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**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
SPECIAL BENCH (video Conference)**

CORAM: HON'BLE SHRI K. ANANTHA PADMANABHA SWAMY - MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 09.05.2020 AT 11.00 A.M. THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA NO.300/2020 in IA No.234/2020 & IA No.235/2020 in CP(IB) No. 492/7/HDB/2019
NAME OF THE COMPANY	KSK Mahanadi Power Company Ltd
NAME OF THE PETITIONER(S)	Power Finance Corporation
NAME OF THE RESPONDENTS(S)	KSK Mahanadi Power Company Ltd
UNDER SECTION	7 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-Mail & Telephone No.	Signature
Mr. Bishwajit Dubey	Advocate		

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-Mail & Telephone No.	Signature
MS. Ranjana Roy Gawai	Advocate.		

ORDER

1. Matter taken up for pronouncement of Order in IA No.300/2020 in IA No.234/2020, IA No.234/2020 & IA No.235/2020 in CP(IB)No.492/7/HDB/2019 through Video Conference in view of Notice of the Headquarters dated 17.04.2020 read with Notice dated 03.05.2020.
2. Mr. Bishwajit Dubey, counsel for the CoC and Ms. Ranjana Roy Gawai, counsel for IRP present through video conference.
3. Orders pronounced vide separate order in IA No.300/2020 in IA No.234/2020, IA No.234/2020 & IA No.235/2020.
4. For confirmation from IBBI, put up the matter on 16.06.2020.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

In the matter of :-
M/S. KSK MAHANADI POWER COMPANY LIMITED

IA No.234 of 2020
In
CP(IB) No. 492/07/HDB/2019

Between:

Power Finance Corporation Limited
Urjanidhi 1, Bara Khamba Lane,
Connaught Place,
New Delhi – 110001.

...Applicant

Versus

Mr. Mahender Kumar Khandelwal
B2A, Sunny Valley, CGHS,
Plot No.27, Sector – 12,
Dwarka, New Delhi.

...Respondent

IA No.235 of 2020
In
CP(IB) No. 492/07/HDB/2019

Between:

Mr. Mahender Kumar Khandelwal
B2A, Sunny Valley, CGHS,
Plot No.27, Sector – 12,
Dwarka, New Delhi.

...Applicant/IRP

Versus

Committee of Creditors of
M/s KSK Mahanadi Power Company Limited
Urjanidhi 1, Bara Khamba Lane,
Connaught Place,
New Delhi – 110001.

...Respondent

IA No.300 of 2020 in IA No.234/2020

In
CP(IB) No. 492/07/HDB/2019

Between:

Power Finance Corporation Limited
Urjanidhi 1, Bara Khamba Lane,
Connaught Place,
New Delhi – 110001.

...Applicant

Versus

Mr. Mahender Kumar Khandelwal
B2A, Sunny Valley, CGHS,
Plot No.27, Sector – 12,
Dwarka, New Delhi.

... Respondent

Order pronounced on: 09.06.2020

Coram: K. Anantha Padmanabha Swamy, Member Judicial

Parties/ Counsels Present:-

For the Applicant: Mr.Bishwajit Dubey, Counsel

For the IRP: Mr.L.Ravichandran, Senior counsel
Mrs. Ranjana Roy Gawai, Counsel

Per: K. Anantha Padmanabha Swamy, Member Judicial

COMMON ORDER

1. That initially Applications bearing IA No.234/2020 & IA No. 235/2020 in CP(IB)No.492/7/HDB/2019 were filed on similar set of facts and both the matters were posted to 08.04.2020 for hearing. However, in view of global pandemic 'COVID-19' and notifications of NCLT headquarters, the said matters were adjourned from time to time. The Applicant in IA No.

234/2020 moved an Application seeking urgency vide IA No. 300/2020 in IA No. 234/2020, through email in the registry, *inter-alia*, seeking to take up IA No.234/2020 for hearing in an urgent manner. The said Application bearing IA No.300/2020 was listed for hearing on 30.04.2020, wherein this Adjudicated Authority after considering the urgency, directed the Registry to list IA No.234/2020 along with IA No.235/2020 for hearing on 08.05.2020 and accordingly both the Applications bearing IA No. 234/2020 and 235/2020 were taken up for hearing together. Therefore, Applications bearing IA No.300/2020 in IA No.234/2020, IA No.234/2020 and IA No.235/2020 are being disposed of by this common order.

2. The Application bearing IA No.234/2020 is filed by Power Finance Corporation on behalf of CoC seeking to appoint Mr. Sumit Binani as the Resolution Professional, who has been voted to act as the Resolution Professional of the Corporate Debtor by Committee of Creditors under Section 22(3)(b) of the Code.
3. The Application bearing IA No.235/2020 is filed by Mr. Mahender Kumar Khandelwal, IRP of the Corporate Debtor, *inter-alia*, seeking to pass directions to the CoC of the Corporate Debtor to reconsider the decision and continue with the Applicant as RP.
4. The Application bearing IA No.300/2020 in IA No.234/2020 is filed by Power Finance Corporation seeking the following prayers:-
 - a. Confirm the appointment of Mr. Sumit Binani as the Resolution Professional of KSK Mahanadi Power Company Ltd. or

