

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 391 of 2020

IN THE MATTER OF:

**Shri Vijay Kumar Singh,
Shareholder/Director
M/s. Newgen Speciality Plastics Limited
S/o Sh Jodhan Singh
Flat No. 263,
Gail Apartment,
Sector - 62, Noida
Gautam Buddh Nagar
Uttar Pradesh - 20130**

.....Appellant.

Versus

**1. Shri Anil Kumar,
Liquidator
M/s. Newgen Speciality Plastics Limited
303, CGHS Limited,
Golf Course Road,
Plot No. 64, Sector 55,
Gurgaon, Haryana - 122011**

.....Respondent No. -1

**2. Punjab National Bank,
(Substituted Oriental Bank of Commerce)
(Member of CoC)
B-31, Sector 62, Noida
Staff Training Centre,
Uttar Pradesh - 201301**

.....Respondent No. -2

**3. Export-Import Bank of India (Exim Bank)
(Member of CoC)
Block Tower 1.7 Floor,
Adjacent Ring Road,
Opposite AIIMS,
Kidawi Nagar East
New Delhi - 110023**

.....Respondent No. -3

**4. Hero Fincorp,
(Member of CoC)
09, Basant Lok, Vasant Bihar,
New Delhi – 110057**

....Respondent No.-4

**5. Intec Capital Limited
(Member of CoC)
708, Manjusha Building
57 Nehru Place,
New Delhi – 110019**

....Respondent No. -5

**6. HDFC Bank Limited,
(Member of CoC)
Plot-31,
Najafgarh Industrial Area
Tower – A, First Floor,
Shivaji Marg
New Delhi – 110015**

....Respondent No. 6

**7. M/s. Dynamic Star Security
& Allied Services,
Village Sutiya,
PO- Kulsera,
Dist. Guatam Budh Nagar,
Uttar Pradesh**

**...Respondent No. – 7/
Operational Creditor**

Advocates:

**For Appellant: Mr. Gautam Singhal and Mr. Rajat Choudhary,
Advocates.**

**For Respondent: Mr. Rajendra Kumar Beniwal and Mr. Anil
Kumar, Advocates for R-1 (Liquidator).**

**Mr. Chirag Gupta and Mr. Kumar Sumit,
Advocates for R-1.**

**Mr. Durgesh Agarwal, Mr. Piyush Beriwal,
Mr. Ankit Raj, Advocates for R-2.**

**Mr. Chander Harsh, Mr. Ashish Rana and
Mr. Ramesh, Advocates for R-3.**

Mr. Kisalay Kartikey and Ms. Kajal Bhatia,

**Mr. Sanjeev Singh, Mr. Sam Panna Pani,
Mr. Prashant Tripathi, Advocates for R-4.
Ms. Amrita Rana, Advocate for R-5.
Mr. Gurmeet Bindra, Advocate for R-6.
Ms. Amita, Mr. Sampurna Gupta, Advocate.**

J U D G M E N T

A.I.S. Cheema, J.

1. This Appeal has been filed by the Appellant, Director of the Corporate Debtor (M/s. Newgen Speciality Plastics Ltd.). The Appeal has been filed against Impugned Order dated 06th January, 2020 passed by Adjudicating Authority (NCLT, New Delhi, Bench – III) at New Delhi in C.P.(IB) No. 1251/ND/2018, in the matter of “M/s. Dynamic Star Securities & Allied Services Vs. M/s Newgen Speciality Plastics Ltd.”

2. By the Impugned Order, the Adjudicating Authority rejected the C.A. No. 962/C-III/ND/2019 filed by Oriental Bank of Commerce (Now, Punjab National Bank) and Others against Respondent No. 1, Amit Kumar (Resolution Professional), (Now, Liquidator).

3. By the same order, the Adjudicating Authority accepted C.A. No. 452/C-III/ND/2019 filed by the Resolution Professional (Now, Liquidator) seeking order of liquidation of the Corporate Debtor.

4. The Present Appeal has been filed by the Appellant Director of the Suspended Board of the Corporate Debtor seeking direction to set aside the

impugned order and prays that the Resolution Plan, copy of which has been filed with Appeal should be considered and accepted by the CoC.

