

NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH AT GUWAHATI

IA No.01 of 2018

In

CP(IB)/20/GB/2017

Under Section 7 of the Insolvency & Bankruptcy, read with the Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Srei Infrastructure (P) Ltd.	...	Petitioner
-Versus-		
Assam Company India Ltd.	...	Respondent

Coram:

Present : HON'BLE MR. JUSTICE P.K. SAIKIA, MEMBER (JUDICIAL)

ORDER


Date of Order : 02.01.2018

Seen the report dated 18.12.2017, submitted by Shri V. Kothari, IPR on the meeting of Committee of Creditors held at Kolkata on 13.12.2018. The formal report with all the Annexures was received on 01.01.2018

2. Let an IA be registered on the same.
3. This Authority on 11.12.2017 passed the following order:-

"Mr V.K. Kothari, Interim Resolution Professional (in short, IRP) is present before this Bench in terms of the order passed on 07.12.2017. For ready reference, said order is reproduced below:

"1. Seen the Registry's note dated 30-11-2017. For ready reference Registry's note is reproduced below: -



"30.11.2017 Hon'ble Member (Judicial)

By E.mail letter dtd. 27.11.2017, Sri V. K. Kothari (Interim Resolution Professional Assam Company India Ltd. has sent copy of the report certifying constitution of Committee of Creditors in the matter of Assam Company India Ltd. Corporate Debtor) in Dy. No.529 of 2017.

Table 'A' (flag 'A') is the list of Financial Creditors as on 14.11.2017 who are 12 in total.

Table 'B' (flag 'B') is the Committee of Creditors with respective voting percentage who are '12' in total as on 14.11.2017.

As per S. 22 of IBC, the first meeting of the creditors shall be held within 7 days of the constitution of creditors.

No further report has reached.

Laid for favour of kind perusal."

"2. The said note was prepared on the basis of the letter dated 27-11-2017 received from Shri V. K. Kothari, IRP. For ready reference, the letter is reproduced below: -

"in the matter of
Diary Number 529 of 2017

Srei Infrastructure (P) Ltd.

... Financial Creditor

vs.

Assam Company India Ltd.

... Corporate Debtor

This is with reference to the order of the Hon'ble National Company Law Tribunal, Guwahati Bench dated 26.10.2017 ("**Order**") intimated to the undersigned via email dated 31.10.2017, whereby the Hon'ble Bench has admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), initiating insolvency proceedings of Assam Company India Limited ("**Corporate Debtor**") and has appointed the undersigned as the IRP.

Order can be viewed at:http://nclt.gov.in/interim_orders/Guwahati/26.10.2017/1.pdf.

As per the requirement of regulation 17(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CRIP Regulations") which stipulated that the interim resolution professional shall file a report certifying constitution of the committee of creditors to the Adjudication Authority on or before the expiry of 30 (Thirty) days from the date of his appointment, please find enclosed herewith the report certifying constitution of committee of creditors of the Corporate Debtor for your record.

Hard copy of the report shall reach you shortly.

-- Vinod Kumar Kothari

Address: 1006-1009, Krishna Building,
224 AJC Bose Road, Kolkata – 700 017

E-mail: resolution@vinodkothari.com

Registration No.: IBBI/IPA-002/IP-N00019/2016-17/10033"

"3. Also seen Registry's note dated 05-12-2017. Registry's note dated 05-12-2017 is reproduced below: -

"05/12/2017 Hon'ble Member (Judicial)

By email letter dtd 4th December 2017, Sri V. K. Kothari the Interim Resolution Professional has sent the 2nd report of the I.R.P. in the matter of Assam Company India Ltd. Dy. No.529 of 2017.

- As per report the 1st meeting of the Committee of Creditors was convened on 28th Nov/2017.
- Neither the appointment of IRP as R – P, nor replacement of I.R.P. could take place due to insufficient vote.
- Accordingly the I.R.P. requests the Hon'ble Bench to fix a short date for hearing.

Laid for favour of kind perusal."

