

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB) 334(ND)/2017
IA/3927/2020 & IA 1356/2021

IN THE MATTER OF:

M/s Applied Electro Magnatics Pvt. Ltd.

Corporate Debtor

AND IN THE MATTER OF:

1. SM Milkose Limited

**5-Morar Enclave, Gora ka Mandir
Gwalior, Madhya Pradesh-474006**

Resolution Applicant

2. M/s Applied Electro Magnatics Pvt. Ltd.

**M-10, 1st Floor, Greater Kailash-II (Market)
South Delhi-110048**

Applicants

Versus

1. M/s Onyx Components and Systems Pvt. Ltd.

**Through Managing Director/Director/Company Secretary
6-1-85/4, First and Second Floors,
Opposite Telephone Bhawan
Saifabad, Hyderabad-500004**

2. Mr. Diwakar Atluri, Director

3. Mr. Pokala Srinaivas

4. Mr. Ramadevi Doronavalli

5. Mr. Srinivas Chakarvarthy Bellamkonda

Respondents

Order delivered on: 16/08/2021

CORAM:

MR. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (JUDICIAL)

MR. L. N. GUPTA, HON'BLE MEMBER (TECHNICAL)

PRESENT: - For the Income Tax Department Mr. Shlok Chandra, Jr.
Standing Counsel along with Ms. Mansie Jain, Advocate,
For the Responent: Mr. Vishal Ganda, Advocate, Mr. Anand Singh
Senger, Advocate and Ms. Guresha Bhamra, Advocate.



ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

IA 3927/2020:

The present application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), for seeking the following directions:

- "a. Direct the Respondents to refund Rs. 12,30,457/- to the Corporate Debtor with interest @18% p.a. being the amounts illegally retained by them and which amounts were given during moratorium period for supply of goods/components.*
- b. Direct that the Respondent is liable to be punished for contravention of Section 14, 31 and Section 74 of IBC for siphoning off proceeds of Corporate Debtor in contravention of Moratorium imposed by this Hon'ble Tribunal.*
- g. Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the matter and in the interest of justice."*

2. The facts mentioned in the application in brief are as follows:

- i. That the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor vide order dated 26.10.2017 and the Moratorium was imposed on the assets of Corporate Debtor. Resolution Plan for Corporate Debtor was approved on 02.04.2019.
- ii. That it is stated that post imposition of moratorium, the Interim Resolution Professional had paid certain amounts to the Respondents on 02.11.2017, 09.01.2018,



09.02.2018, 22.02.2018, 10.04.2018, 26.04.2018, 22.05.2018, and 30.06.2018 by Bank transfer, as advance for the supply of goods.

- iii. That it is contended that Corporate Debtor seeks Rs. 12,30,457/- from respondents; as despite receiving this amount, the respondents neither supplied the goods/components nor refunded the amount to the corporate debtor.
- iv. That it is further contended that the respondents instead of making payments, issued legal notice for recovery of Rs. 34,07,390/-. It is claimed that as per Resolution Plan nothing is payable to the Respondents, which dis-entitles the Respondents and they cannot retain any amount from the Corporate Debtor.
- v. That it is further contended that the abovementioned amounts were given to the Respondents as advance for supply of crucial goods, which were essential for the Corporate Debtor to operate as going concern during the CIRP Proceedings. This is a clear violation of Section 14 and thus the Respondents are liable to refund the amount paid to them.

3. The Respondents have filed reply and submitted that:

- i. That, as per the oral understanding and mutual discussion between the officials of the Corporate Debtor and the Respondents, the Respondents had been supplying goods to the Corporate Debtor since 2012. Accordingly, invoices of the said transactions were raised and a running account of the Corporate Debtor was being maintained, recorded all such transactions by the Respondents in its books of accounts since 2012.



- ii. That due to initiation of corporate insolvency resolution process of the Corporate Debtor, the business between the Respondents and the Corporate Debtor was disrupted and as a result of which, no business took place between the Corporate Debtor and the Respondents for a certain period of time. It is pertinent to mention that as on 25.03.2017, the amount outstanding was Rs. 50,07,390/- and the Corporate Debtor had issued various post-dated cheques in favour of the Respondents to be presented at the relevant dates.
- iii. That it is contended that thereafter the CIRP commenced with effect from 26.10.2017 and on that date an amount of Rs. 37,07,390/- was payable by the Corporate Debtor to the Respondents with certain post-dated cheques in hand that were not yet presented to the Bank. However, due to dishonor of cheques issued by the Corporate Debtor, the Respondent had sent legal notice dated 26.12.2017 to the Corporate Debtor, demanding payment of the outstanding amount of Rs. 34,07,390/- and the amount of the dishonored cheque dated 30.11.2017.
- iv. that it is further contended that due to the CIRP initiated against the Corporate Debtor, moratorium under section 14 of the Code was imposed and because of which, the Respondents could not continue with proceedings under section 138 of the Negotiable Instruments Act, 1881 for the dishonored cheque.
- v. That it is further contended that in furtherance of the public announcement dated November 17, 2017 and as per the oral request made by the RP, the Respondents had submitted their claim dated January 18, 2018 amounting to Rs. 34,07,390/- to the IRP.



