

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

M.A. No. 1626/2018

In

C.P. No. 587/I&BP/2018

Under Section 9 of I & BC, 2016

In the matter of:

Ms. Rama Subramaniam,
R/a B-501, Vasundhara CHSL Limited,
Krishna Vatika Road, Bengalee Compound,
Gokuldham, Goregaon (East), Mumbai-
400063

... Operational Creditor

Vs.

M/s Sixth Dimensions Project Solution
Limited, Shop No.9, Ground Floor, Shree
Anant Bhuvan CHS Ltd, Veer Savarkar Road,
Near Teen Petrol Pump, Thane-400601

...Respondent

MA. No. 1626/2018

Committee of Creditors (Comprising of Axis
Bank Limited)

...Applicant/Petitioner

Order delivered on: 13.03.2019

Coram : Hon'ble Bhaskara Pantula Mohan, Member (Judicial)
Hon'ble V. Nallasenapathy, Member (Technical)

For the Applicant: Advocate Anil D' Souza a/w Adv. Harshal Damania
& Advocate Rubina Khan i/b Fortis India Law

Per: Bhaskara Pantula Mohan, Member (Judicial)

ORDER

1. On the Application moved by Committee of Creditors (COC), stating that in the meeting held on 03.10.2018, COC resolved to appoint Mr. Santanu T Ray, having Registration No. IBBI/IPA-002/IP-N00360/2017-18/11055 as Resolution Professional (RP) in the place of Mr. S. Gopalakrishnan, Interim Resolution Professional (IRP) who had conducted

the first COC meeting this matter is taken up for hearing. The Application is filed on 19.12.2018 without mentioning any reasons for change of IRP. But the grounds on which the IRP Mr. S Gopalakrishnan was sought to be changed is furnished by the Axis Bank in the form of an affidavit dated 29.01.2019 even without affording an opportunity to the RP to give his explanation. The main reasons as contained in the affidavit that the IRP has failed to perform and discharge the duties as mandated by the relevant provisions of law and Regulations which inter alia as follows:-

- a. He had not properly verified the claims of the Operational Creditor and accepted the claim along with interest whereas the Insolvency and Bankruptcy Code and Regulations thereunder do not permit any interest for the Operation Creditor. Resultantly, the claim of the Operational Creditor had gone to the higher side. A copy of the small communication dated 15th November 2018 is attached here to and marked here to and marked as Annexure-III.
- b. Further, to this few claims of financial creditors were accepted by the IRP where the Financial Creditors failed to give the proper proof of liability. Such information was neither shared with the COC nor could it be located in Corporate Debtors Company's Balance Sheet pertaining to last financial year (2017-18) or any other Books of Accounts.
- c. He failed to collate the information relating to the assets, finances and operation of the Corporate Debtor for determining the financial position of the Corporate Debtor except the properties, which are mortgaged to the applicant. Despite having such a longest tenure of IRP, he could not be able to take control and custody of any asset over which the Corporate Debtor has ownership.
- d. He failed to get the rent receivables which were being earlier paid to Corporate Debtor (Licensor) by the Licensee i.e. M/s Computer Age Management Services Pvt. Ltd. and instead of the same, he issued letter dated 13.10.2018 to such licensee to immediately stop paying the rent, thus he helped the licensee and the same is completely detrimental to interest of the COC during Corporate Insolvency Resolution Period. He is ideally supposed to collect the same and keep the same into some FDR or highest interest bearing A/c on a regular basis. A copy of the said letter dated 13.10.2018, is hereto annexed and marked as Annexure IV.
- e. He has been claiming exorbitant fees to act as an IRP over and above the permitted by the COC in its meetings.
- f. He similarly quoted the exorbitant professional fess of third party professional like Forensic Audit Agency, Lawyers, valuers etc. which

is over and above the limit approved by the COC in its meeting. Even services of such professional were availed without seeking any approval from the COC. A copy of a letter dated 20.11.2018 from Khare Legal Chambers is attached hereto and annexed as Annexure-V.

2. We have gone through the above affidavit which is dated 29.01.2019 but the fact remains that the application for change of IRP was filed on 19.12.2018 itself after this Bench had suggested the Axis Bank to continue the IRP as RP. In the open court, we have questioned the IRP as regards the allegations made against him in the above said affidavit. The IRP had given the explanation in the open court stating that the allegations leveled against him are frivolous and basically Bank is interested in appointing their own person as the RP. Apart from that he had agreed to charge the very same amount as fee as is offered to Mr. Ray. He has also explained that he has not considered the Operational Creditors claim on any higher footing and everything is done as per law. In addition to the above, the lease rentals were not stopped but only directed the tenant to pay to the RP. The Bank Officers were present in the Court along with their battery of lawyers but when the explanation was offered in the open court, none of them made any issue out of it. Having noticed the fair and humble conduct of the IRP, we felt that the allegations caste against him is frivolous and the Bank in order to find a ruse to appoint their own person, had filed the subsequent affidavit only as an afterthought. It is pertinent to note the application to change the IRP does not contain any reasons for changing the IRP. The subsequent affidavit which is filed nearly after a month makes allegations against the IRP without affording him an opportunity to offer explanation for the allegations made against him. Even though the law definitely is on an advantageous position in favour of the COC, the discretion vested with the Adjudicating Authority must also be taken into consideration before a final call is taken.

