

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 491 of 2018

[Arising out of Order dated 10th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No. (IB)-75(PB)/2018)

IN THE MATTER OF:

Bhasin Infotech and Infrastructure Pvt. Ltd.

Through its Authorised representative

Mr. P. N. Joshi

Having its registered office at:

28, Raja Garden, New Delhi – 110015.

...Appellant

Vs

Gurpreet Singh

Erstwhile Resolution Professional for

Bhasin Infotech and Infrastructure Pvt. Ltd.

2nd Floor, 2921A,

C/1, Sushant Lok I,

Gurgaon, Haryana – 122002.

....Respondent

Present:

For Appellant: Mr. Ravinder and Ms. Prachi Johri, Advocates.

For Respondent: Mr. Vinod Chaurasia, Chartered Accountant.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by 'M/s Bhasin Infotech and Infrastructure Private Limited' (Corporate Debtor) against order dated 10th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, whereby the Adjudicating Authority directed the Appellant to pay lump sum fee of Rs.5 lakh (Rupees Five Lakh Only) in favour of the Interim Resolution Professional within a week.

2. The Corporate Debtor has challenged the impugned order on the ground that the lump sum fees of Rs.5 lakh fixed by the Adjudicating Authority for payment in favour of Interim Resolution Professional for performing duty for 27 days is excessive and arbitrary.

3. On the other hand according to learned counsel appearing on behalf of the Interim Resolution Professional the Interim Resolution Professional had claimed fee of Rs.6.50 lakhs from the Financial Creditor by letter dated 24th July, 2018 for his functioning of 30 days. The Financial Creditor having accepted the same and on the basis of such assurance, he having appointed, the Interim Resolution Professional has right to claim Rs.6.50 lakh for 30 days of functioning as finally agreed upon by the parties.

4. To decide the issue whether the payment of Rs.5 lakh to Interim Resolution Professional for his working for 30 days is excessive and arbitrary or not, it will be desirable to refer to the relevant facts and provisions of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code').

5. The Financial Creditor before filing application under Section 7 of I&B Code has asked for consent of the Interim Resolution Professional pursuant to which he forwarded email on 22nd December, 2017, relevant of which reads as follows:-

92

I am a Founder Director of Ensemble Resolution Professionals Pvt Ltd, which is a Registered Insolvency Professional Entity with IBBI. We have a group of Qualified Insolvency Professionals (IP's) and a multi-disciplinary team to support these IP's.

I hereby express our interest to provide you with a consent of an IP from our group to be appointed as Interim Resolution Professional for carrying Corporate Insolvency Resolution Process of the corporate debtor in compliance with IBC, 2016. The appointed IP shall be duly supported by the team at Ensemble.

I propose the following terms of appointment:

The fee payable in this regard shall be as under:

a) For acting as Interim Resolution Professional - Rs. 6,00,000/- (for 30 day period as specified for IRP) + applicable taxes - in beginning of the assignment. Any extension shall be charged proportionately. (The billing shall be split between the firm Ensemble and the IRP which shall be conveyed at the suitable time)

b) Any and all expenses apart from the professional team as are required to be incurred for discharge of duties as Interim Resolution Professional and incidental thereto shall be met by the Applicant, which shall include but not limited to expenses for:

- a. Newspaper Publications
- b. Valuation Reports
- c. Conduct of Meetings of Committee of Creditors
- d. Travel, Lodging and Boarding in relation to discharge of functions as Interim Resolution Professional
- e. Appointment of lawyers, experts as may be required for proper management of affairs and protection of interest and assets of the Corporate Debtor
- f. Other expenses as may be required for compliance with law/ discharge of duties as Interim Resolution Professional

It is pertinent to note here that all these expenses (but for the newspaper advert) are expenses which can be / may be ratified by the COC and reimbursed to the applicant.

The interest of the client will be the foremost objective.

As discussed, I also would request you to remit Rs 75,000/- to the following account against the legal advisory:

Sanjeev Ahuja
Savings Account
Citibank Account
Nehru Place
New Delhi
Account # 5230767221
IFSC Code : CITI0000002

Warm Regards

Sanjeev Ahuja ACI Arb
LLB. C.A.
Insolvency Professional

<image002.jpg>

Insolvency. Arbitration. Corporate

6. Pursuant to the said communication while application under Section 7 was filed by the Financial Creditor, one Mr. Gurmeet Singh was proposed as Interim Resolution Professional for initiation of Corporate Insolvency Resolution Process against 'M/s Bhasin Infotech and Infrastructure Private Limited' (Corporate Debtor - Appellant herein).

