

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins) No. 116 of 2022

[Arising out of Impugned Order dated 9th February, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala) in CP (IB) No. 29/KOB/2021]

IN THE MATTER OF:

**M/s IDBI Bank Limited
Rep. by Smt. Lakshmi S Kumar K
Having office at Kottakkal Branch
Ghiyathi Tower, Changuvetty,
Kottakkal, Malappuram – 676501
Kerala**

...Appellant

Versus

**C.J. Davis
(IRP of Tip Top Furniture Private Limited)
4/707, FF, N.H. Kottakal, Edaraikkode P.O.
Malappuram – 676501
Kerala**

...Respondent

Present:

For Appellant : Mr. A.G. Sathiyannarayana, Advocate

**For Respondent : Mr. P.V. Dinesh, Advocate for IRP
Ms. Reetha, Advocate**

J U D G M E N T
(Virtual Mode)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Impugned Order dated 09.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala) in IA No. 26 of 2022 in CP (IB) No.

29/KOB/2021, whereby the Adjudicating Authority rejected the IA filed by the Appellant / Financial Creditor.

Brief Facts:

Appellant's Submissions:

2. The Learned Counsel for the Appellant submitted that the Adjudicating Authority rejected the Application filed by the Appellant /Financial Creditor under Section 22(3)(b) of the I&B Code, 2016. The above applications have been made by the Appellant praying the Bench to appoint Shri CA Mahalingam Suresh Kumar as Resolution Professional of the Corporate Debtor. However, the Learned Adjudicating Authority rejected the prayer of the Appellant, aggrieved by the same the present Appeal is preferred.

3. It is submitted that the Appellant Bank filed Company Application before the Learned Adjudicating Authority under Section 7 of the I&B Code, 2016 seeking for Initiation of the CIRP against the Corporate Debtor and in the said Application, the Appellant had proposed to appoint Shri CA Mahalingam Suresh Kumar as the IRP after its internal selection process. However, the Learned Adjudicating Authority rejected the name as proposed by the Appellant for the reason that the proposed name was not finding in the NCLT, Kochi Bench's list of Insolvency Professionals circulated by the IBBI and appointed the Respondent from the said list as the IRP to carry out the CIRP of the Corporate Debtor.

4. The IRP after analysis of the claims has constituted the CoC by naming the Appellant Bank as the major Financial Creditor of the Corporate Debtor

by allotting 98.03% voting rights. The 1st CoC Meeting held on 21.01.2022 by the IRP as the Chairman in which various resolutions were proposed and the same was considered by the CoC and most importantly the CoC has proposed and recommended to appoint Shri CA Mahalingam Suresh Kumar as Insolvency Professional and valid Authorization For Assignment (AFA) issued by IBBI.

5. The CoC Members comprising of the Appellant Bank and South Indian Bank, after elaborate discussions about the experience and the past handled assignments of the IRP has unanimously decided to appoint Shri CA Mahalingam Suresh Kumar as an IRP and passed an unanimous resolution for replacement of the IRP and appointment of Shri CA Mahalingam Suresh Kumar as the RP in compliance with Section 22(2) of the I&B Code, 2016 and filed an Application before the Learned Adjudicating Authority.

6. The Learned Adjudicating Authority rejected the Application on the ground that the Respondent IRP is eligible to be appointed as RP and he offered himself to be appointed as RP on the 1st CoC Meeting for a professional fee of Rs.1,50,000/- per month. Further, the Learned Adjudicating Authority was of the view that the present IRP is eligible to be appointed as an RP since there is no adverse comments against him and there is no reason to replace him. Further, the Learned Adjudicating Authority was of the view that Shri CA Mahalingam Suresh Kumar cannot be appointed as the RP of the Corporate Debtor as his name is not available in the panel issued by the IBBI

for Kochi Bench for the period from 01.01.2022 to 30.06.2022 or in the earlier panel from 01.07.2021 to 31.12.2021, therefore, he cannot be appointed as the RP.

