

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 306 of 2019

[Arising Out of Impugned Order Dated 23rd January, 2019 Passed by the National Company Law Tribunal, Chennai Bench, In MA/515/2018 in CP/689/IB/2017]

IN THE MATTER OF:

**Pradeep M.R
Residing at
Mandathil House, Muppathadom PO,
Aluva- 683 110**

...Appellant

Versus

**1. Ravindra Beleyur
Resolution Professional in charge
Of the Corporate Debtor,
Merchem Limited
#48/3, 2nd Floor, 2nd Cross, 1st Main Royan
Circle, Chamarajpete, Bengaluru – 560 018
...Respondent No.1**

**2.State Bank of India
Stressed Assets Management Branch
(Lead Banker of Committee of Creditors of
Corporate Debtor, Merchem Limited)
Vankarath Tower, Bypass Junction,
Palarivottom, Kochi – 682 024
...Respondent No.2**

**3.Acme Chem Limited
Resolution Applicant of Merchem Limited
9A, Saket 3, Ho Chi Minh Sarani, Kolkata,
West Bengal – 700 071
...Respondent No.3**

For Appellant : Mr. Rohan Rajasekaran, Mr. Jitendra Malkan and Mr. Kartik Malhotra, Advocates.

For Respondent : Mr. T.Ravichandran with Mr. K.V.Balakrishnan, Advocate for R-1. Mr. P.V.Dinesh Advocate for SBI. Mr. NPS Chawla and Mr.Suresh K Baxy, Advocate for R-3.

With

Company Appeal (AT) (Ins) No. 307 of 2019

IN THE MATTER OF:

1. Merchem (India) Private Limited

Having office at:

L934A, Pulinat Bank Junction,

Edapally, Cochin – 682 024

Represented by Mr. P.E. Thomas

...Appellant No.1

2. Grove Limited

Grove Centre, 44 Development Plot,

Kalamassery, Cochin – 683 109

Represented by Mr. P.E. Thomas

...Appellant No.2

Versus

1. Ravindra Beleyur

Resolution Professional of

Corporate Debtor,

Merchem Limited

#48/3, 2nd Floor, 2nd Cross, 1st Main,

Royan Circle, Chamarajpete,

Bengaluru - 560 018

...Respondent No.1

2. State Bank of India

Stressed Assets Management Branch

(Lead Banker of Committee of Creditors

Of Corporate Debtor, Merchem Limited)

Vankarath Tower, Bypass Junction,

Palarivottom, Kochi – 682 024

...Respondent No.2

3. Acme Chem Limited

Resolution Applicant of Merchem Limited

9A, Saket 3, Ho Chi Minh Sarani,

Kolkata, West Bengal – 700 071

...Respondent No.3

Present:

For Appellant : Mr. S.Santanam Swaminadhan and Ms. Abhilasha Shrawat Advocates.

For Respondent : Mr. T.Ravichandran with Mr. K.V.Balakrishnan, Advocate for R-1. Mr. P.V.Dinesh Advocate for SBI. Mr. NPS Chawla and Mr.Suresh K.Baxy, Advocate for R-3.

With

Company Appeal (AT) (Ins) No. 315 of 2019

IN THE MATTER OF:

**1. P.E.Thomas
Residing at
50/934A, Pulinattu House,
Park Lane, Edappally PO,
Ernakulam – 682 024**

...Appellant

Versus

**1.Ravindra Beleyur
Resolution Professional of
Corporate Debtor,
Merchem Limited
#48/3, 2nd Floor, 2nd Cross, 1st Main,
Royan Circle, Chamarajpete,
Bengaluru - 560 018**

...Respondent No.1

**2. State Bank of India
Stressed Assets Management Branch
(Lead Banker of Committee of Creditors
Of Corporate Debtor, Merchem Limited)
Vankarath Tower, Bypass Junction,
Palarivottom, Kochi – 682 024**

...Respondent No.2

**3. Acme Chem Limited
Resolution Applicant of Merchem Limited
9A, Saket 3, Ho Chi Minh Sarani,
Kolkata, West Bengal – 700 071**

...Respondent No.3

Present:

**For the Appellant : Mr. Swapnil Jain, Advocate
For the Respondent: Mr. T.Ravichandran with Mr.
K.V.Balakrishnan, Advocate for R-1. Mr. P.V.Dinesh
Advocate for SBI and Mr.N.P.S Chawla with Mr. Suresh
K.Baxy, Advocate for R-3.**