7. The application under Section 7 was admitted by the Adjudicating Authority on 13th June, 2018, which was challenged by the shareholder of the Corporate Debtor (Appellant) before this Appellate Tribunal. On 22nd June, 2018, this Appellate Tribunal stayed the public announcement of insolvency. Subsequently, the Appellate Tribunal heard the parties on merit and quashed the order of admission by judgment dated 17th July, 2018 and set aside the initiation of Corporate Insolvency Resolution Process against the Corporate Debtor and remitted the matter to the Adjudicating Authority to decide the 'fee payable to the Interim Resolution Professional'.

8. Thereafter when the matter was taken up, the Adjudicating Authority passed the order dated 10th August, 2018 directing the Corporate Debtor to pay a sum of Rs.5 Lakh (Rupees Five Lakhs Only) to the Interim Resolution Professional for his 27 days of working.

9. We have heard learned counsel for the parties and perused the record.

10. Section 7(3)(b) of I&B Code empower a 'Financial Creditor' to name the Resolution Professional proposed to act as an Interim Resolution Professional.

11. The 'Financial Creditor' before proposing the name is required to obtain the written consent in Form-2 from the proposed Insolvency Professional, in terms of Regulation 9 of the 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016', which is as follows:

“Regulation 9. Interim resolution professional. – (1)

The applicant, wherever he is required to propose or proposes to appoint an insolvency resolution professional, shall obtain a written communication in Form 2 from the insolvency professional for appointment as an interim resolution professional and enclose it with the application made under rules 4, 6 or 7, as the case may be.

(2) The application under sub-rule (1) shall be accompanied by a certificate confirming the eligibility of the proposed insolvency professional for appointment as a resolution professional in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.”

12. From clause 2 of Regulation 9, it is clear that the Application under Sub-regulation (1) should be accompanied by a certificate confirming the eligibility of the proposed Insolvency Resolution Professional.

13. Form-2 is the written communication to be submitted by the proposed Interim Resolution Professional, which is as follows:

“FORM 2

(See sub-rule (1) of rule 9)

**WRITTEN COMMUNICATION BY PROPOSED
INTERIM RESOLUTION PROFESSIONAL**

*[Under rule 9 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016]*

Date.....

To,

*The National Company Law Tribunal
[Address]*

From,

*[Name and address of the registered office of the proposed
interim resolution professional] In the matter of [name of
the corporate debtor]*

***Subject: Written communication in connection
with an application to initiate corporate insolvency
resolution process in respect of [name of the
corporate debtor]***

Madam/Sir,

I, [name of proposed interim resolution professional], an insolvency professional registered with [name of insolvency professional agency] having registration number [registration number] have been proposed as the interim resolution professional by [name of applicant financial creditor] in connection with the proposed corporate insolvency resolution process of [name of the corporate debtor].

In accordance with rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, I hereby:

- (i) agree to accept appointment as the interim resolution professional if an order admitting the present application is passed;*
- (ii) state that the registration number allotted to me by the Board is [insert registration number] and that I am currently qualified to practice as an insolvency professional;*
- (iii) disclose that I am currently serving as an interim resolution professional / resolution professional / liquidator in [insert number of proceedings] proceedings;*

- (iv) *certify that there are no disciplinary proceedings pending against me with the Board or [name of the insolvency professional agency he is a member of];*

- (v) *affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;*

- (vi) *make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;*

.....
(Signature of the insolvency professional)

.....
(Name in block letters)

.....
(Name of insolvency professional entity, if applicable)

[Optional certification, if required by the applicant making an application under these Rules]

I, hereby, certify that the facts averred by the applicant in the present application are true, accurate and complete and a default has occurred in respect of the relevant corporate debtor. I have reached this conclusion based on the following facts and/or opinion: –

[Please give details].

.....
(Signature of the insolvency professional)

.....
(Name in block letters)

.....
(Name of insolvency professional entity, if applicable)"

14. From the aforesaid Form-2 r/w Regulation 9, it is clear that an Interim Resolution Professional, who has been proposed is required to give its Registration Number and other details to function as Interim Resolution Professional.