7. The Learned Adjudicating Authority erred in rejecting the Application on the ground that appointing IRP from the panel of IP's circulated by IBBI and not considering the appointment of IRP as proposed by the Appellant is in contravention of provisions of law. Since as per Section 16(2) of IBC, it is mandatory on the part of the Learned Adjudicating Authority to appoint the proposed IRP as long as there is no disciplinary proceedings against the said RP and who holds valid Authorization For Assignment (AFA). The Learned Adjudicating Authority failed to take into consideration that the Appellant Bank being the Member of CoC and holding more than 98% voting rights, passed resolution for appointment of Shri CA Mahalingam Suresh Kumar and rejecting the Application is in gross violation of the Appellant's rights under law and the impugned order is arbitrary and liable to be set aside.

8. The Learned Adjudicating Authority erred in rejecting the Application for appointment of RP in contravention to Section 22(4) and (5) of the I&B Code, 2016 and has acted beyond its power as it has no equity jurisdiction to decide whether it can appoint or reject the RP proposed to be appointed by the CoC. The Learned Counsel relied upon the judgments of this Tribunal in support of his case.

9. In view of the reasons as stated above, the Learned Counsel prayed this Bench to allow the Appeal and set aside the impugned order passed by the Adjudicating Authority.

Respondent's Submissions:

10. The Respondent filed reply and submitted that the Hon'ble Adjudicating Authority primarily found that the IRP proposed by the Appellant was handling too many assignments and appointed the Respondent from the panel of IRP maintained by the IBBI. It is submitted that despite rejection of the name proposed by the Appellant, the CoC in its meeting dated 21.01.2022 in which the Appellant hold 98.03% voting share appointed again Shri CA Mahalingam Suresh Kumar as RP replacing the Respondent stating that the CoC approved the appointment and the same is in the domain of CoC members exercising their commercial wisdom.

11. The Learned Counsel further submitted that from the IBBI website the proposed RP is handling many assignments when he was given consent to function as RP. The IP (Insolvency Professional) must refrain from taking too many assignments, if he is unlikely to devote adequate time to each of the assignments under Clause 22 of the Code of conduct of the IP.

12. In view of the aforesaid reasons the Learned Counsel prayed this Bench to dismiss the Appeal.

Analysis / Appraisal:

13. Heard the Learned Counsel for the parties perused the pleadings, documents and citations relied upon by the respective parties. The point for

consideration is whether the decision taken by the CoC in their commercial wisdom can be interfered with.

14. The Appellant filed Section 7 Application before the Learned Adjudicating Authority seeking initiation of CIRP against the Corporate Debtor and the Application was admitted on 21.12.2021 and appointed the Respondent Mr. C.J. Davis as the Interim Resolution Professional. The IRP on analysing the claims, constituted the CoC by naming the Appellant as the major Financial Creditor of the Corporate Debtor by allotting 98.03% voting rights. The 1st CoC Meeting held on 21.01.2022 and the IRP acted as Chairman in which various Resolutions were proposed and the same was considered by the CoC. In the said CoC one of the Resolution that has been proposed and recommended to appoint Shri CA Mahalingam Suresh Kumar an Insolvency Professional as Resolution Professional of the Corporate Debtor by circulating his consent. The Appellant had produced the Minutes of the Meeting dated 21.01.2022 along with the Appeal. The constitution of CoC is as under:

Member of the CoC	Voting Right in percentage (%)
IDBI Bank (Appellant)	98.03%
South Indian Bank	1.97%

15. At Agenda item No. B-4, the following Resolution has been passed:

“Agenda Item No. B-4

To discuss and vote upon the appointment of Resolution Professional and to fix his fees.