Case of Appellant in short

5. In short the Appeal claims that the Corporate Debtor was engaged in exporting of products which deal with the manufacture of plastic products; the Company got best MSME awards. On 19.11.2018, Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short IBC) filed by M/s. Dynamics Star Security & Allied Services against the Corporate Debtor was admitted. Earlier, one IRP Mr. Rajesh Parekh was appointed and subsequently the CoC appointed the Respondent No.-1 as RP. The Appellant claims that during the period of CIRP, Promoters secured orders and executed orders worth Rs. 3.4 Crores. It is claimed that the Respondent No. 1/Resolution Professional himself presented that the loss during CIRP period from middle of November to March was Rs. 14 Lacs at an average of Rs. 10 Lacs per month whereas loss for the month of March had come down to Rs. 5.8 Lacs; that it will be made profitable if the operations were continued but, according to the Appellant, Respondent No. 1 however with ulterior motive and mala fide intention presented the case that it would not be viable to run the unit.

6. Respondent No. 1 presented CIRP expenses for two months of July and August, at approximately Rs. 50 lacs and Rs. 25 lacs. The Appellant claims that if the losses were gradually coming down why Respondent No. 1, instead of raising interim finance to run the unit, decided to close the unit.

7. The Appellant claims that Respondent No. 1 distorted and misrepresented the facts to CoC that liquidation is only the alternative. It is claimed that the Adjudicating Authority has not appreciated the documents presented by the Respondent No.1, properly.

8. It is argued by the Appellant that the Respondent No. 1 filed Application under Section 30 (2) of IBC with mala fide intention to force C.D. into liquidation. The Corporate Debtor had 56 employees and orders worth Rs. 12 crores and ready infrastructure. It is argued that Oriental Bank of Commerce (Now, PNB) conducted extensive forensic audit before CIRP started which audit showed that the project is viable subject to infusion of fresh equity. At the time of arguments, Learned Counsel for the Appellant stated that the Corporate Debtor with the help of Ex-Director could have become profitable and was moving towards profitability but Respondent No. 1 suddenly stopped operations from April, 2019. Respondent No. 1 did not pay the suppliers, workers and employees on time intentionally and kept withdrawing his fees and expenses. The Information Memorandum prepared was also with wrong data. The CoC belatedly realized intention of Respondent No. 1 and conducted Joint Lenders' meeting on 25th November, 2019 and sought replacement of Respondent No. 1 as Resolution Professional. The Appellant has referred to Reply of Respondent No. 4 /Hero Fincorp, member of CoC to submit that Respondent No. 4 has supported the CoC for removal of Respondent No.1.

9. The Appellant has argued that the Appellant can still give Resolution Plan for revival of Corporate Debtor and has given a settlement proposal

under Section 230 of the Companies Act, 2013 to the members of CoC as presently the Company is under Liquidation. The Appellant wants liquidation order to be set aside. The Appellant has referred section 27 of IBC and argued that CoC decided that the RP should be replaced. RP is required to be replaced.

Case of Respondent No. 1 (then R.P.-now Liquidator) in short

10. Against this, the Respondent No.1 then RP (now Liquidator) has referred to Reply filed and the case put up before the Adjudicating Authority to submit that the Respondent No. 1 had faced non-cooperation from the Appellant who made efforts to sabotage the entire Resolution Process. The Counsel for Respondent No. 1 referred to Reply to show that the Corporate Debtor was in bad financial position and Respondent No. 1 took all necessary steps under provisions of law to try to keep the Corporate Debtor as a going concern. It is argued that the working capital of the Company depleted to the tune of Rs. 19.99 crores which was shown in the inventory towards procurement and development of moulds. According to Respondent No. 1 the Appellant took orders when Appellant was knowing that the working capital of the Company was depleting and company was in loss.

11. It is argued that the allegations of Appellant that the Respondent No. 1 did not take appropriate steps to keep the Corporate Debtor as a going concern, was concocted story. It is stated that 4th CoC meeting clearly showed that the Corporate Debtor was incurring loss in a recurring manner

