

BENCH-I

NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P.(IB) No. 446/KB/2017

Present: Hon'ble Member (J) Shri Vijai Pratap Singh
Hon'ble Member (J) Shri Jinan K.R

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING ON 04th December 2017, 10.30 A.M

Name of the Company	Shreeshyam Metaliks Pvt.Ltd.-Vs-Concast Steel & Power Ltd.		
Under Section	9 IBC		
Sl. No.	Name & Designation of Authorized Representative (IN CAPITAL LETTERS)	Appearing on behalf of	Signature with date

1. KANISHK KHETAN, ADV

PETITIONER

Kanishk Khetan
4/12/17

2. Saajay Kumar Agarwal, I.R.P

Saajay Kumar
4/12/17

3. Skasara

into
corporate debt
04/12/17

S.K. Singhi Adv.

Ankur Singhi Adv.

Riti Basu Adv.

Subhadeep Basu Adv.

Corporate Debtor

For S.K. Singhi Adv.

Skasara

4/12/17.

P.T.O.

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ORDER

Ld. Interim Resolution Professional (IRP) as well as Ld. Counsel for the operational creditor and the corporate debtor are present.

Ld. IRP has filed progress report which may be taken on record.

Shri I Sreekara Rao, Dy. General Manager, Insolvency and Bankruptcy Board of India has addressed a letter to Shri S. P. Chattopadhyay, Dy. Registrar, NCLT, Kolkata Bench dated 29/11/2017, which has been put by Shri S.P.Chattopadhyay, Dy. Registrar before this Bench. We have considered the letter in detail and passed the following order:

Today Shri S.P. Chattopadhyay, Designated Registrar, NCLT, Kolkata has put up a note before this bench along with a letter written by DGM, IBBI Shri Sreekara Rao dated 29.11.2017, which has been received by e-mail. Shri Sreekara Rao, Dy. General Manager, IBBI **has further directed to the Dy. Registrar/NCLT for placing the letter before the NCLT Kolkata Bench.** So, he has put up the note before this Bench.

In the said letter he has narrated the sequence of events as given below:

No	Date	Event
1	07.11.2017	NCLT passed an order with the following direction: "The Registry is directed to make a reference to the IBBI for the appointment of an interim

		resolution professional as per section 16 (4) of I&B Code."
2	10.11.2017 11.53 A.M.	Letter dated 08.11.2017 of Deputy Registrar, NCLT enclosing a copy of the above letter of NCLT "for information of the IBBI was booked by speed post at Esplanade S.O. (Based on Speed Post tracking).
3	14.11.2017 14.05 P.M.	The above letter was delivered by New Delhi GPO (based on speed post tracking).
4	15.11.2017 10.45 PM	The above letter was delivered by New Delhi GPO (based on speed post tracking).
5	15.11.2017 10.45 PM 17.11.17 12.44 PM	Due process under the IRP Recommendation Guidelines, 2017 was followed: Expression of interest was invited, eligible IPs were evaluated by a Committee based on the specified criteria, and an IP was identified and recommended.
6	17.11.2017 12.44 PM	Vide an e-mail, IBBI recommended the name of Shri Sanjay Kumar Agarwal for appointment as the IRP, under intimation to Shri Agarwal.
7	17.11.2017 18.08 PM	Vide an email, Deputy Registrar, NCLT informed that Ms Binani has already been appointed as IRP in the matter by an order dated 17.11.2017 before receiving mail from IBBI.
8	18.11.2017 2.39 PM.	Vide an e-mail, Shri Agarwal informed: "When contacted the Dy. Registrar conveyed that some other IRP has been appointed by the NCLT as recommendations from IBBI was late."

Para 3 and Para 4 the letter is as given below.

" 3. The Code allows the IBBI to recommend an IP within ten days of receipt of reference from the AA. As may be seen from row 5 of the table under Para 2, IBBI recommended the name of an IP in two days (50 hours to be precise). Yet it was not used.

4. When a reference is received from AA for recommending the name of an IP, the IBBI has no information about the volume, nature and complexity of the transaction for which an IRP is required. The AA who is considering a petition probably has better information than the IBBI has. It perhaps makes sense if AA appoints an IRP on its own rather than making a reference to the IBBI and saving ten days precious time. If considered appropriate, an amendment to the Code to this effect may be considered.

This letter may kindly be placed on the Hon'ble Bench."

