

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.497 of 2020

[Arising out of Order dated 20.02.2020 passed by National Company Law Tribunal, Amaravati Bench in I.A. No. 34/2020 in CP (IB) No.160/10/AMR/2019]

IN THE MATTER OF:

Bank of India

...Appellant

Versus

M/s. Nithin Nutritions Pvt. Ltd.

...Respondent

With

Company Appeal (AT) (Ins) No.498 of 2020

[Arising out of Order dated 20.02.2020 passed by National Company Law Tribunal, Amaravati Bench in I.A. No. 33/2020 in CP (IB) No.159/10/AMR/2019]

IN THE MATTER OF:

Bank of India

...Appellant

Versus

M/s. Nithin Proteins Pvt. Ltd.

...Respondent

With

Company Appeal (AT) (Ins) No.499 of 2020

[Arising out of Order dated 20.02.2020 passed by National Company Law Tribunal, Amaravati Bench in I.A. No. 35/2020 in CP (IB) No.174/10/AMR/2019]

IN THE MATTER OF:

Bank of India

...Appellant

Versus

Ramanasri Logistics Pvt. Ltd.

...Respondent

With

Company Appeal (AT) (Ins) No.500 of 2020

[Arising out of Order dated 20.02.2020 passed by National Company Law Tribunal, Amaravati Bench in I.A. No. 32/2020 in CP (IB) No.158/10/AMR/2019]

IN THE MATTER OF:

Bank of India

...Appellant

Versus

Ramanasri Consumer Products Pvt. Ltd.

...Respondent

With

Company Appeal (AT) (Ins) No.501 of 2020

[Arising out of Order dated 20.02.2020 passed by National Company Law Tribunal, Amaravati Bench in I.A. No. 31/2020 in CP (IB) No.157/10/AMR/2019]

IN THE MATTER OF:

Bank of India

...Appellant

Versus

M/s. Nithin Grains and Mills Pvt. Ltd.

...Respondent

For Appellant: Shri Aditya Kumar, Advocate

For Respondents: None

ORDER

03.06.2020 These five Appeals are arising out of five separate proceedings initiated against the Respondents – Corporate Debtors. The facts involved and the Appellant is common in all the five proceedings. The Appellant filed Applications under Section 22 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) that the Interim Resolution Professional (IRP) – Pavan Kankani had called third meeting of Committee of Creditors (COC) consisting of the Appellant Bank with 100% voting share and COC resolved in the third meeting dated 08.02.2020 to replace IRP with one Mr. B. Naga Bhushan – Resolution Professional. It appears that the respective insolvency proceedings (of these Appeals) were initiated under Section 10 of IBC and the initial IRP – Mr. Pavan Kankani was appointed at the instance of the Corporate Debtor/s. In the third meeting of COC (Committee of Creditors), the COC changed the IRP (Interim Resolution Professional) who had continued to function as RP (Resolution Professional) to appoint Mr. B. Naga Bhushan as RP. Learned Counsel states that this is common in all these Appeals and B. Naga Bhushan was proposed in the five CIRPs. The learned Counsel states that this new proposed RP is recognized to function as RP by IBBI (Insolvency and Bankruptcy Board of India) and his number is reflected in the Impugned Orders. Counsel states that the Appellants had moved the Adjudicating Authority (National Company Law Tribunal, Amaravati Bench at Hyderabad). Copy of one of the Applications is shown from Company Appeal (AT) (Ins) No.497 of 2020 which is at Page – 196 as Company Application 34 of 2020 in Company Petition

No.IB/160/10/AMB/2019. It is stated that similar such applications were filed in the other four matters also. Counsel states that in spite of law being clear on this count that COC has a right with regard to the continuation/change of the IRP/RP, the Adjudicating Authority wrongly rejected the Applications in all the five matters with similar orders giving rise to these five Appeals. Counsel states that facts on this count are common in all the five matters and according to him, the IRP initially appointed, was required to be replaced immediately in the interest of the Corporate Debtors themselves.