- b. Urgently take up IA No. 234 of 2020 in CP (IB) NO.492/7/HDB/2019 for hearing/ disposal; and
 - c. exclude the time period from January 22, 2020 till the date of appointment of Mr. Sumit Binani from the CIR Process time period; and
 - d. Pass any such orders which this Hon'ble Tribunal deems fit.
5. Brief averments of the Applicant in Application bearing IA No. 234/2020 are as under:-
- a. That an Application under Section 7 of IB Code, 2016 was filed by Power Finance Corporation Limited against the Corporate Debtor herein i.e., KSK Mahanadi Power Company Limited and the same was admitted for CIRP on 03.10.2019 and Mr. Mahender Khandelwal was appointed as the IRP. Thereafter, the Committee of Creditors as per Section 21 of the Code was constituted by the IRP.
 - b. That at the fourth meeting of Committee of Creditors convened on 22.01.2020, one of the agendas for the meeting was to appoint the Resolution Professional of the Corporate Debtor and accordingly, CoC with 89.6% voted in favour of appointing Mr. Sumit Binani as the Resolution Professional, replacing the IRP in accordance with Section 22 of the Code. The Resolution of the CoC is extracted as below:

“RESOLVED THAT pursuant to Section 22 of 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 Mr. Sumit

Binani, an Insolvency Professional (Registration No.IBBI/IPA-001/IP-N00005/2016-17/10025) as the Resolution Professional in the matter of corporate insolvency resolution process of KSK Mahanadi Power Company Limited.

RESOLVED FURTHER THAT approval is hereby accorded for payment of fees aggregating to INR 5,00,000/- per month (exclusive of out of pocket expenses up to the maximum limit of 7.5% of aggregated monthly remuneration and applicable taxes) to the Resolution Professional, which shall constitute insolvency resolution process costs and may be paid out of the funds of the Corporate Debtor."

- c. That Mr. Sumit Binani has issued Form AA dated 22.01.2020, giving his written consent to act as the Resolution Professional of the Corporate Debtor.
 - d. Reiterating above, the Applicant prayed to allow the Application as prayed for.
6. Counsel for IRP filed counter, *inter-alia*, stating as under:-
- a. That the IRP herein has filed an IA No. 235 of 2020 in the above Company Petition for continuing IRP as RP of the Corporate Debtor.
 - b. That the instant Application is not supported by any resolution of CoC in favour of Applicant for filing the Application on behalf of CoC. Hence, the Application deserves to be dismissed on this ground alone.
 - c. That a complaint came to be filed before the Insolvency and Bankruptcy Board of India (IBBI) alleging misconduct on the part of the IRP in conducting the CIRP of Bhushan Power and Steel Ltd. As a consequence of the order dated 14.11.2019 of the Disciplinary Committee of IBBI, the IRP was inter-alia barred from taking any fresh

assignment. That the IRP duly disclosed the same to the CoC members promptly vide an email dated 15.11.2019, while voting on resolution to appoint IRP as RP was being conducted.

- d. That immediately thereafter, the IRP challenged the order of the Disciplinary Committee before the Hon'ble High Court of Delhi vide W.P (c) 12189 of 2019. The Hon'ble High Court vide order dated 19.11.2019 passed an interim protection as under:

"...10. In view of the order passed today, the petitioner is given liberty to place this order before the CoC concerned with M/s. K.S.K Mahanadi Power Company Limited (KSK). The CoC concerned with KSK will be free to act in accordance with the Law.

- e. That on 19.11.2019 itself the IRP wrote to the CoC to appraise the order dated 19.11.2019, passed by the Hon'ble High Court of Delhi.
- f. That vide order dated 25.11.2019, the Hon'ble High Court of Delhi has directed that the impugned order dated 14.11.2019 passed by the IBBI, be stayed in so far as it prevents the IRP herein from accepting any new assignment as an IRP or RP, thus indicating that the order passed by IBBI has not been in accordance with the law. The relevant portion of the Order dated 25.11.2019 is as under:-

"....7. Under these circumstances, for the moment the operation of the impugned order, insofar as it prevents the Petitioner from accepting any new assignment as an Interim Resolution Professional (IRP) or Resolution Professional, is stayed. ..."

- g. That the said order was intimated to CoC vide email dated 26.11.2019.

Thus, the CoC had complete knowledge of the developments in respect

of the said complaint, and further, the IRP herein was eligible to act in the capacity of the IRP or RP of the Corporate Debtor.

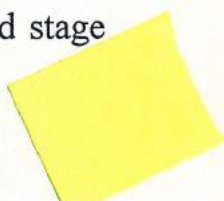
- h. That in the second meeting of the CoC held on 29.11.2019, wherein the implications of the orders of the Hon'ble High Court of Delhi was appraised to the CoC that the IRP has already deposited the amount in terms of the order dated 25.11.2019, passed by the Hon'ble High Court of Delhi and the IBBI order had also been stayed. Thus, there is no legal bar preventing the IRP to act as RP of the Corporate Debtor.
- i. That in the third Meeting of CoC held on 26.12.2019, the IRP has duly apprised the members of CoC about the possible outcomes of the proceedings before the Hon'ble High Court of Delhi. The IRP was shocked when he came to know the result of voting on the resolution proposed for his appointment as Resolution Professional was rejected by 71%. That the said conduct of the CoC was devoid of any reasoning and merit.
- j. That most of the members comprising the CoC of the Corporate Debtor herein also constitute the CoC of Bhushan Power and Steel Limited (BPSL). The said CoC of BPSL has also challenged the IBBI order dated 14.11.2019 vide WP(C) No. 692/2020 before Hon'ble Delhi High Court. The said conduct depicts the apprehensions of the CoC members against the IBBI order dated 14.11.2020, which surprisingly has been used as a reason to remove the IRP herein from the CIRP proceedings of the Corporate Debtor.