A copy of this letter was further sent to Mr Pankaj Garg, Secretary, NCLT, New Delhi and Shri A.S. Bhatia, Joint Secretary, Ministry of Corporate Affairs, Shastri Bhawan, New Delhi.

Brief facts of the case are narrated below.

This petition under Section 9 of the Insolvency and Bankruptcy Code 2016 (IBC) was admitted by this Bench vide Order dated 07.11.2017. In this case, the petitioner had not recommended the name of an Insolvency Resolution Professional (IRP). Under Section 9 of the IBC 2016, the petitioner had the discretion to suggest the name of the IRP. In this case, the Operational Creditor has not recommended the name of IRP. Therefore, after the admission of the petition, the order was passed for referring the matter to Insolvency and Bankruptcy Board (IBBI) for the appointment of IRP under Section 16 (4) & (5) of the IBC 2016. For ready reference the following part of the order is quoted:

"The Registry is directed to make a reference to the IBBI for the appointment of an interim resolution professional as per Section 16(4) of I&B Code.

This order is communicated to the Operational Creditor as well as Corporate Debtor.

Urgent photostat certified copies of this Order, if applied for, be supplied to parties upon compliance of all requisite formalities."

In compliance with the above order, reference was made to IBBI by NCLT Kolkata Bench vide letter No.NCLT/KB/2017/1317-1319 dated 08.11.2017 by Shri S.P. Chattopadhyay, Designated Registrar, NCLT, Kolkata Bench. The letter Dt.8.11.17 contains the copy of the Tribunal's Order dated 07.11.2017 which was sent to the Operational Creditor, the Corporate Debtor and the Insolvency & Bankruptcy Board of India. It appears that though the letter was prepared on 8.11.17, it was dispatched by Speed Post on 10.11.2017.

It also appears from the record that on 13.11.2017 Reminder letter No.NCLT/IKB/Q(IBC)/2017 was again sent to the Dy. General Manager, IBBI, 7th Floor, Mayur Bhawan, Connaught Place, New Delhi, 110 001, wherein a request was further made to IBBI for the appointment of IRP in this matter. Order Sheet of the file also shows that **on 13.11.2017 the case was listed in the Court** in the hope that by that time nomination will be received from the IBBI. But no name was obtained from IBBI by that date. Therefore the order was passed by the Court as under:

"-----As per order dated 7th November 2017 this petition was admitted under Section 9 of I&B Code 2016 and IBBI was to nominate any person as Interim Resolution Professional. But till date, no information received from IBBI. The Registry is again directed to send information to the IBBI by e-mail today for the appointment of an Interim Resolution Professional as per provision of Section 16(4) of I&B Code 2016.

List on 16.11.2017."

It also appears that in compliance with our order dated 13.11.2017 reminder for the appointment of IRP was again sent to the IBBI through e-mail dated 15.11.17 at 1.20 p.m. by Dy. Registrar, NCLT. This e-mail had attachment of Court's Order dated 07.11.2017 and 13.11.2017 for the appointment of IRP.

It is also pertinent to mention that maximum ten days' time limit prescribed for appointment of IRP from the date of admission of the petition was to expire on 17.11.2017. Therefore, on our instruction Designated Registrar/NCLT/Kolkata again sent a request to the IBBI through e-mail on 15.11.2017 at 6.30 p.m. attaching all the earlier requests sent through e-mail. In this e-mail again it was emphasised to appoint an IRP at the earliest. It further reveals that on 16.11.2017 at 11.06 hrs. Another mail was sent to DGM, IBBI, Mr Rao at his mail address sreekararao@ibbi.gov.in.

It was stated in the mail message that **"we are yet to receive your approval for appointment of IRP for C.P.(IB) No.446/KB/2017 in the matter of Shreeshyam Metaliks Pvt. Ltd. Vs. Concast Steel & Power Ltd. You are requested to appoint IRP urgently.** This has reference to our e-mail dated 15.11.2017 at 6.30 p.m. sent to you."

It also appears that on 16.11.2017 a judicial order was passed by us which is quoted below for ready reference:

"Ld. Counsel for the operational creditor and the corporate debtor are present.

By our order dated 07.11.2017 Insolvency and Bankruptcy Board of India (IBBI) was requested to propose the name of any Insolvency Professional for appointing as an Insolvency Resolution Professional, but till date, we have not received any communication from the IBBI. A reminder letter is sent to IBBI, and if no reply is received

recommending the name of IRP from IBBI, then we will pass a necessary order.