2. We have heard the learned Counsel for the Appellants in these Appeals. The Impugned Orders are similar and for the sake of convenience, it would be appropriate to reproduce the Order from the record of Company Appeal (AT) (Ins) No.497 of 2020:-

ORDER

This is an application filed by the sole Financial Creditor seeking replacement of IRP.

2. The brief facts that led to the Application are as follows. The Authority by an order dated 15.11.2019 admitted the Company Petition and directed initiation of the Corporate Insolvency Resolution Process (CIRP) of the respondent corporate debtor. It appointed Mr. PavanKankani as the Interim Resolution Professional (IRP). The Committee of Creditors (CoC) of which the present applicant is the sole member in its 3rd meeting on 08.02.2020 resolved to replace the IRP and appoint one Mr. B. Naga Bhushan (IBBI/IPA-001/IP-P00032/2016-2017/ 10085) as the Resolution Professional (RP). It accordingly filed the present application.
3. It enclosed the copy of the Resolution as well as the written consent of the proposed Resolution

Professional in Form AA of the Regulation 3(IA) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

4. During hearing of the Application the learned counsel appearing for the company submitted that the CoC could not be given a free hand to recommend the name of the RP from among its own panel. No material has however been placed before this Authority to show that the proposed Resolution Professional, a Chartered Accountant, is on the panel of Chartered Accountants connected to the Financial Creditor (Applicant).
5. Sub-section 2 of Section 22 of the Code provides that the CoC may in its first meeting by a majority vote of not less than 66% of the voting share of the Financial Creditors resolve to replace the IRP by another RP. The present application is brought about on the basis of the resolution of the 3rd meeting of the CoC. No reason is assigned as to why the resolution to replace the IRP was not adopted in its first meeting. Law doesn't envisage that the CoC could replace the IRP appointed by the Authority at anytime it chooses. The provision does provide for any leeway or any exception to resolve to replace the IRP in any subsequent meeting. Considering the time bound manner the CIRP is to be concluded, the CoC cannot have the luxury of taking its own time. The CoC having not resolved to replace the IRP in its first meeting could not be allowed to replace him by a resolution in any of its subsequent meetings. The application, therefore, cannot be allowed. Hence ordered.

ORDER

The application be and the same is rejected. No costs.”

3. We are considering the Appeal No.497 of 2020 as the leading Appeal and we will refer to the documents from this Appeal.

4. The learned Counsel for the Appellants states that this Tribunal has already in the matter of “**Punjab National Bank Versus Mr. Kiran Shah**” – Company Appeal (AT) (Ins) 749 of 2019 (in para – 2) which was pronounced on 6th August, 2019 and in the matter of “**Axis Bank Ltd. vs. Sixth Dimension Project Solution Ltd.**” – Company Appeal (AT) (Ins) No.356 of 2019 dated 16th August, 2019 held that when it relates to matter of replacing the IRP, reading Section 22 with Section 27 of IBC, it is not necessary for COC to record reasons for replacing the IRP/RP and it is not necessary for the Adjudicating Authority to call for reasons or decide whether there are sufficient reasons.

5. Having gone through the Impugned Order, what appears is that the Adjudicating Authority has proceeded on the basis that if in the first meeting of COC, the COC does not replace the IRP with another RP, the COC cannot do so subsequently. Like statement of question of law is stated by the Adjudicating Authority that “The COC having not resolved to replace IRP in its first meeting could not be allowed to replace him by a resolution in any of its subsequent meetings”. It appears to us that this is clearly a wrong legal proposition considering the provisions of IBC. There is not merely Section 22 Sub-Section (2) which is relevant but also Section 27. Section 22(1) and (2) read 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.”

Section 27 reads as under:-

“27. Replacement of resolution professional by committee of creditors.—(1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.

(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.]

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.”

6. In both the above provisions, the law nowhere says that the COC is required to give reasons. This appears to be also right. The reason is that relationship between the IRP/RP and the COC is that of confidence. If there

is loss of confidence and combination is continued, the Corporate Debtor would be put to loss because of the bad relationship between IRP/RP with COC.