k. That the non-recommendation of IRP as RP despite being eligible and qualified to conduct the CIRP of the Corporate Debtor is bad in view of orders passed by the Hon'ble High Court of Delhi in WP No. 12189/2019.

l. That vide order dated 05.09.2019 at page 104 in para 91 the Hon'ble Principal Bench of the National Company Law Tribunal, Delhi had clearly appreciated and observed that the IRP had conducted the CIRP of Bhushan Power & Steel Limited in a completely transparent and fair process. The Relevant part of the same is being reproduced herein below:

"... The process undertaken by the RP and minutes of meetings of CoC conducted by him do not leave any manner of doubt that the process is fair and transparent".

m. That the members of the CoC have taken decision at a belated stage of the CIRP, i.e., after three months, causing not only due loss to the reputation to the IRP but also detrimental to the interest of the Corporate Debtor as the appointment of new individual will require time to get well acquainted with the operations of the Corporate Debtor and this change shall set back the CIRP of the Corporate Debtor by months and may adversely affect the Resolution of the Corporate Debtor. In this regard, the IRP has placed reliance on the judgment of NCLT, Amaravati Bench, in the matter of *Bank of India V Nithin Grains and mills Pvt Ltd*, wherein it is held that the CoC cannot take such a decision of change in appointment of RP at such belated stage




and according to its own wishes as it defeats the purpose of the Code which provides for time bound resolution and CoC is also duty bound by Code.


- n. That irregularities in conduct of the CoC of the Corporate Debtor are evident from the revelation that the CoC members constituted a consortium behind the back of IRP and devised a scheme for appointment of the proposed RP. That the said meetings were conducted parallel to the meetings of CoC and therein the members present have deliberated upon the decision with respect to the resolutions presented in the CoC meetings.
- o. That no fair or due process of selection was conducted for screening/identification of potential candidates for appointing RP, and for selecting Mr. Binani as RP. That the members of CoC never brought or discussed the agenda for identifying potential candidates for appointment as RP in any previous meetings of CoC and the Applicant raised his concern towards the manner of appointment of Mr. Sumit Binani as RP.
- p. That any such meeting, cannot be construed as a meeting of the Committee of Creditors in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 as it is expressly provided by Regulation 24(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that the Resolution Professional is the chairman of the meetings of the

Committee of Creditors. In view of the same, it is stated that if any such meeting of any of the Creditors of the Corporate Debtor was conducted, the same is void and has no standing in the eyes of law.

- q. That it is reliably understood that, in one of such core lender's meetings, a few lenders expressed their concern in appointing IRP as RP of Corporate Debtor alleging that the matter was sub-judice which may cause delay in the Resolution process. This is contrary to order of Hon'ble High Court allowing CoC of Corporate Debtor to appoint IRP as RP as per law.
- r. That a few lenders said they had received some complaints against the IRP and PwC in some other cases. However, upon asking no such complaint or evidence could be produced for consideration.
- s. That vide the IA No.235/2020 the IRP has prayed that the minutes of the said Consortium Meetings be directed to be placed on record in order to bring the correct facts into light before this Adjudicating Authority.
- t. That the IRP herein has appointed PwC as a professional agency in order to assist the IRP in discharging his duties and responsibilities in accordance with the provisions of IBC, 2016 to effectively conduct the CIRP process for the Corporate Debtor. The same was confirmed in the First Meeting of the CoC itself.
- u. That the CoC should have rejected the services of PwC, as agency supporting the CIRP, as well if there was any fault with the IRP

However, non-confirmation of IRP while continuing with the Agency appointed by the IRP is beyond understanding to a prudent mind since in the light of the fact that the CIRP process was conducted by the IRP with the aid of professional assistance from PWC. That any alternation in the IRP should have also led to the change in the professional agency, which was supporting the IRP.

- v. That on 18.01.2020, the IRP herein circulated the Notice and Agenda for the Fourth Meeting of CoC to be held on 22.01.2020 and with one of the agenda being for voting on proposed resolution to appoint Resolution Professional on 22.01.2020 and to fix remuneration. The CoC while deliberating on the issue of appointment of RP invited one Mr. Sumit Binani as the proposed RP for the CIRP of the Corporate Debtor on the recommendation of PwC and discussed the way forward with him. It has been learnt by the IRP that the lenders continued services of the PwC as appointed by IRP for carrying out CIRP. It is beyond understanding, as to how the lenders could have found any fault with the appointment of the IRP as RP since admittedly the CIRP has been progressing efficiently and that there was no legal impediment in his conducting the CIRP.
- w. That the CoC did not assign any reason for the non-continuance of the IRP as the RP for the CIRP of the Corporate Debtor when he has been handling and discharging his duties and performing all functions of the IRP/RP of the Corporate Debtor since the inception of CIRP.
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- x. That in the light of the above facts and circumstances, it is humbly submitted that the application of the applicant be dismissed and the IA 235/2020 of the Non-Applicant/IRP be allowed.
7. Reiterating the averments made in reply to IA No.234/2020, the counsel for the IRP has filed IA No.235/2020, *inter-alia*, seeking to pass directions to the CoC of the Corporate Debtor to reconsider the decision and continue with the Applicant as RP.
8. Counsel for CoC filed its reply to IA No.235/2020, *inter-alia* stating as under:
- a. That the Application deserves to be out rightly dismissed, as IRP does not have a vested right to be appointed as the RP. That as per the law laid down by the Hon'ble Supreme Court in *K. Sashidhar v. Indian Overseas Bank 2019 SCCOnline SC 257, committee of Creditors of Essar Steel India Limited V. Satish Kumar Gupta & Ors., Civil Appeal No.8766-67 of 2019*, it is the commercial wisdom of the CoC reflected by the decisions taken by the requisite majority of the CoC, that must prevail on the facts of any given case, subject to certain minimum guidelines to be observed. This is one of the basic tenets of the Code and any transgression of the same is violative to the spirit of the Code.
- b. That the power to appoint an RP in place of an IRP vests solely and absolutely with the CoC and any decision taken in this regard is non-justiciable and not liable to be challenged or set aside as long as the pre-requisites of the relevant provisions have been duly complied with.
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c. The power to replace an RP is solely and absolutely the prerogative of the CoC and the only pre-requisites that are required to be met as per Section 22 are as under:

