

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Ins.) No. 1395 of 2022 &**  
**I.A. No.4539 of 2022**

[Arising out of order dated 14.10.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench, Court-V in IA (IB) No. 3757/2022 in CP(IB) No.1731 of 2019]

**IN THE MATTER OF:**

**Venus India Asset-Finance Pvt. Ltd.**  
**Registered office at 198/12-13, 2<sup>nd</sup> Floor,**  
**Main Road, Ramesh Market, East of Kailash,**  
**New Delhi – 110065**

**....Appellant**

**Vs.**

**Suresh Kumar Jain,**  
**Resolution Professional of**  
**MK Overseas Pvt. Ltd.**  
**Res Add: 3775/3, Kanhaiya Nagar,**  
**Delhi -110035**

**....Respondent**

**Present:**

**For Appellant: Mr. Brijesh Kumar Tamber, Mr. Vinay Singh Bist,**  
**Advocates**

**For Respondents: Mr. P. Nagesh, Sr. Advocate**  
**Mr. Anoop Prakash, Ms. Prapti Singh and Ms. Parthvi**  
**Ahuja, Advocates for R-1.**  
**Mr. Kunal Tandon, Ms. Richa Sandilya and Shivangi**  
**Chawla, Advocates for Intervenor (HDFC Bank)**

## **J U D G M E N T**

**[Per: Barun Mitra, Member (Technical)]**

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 14.10.2022 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court – V) in IA No. 3757/2022 in CP (IB) No. 1731 of 2019. By the Impugned Order, the Adjudicating Authority rejected the application for replacement of Resolution Professional with one Mr. Sapan Mohan Garg though approved by the Committee of Creditors (“**CoC**” in short) by a voting share of 76.69%. Aggrieved by this impugned order, the present appeal has been preferred by Venus India Asset-Finance Pvt. Ltd. (“**VIAF**” in short), being one of the Financial Creditors of the Corporate Debtor which is under the rigours of Corporate Insolvency Resolution Process (“**CIRP**” in short).

2. The brief facts of the case which are necessary to note for deciding the appeal are: -

- M.K. Overseas Private Limited – Corporate Debtor was admitted into CIRP on 19.09.2019 following admission of Section 7 application filed by Mayoga Investment Private Limited, a financial creditor.
- Following initiation of CIRP, Mr. Suresh Kumar Jain was appointed as Interim Resolution Professional on 19.09.2019 and later confirmed as Resolution Professional by the CoC in the 2<sup>nd</sup> CoC meeting which concluded on 30.10.2019.

- The CoC comprises of VIAF (74.55%), HDFC Bank Limited (12.02%), Yes Bank Ltd. (11.29%), Drip Capital Inc (2.05%) and Mayoga Investments Ltd.(0.09%) with the voting shares assigned against their names.
- The CoC approved the Resolution Plan on 02.12.2020 and the application under Section 30(6) for approval of the Resolution Plan is pending before the Adjudicating Authority from 09.12.2020.
- Later, the CoC in its 21<sup>st</sup> meeting voted and approved the replacement of the Resolution Professional/Respondent with a voting share of 76.69% on 01.08.2022. The written consent of the newly proposed Resolution Professional was also obtained before submission to the Adjudicating Authority.
- The CoC resolution for replacement of the Resolution Professional was voted in favour by 3 CoC members – VIAF, Drip Capital and Mayoga. The resolution was not approved by one member, namely, HDFC Bank while one member namely, Yes Bank had abstained from voting.
- The resolution for appointment of the new Resolution Professional, Mr. Sapan Mohan Garg in place of the existing Resolution Professional, Mr. Suresh Kumar Jain, was forwarded by the Appellant/VIAF for confirmation to the Adjudicating Authority in terms of Section 27 of the IBC. This application was rejected by the Adjudicating Authority.
- Aggrieved by this order, VIAF being one of the main Financial Creditors having majority voting share on the CoC has preferred this appeal.

3. Making his submissions, the Learned Counsel for the Appellant stated that in terms of Section 27(2) of the IBC, the CoC of a Corporate Debtor can resolve to replace the Resolution Professional appointed under Section 22 of the IBC with another Resolution Professional after putting such a resolution to vote and passed by a voting share of 66%. It has been further submitted that it is a settled principle that the CoC is not required to give reasons for replacing the Resolution Professional. In the present case, it was pointed out that the resolution for replacement of the existing Resolution Professional was approved by the CoC by a voting share of 76.69%. However, in spite of having followed the statutory prescription laid down for replacement of the Resolution Professional, the proposal has been erroneously turned down by the Adjudicating Authority.

