

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

IN THE MATTER OF:

CP/CA. No. (IB)-23(PB)/2017

M/s Alchemist Asset Reconstruction
Co.Ltd

.... APPLICANT / PETITIONER

Vs

M/s Hotel Gaudavan Pvt. Ltd.

....

RESPONDENT

SECTION:

Under Section 7 of Insolvency & Bankruptcy Code, 2016

Coram:

Order delivered on 22.09.2017

CHIEF JUSTICE M. M. KUMAR
Hon'ble President

DEEPA KRISHAN
MEMBER (TECHNICAL)

For the APPLICANT / PETITIONER :-

For the RESPONDENT :-

ORDER

This is an application filed by the Insolvency Resolution Professional under section 60(5) of IBC 2016 read (for brevity the 'code') with its section 233 and 238. The prayer made by the Insolvency Resolution Professional is to grant him protection for all acts done by him in good faith and also to save him from the frivolous allegations made in FIR 605/2017 dated 06.08.2017 before the Police Station, Vaishali Nagar, Jaipur. The prayer has also been made for quashing the aforesaid FIR.

The FIR No. 605/2017 has been lodged on 06.08.2017 by one of the Directors of the Ex-Management Mr. Harendra Singh Rathore with the allegations that the Insolvency Resolution Professional has prepared fake documents and with some other allegations closely connected to his functions as a Resolution Professional. He has also sent reply to the Investigating Officer of Police Station, Vaishali.

The Insolvency Professional has to function in accordance with the scheme of the Code and perform his duties as such. If, there is any complaint against the Insolvency Professional then the Insolvency Bankruptcy Board of India (for brevity 'IBBI') is competent to constitute a disciplinary committee and have the same investigated from an Investigating Authority as per the provision of section 220 of the Code. If, after investigation 'IBBI' finds that a criminal case has been made out against the Insolvency Resolution Professional then the 'IBBI' has to file a complaint in respect of the offences committed by him. It is with the aforesaid object that protection to action taken by the Insolvency Resolution Professional in good faith has been accorded by section 233 of the Code. There is also complete bar of trial of offences in the absence of filing of a complaint by the 'IBBI' as is evident from a perusal of section 236 (1)(2) of the Code. Therefore, a complaint by Harendra Singh Rathore, a former director with the SHO, Police Station would not be maintainable and competent as the complaint is not lodged by the 'IBBI'. Moreover, the ex-management has already filed a complaint on 22.01.2017 before the 'IBBI' and the same is under investigation.



There is another aspect of matter the ex-management in the present case is moving various forums to scuttle the functioning of IRP and the Insolvency process. The events have been listed in detail in the application. Those are summarised as under:

- (i) The Financial Creditor (Alchemist Asset Reconstruction Company) filed an application under Section 7 of the IBC, 2016 against the Corporate Debtor (Hotel Gaudavan Private Limited) before the Hon'ble NCLT, Principal Bench, New Delhi ("NCLT") on 09.03.2017.
- (ii) That vide order dated 31.03.2017, the said petition was admitted by Hon'ble NCLT and Mr. Arunava Sikdar was appointed as the IRP of Corporate Debtor. The order was pronounced in the presence of the counsel of the Corporate Debtor, after considering the objections filed by the Corporate Debtor and hearing the Counsel of Corporate Debtor.
- (iii) To comply with the order dated 31.03.2017 passed by NCLT, the IRP along with his team reached the premises of the Corporate Debtor viz. Fort Rajwada, Jaisalmer on 03.04.2017 at 09:30 A.M. However, the General Manager Mr. Prakash Topa refused to cooperate with the IRP unless and until he got specific instructions from his Managing Director i.e. Mr. Lokendra Singh Rathore. The management and personnel at the Hotel Fort Rajwada resisted the takeover of the property. It is pertinent to mention herein that the




intimation regarding the said visit was duly given to the Corporate Debtor well in advance through email. That as such the IRP was then constrained to return from Jaisalmer and filed an application bearing CA No. 78 of 2017 before Hon'ble NCLT seeking direction for cooperation from the Corporate Debtors and also sought for police protection to takeover custody of the assets situated at Fort Rajwada. In the meanwhile the erstwhile management of the Corporate Debtor filed a writ petition before Jaipur High Court challenging the constitutional validity of IBC, 2016. The said writ petition was admitted by the Hon'ble High Court of Jaipur, which was limited to challenge to certain provisions of IBC, but the stay application was dismissed. Copy of the order dated 06.04.2017 passed by the Hon'ble High Court of Jaipur is annexed.

- (iv) That the said application No. 78 of 2017 filed by the IRP was listed on 13.04.2017, when NCLT was pleased to issue direction to the concerned police officials to assist the IRP in taking possession of the property in compliance of order dated 31.03.2017 passed by the Hon'ble NCLT, New Delhi. Copy of the said order dated 13.04.2017 is annexed.