7. The learned Counsel for the Appellant is rightly pointing out that initially Section 16 of IBC which deals with appointment and tenure of Interim Resolution Professional had provision which stated that “The term of Interim Resolution Professional shall not exceed 30 days from date of his appointment.” This could have caused vacuum and confusion in case of default. This provision was substituted with effect from 6th June, 2018 and now the provision in Section 16(5) provides – “The term of the Interim Resolution Professional shall continue till the date of appointment of the Resolution Professional under Section 22.” It is rightly submitted by the learned Counsel that the earlier provision created serious difficulty if for any reason in the first meeting, the RP was not appointed and thus the law recognised that there could be situations where this may have to be done on a subsequent occasion. The learned Counsel for the Appellant has rightly referred also to Regulation 17 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 where Regulation 17(3) reads as under:-

“17. Constitution of committee.—

(1)

(2)

(3) Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the

insolvency commencement date till a resolution professional is appointed under section 22.”

Thus the IRP continues to be IRP though performing functions of Resolution Professional (RP) from fortieth day.

8. The Counsel is submitting that these provisions make it clear that even if in the first meeting, it remains for COC to change the IRP, there is no bar as such that in subsequent meeting, the IRP who has continued, cannot be changed.

9. Considering these provisions, we have no doubt that the COC has the requisite powers to propose change of the Interim Resolution Professional even in meeting/s subsequent to the first meeting mentioned in Section 22(2) of IBC. There is no requirement that they should give particular reasons for the change.

10. In the present matter, these Appeals have come up today for the first time for admission. The Respondents in the Appeals are only the Corporate Debtors who are represented through the same IRP – Pavan Kankani. The Applications filed by the COC (Appellant) does not in any manner attribute any motives against the present IRP and this being so, there is no necessity for issuing Notices in these Appeals. It is purely a question of law and as we find that the Adjudicating Authority has clearly erred in its approach, we are dispensing with issuing of Notices to the Respondents. The IRP who is representing the Respondents is even otherwise expected to be dispassionate. IRP is not supposed to be having any personal interest in any

given matter and is expected to discharge duties as required under the provisions of IBC and its Regulations. As there are no personal allegations against the IRP and the Appellants as COC, has in the five respective matters exercised their discretion under the law and this being so, we are not issuing Notices in these Appeals. Issuing of Notices to the Respondents would only further prolong the Corporate Insolvency Resolution Process which would not be in the interest of the concerned Corporate Debtor as the effort of law is to find resolution in favour of the Respondents.

11. The Counsel for the Appellant now states that after the Impugned Order was passed, the earlier IRP – Mr. Pavan Kankani has gone beyond the provisions of Regulations 12(2) and accepted a few more claimants as Financial Creditors although the 90 days period as laid down in Regulation 12(2) was over. It is stated that such action was done by the said RP – Pavan Kankani much after the Impugned Order was passed calling a fourth COC meeting. The Counsel states that the fact remains that when third meeting was held and resolution passed, the Appellant was the only Member of COC with 100% voting rights. The learned Counsel states that the present Appeals may be dealt with on the basis of facts as prevalent at the time of third meeting and passing of Impugned Orders. We will leave, such subsequent developments to be looked into by RP approved in third meeting, referred above.

12. For the above reasons, we pass following Orders in these Appeals:-

ORDER

The Appeals are allowed. Impugned Orders in these Appeals are set aside. We allow the Committee of Creditors in each of these matters to engage Shri B. Naga Bhushan as Resolution Professional in each of the matters, if there is no proceeding pending against him.

In so far as fees and costs incurred by IRP, Pavan Kankani in each of these matters, he will place the evidence in support of the fees and costs incurred by him and COC will decide the same and admitted dues to be released in his favour by COC, which will be adjusted from the resolution costs. Mr. Pavan Kankani is directed to hand over charge to Shri B. Naga Bhushan.

Each of the above Appeals are disposed accordingly. No costs.

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

[Alok Srivastava]
Member (Technical)

/rs/md