and that the Appellant along with other promoters deliberately took orders from the market while being completely aware of the fact that the working capital of the Company was not even sufficient to achieve the break even sales. Referring to the Reply, it is argued that it has been categorically recorded in second, third and fourth CoC meetings that Corporate Debtor was incurring huge loss on daily basis and working capital of the corporate Debtor was steadily decreasing. The Respondent No. 1 has argued that CoC was mainly responsible for taking commercial decisions and the members of CoC were sent Notice of meeting fixed on 19th June 2019, in advance having Item No. 9 with regard to taking decision regarding liquidation. It is argued that the CoC wrongly claimed before the Adjudicating Authority that Respondent No. 1 made misrepresentation of facts and that it did not understand the decision they were taking. Reference is made to Minutes at page 340 @ 362 of the Appeal Paper Book, which is part of Minutes of 5th CoC meeting dated 19th June 2019 where CoC recorded that although they could physically cast their votes on the items of the agenda but as important decisions were to be taken, they might require prior approval of the concerned authorities of their organisation and insisted on e-voting. Respondent No. 1 has argued that accordingly e-Voting took place and reference is made to Summary of the decision taken by way of e-Voting Page 367. It is argued that CoC had no ground to claim before Adjudicating Authority that it had no idea of procedure or that Resolution dated 19.06.2019 was based on misrepresentation.

12. According to the Respondent No. 1 Minutes of 5th Meeting show that Resolution regarding liquidation was duly approved by the RP was approved by CoC.

Case of other Respondents (Members of CoC)

13. The Respondent No. 2 OBC Bank (Now PNB) having 66.79 % voting share in the Committee of Creditor has filed written submissions and argued that the Corporate Debtor was a loss making entity and accumulated ever increasing losses since 2015-2016. It is argued that no Resolution Plan was received by CoC within stipulated time of 180 days which ended on 17th May, 2019. However, the consortium of two directors of the Corporate Debtor which included the Appellant along with a third party, assured CoC to grant sometime to submit Resolution Plan. As such CoC decided to grant further time to Consortium including Appellant and sought extension of time for CIRP before the Adjudicating Authority. The Adjudicating Authority by order dated 23rd May 2019 granted extension of 90 days which was ending on 16th August, 2019. Respondent No. 2/PNB has argued that several opportunities were granted for submission of Resolution Plan but no Resolution Plan was submitted and therefore CoC in the 5th meeting held on 19th June 2019 resolved:

(a) by way of last opportunity, the consortium of two directors of the Corporate Debtor along with a third party was granted a final opportunity to submit a Resolution Plan by 21st June 2019;

(b) If any Resolution Plan is not submitted by 21st June 2019, appropriate proceedings to be initiated for liquidation of corporate Debtor.

14. According to the Respondent No. 2, no Resolution Plan was submitted by 21st June 2019 and therefore CoC requested RP to proceed as per agenda to liquidate the corporate Debtor through e-Voting which was resolved with 100 % voting share to initiate appropriate proceedings for liquidation of the Corporate Debtor.

15. It is argued that accordingly on 1st July, 2019, Respondent No. 1 filed CA No. 452 of 2019 under Section 33 (2) of IBC with Respondent No. 1 to be appointed as Liquidator if the Application is allowed.

16. Respondent No. 2 has then argued that subsequently members of CoC called Joint Lenders' Meeting on 20th November, 2019 and decided that an application should be filed before the Adjudicating Authority under Section 27 of IBC for removal of Respondent No. 1 as Resolution Professional which was recorded in the Joint Lenders' Meeting. However, the Adjudicating Authority did not agree and appointed the Respondent No. 1 as Liquidator. The grievance of Respondent No. 2 is that in view of the decision taken in Joint Lenders' Meeting, Respondent No. 1 should not have been appointed as Liquidator.

17. Respondent No. 3 (Export Import Bank of India) who was another member of CoC has also filed written submissions and argued that when Expression of Interest was called, only two EoI were received. One, from a reconstruction company M/s. Prudent ARC Limited, and, another was from

Consortium comprising of the Appellant V.K. Singh, with Mr. SK Singh, directors of the Corporate Debtor and M/s. Air Touch Technology Pvt. Ltd. Subsequently, the first Resolution Applicant M/s. Prudent ARC Ltd. sent letter that they do not have any viable Resolution Plan. The Consortium consisting of the Appellant informed that they are yet to submit relevant information on the consortium and the queries raised. Respondent No. 3 has argued that CoC decided to give them chance by submitting relevant documents and Resolution Plan by 25th May 2019 and extension of time was sought from Adjudicating Authority under Section 12 of IBC. On 19th June 2019, the 5th CoC meeting was conducted wherein request for time for prospective Resolution Plan till 30th June 2019 was discussed. CoC was not inclined to grant extension but on persistent demand, CoC agreed to grant extension of time till 21st June 2019 to submit a Resolution Plan. Till the stipulated time, no Resolution Plan was received. As there was no resolution plan, CoC opined to initiate liquidation process of the Corporate Debtor and CoC passed Resolution dated 19th June, 2020 to take Corporate Debtor into Liquidation. The RP was directed to submit an appropriate Application for seeking liquidation of the Corporate Debtor. The Respondent No. 3 submitted that at the request of members e-Voting was conducted on 22nd June, 2019 and 24th June, 2019. However, Respondent No. 3 further argued that subsequently Joint Lenders' Meeting took place on 25th November, 2019 and Financial Creditors noted the losses caused to the Financial Creditors as a result of CIRP costs and sought replacement of the Resolution Professional. The Application filed in this regard on 16th December, 2019 came to be rejected by Impugned Order. This Respondent No. 3 also agrees