- vi. That it is further contended that the Respondents received a notice dated 10.10.2019 from the Corporate Debtor wherein, it is alleged that Rs. 12,30,457/- is outstanding in the books of account maintained by the Corporate Debtor.
- vii. That it is further contended that against the said notice dated 10.10.2019, the Respondents had sent reply dated 21.10.2019 claiming that Rs. 34,07,390 is due and payable by the Corporate Debtor. It is pertinent to mention that the said reply clearly specified that the amount as alleged by the Corporate Debtor is not payable as the Respondents had supplied goods to the Corporate Debtor and RP had made part payment against the invoices issued for the said supply of goods.
- viii. It is alleged that the applicants have relied on the ledger for the period between 26.10.2017 to 31.03.2019 but the applicants elected not to disclose a material fact regarding the outstanding balance payable by the Respondents to the Corporate Debtor amounting to Rs. 37,07,390 that should have been the opening balance in such a ledger keeping in mind the prior business and commercial relationship between the Respondents and the Corporate Debtor since 2012.
- ix. It is also stated that prior to approval of the Resolution plan by the CoC on 21.07.2018, Successful Resolution Applicant ought to have known the means through which the Corporate Debtor is carrying out the business during the CIRP. It is humbly submitted that, even with the approval of the resolution plan by the Hon'ble Adjudicating Authority on 02.04.2019, the Successful Resolution Applicant did not take any immediate action and kept silence with respect to the



transactions between the Corporate Debtor and the Respondents for almost six months.

- x. That it is further contended that the Respondents raised objection that the present dispute in relation to the recovery of alleged amount of Rs. 12,30,457/- from the Respondents is purely a civil dispute as the rights and liabilities of the parties involved will be affected by it. Therefore, this Adjudicating Authority is not the appropriate forum to adjudicate the civil dispute between the Applicants and Respondents.
- xi. It is stated that since respondents had duly supplied material to corporate debtor during the moratorium period, there is no contravention of Section 14 and 31 of the Code and the allegations of the applicant are only afterthought. The Respondents have placed copy of ledger accounts maintained in the books of Respondents in respect of Corporate Debtor along with the reply.

IA-1356/2021:

4. The present application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), for seeking consideration of IA 3927/2020 filed in IB 334/ND/2017 is under Section 60(5) of the Code. .

5. The applicant has also relied upon the case of Pruthviraj sinh Nodubha Jadeja (D) Vs. Jayeshkumar Chakkaddas Shah, reported in (2019) 9 SCC 533 and Vijaya Bank Vs. Shyamal Kumar Lodh (2010) 7 SCC 635.

IA/3927/2020:

6. We have heard the Ld. Counsels for the applicant and the respondents and perused the averments made in the application and reply filed by the respective parties.

7. We notice that during the pendency of application i.e. IA/3927/2020, filed under Rule 11 of NCLT Rules, 2016 read with Section 14, 31 & 74 of IBC,

the applicant has also filed another application being IA/1356/2021, praying therein to consider IA/3927/2020 also under Section 60(5) of Insolvency & Bankruptcy Code, 2016. Therefore, we would like to dispose of both these applications i.e., IA/3927/2020 and IA/1356/2021 by this common order.

8. Ld. Counsel for the applicant contented all the facts that are mentioned in the application.

9. It is further contended by the Applicants' Counsel that in this matter, the Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') was initiated on 26.10.2017 against the Corporate Debtor and during the moratorium period, the Interim Resolution Professional (IRP) had made payments to the respondents on the following dates i.e., 02.11.2017, 10.04.2018, 26.04.2018, 22.05.2018 and 30.06.2018 for the supply of the goods/components.

10. He further contended that the Resolution Plan was approved by the Adjudicating Authority on 02.04.2019 and the Corporate Debtor seeks payment of Rs. 12,30,457/-, which were wrongly misappropriated by the respondents.

11. He further contended that although the advance payment was made to the respondents for the supply of goods/components but the respondents failed to supply the goods/components. Therefore, the Corporate Debtor had sent a legal notice to the respondents for the refund of that amount.

12. He further contended that the respondents instead of refunding Rs. 12,30,457/-, rather sent a demand of Rs. 34,07,390/- to be recovered from the Corporate Debtor.

13. He further contended that since there are contravention of the provisions contained under Section 14, 31 and 74 of IBC, the applicant may also be punished therefor.

