

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.77 OF 2018

(ARISING OUT OF THE ORDER PASSED BY NATIONAL COMPANY LAW TRIBUNAL, BENGALURU BENCH, BENGALURU ON 19.01.2018 IN CP/59/2014 (TP/66/16)

IN THE MATTER OF:

Before NCLT

Before NCLAT

R. Swarup Reddy
S/o R.T. Mal Reddy,
R/o No.9 Ranjith Road,
Surya Nagar,
Kotturpuram,
Chennai-600086

2nd respondent

Appellant

Vs

1. M.N. Pratap Reddy & Ors,
R/o Flat No.205.
2nd floor, Vishwaprkruthi
Haveli,
Sneha Nagar Colony,
Amruthahalli Main Road,
Bengaluru-560024.

1st Petitioner

1st respondent

2. M Kiran Kumar Reddy
R/o Sri Lakshmi Nilayam,
No.266, 2nd Block,
RMV 2 Stage, 4th Cross
80 feet Road, Sanjay Nagar,
Bengaluru-560094

2nd Petitioner

2nd respondent

3. R. Yathin Reddy,
S/o R Swarup Reddy,
R/o No.9, Ranjit Road,
Surya Nagar,
Kotturpuram
Chennai-600085.

3rd respondent

3rd respondent

4. Smt Jansi Swarup Reddy,
W/o R. Swarup Reddy,
Residing at No.9,
Ranjit Road,
Surya Nagar,

Kottur Puram, Chennai-600085	4 th respondent	4 th respondent
5. Imran Pasha R/o No.9, Ranjit Nagar, Surya Nagar, Kotturpuram, Chennai-600085.	5 th respondent	5 th respondent
6. Sri Lakshmi Narasimha Mining Co Pvt Ltd, No.83, Ground Floor, 6 th Cross, AG's Layout, New BEL Road, Bengaluru-560 054.	1 st respondent	6 th respondent
7. M/s Brahmayya & Co. Khivraj Mansion 10/2 Kasturba Road, Bengaluru-560001.	---	7 th respondent

For Appellant:- Mr. Jayant Mehta, Ms Sayaree Malik, Mr.Sajal Jain, Ms Surabhi Limaye and Maishali Kalera, Advocates.

For Respondents: - Mr. GV Rao, CA for Respondent No.1 and 2. Mr. N.S. Sudarshan Gupta, of M/s Brahmayya & Co in person for Respondent No.7. Vaibhav Niti for Respondent 3.

And

COMPANY APPEAL (AT) NO. 121/2018

IN THE MATTER OF:

Before NCLT

Before NCLAT

Trans India Shipping Services
Pvt Ltd.
No.1A, First Floor,
Riviera Park Apartments,
No.11, 4th Main Road Extension,
Kotturpuram,
Chenna 600 085
Through its Authorized Signatory
Shri C. Sathyanarayanan

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Appellant

Vs

1. Sri Lakshmi Narasimha
Mining Co Pvt Ltd,

No.83, Ground Floor, 6 th Cross, AG's Layout, New BEL Road, Bengaluru-560 054.	1 st respondent	1st respondent
2. M.N. Pratap Reddy & Ors, R/o Flat No.205. 2 nd floor, Vishwaprkruthi Haveli, Sneha Nagar Colony, Amruthahalli Main Road, Bengaluru-560024.	1 st Petitioner	2nd respondent
3. M Kiran Kumar Reddy R/o Sri Lakshmi Nilayam, No.266, 2 nd Block, RMV 2 Stage, 4 th Cross 80 feet Road, Sanjay Nagar, Bengaluru-560094	2 nd Petitioner	3rd respondent
4. R. Yathin Reddy, S/o R Swarup Reddy, R/o No.9, Ranjit Road, Surya Nagar, Kotturpuram Chennai-600085.	3 rd respondent	4th respondent
5. Smt Jansi Swarup Reddy, W/o R. Swarup Reddy, Residing at No.9, Ranjit Road, Surya Nagar, Kottur Puram, Chennai-600085	4 th respondent	5th respondent
6. R. Swarup Reddy, 9 Ranjit Road, Surya Nagar, Kottur Puram, Chennai-600085	2 nd respondent	6 th respondent
7. Imran Pasha R/o No.9, Ranjit Nagar, Surya Nagar, Kotturpuram, Chennai-600085.	5 th respondent	7 th respondent

For Appellant:- Mr. Jayant Mehta, Ms Sayaree Malik, Mr.Sajal Jain, Ms surabhi Limaye and Maishali Kalera, Advocates.

