

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

M.A. NO. 156 OF 2020

Filed by

Axis Bank Limited

Axis House, Wadia International Centre,
Pandurang Budhkar Marg, Worli, Mumbai-
400025.

...Applicant

versus

Mr. Nimit Kalsi

A-402, Ravechi Heights, Plot No.25, Sector 7,
Khargar, Navi Mumbai, Maharashtra – 410
210

...Respondent/Resolution Professional

In the matter of

C.P. No. 4513/I&B/MB/2018

M/s S.K. Ganguli

...Operational Creditor

versus

D. Thakkar Constructions Private Limited.

...Corporate Debtor

Order Pronounced on: 19.03.2020

Coram:

Hon'ble Shri Bhaskara Pantula Mohan (Member Judicial)

Hon'ble Shri Shyam Babu Gautam (Member Technical)

Appearance:

For the Applicant: Ms. Savita Nangare, Advocate i/b Law Focus

For the RP: Mr. Abhishek Adke, Advocate

Resolution Professional: Mr. Nimit Kalsi

For the Creditors of Corporate Debtor: Mr. Vishal Phal a/w Ms.
Sunita Sonawane, Advocates

Per: Shri. Bhaskara Pantula Mohan, Member (Judicial)

ORDER

1. This is a Miscellaneous Application filed by Axis Bank Limited, (hereinafter called as “the applicant”) against Mr. Nimit Kalsi (hereinafter called as the “respondent”) who is the Resolution Professional (hereinafter called as the “RP”) of a company named D. Thakkar Constructions Private Limited (hereinafter called as the “corporate debtor”) for his replacement from the said post and instead appoint Mr. Ram Ratan Kanongoo.

2. By an order dated 27.03.2019 of this tribunal, the petition numbered C.P. 4513/I&B/MB/2018 which was filed by one M/s S. K. Ganguli for initiation of the Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) was admitted and Mr. Ashish M. Chandak was appointed to act as the Interim Resolution Professional directing him to take necessary steps in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. Later, on 26.04.2019 when the first meeting of the Committee of Creditors (hereinafter called as the “CoC”) consisting of 4 Financial Creditors was conducted by the IRP wherein the CoC unanimously decided to replace the IRP and appoint Mr. Nimit Kalsi as Resolution Professional. The said appointment was approved by this Tribunal vide order dated 28.05.2019.

3. The applicant stated that the members of the CoC are very unhappy with the manner in which the business of the Corporate debtor has been conducted by the RP. The RP initially suggested raising of interim finance of Rs.8 Crores to 10 Crores to keep the corporate debtor a going concern. However, the corporate debtor has liquidity of around Rs. 2 Crores, which the present RP is not able to utilize effectively and hence, the CoC has doubts on the ability of the RP to handle the business of the corporate debtor. The CoC members, in every meeting have raised queries like projects getting terminated, factory equipment left unutilized and unguarded, etc. However, the RP has always deflected the queries and proceeded with the CIRP.

4. The applicant has further stated that the RP has always been circulating minutes of the CoC meetings only after 14-15 days, which is contrary to the provisions of the Code. As per regulation 25(5) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP must circulate minutes of the meeting by electronic means to all the members within 48 hours of the conclusion of the meeting. However, in the present case, the RP never circulated minutes of the meetings as per the said regulations and hence, not complied with the provisions of this regulation.
5. The RP has been recording minutes of the meeting on his whims as most of the decisions recorded in the said minutes were not voted upon and were only at a premature stage of discussion. The present RP has appointed valuers and transaction auditors, however, voting on the same was not conducted by the RP. In fact, on the decision of extension of CIRP period by 90 days, the RP did not conduct voting.
6. Further, despite repeated requests by the CoC, the RP has delayed in submitting his monthly expenditure and the same was submitted by RP only in the 7th CoC meeting which was held on 06.12.2019. Even after completion of seven months of his tenure serving as the RP who was in charge of the corporate debtor he did not complete the valuation exercise and transaction audit. The RP has not verified the claims of the employees as well as the financials for the years 2017-2018 and 2018-2019 till date. The official of State Bank of India who is the financial creditor visited various sites of the corporate debtor and reported that machinery, vehicles, tools, etc were lying abandoned and no security was present to guard the same and upon the CoC questioning the RP about the same in the 7th CoC meeting, the RP replied that the material is either scrap or belongs to sub-contractors, however, the RP failed to understand even if the material is scrap the same may have some value which can be applied towards running the corporate debtor.
7. The applicant stated that the RP has published FORM-G for inviting Expression of Interest on 29.08.2019 i.e. 3 months after his appointment. Accordingly, 3 expression of interests were received

