

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.34 of 2020

IN THE MATTER OF:

Prakash Shankar Mishra & Ors.

...Appellants

Versus

Ashok Kriplani & Anr.

...Respondents

For Appellants: Shri Abhay K. Das and Aruni Poddar, Advocates

**For Respondents: Shri Sunder Khatri and Ms. Ritika, Advocates
(R-1 & 2)
Shri Vijay Pal Sharma
Ashok Kriplani (R-1 in person)**

With

Company Appeal (AT) (Ins) No.166 of 2020

IN THE MATTER OF:

Sampoorna Owners Welfare Association

...Appellant

Versus

Ashok Kriplani & Anr.

...Respondents

For Appellants: Shri Amit Singh Gulia, Advocate

**For Respondents: Shri Sunder Khatri and Ms. Ritika, Advocates
(R-1 & 2)
Ashok Kriplani (R-1 in person)**

ORDER
(Virtual Mode)

13.01.2021 Heard Counsel for both sides.

2. This Appeal has been filed by the Appellants - Members of COC against Impugned Order dated 17th December, 2019 passed in I.A. Nos.659 and 670 of 2019 in C.P (IB) No.84/BB/2019 which Order has been passed in continuation with detailed Order in I.A. Nos.660, 661, 662, 668, 669 and 675 of 2019 in C.P (IB) No.84/BB/2019 copy of which is at Page – 47. The CIRP relates to Corporate Debtor – M/s. Dreamz Infra India Ltd. The grievance of the Appellant is that in spite of provisions under Section 22 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short), the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench, Bengaluru) did not appoint persons selected by the COC (Committee of Creditors) as Resolution Professional and Authorized Representative and appointed the present Respondents 1 and 2.

3. Learned Counsel for the Appellant referred to Annexure A-10 (Page – 129) which was Notice issued by Respondent No.1 – IRP for first COC meeting which was fixed for 01.10.2019. The Agenda Item No.6 in this meeting was relating to appointment of Resolution Professional (RP) in place of IRP - Respondent No.1 who had been appointed when the Section 7 Application was admitted. The learned Counsel referred to Minutes - Annexure A-11 (Page – 136) at Page – 144 where the appointment of Shankar B. Iyer who was proposed as RP was rejected. It is stated that the Respondent No.1 wanted fee of Rs.10 Lakhs per month to be fixed which was not accepted by the COC

Members, who were the home buyers and thus the name of Mr. Shankar B. Iyer was proposed but even that was not approved by COC. The fees sought was also not approved, if Item No.4 is seen.

4. The learned Counsel for Appellant submitted that Respondent No.1 subsequently issued another Notice (Annexure A-21 – Page 194) for holding second COC meeting. The learned Counsel referred to the Agenda and then the minutes (Annexure A-23). The Notice was issued by Respondent No.1 who was still IRP and the minutes of the meeting are as at Page – 208. The learned Counsel submitted that there were three names circulated which can be seen if Page -210 is seen and in the second COC meeting after deliberations and voting, “Mr. Hari T. Devadiga” was declared as name approved for appointment as Authorized Representative (AR). The learned Counsel referred to the Resolution at Page – 211 of the Appeal Paper Book to point out that from the different persons whose names were considered, the COC approved the name of “Mr. Konduru Prasanth Raju” as the Resolution Professional by 90% voting.

5. Learned Counsel for Appellant submitted that subsequently, even Respondent No.1 congratulated Mr. Hari T. Devadiga as well as Mr. Konduru Prasanth Raju by sending e-mails, copies of which are at Page Nos.203 and 220.

6. The learned Counsel is pointing out that Mr. Hari T. Devadiga the person who was selected by COC as Authorized Representative filed I.A. No.670 of 2019 in CP No. (IB) 84/BB/2019 (Annexure A-27) on behalf of COC

requesting the Adjudicating Authority to confirm the name of Mr. Konduru Prasanth Raju as Resolution Professional.

