

In the National Company Law Tribunal
Mumbai Bench, Mumbai

MA 362/2017 IN CP No. 1132/I&BC/NCLT/MB/MAH/2017

Under Section 10 of Insolvency & Bankruptcy Code, 2016
(Application by a Financial Creditor)

In the matter of

M/s. Raj Oil Mills Ltd.,
Registered Office:
224, Bellasis Road, Nagpada,
Mumbai – 400 008

AND

M/s. Edelweiss Asset Reconstruction Company Limited
Applicant / Financial Creditor.

Order delivered on 15.09.2017.

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)
Hon'ble Shri Bhaskara Pantula Mohan, Member (Judicial)

Present :

1. Mr. Rashid Boatwala, Advocate
2. Ms. Suchitra Valjee, Advocate
3. Mr. Rashi Agarwal, Advocate
4. Mr. Vinay Deshpande, Advocate
5. Mr. Nikkil Rajani, Advocate
6. Mr. Ganesh Khatal, Sicom Ltd. (Legal)
7. Mr. Ami Jain, Advocate for IRP.

Per M.K. Shrawat, Member (Judicial)

ORDER

1. An application has been moved on 24.08.2017 (MA No. 362/2017) by a Financial Creditor viz. M/s. Edelweiss Asset Reconstruction Company Limited seeking following relief:-

"In these circumstances, it is, therefore, most respectfully prayed by the Applicant that this Hon'ble Tribunal may be pleased to:-

- (A) *Appoint Mr. Rajendra Ganatra (Registration No. IBBI/IPA-003/IP-N00049/2017-18/10363) enrolled with the Indian Institute of Insolvency Professionals of ICAI as Insolvency Professional, as the RP of Respondent No. 1;*
- (B) *pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."*

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2. **Background of the case** is that the Corporate Debtor viz. M/s. Raj Oil Mills has submitted a Petition on 23.06.2017 seeking invocation of the provisions of **section 10 of the I&B Code** to declare itself insolvent. An order was pronounced on 10.07.2017 vide TCP No.1132/I&BP/NCLT/MB/MAH/2017 wherein the Petition was admitted and by appointing an IRP viz. Mr. U.V.G. Nayak, it was ordered to commence the Corporate Insolvency Resolution Process. Consequence thereupon the IRP called a meeting of Committee of Creditors on 09.08.2017. A commencement report was placed on record. Thereafter, an Application (MA No.355/2017) was moved by the IRP seeking direction to remove the dead-lock arose due to unclear verdict of the Committee of Creditors in favour of one of the Insolvency Professional. On due consideration of the facts and the percentage of voting for and against the said agenda, this Bench has decided the said M.A. (355/2017) vide order dated 24.08.2017 in following manner :-

"6. *Heard the submissions of the Learned Representatives present on behalf of the IRP and a Representative on behalf of the Co-operative Bank, one of the Financial Creditor. Also heard IRP Mr. Nayak present in person. Facts as narrated in the Application have demonstrated that due to unclear stand by few Creditors viz. Edelweiss ARC, SIDBI Limited and IFCI Factors Limited the selection of the Insolvency Professional could not be finalized along with other Resolutions. On due consideration of the percentage of Voting for and against as annexed with this Application, this bench is of the view that the present IRP shall immediately commence one more Meeting of the Creditors and repeat the Resolutions specially the Resolution about the selection of the Insolvency IP within Five days time from the receipt of this Order. The process already adopted can be followed again. It is hereby made clear that time is the essence hence any deadlock or stalemate has to be removed as early as possible. The outcome of the COC and the Compliance Report shall be presented before this Bench on the very next day, if finalized, or in the alternative, within Two days time.*

7. *During this interregnum the present IRP shall perform all the duties as prescribed under The Code so that the ongoing Business of the Debtor Company should not get effected.*

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8. *On perusal of the bifurcation of the remuneration and expenses of the IRP and Company Secretary, it appears that the Professional Fees is reasonable for the time being but subject to revision depending upon the progress or out come of the Insolvency Resolution Process."*

3. In compliance of the directions of the said order, IRP Mr. U.V.G. Nayak has placed on record a compliance report dated 12.09.2017. In the compliance report it is informed that a second meeting of the Committee of Creditors (CoC) was convened on 11.09.2017 and the agenda put up for voting, as informed in the report, was as under:-

Item No.	Matters for voting
1	To take note of and approve the remuneration and expenses incurred on or by the IRP including that on professional advisors which shall constitute the Corporate Insolvency Resolution Process costs till the date of the first meeting i.e. 08.08.2017
2	To appoint the IRP, Mr. U V G Nayak, Chartered Accountant / Insolvency Professional, as the Resolution Professional and to fix the remuneration and expenses, which shall constitute Corporate Insolvency Resolution Process costs
3	To replace the existing IRP and appoint Mr. Rajendra M. Ganatra, CFA/ Insolvency Professional, as the Resolution Professional and to fix the remuneration and expenses which shall constitute Corporate Insolvency Resolution Process costs
4	To fix a limit up to which the Resolution Professional, without the permission of the Committee of Creditors, is entitled to initiate a debit transaction with the financial institution / banks maintaining accounts of the Corporate Debtor
5	To take note and approve further expenses / costs incurred on or by the IRP from 09.08.2017 to date, i.e. 07.09.2017.