by 29.09.2019. The RP informed the CoC in their 8th meeting that the expression of interest received from Obtain Vincom together with Anuj Badjate has been rejected as the bid bond was submitted after cut-off time and unilaterally recorded in the minutes of the meeting that the CoC decided to reject the bid of the proposed Resolution Applicant. In respect of the other two proposed Resolution Applicants i.e. Invent ARC Private Limited and Om Metal Infra Projects Limited, the RP informed the CoC in the same meeting that these Resolution Applicants required certain information which was not provided by the suspended Board of Directors. The applicant points out that the data required by the interested Resolution Applicants could be easily provided by the RP himself since he was handling the affairs of the corporate debtor for around 7-8 months.

8. Vide an order dated 29.11.2019 of this tribunal while deciding the MA/3386/2019 which was filed by one of the employees of the corporate debtor, this bench directed the CoC to take call on the entire pending project and to see if the RP was in violation in pursuing the pending projects and the CoC was granted liberty to submit a comprehensive report as to their willingness to continue with the present RP or to seek any alternative. Accordingly, the CoC members decided to replace the present RP with Mr. Ram Ratan Kanoongo having his registration no. IBBI/IPA-001/IP-P00070/2016-2017/10156. The CoC directed the respondent RP to put the agenda for e-voting. However, until the date of filing of present application, the respondent RP has neither circulated minutes of the said meeting nor has conducted any e-voting for the agenda of change of RP. Therefore, 83.51% financial creditors decided suo-moto to file the present application by circulating e-mails of the voting in favour of change of RP.
9. Mr. Ram Ratan Kanoongo has furnished his written communication in the prescribed Form AA along with the requisite information to act as RP in replacement of Mr. Nimit Kalsi.
10. The respondent on the other hand has denied all the allegations and averments made by the applicant. He has raised a number of

questions in his *Preliminary Submissions* for us to deliberate upon which are as follows:

- (a) Whether the COC had jurisdiction to replace the RP after completion of 270 days?
- (b) Whether a COC does not ipso facto cease to exist after expiry of 270 days when there has been no extension and the creditors' meeting is just a lenders' meeting and thus the role it performs cannot be performed further? And whether the provisions of the Code are not to be construed strictly therefore? And whether the COC meeting is to be called a lenders' meeting after the end of the CIRP period if at all called?
- (c) In the instant case, the CIRP expired on 23.12.2019 and thus the COC ceased to exist in terms of the Code and was only a lenders' meeting and therefore any decision to replace the RP or any other decision post 23.12.2019 could not be taken?
If so, then the email dated 07.01.2020 whereby the approval of the bankers is circulated would have no effect. And even if the decision was taken within the 270 days period, in absence of any order passed by the Adjudicating Authority, such decision cannot be entertained.
- (d) Whether a person who does not show clear source of authority can institute or file an application?
- (e) Whether a Financial Creditor having merely 17% of the voting share can institute an application by itself merely on alleged averment, without the other Financial Creditors?
- (f) Whether a Power of Attorney holder can institute a proceeding to change the Resolution Professional on behalf of a Financial Creditor whether a specific authorisation clearly and specifically providing for a change in RP should be passed?
- (g) Whether the COC is estopped from raising a dispute about the minutes of the COC meetings that were circulated by the RP and on the basis of which subsequent actions have been taken and CIRP has progressed?
- (h) This Hon'ble Tribunal vide order dated 11.10.2019 extended the CIRP by another 90 days and recorded that the COC has given 100% approval. The said order was communicated to the COC. Whether the COC can subsequently question the resolution passed for extension and the order passed by this Hon'ble

Tribunal and whether having waived the objection, if any, the COC can question the same now?