15. Normally, for the Corporate Insolvency Resolution Process, if it is successful, Resolution Applicant is required to pay the fee of the Resolution Professional and the resolution cost, as apparent from Section 30(2)(a) of the I&B Code. As per Regulation 33 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016', the applicant (Financial Creditor in the case) is required to fix the expenses to be incurred on or by the Interim Resolution Professional. However, where Applicant has not fixed the expenses as per sub-regulation (1) of Regulation 33, the Adjudicating Authority is required to fix the expenses of the Interim Resolution Professional. As per explanation below Regulation 33, the expression 'expenses' means 'the fee to be paid to the Interim Resolution Professional' and 'other expenses', including the cost of engaging professional advisors, to be incurred by the Interim Resolution Professional.

16. It is not in dispute that the Interim Resolution Professional has not incurred any expenses such as issuance of advertisement, the cost of engaging professional advisors in view of the interim order passed by this Appellate Tribunal. Therefore, it is to be determined that what fee is payable to the 'Interim Resolution Professional'.

17. From the record and the e-mail communication dated 22nd December, 2017, as quoted above, we find that no communication was made between the 'Financial Creditor' (applicant) and the 'Interim Resolution Professional' as required under the provisions of I&B Code and Regulation framed therein (including Form-2), which is required to be filed. The 'e-mail' aforesaid shows that the said 'e-mail' was sent by one 'Mr. Sanjeev Ahuja, Insolvency Professional', as the Founder Director of

‘Ensemble Resolution Professionals Pvt. Ltd.’ which is a registered Insolvency Professional Entity (‘IPE’ for short) with IBBI. Said IPE have a group of ‘Insolvency Professionals’ and quoted fee for naming a person for acting as an Interim Resolution Professional @ Rs.6 Lakh for 30 days *plus* applicable tax. It was indicated that ***any extension will be charged and billing shall be split between the firm ‘Ensemble’ and the Interim Resolution Professional.***

18. From the aforesaid communication we find that the consolidated amount of Rs.6 lakh has been charged jointly for the firm - ‘Ensemble Resolution Professionals Pvt. Ltd.’ and the ‘Interim Resolution Professional’ and not towards the fee of ‘Interim Resolution Professional’.

19. Admittedly, the Applicant (Financial Creditor) had not fixed the expenses to be incurred by the Interim Resolution Professional. Therefore, as per Sub-regulation (2) of Regulation 33, the Adjudicating Authority was required to fix the expenses which includes the fee to be paid to the Interim Resolution Professional and other expenses.

20. The application under Section 7 was admitted on 13th June, 2018. The copy of which was received by the Interim Resolution Professional on 20th June, 2018. Finally the proceeding was terminated by judgment of this Appellate Tribunal dated 17th July, 2018, thereby we find that the Interim Resolution Professional has worked for 27 days.

21. In the aforesaid background, as we find that the 'Interim Resolution Professional' has performed duty only for 27 days and not incurred any expenses, except for travelling allowance which he is entitled to, we hold that Rs.5 Lakh (Rupees Five Lakhs Only) allowed by the Adjudicating Authority is excessive.

22. The Adjudicating Authority has failed to notice that claim of Rs.6 Lakh (Rupees Six Lakhs Only) was made by the firm namely 'Ensemble Resolution Professionals Pvt. Ltd.', payable to the Interim Resolution Professional. As the aforesaid firm is not eligible or entitled to receive any fees or any cut or commission from the fees of the 'Interim Resolution Professional', demand of Rupees Six Lakhs cannot be accepted.

23. Taking into consideration the facts and circumstances of the case, we are of the view that a sum of Rs.1.5 Lakhs (Rupees One Lakh Fifty Thousand) should be paid in favour of the 'Interim Resolution Professional' for his functioning for period of 27 days (which is approximately 30 days). In addition Rs.25,000/-, is allowed towards travel expenditure, if any, incurred by the Interim Resolution Professional. Thus, Interim Resolution Professional is allowed a sum of Rs.1.75 Lakh (Rupees One Lakh Seventy Five Thousand Only) to be paid by the Appellant (Corporate Debtor), which should be paid within two weeks. The impugned order dated 10th August, 2018 stands modified to the extent above.

24. The appeal stands disposed of with aforesaid observations and directions. There shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

13th December, 2018

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