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that as in requisite time, no Resolution was received, the liquidation Order was required to be passed. However, this Respondent also (like P.N.B.), wants the present Liquidator Respondent No. 1 to be changed.

18. Respondent No. 4 has also filed written Submissions and argued that Respondent No. 1 misrepresented the fact by quoting wrong figures and suppressed the material to make contradictory statements with the object of pushing the company into liquidation. Respondent No. 4 has claimed that Respondent No. 1 suppressed material facts and induced CoC to vote for Liquidation. This Respondent wants the Respondent No. 1 to be substituted by another insolvency professional.

19. The Learned Counsel for Respondent No. 6 has also supported the other Respondents for change of the Respondent No. 1 as by another professional.

Reasonings and Findings

20. We have heard the Learned Counsel for both the sides and perused the record.

21. Regarding Liquidation Order passed, the impugned order shows that Counsel for CoC submitted that CoC had no idea about the procedure to be followed for conducting the CoC and the Resolution that came to be passed by CoC on 19th June 2019 was passed on misrepresentation. Before the Adjudicating Authority, the Respondent No. 1 supported the decision taken, by pointing out the record and Adjudicating Authority held that the Counsel for CoC failed to prove that CoC had lack of knowledge. Consequently, the

Application filed by CoC (which was actually for replacement of Respondent No. 1) came to be dismissed. As regards, the Application filed by then RP for Liquidation, the Adjudicating Authority in Paragraphs 4 to 9 of Impugned Order observed as under:

“4. In the 2nd COC meeting held on 20.02.2019, after deciding the eligibility criteria for prospective resolution applications in terms of Section 25(2) of the IBC, it was agreed that Form-G in the instant matter should be published in all India edition of a widely circulated newspaper, keeping in mind the pan-India nature of clientele of CD. It was further noted that in view of non-availability of working capital to run the CD, the RP put the proposal to raise Interim Finance before the CoC, but it did not get approved. The RP received two Expression of Interest (EOI) i.e. one from Mr.VK Singh and Mr. SK Singh (directors of CD) & M/s. Air Touch Technologies Pvt. Ltd and after this no further EoI(s) were received by the applicant.

5. In 3rd meeting of the CoC, held on 16.04.2019, the sole resolution applicant i.e. consortium of directors of CD and M/s. Air Touch Technologies Pvt. Ltd. sought extension for submitting their resolution plans.

6. In 4th meeting of the COC held on 13.05.2019, again the sole consortium sought extension of time for submitting their resolution plan. The minutes of COC clearly indicate the non-cooperation on the part of the suspended board of directors.

7. On 25.05.2019, Mr. SK Singh (Director) the proposed Resolution applicant of the CD sent email to RP requesting

to further extend the time period for submitting a resolution plan.

8. In 5th meeting of the COC held on 19.06.2019, the chairman shared the complete background giving trails of events as to how the directors of the company have been accommodated by the COC to submit a resolution plan. Directors who were eligible and allowed to submit a Resolution Plan by 25.05.2019, were given an extension till 06.06.2019, were given an extension till 06.06.2019 for submission of resolution plan as requested. But no resolution plan has been submitted by the directors even after the extended period of time. Thus, Oriental Bank of Commerce, the key lender having 67% of the voting share declined to approve further extension of time to the prospective resolution applicants. Lastly, the COC members resolved to allow the directors to submit a resolution plan in respect of CD to the RP latest by 21.06.2019. As no resolution plan was received by the last stipulated date, the COC members requested the RP to proceed as per agenda to liquidate the company and put the resolution for e-voting.