4. Challenging the impugned order, the Learned Counsel for the Appellant has questioned the rationale adopted by the Adjudicating Authority in rejecting the application. Elaborating further, it was submitted that the Adjudicating Authority, disallowed the application for replacement of Resolution Professional on the ground that the IBC does not envisage any decision-making role for the CoC once it has approved the Resolution Plan and the Resolution Plan is pending adjudication of the Adjudicating Authority.

5. It has been further contended that a decision under Section 27 to replace the Resolution Professional can be taken up at any time during CIRP and that this has been expressly defined in the Regulation 2(e) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for

Corporate Persons) Regulations, 2016 (“**Regulations**” in short) and includes the time up to the approval of the Resolution Plan by the Adjudicating Authority and further time until the disposal of appeal under Section 62 of the IBC. Stating that the Adjudicating Authority has misconstrued the provisions of the IBC, the Learned Counsel for the Appellant further pointed out that Explanation to Regulation 18 clarifies the position in that in terms of the said Explanation, the CoC is well within its right to convene a meeting before the approval of a Resolution Plan by the Adjudicating Authority or till the time an order for liquidation has been passed to discuss matters which do not affect the Resolution Plan. Contending that the replacement of the Resolution Professional/Respondent would not in any way affect the Resolution Plan, it has been argued therefore that the Appellant along with other members of the CoC were well within their rights to pass a resolution seeking replacement of Resolution Professional in accordance with Section 27 of the IBC.

6. Further taking notice that the Adjudicating Authority in the Impugned Order has observed that it would be prudent and advisable to continue with the same Resolution Professional, the Learned Counsel for the Appellant vehemently contended that the Adjudicating Authority has exceeded its jurisdiction by going beyond the commercial wisdom of the CoC. It was asserted that it is a settled law that the commercial wisdom of the CoC is paramount and the present decision to replace the Resolution Professional being their collective decision, the scope for judicial intervention is restricted.

7. It has been further submitted that it has been wrongly held by the Adjudicating Authority that in the present case since the resolution plan had already been approved by the CoC and thereafter placed before the Adjudicating Authority for approval, this had rendered the CoC functus officio. There is no provision in the IBC which puts a bar on the CoC to convene its meeting after it has approved the Resolution Plan and the same is pending approval before the Adjudicating Authority. It has been submitted that Section 33(2) of the IBC expressly clarifies that the CoC continues to function and is authorised to take decisions till the Resolution Plan is approved by the Adjudicating Authority or a liquidation is ordered. In support of their contention it was mentioned that this Tribunal in ***Gulabchand Jain vs Ramchandra Choudhary in Company Appeal (AT) (Ins.) 142 of 2021*** had taken a similar view and that this decision has been upheld by the ***Hon'ble Supreme Court of India in Civil Appeal No. 5640/2021 of 17.09.2021***. To hold the view that the CoC becomes functus officio after it has approved the Resolution Plan would render the IBC unworkable since some of the basic functions of the Resolution Professional as outlined in Section 28 would become impossible to perform if the CoC ceases to exist. Even the CIRP cost cannot be ratified if the CoC ceases to exist. It was therefore contended that the Adjudicating Authority has misunderstood, misconstrued and mis-applied the provisions of IBC.

8. The Learned Counsel for M/s Drip Capital Inc., having 0.5% voting share also stated that it had voted in favour of replacement of the Resolution Professional.

9. The Learned Counsel for the Respondent /Resolution Professional has contended that the appeal is not maintainable since it has been filed by VIAF in private and individual capacity and not representing the CoC. Further, in the absence of any Board resolution of VIAF authorising Ms. Purna Bajaj to file the appeal, the appeal may be treated as non-instituted.