- (i) Whether the COC can refuse Interim Finance demanded by the erstwhile management required for projects then choose to cast the blame on the Resolution Professional?
- (j) Whether the suspended Board of Directors and the erstwhile management are not in violation of the orders dated 20.08.2019 and 26.09.2019 wherein specific directions were given.

11. Mr. Nimit Kalsi in his Submission on Merits made certain claims that

- (a) He has not conducted himself in violation of any provisions under the Code or the Rules, and that the allegations in the Application are pertaining to commercial decisions and verification of records, they do not show any malafide on his part.
- (b) the COC did not raise any objections till the month of December 2019. When the suspended BOD initiated an application as a counter blast to the application u/s 19 of the IBC that an application was filed by Mr. Anil Chavan and prayers were made against the COC as well, the COC decided to remove the RP.
- (c) the Application filed by Mr. Anil Chavan (MA 3386 of 2019) making baseless allegations are nothing but a counter to the Application u/s 19 of the IBC filed by the RP seeking directions for cooperation against the suspended Board of Directors. The said Application is also a counter to the complaint filed on 14.08.2019 before the police complaint filed by the RP in view of the threats and intimidation by certain persons at the behest of the suspended Board of Directors.
- (d) the suspended Board of Directors are in violation of the orders dated 20.08.2019 and 26.09.2019 wherein specific directions were given to them for cooperation with the present RP.
- (e) the reply filed by the erstwhile management is full of wrong statements and that too on oath under an affidavit.
- (f) the parties to this CIRP, except him, have committed violations of the provisions of the IBC and its rules.
- (g) the erstwhile management has not even cooperated with the Forensic expert, also that they have been falsifying the Income Tax Returns.

12. Mr. Nimit Kalsi has responded to the allegations made against him by the Applicant by clarifying that;
- (a) with regards to the allegation that the RP did not use funds of INR 2 Crore and kept asking for Interim Finance, that the Interim Finance was always sought due to the demands of the promoters and merely Rs. 2 Crores could not be used when there was a need for far more as specified in the minutes of the COC meeting of 24.07.2019.
 - (b) With regards to the COC's allegation on projects not having been pursued or the COC statement in its application about projects getting terminated, it was submitted that when the RP took over the Corporate Debtor, about 28 projects of the Corporate Debtor had already been terminated and there were only a few projects that were going on that to were outsourced against the terms of the contract with the Corporate Debtor having no shares in the projects and full risk with the Corporate Debtor.
 - (c) The allegation of the COC that the minutes of the COC meeting were not circulated correctly or as per regulations are in the wrong context. Barring one or two occasions the minutes of COC meetings were circulated in time. The RP had offered to scribe the minutes over a large screen and close the same the very same day of the meeting but the COC did not approve of this because they wanted to deliberate and send comments later on. This was also a part of the reason that the minutes were not circulated within 48 hours.
 - (d) The assertion that the extension of the CIRP beyond 90 days was not voted upon by the COC is wrong and incorrect. The said decision was taken on 13.09.2019 vide item no. 8 of the COC meeting and thereafter an Application being MA NO. 3246 of 2019 was filed. An order of extension was passed on 11.10.2019 on the strength of the Resolution passed by the COC (with 100% voting in its meeting).
 - (e) With regards to the allegation Mr. Nimit Kalsi did not give details of expenses despite asking several times. The present RP submitted that he did furnish the details at various meeting but it was formally recorded only on 06.12.2019.
 - (f) The COC alleged that the EOI of Obtain Vincom together with Anuj Badjate has been rejected wrongly wrt the 8th COC meeting

dated 23.12.2019. A decision on the same was merely deferred as can be gleaned from the said meeting. With regards to the other EOIs, the same could not be proceeded with since support from the suspended Board of Directors was lacking.

