National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 307 of 2020

(Arising out of Order dated 15th January, 2020 passed by National Company Law Tribunal, Mumbai Bench, (31) MA 4002/2019 MA 4034/2019 in Company Petition (IB) No.- 2849/MB/2018)

IN THE MATTER OF:

Committee of Creditors of EMCO Limited,
A Company incorporated under the
Companies Act, 1956
Having its Registered Office at:
N-104. MIDC Area, Jalgaon,
Maharashtra – 425 003
Through the State Bank of India
Email: team6.15859@sbi.co.in

.....Appellant

Versus

1. Mrs. Mary Mody,
Individually and in her capacity of holding the letter of authority of employees/ ex-employees of EMCO Limited.
Having her address at:
C4/301, Hyde Park, Near Tulsidham,
Thane (W), Mumbai – 400 610 **...Respondent No. 1**
Email: mary.mody@emco.co.in

2. Mr. Sundaresh Bhat,
In his capacity as the Resolution Professional of the Corporate Debtor i.e. EMCO Limited
Having its Registered Office at:
N-104, MIDC Area,
Jalgaon, Maharashtra – 425 003
Email: REPMCO@bdo.in **....Respondent No. 2**

Appellant: **Mr. Sanjeev Kumar, Mr. Anshul Sehgal and Mr. Abhishek Kisku, Advocates.**

Respondents: **Mr. Zain Khan and Ms. Saloni Kothari (RP), Advocates for R-1.**
Mr. Ayush J Rajani, PCA (RP), Advocate for R-2.
Mr. Sundaresh Bhat, Advocate.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The present Appeal, by the Committee of Creditors is filed under Section 61 of the Insolvency and Bankruptcy Code 2016 (in short the 'IBC') against the Impugned Order dated 15.01.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, in MA 4002/2019 in CP (IB) No. 2849/MB/2018, whereby the Learned Adjudicating Authority, vide the Impugned Order has directed the Committee of Creditors of the Corporate Debtor Company, namely EMCO Limited, to provide interim funds to the Resolution Professional to run during the CIRP period; to provide funds to meet the expenditure already incurred to the tune of Rs. 2.21/- Crores till December 2019 and further directed the CoC to submit the compliance report at the time of next hearing.

2. The Learned Adjudicating Authority while issuing the aforenoted directions has observed as follows;

> *"4. MA 4002/2019 – This application has been preferred by the employees/ex-employees of the Corporate Debtor. The application inter-alia seeks payment due to the employees during the CIRP period. The learned Counsel appearing for the RP in an affidavit has mentioned that the total amount available in the Debtor company is about Rs. 1.27 Crore whereas the total out go on account of payment towards CIRP cost is about Rs. 1.74 Crore per month. It was also brought through an affidavit before this Bench that total unpaid CIRP costs is now about Rs. 2.21 Crore till December, 2019. Out of which the payment towards wages and salaries to the employees during the CIRP period is about Rs. 80 lacs per month. Besides, it was brought to the notice of the Bench that certain employees who are on the rolls of*

the company are coming to the plant but are not being paid any wages."

3. Learned Counsel appearing for the Appellant/CoC contended that the directions issued by the Learned Adjudicating Authority were contrary to the provisions of the IBC; for Section 5(13) of the Code defines 'Insolvency Resolution Professional Costs' and any 'Interim Finance' raised should confirm to the same and also placed reliance on Section 5(15) which defines 'Interim Finance', Section 25 which deals with dues of 'Resolution Professional' and Section 25(2)(c) which provides that the Resolution Professional shall undertake to raise 'Interim Finance' subject to approval of the Committee of Creditors under Section 28.

4. The Learned Counsel argued that as per Section 28(3) of the Code approval of the CoC by a vote of 66 % of the voting share is required to raise any Interim Funds and as the Appellant has not granted any such approval and the decision of the CoC is non-justiciable as laid down by the Hon'ble Supreme Court in several Judgements, no direction to provide Interim Finance ought to have been passed by the Learned Adjudicating Authority.

5. Learned Counsel appearing for the CoC, further submitted that the said direction was passed without hearing the Appellant and in a proceeding whether the Appellant was not even made a party.