10. Making further submissions, the Learned Counsel for the Respondent/Resolution Professional while admitting that Section 27 of the IBC allows for replacement of the Resolution Professional but added that this replacement was only possible at “any time during the Corporate Insolvency Resolution Process”. Expanding on the words “during the CIRP period”, it was submitted that Section 12 of the IBC prescribes the tenure of CIRP as 180 days which can go up to a maximum of 330 days after factoring in extension/exclusion periods. The 330 days life span of CIRP of the present Corporate Debtor stood completed on 24.12.2020. Since CIRP cannot survive beyond 330 days, the applicability of Section 27 of IBC with regard to replacement of Resolution Professional also ceases to exist after 330 days of CIRP. Hence, in the present case the decision of the CoC on 28.07.2022 to put to vote the agenda item for replacement of Resolution Professional and completion of the voting process on 01.08.2022, both fall outside the life span of the CIRP. Thus, the CoC had power to trigger Section 27 to replace the

Resolution Professional only up to 24.12.2020 while in the present case this was done on 01.08.2022 which is more than 600 days of completion of CIRP and hence not legally tenable.

11. It was further submitted that in the instant case the Resolution Professional having placed the CoC approved plan before the Adjudicating Authority and CIRP period of 330 days being over, the CoC had become functus officio and hence could not have convened any meeting thereafter. In support of their contention it was mentioned that this Tribunal in the matter of ***ICICI Bank Ltd vs. Mr. Venkataramanarao Nagarajan in Company Appeal (AT) (Ins.) No. 772 of 2018*** has held that CoC becomes functus officio after the expiry of the CIRP period and cannot take any decision on replacement of Resolution Professional after expiry of CIRP period. Even the Explanatory Clause to Regulation 18 on “Meetings of Committees” added by an amendment dated 16.09.2022 which allows meetings of CoC to be convened till the Resolution Plan is approved under Section 31 or order for liquidation is passed under Section 33, it was contended that benefit of this amendment cannot be extended in the present case since the decision to replace the Resolution Professional was passed by CoC on 01.08.2022 on which date this amendment had not come in force.

12. It has also been pointed out that the amendment of 16.09.2022 also clearly states that meetings of CoC could only be convened for matters other than matter which affects the pending Resolution Plan. In the present case, since the agenda for the CoC meeting was also to consider passing a



resolution for replacement of Resolution Professional, this would have directly impacted the pending Resolution Plan and hence not permissible. The Resolution Plan would have been affected since it is the Resolution Professional who has to certify that the Resolution Plan complies with the requirements of IBC and that it is in compliance with Section 30(2) of the IBC.

13. Pointing out that the CoC in the 21<sup>st</sup> meeting proceedings has recorded that the representative from VIAF had submitted that an aggressive approach on the part of the Resolution Professional is required to close the CIRP is bound to indirectly reflect poorly on the part of the concerned Resolution Professional which would be prejudicial to his reputation. VIAF had indirectly commented on the performance of the Resolution Professional at a time when the Resolution Professional could not be blamed for delay in the approval of the Resolution Plan. The Resolution Professional had submitted the Resolution Plan before the Adjudicating Authority on 09.12.2020 within the permitted time frame of CIRP but the Plan could not reach its logical conclusion due to several rounds of hearing before the Adjudicating Authority and other related administrative reasons and not on account of any failing on the part of the Resolution Professional. It has also been pointed out that the Resolution Professional acts as an officer of the Court and therefore the discretion of the CoC to replace the Resolution Professional can be looked into by the Adjudicating Authority and not be allowed merely on the grounds of commercial wisdom of the CoC.

14. I.A. No. 4539/2022 has also been filed in the matter on behalf of HDFC Bank, bringing on record their objections to the replacement of Resolution Professional at this juncture when the Resolution Plan is already pending approval of the Adjudicating Authority. The Learned Counsel representing HDFC Bank, in support of the Respondent/Resolution Professional contended that the CIRP period of 330 days having been completed, the IBC provisions do not provide any jurisdiction to the CoC to replace the Resolution Professional and that such replacement would be prejudicial to their interest.

15. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

16. The two points which need to be answered in the present facts of the case are as follows:

- (i) Whether the CoC in passing a resolution to replace the Resolution Professional in the facts of the present case has committed any breach of the IBC and regulations framed thereunder; and
- (ii) Whether the decision of the CoC to replace the Resolution Professional being the outcome of the wisdom of the CoC, is not subject to judicial review.

