

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-201

IB-2371/ND/2019

IA/3424/2020

IA/3083/2020

IA/3581/2020

IN THE MATTER OF:

Ingram Micro India Pvt Ltd

Vs

K.D.K Enterprises Pvt Ltd

...Applicant

...Respondent

SECTION

U/s 9 IBC Code 2016

Order delivered on 04.09.2020

CORAM:

SHRI ABNI RANJAN KUMAR SINHA
HON'BLE MEMBER (JUDICIAL)

SHRI K.K. VOHRA,
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant

: Mr. Saurabh Jain, Mr. Kumar Sumit & Mr. Chirag Gupta
Applicant-1&2, Mr. Naveen Kumar Jain, Mr. Harsh Tikoo,
Mr. Ashish Rana CoC

For the Respondent

:

ORDER

IA-3424/2020

Mr. Kumar Sumit appearing on behalf of the Suspended Board of Directors seeks two weeks' time to file the reply. The prayer is allowed. He is directed to file the reply within two weeks from today after serving an advance copy on the Ld. Counsel for the IRP. List the case for 21.09.2020.

In the meantime, Ld. IRP/ RP is directed to verify the documents referred in the application from the concerned department/Section.

-sd/-

(K.K. VOHRA)
MEMBER (T)

-sd/-

(ABNI RANJAN KUMAR SINHA)
MEMBER (J)

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PRESENT:

For the Applicant :

For the Respondent :

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

ORDER

IA-3083/2020 & IA-3581/2020

Since, both the applications are related with each other, therefore, we would like to dispose off both the applications with this common order.

IA-3083/2020

1. This application has been filed by the IRP under Section 60 (5) of the IBC read with Rule 11 of NCLT Rules praying therein for fixation and payment of fee of IRP and also stay the replacement of applicant IRP with new RP on discriminatory grounds.



2. The facts mentioned in the application in short is that fix fee of Rs. 2,50,000/- for 30 days period of IRP and to make the payment of outstanding CIRP Cost including total fee and expenses, direct the non-applicant no. 2 to continue to periodically and timely, make the payment of the recurring CIRP cost. Stay or reject the replacement of the applicant with the new RP Mr. Harsh Kumar Malhotra (Regn. No. IBBI/IPA-003/IPA-ICAI-N-00255/2019-2020/12904).
3. Further, as per Regulation 33 (1) & (2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Adjudicating Authority shall fix the expenses, where the applicant has not fixed the expenses. Further, in this case the applicant did not propose any IRP and the Adjudicating Authority has appointed the petitioner as an IRP and the applicant has been discharging his duties in accordance with the provisions of the IBC. Further, on 24.07.2020, the applicant conducted second CoC meeting and non-applicant no. 2 has placed an agenda of replacement of applicant/IRP.
4. The respondent no. 2 has filed a reply and the facts mentioned in the reply in short are that on 24.07.2020, the respondent no. 2 had sent a mail to the applicant intimating that a fee of Rs. 50,000/- has been approved and other expenses of Rs. 42,160/- has been incurred by the applicant has also been approved. Further, on 31.07.2020, in response to the mail dated 30.07.2020 respondent no. 2 applicant has declined the request of respondents no. 1 & 2 for modification/amendment of the minutes dated 24.07.2020. Further, the respondent has also preferred a separate application under Section 27 for change of IRP.

IA-3581/2020

5. This application has been filed on behalf of the CoC under Section 27 of the IBC praying therein to replace the RP. The facts mentioned in the application in short are that the Operational Creditor did not propose the name of the IRP and this Adjudicating Authority has appointed Mr. Naveen Kumar Jain as IRP. The first meeting of CoC was held on 19.06.2020, where the CoC disapproved to appoint the IRP as RP under Section 22 (3) of IBC. On 24.07.2020, the second meeting of CoC was held wherein it was proposed to change the IRP and the CoC decided to replace Mr. Naveen Kumar Jain with Mr. Harsh Kumar Malhotra. Further, on 17.08.2020, third CoC meeting was held wherein the CoC withdrew the earlier proposal of Mr. Harsh Kumar Malhotra to act as a RP and proposed Mr. Devendra Singh having Registration No. IBBI/IPA-002/IP-N00001/2-16-17/10001 to appoint as RP. With this application, the CoC has enclosed the



minutes of meeting dated 24.07.2020 and minutes of meeting dated 17.08.2020 as well as the written consent of Mr. Devendra Singh.

