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The Committee of Creditor's Prerogative: Doesn't Require Recording of its Reasons to Replace The Resolution Professional

■ Maneesha Dhir & Karan Kanwal

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ection 27 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), states that a Resolution Professional may be replaced at any time

during the Corporate Insolvency Resolution Process ("CIRP") by the Committee of Creditors ("CoC"). Sub-section (1) of Section 27 of the IBC states that where, at any time during the CIRP, the CoC is of the opinion that a Resolution Professional ("RP") appointed under Section 22 of the IBC is required to be replaced, it may replace him with another RP in the manner provided under Section 27 of the IBC. Further, Sub-section (2) of Section 27 provides that the CoC may, at a meeting, by a vote of sixty six per cent of voting shares, propose to replace the RP appointed under Section 22 with another RP. Therefore, from reading of Sub-section (1) of Section 27, it is evident that the CoC can replace the RP and pass appropriate resolution with requisite majority for the same. In such case, the CoC is required to forward the name of the Proposed RP who is sought to be replaced by them to the Adjudicating Authority for its confirmation, whereinafter the Proposed RP can be appointed in the same manner as provided under Section 16 of the IBC. But in the

meantime, the RP already appointed under Section 22 is required to continue till the appointment of another RP. In view of the aforesaid provisions, minimum 66% of the voting share as prescribed under Section 27 is mandatory.

The issue regarding change/replacement of RP by the CoC has been dealt with by the Hon'ble National Company Law Appellate Tribunal ("NCLAT") in the matter titled as "State Bank of India vs. Ram Dev International Limited" passed in Company Appeal (AT) (Insolvency) No. 302 of 2018, decided on 16.07.2018, wherein it was held that the CoC is not required to record its reasons at the time of change of Resolution Professional in terms of Section 27 of the IBC. The Hon'ble NCLAT held as under

"10. From the aforesaid provision it is clear that during the Corporate Insolvency Resolution Process, at any time, if the Committee of Creditors 'is of opinion' that the Resolution Professional appointed under Section 22 is required to be replaced, it may replace him with another Resolution Professional in the manner provided under said section. In terms of Section 27(2), the Committee of Creditors at a meeting by vote of 75% of voting share (as per un-amended



D-55, Defence Colony,
New Delhi-110 024.
Tel: 91(11) 42410000,
Fax: 91 (11) 42410091
E:expertspeak@dhirassociates.com



provision) can propose to replace the Resolution Professional appointed under Section 22 with another Resolution Professional.

13. Learned counsel appearing on behalf of Mr. Rakesh Kumar Jain, further submitted that no adverse comment has been made against him by the Committee of Creditors and no reasons has been recorded for replacing the Resolution Professional.

14. Though such submission seems to be attractive, we are of the view, it is not desirable for a Committee of Creditors to

record its opinion in view of the following reasons:

(i) If the Committee of Creditors record any adverse opinion for replacement of Resolution Professional, it will not only harm him for the present but will also affect him in future during appointment as Resolution Professional in another proceeding. In such case, the Committee of Creditor will have to refer the matter to IBBI for initiation of departmental proceeding, which is also not desirable in all the cases.

(ii) If the Committee of Creditors forms

opinion on the basis of performance of the Resolution Professional and not because of allegation, it will also go against the Resolution Professional in interest of the Resolution Process.

From the perusal of the dicta passed by the Hon'ble NCLAT, it is clear that it is absolutely not obligatory for the CoC to give its reasons for replacing the RP as per Section 27 of the IBC. As per Sub-section (1) of Section 27 of the IBC, the CoC has to form an opinion that the RP appointed under Section 22 of the IBC is required to be replaced by another RP and further as per Sub-section (2), the said

agenda has to be voted by at least 66% (as per the amended Section 27 of the IBC) members of the CoC in favor of the said agenda. The Hon'ble NCLAT further made it clear vide the above dicta that in case any adverse opinion is stated by the CoC for replacing the RP, then the same may affect the RP in its future engagements and an enquiry can be initiated against the RP before the Insolvency and Bankruptcy Board of India ("IBBI"). The Hon'ble NCLAT in the matter titled as Rajinder Kapoor and Ors. vs. Anil Kumar and Ors., in Company Appeal (AT) (Insolvency) Nos. 198 and 200 of 2017, decided on 22.09.2017, in relation to an application filed under Section 27 of the IBC has held that the Adjudicating Authority is duty bound to consider the

name of another RP, if proposed by the CoC or may call for name from the IBBI, if no name has been proposed.

The aforesaid issue besides came up before the Principal Bench of the Hon'ble National Company Law Tribunal ("NCLT") in the matter of the "Alchemist Asset Reconstruction Company vs. Moser Baer India Limited" in (IB)-378(PB)/2017, decided on 10.08.2018, wherein the Principal Bench of the Hon'ble NCLT has replaced the RP on the 269th day of the CIRP of the Corporate Debtor therein. The Hon'ble NCLT in the said matter has held as under:

"CA No. 716(PB)/2018 and CA-723(PB)/2018

On 09.08.2018 CA No. 716(PB)/2018 was pressed for replacing the earlier RP with a new RP namely Mr. Anil Kohli. However, the hearing on the application was adjourned for today 10.08.2018 as the CoC was to consider the issue again in the meeting held on 09.08.2018 i.e. yesterday. The item concerning replacement of the RP was taken up being Item No. B2 and the minutes of 03.08.2018 were to be confirmed in the meeting held on 03.08.2018 which are set out verbatim as under:

**Item No. B2
To Replace The Resolution Professional
With Another Resolution Professional
Subject to The Provisions under
Section 27 of The Insolvency and**



Bankruptcy Code, 2016

The Chairman informed the members of CoC that as per the provision under Section 27 of the Insolvency and Bankruptcy Code, 2016, the Committee of Creditors (CoC), may, in the meeting by a majority vote of not less than sixty six percent of the voting share of the financial creditors, replace the Resolution Professional with another Resolution Professional.