6. The Learned Counsel drew our attention to the Minutes of the 6th CoC Meeting dated 08.01.2020 wherein it was recorded by the CoC Members that EMCO Ltd. was not a going concern and therefore *'it was viable at the stage to confirm the unpaid salary and wages to all the employees and the workmen as the CIRP cost which would be required to be borne by successful*

Resolution Applicant and paid within 30 days of the approval of the Resolution Plan as per the provisions of the IB Code'. It is further submitted that as per Section 30(2)(a) of the Code, if the Resolution Plan is approved such a Plan would provide for the payment of the 'Insolvency Resolution Process Cost' in a manner specified by the Board in priority to the payment of other debts and in case no Resolution Plan is approved and an Order of liquidation is passed, the 'Costs' are paid as per Section 53 of the Code. In the present case no Resolution Plan is approved and the CoC has voted for liquidation and an Application seeking liquidation has already been filed before the Adjudicating Authority which is pending. It is submitted that as the Corporate Debtor is non-operational only salaries of those employees which the Resolution Professional has retained to keep the CIRP going, at reduced salaries, was paid and hence the directions of the Learned Adjudicating Authority to the Appellant to raise Interim Finance and pay the amounts is erroneous.

7. Per contra, the Learned Counsel appearing for the 1st Respondent/ the Applicant in MA 4002/2019 contended that as on the date of CIRP i.e. 16.08.2019, the Corporate Debtor had work orders amounting to Rs. 307/- Crores; that the said work orders could not be completed owing to the failure of the CoC to raise Interim Finance despite requests made by the Resolution Professional; that the services of the Respondent employees were not terminated; that even though approval of CoC is required for raising any Interim Finance, however, the approval of CoC is *not* required for payment of salaries to the workmen of the Corporate Debtor for the period of CIRP.

8. It is further submitted that the Appellant has misappropriated the amounts from the Corporate Debtor after commencement of CIRP and the genuine dues of the workmen have not been paid. It is argued by the Learned Counsel that the Corporate Debtor was a going concern and placed reliance on the Minutes of the 2nd Meeting of the CoC in which under point 4 it is noted as follows;

> ***"4. Updates on the Operational Matters-***
> *The RP informed the CoC members that with the permission of the CoC members & IRP RP's Team had visited the Thane Plant on 3rd Oct 2019, 11th Oct 2019 and the RP had visited the Thane Plant on 15th Oct 2019.*
> *The RP informed the CoC members that he had met the key officials from EMCO Limited and had also addressed concerns of the workers during his visit Dt. 15th Oct 2019.*
> *Tax auditor M/s Suresh Bhardwaj & Co., Mumbai is appointed for completing tax audit and filling with Income tax, some of the PBG were also extended.*
> *The RP updated the CoC members on the following Operational Matters."*

9. Learned Respondent Counsel argued that as per Section 20(2)(c) of the Code, 'Management of Operations of Corporate Debtor as a going concern', to raise Interim Finance provided that no security interests shall be created over any encumbered property of the Corporate Debtor without the prior consent of the Creditor whose debt is secured over such encumbered property, provided that no prior consent of the Creditor shall be required with a value of such property is not less than the amount equivalent to twice the amount of debt.

10. It is contended by the Learned Counsel that this Tribunal has decided in a plethora of cases that the employees of the Corporate Debtor be paid their timely dues and to ensure that the Corporate Debtor remains a going

concern and the said funding made by the CoC shall be termed as the CIRP cost and shall be recoverable in priority over the claims and prayed for dismissal of the Appeal.

