

**NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

MA/362/IB/2018
MA/312/IB/2018
In
MA/100/IB/2018
In
CP/616/IB/CB/2017

Under Section 60 r/w Section 30(6) of the IBC, 2016 r/w Regulation 39(4) IBBI
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016

In the matter of

Ms.J.Karthiga

... Applicant/ Resolution Professional

Vs.

1) M/s.Agarwal Coal Corporation Private Limited

... 1st Respondent/ Operational Creditor

2) M/s.Sun Paper Mill Limited

...2nd respondent/ Corporate Debtor

Order delivered on: 18.09.2018

CORAM

**K. ANANTHA PADMANABHA SWAMY, MEMBER (JUDICIAL)
S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

<i>For the Applicant</i>	<i>: Shri.Jayanth Viswanathan, PCS</i>
<i>For the OC</i>	<i>: Shri.N.K.Bhansali, PCS</i>
<i>For the CD</i>	<i>: Shri.Om Prakash, Senior Advocate</i>
	<i>: Shri.G.Ashokpathy, Advocate.</i>

ORDER

Per : S.VIJAYARAGHAVAN, MEMBER(TECHNICAL)

1) The RP has stated that the Petitioner in the main CP is an Operational Creditor and had filed an application under section 9 of the IBC,

2016. The said application was admitted by this Tribunal vide its order dated 20.12.2017.

- 2) This Tribunal has directed the RP to prepare a revised resolution plan considering the applicant operational creditor's claim of Rs.2,39,33,935/-. It has been stated by the RP that any claim, for inclusion in the resolution plan by the RP, needs to be backed by valid invoices and that the claim amount of Rs.2,39,33,935/- is not supported by valid unpaid invoices and all invoices produced by the OC, so far, before the RP have been duly paid as per the books of the CD.
- 3) The COC in its meeting dated 18.07.2018 subsequent to this Tribunal's order dated 28.06.2018 has approved provision of the Bank Guarantee to the extent of Rs.2,39,33,935/- which reflects the penalty paid to Customs Authorities by the CD and which is a subject matter of dispute between the CD and the OC. After reviewing the order of this Tribunal the COC is of the opinion that the dispute ought to be referred to the Hon'ble High Court of Indore within whose jurisdiction the dispute falls and upon verdict by the Hon'ble High Court of Indore, the Guarantee will be discharged suitably. The RP has stated that this would protect the interest of the OC.

- 4) The COC has set an eligibility criteria to the effect that there should be no change in the management of the CD. Since no person other than the present management would meet this eligibility criteria, the COC seeks direction for waiving the requirement of public invitation.
- 5) The Applicant has prayed for the following;
- a) *The basis for reckoning the claim of the Operational Creditor in the absence of valid supporting unpaid invoices for the claim*
 - b) *If the interest of the Operational Creditor can be protected by way of a Bank Guarantee from the Financial Creditor, subject to the outcome of the judgment by the High Court of Indore, within whose jurisdiction the dispute on penalty by Customs Authorities falls.*
 - c) *If the Public Notice can be dispensed with since the COC has set as Eligibility Criteria of continuance of existing management.*
 - d) *Pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the circumstances the case and thus render justice.*

In the reply the Operational Creditor has raised the following questions;

- a) Whether the duties embodied on Resolution Professional under section 25 of IBC/other applicable provisions of the Code/Regulations made there under, at all can be waived by COC?
- b) Whether the conduct of RP is appropriate for non-invitation of Resolution Plan from prospective Resolution Applicants and later on submission of sole Resolution plan collected from the Promoters/Directors of the Corporate Debtor to COC and getting the

waiver of its duties as RP irrespective of the same mandated under section 25(2)(h) read with rule 36A of CIRP Regulation?

c) Whether RP is justified in submission of said defective Resolution Plan for approval before this Tribunal under section 30(6) of the Code?

d) Whether the RP is justified in reduction of claim at Rs. 2,173/- instead of Rs. 2,39,33,935/- submitted by the Applicant, merely on the basis of alleged debit notes provided by the Corporate Debtor, without examining the legal substance of the same?