17. To answer the first question, it would be useful to go through the statutory provisions which govern the appointment of Resolution Professional

and also the replacement of Resolution Professional. Section 22 outlines the modalities for appointment of Resolution Professional while Section 27 prescribes the procedure to be followed for replacement of the Resolution Professional. The relevant statutes are as reproduced below: -

**Section 22 of IBC - Appointment of resolution professional.**

*(1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.*

*(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent. 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.*

*(3) Where the committee of creditors resolves under sub-section (2) —*

*(a) to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or*

*(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.*

*(4) The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board.*

*(5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.*

**Section 27 – Replacement of Resolution Professional by Committee of Creditors**

*(1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.*

*(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent. of voting shares, propose to replace the resolution professional appointed under section 22 with another resolution professional.*

*(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.*

*(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.*

*(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.*

18. Given this statutory construct for appointment and replacement of a Resolution Professional, we now proceed to examine how the CoC has approached the issue of replacement of Resolution Professional in the present case. It is an admitted fact that the CoC in its 21<sup>st</sup> meeting at agenda item 3 had put to vote the decision to replace Mr. Suresh Kumar Jain-Resolution Professional by Mr. Sapan Mohan Garg and on conclusion of voting on 01.08.2022 with 76.69% vote share had resolved to replace the Resolution Professional. Before we go into the resolutions that were passed in this meeting, we may take notice of the voting results as under:

Agenda Item No. 3					
To discuss and decide on the replacement of resolution professional and to discuss and decide the remuneration of mr. sapan mohan garg					
Name of Members	Voting share %	Voted		Abstained	
		Voted for %	Voted against %	By voting %	By not voting %
Venus India Asset Finance Pvt. Ltd	74.55	74.55	--	--	--
HDFC Bank Limited	12.02	--	--	--	12.02
Yes Bank Limited	11.29	--	--	11.29	--
Drip Capital INC	2.05	2.05	--	--	--
Mayoga Investments Limited	0.09	0.09	--	--	--
Total	100.00	76.69	0	11.29	12.02

19. Next we may peruse the resolutions as passed in the said CoC meeting:-

*“RESOLVED THAT pursuant to section 27 read with section 22, and other applicable provisions of Insolvency and Bankruptcy Code, 2016 read with regulation 3(1A), 31(D) and 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in accordance with rules and regulations made thereunder, approval of committee of creditors be and is hereby accorded for replacement of Mr. Suresh Kumar Jain, Resolution Professional of M/s M.K. Overseas Private Limited, bearing Registration No. IBBI/IPA-001/IP-P01179/2018-19/11839 and appointment of Mr. Sapan Mohan Garg an Insolvency Professional, bearing Reg. No. IBBI/IPA-002/IP-N00315/2017-2018/10903, as Resolution Professional in the matter of the Corporate Insolvency Resolution Process of M/s M.K. Overseas Private Limited.”*

*“RESOLVED FURTHER THAT pursuant to sub section 3 of Section 27 of the IBC, 2016 the member of Committee of Creditors hereby authorizes Venus India Asset-Finance Private Limited, CoC member having voting rights of 74.55% to file necessary application for appointment of Mr. Sapan Mohan Garg, an Insolvency Professional (Registration No. IBBI/IPA-002/IP-N00315/2017-2018/10903) with Hon’ble NCLT for appropriate directions and orders in the regard and to do all such acts, deeds, and matters as may be necessary to give effect to this resolution.”*

20. We, therefore, find that Section 27 of the IBC empowers the CoC to replace a Resolution Professional who has been appointed under Section 22 of the IBC at any time during the CIRP. In the present case, we find that the CoC after passing a resolution with majority vote to replace the Resolution Professional has thereafter filed an application before the Adjudicating Authority along with the written consent from the proposed Resolution Professional in the specified form. It is also noted that against a requirement of 66% voting share, the requisite resolution has been passed with 76.69% vote share. We also note that the CoC had also resolved that the application for replacement of the Resolution Professional will be presented before the Adjudicating Authority by VIAF and this resolution has also been complied with. This nullifies the contention of the Respondent/Resolution Professional that the present appeal having been filed by VIAF is not maintainable since VIAF had been clearly authorized to represent on behalf of the CoC before the Adjudicating Authority. VIAF is therefore entitled to defend the interests of the CoC when the matter has come up for appeal.

21. The statutory provisions and related Regulations framed thereunder having laid down in unambiguous terms the manner and procedure for replacement of the Resolution Professional and the CoC having acted in conformity with those provisions, the CoC was well within its rights to replace the Resolution Professional with a new one of its own choice. There is no disagreement that the replacement of Resolution Professional is complete when the required decision is taken by the CoC in its meeting with requisite

majority. Interference would be warranted only if the decision of the CoC was suffering from material irregularities or dehors the statutory provisions and the rules framed thereunder which is not the case. We, therefore, hold that there was no violation of the statutory provisions in bringing about the replacement of the Resolution Professional by the CoC and all procedural compliances having been met, there is no room to hold the process to have been vitiated in any manner. Since the requirements laid down by IBC have been met, the Adjudicating Authority is duty bound to abide by the discipline of the statutory provisions.