- (v) On 17.04.2017, the IRP took over the possession of the Hotel and management of its affairs from the staff present at the Hotel. It is pertinent to mention that to create hurdle in smooth takeover of the Hotel property, Mr. Lokendra Singh Rathore (Managing

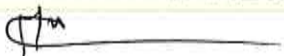


Director) despite assurances, was not present at the site and had locked the rooms designated as Managing Director's office. Mr. Prakash Topa, the GM has also gone on leave and locked his room. It is further pertinent to mention herein that at that particular point of time some other critical officials had also proceeded on leave. However, the IRP along with his team took possession of the assets and management of affairs of the Hotel.

- (vi) After taking the possession, it came to the notice of the IRP that from 03.04.2017 to 06.04.2017 (i.e. post commencement of CIRP) the erstwhile management of the Corporate Debtor had siphoned off the monies totalling to approx. Rs. 123.60 Lacs by withdrawing funds from the Bank accounts of HGPL in the name of the Directors & certain other people entitles. That for which the IRP moved two application before NCLT bearing CA 87 of 2017 and CA 136 of 2017.
- (vii) On 24.04.2017, SLP was filed by the Corporate Debtor before the Hon'ble Supreme Court of India against the order dated 06.04.2017 passed by the Hon'ble High Court at Jaipur and the said SLP was dismissed by the Hon'ble Supreme Court of India vide order dated 26.04.2017. Copy of the order dated 26.04.2017 is annexed.
- (viii) On 03.05.2017, the erstwhile director of the Corporate Debtor requested NCLT to grant some time to file reply to the Company
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Application No. 87 of 2017. On the same day i.e. 03.05.2017 (unknown to anyone including the IRP) the Corporate Debtor has allegedly conducted a Board of Directors Meeting & passed a Board Resolution authorizing Mr. Harendra Singh Rathore, suspended Director to appoint Arbitrator to commence arbitration proceedings against the Financial Creditor (AARC), which is in complete violation of Section 14 and 17 of IBC. The very next date i.e. on 04.05.2017 the Corporate Debtor unilaterally appointed one Mr. Pankaj Garg (Advocate) to act as arbitrator. Copies of the alleged minutes of Board meeting dated 03.05.2017 and the letter dated 04.05.2017 are annexed.

- (ix) On 11.05.2017 the Corporate Debtor filed an Appeal before the Hon'ble Appellate Tribunal ("NCLAT") against the order dated 31.03.2017, passed by Hon'ble NCLT, New Delhi. That in the said appeal the Corporate Debtor suppressed the fact of the purported board meeting dated 03.05.2017 & appointment of Arbitrator dated 04.05.2017 from the Hon'ble Appellate Tribunal. That after arguments on various dates, the said Appeal was dismissed as withdrawn on 17.07.2017. That no liberty was granted to the Corporate Debtor to challenge the order dated 31.03.2017 passed by the Hon'ble NCLT, New Delhi. Copy of the order dated 17.7.2017 is annexed.



- (x) Further, on 26.05.2017 the RP, received an email from the Financial Creditor attaching therewith the letter dated 22.05.2017, whereby Mr. Pankaj Garg issued a letter to the Corporate Debtor with a copy marked to the Financial Creditor ostensibly consenting to be appointed as the Sole Arbitrator for adjudication of alleged disputes and differences with regard to debt, declaration of NPA and restructuring of loan account between SBI Commercial Branch, Shastri Nagar, Jodhpur as Lender through M/s. Alchemist Asset Reconstruction Company Ltd. as Assignee and had further allegedly fixed a preliminary hearing of the matter on 31.05.2017 at 4 P.M. at Jaisalmer. Copy of the said email dated 26.05.2017 is annexed.
- (xi) That the RP thereafter on 30.05.2017 filed an application bearing Company Application No. 173/2017 before NCLT, inter alia, seeking a prayer to declare the letters dated 22.05.2017 and 04.05.2017 as null and void and non-est as he has taken charge as an IRP w.e.f. 31.03.2017 and as such no BOD meeting can be convened on 03.05.2017 and arbitration cannot be commenced without the knowledge of the IRP/RP.
- (xii) On 31.05.2017, Hon'ble NCLT held that the said arbitration is illegal and unlawful and had further restrained Mr. Pankaj Garg from holding any arbitration with respect to the alleged arbitration proceedings initiated by the Corporate Debtor and passed a



detailed order. That the said order was duly intimated to Mr. Pankaj Garg on the same day. That the NCLT further directed that all the monies, which were withdrawn subsequent to the order of admission, be returned to the Corporate Debtor. Copy of the said order dated 31.05.2017 is annexed.

(xiii) That inspite of the said order dated 31.05.2017 passed by NCLT, Mr. Pankaj Garg passed the order dated 03.06.2017 in presence of the Corporate Debtor and had adjourned the alleged arbitration proceedings to 12.06.2017. Copy of the said order dated 03.06.2017 is annexed.

(xiv) That while the RP was inspecting the records at the Registered office of HGPL, it came to his notice that there are three vehicles(Two (2) Toyota Fortuner and One (1) Toyota Innova) which belongs to HGPL are being used by the erstwhile management for their own personal use. The RP vide email dated 12.06.2017 again asked Mr. Lokendra Singh Rathore to provide the said statutory records etc. and also asked him to send the said vehicles (Two(2) Toyota Fortuner and One (1) Toyota Innova) to Hotel Fort Rajwada, Jaisalmer immediately. Copy of the said email dated 12.06.2017 is annexed.