- i. The CoC shall pass the resolution with at least 66% voting shares;
- ii. Written consent shall be obtained from the proposed RP in the specified form;
- iii. The CoC shall file an application before the Ld. Adjudicating Authority for appointment of the proposed RP; and
- iv. The Ld. Adjudicating Authority shall forward the name of the proposed RP to Insolvency and Bankruptcy Board of India ("IBBI") for its confirmation and shall make such appointment after confirmation by the IBBI.

d. That the first mandatory requirement is approval of Resolution by requisite majority of CoC. Such a decision is non-justiciable and cannot be interfered with unless there are convincing reasons to do so. In fact, it is relevant to note that the Hon'ble National Company Law Appellate Tribunal has clearly held that CoC's decision to replace the RP cannot be interfered with unless the same is perverse or without jurisdiction. For instance, in *Punjab National Bank vs. Kiran Shah, Company Appeal (AT) (Insolvency) No.749 of 2019 ("Kiran Shah")*, the Hon'ble Appellate Tribunal held as follows:

"..., we are of the view that the 'Committee of Creditors' is not required to record any reason or ground for replacing of the 'Resolution Professional', which may otherwise call for proceedings against such 'Resolution Professional'."
The 'committee of Creditors' having decided to remove the 'Resolution Professional' with 88% voting share, it was not open to

the Adjudicating Authority to interfere with such decision, till it is shown that the decision of the 'committee of Creditors' is perverse or without jurisdiction.

- e. Similar rationale was followed by the Ld. Adjudicating Authority, Mumbai Bench in the matter of *SBI vs. Videocon Industries Limited*, MA 3173/2019, MA 3008/2019 & MA 3013/2019 in CP No.02/2018 ("*Videocon*"), wherein the present Applicant himself had raised a challenge against his replacement as the RP. The Ld. Adjudicating Authority had held that CoC's powers in this regard as provided under Section 22 or 27 of the Code cannot be interfered with and held as follows:

"10... the power of CoC, to replace the IRP with RP in the first CoC meeting as prescribed under section 22 of the I&B Code or the power to replace the RP at any time during the CIRP proceedings as prescribed under section 27 of the I&B Code, cannot be interfered with..."

11. In the insolvency resolution mechanism, the RP acts as a bridge between the CoC and the prospective investors and other stakeholders of the Corporate Debtor. Hence, the appointed RP should be the one in active confidence of the CoC..."

- f. That during the Third CoC meeting held on 26.12.2019, the Applicant had proposed a resolution for his appointment as the RP of the Corporate Debtor and it had been put to vote before the CoC. However, the CoC by a majority vote of 71%, had rejected the resolution for confirming the appointment of the Applicant as the RP of the Corporate Debtor. Thereafter, at the fourth meeting of the CoC convened on 22.01.2020, one of the agendas for the meeting was to appoint the RP. The CoC unanimously decided to put the matter to vote. Thereafter, e-voting was conducted through which the COC resolved by a vote

89.6% to appoint Mr. Sumit Binani, an insolvency professional having registration number IBBI/IPA-001/IP-N00005/2016-2017/10025 as the Resolution Professional, replacing the IRP in accordance with section 22 of the Code.

- g. Therefore, the CoC's Resolution passed by 89.6% majority approving the appointment of Mr. Sumit Binani as the RP, being unequivocal in nature, cannot be interfered with.
- h. The Applicant's averment that no fair or transparent bidding process was followed inviting Expression of Interest for the appointment of RP, is denied as there is no such requirement prescribed under the Code for inviting Expression of Interest at the time of appointing/confirming the RP as per Section 22 of the Code. In fact, the Hon'ble Appellate Tribunal has also rejected a similar argument in the matter of *Friends Agencies v. BIW Fabricators Pvt. Ltd.*, 2019 SCCOnline NCLAT 461, and upheld the COC's decision to replace the RP.
- i. That so long as the conditions stipulated under Section 22 of IB Code, 2016, have been met, there cannot be any interference with the CoC's decision to appoint the RP.
- j. The CoC has approved the appointment of Mr.Sumit Binani with 89.6% votes. Additionally, Mr.Sumit Binani's written consent dated 22.01.2020 has been duly obtained.
- k. Therefore, the conditions of Section 22 of the IB Code having been duly complied with so far, the CoC's resolution seeking appointment of the new RP, is not liable to be interfered with.