7. The learned Counsel states that Respondent No.1, however, went ahead to file the Application CA No.669/2019 (Annexure A-28 Page – 240) and in spite of COC decisions made following prayers to the Adjudicating Authority:-

“In view of aforesaid facts and circumstances it is prayed most respectfully to this Hon’ble Tribunal to:

1. Appoint Insolvency Professional Mr.HARI T. Devadiga having registration NO. IBBI/IPA-002/IP-N00752/2018-2019/12351 as Authorised Representative of a class of financial creditors (home or shop buyers) of Dreamz Infra India Ltd. under provision of section 21 sub section 6(A) (b) of Insolvency and Bankruptcy Code 2016.
2. to set aside selection of Insolvency Professional Mr. KONDURU PRASANTH RAJU having registration NO. IBBI/IPA-002/IP-N00708/2018-2019/12200 as Resolution Professional of Dreamz Infra India Ltd., and
3. Appoint IP, Mr.Suresh Kannan having Reg. No. IBBI/IPA-001/IP-P-01434/2018-2019/12277 as RP as stated in para11 above.”

8. It is argued that although he proposed name of Mr. Konduru Prasanth Raju as authorized Representative for the Financial Creditors (home and shop buyers) of Dreamz Infra India Ltd. – the Corporate Debtor, he sought setting aside the selection of Mr. Konduru Prasanth Raju which was approved by COC and proposed the name of one Mr. Suresh Kannan. It is argued that the Adjudicating Authority went still further and appointed Respondent No.1 as RP and the Respondent No.2 as the Authorized Representative instead of

Konduru Prasanth Raju and Hari T. Devadiga. The learned Counsel submits that the Adjudicating Authority could not have done this.

9. Learned Counsel for the Respondents 1 and 2 referred to the Reply filed to submit that the Adjudicating Authority took into consideration the volume of the work to be done and considered the interest of the Company to not approve the decision of the COC and to make the appointments of Respondents 1 and 2. The learned Counsel referred to para – 14(6) of the Impugned Order relevant part of which reads as under:-

- “(6) When we have asked IRP Shri Ashok Kriplani and Mr. Viswanathan, earlier proposed AR, who are present in the Court, whether they are willing to accept the assignments if the Adjudicating Authority offers them. In pursuant to the above directions, the IRP has filed I.A.No.675 of 2019 dated 14.12.2019 by inter alia stating as follows:
- a. The Complexity of the project that is caught in the web of CIR, AC and the key fraudulent suspended Directors of the Corporate Debtor who are already behind the Bar. It has about 60+ sites, each having its own problem, almost all are Joint Venture, each site is 10+ Km away from one another, some of the Homebuyers are still continuing with the execution of their decrees which need to be stopped, completely hostile atmosphere, this is going to be the most difficult CIRP till date.
 - b. Mr. Ashok Kriplani is requesting the Adjudicating Authority to fix fees of Rs.6.75 Lakhs pm+ GST, plus out of pocket expenses as Mr. Ashok Kriplani is based in Delhi plus variable fees of 10% + GST as the success fees measured on the difference of liquidation valuation done by the valuers as per law and the valuation done at the time of completion of the projects and liberty to appoint professionals, consultants as per law.”

The learned Counsel submitted that the Orders passed by the Adjudicating Authority are in the interest of the CIRP proceedings and to protect the interest of the Corporate Debtor. He submits that the Appeal deserves to be rejected. It is stated by the learned Counsel that the Respondent No.1 has done lot of work which deserves to be recognised.

10. Section 22 of IBC reads as under:-

“22. Appointment of Resolution Professional.—(1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than [sixty-six] percent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

(3) Where the committee of creditors resolves under sub-section (2)—

(a) to continue the interim resolution professional as resolution professional [subject to a written consent from the interim resolution professional in the specified form], it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or

(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional [along with a written consent from the proposed resolution professional in the specified form].