14. On the other hand, Ld. Counsel for the respondents contended all the facts mentioned in their reply.

15. He contended that there is no violation of any of the provisions contained under Sections 14, 31 and 74 of IBC as alleged by the Ld. Counsel for applicant.
16. He further contended that in terms of Section 14 (2) & (2A) of IBC read with Section 25 of IBC, it was the duty of the IRP/RP to keep the operations of the Corporate Debtor as “a going concern”.
17. He further contended that RP in exercise of its powers under Section 25 read with Section 14 (2) & (2A) of IBC, requested the respondents to supply the goods/components in order to keep the Corporate Debtor as a going concern and accordingly, part payment was made by the RP/IRP and in lieu of that payment the respondents have supplied the goods/components to the corporate debtor.
18. He further contended that the respondents have also in para 20 of the reply has referred to the summary of transactions made in between the respondents and the Corporate Debtor.
19. He further contended that the RP had kept the claim dated 18.01.2018 filed by the respondents in abeyance and communicated to the respondents that as the running account of the respondents has been continuing during the moratorium period on account of supply of essential goods during the said period, therefore, the claim of the respondents would be settled at the end.
20. He further contended that the present application is not maintainable because the applicants have suppressed the material facts.
21. He further contended that the Resolution Plan was approved by the CoC on 21.07.2018 whereas, the respondents had started the supply of the material prior to the approval of Resolution Plan by the Committee of Creditors (hereinafter referred to as ‘CoC’) Therefore, the Resolution Applicant must be aware of the fact that in order to keep the Corporate Debtor a going concern, on the request of RP, the respondents had been supplying the material.



22. Before entering into the merit of the prayers of the applicants, first, we would like to consider whether the present application is maintainable under Rule 11 of the NCLT Rules, 2016 or under Section 60 (5) of IBC, 2016, which is subsequently added by filing IA/1356/2021.

23. So far as the Section 60 (5) of IBC is concerned, at this juncture, we would like to examine the said provision to consider whether the prayers of the applicants come within the purview of Section 60 (5) of IBC, 2016 or not?

24. The relevant provision of Section 60 (5) of IBC, 2016 is quoted below :

IBC Section 60-Adjudicating Authority for corporate persons.

1.....

2.....

3.....

4.....

5. *Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-*

(a) *any application or proceeding by or against the corporate debtor or corporate person;*

(b) *any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*

(c) *any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.*

6.....

25. When we consider the prayer of the applicants, in the light of the provision of Section 60 (5) of IBC, 2016, we observe that the provisions of Section 60 (5) (a) & (b) of IBC, 2016 are not applicable.

26. Now, we consider whether the prayer of the applicant comes within the purview of Section 60 (5)(c) of IBC, 2016. Section 60(5)(c) of IBC, 2016 states that any question of priorities or any question of law or facts, arising

out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code shall be considered by the Adjudicating Authority.

27. Admittedly, in the present matter, the Resolution Plan has already been approved. Therefore, at this juncture, we would like to consider the meaning of 'insolvency resolution process period', which has been defined in Section 5 (14) of IBC, 2016, which is quoted below:

5(14) : "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;

28. A bare perusal of the provision shows that the insolvency resolution process period means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day.

29. This period of 180 days may be extended under Section 12 of IBC, 2016 and in terms of the amended provision of Section 12 of IBC, 2016, the total period of insolvency resolution process is 330 days, which means that the period so referred to in Section 5 (14) of IBC, 2016 is subject to the extension made under Section 12 of IBC, 2016 or when the Resolution Plan is approved by the Adjudicating Authority.

30. Here in the case in hand, the Resolution Plan has already been approved by the Adjudicating Authority on 02.04.2019. Therefore, no insolvency proceeding is pending before the Adjudicating Authority.

31. Under such circumstances, in our considered view, the application filed by the applicants under Section 60 (5) of IBC, 2016 is not maintainable under the law.



32. So far as the application maintainable under Rule 11 of NCLT Rules, 2016 is concerned, in our considered view, during the pendency of any matter before the Tribunal, when there is no specific provision under the Act/Code is given only then the Tribunal may pass order by exercise of its power under Rule 11 of the National Company Law Tribunal Rules to deal with such situation. But herein the case in hand, no such matter is pending after the approval of Resolution Plan by the Adjudicating Authority, therefore, in our considered view, a separate application to deal with a new issue cannot be entertained under Rule 11 of the NCLT Rules, 2016. **Therefore, in our considered view, Rule 11 of NCLT Rules, 2016 is also not applicable in the case in hand. And the application filed by the applicants is also not maintainable under Rule 11 of NCLT Rules.**

33. Apart from the above, we also consider the submissions of Applicants on merit. Therefore, in the light of the submissions raised on behalf of the parties, we consider the prayer of the applicants.

34. On the basis of the pleadings of the parties, the following are the admitted facts:

- i. Prior to the initiation of CIRP, respondents used to supply material i.e. goods/components to the Corporate Debtor.*
- ii. After the initiation of CIRP, on the request of RP, the respondents continued to supply the goods/components and the payment was being made by the RP for the said goods/components.*

35. The question raised in the application, jointly filed by the Corporate Debtor and the Successful Resolution Applicant is that the RP has made payments in contravention of the provisions contained under Sections 14, 31 and 74 of IBC.



36. Therefore, at this juncture, we would like to refer to Section 14 (2) and (2A) and Section 25 of IBC and the relevant portions of the said sections are quoted below:

IBC Section 14 - Moratorium.

(1)

- (a)
- (b)
- (c)
- (d)

(2) *The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*

(2A) *Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations or such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be Specified.*

(3)

- (a)
- (b)

(4)

IBC Section 25 - Duties of resolution professional.

(1) *It shall be the duty of the resolution professional to preserve and protect the assets of the corporate*

debtor, including the continued business operations of the corporate debtor.