For Respondents:- Mr GV Rao, CA for Respondent No.2 and 3. Vaibhav Niti for Respondent No.6

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

The present appeal being Company Appeal (AT) No.77 of 2018 has been preferred by the appellant under Section 421 of the Companies Act, 2013 against the impugned order dated 19.01.2018 passed in Company Petition No.CP/59/2014 (TP/66/16) of the National Company Law Tribunal Bengaluru Bench, Bengaluru (hereinafter referred to as the "Tribunal").

2. The second appeal being Company Appeal (AT) No.121 of 2018 has been filed by the appellant, M/s Trans India Shipping Services Pvt Ltd, sister concern of 6th respondent in Company Appeal (AT) No.77/2018 against the same impugned order dated 19.1.2018. Smt Jansi Swarup Reddy who is wife of Mr.R.Swarup Reddy, is the Managing Director of M/s Trans India Shipping Services Ltd (appellant in Company Appeal (AT) No.121/2018). Mr. R. Swarup Reddy is appellant in Company Appeal (AT) No.77/2018. Therefore, the appellants in both the appeals are husband and wife (through Company) who are aggrieved by the impugned order. As the facts of case are similar and the appeals have been filed against the same impugned order, therefore, we will decide both these appeals by passing a common order.

3. The brief facts of the case are that originally the Company Petition No.59/2014 was filed before the Company Law Board and during the pendency of the matter before the CLB, M/s Brahmayya & Co, were appointed as an independent Auditor vide order dated 7.7.2015 for the purpose of Company Appeal(AT) No.77 and 121 of 2018

auditing the books of accounts of the 6th respondent including related party transactions entered at the instance of appellant and 3rd respondent with M/s Auro Logistics Ltd and M/s Trans India Shipping Services Pvt Ltd for the period from 1.4.2007 to 31.3.2014. It was made clear that the 6th respondent shall bear the fees and the other claims of the Independent Auditor and the Auditors were at liberty to discuss with the Management on the quantum of fees/remuneration.

4. The auditors completed their work and claimed fees of Rs.36,16,032/-. The Tribunal vide its order dated 18.7.2017 directed the Respondent company to pay 50% of the total fees claimed by the auditor pending taking further decision on the fees claimed by the Auditor. Being aggrieved the appellant preferred an appeal being Company Appeal (AT) No.295/2017 before this Appellate Tribunal. This Appellate Tribunal vide order dated 17.11.2017 observed that Rs.5 lacs has been paid to the Auditor and the Tribunal is yet take a final decision on the fees to be paid. This Appellate Tribunal further observed that the Tribunal would take a final decision considering the efforts put in by the Auditors regarding the fees. The appeal was thus disposed.

5. The auditors submitted final report to the Tribunal in a sealed cover. The auditors furnished information according to which the fees is claimed. The auditors have also furnished information dated 14.11.2007 regarding man-day spent for the completion of work. The auditors submitted that they have audited books of accounts of the Respondent company from 1.4.2007 to 31.3.2014 and also audit of three specific transactions from 1.4.2014 till date of filing of the main petition. The auditors also investigated into the affairs of the Company including misconduct committed by B. Venkatarama Reddy and

verification of transactions with M/s Auro Logistics Limited and M/s Trans India shipping Services Pvt Ltd. The auditors stated that for auditing the books of Respondent company total man days spent is about 439 days. The auditors submitted a bill dated 16.1.2017 for Rs.36,16,032/-. The auditors also furnished information regarding the days spent by Senior Audit Executives, Assistant Managers, Audit Managers and Partners. Total number of days spent is 439 and number of hours spent was 3,512.