- l. The Hon'ble Appellate Tribunal's decisions in the matter of *Axis Bank Ltd. Vs. Sixth Dimension Project Solution Ltd, Company Appeal (AT) (Insolvency) No.356 of 2019* wherein a similar challenge had been raised by the IRP that the CoC had failed to put forth any valid or tenable reasons for appointment of another RP. Therein, the Hon'ble Appellate Tribunal categorically held that Section 22 of the Code does not require giving reasons for replacement and the Ld. Adjudicating Authority is not required to decide on such reasons.
- m. Therefore, the law in this regard is well settled and there is no requirement in law mandating the CoC to assign any reasons while appointing or replacing an RP.
- n. The concern of the Applicant regarding the decision of the CoC to appoint the RP at this stage is delaying the Corporate Insolvency Resolution Process of the Corporate Debtor and will adversely impact the chances of resolution, is untenable as no undue delay has been caused by the CoC in taking the decision to appoint Mr.Sumit Binani as the RP. Firstly, it is pertinent to note that under Section 27 of the Code, the CoC is empowered to replace an RP *at any point of time* during the CIR Process. Therefore, the Applicant cannot claim to be aggrieved by the delay.
- o. It is apt to note the order dated 25.11.2019 passed by the Hon'ble Delhi High court wherein the CoC has been given the power to *act in accordance with law*. Accordingly, the COC has taken a decision in its commercial wisdom to firstly, reject the resolution of appointment of

the Applicant as the RP, and secondly, to approve the appointment of Mr.Sumit Binani as the RP of the Corporate Debtor.

9. Applicant in IA No.235/2020 filed rejoinder reiterating the averments made in the Application and further prayed to allow the Application as prayed for.
10. Counsel for the Applicant in IA No. 234/2020, filed its written submissions inter-alia stating as under:-
 - a. That PFCL was the lender which had initiated the CIR Process of the Corporate Debtor and coupled with the fact that it has a substantial voting share in the CoC, it is empowered to file applications on behalf of the CoC. In any event, CoC has subsequently by way of ratification duly, unanimously authorized PFC to file any pleadings, applications on behalf of CoC. Therefore, a technicality, capable of being rectified, should not prejudice the adjudication of the present Application.
 - b. That the IRP, despite having knowledge about it, failed to bring this to the notice of the CoC so that steps for ratifying PFCL's authority to file Application on behalf of the CoC could have been taken, if required. This goes to show that the IRP consciously and maliciously elected to remain silent on it during the CoC meetings, to further serve his own interest.
 - c. The power to appoint an RP in place of an IRP vests solely and absolutely with the CoC and any decision taken in this regard is non-justiciable and not liable to be challenged or set aside as long as the pre-


requisite of Section 22 of the Insolvency and Bankruptcy Code, 2016, which is applicable in the instant case, are complied with.

- d. Further, the Hon'ble National Company Law Appellate Tribunal in the case of *Punjab National Bank vs. Kiran Shah* has clearly held that CoC's decision to replace the RP cannot be interfered with unless the same is perverse or without jurisdiction –

"Having heard the learned counsel appearing on behalf of the Appellant and the learned counsel appearing on behalf of the 'Resolution Professional', we are of the view that the 'Committee of Creditors' is not required to record any reason or ground for replacing of the 'Resolution Professional', which may otherwise call for proceedings against such 'Resolution Professional'. For the purpose of proceedings reported to the 'Insolvency and Bankruptcy Board of India' (for short, 'the IBBI', the 'Committee of Creditors' cannot await the decision of the IBBI for the purpose of replacement. The 'Committee of Creditors' having decided to remove the 'Resolution Professional with 88% voting share, it was not open to the Adjudicating Authority to interfere with such decision, till it is shown that the decision of the 'Committee of Creditors' with majority voting share of 88% having decided to replace 'Mr.Kiran Shaj', he cannot function as 'Resolution Professional', though he will be entitled to his fee and cost, if any, incurred by him in terms of the 'I&B Code'."

- e. Similar rationale was followed by the Ld. Adjudicating Authority, Mumbai Bench in the *Videocon* matter, wherein the present IRP himself had raised a challenge against his replacement as the RP. The Ld. Adjudicating Authority held that :-

"10. On going through the submissions made by the Senior Counsels of all the sides this Bench is of the view that the power of COC, to replace IRP with RP in the first COC meeting as prescribed under section 22 of the I&B Code or the power to replace the RP at any time during the CIRP proceedings as prescribed under section 27 of the I&B Code, cannot be interfered with. In light of the decision of Hon'ble NCLAT in the above said order (supra), the CoC even need not give the reasons for the replacement of IRP/RP."



11. In the insolvency resolution mechanism, the RP acts as a bridge between the CoC and the prospective investors and other stakeholders of the Corporate Debtor. Hence, the appointed RP should be the one in active confidence of the CoC."

f. That the settled position of Law is that there is no requirement mandating the CoC to assign any reasons while appointing or replacing an RP. The Hon'ble Appellate Tribunal in the matter of *Axis Bank Ltd Vs Sixth Dimension Project Solution Ltd.*, categorically held that Section 22 of the Code does not require giving reasons for replacement of IRP and the Ld. Adjudicating Authority is not required to decide to such reasons and imposing such a procedure would only delay the CIR Process.

g. That the rationale behind not giving reasons for replacement of RP has been noted by the Hon'ble appellate Tribunal in *State Bank of India vs. Ram Dev International Ltd*, wherein the Hon'ble Appellate Tribunal held that:

"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 proceedings, 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."