(4) The Adjudicating Authority shall forward the name of the resolution professional proposed under

clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board.

(5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.”

Considering the provisions as found in Section 22 of IBC, it is the discretion of the COC whether or not to confirm the IRP appointed at the time of admission of the Application under Section 7, 9 or 10 as the case may be. If the IRP is continued, it is required to be informed to the Adjudicating Authority as per Section 22(3)(a). If the COC decides to replace the IRP, it has to file Application before Adjudicating Authority to appoint proposed Resolution Professional. This was done when IA No.670 of 2019 was filed informing the Adjudicating Authority regarding the selection of Konduru Prasanth Raju as RP. Sub-Section (4) of Section 22 provides that the Adjudicating Authority in such situation should forward the name of the Resolution Professional proposed under Clause (b) of Sub-Section (3) to the IBBI (Insolvency and Bankruptcy Board of India) for confirmation and such appointment will be made after confirmation by the Board. Under Sub-Section (5) of Section 22 if the Board does not confirm the name of the proposed Resolution Professional within 10 days of the receipt of the name of the proposed Resolution Professional, then the Adjudicating Authority shall direct the IRP to continue to function as Resolution Professional until such time as the Board confirms the appointment of the Resolution Professional. The

Adjudicating Authority was required to follow this procedure which was not done and the Adjudicating Authority appears to have asked Respondent No.1 if he was willing and went ahead to appoint Respondent No.1 - Ashok Kriplani as Resolution Professional and Respondent No.2 – Viswanathan Sankaran as the Authorized Representative.

11. Section 21(6-A) has provision with regard to Authorized Representative. This Section is required to be read with Regulation 16A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 16A of these Regulations records procedure with regard to selection of Resolution Professional to act as Authorized Representative. Regulation 16A(1) and (2) reads as under:-

“16A. Authorised representative.—(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub-regulation (2) of regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.”

When Section 21(6-A) is read with these Regulations, and Resolutions passed by COC are kept in view, it is apparent that the Adjudicating Authority

was required to treat Mr. Hari T. Devadiga as Authorized Representative whose name was even recognised by the Respondent No.1 when he filed CA No.669 of 2019. We find Adjudicating Authority had no power to impose Resolution Professional of its choice. Even for Authorised Representative decision of the majority is to be respected.

12. For the above reasons, we set aside the Impugned Order as at Annexure A-1 Page – 45 read with Order as at Page 47 to the extent it appointed Respondent No.1 as Resolution Professional and Respondent No.2 as Authorised Representative. We remit back the matter to the Adjudicating Authority with the following directions:-

(A) Mr. Hari T. Devadiga will be treated as the Authorized Representative of class of Financial Creditors (home or shop buyers) of Dreamz Infra India Ltd. under Section 21(6-A)(b) of IBC. Charge, if any, required to be handed over by Respondent No.2 shall be handed over to Mr. Hari T. Devadiga.

(B) The Adjudicating Authority shall in compliance of Section 22(4) forward the name of Mr. Konduru Prasanth Raju to the IBBI and follow the procedure as laid down in Section 22(4) and (5) of IBC.

(C) In the meanwhile, the charge of IRP will remain with the Respondent No.1 - Ashok Kriplani who will be treated as IRP till the Adjudicating Authority does compliance of Section 22(4) and (5) of IBC.

(D) Legality of the actions taken by the Respondents 1 and 2 in the period between passing of the Impugned Orders dated 17th December, 2019 till now, shall not be called into question on the basis of present Orders which we are passing. The steps taken by them pursuant to Impugned Orders shall be treated as acts done in regular course. The steps taken by them in CIRP and fees paid/payable in terms of Impugned Orders, shall be protected.

13. Before parting, we record that when this Judgement was dictated in open Court we had orally directed to hand over the charge within two weeks. However, before signing of the Order, we have relooked to the concluding and operative part of this Order reworded the same before signing of Order, as we found it appropriate to pass orders as above, which we do.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

rs/md