4. The Result of the voting has also been informed in this "compliance report". Presently we are not concerned about rest of the agenda but confine ourselves to the **main issue of appointment of RP/Insolvency Professional** which is raked up in this Miscellaneous Application, now under consideration. It is informed that the continuation and appointment of Mr. U.V.G. Nayak was voted in favour by 31.70 share of voting, however, the appointment of Mr. Rajendra M. Ganatra was voted in favour by 61.84 of the voting share. It is clarified that the Financial Creditor M/s. Edelweiss ARC is having 53.52 per cent and IFCI Factors has 8.32 per cent, thus totalling 61.84 per cent, have approved the name of Mr. Ganatra as Insolvency Professional.

5. A legal question has been raised that in the absence of clear majority of 75 percent of voting share whether one name of Insolvency Professional can be approved? In terms of **section 22(2) of the Code** it is prescribed that the **Committee of Creditors may by a majority vote of not less than 75 per cent of the voting share** of the Financial Creditors either resolve to appoint the IRP as a Resolution Professional or to replace the IRP by another Resolution Professional. So, in a situation when the requisite 75 per cent has not reached and only 61.84 per cent have resolved for appointment of Mr. Ganatra then whether the requisite compliance of the section has been made? According to the Applicant it has resulted into a dead-lock situation.
6. **From the side of the IRP Mr. Nayak**, Learned Counsel pleaded that the creditors are as many as 12 (approx.) in number, who have voted in favour of Mr. Nayak, although having lesser percentage (31.50 %) of voting right. According to the argument, the number of Financial Creditors were more in favour of continuance of the present IRP Mr. Nayak hence the application deserves to be rejected. According to her on the last occasion when the meeting was convened the number of creditors were in favour of Mr. Nayak. On the other hand, the name of Mr. Ganatra was supported by only two Financial Creditors i.e. Edelweiss and IFCI. The result of the Resolution should be based upon democratic pattern, hence the number of hands in favour of the IRP should be approved. The say of only two persons as against the say of rest of the ten persons should be overruled because such a Resolution is undemocratic. Further adding in the argument it is pleaded that the suggestion of this democratic method is the only viable method specially when the percentage method had failed or not arrived at a final conclusion.
7. On the other hand, **from the side of the Financial Creditor**, Learned Counsel has drawn our attention on the 'objects & reasons' of enactment of I & B Code wherein while narrating the intention of introduction of Code in Clause 22 it is explained that one of the main function of the CoC is the appointment of the Resolution Professional. In the first meeting of the CoC the committee may decide

by a majority of 75% of voting share of the Financial Creditors to appoint the IRP as the Resolution Professional or propose the name of another insolvency professional to be appointed as the Resolution Professional. In this explanatory Clause it is said :-

"Clause 22 provides that one of the main functions of the committee of creditors is that appointment of the resolution professional. Clause 22 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. The adjudicating authority shall, upon receipt of a confirmation from the Insolvency and Bankruptcy Board of India, appoint the proposed insolvency resolution professional as the resolution professional. Where no confirmation is received from the Insolvency and Bankruptcy Board of India, the interim resolution professional is to continue as the resolution professional until the receipt of the confirmation.

This clause also provides for involvement of the financial creditor in the appointment of the resolution professional. The committee of creditors are likely to be most incentivised to select the person who is best suited for the task – as the fees payable to the resolution professional will in all probability be taken out of the company's assets (which will eventually affect the final repayment to the creditors), they will often choose a person who is familiar with the company's business, its activities or assets or has skills, knowledge or experience in handling the particular circumstances of a case."