3. In the course of proceedings, this Bench had noticed certain serious fraudulent activities committed by the Directors of the Corporate Debtor because the Applicant in the CP No. (IB) 587(MB)/2018 Ms. Rama Subramaniam had worked in the said Organization and had submitted on various occasions that there is a fraudulent background on the part of the persons behind the scene and it is in the national interest that the same requires a thorough investigation by the Government Authorities/SFIO. Subsequent to the admission of the said Company Petition, the IRP was appointed and he had gone through the records of the Company and noticed very serious illegal activities on the part of the promoters of the

Corporate Debtor and its group Companies against which CBI investigation is on and there are cases pending before the Special Judge (CBI) Greater Mumbai. In view of the delicate security situation on the part of the applicant in the main Company Petition No. 587/2018, we are not in a position to reproduce the entire details. However, in the course of proceedings of this Misc. application for the change of IRP, having noticed certain fraudulent activities on the part of the Directors/Promoters of the Corporate Debtor and its group companies, we have directed the officials of the Axis Bank to meet us in Chambers. At the same time, we have directed the IRP to file in a sealed cover details containing all confidential information with necessary supporting documents, if any, into the Court. Accordingly, the IRP Mr. S Gopalakrishnan had filed a bunch of papers which goes to show that the suspended Directors of the Corporate Debtor/its Group Companies were involved in various nefarious, illegal and fraudulent activities against whom there is an investigation going on by the CBI.

4. On 04.02.2019, when we took up the proceedings in Camera and one Mr. Ray, Vice President of the Axis Bank along with their Counsel and the IRP Mr. S Gopalakrishnan and his Counsel were present. We brought it to the notice of Mr. Ray of Axis Bank, the necessity and rational behind continuing Mr. S. Gopalakrishnan, IRP as RP until the proceedings before this Forum attains the finality. But the said Vice President of the Axis Bank was vehement and somehow wanted to change the IRP without any valid or tenable reasons particularly when this Bench tried its best convince the Vice President of the Axis Bank. The point here is, are we really required/empowered to take such a step to convince the COC to retain or change the IRP or the RP.

Section 22 (3)(b) referred as below:-

To replace the Interim Resolution Professional, it shall an file an application before the Adjudicating Authority for the appointment of the proposed Resolution Professional along with the written consent from the proposed Resolution Professional in the specified form.

Section 22 (4) referred as below:-

The Adjudicating Authority shall forward the name of the Resolution Professional proposed under clause (b) of such section 3 of the Board for its confirmation and shall make such appointment after confirmation by the Board.

5. A plain reading of the above provision makes it mandatory on the part of the COC to seek a nod from the adjudicating authority for changing the IRP to continue as RP. Here a question arises whether it is open for the COC

to choose any person they like from the list of qualified RPs and appoint them or change them according to their whims and fancies, even when the Adjudicating Authority finds a particular IRP as very competent and performing his duties with high integrity without fear or favour ? We are conscious of the fact that Bank did made some allegations against the IRP for which a suitable answer was given in the open court. Here is a peculiar situation, had the Bank issued a letter seeking an explanation from the IRP for alleged un-cooperative attitude, the IRP either would have replied or abstained from saying anything, which could have enabled the COC to take an appropriate decision on merits. In the present case no explanation was sought for nor was neither any opportunity given nor a rational decision taken by the Bank which is 100% COC. Its more than the monitory things, the information gathered by the IRP against the fraudulent Corporate Debtor which matters most for continuing Mr S. Gopalakrishnan as RP in the present case in as much as a new person in his place may not be in a position to pursue the objective of bringing out the fraudulent acts of the Corporate Debtor to the notice of the public authorities. We have carefully gone through the facts and circumstances of this case and we found Mr. S. Gopalakrishnan is performing his job diligently and had made lot of efforts to go very deep into the matter and was willing to take appropriate steps to take the matter forward into the hands of the Investigation Authorities in public and national interest. That is the exact reason which compelled us to make a serious effort to convince the Bank Authorities for continuing Mr. S. Gopalakrishnan as RP particularly in the circumstance of the case wherein the change of RP who is new to the whole case and requires more time and effort to proceed with the Insolvency Process and the continuance of the IRP is easy as there are no tenable negative issues that would come against him. In view of the vehement and unprofessional attitude on the part of the said Bank Officer Mr. Ray, who is hell bent upon appointing one Mr. Santanu T Ray and failure on his part to furnish any tenable reason for change of IRP, we are of the opinion that the legislation had given us the power to exercise our discretion in the appointment or change of the RP. If the intention of the legislation is to give absolute power to the COC, there would not have been a provision under Section 22 (3)(b) making it mandatory to file an application before the Adjudicating Authority seeking change of the IRP /RP. We wanted to first convince the Bank authorities for continuing the IRP as RP in as much as we felt that the IRP had gone into the matter very deep and his continuance as RP is in the best interest of the COC and as there is a public interest in pursuing the matter from various angles with various Government Authorities particularly when the activities of the Suspended Directors of the Corporate Debtor smacks of fraud and illegality. Having taken note of the background of this case we

are of the considered view that the decision of the COC for the change of IRP, Mr. S Gopalakrishnan and appointing Mr. Santanu T Ray in his place is not tenable and the COC has no absolute power to change the IRP / RP at their whims and fancies without any valid or tenable reasons. The change of RP must be rational/tenable/reasonable and not at the whims and fancies of the COC.

6. Hence, in view of the above, the Misc. Application No. 1626/2018 for the change of IRP and to appoint Mr. Santanu T Ray as RP is rejected as the Bank consisting of 100% COC had thoroughly failed to put forth any tenable or valid or genuine reasons for the same and we hold that the COC is not vested with the absolute power to change the IRP without any valid or tenable reasons particularly when the Adjudicating Authority after considering the contentions on both sides and expresses an opinion to continue the IRP as RP, and accordingly the present IRP is confirmed as RP of the Corporate Debtor.

Therefore, the above Misc. Application is dismissed.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)