11. Learned Counsel appearing for Respondent No. 2, the Resolution Professional (RP) contended that the Corporate Debtor was 'not a going concern' and was non-operational; that the RP approached the CoC several times with detailed Plans during the 3rd, 4th, 5th and 6th CoC Meetings to seek Interim Finance funding from the CoC since the Corporate Debtor was in dire need of funds in order to restart the production at Thane Plant which could not be achieved due to the lack of funding; when these business Plans were presented to CoC, the first Respondent, Mrs. Mary Mody, head of the Engineering Department and Mr. Yogesh Sonje, were invited for the meetings and were personally present and hence were given sufficient opportunity to present their case before the CoC. It is also submitted by the Counsel appearing for the RP that all efforts were made to allocate some funds to the employees and workman towards their monthly salaries but the draft of the Settlement Agreement was rejected by them and the dues of only those employees whose dues during the CIRP period were approved by the CoC as CIRP cost have been cleared. The CoC has not approved the dues of the first Respondent as CIRP cost and therefore the RP could not get these dues cleared. Hence it is prayed that the Impugned Order be set aside as it is in violation of the provisions of the I&B Code.

12. Heard both the Parties at length. The main point which falls for consideration here is whether the Corporate Debtor was a going concern and whether the Learned Adjudicating Authority was justified in directing the

CoC to raise interim funds and provide to the RP to run the CIRP period and to meet the expenditure incurred till December 2019 to the tune of Rs. 2.21/- Crores.

13. It is observed from the record that the Impugned Order was passed without hearing the CoC.

14. It is an admitted fact that the CIRP proceedings began on 16.08.2019 and the Resolution Professional was confirmed on 14.10.2019. In the Reply filed by the RP to the MA all facts with respect to the salaries of 51 employees were placed on record till 31.08.2019. It is stated in the Reply that any salary dues *prior* to the commencement of CIRP process will be considered by the Resolution Applicant, whose Resolution Plan, if any, shall be approved by the CoC Members. It is also an admitted fact that the said employees have also filed a Claim with the RP.

15. It is pertinent to mention that the Resolution Professional in para 18 of the Additional Affidavit in Reply has clearly deposed that the 'Corporate Debtor was non-operational and not a going concern'. It is significant to reproduce the para as hereunder;

> *"18. I say that with regard to content of para 3(k) of the Reply of Respondent No. 1, I submit that dues of only those staffers whose dues during CIRP period were approved by CoC as CIRP Cost per meaning under the I&B Code have been cleared, further to the provisions of the I&B Code which stipulate that only those dues approved by CoC are CIRP Cost. The CoC has not approved the dues of the Respondent No. 1 as CIRP cost, hence as per the I&B Code, I am not permitted to clear any such dues and they will be settled as per the I&B Code. Furthermore, the CD was non-operational and not a going concern. Further, the CD was under severe financial distress and to ensure smooth progress of the CIRP, RP was compelled to retain only few of the employees at a reduced salary*

who were required to be retained in-order to continue with Corporate Insolvency and Resolution Process and under express direction and approval of the CoC.

(Emphasis Supplied)

16. It is stated by the Resolution Professional that the Claims related to Pre-Corporate Insolvency Resolution Process cannot be raised now as they have to be considered only up to 16.07.2020; that RP released the payment to the tune of 4,500 per workmen to 277 workmen aggregating to Rs. 12.46/- Lakhs; that CoC decided to contribute only Rs. 1.50/- Crores as internal corporate funds in the favor of funding to meet the critical CIRP expenses and the proposal given by the RP to sell the various unencumbered assets was not approved by the CoC Members and the RP has no funds available for running the CD as a going concern. The salaries of only certain critical employees were approved by the CoC to form part of the CIRP cost during various CoC meetings and this decision was taken by the CoC to ensure smooth CIRP process towards the employees who were required to support the RP in discharging his duties.

17. As regarding the contribution to be made by the Suspended Board of Directors towards the gratuity funds, it is stated by the RP in his Affidavit that the CD has not been contributing the sufficient amounts to meet the gratuity, liabilities for its employees and workmen which cannot be attributed to the RP. At this juncture, Learned Counsel for the Appellant placed reliance on the recent Judgement of this Tribunal in ***'Savan Godiawala, Liquidator of Lanco Infratech Ltd.' V/s. 'Apalla Siva Kumar', in Company Appeal (AT) (Insolvency) No. 1229 of 2019*** in which this Tribunal has held that 'the Provident Fund, the Pension Fund and the

Gratuity Fund, do not come within the purview of 'liquidation Estate' for the purpose of distribution of assets under Section 53 of the Code'. We are conscious of the fact that at this stage when admittedly an Application under Section 33 seeking a direction for liquidation is still pending before the Adjudicating Authority, we refrain from making any observations.