List on 17.11.2017 for further orders.

Copy of the order may be communicated to IBBI immediately."

This order dt.16.11.17 was again complied with by the Designated Registrar/NCLT/Kolkata Bench. **He sent a mail to DGM, IBBI, Shri Sreekara Rao on 16.11.2017 at 6.09 p.m.** attaching all earlier court orders. In this letter, it was explicitly mentioned that

"As per our order dated 16.11.2017 on NCLT Kolkata Bench appended herewith, you are once again requested to appoint IRP immediately in the following matter:

C.P.(IB) No.446/KB/2017 in the case of Shreeshyam Metaliks Pvt. Ltd. Vs. Concast Steel & Power Ltd.

This has already been discussed with you over the telephone today, and e-mail also sent in the morning. Matter extremely urgent."

But on 17.11.2017, i.e. the date of hearing **happens to be the 11th day after referring for the appointment of IRP to the IBBI;** the case was listed before this Bench. But until the time of hearing no communication was received from IBBI.

During the hearing of the case, the learned counsel for the operational creditor filed a Form-2 declaration of IRP, and he requested that since no name has been recommended by the IBBI, therefore their proposal for appointment of IRP may be considered. We don't have any other name at that time, so this bench decided to appoint Ms Mamta Binnani as IRP. The order was dictated by us in the open court to nominate Ms Mamta Binani as IRP.

When we retired to chambers at 1.30 PM after a court hearing, immediately the Designated Registrar of the Bench laid a letter received from IBBI (e-mail message) before both of us, then we came to know that IBBI has recommended the name of Mr Sanjay Kumar Agarwal as IRP. **This mail was sent on 17.11.2017 at 12.44 p.m.,** whereas case was listed for hearing at 10.30 AM on the same day, and this fact was in the knowledge of Mr **DGM, IBBI, Shri Sreekara Rao** **that case is listed in Court on 17th Nov 2017.** We are not sure whether the mail recommending the name of Mr S K Agarwal was sent after knowledge of the court order dt.17.11.2017, which was dictated in open court. On 17th Nov 2017 when the case was taken up for hearing by that time email recommendation from IBBI was not received and Advocate representing operational creditor submitted consent letter of IRP with permission of the court. In the circumstances we accepted the request of Learned advocate of operational creditor and order was dictated in open court to appoint M/S Mamta Binnani as IRP.

However, we received the name of IRP from IBBI on 17.11.17 at 1.30 PM in the chamber and by that time order was not typed by the P.S., so we gave a thought to modify our order, and subsequently, we appointed Shri Sanjay Kumar Agarwal as IRP, whose name was recommended by IBBI.

Because we have changed the name of M/S Mamta Binnani from the case of Shreeshyam Metaliks Pvt. Ltd, even after pronouncement of her name in open court, so we appointed M/s Mamta Binnani in another case no CP(IB)213/KB/2017 of Stewarts And Lloyds of India Ltd as Liquidator as on the very same day.

It is pertinent to mention that we have appointed Shri Sanjay Kumar Agarwal as IRP on 17.11.2017 after modifying our earlier order, solely on the basis that we have earlier referred IBBI to recommend the name of IRP. We considered the recommendation of IBBI and appointed

Sri Sanjay Kumar Agarwal as IRP, even though we received the proposal belatedly.

It is also important to mention that the mail received from IBBI was received on 17.11.2017 at 12.44 p.m. and registered letter regarding the appointment of Shri S.K. Agarwal was received in the NCLT Kolkata Bench on 22.11.2017 which has been entered in the register at Serial Number 9967 on 22.11.2017. But before that, we acted on the email received from IBBI and considered the recommendation of IBBI.