With

Company Appeal (AT) (Ins) No. 554 of 2019

In the matter of :

**Industrial Engineering Co.
Through its sole proprietor**

Mr. Sugathan Lakshmanan
Plot No.910/7, OPP Norris Medicines Ltd.,
G.I.D.C, Ankleshwar 393002 Gujarat
....Appellant

Versus
M/s.Merchem Ltd
V/774, 141 Development Area,
Edayar, Muppathadom
P.O.Paravur, Kerala – 683 110 ...Respondent No.1

2.Mr. Ravindra Beleyur
Resolution Professional
48/3, 2nd Floor, 1st Main, 2nd Cross
Royan Circle, Chamarajpet
Bengaluru, Karnataka 560 018 ...Respondent No.2

Present
For the Appellant : Mr. Jitendra Malkan, Advocate.
For the Respondent: Mr. T.Ravichandran, and Mr.
K.V.Balakrishnan, Advocate for R-1. Mr. NPS Chawla and
Mr. Suresh K.Baxy, Advocate for R-3

J U D G M E N T

(29th July, 2020)

PER : DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

These Appeals have been filed under Section 32 and 61(3) of the Insolvency & Bankruptcy Code, 2016 ('for short I&B Code, 2016') to set aside the impugned order passed by National Company Law Tribunal, Chennai Bench ('Adjudicating Authority') in MA/515/2018 in CP/689/IB/2017 dated 23.01.2019. The Adjudicating Authority vide above stated Miscellaneous Application has approved the Resolution Plan and has made it effective from the date of passing of order and has directed to the Resolution Professional to send a

copy of that order to the participants and the Resolution Applicant. Hence, we have considered for disposal by way of a common order.

2. The Resolution Plan was approved by the Adjudicating Authority contains various terms and conditions as submitted by the Resolution Applicant as per details enumerated at page 74 of CA(AT) (Ins) No.315 of 2019.

3. As far as, Company Appeal (AT) (Ins) No.306 of 2019 is concerned. The Appellant has submitted that the Resolution Plan of the Resolution Applicant is a sale of assets under the guise of Resolution Plan.

a) He has also stated that the Adjudicating Authority has failed to appreciate that no provision for payment of statutory dues related to employees/workmen such as gratuity, provident fund etc. has been made in the 'Resolution Plan' and it is discriminatory as against the employees and workmen of the Corporate Debtor.

b) He has also submitted that the Adjudicating Authority has failed to appreciate that the mass retrenchment/termination of the employees and workmen through Resolution Plan is without following the due procedure of law. He has also submitted that intent of the I&B Code, 2016 is Insolvency Resolution as a "going concern concept" and should not be slump sale of assets. The Appellant in this Appeal is an employee of the Corporate Debtor who has filed the application under I&B Code, 2016 and initiated the Corporate Insolvency Resolution Process (for short CIRP).

c) However, the Respondent No.1 in this Appeal i.e. the Resolution Professional has submitted that the Appellant had resigned much before the commencement of CIRP and has left the services of Corporate Debtor on 19.09.2017 while CIRP has been initiated on 15.01.2018. Resolution Professional has also stated that there is a collusion between the Appellant and the Promoter. He has also stated that he is the person being ex-employee of the Corporate Debtor has triggered the CIRP, Corporate Debtor does not appear before the Adjudicating Authority and the petition proceeded ex-parte and gets admitted on 15.01.2018.

d) Resolution Professional has also submitted that the Resolution Plan is inconsonance with the provisions of I&B Code, 2016 and the principles laid down by Hon'ble Supreme Court in K Shashidhar Vs. Overseas Bank & Ors (2019) 12SCC 150 and Committee of Creditors of Essar Steel Limited Vs. Satish Kumar Gupta and Ors.

e) While the Respondent No.3 i.e. Resolution Applicant of Corporate Debtor has stated that the Resolution Applicant has already implemented the Resolution Plan by 18.03.2019 and has largely made all the payment to all the Stakeholders/Creditors and has incurred additional costs of Rs.22.40 Crores towards refurbishment of Plant. He has also confirmed that he is keeping the operation of the Corporate Debtor as a going concern and has re-employed 36 ex-employees of Corporate Debtor out of total employees joining the unit being 93. He has also stated that the liquidation value of the corporate debtor is Rs.86.27

Crores while Resolution Plan value Rs.115.25 Crores. He has also stated that dues of workmen & Secured Financial Creditors are more than the Resolution Plan value therefore they were paid in equal proportion. However, employees dues comes in lower priority they should got zero per cent whereas they got 1.2%. The Resolution Applicant was even willing to redistribute out of the total proceeds to provide 100% payment of admitted dues of workmen and employees. However, the erstwhile CoC in its meeting on 25.11.2019 has unanimously voted against it.