"The said note was prepared on the basis of report dated 04-12-2017 from Vinod Kothari, IRP. For ready reference, the letter dated 04-12-2017 is also reproduced below: -

*"To
National Company Law Tribunal
Guwahati Bench*

Dear Sir,

With reference to the captioned subject, please find attached herewith Second Report of the IRP in the matter of Assam Company India Limited.

The Hon'ble Bench is hereby notified that as per requirement of section 14 of Insolvency and Bankruptcy Code, 2016 ('Code 2016') and regulation 17 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016, first meeting of Committee of Creditors (as constituted of IRP) was duly convened on 28th November, 2017.

It is hereby informed that as per the requirement of section 22 of the Code, 2016, the agenda for appointment of IRP as RP was placed before the Committee, however, the same not being able to get 75% votes cast in favour, was lost.

Even the proposal to replace the existing IRP failed to get requisite majority. Kindly refer the attached Report for details.

Kindly note that the Company in present case being a tea producing company, belongs to a sensitive, labour intensive sector, employing nearly 25000 workers and extremely important for the economy and social fabric of North-Eastern Region. In view of this, appropriate directions are required from the Hon'ble Bench.

Accordingly, the Interim Resolution Professional hereby requests the Hon'ble Bench to kindly fix a short date for hearing.

***Vinod Kumar Kothari
Interim Resolution Professional
Assam Company India Limited***

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224 AJC Bose Road, Kolkata – 700 017
E-mail: resolution @vinodkothari.com
Registration No.:IBBI/PA-002/IP-N00019/2016-17/10033"***

"5. In this connection, I find it necessary to visit the provision of Section 22 of Insolvency and Bankruptcy Code, 2016, which deals with the matter relating to

appointment of Resolution Professional. For ready reference, the said provision is also reproduced below: -

"22. (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 seventy-five per cent. 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, 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.

(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."

6. It is, thus, apparent that the Committee of Creditors (in short "COC") may, in its first meeting, by majority vote not less than 75% of voting share of the financial creditors, either resolved to appoint IRP as Resolution Professional or replace the IRP by another Resolution Professional.

7. A perusal of the Code and the Rules framed thereunder, makes it clear that the Insolvency and Bankruptcy Code, 2016, provides a mechanism for resolution of the disputes thereunder in a time bound manner. Therefore, the Committee of Creditors cannot be allowed to dilly dally in a matter as important as appointment of Resolution Professional.

8. It is seen from the report of the IPR that the Corporate Debtor, being a tea producing company, belongs to a sensitive labour sector with more than 25,000 workers in its pay roll playing extremely important in shaping the economy and economic health of a large section of the society. In such a scenario, the Registry is directed to list the matter tomorrow for necessary order.

9. The IRP be directed to remain present tomorrow for taking further necessary action.

10. Let the report of the IRP dated 04-12-2017 in Diary No.529 of 2017, be admitted as Interlocutory Application.

11. List the matter tomorrow on 08th December, 2017."

2. Mr Vinod Kumar Kothari, IRP, submits that the Committee of Creditors in its meeting held on 28.11.2017, amongst other things, had discussed about (1) the proposal for ascertainment of voting rights of Financial Creditors, so proposed by IRP, (2) the proposal seeking ratification of expenses for the IRP process and (3) proposal for confirmation of appointment of IRP as RP.

3. While the proposal regarding the ascertainment of voting rights of Financial Creditors as submitted by the IRP was not disturbed, the proposal regarding ratification of expenses of/for the IRP was also ratified. However, the Financial Creditors could not ratify the appointment of IRP as RP.

4. It is evident from the above that the CoC had failed to ratify the appointment of Mr V.K. Kothari as regular RP. It also failed to replace him by appointing another RP as required under Section 22 of the Insolvency and Bankruptcy Code, 2016 (in short, Code of 2016). For ready reference, said section is reproduced below:

“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 seventy-five per cent 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, 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.

(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.”

5. A perusal of Section 22 reveals that one of the main functions of the committee of creditors is the appointment of the resolution professional. It further provides that at the first meeting of the committee of creditors, the committee may decide, by a majority of 75 per cent of voting share of the financial creditors to appoint the interim resolution professional as the resolution professional or propose the name of another insolvency professional to be appointed as the resolution professional. Where the committee of creditors decides to not appoint the interim resolution professional as the

resolution professional it has to file an application with the adjudicating authority for the appointment of the proposed resolution professional.