22. This now brings us to the second question identified by us in that whether the replacement of the Resolution Professional being integral to the wisdom of the CoC which is not subject to judicial review.

23. Before diving into the facts of the present case, it may be pertinent to state a few well-acknowledged precepts in the context of the IBC. The IBC adumbrates a new ethos of insolvency resolution with a creditor-in-control regime as opposed to the debtor-in-possession format of the legacy laws. One of the most distinguishing features of the Code is that all the major decisions from the initiation till the end of the CIRP is taken by the CoC and in the conduct of this resolution process, it is aided by the Resolution Professional. The Resolution Professional is tasked with facilitating and conducting the entire CIRP and in doing so is expected not only to address and balance the interests of all stakeholders but also to act as the link between the Adjudicating Authority and CoC during CIRP. Further in the matter of the



**Swiss Ribbons (P) Ltd. v. Union of India (2019) 4 SCC 17**, the Hon'ble Supreme Court has held that the IRP/ Resolution Professional is an administrator of the IBC Code and is expected to function under the guidance and the directions of the CoC that controls the Corporate Debtor. Given this backdrop, the importance of seamless functioning of the CoC and the Resolution Professional needs no special emphasis. The relationship between the Resolution Professional and the CoC needs to be extremely transparent and one of trust and confidence with no scope for friction. It is therefore a logical corollary that if the Resolution Professional loses the trust of the CoC and the CoC as per its wisdom decides to replace the Resolution Professional that discretion ought to be allowed to prevail in the interest of smooth and effective completion of CIRP. In such circumstances, when the CoC contemplates change of Resolution Professional, the Adjudicating Authority in terms of the statutory construct has to merely look into two basic check boxes which is whether the CoC has resolved to that effect with 66% vote share and whether the proposed Resolution Professional has given his written consent and not look at anything beyond. Both these conditionalities stand met in the present case.

24. We however find that in the present case the Adjudicating Authority has held that in their opinion it would be "*prudent and advisable*" to continue with the same Resolution Professional given that 330 days have already passed from the date of initiation of CIRP and no adverse references have been received by the CoC regarding the performance of the Resolution

Professional. Further it has held the decision of the CoC to replace the Resolution Professional at this juncture to be “*untenable and misconceived*” when Resolution Plan has already been submitted to Adjudicating Authority and that this is not in conformity with the provisions of the Code as the Code does not envisage any role or decision to be taken by the CoC after it has approved the Resolution Plan.

25. The view taken by the Adjudicating Authority is that 330 days of CIRP having expired on 24.12.2020, the Resolution Plan has reached an advanced stage and in this backdrop cognisance has to be taken that the overarching objective of the IBC is to complete CIRP in a time-bound manner so that the value of assets of the Corporate Debtor is not depleted is well taken. We notice that the same objective of bringing the CIRP to a closure was also one of the triggers for holding the 21<sup>st</sup> meeting of CoC. In view of the sluggish rate of CIRP progress, the CoC by majority vote felt that a new Resolution Professional with a more aggressive approach is needed to complete the CIRP as against the view taken by the Adjudicating Authority that replacement of the existing Resolution Professional would only delay the process. This amounts to the collective wisdom of the CoC being substituted by that of the Adjudicating Authority which approach is hit by the well settled principle of supremacy of the collegiate wisdom of the CoC.

26. It is also the case of the Respondent/Resolution Professional that though Section 27 allows for replacement of the Resolution Professional but this replacement was only possible at “any time during the Corporate

Insolvency Resolution Process” and that in the instant case the Resolution Professional having already placed the CoC approved resolution plan before the Adjudicating Authority and CIRP period of 330 days being over, the CoC could not have convened any meeting thereafter. The Learned Counsel for the Respondent/Resolution Professional argued that the Adjudicating Authority has therefore rightly held that though replacement of Resolution Professional can be done when the required decision is taken by the CoC in its meeting with requisite majority, however, it is required for the Adjudicating Authority to examine the *locus standi* of the CoC whether it is empowered to take such decisions after approving Resolution Plan.