9. Since no resolution plan was submitted till the extended period of time, the resolution for liquidation was passed unanimously through e-voting with 100% voting rights by the CoC, which is extracted below-

“Resolved that the appropriate application under Section 33 (1) (a) of the IBC , 2016 for initiation of Liquidation of Newgen Speciality Plastics Limited, CD undergoing corporate insolvency resolution process be filed before the Hon’ble National Company Law Tribunal and its Resolution Professional, CA Anil Kumar having IBBI

registration number IBBI Registration Number IBBI/IPA-001/IP-P00144/2017-2018/10308 be appointed as the liquidator for the company the Liquidator's fee as prescribed in the fee table under Regulation 4 (3) of the IBBI (liquidation process) Regulations, 2016 be and is hereby ratified."

9. Since no Resolution Plan is received by this Authority under Sub-section (6) of Section 30 of the IBC, 2016, before the expiry of the maximum period of the Corporate Insolvency Resolution Process, the CD has to be ordered for Liquidation."

For such reasons, the Liquidation Order came to be passed.

22. Regarding liquidation order which has been passed, although, the Appellant has made various allegations against the Respondent No. 1 to claim that the Losses being incurred by the Corporate Debtor were coming down and thus it was possible to make corporate debtor profitable, the Resolution Professional (Respondent No. 1) has pointed out that keeping the Corporate Debtor as a going concern was incurring more losses. The Appellant wants to claim that Appellant procured fresh orders for supply. However, the Respondent No. 1 is pointing out that although the Corporate Debtor was incurring losses and the Appellant was aware that the working capital of the company were not sufficient to achieve the break even sales, still the Appellant took Orders. Reply filed shows that there are allegations of Respondent No. 1 against the Appellant and other promoters of the company regarding non-cooperation. The Appellant does not appear to have taken up these issues before the Adjudicating Authority when question of

passing of liquidation order came up. In fifth CoC meeting dated 19.06.2019 (Page 340) these Minutes were approved. Once CIRP is initiated the management vests with the IRP/RP and under Section 20 the IRP/RP is to keep the company as a going concern. Thus, Appellant could not have acted in a manner not agreed to by the Resolution Professional and get Orders when Resolution Professional did not agree. Record shows non-cooperation by Directors & Respondent No. 1 placed facts before CoC. If there was grievance, it should have been taken up with CoC by the Appellant. The arguments of the Respondent No 2 show that the Corporate Debtor was a loss making entity and had accumulated ever increasing losses since 2015 - 2016. For such reasons, we are not impressed by the arguments made by the Learned Counsel for the Appellant that Respondent No. 1 should have kept the Corporate Debtor as going concern even if it was incurring loss.

23. Minutes of 4th CoC dated 13.05.2019 (Appeal Page 300 @ page 303) has item No. A 5 relevant parts of which read as under:

“Books and other information of the Corporate Debtor

The members were informed that even now, the books of accounts and data base of the Corporate Debtor claimed to be scattered among various consultants employed by the Company in the past have still not been made available to the RP despite repeated request. The Directors had undertaken in the previous CoC meeting that they would provide the necessary documents to the Transaction Authority by 26.04.2019. However, the record finally provided by them on 30.04. 2019 when compiled and cross-verified by the RP, was

found to be incomplete or unsatisfactory. Accordingly, upon request due to administrative difficulty, the RP has allowed them last opportunity to provide the requisite information to his satisfaction by 20.05.2019 positively.

Book Debts

As was brought to the notice of the members of the CoC in the previous CoC meeting, high values of book debts have been written off the CD in the previous financial year.

In the Financial Year 2017-18, after writing book debts of nearly Rs. 16.18 Crores the total book debts outstanding in the balance sheet is Rs. 8.67 Crores. It was claimed in the books of the CD that only Rs. 1.25 Crore out of the total Book Debts of Rs. 7.43 Crores as on 30.04.2019 was recoverable. The Directors have till date not been able to provide the complete required information to ascertain their recoverability.”

.....

“Operations of the CD

As explained in Item A10 and A11 below, the members were informed that contrary to the sales level of Rs. 80 lakhs for the month of March, 2019 expected to be achieved by the Directors which would have been sufficient to recover fixed cost of the CD, the company has continued to incur cash losses in the month.

Similarly, in the month of April, 2019, only sales of Rs. 12,28,239/- have been achieved mainly due to non-availability of working capital. In light of these circumstances, and the details mentioned in Item A 10

and Item A 11 below, the RP after taking required inputs from the Directors has taken a conscious business decision to temporarily suspending the operations of the Corporate Debtor Members so as to avoid.