(2) *For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-*

- (a) *take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;*
- (b) *represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;*
- (c) *raise interim finances subject to the approval of the committee of creditors under section 28;*
- (d) *appoint accountants, legal or other professionals in the manner as specified by Board;*
- (e) *maintain an updated list of claims;*
- (f) *convene and attend all meetings of the committee of creditors;*
- (g) *prepare the information memorandum in accordance with section 29;*
- (h) *invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;*
- (i) *present all resolution plans at the meetings of the committee of creditors;*
- (j) *file application for avoidance of transactions in accordance with Chapter III, if any; and*



(k) such other actions as may be specified by the Board.

IBC Section 25A. - Rights and duties of authorised representative of financial creditors.

(1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all



the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote:

Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3).

(4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to insure that the appropriate voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

Explanation.- For the purposes of this section, the "electronic means" shall be such as may be specified.

37. From the conjoint reading of the above Sections, we observe that as per Section 25(1) of IBC, it is the first and foremost duty of the IRP/RP to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor. And in order to protect and preserve the assets of the corporate debtor, a separate provision has been made under Section 14 (2) of IBC and Sub Section 2A of Section 14 is added w.e.f. 28.12.2019, as per which the supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended or interrupted during the period of moratorium. Even before the insertion of Sub Section 14 (2A) there was a provision under Section 14(2) of IBC, which authorised the RP to permit anyone to continue the supply of essential goods



or services which is necessary to keep the Corporate Debtor as a going concern.

38. By exercising this power, the RP had made a request to the respondents to continue the supply of goods/components and accordingly, the respondents had been continuing the supply of the goods/components in order to keep the Corporate Debtor as a going concern and in lieu of that, the payments were received by the respondents.

39. The respondents in its reply in para 20 have given a summary of transactions occurred between the respondents and corporate debtor, prior to the initiation of CIRP and after the initiation of CIRP as well as the amount received by the respondents from the corporate debtor or by the RP. The scanned true copy of the ledger account of the Corporate Debtor is reproduced below:-

S. No.	Date	Particulars	Amount (Rs.)	Balance (Rs.)
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1.	26/10/2017	Outstanding balance as on Insolvency Commencement Date	-	37,07,390
2.	02/11/2017	Amount received from cheque issued prior to Insolvency Commencement Date	(3,00,000)	34,07,390
3.	05/01/2018	Amount received from RP	(95,378)	33,12,012
4.	09/01/2018	Goods sold to Corporate Debtor	2,72,509	35,84,521
5.	09/01/2018	Amount received from RP	(1,77,131)	34,07,390
6.	09/02/2018	Goods sold to Corporate Debtor	3,75,476	37,82,866

7.	09/02/2018	Amount received from RP	(10,00,000)	27,82,866
8.	22/02/2018	Amount received from RP	(4,50,674)	23,32,192
9.	23/02/2018	Goods sold to Corporate Debtor	1,82,999	25,15,191
10.	24/02/2018	Goods sold to Corporate Debtor	4,09,078	29,24,269
11.	10/04/2018	Amount received from RP	(3,25,000)	25,99,269
12.	12/04/2018	Goods sold to Corporate Debtor	1,82,881	27,82,150
13.	26/04/2018	Goods sold to Corporate Debtor	1,44,361	29,26,511
14.	26/04/2018	Amount received from RP	(2,25,000)	27,01,511
15.	03/05/2018	Goods sold to Corporate Debtor	24,237	27,25,748

16.	22/05/2018	Amount received from RP	(2,77,298)	24,48,450
17.	23/05/2018	Goods sold to Corporate Debtor	2,28,483	26,76,933
18.	30/06/2018	Amount received from RP	(2,00,000)	24,76,933
		Outstanding balance C/F	-	24,76,933

40. At this juncture, we would also like to refer to the relevant dates of the preparation of Information Memorandum, EOI, Request for Resolution Plan and filing of this application which is referred to in para 30 of the reply and the scanned copy of the same is quoted below:-



That, the dates relevant for highlighting the present issue are provide in the table hereinunder:

S. No.	Date/Time Period	Event
i.	Prior to July 2018	Preparation of Information Memorandum, Expression of Interest, Request for Resolution Plan, etc. by the RP
ii.	July 21, 2018	Approval of resolution plan by the CoC
iii.	April 2, 2019	Approval of resolution plan by the Hon'ble Adjudicating Authority
iv.	October 10, 2019	Frivolous Legal notice from the Corporate Debtor to the Respondent
v.	October 21, 2018	Reply by the Respondent to the frivolous legal notice sent by the Corporate Debtor
vi.	September 14, 2020	Filing of the present Application

41. On the basis of of the aforesaid discussion, when we consider the prayer of the applicant, we are of the considered view that goods/components were supplied by the respondents on the request of the RP during the moratorium period and the RP has acted as per the provision contained under Section 14 (2) of the IBC 2016.

42. Therefore, there is no contravention of provisions contained under Section 14 of IBC.

43. Similarly, since the Code provides and authorizes the RP to permit anyone to continue the supply of goods/components to keep the Corporate Debtor as a going concern, we also do not find any violation of Section 31 & 74 of IBC.

44. Hence, we find, no force in the contention raised on behalf of applicants that there is a violation by RP of any of the provisions contained under Section 14, 31 & 74 of IBC and the respondents are required to refund the amount i.e., Rs. 12,30,457/- to the Corporate Debtor.