- h. The change of insolvency professional at this stage does not jeopardize the CIR Process of the Corporate Debtor and the IRP's concerns as to delay are misplaced.
- i. The issue of appointment/confirmation of the IRP as the RP of the Corporate Debtor had been put as a voting item in the first CoC meeting dated November 7, 2019 itself. However, the voting on the said agenda was deferred by the IRP himself vide email dated November 15, 2019 in order to obtain clarity on the IBBI order dated November 14, 2019 against the IRP and the interim order passed by the Hon'ble Delhi High Court on November 25, 2019 on the Writ Petition filed by the IRP himself, with respect to the CIRP of BPSL.

11. Counsel for the IRP filed Written submissions inter-alia stating as under:-

- a. That the Application bearing IA No.234/2020 filed by the Power Finance Corporation Ltd. (PFC) is not maintainable in terms of Section 22 (3)(b) of the IBC 2016, since an application for appointment of RP can only be filed by CoC and that IA No.234/2020 file by PFC is not supported by any resolution of CoC in favor of the PFC for filing the above application on behalf of the CoC before this Hon'ble Tribunal. The Application deserves to be dismissed on this ground alone.
- b. That the IA No.234/2020 is not maintainable in view of the settled law as has been reiterated by the Hon'ble Supreme Court in AMCHANDRA KESHAV ADKE V. GOVIND JOTI CHAVARE, (1975) 1 SCC 559 that:

"A century ago, in Taylor v. Taylor [(1876) 1 ch D 426] Jassel, M.R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that

other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council, in Nazir Ahmed v. Emperor [AIR 1936 PC 253 : LR 63 IA 372] and later by this Court in several cases [Shiv Bahadur Singh v. State of U.P., AIR 1954 SC 322 : AIR 1954 SC 1908 : 1954 SCR 1098 : 1954 Cri LJ 910; Deep Chand v. State of Rajasthan, AIR 1961 SC 1527 ; (1962) 1 SCR 662 : (1961) 2 Cri LJ 705], to a Magistrate making a record under Sections 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other."


- c. Furthermore, the Hon'ble High Court of Hyderabad in M.SHANKAR REDDY V. AMARA RAMAKOTESWARA RAO, 2017 SCC ONLINE HYD 426 stated that *"When a statute describes or requires a thing to be done in a particular manner; it should be done in that manner or not at all."*
- d. That the IRP on 06.01.2019 had shared legal opinion by a former judge of the Hon'ble Supreme Court, to the CoC giving opinion that there are no legal impediment against IRP to be confirmed as RP.
- e. The Hon'ble Supreme Court has categorically held in the matter of *Mohd. Yunus Khan v. State of U.P., [(2010) 10 SCC 539]*:
- "Arbitrariness is an anathema to the principles of reasonableness and fairness enshrined in our constitutional provisions. The rule of law prohibits the exercise of power in an arbitrary manner and/or in a manner that travels beyond the boundaries of reasonableness. Thus, a statutory authority is not permitted to act whimsically/arbitrarily. Its actions should be guided by the principles of reasonableness and fairness. The authority cannot be permitted to abuse the law or to use it unfairly."*
- f. That further the Hon'ble Supreme Court in its judgment in the matter of *Om Kumar v. Union of India* [(2001) 2 SCC 386], has clearly held that

considering irrelevant facts is arbitrary. The relevant extract is as follows:

“...67. Where, an administrative action is challenged as ‘arbitrary’ under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is ‘rational’ or ‘reasonable’ and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his views is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary....”

- g. That further, in this regard, the observations made by Hon’ble Supreme Court of India in the matter of *Rameshwar Prasad (VI) vs. Union of India*[2006 (2) SCC 1] are of utmost significance. The Hon’ble Supreme Court had observed that:

“The Wednesbury principles is often misunderstood to mean that any administrative decision which is regarded by the Court to be unreasonable must be struck down. The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if (i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever have reached it,”



- e. Thus, it is humbly submitted that by not approving the appointment of the Applicant as the RP solely on the basis of a complaint, which was clearly stayed by the Hon'ble Delhi High Court as shown above, the CoC acted in contrast to the settled position of law.
- f. That the members of the CoC have taken this decision at a terrible belated stage of the CIRP, i.e., after three whole months, causing not only undue losses of reputation to the Applicant but also detrimental to the Corporate Debtor as appointment of a new individual will require further time to get well acquainted with the Corporate Debtor and its processes. At this juncture, it is utmost significant to reiterate the following decision passed in the matter of *Ambica Quarry Works etc. Vs. State of Gujarat & Ors. (AIR 1987 SC 1073)* wherein it was held that:

"There may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

- h. Thus, the CoC cannot exercise its power to make decisions which undermine and contradict the object of the IBC Code. Such a decision, in the light of the judgement reiterated above, is liable to be set aside at the outset.
- i. The Hon'ble Supreme Court has observed in the landmark decision of the Committee of Creditors of *Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors. (CIVIL APPEAL*

NO8766-67 OF 2019)("Essar Steel") that the reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority to satisfy itself for compliance of the law.