4. The Appellant in Company Appeal (AT) (Ins) No.307 of 2019 is the absolute owner of the Corporate Debtor's factory, he has entered into a Licence Agreement with Corporate Debtor on 01.10.2011 and the Corporate Debtor has agreed to pay a sum of Rupees towards licence fee payable either a lump sum or such other instalments being Rs.16,50,000/- towards building and Rs.38,58,000/- towards plant and machinery. He is aggrieved that the Licence fee for the CIRP period forms part of IRP costs and should have been paid in full while this has not been considered and similarly the financial debt has not been paid. The Appellant is insisting that the Resolution Applicant has handed over the building and other apartments only on 17.06.2019 and his dues of Rs.82,65,000/- along with additional 5 months licence fee at the rate of Rs. 5 Lakhs per month has yet to be paid.

a)However, the Resolution Professional stated that the Appellants are related party and hence are not prejudicially affected and he has determined over Rs. 6 Crores recoverable from the related party. He has also stated that that figures

of Rent etc. are invariance with Income Tax Return filed by the Appellant and hence they are not entitled to the claim. This is a grey area and needs consideration in view of Section 14(1) of I&B Code, 2016 read with Regulation 31 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Since the premises was used by the Resolution Professional during the CIRP licence fee payment should have been considered at least tallying to the Income Tax Return of the respective years. The Resolution Applicant has submitted that he has provided the copy of the Resolution Plan to the Appellant and requested him to sign the Non-Disclosure Agreement which he has failed to do and accordingly, he has not provided a copy of the Resolution Plan.

5. The Appellant in Company Appeal (AT) (Ins) No. 315 of 2019 has stated that he is Promoter and Director of the Corporate Debtor and had extended personal guarantees to the loans of Corporate Debtor and he has mortgaged several of his properties as stated in the Application including of his wife's properties to raise loans for the Corporate Debtor. He was restructuring the Company but in the meantime CIRP was initiated. He has not been paid dues over Rs.2.65 crores towards his salary and unsecured loan of over Rs.16 Crores. He was both Financial Creditor and Operational Creditor. He has also stated that he has the reservations over the viability and feasibility of Resolution Plan approved.

a)He has also stated that the Resolution Applicant has sought several concession and exemption like allowing setting up off of brought forwarded losses and unabsorbed depreciation for computation of Taxable Profits as per

Income Tax Act, 1961, directing to provide reasonable opportunity to the jurisdiction principal Commissioner of Income tax for allowing this set off and also claiming certain other benefits apart from exemption under Stamp Duty Act, waiver by the Gujarat Government/ Gujarat Industrial Corporate from compliance related to drawal of water, approval from Environment and Forest Dept., Central Pollution Control Board and other Govt. Authorities for regularisation and waiver of any non-compliances pertaining to other requirements etc. A look at the Balance Sheet as on 31.03.2018 vide Annexure – A 2.2 page 9 filed by Appellant on 17th October, 2019 it appears that **accumulated losses as on 31.03.2018 itself is over Rs.121 Crores apart from unabsorbed depreciation.** However, these figures are as per Financial Statement and will require adjustment under Income Tax Act, 1961 to determine exact carry forward of losses for setting up off. Hence, **the impact is very high.** In this context there is a need for referring to the provisions of Section 61 of the I&B Code, 2016 which clearly lays down that the approved Resolution Plan should not be in contravention of the provision of any law for the time being in force apart from the other criteria as specified by the IBBI.

b) In this context reference is invited to the order dated 29.03.2019 of this Appellate Tribunal, which reads as under:

“29.03.2019 - Learned counsel appearing on behalf of the Appellant submits that there is no delay if it is counted from the date of the impugned order received

by the Appellants. If it is counted from the date of the impugned order, then only there is a delay of two days.

