
- 6.12.** Hence, considering all the facts and circumstances abovementioned, we direct the Committee of Creditors to take necessary action in regard to reimbursing all the fees due including the CIRP costs and Professionals’ fees incurred by the Applicant herein, the Resolution Professional for the Corporate Debtor.
- 6.13.** Further, we also direct the Committee of Creditors to take proper action immediately towards release and discharge the RP from his duty as Resolution Professional, and propose new name for the Resolution Professional for Corporate Debtor for continuing the Corporate Insolvency Resolution Process (CIRP).
- 6.14.** Further, in view of the direction *vide* an **Order dated 14.09.2022** passed by the **Hon’ble National Company Law Appellate Tribunal (NCLAT) in Company Appeal (AT) (Insolvency) No. 615 of 2020** that “*the Insolvency and Bankruptcy Board of India to investigate this matter further regarding the conduct of RP and take necessary action under the regulations*”, the IBBI shall continue and conclude the investigation against the Applicant (RP) regarding the conduct of RP in this matter and take appropriate action under the regulation, if not already done.
- 7.** Accordingly, the present Application, being, **I.A. (IB) No. 83/KB/2023 in C.P. (IB) No. 1582/KB/2019** is **disposed of**, in terms of the order above.

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8. Further, it has come to the fore that the Applicant has filed and interlocutory application, being **I.A. (IB) No. 930/KB/2023** in **C.P. (IB) No. 1582/KB/2019** by praying similar relief as sought for in the present I.A., as:
- (i) *Directions of the Respondents for payment of costs incurred by the applicant in accordance with their voting share on account of the corporate insolvency resolution process for a sum of Rs. 11,67,518/- as stated;*
 - (ii) *Direction to provide all future expenses including Legal Expenses, Statutory Audit and the expenses incurred for ROC, WB compliances as and when incurred in proportion to voting share till all the applications are being disposed;*
 - (iii) *Costs of this I.A.;*
 - (iv) *Any other order that this Tribunal deem fit.*
9. As the application being **I.A. (IB) 930/KB/2023** is almost identical in nature and similar in prayer to the present application. Thus, the **I.A. (IB) No. 930/KB/2023** be listed for disposal on **05/ 09/ 2023**.
10. Urgent Certified copy of the order may be issued, if applied for, upon compliance with all the requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 01st Day of September, 2023

Bose, R. K. [LRA]