“RESOLVED THAT pursuant to Section 22(2) Insolvency and Bankruptcy Code, 2016 and other applicable provisions, if any, of the Insolvency and bankruptcy Code, 2016 and in accordance with rules and regulations made there under, approval of the members of the committee of creditors is hereby accorded for appointment of CA. Mahalingam Suresh Kumar as the Resolution Professional in the matter of Corporate Insolvency Resolution Process of M/s Tip Top furniture Private Limited.

“RESOLVED FURTHER THAT Resolution Professional be and is hereby authorised to do all such acts, deeds and things as may be required necessary or incidental thereto.”

16. Even prior to the Resolution passed by the CoC appointing Shri CA Mahalingam Suresh Kumar, the Indian Institution of Insolvency Professionals of ICAI issued Form-B an Authorization For Assignment (AFA) dated 26.11.2021 and the authorization is valid from 26.11.2021 to 25.11.2022. Further, the said Shri CA Mahalingam Suresh Kumar has given his written consent in Form-AA dated 20.01.2022 i.e. prior to the 1st CoC dated 21.01.2022.

17. The Learned Counsel for the Appellant submitted that the rejection of the Application by the Adjudicating Authority is in contravention to Section 22(4) and (5) of the I&B Code, 2016. Section 22 empowers appointment of Resolution Professional. Sub-section (1) of Section 22 reads as under:

“The 1st Meeting of the Committee of Creditors shall be held within 7 days of the Constitution of the Committee of Creditors.”

Sub-section (2) of Section 22 reads as under:

“The Committee of Creditors, may in the 1st Meeting, by a majority vote of not less than 66% 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.”

“Per sub-section (3), where the Committee of Creditors resolves under sub-section (2)

a)

b) *To replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed Resolution Professional (along with a written consent from the proposed Resolution Professional in the specified form.”*

18. Admittedly, the Appellant had filed the Application before the Learned Adjudicating Authority under Section 22(3)(b) of the I&B Code, 2016 with a specific prayer to appoint Shri CA Mahalingam Suresh Kumar Insolvency Professional as the Resolution Professional of the Corporate Debtor. The Application filed by the Appellant is in accordance with law and rightly invoked the provisions of law. As per sub-section (3) of Section 22, the Committee of Creditors in its 1st Meeting by a majority vote not less than 66% of the voting share either to continue the IRP as RP under sub-clause (a) of sub-section (3). Further, the Committee of Creditors may replace the IRP, in such case it shall file an Application before the Adjudicating Authority along with written consent from the proposed Resolution Professional in the

specified form as per sub-clause (b) of sub-section (3). It is apt to note that Shri CA Mahalingam Suresh Kumar possessing Form-B i.e. Authorization For Assignment which is valid from 26.11.2021 to 25.11.2022 and gave his written consent to act as Resolution Professional in Form-AA dated 20.01.2022. Since the Appellant had complied with the provision of law as mandated and the Adjudicating Authority ought to have considered the same without going into the other technicalities. When the Applicant comply with the provisions of law and there is no scope to reject the prayer or relief as sought by the Applicant.

19. The Learned Counsel for the Appellant relied upon the decision of this Tribunal in the matter of Naveen Kumar Jain Vs. Committee of Creditors versus KDK Enterprises Limited & Ors. in CA (AT) (Ins) No.882 of 2020 dated 03.11.2020. This Tribunal held as under:

“In the instant case, the sole Financial Creditor (Indian Bank) has voted to replace the Resolution Professional under Section 22 of the I&B Code, which means the replacement is sought with 100% voting shares while the requisite vote is 66%. It is well settled that the commercial wisdom of the Committee of Creditors which covers matters including the replacement of the Resolution Professional does not fall within the limited scope of judicial review and is not justiciable.”