6. According to Mr Kothari, the company in question has been passing through an extremely crucial period facing numerous problems of extremely serious nature threatening to overthrow the company itself out of gear and, therefore, a regular RP needs to be appointed without any further delay. Otherwise, the very purpose of initiation of Corporate Insolvency Resolution Process (in short, CIRP) may go haywire.

7. Therefore, Mr Kothari submits that till regular RP is appointed by the concerned authority, the present IRP may be allowed to continue discharging urgent and important functions in accordance with the requirements of law. In that connection, he has relied on several decisions to show that the IRP may be allowed to continue till the regular RP is appointed in accordance with the prescription of law.

8. In the case in hand, it is now found that the CoC failed to confirm the IRP as regular RP. Nor was it able to replace the IRP by a regular RP in its first meeting as required under Section 22 (1) of the Code of 2016. What is equally important to note is that even in the second meeting, the Board could not carry out the direction rendered in the aforesaid provisions of law.

9. Therefore, I am of the opinion that the CoC has not demonstrated enough seriousness in the matter of appointment of regular RP, one of the most essential functions of the CoC in taking the matters towards the formulation of successful resolution plan. However, considering the fact that they are the best authorities to decide as to whether to allow the present IRP to continue as RP or to appoint a new RP in his place, I find it necessary to give one more opportunity to the CoC to decide the above questions in accordance with the prescription of law.

10. In the event of their failure, this authority would be bound to request the Board to do the needful in that regard following the prescription of law.

11. Resultantly, the CoC is directed to do the needful in regard to confirmation of present IRP or his replacement by another RP and the CoC is to do so within a period of one week from the date of receipt of a copy of this order.

12. The IRP is directed to intimate this authority about the result of such an exercise soon after the meeting of CoC.

13. Registry is directed to send a copy of this order immediately to all concerned including IRP by all means including email."

4. As required under the order aforesaid, the IRP convened the meeting of Committee of Creditors on 13.12.2017 to discuss several proposals including the proposal for confirmation or replacement of IRP. The Committee of Creditors discussed the agenda on the board and also adopted several resolutions. The IRP has submitted a report on the outcome of the meeting of the Committee of Creditors held on 13.12.2017. For ready reference, the same is reproduced below: -

THIRD REPORT OF THE INTERIM RESOLUTION PROFESSIONAL

1. Brief Background

1.1 By virtue of the Hon'ble NCLT, Guwahati Bench ('NCLT'/Bench), direction dated 11.12.2017 (received by the IRP on 11.12.2017), and in view of urgency originated pursuant to SEBI's order dated 08.12.2017, second meeting of the committee of creditors was called on 13.12.2017.

1.2 As per the requirement of Section 24 of the Insolvency and Bankruptcy Code, 2016 ('Code, 2016') and regulation 17 of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016, First Meeting of Committee of Creditors (CoC) of the Corporate Debtor, as constituted by the undersigned, was duly convened on 28.11.2017. However, the resolution for appointment of Resolution Professional was failed to get consent of the 75% members of the CoC. Therefore, the Hon'ble NCLT has directed the Members to meet at the earliest and decide on the appointment of the Resolution Professional (RP).

1.3 Pursuant to the above mentioned direction of the Hon'ble NCLT, 2nd meeting of Committee of Creditors was called to be held on 13.12.2017

1.4 Notice of the Meeting along with notes to agenda and annexures thereto as sent to the members of the CoC and suspended board of directors of the Corporate Debtor are enclosed herewith and collectively marked as Annexure 'A'.

2. Calling the Second CoC Meeting

2.1 The Meeting was physically attended by 8 (Eight) members. Representative of 1 (One) Member viz. ICICI Bank Limited participated in the Meeting via video conferencing and Representative of 2 (Two) Members viz. Aadarsh Real Estate and Associates Private Limited, Peter Beck and Partner Vermögensverwaltung GmbH participated in the Meeting through telecom. One member viz. Oriental Bank of Commerce, was not present at the meeting. A copy of the Attendance Sheet showing attendance of the Members of the CoC is enclosed herewith, marked as Annexure 'B'.