18. It is pertinent to mention that the Resolution Professional filed his Affidavit in Reply to the MA 4002 of 2019 before the Learned Adjudicating Authority stating as follows;

> ***"7.*** *With respect to the contents of the para 6 of the Application, it is submitted that I as an RP is aware about the hardships faced by the employees and is making best possible efforts to meet the ends. It is submitted that I am appointed as an RP by the Order of the Court as an officer to look after the Corporate Debtor and its affairs and manage and continue the company as a going concern. In the present scenario I have therefore tried and retained some of the employees to keep the CIRP going as well as ensure that the salaries are paid to the employees, which is a CIRP cost as per the provisions of the Insolvency and Bankruptcy Code, 2016. It is in the view of the Corporate Debtor being under severe financial distress and the fact that the Corporate Debtor is non-operational, that the RP had decided to retain the employees at a reduced salary....."*
>
> *(Emphasis Supplied)*

> ***"25.*** *With respect to para 26 of the I state that there has never been a dispute or an iota of doubt with respect to the salaries of the employees who are working during the CIRP being a part of the CIRP cost. In fact, RP is paying the salaries of the employees who are helping the RP in the CIRP process after the approval of the CoC. It is pertinent to note that the CIRP cost has to be approved by the members of the CoC in terms of Regulation 34 of the CIRP Regulations and to the extend claims being verified, and then ratified by CoC, I as an RP is including the same as part of the CIRP costs. It cannot be interpreted to say that salaries of all employees/workmen of corporate*

debtors who are not working are to be considered as CIRP cost on the basis on Section 5(13) of the Code.

(Emphasis Supplied)

19. Keeping in view that the Application under Section 7 or Section 9 is not a 'Suit' or a 'Money Claim' and having regard to the fact that the Resolution Professional has filed a detailed Affidavit that the Corporate Debtor is not a 'going concern and is non-operational', this Tribunal is of the considered opinion that the Learned Adjudicating Authority ought to have taken this aspect into consideration and heard the CoC before issuing the directions.

20. Section 5(13) of the Code defines Insolvency Resolution Professional process cost as follows;

> ***"5(13). Insolvency Resolution Process cost means-***
> ***(a)*** *the amount of any Interim Finance and the costs incurred in raising such finance;*
>
> ***(b)*** *the fees payable to any person acting as a resolution professional;*
>
> ***(c)*** *any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
>
> ***(d)*** *any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
>
> ***(e)*** *any other costs as may be specified by the Board."*

21. Section 5 (15) of the Code defines Interim Finance;

> ***"5(15). Interim Finance*** *means any financial debt raised by the resolution professional during the insolvency resolution process period."*

22. Section 28 (1) refers to approval of Committee of Creditors for certain actions. Section 28(1)(a), Section 28(3) and Section 28(4) read as follows;

> ***"28. Approval of committee of creditors for certain actions.-***
> ***(1)*** *Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely;-*
> ***(a)*** *raise any Interim Finance in excess of the amount as may be decided by the committee of creditors in their meaning****...."***
>
> ***"28(3)*** *No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of [1][sixty-six] percent of the voting shares."*
>
> ***"28(4)*** *Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void."*

It is clear from the aforenoted Sections that the Resolution Professional can raise Interim Finance only subject to approval of the Committee of Creditors by a vote of 66 % under Section 28. In the instant case it is an admitted fact that the CoC have not approved the raising of any interim funds.