6. We have heard the Ld. Counsel for the CoC and the RP and Operational creditor and perused the averments made in the applications. Ld. Counsel for the RP has submitted that although in its application, he has claimed the expenses but that has been approved by the CoC so he has no grievance against the expenses. He further submitted that so far the fee approved by the CoC i.e. Rs. 50,000/- is concerned, it is not proper because the CoC is not empowered to fix the fee of the IRP, rather it is the Operational Creditor or the Adjudicating Authority, who can fix the fee of the IRP and in this regard, he has placed reliance upon Regulation 33 of IBBI (Insolvency Resolution Process for Corporate Persons, 2016). He further submitted that if the applicant has not fixed the expenses then in view of Regulation 33 (2), the Adjudicating Authority shall fix the expenses and he also referred the explanation of Regulation 33, which says that expenses including the fee to be paid to the IRP and on this basis of that he claimed that the fee fixed by the CoC is not in accordance with the provisions contained under Regulation 33 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016.
7. On the other hand, Ld. Counsel appearing for the CoC submitted that the expenses has already been ratified and there is no grievance of IRP against the ratification of the expenses. He further submitted that even in the reply filed by the CoC in IA-3083/2020, the CoC through mail dated 24.07.2020 intimated the IRP regarding the fixation of fee of Rs. 50,000/- during the period of 30 days. He further submitted that the proposed RP has also accepted the fee of Rs. 50,000/- and on the basis of the same, he fixed the fee of the RP @ Rs. 50,000/- per month.
8. Ld. Counsel for the Operational Creditor submitted that the Operational Creditor has deposited Rs. 2 Lakhs and as per the order, he is entitled to get the same reimbursed by the CoC. Ld. Counsel for the CoC in his reply submitted that the CoC shall consider the prayer of the OC to reimburse the amount and he also informed that the amount will be reimbursed.
9. In the light of the submissions made on behalf of the parties, we have gone through the averments made in the applications filed by the RP as well as COC and the reply filed by the CoC in response to the application filed by the RP.
10. Before considering the submissions, we would like to refer Regulation 33 of IBBI (Insolvency Resolution Process for Corporate Persons, 2016) upon which the RP has placed reliance and the same is quoted below:-

33. Costs of the interim resolution professional.

(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs. 8

[Explanation. - For the purposes of this regulation, "expenses" include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.]

11. Mere plain reading of the provision shows that the explanation attached to the Regulation 33 of IBBI says that the expenses referred in the regulation includes the fee to be paid to the IRP and Regulation 33 (3) says that the applicant shall bear the expenses which shall be reimbursed by the Committee to the extent it ratifies. Therefore, in our considered view, in view of Regulation 33 (3) of the IBBI, it is the CoC who is authorized to ratify the expenses, which includes the fee. This Adjudicating Authority shall exercise its powers under Regulation 33 (2) only if the applicant has not fixed the expenses under sub-Regulation (1).
12. Here in the case in hand, we find that the CoC has also ratified the expenses and that is the reason so far the expenses are concerned, the RP has not raised any grievance. His grievance is only against the fee, which is fixed by the CoC i.e. Rs. 50,000/- for 30 days. As we have already referred the explanation of Regulation 33, which says that the expenses includes the fee, therefore, when the RP is satisfied with the ratification made by the CoC towards the expenses incurred, therefore, there is no question to defer the second part of the resolution of the CoC, which relates to the fee of the RP. In our considered view, a person cannot be allowed to blow hot and cold in the same breath. Once the RP has accepted this fact that the the CoC has ratified the expenses and he accepted the same then he cannot be permitted to raise this question that CoC is not empowered to decide the fee of the RP rather it is the applicant or the Adjudicating Authority who can decide the fee of the IRP, therefore, we find, no force in the contention raised on behalf of the IRP that the fee fixed by the CoC is not in accordance with the Regulation 33 of the IBBI.



13. For the reasons discussed above, we have no option but to hold that the fee fixed by the CoC i.e. Rs. 50,000/- is under Regulation 33 (3) of the IBBI and therefore, this Adjudicating Authority is not inclined to interfere with the wisdom of CoC, which CoC is empowered to exercise under the Law.
14. Although, the RP has made several prayer, which relates to the expenses and the challenge of resolution taken by the CoC for replacement of the RP, so far the expenses are concerned, we have already expressed our view, therefore, it is needless to repeat the same.
15. So far the prayer regarding the rejection of the prayer of the CoC for the replacement of RP is concerned, in view of Section 27 (3) of the IBC, the CoC is empowered to replace the IRP under Section 27, where at any time during the CIRP, the CoC is of the opinion that a RP appointed under Section 22 is required to be replaced, it may be replaced with another RP in the manner provided under this Section i.e. by vote of 66 per cent, the Indian Bank is the sole financial creditor having voting share of more than 66 per cent, therefore, we are unable to accept the contention of the RP to reject the prayer of the CoC to replace the RP, hence, this prayer of the RP is hereby rejected.
16. So far the prayer made by the CoC for replacement of the RP is concerned, since it is duly approved by the resolution of the CoC as required under Section 27 (2) of the IBC, therefore, we hereby approve the replacement of the RP by Mr. Devendra Singh having Registration No. IBBI/IPA-002/IP-N00001/2-16-17/10001.
17. Before parting with this case, we hereby direct the CoC to reimburse the amount, which has been deposited by the Operational Creditor i.e. Rs. 2,00,000/- within two weeks from today and communicate this Adjudicating Authority.
18. **With this order both the IAs stands disposed off.**


(K.K. VOHRA)
MEMBER (T)


(ABNI RANJAN KUMAR SINHA)
MEMBER (J)