2.2 Since, one of the member of CoC was not present, the voting on items requiring voting had to be sought through e-voting facility as per Regulation 25(5) of the CIRP Regulations. The IRP engaged the services of Karvy Computershare Private Limited (Karvy) to provide such e-voting facility.

2.3 A copy of Minutes of the proceeding of the Meeting has already been circulated to the Members of CoC via mail dated 18.12.2017. A copy of the said Minutes is enclosed herewith and marked as Annexure 'C'.

3. Significant point of discussion at the 2nd CoC Meeting

3.1 Further, it is to be noted that the meeting was called (a) to discuss the implication of SEBI Order dated 8th December, 2017 (b) appointment of Resolution Professional and (c) to discuss

about the emerging liquidity issue of the Corporate Debtor and measures required to be adopted for the same.

- 3.2 With respect to the SEBI's Order dated 8th December, 2017, it was informed to the members that the Stock Exchange has been directed to appoint an independent forensic auditor *inter alia*, to verify :

- (a) Misrepresentation on including of financials and/or business of Corporate Debtor
- (b) Misuse of the funds/books of accounts of Corporate Debtor.

The members discussed the above mentioned order of SEBI and decided that the scope of currently ongoing forensic audit of the Corporate Debtor be amended. Accordingly, the members unanimously agreed to authorize the IRP to prepare amended scope of forensic audit, incorporating the concerns arises from the SEBI's order.

- 3.3 The agenda item for appointment of Mr. Kannan Tiruvengadam, Insolvency Professional holding IBBI Regn. No. IBBI/IPA-001/IP-P00253/2017-18/10482, as the RP was passed with the unanimous consent of the members of the CoC.

- 3.4 The agenda item to approve the raising the interim finance for the short term working capital requirement of the Corporate Debtor, failed to get consent of 75% of the members, hence lost.

- 3.5 Pursuant to section 22(4) of the Insolvency and Bankruptcy Code, 2016, where the committee of creditors resolves to replace the IRP, it shall make an application to the Adjudicating Authority for appointment of the proposed resolution professional and the Adjudicating Authority shall forward the name of resolution professional to the IBBI for its confirmation and shall make such appointment after getting confirmation from the IBBI.

4. Further Directions from the Hon'ble Bench

In view of the above, this is humbly prayed before the Hon'ble Bench, on behalf of the Committee of Creditors, to give direction with respect to the following :

- (a) In terms of section 22(4) of the Code, 2016, forward the name of Mr. Kannan Tiruvengadam, RP proposed by the CoC, to the IBBI for its confirmation.
- (b) To confirm the appointment of Mr. Kannan Tiruvengadam as the RP of the Corporate Debtor, after getting confirmation from the IBBI.
- (c) To give such other directions as the Hon'ble Bench deems appropriate in the instant case.

The above may kindly be considered as an application for appointment of RP filed on behalf of the CoC.

Yours sincerely,

Sd/-

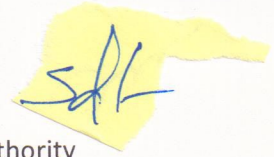
Vinod Kumar Kothari

5. A perusal of the report aforesaid reveals that the CoC, in its wisdom chose to replace Mr. Vinod Kumar Kothari, the IRP, by one Mr. Kannan Tiruvengadam as being regular RP. The particulars of the proposed RP have been given in para 4 (b) of the report of the IRP dated 13.12.2017. In my considered opinion, the report dated 13.12.2017 may be treated as application of the CoC as contemplated in Section 22(3) and 22(4) of the Code of 2016.

6. Being so, as required under Section 22(4), this Authority is to forward the application aforesaid to the IBBI for doing needful in-acordance with the law.

7. Till the receipt of confirmation, made by the IBBI/appointment of RP by the undersigned, the IPR shall continue to manage the operation of Corporate Debtor as a going concerned, subject, of course, to the instructions and limitations, incorporated in the Code and the Rules framed thereunder.

8. A copy of this order be sent to all concerned for their information and necessary action.



Adjudicating Authority
National Company Law Tribunal
Guwahati Bench: Guwahati.

TDR