27. Rebutting the stand taken by the Respondent/Resolution Professional, it has been submitted by the Learned Counsel for the Appellant that Section 27 expressly mandates that the CoC is vested with the power to replace the Resolution Professional “at any time during the Corporate Insolvency Resolution Process” and the CIRP period continues until the Resolution Plan is approved. To buttress their claim, it has been pointed out that Regulation 2(e) defines CIRP. As per this definition, CIRP means the Insolvency Resolution Process for Corporate Persons as laid down under Chapter II of Part II of the IBC and that Chapter II of Part II of the IBC ends only with the approval of the Resolution Plan by the Adjudicating Authority. Thus, it has been argued that CIRP continues till the Resolution Plan is approved by the Adjudicating Authority and in the present case the Resolution Plan not having been approved so far, the decision to change the Resolution Professional lies

squarely within the exclusive domain of the CoC which it can decide by way of voting. It has also been contended that the jurisdiction of Adjudicating Authority is circumscribed by the provisions of IBC and they cannot reverse the decision supported by majority in the CoC.

28. Attention has also been adverted to Explanation to Regulation 18 to state that it clearly empowers the CoC to hold meetings till the resolution plan is approved under sub-section (1) of section 31 or order for liquidation is passed under section 33. It may be relevant to reproduce the same as under:

**Regulation 18**

*“18. Meetings of the committee.*

*(1) A resolution professional may convene a meeting of the committee as and when he considers necessary.*

*(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty three per cent of the voting rights.*

*(3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty three per cent of the voting rights.”*

*“Explanation: For the purposes of sub- regulation (2) it is clarified that meeting (s) may be convened under this sub-regulation till the resolution plan is approved under sub-section (1) of section 31 or order for liquidation is passed under section 33 and decide on matters*

*which do not affect the resolution plan submitted before the Adjudicating Authority."*

29. The Learned Counsel for the Respondent/Resolution Professional argued that this cannot come to the help of the Appellant since this Explanation was inserted by an amendment which came about on 16.09.2022 which was subsequent to the date of CoC meeting when the decision was taken to replace the Resolution Professional. This was refuted by the Learned counsel for the Appellant on the ground that an Explanatory clause being clarificatory in nature it cannot be held to be prospective. We are also not persuaded to subscribe to the contention of the Respondent/Resolution Professional since the applicability of the Explanatory clause cannot be pegged with reference to any particular point of time as it is intended to remove any obscurity or vagueness or ambiguity in the Regulation. The explanatory clause now allows CoC meetings to be held until the Resolution Plan is approved. In the instant case too, the 21<sup>st</sup> CoC meeting has been held prior to the approval of the Resolution Plan. The two being in harmony, we are inclined to agree with the Appellant's stand that the CoC was entitled to hold the meeting.

30. We also find force in the argument made by the Learned Counsel of the Appellant that on the one hand the Respondent / Resolution Professional have contended that the CoC could not have held a meeting to replace the Resolution Professional since 330 days of CIRP is over but on the other hand have raised no objections to two other items taken up in the same meeting

including ratification of expenses incurred by Resolution Professional and other CIRP expense. This clearly depicts approbation and reprobation at the same time and therefore cannot be countenanced.

31. The reliance placed by the Learned Counsel for the Respondent/Resolution Professional on the judgement of this Tribunal in the matter of ***ICICI Bank Ltd vs. Mr. Venkataramanarao Nagarajan in Company Appeal (AT) (Ins.) No. 772 of 2018*** is distinguishable from the facts of the present case since in that case no Resolution Plan had been approved by the CoC and the Resolution Professional had filed application for liquidation and order of liquidation had been passed. Hence, this judgement does not come to the aid of the Respondent/Resolution Professional. Further it has also been submitted by the Learned Counsel for the Respondent/Resolution Professional that this Tribunal in the matter of ***Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr. in Company Appeal (AT) (Ins.) No. 560 of 2018*** has held that after completion of 270 days, the CoC ceased to exist and thereby they have no jurisdiction to replace a Resolution Professional. The said judgment is also not applicable since the facts are distinguishable since in that case there was no Resolution Plan.