6. The appellant objected to the fee claimed by the auditor and stated that the audit fee claimed is highly excessive and that the auditors are best entitled for a fees of Rs.8,00,000/-. The appellant stated that the auditors should have consulted the company before starting the work of auditing, for fixation of fees as directed by the Company Law Board. The appellant stated that the auditors have not adhered to the directions issued by the Tribunal and further stated that the cash balance lying with the Respondent Company in its bank account at Syndicate Bank is just Rs.13,46,800/-. The appellant stated that the ICAI norms basing of which the auditors claimed fee is only a recommendatory in nature, therefore, the auditors can not fix the fee by merely quoting the norms of ICAI. The appellant gave the example of the fee paid by the banks basing on the turnover and contended the fee claimed by the auditors is too high in respect of the company whose turnover was only Rs.60 crores in its entire operation of 33 months.

7. The original petitioners (1st and 2nd respondent herein) in the Company Petition filed their objections to the objections filed on behalf of the appellant. The original petitioners (1st and 2nd respondent herein) supported the stand taken by the Auditors regarding the payment of fee to them. 1st and 2nd

respondent enclosed annual returns of M/s Auro Logistics Limited and M/s Trans India Shipping Services Pvt Ltd and summary of audit fee paid by the two companies. From the annual returns of these companies it is seen that these companies have paid around Rs.62 lacs towards audit fees for the period from 2007-08 to 2013-14. 1st and 2nd respondent also stated that the appellant paid more than Rs.60 lacs towards audit fee for auditing of accounts for a period of seven years in respect of sister concern.

8. 7th respondent stated that they have not only done the audit but also investigation was done in the affairs of the 6th respondent company including misconduct committed by B. Venkatarama Reddy for a period of seven years. 7th respondent further stated that at the time of commencing the work, it was not possible to estimate the number of days required for audit work and they have claimed fee as per ICAI norms. Turnover and profit is not at all a criteria for fixing the fees. The auditors further stated that the scope of work being audited/investigation and in-depth critical examination of books of accounts and supporting documents and, therefore, it involves lot of time.

9. After hearing the parties the learned Tribunal pass the following orders:

“We have seen the details of man-days spent by the Auditors and also the work undertaken by each of the persons employed by the Auditor Company for the purpose of not only auditing but also investigation, particularly with reference to the transactions with the family members of B. Venkatarama Reddy. The Auditors have given full details as to how this audit work was attended to, the total man-days spent and the various personnel involved in the auditing. It is also stated that the fees claimed is in accordance

with the norms of ICAI. It is also pertinent to note that the 2nd respondent has paid nearly Rs.62,00,000/- for auditing of the sister concerns for the same period as in the case of 1st respondent company. The total transactions undertaken by the Auditors and the actual days spent are given in detail. When fees is claimed in accordance with the norms of ICAI, then this Tribunal cannot interfere with the question of fees claimed by the M/s Brahmayya & Co. The Tribunal is guided by the details furnished by the Auditors for auditing of the books of accounts of 1st respondent company for a period of seven years and one more year is also included i.e. 2013-14. Therefore, considering the voluminous of work, the man-days spent the fees claimed is in accordance with the ICAI norms. Therefore, the fees as claimed by the Auditors M/s Brahmayya & Co is to be allowed. Already Rs.500,000/- was paid out of Rs.36,16,032/-. The balance amount is liable to be paid to Auditors M/s Brahmayya & Co.

In the result, the 1st respondent company is directed to pay balance of the Auditors fees of Rs.31,16,032/-. If the company has no money at present, it has to realise the money which is recoverable from the two sister Companies i.e. M/s Auro Logistics Limited and M/s Trans India Shipping Services Pvt Ltd after paying the amount now available with the company bank account.”