7.1 Learned Counsel of the Applicant has placed on record few judgments in support of the above submission that the term "may" or "shall" whether to be mandatory or directory is to be decided after examining the intent of the Legislature. The case laws cited are :-

- 1. Bachahan Devi And Another Vs. Nagar Nigam, Gorakhpur And Another, reported in (2008) 12 Supreme Court Cases 372. Relevant Paras 18 to 21,**

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2. Sarla Goel And Others Vs. Kishan Chand, reported in (2009) 7**Supreme Court Cases 658.**

- 7.2 Learned Counsel has also drawn our attention on an order of NCLT, Kolkatta Bench dated 09.03.2017 in the case of Edelweiss Asset Reconstruction Company Limited acting in its capacity as trustee of EARC Trust SC 44 and 116 having its office at Edelweiss House, Off. CST Road, Kalina, Mumbai-400 098 Vs. Sree Metaliks Limited (under Insolvency Resolution Process) represented through Mr. S.M. Gupta, Interim Resolution Professional wherein the percentage of voting in favour of one of the IP was 67.27 per cent, hence the issue was that in the absence of requisite percentage of vote of 75 per cent whether the proposed name could be approved. It was held that the name of the said Professional was to be approved for the purpose of reference to Insolvency Board. The Learned Counsel has, therefore, pleaded that the decision of the Coordinate Bench has direct persuasive value hence the decision should be taken in the present application on identical lines.

FINDINGS

8. In the light of the foregoing discussion an interesting situation had arisen, which might have not been apprehended while formulating the clause of 75 per cent of voting share of the Financial Creditor under section 22(1) of The Code. The situation is that on two occasions when the Meetings of the Committee of Creditors were held with the Agenda to approve the continuance of the existing IRP or to replace by appointing a new Insolvency Professional, the largest Financial Creditor among the list of the Financial Creditors were two in number viz. Edelweiss ARC and IFCI Factors having 53.52 per cent and 8.32 per cent i.e. in total 61.84 per cent. Admittedly, the total of the percentage of the two largest Creditors had not reached to the threshold limit of 75 per cent. To resolve this stalemate, this Application is before us and to decide the same we have examined the objects and reasons of introduction of this new Code, (reproduced above) and noticed

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that the Committee has approved that the Committee of Creditors are likely to be most incentivised to select the person who is best suited for the task. It has also been observed in the said Report of the Committee that the Financial Creditor often choose a person who is familiar with the Company's business, its activity and has skill, knowledge, experience etc. in handling the particular circumstances of a case.

- 8.1 A conclusion can be drawn that the responsibility is affixed on the Financial Creditor to propose the name of the IRP. A Financial Creditor who is the largest stake holder in a Company should be heard before taking any decision on selection of the IP. We have examined that the intention of the Legislature was definitely tilted in favour of a Financial Creditor who has the largest stake. That intention is to be carried out as it had already happened in the case decided by the respected Kolkatta Bench of NCLT (refer *supra*). There is no occasion in the present scenario to depart from the view already taken by the NCLT, Kolkatta Bench. The fixation of 75 per cent voting share itself portray a clear intention of the Hon'ble Legislatures that the Financial Creditors having largest percentage of stake should be given preference over the stake holders having nominal percentage of voting rights. Moreover, the term "may" used in this section has prescribed a jurisdiction to deal with the issue of percentage of voting share depending upon the facts and circumstances of a case. The case laws on this subject have already been cited *supra* wherein it is held that before taking any decision the intent of the Legislation is required to be analysed. After doing so, we are of the conscientious view that this dead lock has to be removed by approving the name of Mr. Rajendra M. Ganatra, whose consent is placed on record. A Professional who is familiar with the nature of business and knowledge of handling the Resolution Process is to be selected that too based upon the recommendation of the highest percentage of the Creditors.
- 8.2 The term "voting share" is duly defined in section 5(28) of The Code which says, "means the share of the voting rights of a single financial creditor in

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the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor". A co-joint reading of section 5(28) and section 22(2) thus result into a meaningful solution which is workable and suitable for the insolvency process. As a result, in our opinion, a viable solution is to give the preference to the decision taken by the largest percentage in voting rights of the Financial Creditor(s).

- 8.3 Before we part with, it is worth to place on record that the reason given in para 17 in the Application now under consideration for not approving the name of the existing IRP was neither necessary nor required hence to be removed/expunged from the record. Rather, this Bench place on record a word of appreciation for the Professional work supervised by Mr. U V G Nayak (IRP) after perusing the compliance reports timely submitted by him. The reports as submitted by him are found to be systematic, informative, exhaustive as well as covered the required details. We have also noted that the Learned Advocate of the IRP remained present when the Meeting was commenced along with other Professionals and their assistance in conducting the Meeting efficiently and representation of the matter also deserve a word of appreciation.
9. Resultantly, the Miscellaneous Application is allowed and appointment of Mr. Rajendra M. Ganatra as Insolvency Professional is hereby approved.

Sd/-

BHASKARA PANTULA MOHAN

Member (Judicial)

Date : 15.09.2017

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Sd/-

M.K.SHRAWAT

Member (Judicial)