Restricting the involvement of the Directors in running the operations and entering the premises of the CD

As explained above, the Directors have not been able to provide the satisfactory explanation, records and document with regard to past transactions and current operations of the company.

It was felt that restricting the rights of the directors might bring effective control expedite submission of information and documents. Accordingly, the RP has restricted the role of the Directors in running the day to day operations of the CD by asserting that all decisions of purchase and sales would be taken by RP based on the recommendations of directors along with facts and figures.”

.....

“After due discussion on the steps taken by the RP and the challenges being faced by him in running the operations of the CD and conducting the instant CIRP, the members acknowledged the various points presented by him and took note of the same.”

Thus, Respondent No. 1 had updated CoC about the state of Accounts and non-co-operation and business decision to temporarily suspend operations and CoC took note of the same. Thus, losses were gradually

coming down is poor reason to keep going. The Allegations not having been taken up by the Appellant before the CoC it would not be appropriate for us to consider them in Appeal.

24. The fact remains that during the CIRP period, there was no resolution plan received which was available for CoC to consider. As such Liquidation Order would be unavoidable.

25. Under Section 12 of IBC in 180 days from date of admission of application and after extension, in extended period of 90 days CIRP was required to be concluded. According to the Respondent No. 2, the extended period of CIRP was ending on 16th August 2019. The Respondent Nos. 2 and 3 state that because the Consortium which included the Appellant had stated that they want to submit resolution plan, the initial extension under Section 12 of IBC seeking another 90 days was sought and taken from Adjudicating Authority. The record shows that in spite of giving opportunities to the Consortium (which included Appellant) no resolution plan was submitted and consequently in the fifth CoC meeting, CoC decided to move for liquidation. The changed tone of Respondent No. 4, in Appeal that Respondent No. 1 misrepresented facts or suppressed facts, in the face of the Minutes of various meetings must be ignored as vague and after thought.

26. The Respondent No.1 filed CA No. 452 of 2019 under Section 33 (2) on 01st July 2019 (Annexure A-11). The Liquidation order came to be passed on 06th January, 2020 by when time stated even in Second Proviso of Section 12 (3) of IBC was already over.

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27. The Appellant has added Annexure A-5 as proposed Resolution Plan with the Appeal. We will not go into it as Resolution Plans were required to be submitted before CoC during the CIRP period and in spite of opportunities, the Appellant and Consortium consisting of Appellant had failed to put up any resolution plan.

28. We do not find any error in the conclusion of Adjudicating Authority that the liquidation order was required to be passed as no resolution plan was submitted even in the extended period of time.

Whether Resolution Professional/Prospective Liquidator should have been charged?

29. With regard to the Application filed by CoC having CA No. 962 of 2019 (Annexure A-12), we have seen the Application. The Application referred to Joint Lenders' Meeting dated 25th November, 2019 and the prayer was to replace Resolution Professional/Liquidator. The Adjudicating Authority just referred to the argument of the Counsel for CoC that CoC did not have idea about the procedure to be followed for conducting the CoC and the Resolution that came to be passed by CoC on 19 June, 2019 is based on the misrepresentation. Adjudicating Authority did not refer to the contents of Application or Minute. It would be appropriate to refer to Minutes of the Joint Lenders' Meeting in which the Respondent No. 1 also appears to have been present for some time. We are not referring to the Application as Minutes and contents of Application are not carrying the same effect as seen in Minutes. It would be appropriate to photocopy the Minutes which are as under:



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Minutes of Joint lenders meeting (Financial Creditors) of M/s Newgen Specialty Plastics Private Limited held on 25.11.2019 at Oriental Bank of Commerce, Sector-62, Noida.

The following FC members were present in the meeting.

Sr. No	Name Of FC	Name of Authorized Officer	Voting Share
1	Oriental Bank Of Commerce	Mr. Dugesh Kumar, Chief Manager	66.79%
2	EXIM Bank	Mr. Manish Joshi	21.89%
3	EXIM Bank	Mr. Chander Harsh Joon	
4	Intec Capital Limited	Mr. Subhash Chander Sharma	4.87%
5	HDFC Bank	Ms/ Sampurna Gupta	0.04%
6	Anil Kumar	RESOLUTION PROFESSIONAL	

The FCs with majority shareholding were present in the meeting. The leave of absence was granted to Hero Fincorp Limited having 6.41% share.

The signature of all the members present in the meeting were obtained in the attendance register of the OBC Bank.

Shri. Durgesh Kumar, Chief Manager of OBC was appointed as chairman of the Joint lenders meeting.