10. Being aggrieved by the said order dated 19.1.2018 the appellant has preferred the present company appeal.

11. Learned counsel appearing on behalf of the appellant stated that the Tribunal erred in directing that the 6th respondent to remit to the auditors the entire claimed amount of Rs.36,16,032/-. The Learned Tribunal did not consider that the appellant has only Rs.13,46,800/- standing to the credit of 6th respondent in its current account is set off towards company's Income Tax arrears. Learned counsel for the appellant further stated that the Tribunal has erred in directing the 6th respondent that after paying the auditors whatever amounts that are standing to its credit in its accounts, it should remit the balance of audit fee by recovering the amounts recoverable from two companies namely M/s Auro Logistics Ltd and M/s Trans India Shipping Services Pvt Ltd. Learned counsel for the appellant stated that these two companies are not party to the petition and the order has been passed against these companies without any notice. Learned counsel for the appellants stated that these companies have initiated Arbitration proceedings against 6th respondent claiming certain amount. Learned counsel for the appellant further stated that 1st and 2nd respondents (original petitioners) appeared before the Learned Arbitrator and filed objections on behalf of 6th respondent.

12. Learned counsel appearing on behalf of the appellants stated that the Tribunal ought to have considered alternative methods for recovering monies to pay the audit fee including auctioning of the 6th respondent movable assets instead of directing recovering from two companies.

13. Learned counsel appearing on behalf of the appellant stated that the Tribunal erred in holding in the impugned order that the auditors audited the books of accounts of 6th respondent for seven years whereas the operation of the 6th respondent were spread over merely 33 months from January 2009 to

August, 2011 and prior to January, 2009 the mining lease was operated by another lessee. It is further stated that the 6th respondent did not undertake any transactions of any nature prior to January, 2009 as is evident from the Balance Sheets of the company.

14. Learned counsel appearing on behalf of the appellant stated that the mining operation of 6th respondent was closed in August, 2011 and there being no sales or production, the Auditors could not have spent any substantial audit time as being claimed for auditing the books of 6th respondent. Learned counsel for the appellant stated that the Tribunal erred in holding that the auditors have audited the books for an additional year while failing to realize that the alleged additional year of audit pertains to mere confirmation of 3 payments made by 6th respondent to creditor companies. Learned counsel for the appellant further stated that the Tribunal has wrongly held that the auditors have spent 439 man days for auditing the books of accounts whereas the 6th respondent was in operation for just 33 months and the auditors have not discussed the remuneration with 6th respondent before commencing the work as directed by the Learned Company Law Board as the auditors were fully aware of the weak financial position of 6th respondent. Learned counsel for the appellant further stated that the Tribunal erred in holding that the auditors have spent considerable audit time towards investigating the transactions done by the family members of Mr. B. Vekatarami Reddy the then CEO of 6th respondent. Learned counsel for the appellant stated that the Tribunal erred in accepting the unsustainable justification provided by the Auditors that since the audit work assigned to them involved investigations apart from normal audit and in view of the

complexity of the case and that they were unable to arrive at the likely man hours before commencement of the audit and the auditors failed to explain what is complex about the case. At last learned counsel for the appellant submitted that the impugned order dated 19.1.2018 passed by the NCLT Bengaluru Bench, Bengaluru may be set aside.

15. Reply on behalf of 1st and 2nd respondent has been filed. Learned counsel for the 1st and 2nd respondent submitted that the present appeal has been filed on a very narrow compass and relates to the fee/remuneration to be paid to the independent Auditor for the services relating to verifying the accounts of the 6th respondent from the year 1.4.2007 to 31.3.2014 and filing a final audit report with respect to the same. Learned counsel for the 1st and 2nd respondent submitted that the Tribunal has rightly held that the independent auditor had given full details as to how the audit work in question was conducted, the total man days spent and the various personnel involved in the auditing. Learned counsel for the 1st and 2nd respondent further submitted that the fees claimed by the auditors is in accordance with the norms of ICAI and therefore considering the voluminous nature of the work the fees claimed by the auditors is justified.

16. Learned counsel for 1st and 2nd respondent submitted that they were constrained to file company petition against 6th respondent and the appellant herein alleging oppression and mismanagement and sought an investigation to be carried into the affairs of 6th respondent including the misconduct committed by Shri Venkata Rama Reddy and direct the appellant to restore to the company all funds misapplied or retained by them including the company funds illegally diverted to other companies.

