

ONE PAGE 40 - In the matter of M/s Torque Automotive Pvt. Ltd.
Is replacement of IRP/RP a purely commercial decision of COC?
Court: NCLT Ahm CP(IB) 781 of 2019, 12.07.2021

1. Background: IA filed by 2 FCs of **COC with 78.26% voting u/c 22(2)(b) for replacement of RP. Original FC** (Sapati Securities Ltd) & **IRP raised objections** on grounds that, there is no need, it is arbitrary, RP is based at Delhi while IRP is located close to CD, RP fee is higher, lack of authority to file the instant IA & IA must be filed u/s 27 and not u/s 22. According to the 2 FCs, objections are being raised without any valid ground. Appointment of RP is the prerogative of COC; based on their commercial wisdom, and IRP can't claim to be appointed as a matter of right.

2. Sections of IBC dealt with: Sections 7(3), 13, 15, 16, 17, 18, 20, 22, 27, 28, 31, 217, CIRP regulations 36,37,38, 39 along with NCLT Rule 11.

3. Case Laws: **Essar Steel vs Satish Kumar Gupta SC 1478 of 2019** - When COC exercises its commercial wisdom, to arrive at a business decision to revive the CD, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of the financial and operational creditors. COC's decision must reflect the fact that it has adequately balanced the interests of all stakeholders including the OCs. **Judicial review of the AA that the Rplan approved by COC has met requirements u/s30(2) would include judicial review that is mentioned in Section 30(2)(e) as the provisions of the Code are also the provisions of law for time being in force.** Thus, while AA cannot interfere with commercial decision taken by COC, the limited judicial review is available to see that COC has taken into account the fact that CD needs to keep going as a going concern during CIRP, maximize the value of CDs assets, takes care of interests of all stakeholders including OCs.

4. NCLT Evaluation & Judgment: The final power to replace the IRP does not rest with COC as such proposal is to be confirmed by IBBI as prescribed u/s 22(5). Thus, is incorrect to say that if COC passes a resolution with requisite % of votes to replace the IRP such decision needs to be confirmed by AA in all circumstances. If there is any disciplinary action against IP, then also decision remains with IBBI and not with COC. Exercise of appointment/replacement of IRP can't be an exercise of commercial wisdom of the COC because by then no significant developments happen as regard to steps specified u/s 25(2)(h) ie invitation for prospective RAs etc. NCLT is guided by natural justice principles and inherently involve equitable considerations. A person cannot be punished or made to suffer without assigning any reasons or giving an opportunity of being heard. In such situations NCLT can invoke jurisdiction under Rule 11 of NCLT Rules. Also, interests of all other stakeholders may suffer, if IRP is replaced by a large voting % FC without any justified reason. So, preferable that IRP/RP should independent of undue influence of COC as far as possible. **NCLT while stating that the term "Commercial wisdom of COC" is not defined under IBC or its regulations explained how it involves rational meaning and ability to understand the consequences of such action while taking such matter.**

Thus, decision of COC to replace IRP stands rejected, originally appointed IRP to continue as RP. The new is RP ordered to handover all documents and records of CD to IRP/RP

-MS Mano Ranjani

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