- j. The judiciary has stressed upon the significance of "reasons" behind every decision taken. For instance, it has been opined in a plethora of cases, for instance, *Ravi Yashwant Bhoir vs. District Collector* [(2012) 4 SCC 407] that:

"....The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

- k. Therefore, the powers of the CoC are not absolute and its reasons for a decision are amenable to the scrutiny and decision of this Hon'ble Tribunal.
- l. That the IRP/Applicant has been managing the operations of the Corporate Debtor. The IRP with the deployment of his teams have been able to run the plant at 100% capacity. The IRP has made provisions for about Rs.500 crores as exigencies in case if there is shortage of funds during these times. The IRP has made some extraordinary efforts

to keep the operations at maximum. The Employees are being paid on time.

- m. That the CoC had complete knowledge of the professional credibility and experience of the Applicant, but ignored it straightaway, thereby passing a biased decision in favor of Mr. Sumit Binani without considering the ramifications of the same on the Corporate Debtor and not considering that the interest of the Corporate Debtor is at stake. It has been opined in the matter of *Union of India vs. Vipin Kumar Jain* (2005) 9 SCC 579) that:

"Ultimately, the question of bias will have to be decided on the facts of each case. If the assessee is able to establish that the Assessing Officer was in fact biased in the sense that he was involved or interested in his personal capacity in the outcome of the assessment or the procedure for assessment, no doubt, it would be a good ground for setting aside the assessment order. But to hold, as the High Court has that bias is established only because the authorized officer under Section 132 and the Assessing Officer are the same person is, in our view, an incorrect approach."

- n. Resultantly, the CoC decision in relation to not to confirm the IRP as RP will set a precedent and diminish the opportunities of getting assignments with loan portfolios worth a few thousand cores as per the capability of the IRP/Applicant.
- o. Reiterating above, the counsel for the IRP prayed to allow the Application as prayed for.
12. Heard both sides and perused the records.
13. The brief list of factual events relating to instant matter are as under:-

- a. The Company Petition filed by PFC Limited U/s.7 of IB Code, 2016 against the Corporate Debtor was admitted for CIRP on 03.10.2019 and Mr. Mukesh Khandelwal was appointed as IRP.
- b. The 1st CoC meeting was held on 07.11.2019 wherein the agenda to discuss the authorization for appointment of IRP as RP was placed and when the matter was put up for voting, IRP has sent an email dated 15.11.2019 to the members of CoC, wherein he has brought to the notice, the order passed by IBBI against the IRP herein by Disciplinary Committee of IBBI in a matter pertaining to Bhushan Power and Steels Limited. The extract of the order of IBBI dated 14.11.2019 is as under:-

"Mr. Mahender Kumar Khandelwal shall not accept any new assignment either as IRP or RP till:
i. he deposits the monetary penalty of Rs.29,24,167/- (Twenty Nine Lacs Twenty Four Thousand One hundred and Sixty Seven only) with the Board; and
ii. produces evidence to the Board of deposit of Rs.12,09,90,185/- (Twelve Crores Nine Lacs Ninety Thousand One Hundred and Eighty Five only) in CD's Account".

- c. In view of the above, the voting for appointment of IRP as RP was kept in abeyance by CoC.
- d. That IRP against such order of IBBI has approached before Hon'ble High Court of Delhi, wherein on 19.11.2019, the following Interim Order in W.P.(C) 12189/2019 was passed:-

"....3. For the moment, Mr. Sethi, learned senior counsel, who appears on behalf of the Petitioner, says that without prejudice to the rights and contentions of the petitioner, the petitioner will deposit a sum of Rs.29,24,167/-, imposed as penalty by respondent No.1, with the Registry of this Court within two days. Upon deposit of the amount, the Registry will invest the same in an interest bearing fixed deposit."

.....

"...10. In view of the order passed today, the petitioner is given liberty to place this order before the CoC concerned with M/s. K.S.K Mahanadi Power Company Limited (KSK). The CoC concerned with KSK will be free to act in accordance with the Law."

e. Further, on 25.11.2019, the Hon'ble High Court of Delhi in W.P.(C)

12189/2019 has passed the following order:-

"....7. Under these circumstances, for the moment the operation of the impugned order, insofar as it prevents the Petitioner from accepting any new assignment as an Interim Resolution Professional (IRP) or Resolution Professional, is stayed..."

f. That at the 2nd CoC Meeting of the Corporate Debtor, held on 29.11.2019 the matter for appointment of RP was deferred by CoC and subsequently, the 3rd CoC Meeting was held on 26.12.2019, wherein the resolution to appoint Mr. Mukesh Khandelwal as RP was put to vote and the same was rejected with 71% Votes of CoC.

g. That in the 4th CoC meeting held on 22.01.2020, the resolution to appoint Mr. Sumit Binani as RP was approved with 89.6% votes of CoC and has passed the following resolution:-

"RESOLVED THAT pursuant to section 22 of 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 the members of the Committee of Creditors is hereby accorded for appointment of Mr. Sumit Binani, an Insolvency Professional (Registration No. IBB/IPA-001/IP-N00005/2016-17/10025) as the Resolution Professional in the matter of Corporate Insolvency Resolution Process of KSK Mahanadi Power Company Limited.