20. Further, the Learned Counsel relied upon the judgments of this Tribunal in the matter of Committee of Creditors of LEEL Electrical Limited through State Bank of India Vs. LEEL Electrical Limited through its Interim

Resolution Professional, Arvind Mittal in CA (AT) (Ins) No. 1100 of 2020 dated 21.12.2020. This Tribunal relying upon the earlier decision held that *“appointment of RP is governed by Section 22 which provides that the 1st Meeting of CoC shall be held within 7 days of constitution of CoC and the CoC may by a majority vote of not less than 66% of the voting share of Financial Creditors either resolve to appoint the IRP as a Resolution Professional or to replace the IRP by another Resolution Professional. It is now well settled that the decision in regard to appointment of IRP as RP or replacement of IRP by another RP falling within the ambit of Section 22 of I&B Code, 2016 is a decision based on commercial wisdom of CoC, which is not amenable to judicial review”*.

21. In the present case, admittedly the 1st CoC was held on 21.01.2022 and at Agenda Item No. B-4 the CoC in accordance with Section 22(2) of the I&B Code, 2016, was resolved unanimously resolved for appointment of Shri CA Mahalingam Suresh Kumar as the Resolution Professional in respect of the Corporate Debtor. Thus, it can be seen that the Appellant is having 98.03% voting share in the Committee of Creditors filed the Application for appointment of RP, hence the voting share of the Appellant in passing the Resolution is much more than the required voting percentage i.e. 66%. This Tribunal is of the view that, since two Members of CoC participated it is deemed 100% voting share in favour of the Resolution and it is a unanimous. In any case, the Appellant is having the majority voting share accorded the Resolution for appointment of new RP.

22. If the decision of the CoC, exercising their commercial wisdom in accordance with law the same cannot be interfered with by the Tribunals as held by the Hon'ble Supreme Court in the matter of Vallal RCK Vs. M/s Siva Industries and Holdings Limited & Ors. (CA 1811-1812 of 2022) liable (SC) 541 dated 03.06.2022, whereby and whereunder at para 24 and 27 held as under:

“24. When 90% and more of the Creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, in our view, the Adjudicating Authority or the Appellate Authority cannot sit in an Appeal over the commercial wisdom of CoC. The interference would be warranted only when the Adjudicating Authority or the Appellant Authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules.

27. This court has, time and again, emphasized the need for minimal judicial interference by the NCLAT and NCLT in the framework of IBC. We may refer to the recent observation of this Court made in the case of “Arun Kumar Jagatramka vs Jindal Steel and Power Limited and Another” (2021 7 SCC 474):

“95.....However, we do take this opportunity to offer a note of caution for NCLT and NCLAT, functioning as the Adjudicatory Authority and Appellate Authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced

in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC.....”

23. In view of the decision of the Hon'ble Supreme Court that the commercial wisdom of the CoC is paramount and cannot be interfered with by the Tribunals. Further, the provisions of law empower the CoC contemplated under Section 22 of the I&B Code, 2016 either to continue the IRP as RP or replace the IRP. When the provisions are unambiguous and authorises the CoC to act in accordance with law the same cannot be interfered with by the Tribunals unless and until it is arbitrary, illegal and irrational and dehors the provisions of the Code and the Rules.

Conclusion:

24. For the aforesaid reasons, this Tribunal comes to an irresistible and inescapable conclusion that the Appellant has made a prima-facie case to be interfered with the order passed by the Adjudicating Authority. Accordingly, the Appeal is allowed and the order passed by the Adjudicating Authority in I.A. No. 26 of 2022 in CP No. 29 of 2021 dated 09.02.2021 is hereby set aside. The matter is remanded back to the Adjudicating Authority (National

Company Law Tribunal, Kochi Bench, Kerala) to consider appointment of Shri CA Mahalingam Suresh Kumar as RP of the Corporate Debtor i.e. Tip Top Furniture Private Limited within a period of two weeks from the date of receipt of copy of the order in accordance with law and pass appropriate orders. This Tribunal is hereby directed the parties to be present before the Learned Adjudicating Authority when the matter is taken up. The IA's if any pending stand closed. The Parties shall bear their own costs.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

2nd August, 2022

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