- (g) The COC alleges that an application was filed by one of the employees in MA 3386 of 2019 for seeking disbursements, the RP has filed a reply to the same already. Mr. Nimit Kalsi points out that on one hand the COC states that the RP asked for Interim Finance and whilst the same was not acceded, the COC expects that the payment could have been made to disburse all expenses. Despite the fact that the suspended Board did not verify the credentials of the employees, the salaries have been paid. The said application was listed for hearing before the Hon'ble Tribunal on 29.11.2019 and subsequently there was a COC meeting on 06.12.2019. The COC was directed to make a comprehensive report, no such report has been prepared and furnished to the Resolution Professional for an answer.
- (h) The COC alleges that the RP needs to be changed and refutes during the hearing of 17.02.2020 that the resignation has been accepted by them though in fact they did accept it.

13. Mr. Nimit Kalsi states that he was had not been marked in the email approving the change of RP. This action of not marking the RP in the email clearly shows the malafide intent of the Applicant Bank. Also, that the CIRP had expired on 23.12.2019 therefore a COC meeting could not be convened on 31.12.2019 and that it was merely a lenders' meeting. On the other hand, the CoC under its commercial wisdom has decided to remove him and replace with another RP.

FINDINGS

We have heard both the parties and upon perusal of all the documents submitted by them, it is undisputed that the CoC in its commercial wisdom has unanimously taken decision to replace the current Resolution Professional with new Resolution Professional Mr. Ram Ratan Kanoongo.

But there are certain objections raised by the current RP i.e. Mr. Nimit Kalsi, the respondent herein seeking that the change of RP should not be done. He has raised issues which are mentioned above in this order. The main point this Bench finds that the CoC has with a majority

of 83.51% has decided to replace the respondent from the post of RP and appoint another RP.

Here, we need to take into consideration the several grave allegations raised by the CoC against the respondent RP. The applicant has submitted that the respondent is found to be in violation of the provisions of the Code and have time and again delayed the proceedings and submitted false documents. The CoC has also alleged that the respondent has always been circulating minutes of the CoC meetings only after 14-15 days which is contrary to the CIRP Regulations and also the respondent was found to the recording minutes of the meetings on his whims as the decisions recorded in the minutes were not voted and were only at the stage of discussion. Also, despite repeated requests, the respondent delayed in submitting his monthly expenditure and was submitted only in the 7th meeting of the CoC. The CoC contended that there were several other occasions where the conduct of the respondent was not satisfactory and even upon several chances being given to him, he continued to perform his duties in a manner violative of provisions of the Code. Therefore, the CoC not being satisfied with the respondent, is not willing to continue with him. Therefore, it was by an order dated 29.11.2019 of this Bench that the members of CoC have taken up for discussion the issue regarding removal of the respondent from the post of RP and therefore, the contention of the respondent that the CoC does not exist after expiry of 270 days is irrelevant. We have heard the respondent on other issues also and given him ample opportunity to satisfy this Bench, but we find the respondent is raising these contentions merely to delay the proceeding and nothing else. The respondent also raised an issue wherein he stated that the CoC has violated orders of this Bench dated

We are of the opinion that it is the commercial wisdom of the CoC to decide as to who will be the RP and therefore, if it has decided, we are to allow the change of RP. In view of the same, this Miscellaneous Application is allowed and we hereby direct that the present RP Mr. Nimit Kalsi be replaced with Mr. Ram Ratan Kanoongo.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

/SSB/

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)