"RESOLVED FURTHER THAT approval is hereby accorded for payment of fees aggregating to INR

5,00,000/- per month (exclusive of out of pocket expenses up to the maximum limit of 7.5% of aggregated monthly remuneration and applicable taxes) to the Resolution Professional, which shall constitute insolvency resolution process costs and may be paid out of the funds of the Corporate Debtor”

14. Basing upon above Resolution of CoC, PFC has filed an Application under Section 22 of the Code, 2016 before this Adjudicating Authority.
15. Considering the facts and submissions supra, the point for consideration before this Adjudicating Authority is whether the decision of the CoC to appoint Mr. Sumit Binani as RP is valid in the eye of law or whether Mr. Mukesh Khandelwal, IRP should continue as RP?
16. The first ground taken up by the IRP for rejection of IA No. 234/2020 is that the Application under Section 22 of IB Code, 2016 is not filed by CoC, but it is filed by PFC, one of the members of CoC, who is not authorized on behalf of CoC. Per contra, it is averred by the PFC that, it was the original Applicant before this Adjudicating Authority for initiation of CIRP and that the PFC is one of the Lead members in the CoC.
17. Considering the submissions, this Adjudicating Authority is of the view that a mere technical objection regarding the authorization on behalf of CoC to one of its members cannot construe a valid ground for rejection of Application under Section 22 of IB Code, 2016, as the same act conducted by PFC is basing upon the Resolution for Change of IRP to RP by CoC with 89.6% votes in favour and that such act would not cause any hardship to any of the members of the CoC.


18. The other contention of the IRP is that although he has handled various complicated CIRP's such as BSPL etc., in a fair and transparent manner, the CoC has not considered his appointment as RP and such non appointment is based on the Order of IBBI, without considering the Order passed by Hon'ble High Court of Delhi dated 19.11.2019 & 25.11.2019 and that the CoC has also not deliberated or recorded any specific reasoning for non-consideration of the IRP as RP.
19. It is a fact not in dispute that the IRP herein has carried out various complicated CIRP's such as of BSPL in a fair manner, and the same is evident from the order of NCLT Principal Bench, Delhi in the matter of BSPL. It is also observed that the CoC in the instant manner has also not levelled any allegations against the conduct of the IRP herein. Further, this Adjudicating Authority observes that pursuant to stay on IBBI Order by Hon'ble High Court of Delhi, there is no bar on the CoC to continue IRP herein as the RP and the IRP herein cannot be excluded from the zone of consideration on the same ground.
20. In relation to the recording of reasons by CoC in its meeting for removal of the IRP as RP, this Adjudicating Authority observes that the Hon'ble Supreme Court and Hon'ble NCLAT in plethora of Judgments has held that the CoC is not bound to record any reasons under Section 22 of IB Code, for change of IRP with another Insolvency professional as RP.
21. On a plain reading of Section 22 of the Code, 2016, it is clear that the CoC is conferred with the power of replacing the IRP by another Resolution Professional and no reasons need to be recorded by the CoC

for affecting such replacement. It is the prerogative of the CoC whether to continue the IRP as the RP or to replace the IRP with by another RP.

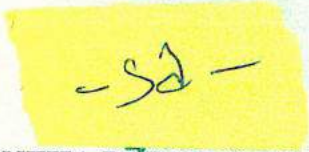
22. The power to replace an RP is solely and absolutely vested with the CoC and the only pre-requisites that are required to be met as per Section 22 are as under:

- i. The CoC in its first Meeting, shall pass the resolution with at least 66% voting shares;
- ii. Written consent shall be obtained from the proposed RP in the specified form;
- iii. The CoC shall file an application before the Ld. Adjudicating Authority for appointment of the proposed RP; and
- iv. The Ld. Adjudicating Authority shall forward the name of the proposed RP to Insolvency and Bankruptcy Board of India ("IBBI") for its confirmation and shall make such appointment after confirmation by the IBBI.

23. It is pertinent to note that the CoC has decided to appoint Mr. Sumit Binani as RP in the 4th CoC meeting with 89.6% votes and that the written consent by way of Form-AA is also placed along with the instant Application. Further, the CoC has also filed an Application vide IA No. 234/2020 before this Adjudicating Authority for appointment of the proposed RP. Therefore, this Adjudicating Authority observes that the first three of the above conditions have been fulfilled and, therefore, what remains is only appointment by this Adjudicating Authority after confirmation by the IBBI.



24. Further, the reliance placed by the Counsel for the IRP on several cases are not applicable as the facts and circumstances of the instant case are otherwise.
25. In view of the foregoing discussions, this Adjudicating Authority does not find any infirmity with the decision of CoC to replace Mr. Mukesh Khandelwal with Mr. Sumit Binani as RP to conduct the CIRP of M/s KSK Mahanadi Power Company Ltd. Accordingly, IA No. 235/2020, filed by Mr. Mukesh Khandelwal, IRP is rejected.
26. Further, this Adjudicating Authority directs the Registry to forward the name of the proposed RP in IA No.234/2020 to the IBBI for its confirmation, as contemplated under Section 22(4) of IBC, 2016.
27. Applicant in IA No. 234/2020, is also directed to obtain Authorization for Assignment (AoA) of the proposed RP on or before next date of hearing and file a memo in this regard.
28. For confirmation from IBBI, put up the matter on 16.06.2020.


K.ANANTHA PADMANABHA SWAMY
MEMBER JUDICIAL

SkRathi/Alekhy