45. Hence, the prayer of the applicants is hereby rejected and accordingly, the present application i.e. IA/3927/2020 stands Dismissed.

IA/1356/2021:

46. In the light of the aforesaid order passed in the IA/3927/2020, the present application is liable to be dismissed.

47. Accordingly, the same is hereby Dismissed.

- Sd -

(L. N. GUPTA)
Member (T)

- Sd -

(ABNI RANJAN KUMAR SINHA)
Member (J)

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB) 334(ND)/2017

IA/5557/2020 & IA 1362/2021

IN THE MATTER OF:

M/s Applied Electro Magnatics Pvt. Ltd.

Corporate Debtor

AND IN THE MATTER OF:

**1. SM Milkose Limited
5-Morar Enclave, Gora ka Mandir
Gwalior, Madhya Pradesh-474006**

Resolution Applicant

**2. M/s Applied Electro Magnatics Pvt. Ltd.
M-10, 1st Floor, Greater Kailash-II (Market)
South Delhi-110048**

Applicants

Versus

**1. Assistant Provident Fund Commissioner & Recovery Officer
Employee Provident Fund Organisation
Nidhi Bhawan, A-2C, Sector-24 Noida-201301**

**2. Employee Provident Fund Organisation
Nidhi Bhawan, A-2C, Sector-24 Noida-201301**

Respondents

Order delivered on: 16/08/2021

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. L.N. GUPTA, MEMBER (TECHNICAL)



PRESENT: - For the Income Tax Department Mr. Shlok Chandra, Jr. Standing Counsel along with Ms. Mansie Jain, Advocate,
For the Responent: Mr. Vishal Ganda, Advocate, Mr. Anand Singh Senger, Advocate and Ms. Guresha Bhamra, Advocate.

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

IA 5557/2020:

The present application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") seeking following directions:

- "a. pass ex-parte ad interim directions till the disposal of present application restraining and Respondents from taking coercive action against the Applicants in respect of past conduct of Corporate Debtor prior to 2.4.19, i.e. the date of Approval of Resolution Plan by this Hon'ble Tribunal;*
- b. Set aside letter dated 27.08.2020 bearing no. 11174/EPFO/RO/NOI/Comp-IV/UP/48763 and show cause notice dated 11.11.2020 bearing No. 11505/EPFO/RO/NOI/Comp-IV/UP/48763 and any other coercive process/proceedings/demand against the Corporate Debtor in respect to any conduct of Corporate Debtor prior to 2.4.2019, i.e. the date of the Approval of Resolution Plan by this Hon'ble Tribunal.*
- c. Direct the Respondents to classify the dues of the Corporate Debtor prior to 02.04.2019, i.e. the date of Approval of Resolution Plan by this Hon'ble Tribunal and as shown in Annexure A-8 as NIL in the records of the Respondents and on*



the website of the Respondent against the account of the Corporate Debtor.

d. Direct the Operational Creditor that the Resolution Plan passed and approved by this Hon'ble Tribunal is binding upon it and no coercive action or pending claims can be sought by Operational Creditor from the Corporate Debtor prior to 2.4.19, i.e. the date of Approval of Resolution Plan by this Hon'ble Tribunal.

e. Direct that the Operational Creditor is liable to be punished for contravention of Section 14, 31 and Section 74 of IBC for siphoning off proceeds of Corporate Debtor in contravention of Moratorium imposed by this Hon'ble Tribunal.

f. Direct the Operational Creditor to pay the Corporate Debtor and Resolution Applicant compensation and opportunity cost of Rs. 5 lacs for loss of interest.

g. Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the matter and in the interest of justice.

2. The facts mentioned in the application in brief are as follows:

i. That the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor vide order dated 26.10.2017 and the Resolution Plan for Corporate Debtor was approved on 02.04.2019.

ii. That it is contended that when the Interim Resolution Professional had issued Information Memorandum, the dues of Corporate Debtor were shown as Rs. 78 lacs under this head and no Claim was filed by the Respondents, thus Rs. 78 lacs formed the basis of the claim of Respondents for CIRP. It is claimed that the Respondents issued an order dated 19.03.2019, in which it is mentioned that on 27.07.2018, Sh. Prem Kumar Dutt had appeared on behalf of Corporate Debtor

and informed about appointment of Resolution Professional. The Respondent's letter dated 30.08.2018 established this fact that the Respondents had knowledge of CIRP.

iii. That it is further contended that the liquidation value of the company was less than the claims of Respondents and the liquidation value payable to the Respondents was NIL. The Corporate Debtor paid Rs. 78 lacs to Respondents vide D.D. no. 220525 dated 21.01.2020.

iv. That it is further contended that the Respondents/Operational Creditor even attached the accounts of the Corporate Debtor which were later on de-attached by the Respondents.

It is further contended by the Applicants that except the amount; which has already been paid, no further amount is payable to the Respondents, in terms of the approved Resolution Plan. However, the web portal of the Respondents still shows the dues of Rs.57,07,411/- for which the Corporate Debtor is not liable to pay.

v. That it is further contended that despite various efforts of the applicants, the respondents had issued letter dated 27.08.2020 and show cause notice dated 11.11.2020 threatening coercive actions against the applicants/corporate debtor. Hence, the applicants have filed the present application seeking directions against the Respondents.