32. Coming to the findings of the Adjudicating Authority that the conduct of the Resolution Professional has been satisfactory and that no adverse references were received by the CoC regarding the performance of the Resolution Professional, we have done a fact-check by going through the

proceedings of the 21<sup>st</sup> CoC meeting at Annexure A-3 in the Appeal Paper Book. The relevant excerpts are as extracted below:

*“Mr. Jogendra Singh from HDFC Bank enquired about the reason for the change of Resolution Professional and Mr. Arjun Sethi from Yes Bank also enquired about the reason of change in Resolution Professional after the gap of 3 years.*

*Mr. Saket Misra from Venus India Asset-Finance Private Limited submitted that three years have passed and fair amount of progress have been made but aggressive approach on the part of Resolution Professional is required to close the CIRP and we expect that proposed Resolution Professional will take up aggressively as huge amount of capital is involved.”*

33. This clearly shows that CoC had deliberated on the performance of the Resolution Professional before considering to move the resolution and putting the same to vote. Further, since the decision of the CoC to replace the Resolution Professional was taken by exercising of voting rights assigned to the creditors, it was not necessary for Adjudicating Authority to look into reasons or decide whether there were sufficient reasons for change of the Resolution Professional as the Adjudicating Authority cannot don the mantle of a supervising authority. More importantly, the relevant section 27 does not prescribe the need to assess the performance of the Resolution

Professional while seeking his replacement. It has been pointed out by the Appellant that this Tribunal in the matter of **State Bank of India vs. Ram Dev International Ltd. in Company Appeal (AT) (Ins.) No. 302 of 2018** held that it is not desirable for the CoC to record its opinion or comments about the Resolution Professional while seeking his replacement so that no harm is caused to his present and future appointment as Resolution Professional. We also find that the Adjudicating Authority in the impugned order has observed that in terms of judgement of this Tribunal in **Sumant Kumar Gupta vs Committee of Creditors in Company (AT) Ins No. 1037 of 2020** and in the matter of **Bank of India vs Nithin Nutritions Private Limited in Company (AT) Ins No. 497 of 2020**, the CoC is not required to give reasons in matters relating to Sections 22 and 27 of IBC and yet have gone ahead on their own to comment on the functioning of the Resolution Professional. The statutory framework of the IBC also does not mandate that the CoC is required to adduce reasons for replacing the Resolution Professional. We find that in the present case too, the Appellant while filing the application for replacement of the Resolution Professional has desisted from making any adverse observations on his performance and thus cannot be held to have acted in any manner contrary to law or having not adhered to the precepts laid down in the above judgments.

34. It has also been pointed out by the Learned Counsel for the Appellant that the impugned order contains submissions of the Resolution Professional which were not part of the records. Specific reference was made in respect of



para 6 of the impugned order which records allegations and responses which were neither pleaded nor orally made in the first place and therefore there was no occasion to return the said findings. As no allegations were made against the Resolution Professional in the application filed by the Appellant before the Adjudicating Authority and there was no other pleading on record or argument to that effect, there was absolutely no occasion to embark upon a detailed discussion on the conduct of the Resolution Professional as has been done in the impugned judgment. This fact was not denied by the Learned Counsel for the Respondent/Resolution Professional. Similarly in para 7 of the impugned order, reference was made to a short affidavit of M/s Drip Capital on record when no such affidavit had been filed clearly indicates factual errors in the impugned order. We hold that placing reliance on extraneous record by the Adjudicating Authority in arriving at the impugned order is not sustainable in the eyes of law.

35. This now brings us to that part of the impugned order wherein the Adjudicating Authority has rejected the application of the Appellant to replace the Resolution Professional by advising the CoC to continue with the same Resolution Professional. It is well settled that the IBC does not postulate jurisdiction for the Adjudicating Authority to undertake scrutiny of the justness of the majority opinion expressed by financial creditors by way of voting. The insolvency regime introduced under the IBC has placed fetters on the power of interference by the Adjudicating Authority. Applying this principle in the instant case, we are of the view that the Adjudicating Authority

being a creature of IBC Code and the statutory provisions therein not having invested jurisdiction and authority upon it to review the decision exercised by the CoC to replace the Resolution Professional, the rejection of the application for the replacement of the Resolution Professional is a transgression of jurisdiction and therefore deserves to be set aside.

36. For the reasons recorded above, we set aside the impugned order dated 14.10.2022 and allow the replacement of Mr. Suresh Kumar Jain by appointing Mr. Sapan Mohan Garg as Resolution Professional, who will act in accordance with law. Mr. Suresh Kumar Jain may submit his claims for fees and other costs, if any incurred, before the CoC and the CoC is directed to consider the claims and entitlements, if any, expeditiously. This appeal is allowed with the above observations. No costs.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**Place: New Delhi**

**Date: 09.02.2023**

PKM