23. At this juncture, we find it relevant to rely on the principle laid down by the Hon'ble Supreme Court in ***'K. Sashidhar' V/s 'Indian Overseas Bank' (2019) 12 SCC 150;***

> ***"44.*** *Suffice it to observe that in the I&B Code and the Regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code*

which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, Under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors-be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds Under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority Under Section 31 of the I&B Code dealing with approval of the resolution plan…"

***"48.** Suffice it to observe that the amended provision merely restates as to what the financial creditors are expected to bear in mind whilst expressing their choice during consideration of the proposal for approval of a resolution plan. No more and no less. Indubitably, the legislature has consciously not provided for a ground to challenge the justness of the "commercial decision" expressed by the financial creditors – be it to approve or reject the resolution plan. The opinion so expressed by voting is non-justiciable. Further, in the present cases, there is nothing to indicate as to which other requirements specified by the Board at the relevant time have not been fulfilled by the dissenting financial creditors. As*

> *noted earlier, the Board established Under Section 188 of the I&B Code can perform powers and functions specified in Section 196 of the I&B Code. That does not empower the Board to specify requirements for exercising commercial decisions by the financial creditors in the matters of approval of the resolution plan or liquidation process. Viewed thus, the amendment under consideration does not take the matter any further.*

24. The contention of the Learned Counsel appearing for the first Respondent that Section 20(2)(c) is to be relied upon which refers to 'Management of Operation of Corporate Debtor as a going concern' is untenable as the said Section refers to duties of Interim Resolution Professional. Section 25(2)(c) is relevant to the instant case as it deals with 'Duties of Resolution Professional' with respect to raising Interim Finance subject to the approval of Committee of Creditors under Section 28. Section 28 refers to whether the approval of Committee of Creditors is required for raising 'Interim Finance'. It is reiterated by the Resolution Professional that the Corporate Debtor is not a going concern. The Application MA 4002/2019 in CP (IB) No. 2849/MB/2018 was preferred by the employees seeking direction to also pay the salaries for the period **prior** to the commencement of CIRP cost. It is a well settled proposition of law that for the cost incurred prior to the CIRP process, in case any Resolution Plan is approved, the 'Resolution Applicant' shall bear the expenses. In the instant case, it is not in dispute that the Resolution Plan has not been approved and the CoC has recommended for liquidation.

25. Additionally, the contention of the Learned Counsel appearing for the Respondent that point 4 of the second Meeting of the CoC proves that the Company was a going concern is unsustainable as it only refers to the RP's

visit to the Plant and cannot be construed to be of any documentary evidence to substantiate the plea of the Respondent that the Corporate Debtor was a going concern.

26. CIRP Costs have to be approved by the CoC in terms of Regulation 31 of the CIRP Regulations which reads as hereunder;

> ***"31. Insolvency Resolution Process Cost:-*** *"Insolvency resolution process costs" under Section5(13)(e) shall mean-*
> *(a) amounts due to suppliers of essential goods and services under regulation 32;*
> *[1][(aa) fee payable to authorized representative under [2][sub-regulation (8)] of regulation 16-A;*
> *(ab) out of pocket expenses of authorized representative for discharged of his functions under [2][Section 25-A];]*
>
> *(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d);*
>
> *(c) expenses incurred on or by the interim resolution professional to the extent ratified under regulation 33;*
>
> *(d) expenses incurred on or by the resolution professional fixed under regulation 34; and*
>
> *(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.*

27. Further Section 30(2)(a) of the Code specifies that if a Resolution Plan is approved then the same would provide for the payment of Insolvency Resolution Professional Process cost in a manner specified by the Board in priority by the repayment of other debts of the Corporate Debtor and if such a Plan is not approved and if companies go into liquidation under Section 33(1) of the Code, then the distribution of assets under Section 53(1) would arise.

28. Keeping in view all the aforenoted reasons and the ratio of the Hon'ble Supreme Court in ***'K. Sashidhar' (Supra)*** that the commercial or business decision of the CoC is non-justiciable, and at best, the Adjudicating Authority may cause an enquiry on limited grounds, and does not have Jurisdiction to undertake scrutiny of the justness of the opinion expressed by the CoC when it has voted by a majority share, we are of the opinion that this ratio is applicable to the facts of this case as the CoC has by a majority vote rejected to raise any 'Interim Funds' and the Adjudicating Authority cannot direct the CoC to do the same. Hence, we hold that the direction given by the Adjudicating Authority in MA 4002/2019 are contrary to the provisions of IBC and are hereby set aside.

29. In the result, this Appeal is accordingly allowed and the Impugned Order is set aside. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
02nd March, 2021

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