e) Whether the RP is justified in declaring the debt of Rs. 2,39,33,935/- claimed by the Applicant as disputed on account of alleged debit notes, in spite of the such debt is held as undisputed by the this Tribunal while passing the order for initiation of IBC proceedings, which is affirmed by the Hon'ble NCLAT as well as by the Hon'ble Supreme Court, while dismissing the appeal in the matter?

f) Whether the RP is Justified in reduction of the claim of the Applicant merely on the basis of alleged debit notes provided by the Corporate Debtor in respect of certain custom duty litigation pending at Hon'ble Supreme Court in respect of certain High Seas Sales

earlier made by the Applicant to the Corporate Debtor, without verifying the existence of the liability of such duty as on date, as well as the obligation in respect of that which party is supposed to bear under the law, even if some liability arises in future?

6. Further the OC has stated that this Tribunal disposed of both the applications vide orders dated 28.06.2018 and 29.06.2018 and gave specific directions in those orders to RP, which had been not adhered to by both COC and RP in particular till date. The RP has submitted in the present application that the claim of Operational Creditor can only be admitted after being backed up by valid invoices and all invoices of Operational Creditor is duly paid as per the books of the Corporate Debtor. Such submission of RP is contrary to the detailed submissions including the OC's unpaid invoices, agreements and all other relevant documents made available to the RP.
7. The RP has submitted in present application that the interest of Operational Creditor can be protected by way of Bank Guarantee from the financial creditor. The Operational Creditor has submitted that such submission is vague and irrelevant in the context of the present matter.
8. The alleged debit notes which were the sole basis for the rejection of OC's claim have been raised in respect of certain custom duty liability raised by

the custom authorities in pursuance to order dated 21.02.2014 on the corporate debtor, in respect of certain supplies of coal to the corporate debtor by the operational creditor earlier during the year 2011-12.

9. The right/title over the goods under question as appearing on bill of lading/other import documents were transferred in favor of buyer in pursuance to High Seas sale agreements and as per the agreements, the buyer is under obligation to meet custom obligations whatsoever arises in the matter, no recourses/claim in this connection can be raised against the seller at all. Even otherwise the alleged custom duty liability as imposed by the custom authorities vide order, got cancelled in pursuance to order dated 08.11.2017 passed by Hon'ble CESTAT.

The OC has prayed for the following in the reply

- a) *The present application MA/312/IB/2018 be dismissed with severe costs as the various directions of the Hon'ble NCLT is not complied with till date.*
- b) *The company be liquidated as no resolution plan is approved till date and also direct for the payment of appropriate interest as accrued till date along with cost incurred by the Respondent No.1.*
- c) *And/or Pass any other order that the Hon'ble NCLT deems fit in the interest of justice, equity and good conscience.*

ORDER

The Tribunal observes that in regard to the claim made by the OC this Tribunal has already passed an order dated 29.06.2018 in **MA/100/IB/2018** and the same was upheld by the Hon'ble NCLAT and

Hon'ble Supreme Court. In this regard the RP is directed to comply with the same.

The PCS representing the OC has stated that they had copy of the invoices and the firm is directed to produce the invoices to the RP and the CD is directed to make the payment for the same without insisting on a bank guarantee and for depositing the amount in an escrow account. It is seen that the issue regarding the customs classification and tariff are pending before the Hon'ble Supreme Court and if the Hon'ble Supreme Court's verdict is in favour of the CD the same may be passed on to the corporate debtor by the operational creditor.

In this case the Tribunal observes that as per section 25(2)(h) of the Code ;

*“Section 25(2) For the purposes of the sub-section (1), the resolution professional **shall** undertake the following actions, namely:-
(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.”*

In view of the above section the Tribunal is of the opinion that the resolution professional “**shall**” undertake the following actions, which makes it clear that the provision is a mandatory provision thus the prayer by the RP to dispense the public notice is not tenable.

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With the above directions, the Application **MA/312/IB/2018 In MA/100/IB/2018 In CP/616/IB/CB/2017** stands **disposed of**.

In **MA/362/IB/2018** the RP has prayed for an extension of CIRP by 60 days the same is allowed. The Application in **MA/362/IB/2018** stands **disposed of**.

S. Vijayaraghavan.

(S.VIJAYARAGHAVAN)
MEMBER (TECHNICAL)



(K.ANANTHA PADMANABHA SWAMY)
MEMBER (JUDICIAL)

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