IA-1362/2021:

3. The present application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), for seeking consideration of IA 3927/2020 filed under Section 60(5) of the Code.

4. The applicant has also relied upon the cases of Pruthvirajsinh Nodubha Jadeja (D) Vs. Jayeshkumar Chakkaddas Shah, reported in



(2019) 9 SCC 533 and Vijaya Bank Vs. Shyamal Kumar Lodh (2010) 7 SCC 635.

5. We have heard the Ld. Counsel for the applicant and the respondent and perused the averments made in the application and written submissions filed by the respective parties.

6. During the pendency of application i.e. IA/5557/2020, filed under Rule 11 of NCLT Rules, 2016 read with Section 14, 31 & 74 of IBC, the applicant has also filed one separate application being IA/1362/2021, praying therein to consider IA/5557/2020 filed under Section 60(5) of the Code. Therefore, we would like to dispose of both these applications i.e. IA/5557/2020 and IA/1362/2021 by this Common Order.

7. Before getting into the merit of the prayers of the applicants, first we would like to consider whether the present application is maintainable under Rule 11 of the NCLT Rules, 2016 or under Section 60 (5) of IBC, 2016, which is subsequently added by filing IA/1356/2021.

8. So far as Section 60 (5) of the IBC is concerned, at this juncture, we would like to examine the said provision to consider whether the prayers of the applicants come within the purview of Section 60 (5) of IBC, 2016 or not?

9. The relevant provision of the Section 60 (5) of IBC, 2016 is quoted below: -

IBC Section 60 - Adjudicating Authority for corporate persons.

1.....

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5. Notwithstanding anything to the contrary contained in any other law for the time being in force, the



National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

6.....

10. When we consider the prayers of the applicants in the light of the provision of Section 60 (5) of IBC, 2016, we observe that the provision of Section 60(5)(a) & (b) of IBC, 2016 are not applicable.

11. Now, we consider, whether the prayers of the applicants come within the purview of Section 60 (5)(c) of IBC, 2016 ? The Section 60(5)(c) of IBC, 2016 states that any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code shall be considered by the Adjudicating Authority.

12. Admittedly, the Resolution Plan has already been approved. Therefore, at this juncture, we would like to consider the meaning of 'insolvency resolution process period', which has been defined under Section 5 (14) of IBC, 2016 and the same is quoted below:-

5(14) "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency



commencement date and ending on one hundred and eightieth day;

13. A bare perusal of the provision shows that the insolvency resolution process period means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day.

14. This period of 180 days may be extended under Section 12 of IBC, 2016 and in terms of the amended provision of Section 12 of IBC, 2016, the total period of insolvency resolution process is 330 days, which means the period so referred to in Section 5 (14) of IBC, 2016 is subject to the extension made under Section 12 of IBC, 2016 or when the Resolution Plan is approved by the Adjudicating Authority.

15. Here in the case in hand, the Resolution Plan has already been approved by the Adjudicating Authority on 02.04.2019. Therefore, no insolvency proceeding is pending before the Adjudicating Authority.

16. Under such circumstances, in our considered view, the Application filed by the applicants under Section 60 (5) of IBC, 2016 is not maintainable under the law.

17. So far the application maintainable under Rule 11 of NCLT Rules, 2016 is concerned, in our considered view, during the pendency of any matter before the Tribunal, when there is no specific provision provided under the Act/Code, only then the Tribunal may exercise of its power under Rule 11 of the National Company Law Tribunal Rules. But here in the case in hand, no such matter is pending after the approval of Resolution Plan by the Adjudicating Authority. Therefore, in our considered view, a separate application to deal with a new issue cannot be entertained under Rule 11 of the NCLT Rules, 2016. **Therefore, in our considered view, Rule 11 of NCLT Rules, 2016 is also not applicable in the case in hand and hence, the application filed by the applicants is not maintainable under Rule 11 of NCLT Rules.**



18. Apart from the above, we also consider the submissions of Applicants on merit. Therefore, in the light of the submissions raised on behalf of the parties, we consider the prayer of the applicants. On perusal of the averments made in the application, we notice that the applicants on page 61 of the application have enclosed the order dated 19.03.2019 passed under Section 7A of the EPF & MP Act, 1952.

19. On perusal, we observe that order under Section 7A was issued by the Respondent vide letter no. 16177/EPFO/UP/RO/C-III/MRNOI/48763 dated 26.03.2018 for the period of 12/2012 to 02/2018 and the establishment was directed to represent the case on 20.04.2018. Accordingly, the authorized representative of establishment appeared on 11.05.2018, whereas the Resolution Plan was placed before the CoC on 21.07.2018 for approval. We further notice that the claim of the applicants is that as per the Information Memorandum prepared by Resolution Professional (hereinafter referred to as R.P), the dues of the respondents towards EPFO was only Rs. 78 lakhs, and the said amount has already been deposited by the applicants.