After welcoming the members and the RP, the Shri. Durgesh Kumar requested Mr Anil Kumar, RP to update the status of Liquidation application and other updates in the account.

Mr. Anil Kumar, RP informed that liquidation order has been reserved by the Hon'ble NCLT court and same is the status. However, he informed that as on 25.11.2019 there was hearing on the application of RP for Non Co-operation against the ex-director, in which advocate of CD raised the issue of liquidation order. For this, Hon'ble judge has informed that at present file is missing and they ordered for search of file. The advocate has stated in court that in case of need fresh arguments may be heard.

Subsequently, while on perusal of the order of Hon'ble NCLT on dated 25.11.2019, it is revealed that liquidation order which was heard on 05.08.2019, the order could not be uploaded and directed the registry to file a detailed report within a weeks' time and matter is posted on 12.12.2019, against CA/452/C-III/ND/2019 i.e. for liquidation order and the appointment of liquidator.

It is further revealed that an application under section 9 from Dynamic Start Security Allied Services was also heard on dated 25.11.2019 and RP was directed to file reply within a week. The application bears CA/618/2019.

The FCs could not understand that why full facts were not disclosed to the FC members.

During the meeting Mr. Anil Kumar, RP informed that for application under 19(2) for non-co-operation against ex-director, Hon'ble NCLT has given the next date as 12.12.2019 and directed the Ex-director to produce the resolution plan, if any directly to the court.

However, subsequently the FCs noted that there is no such order in the order sheet dated 25.11.2019 and no CA number was mentioned for application filed U/s 19(2) of the IB Code.

The FC could not understand this type of reporting by the RP.



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Exim Bank officials stated that they are of the view that manufacturing process must have been continued. For this, Mr. Anil Kumar, RP informed that he was experiencing more loss from continuing the operations, than closing the operations of the firm and as such he decided to close the operations of the company.

During the CIRP period, RP had sold certain items which were not delivered to the beneficiary and was confiscated by the transporter claiming the remaining payments from the company. RP apprised the lenders that they are in process of filing the CIVIL suit against the transporter since the local police station has denied to register the any FIR.

The FC could not understand that why FIR was not lodged and if there was any problem then why the necessary order could not be requested from the Hon'ble NCLT by the RP.

The FCs further noted that there was a fire in the factory on January 2019 and estimated claim from insurance company was approx. 1.50 Cr and insurance claim being settled at Rs. 60-70 Lac. The FCs were concerned in relation to the time taken in the process of realization of debtors, and insurance claim.

Upon Inquiry from RP about the insurance claim, has informed that the insurance company has appointed Independent agency for verification of claim and it may take some more time.

RP has again requested for release of funds towards salary distribution of security guards, worker and the law firm.

For this, lenders have decided to pay by liquidating 5 FDRs kept with OBC and to make payment to the security agency directly with instruction to RP that security should not be withdrawn from the lenders assets.

The FCs were not satisfied that how security agency had suddenly withdrawn the security without any prior notice to RP and reduced the security coverage by informing the RP vide email dated 07.11.2019.

After stating the above points, RP took the permission of the lenders to exit the meeting and left.

The FCs discussed various concerns related to CIRP process and the losses incurred. The points of work performed by RP was discussed during the meeting and after summarizing it was concluded that, the FCs were not satisfied with the way the CIRP was handled during the period.

All lenders, were of the view that the entire CIRP process has not been conducted in desired way by the RP, and were of the view that RP may be replaced and a new liquidator may be appointed to undertake the liquidation process.

After discussions it was resolved that Mr. Sandeep Kr Bhatt, having registration no - IBBI/IPA-003/IP-N00038/2017-18/10298 who is presently is working as RP in another case of Oriental Bank of Commerce may be proposed to undertake the work of liquidator, since his work as RP is satisfactory till date.

Mr. S K Bhatt, vide letter dated 25.11.2019 has given his consent to act as liquidator.

Further, Sri Durgesh Kumar, Chief Manager of the Oriental Bank of Commerce, Sector 62, Noida is hereby authorized to sign application, affidavit...etc on behalf of all FCs (Lenders) and to get the application filed to the Hon'ble NCLT U/s 60(5) read with Rule 11 of the NCLT Rules at the earliest proposing the appointment of Mr. Sandeep Kr Bhatt as liquidator.