In the circumstances, we find that there is no delay in preferring this appeal IA No.115 of 2019 stands disposed of.

Issue Notice Mr. K.V.Balakrishnan, Advocate accepts notice on behalf of the 1st Respondent – (Resolution Professional). Mr. R.S.Lakshman, advocate accepts on behalf of 2nd Respondent. No further notice need be issued to them. They may file reply along with vakalatnama within two weeks. Rejoinder, if any, be filed by the Appellants within two weeks thereof.

Let notice be issued on rest of the Respondents by speed post. Requisite along with process fee, if not filed, be filed by 1st April, 2019. If the Appellant provides the e-mail address of the rest of the Respondents, let notice be also issued through e-mail.

Post the case 'for admission' on 3rd May, 2019.

In the meantime, the Resolution Plan may be implemented at the risk of the 'Resolution Applicant', which shall be subject to the decision of these appeals. However, the 'Successful Resolution Applicant' will

not sell or transfer not alienate or create third party interest on any of the moveable or immovable property of the 'Corporate Debtor'."

Hence the above order clearly stated that the Resolution Plan can be implemented at the risk of the Resolution Applicant which shall be subject to the decisions of the Appellate Tribunal.

c) However, the Resolution Professional has stated that the appellant has not signed the Non-Disclosure Agreement and hence was not given the copy of Resolution Plan and has also stated that no prejudice will be caused due to non-submission of the Resolution Plan as he has attended the CoC meeting.

d) The Resolution Applicant has submitted that he has implemented the Resolution Plan by 18.03.2019 and has spent Rs.22.40 Crores additionally to bring the Corporate Debtor as a "going concern". He is also agreeable that he was willing to redistribute the amount which is approved by CoC but CoC has unanimously rejected the proposal on 25.11.2019. He has also stated he is incurring losses due to such frivolous appeal.

6. The Appellant in Company Appeal (AT) (Ins) No. 554 of 2019, the Appellant is an Operational Creditor and he is working in the field of Mechanical fabrication work. He has carried out the work last being in 2016 and his amounts due were Rs.84,30,487 /-. He is talking about the discrimination between operational creditors and financial creditors and has stated that out of dues of over Rs.84,00,000/- he is getting Rs. 34,862/-. He has also stated that he is a fabrication

contractors and not getting at least a reasonable amounts, his business is also in a bad shape.

(a) While the Resolution Applicant has submitted that the Appellant is sole proprietorship concern and is not being eligible under Section 61 of the IBC, 2016 to Appeal. He has also stated that the instant appeal has been filed on 16.05.2019 after implementation of the Resolution Plan by 18.03.2019. He has also raised an issue that whatever amount he has got at that time he has not protested. In any case Section 61 of the IBC, 2016 provides for the terminology “person” which is defined in Section 3(23) of the IBC, 2016 and accordingly, any entity established under a statute will also be covered under this ambit.

7. We have gone through the various submissions made by the Appellants and the Respondents. We also understand that the Resolution Plan have been implemented by 18.03.2019 and a lot of time has lapsed in getting final approval and landing into appeals before this Appellate Tribunal. The grey area in this case is that the setting up off losses under Income Tax Act, 1961 is subject to scrutiny by the Income Tax Department and IBC 2016 lays down that the Resolution Plan should be in compliance with the law laid down. Hence, there is a need for getting an affidavit from the Resolution Applicant that he will be successfully completing the Resolution Plan whether he gets this set off under Income Tax Act or not. Secondly the issue is payment of licence fee to the building owner where the CIRP has been carried out and business was running on a “going concern basis” for the period till CIRP was continued or they have handed over the building to

the building owner whichever is earlier and the same is to be restricted to his Income Tax Returns so far filed. This costs needs to be included in CIRP costs.

8. We are of the view that there is no substance in CA(AT) (Ins) No.306 of 2019 and CA(AT) Ins No. 554 of 2019. Hence dismissed. However, CA(AT) Ins No. 307 of 2019 and CA(AT) Ins No.315 of 2019 are partly allowed as indicated above. Any interim order issued, stands vacated and pending IA's, if any, stands disposed of. No order as to costs.

The Adjudicating Authority shall ensure the compliance of above directions within a period of 4(four) weeks. Registry is directed to send the copy of this Judgment to the Adjudicating Authority (NCLT, Chennai Bench).

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member(Technical)

RK

New Delhi