20. At this juncture, we observe that when the order by the Respondents was served upon the Corporate Debtor prior to the approval of the Resolution Plan by the CoC then why didn't the RP (who represent the corporate debtor) brought this fact to the knowledge of the CoC or the Resolution Applicant. This has not been explained by the applicants.

21. Therefore, merely on the ground that the claim has not been submitted by the Respondents, the correct amount has not been reflected in the information memorandum, in our considered view, is not liable to be accepted, especially when part of the claim was admitted on the basis of available records and without submission of claims by the respondents.

22. At this juncture, we would like to refer to Section 18 of IBC, which is quoted below:-

18. The interim resolution professional shall perform the following duties:—



(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to -

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including -



- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;**
 - (ii) assets that may or may not be in possession of the corporate debtor;**
 - (iii) tangible assets, whether movable or immovable;**
 - (iv) intangible assets including intellectual property;**
 - (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;**
 - (vi) assets subject to the determination of ownership by a court or authority;**
- (g) to perform such other duties as may be specified by the Board.**

Explanation.—For the purposes of this 1[section], the term “assets” shall not include the following, namely:—

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;**
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and**
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.**



23. A bare perusal of the aforesaid provision shows that it is the duty of the IRP to collect all information relating to the assets, liabilities finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to financial and operational payments for the previous two years.

24. Similarly, the duties of the RP are defined under Section 25 of IBC, 2016.

25. When we read these two provisions together, we find that it is the duty of the RP/IRP to collect the information relating to the financial and operational payments for the previous two years as well as to list assets and liabilities on the initiation date.

26. Here, the order under Section 7A issued by the Respondent vide letter no. 16177/EPFO/UP/RO/C-III/MRNOI /48763 dated 26.03.2018 was duly served upon the RP, prior to approval of the Resolution Plan by the CoC but the RP did not place the correct facts, rather in the Information Memorandum the RP had shown an incorrect figure.

27. So, under such circumstances, though the claim of the respondents had come to the knowledge of RP prior to the approval of Resolution Plan by the CoC, he failed to produce/project the correct figure of liability before the CoC as well as Resolution Applicant.

28. Therefore, it is not the fault of the respondents rather the RP has failed to perform his duty in term of the provisions contained under the IBC. Hence, on this ground also, in our considered view, the Application is not maintainable.

29. The Applicants have also placed reliance on the following judgements of:

- i. Hon'ble Supreme Court in the case of Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors. [Civil Appeal No. 8129 of 2019 with WP (Civil)]**



No. 1177 of 2020 and Civil Appeals No. 1550-1554 of 2021].

- ii. Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta & Ors. [2020 8 SCC 531].
- iii. Hon'ble NCLAT in the case of Santosh Wasantrao Walokar vs. Vijay Kumar V. Iyer and Ors. [MANU/NL/0039/2020].
- iv. Hon'ble NCLAT in Committee of Creditors of Amtek Auto Ltd. through Corporation Bank Vs. Mr. Dinkar T.Venkatasubramanian & Ors. [Company Appeal (AT) (Insolvency) No. 219 of 2019].

30. We observe that the facts of the judgements referred Supra are different from the facts of the case in hand and the same are not applicable to the Applications in hand.

31. For the reasons discussed above, we find, no merit in the Applications. **Accordingly, both the Applications i.e. IA/5557/ 2020 & IA/1362/2021 stand Dismissed.**

-sd-

(L.N. GUPTA)
Member (T)

-sd-

(ABNI RANJAN KUMAR SINHA)
Member (J)

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB) 334(ND)/2017

IA/4843/2020 & IA 1333/2021

IN THE MATTER OF:

M/s Applied Electro Magnatics Pvt. Ltd.

Corporate Debtor

AND IN THE MATTER OF:

1. SM Milkose Limited
5-Morar Enclave, Gora ka Mandir
Gwalior, Madhya Pradesh-474006

Resolution Applicant

2. M/s Applied Electro Magnatics Pvt. Ltd.
M-10, 1st Floor, Greater Kailash-II (Market)
South Delhi-110048

Applicants

Versus

1. Deputy Commissioner of Income Tax
Circle-3(1), New Delhi,
Income Tax Department
Room No. 308B, CR Building, New Delhi-02

2. Income Tax Department
Room No. 308B, CR Building, New Delhi-02

Respondents

Order delivered on: 16/08/2021

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. L.N. GUPTA, MEMBER (TECHNICAL)



PRESENT: - For the Income Tax Department Mr. Shlok Chandra, Jr. Standing Counsel along with Ms. Mansie Jain, Advocate,
For the Responent: Mr. Vishal Ganda, Advocate, Mr. Anand Singh Senger, Advocate and Ms. Guresha Bhamra, Advocate.