(xv) The said email dated 16.06.2017 was replied on 16.06.2017 and to circumvent the law and to frustrate the process of CIRP,



Mr. Lokendra Singh Rathore vide its purported email dated 16.06.2017 informed RP that all the statutory records were already provided. That surprisingly in the said email dated 16.06.2017 Mr. Rathore very conveniently ignored to refer anything about the said vehicles as was asked by the RP in his email dated 12.06.2017. Copy of the said email dated 16.06.2017 is annexed.

(xvi) The said email was duly replied by the RP vide email dated 23.06.2017 again reiterated his stand and again asked for the said relevant information/statutory records/financial records. That in the said email the RP herein had also mentioned the complete list of registers and files, which are required to be maintained at the Registered office of the Company as per provisions of Companies Act, 2013. That in the said email the RP again directed the erstwhile management to deliver the vehicles (Two (2) Toyota Fortuner and One (1) Toyota Innova) to Hotel Fort Rajwada, Jaisalmer immediately. But nothing is done by the Corporate Debtor. Copy of the said email dated 23.06.2017 is annexed.

(xvii) As the arbitration was still continuing inspite of the order dated 31.05.2017, the RP was constrained to file contempt application bearing company application No. 183/2017 under Section 60(5), 65, 69, 70, 72 and 74 of the Insolvency and Bankruptcy Code, 2016 read with section 425 of the Companies Act, 2013 against Mr. Pankaj Garg and the erstwhile management of HGPL and the

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Hon'ble NCLT vide order dated 29.06.2017 was pleased to issue notice on the said application and the matter was posted for hearing on 07.07.2017. Copy of the said order dated 29.06.2017 is annexed.

(xviii) The Corporate Debtor also filed an application for modification of the order dated 31.05.2017 wherein it has been stated that the arbitration had already commenced. The said application was dismissed by NCLT by the same order dated 29.06.2017.

(xix) The conduct of the Corporate Debtor can be seen from the very fact that the order dated 29.06.2017 passed by NCLT was challenged in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, before the District Court, Jaisalmer instead of filing a regular appeal before Hon'ble NCLAT. That the district Court Jaisalmer issued notice vide order dated 06.07.2017. Copy of the said order dated 06.07.2017 is annexed.

(xx) Thereafter, the Financial Creditor filed a SLP bearing SLP No. 18195 of 2017 before the Hon'ble Supreme Court of India praying for stay of arbitration proceedings and the appeal filed before District Court Jaisalmer. Vide order dated 21.07.2017, the Hon'ble Supreme Court of India was pleased to stay the same. Copy of the said order dated 21.07.2017 is annexed.



- (xxi) An application was filed by the RP before NCLT seeking direction against the Corporate Debtor to return the vehicles, statutory record etc. That vide order 25.07.2017 Hon'ble NCLT directed the Corporate Debtor to return the vehicles and statutory records of HGPL to the Resolution Professional. Copy of the said order dated 25.07.2017 is annexed.
- (xxii) That in order to put further pressure on the RP, the Suspended Director of the Corporate Debtor has filed an application No. 221 of 2017 before the Hon'ble NCLT challenging the conduct of the Resolution Professional. After detailed hearing, the Hon'ble NCLT vide order dated 16.08.2017 has dismissed the said application No. 221/2017 with a cost of Rs. 2 laks. Copy of the said order dated 16.08.2017 is annexed.
- (xxiii) In order to put further pressure on RP, the Corporate Debtor has allegedly filed an FIR (in August, 2017) against the Directors/Employees of AARC (the Financial Creditor), the RP as well as some unknown persons (who run a prominent Hotel called Surya Garh Hotel in Jaisalmer) including Mr. Jitendra Singh Rathore who is a relative of the Corporate Debtor and is also a Personal Guarantor for loans given by AARC (assignee of SBI) and SBI (earlier SBBJ) the two principal Secured Creditor of the Corporate Debtor.



The aforesaid details would demonstrate that the ex-management has not taken process issued by this forum supportively and is completely frustrated by filing a heap of litigation.

It is also pertinent to notice that we have asked the petitioner to serve the SHO/IO. The petitioner has duly served the S.H.O. Despite service he has not put in appearance.

Learned Counsel for the R1 & R2 seeks and is granted one-week time to file reply. Let the reply be filed within a week with a copy in advance to the counsel for the Applicant.

In the meanwhile, proceeding in the case FIR No. 605/17 P.S. Vaishali Nagar Jaipur shall remain stayed as the Investigation Officer has exercised power without any jurisdiction. The jurisdiction would vest with Investigation Officer only when a complaint is filed by IBBI.

List on 16th October 2017.

Sd-
CHIEF JUSTICE M. M. KUMAR
PRESIDENT

22.09.2017

Sd-
DEEPA KRISHAN
MEMBER (TECHNICAL)

Deepak Kumar