[Handwritten signature]



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Resolved further that Advocate Vaibhav Mahajan having office at W - 31, LGF, Greater Kailash - 1, New Delhi - 110048 Mobile +91 9899805856 is hereby appointed as advocate to represent the FCs (NCLT) on a consolidated remuneration of Rs 10,000 including travel cost plus actual NCLT filing expenses, Photocopy, Notice, Rejoinders...etc and to get filed application ASAP.

Resolved further that Advocate is requested to file an application for appointment of new liquidator in court III during the hearing scheduled for 12/12/ 2019 and appraise the court about the decision of the FCs as detailed above and request for a week's time for filing of application.

The meeting concluded with vote of thanks.

Durgesh
 For and On behalf of all FCs (Lenders) of Newgen Speciality Plastics P Ltd

Date- 11-12-19

Place- Noida

(Durgesh Kumar)



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30. The Adjudicating Authority does not appear to have referred to contents of this meeting and rejected the CA No. 962 of 2019 because the Advocate could not convince that CoC was ignorant about procedure and law. The Joint Lenders' Meeting did not seek to recall decision to go for liquidation. For reasons discussed they observed that "entire CIRP process has not been conducted in desired way" and Resolution Professional may be replaced.

31. The Respondent No.1 claims that such Joint Lenders' Meeting was illegal. However, we are not going into that technicality. Under Section 27 of IBC during pendency of CIRP Proceeding, CoC can take a decision to replace the RP. In the present matter stage was that already RP had, on decision of the CoC, moved Adjudicating Authority with Application CA No. 452 of 2019 for liquidation. At such stage, the decision which remained to be taken by the Adjudicating Authority was if liquidation should be ordered and under Section 34 (4) of IBC to appoint Liquidator and fee to be paid. Sub-Section 4 of Section 34 reads as under:

"(4) The Adjudicating Authority shall by order replace the resolution professional, if –

(a) – The Resolution Plan submitted by the Resolution Professional under Section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of Section 30; or

*(b) – the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or
(c) The resolution professional fails to submit written consent under sub-section (1).”*

32. In the present matter, the Resolution Professional had already given the written consent and sub-clause a and b of Sub-Section 4 of Section 34 did not arise.

33. The Application filed by CoC Annexure A-12 was under Section 60 (5) of IBC read with rule 11 of National Company Law Tribunal Rules, 2016. The Resolution Professional/Liquidator act in trust of CoC and Creditors. Under Section 10 (3) (b) of IBC name of Resolution Professional is proposed by Corporate Applicant at the time of initiation of CIRP. Under Section 34 the Resolution Professional subject to submission of consent is appointed Liquidator unless replaced by Adjudicating Authority under sub-section (4).

34. In the facts and circumstances of the present matter, it would have been more appropriate that the Adjudicating Authority should have considered appointing any other Professional as liquidator instead of appointing the Respondent No. 1 in the face of the Joint Lenders’ Meeting Minutes reproduced above which claimed that the lenders were of the view that entire CIRP had not been conducted in desired way by the RP. Liquidation Order was yet to be passed and claim of CoC could not have been ignored under Section 27 of IBC. The interest of Financial Creditors

and other Creditors is there even during Liquidation proceeding and it would not be appropriate if there are doubts regarding the manner in which the Liquidator is conducting the process. We are not sitting in judgment on the question whether the averments made in the Joint Lenders' Meeting by the Financial Creditors against the Respondent No. 1 are correct or not. We hold that though delayed, when CoC had conveyed that it wanted Resolution Professional changed and as Liquidation Order was yet not passed, Adjudicating Authority should have first replaced Resolution Professional and then passed Liquidation Order.

For the above reasons, we pass the following orders:

1. The liquidation order passed by the Adjudicating Authority is maintained.
2. The Order passed by Adjudicating Authority dismissing C.A. (AT) No. 962/C-III/ND/2019 is set aside.
3. The matter is remitted back to appoint another Insolvency Professional as Liquidator replacing Respondent No. 1.
4. Adjudicating Authority may appoint Mr. Sandeep Kr. Bhat as proposed by CoC as Liquidator, or may call for name of any other Insolvency Professional from IBBI, if felt necessary by Adjudicating Authority. The Adjudicating Authority is requested to pass Orders for proper handing over of charge from Respondent No. 1 to the Insolvency Professional to be

appointed as Liquidator for replacing the Respondent No. 1.

Other orders necessary may also be passed in this regard.

5. The Appeal is disposed of accordingly.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi
09th November, 2020
Basant B.