The one of the Financial Creditor proposed the name of Mr. Anil Kohli.... to be appointed as the Resolution Professional for conducting the CIRP of Moser Baer India Limited for the remaining period. The written consent of Mr. Anil Kohli is submitted in Form AA under Regulation 3(1)(A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The following resolution was proposed for e-voting

“Resolved that pursuant to Section 27 of the 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 thereunder, approval of committee of creditors, be and is hereby accorded for appointment of Mr. Anil Kohli, as Insolvency Professional to act as the Resolution Professional for conducting the CIRP of Moser Baer India Limited for the remaining period, in place of Mr.

Devendra Singh, the existing Resolution Professional, in the matter of Corporate Insolvency Resolution Process of Moser Baer India Limited (MBIL).

The aforesaid resolution was put to e-voting on 07.08.2018 and the resolution has been carried out with more than adequate vote sharing of 66.05%.

There is no serious dispute amongst the parties with regard to the aforesaid factual position. The decision has been confirmed by CoC in its meeting held yesterday i.e. 09.08.2018 and new CA No. 723(PB)/2018 has been filed by RP as per the advice of the CoC. Accordingly, we entertain the new application for change of RP.

As a sequel of the above discussion application is allowed. Mr. Anil Kohli is appointed as the new RP by replacing the earlier RP.”

The Hon'ble Supreme Court in the recent judgment passed in the matter of K. Sashidhar vs. Indian Overseas Bank and Ors., reported as AIR 2019 SC 1329, and dealing with the issue regarding recording of reasons by the Committee of Creditors while accepting or rejecting of the Resolution Plan has held as under:

44. Suffice it to observe that in the I & B Code and the Regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is

no provision in the I & B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I & B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I & B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors-be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds Under Section 61(3) of the I & B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon

accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority Under Section 31 of the I & B Code dealing with approval of the resolution plan.

Thus the recent dicta of the Hon'ble Supreme Court has to be made applicable in the letter and spirit of the IBC and decision of the non-disclosure of reasons in the approval and rejection of the Resolution Plan under Section 31 of the IBC is also required to be made applicable to the provision of Section 27 of the IBC for the change of RP.

However, recently the Mumbai Bench of the Hon'ble NCLT in the matter of Ms. Rama Subramaniam vs. M/s Sixth Dimensions Project Solution Limited, vide its decision dated 13.03.2019 passed in C.P. No. 587/I&BP/2018, contrary to the above position laid down by the Hon'ble NCLAT as well as by the Hon'ble Principal Bench of the NCLT has held as under:

"Having taken note of the background of this case we are of the considered view that the decision of the CoC for the change of IRP, Mr. S. Gopalakrishnan and appointing Mr. Santanu T. Ray in his place is not tenable and the CoC has no absolute power to change the IRP/RP at their whims and fancies without any valid or tenable reasons. The change of RP must be rational/tenable/reasonable and not at the whims and fancies of the CoC.

Having, in view of the above, the Misc. Application No. 1626/2018 for the change of IRP and to appoint Mr. Santanu

T. Ray as RP is rejected as the Bank consisting of 100% CoC had thoroughly failed to put forth any tenable or valid or genuine reasons for the same and we hold that the CoC is not vested with the absolute power to change the IRP without any valid or tenable reason particularly when the Adjudicating Authority after considering the contentions on both sides and expresses an opinion to continue the IRP as RP, and accordingly the present IRP is confirmed as RP of the Corporate Debtor".

The aforesaid judgment of the Mumbai Bench of Hon'ble NCLT while rejecting the CoC application to change the RP has not distinguished the law laid down by the Hon'ble NCLAT wherein it was emphatically held that the members of the CoC need not to record its reasons in forming an opinion to change the RP. Further, even the Hon'ble Supreme Court, while dealing with the issue of approval or rejection of any Resolution Plan has held that there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a Resolution Plan. A combined reading of the judgments passed by the Hon'ble Supreme Court as well as the Hon'ble NCLAT, the CoC has been given a privilege to desist from recording its reasons taken with the requisite majority and the said view has also been followed by the Principal Bench of the Hon'ble NCLT. Therefore, the decision of the CoC, taken with the requisite majority, for replacement of the Resolution Professional is to be given effect to without any need for the CoC to provide the basis of its opinion. [W](#)



Maneesha Dhir is Managing Partner of Dhir & Dhir Associates, a full service law firm. Her core area of practice include Telecom, Dispute Resolution & Arbitrations, Insolvency Laws, Corporate & Financial Restructuring and Merger & Acquisitions.



Karan Kanwal, Senior Associate, is a Corporate Commercial Litigation Lawyer with 9 years of post-qualification experience. He is a graduate in LL.B. (Hons.) from VIPS, IP University. His forte includes appearing in complex and contentious arbitration and litigation including insolvency litigation before various courts and authorities. He is involved in drafting of various petitions, suits, writ petitions, advisory opinions on complex legal issues, legal notices and reply to legal notices etc. in the Firm. He has assisted the Senior Counsels, Counsels, Partners and Team before the Courts and Authorities. Apart from above, he also has an experience in drafting and vetting of various commercial agreements