17. Learned counsel for 1st and 2nd respondent stated that an independent auditor was appointed and the said auditors was directed to audit the books and accounts of 6th respondent from 1.4.2007 to 31.3.2014 and that 6th respondent shall bear the fee and other claims of the independent auditor to undertake the audit work and the independent director was given full liberty to discuss with the management the quantum of his remuneration. Learned counsel further submitted that vide order dated 23.7.2015 (Page 307 of the Appeal Paper Book), the Tribunal directed that the investigations to be carried out in to the affairs of the company including the misconduct committed by Shri Venkata Rama Reddy in accordance with Section 406 read with Schedule XI of the Companies Act, 1956 and direct the Respondents 2 to 4 to restore to the company all funds misapplied or retained by them including the company funds illegally diverted showing them as payments due to Auro Logistics Ltd and Trans India Shipping Services (P) Ltd. Learned counsel further stated that the auditor filed draft report before the Ld. Tribunal and duly raised their invoice of Rs.36,16,302/- as fee/remuneration having worked for 439 days. Learned counsel for the 1st and 2nd respondent further submitted that the auditor has been given liberty to raise his fee/remuneration and the same was to be paid by 6th respondent. It is further stated that this issued is to be decided by the Tribunal and the respondents have no role in the same. Learned counsel for the 1st and 2nd respondent has sought to invoke the jurisdiction of this Hon'ble Appellate Tribunal against the final order dated 19.1.2018 with a sole aim of delaying the adjudication of the company petition pending before the Tribunal. Lastly the learned counsel for the 1st and 2nd respondent submitted that the Tribunal has

proceeded as per law and the order dated 19.1.2018 does not deserve any interference.

18. Rejoinder has been filed by the appellant reiterating the submissions made in the appeal.

19. Learned counsel for the appellant submitted that the 1st and 2nd respondent have failed to reply to the various contentions raised by the appellant in the appeal on the issue of remuneration of the auditors.

20. The other appeal being Company Appeal (AT) No.121 of 2018 has been preferred by the appellant, who was not a party in the Company Petition under Section 421 of the Companies Act, 2013 against the impugned order dated 19.01.2018 passed in Company Petition No.CP/59/2014 (TP/66/16) of the National Company Law Tribunal Bengaluru Bench, Bengaluru (hereinafter referred to as the "Tribunal"). The main grievances of the appellant is that the Tribunal while deciding the company petition pertaining to payment of audit fee by Respondent company deviated from the issue and out of context and by way of a casual reference without passing a speaking order decided that unspecified/unquantified amounts are payable and recoverable from the appellant. Learned counsel for the appellant stated that the NCLT completely ignored the fact that the appellants are not party to the company petition and the NCLT should not have passed the order without hearing the appellants. Learned counsel appearing on behalf of the appellant stated that no such liability against the appellant and in favour of the 1st respondent has been crystallized in any proceeding. The appellant submits that the impugned order passed by the NCLT in so far as its directions to the 1st respondent to recover

amounts from the appellant company is without jurisdiction, perverse and deserves to be set aside.

21. Reply has been filed by 2nd and 3rd respondent. Learned counsel for the respondent stated that the appellant does not have any locus standi to file the present appeal as the appellant was not a party in Company Petition No.59/2014 and is in no way affected by the impugned order dated 19.1.2018. Learned counsel for the respondent submitted that the present appeal filed by the appellant is barred by limitation as per Section 421(3) of the Companies Act, 2013 as the present appeal has not been filed within forty five days' time limit specified in the Act, 2013.

22. We have heard the learned counsel for both the parties in both the appeals and perused the entire.

23. Learned counsel for the appellant argued that the Tribunal erred in directing 6th Respondent to remit to the auditors the entire claimed amount of Rs.36,16,032/- and the appellant has only Rs.1346800/- in their bank account. In this connection, we have noted that the auditors were appointed by the Tribunal and the liability for payment of the amount of audit fee is of the Company. Therefore, the Respondent company is liable to pay the audit fee of the auditors. Thus there is nothing wrong with such directions which calls for our interference with the same.