It is important to point out that 180 days is the time limit prescribed under the I & B Code 2016 for completion of the insolvency resolution process from the date of admission and **no such provision is there for excluding ten days period, that takes place for getting the name of IRP from IBBI.** However, Section 16 (4) of the I B Code provides that name for the appointment of IRP will be provided by IBBI, where the Operational Creditor has suggested no name, then IBBI within ten days of the receipt of the reference shall recommend the name of the IRP to the Adjudicating Authority. **This ten days time limit is the maximum time limit prescribed for suggesting the name of IRP.** By mandating ten days time for suggesting the name of IRP, the IBBI should not have considered exhausting ten days time limit in every case, because there is no provision to exclude these ten days from the total duration provided for completion of Insolvency Resolution Process. However, we made an effort so that within a statutory period of 10 days given u/s 16(4) of the Code for the appointment of IRP could be achieved. Otherwise, the timeline of 180 days provided for completion of Resolution Process under the Code cannot be achieved. Here we find that in spite of our every possible effort for getting the name of IRP from IBBI, the IBBI did not respond responsibly. A senior officer of the rank of DGM, IBBI, who is entrusted with the matters

relating to the recommendation of the name of IRP, has tried to defy the authority of Court and treated himself as a Controlling Authority of the NCLT. It is to be made clear that the bench of NCLT while exercising jurisdiction as an Adjudicating Authority remains a Court and by discharging the functions of Adjudicating Authority, the order of the court does not adopt the nature of an order passed by any authority under control of IBBI. It is a sad state of affairs that IBBI has not considered the sensitiveness of the matter. By getting several reminders through email and telephonic talk by Designated Registrar of NCLT, Kolkata Bench they have not felt the seriousness of the issue. The DGM, IBBI, **Shri Sreekara Rao** was not considering the order of Adjudicating Authority as the order of Court.

The language of the letter is a sarcastic remark against a Court order. Shri Sreekara Rao, Dy. GM, IBBI has failed to understand that he has no right to intervene in the judicial functioning of NCLT. It is further made clear that NCLT is a separate organisation and is not under control of any other authority including IBBI. The IBBI does not have any power to dictate the terms of the order. **It was expected from IBBI to have acted upon with seriousness on the several letters/reminders/e-mails/telephonic talk from the NCLT for appointment of IRP. But it appears that the concerned officials intentionally handled this matter very casually and carelessly** in spite of the fact that the case was already listed on 17.11.2017 at 10.30 AM., just after 10 days after admission of the petition **they have intentionally delayed the mail recommending the name of IRP.** It also appears that Shri Sreekara Rao lacks the basic knowledge that amendment in the IB Code or the regulations cannot be done by NCLT Benches.

It is also to be made clear that any administrative authority has no right to interfere in the JUDICIAL FUNCTIONING OF A COURT. In any case if IBBI were aggrieved by any of our judicial order, they should have challenged the same before the appropriate forum. **Writing of**

letter with a sarcastic remark against a Court is not permissible at any cost ,who so ever it may be. The purpose of sending this letter to us and sending copies to different authorities is not known to us.

On complete perusal of the record and after considering the language of the letter shows that intention of writing the letter to the court for amending IBC 2016,by Dy. GM, IBBI, Shri Sreekara Rao is in a nature of passing sarcastic remark only. If he would have been serious about the amendment of I B Code, then he should have taken appropriate steps through the chairperson of IBBI.

In para 3 & 4 of the said letter displeasure has been shown by the DGM Mr Shri Sreekara Rao for not considering the recommendation of IBBI regarding the appointment of IRP even though the name of Sri Sanjay Kumar Agarwal was recommended within 50 hours of the receipt of the reference from Adjudicating Authority under IBC/Kolkata Bench of NCLT.

The DGM, IBBI ignored the authority of Court and passed sarcastic remark against a court order which is contempt of the authority of Court. By passing snide comment against a judicial order passed by the Division Bench of NCLT exercising jurisdiction as an Adjudicating Authority is a serious matter which cannot be ignored for the majesty of the Court.

He has suggested to this Court to amend the Insolvency and Bankruptcy Code, in spite of the knowledge that this is a legislative function and Court has no role in making or amending the statutory provision.Such type of contemptuous act is becoming more severe and shocking when it is done by DGM of a body, which is itself a Regulatory Body for implementation of I& B Code and not by a person who contains no knowledge about Court proceedings.

Let notice be issued against DGM, IBBI, Mr Shri Sreekara Rao for summoning him in person in Court on DT. 12th Dec 2017

at 10.30 AM to show cause as to why action should not be taken against him under Contempt of Court Act.

Copy of the order should be communicated to Chairperson IBBI Dr M.S Sahoo for issuing necessary direction for making the appearance of DGM Mr Shri Sreekara Rao in court.

Designated Registrar is further directed to serve the copy of the order on DGM Mr Shri Sreekara Rao, IBBI.

List on 12/12/2017.

sdl-
(Jinan K.R.)
Member (J)

sdl-
(V.P.Singh)
Member (J)