24. The other point argued by the appellant is that the Tribunal ought to have considered alternative methods for recovering monies to pay audit fees of auditors including auctioning of Respondent company movable assets instead of directing recovering from two companies. We have considered this issue and we are of the opinion that it is the duty of the Respondent Company

to pay the audit fee of the auditors. It is not the duty of the Tribunal to direct the company to consider the other methods for recovering monies. As regards the Tribunal's observations in the impugned order "**that if the company has no money at present, it has to realise the money which is recoverable from the two sister companies**" is also a possible course of action the company can. The appellant seems to be making out a case that the company does not have enough fund to pay the auditors' fee but we wonder that the poverty of the company does not deter them to fight among themselves rather than concentrated on running the company for mutual benefit of all but fall out of liabilities of such behaviour is made out to be excessive. We do not appreciate this approach.

25. The other point argued by the appellant that the Tribunal wrongly held that the auditors audited the books of accounts of 6th respondent for seven years whereas the operation of the company were spread over merely 33 months from January, 2009 to August, 2011. We have further observed that it is not disputed that the independent auditors were appointed to conduct the auditing the books and for investigating into the affairs of 6th Respondent i.e. Sri Lakshmi Narasimha Mining Company Pvt Ltd including related party transactions entered at the instance of appellant and 3rd respondent for the period 1.4.2007 till 31st March, 2014. It is also not disputed that it was directed that the Respondent Company shall bear the fees and the other claims of the Independent Auditor i.e. M/s Brahmayya & Co. The Auditors submitted their final report and the NCLT after satisfying itself directed the company to pay Rs.36,16,032/- to the auditor. The NCLT further observed

that Rs.500000/- has already been paid by the company, therefore, the said amount may be deducted.

26. The appellant is agitating that the fees claimed by the auditors on higher side and also is not as per the ICAI norms and at best are entitled for a fees of Rs.8,00,000/- We have no grounds to doubt that number of days spent is 439 and number of hours spent was 3512 in auditing. We have noted that Rs.36 lakh approx. claimed by auditor are supported by number of days spend and composition of people working on the assignment whereas there is no rational basis for suggesting that Rs.8 lakhs is a reasonable amount for the duty to be done. It can at best be called a wild guess. We further noted that the appellant has paid nearly Rs.62,00,000/- for auditing of the sister concerns for the same period as in the case of Respondent Company. Therefore, we are satisfied that the fee has been claimed as per ICAI norms seems reasonable.

27. During the course of arguments, the 7th respondent has justified the fees claimed on the basis of norms of ICAI and having meticulously spent the time on the assignment and the composition of people constituting audit team. Hence, 7th respondent asserted that the fees charged is reasonable looking into the context of the work which was required to do.

28. In the course of arguments, we toyed with idea if the 7th Respondent appearing in person through Mr. N.S. Sudarshan Gupta would consider voluntarily accepting to reduce the fees to some extent. The 7th respondent fairly stated that it would accept the orders of the Tribunal and another Rs.4 or 5 lakhs may be reduced. However, going through the material on record and the impugned order for which the audit was involved and the mandays

which were required to be spent as well as the expenditure made on audit of sister concerns, we feel it would be improper for us to reduce fees, least it set a precedent and generating litigations with the hope of getting reduction through the Tribunal by agitating the fees. When the auditor is showing the fees on the basis of ICAI norms we find it improper to interfere. The appellants are also not with clean hands and plead insufficiency of money in their accounts and when the NCLT directed that they can have the money by recovering what their dues are from their sister concern, the appellants, come up in appeals. We do not find that the impugned order has given any cause to the appellant in Company Appeal (AT) No.121 of 2018 to file the appeal.

29. For such reasons we proceed to pass the following orders:-

“Company Appeal (AT) No.77/2018 as well as Company Appeal (AT) No.121 of 2018 both are dismissed. In the circumstances no orders as to costs.”

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

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated: 29-10-2018

BM