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

IA 4843/2020:

The present application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), for seeking following directions:

"a. Direct the Operational Creditor that the Approved Resolution Plan is binding upon it and all claims /dues /prosecutions /demands /interests /penalties / rectifications etc. of the operational creditor/ Respondent upon the Corporate Debtor for period prior to 02.04.2019, the date of Approval of Resolution Plan, and are liable to be considered as extinguished/dropped/non-existent.

b. Direct the Operational Creditor that the demand notices/appeals/prosecutions/proceedings as per Annexure A-4 being continued by the Respondent for conducts prior to the approval of Resolution Plan are liable to be quashed/set aside/withdrawn in view of order dated 2.4.19 passed by this Hon'ble Tribunal approving the Resolution Plan.



c. Direct that the Corporate Debtor is entitled to all accrued benefits/refunds along with interest as per law/ MAT benefits/ carried forward unabsorbed depreciation/ carried forward unabsorbed business losses etc. under law and as per Approved Resolution Plan and as per Annexure A-5.

d. Direct the Operational Creditor that any proceedings etc., if any pending, beyond the list of matters still continuing as per Annexure-A-4 be quashed/set aside/withdrawn and also any benefit accruing to the Corporate Debtor, if available, other than mentioned in Annexure A-5 be also made available to the Corporate Debtor.

e. Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the matter and in the interest of justice.

2. The facts mentioned in the application in brief are as follows:

i. That the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor vide order dated 26.10.2017 and the Resolution Plan for Corporate Debtor was approved on 02.04.2019.

ii. That it is contended that Schedule 5 of the Resolution Plan states that all dues under the provisions of the Income Tax Act, 1961 in relation to any period prior to the effective date pursuant to the Resolution Plan shall stand extinguished by virtue of the order passed by this Tribunal.



iii. That it is further contended that the Resolution Professional determined a claim of Rs. 63,41,000/- and the Corporate Debtor was directed to pay the above mentioned amount to the Respondents by 21.10.2020, which was duly complied. However, the Respondents are raising demands and initiating prosecutions against Corporate Debtor in respect of the transactions prior to 02.04.2019 and despite various representations, the Respondents are not setting aside the demands and not granting benefits such as accrued benefits in law to which the applicants are entitled.

iv. That it is the case of the applicants that since the liquidation value of the Corporate Debtor was much less than the claims of the Financial Creditors, the amount payable to Respondents as per liquidation value was NIL and despite payment of the approved amount as per Resolution Plan, the Respondents are still raising demands/prosecutions against Corporate Debtor and not giving any benefits as per law. Therefore, the present application has been filed by the applicants.

IA-1333/2021:

3. This application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), for seeking consideration of IA 4843/2020 filed in IB 334/ND/2017 under Section 60(5) of the Code.



4. The applicant has also relied upon the case of Pruthvirajsinh Nodubha Jadeja (D) Vs. Jayeshkumar Chakkaddas Shah, reported in (2019) 9 SCC 533 and Vijaya Bank Vs. Shyamal Kumar Lodh (2010) 7 SCC 635.

5. We have heard the Ld. Counsel for the applicants and the respondents and perused the averments made in the application and written submissions filed by the respective parties.

6. During the pendency of application i.e. IA/3927/2020, filed under Rule 11 of NCLT Rules, 2016 read with Section 14, 31 & 74 of IBC, the applicants have also filed one separate application being IA/1333/2021, praying therein to consider IA/4843/2020 which is also filed under Section 60(5) of the Code, 2016 . Therefore, we would like to dispose of both these applications i.e. IA/4843/2020 and IA/1333/2021 by this common order.

7. Before getting into the merit of prayers of the applicants, first we would like to consider whether the present applications are maintainable under Rule 11 of the NCLT Rules, 2016 or under Section 60 (5) of IBC, 2016, which is subsequently added by filing IA/1356/2021 .

8. So far as Section 60 (5) of IBC is concerned, at this juncture, we would like to examine the said provision to consider whether the prayers of the applicants come within the purview of Section 60 (5) of IBC, 2016 or not ?.

9. The relevant provision of Section 60 (5) of IBC, 2016 is quoted below:

IBC Section 60 - Adjudicating Authority for corporate persons.

1.....

2.....



3.....

4.....

5. Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

6.....

10. When we consider the prayers of the applicants in the light of the provision of Section 60 (5) of IBC, 2016, we observe that the provision of Section 60(5)(a) & (b) of IBC, 2016 are not applicable.

11. Now, we consider, whether the prayers of the applicants come within the purview of Section 60 (5)(c) of IBC, 2016? The Section 60(5)(c) of IBC, 2016 states that any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation



proceedings of the corporate debtor or corporate person under this Code shall be considered by the Adjudicating Authority.

12. Admittedly, in the present matter, the Resolution Plan has already been approved. Therefore, at this juncture, we would like to consider the meaning of 'insolvency resolution process period', which has been defined under Section 5 (14) of IBC, 2016 and the same is quoted below:-

5(14) "insolvency resolution process period"
means the period of one hundred and eighty
days beginning from the insolvency
commencement date and ending on one hundred
and eightieth day;

13. A bare perusal of the provision shows that the insolvency resolution process period means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day.

14. This period of 180 days may be extended under Section 12 of IBC, 2016 and in terms of the amended provision of Section 12 of IBC, 2016, the total period of insolvency resolution process is 330 days, which means the period so referred to in Section 5 (14) of IBC, 2016 is subject to the extension made under Section 12 of IBC, 2016 or when the Resolution Plan is approved by the Adjudicating Authority.

15. Here in the case in hand, the Resolution Plan has already been approved by the Adjudicating Authority on 02.04.2019. Therefore, no insolvency proceeding is pending before the Adjudicating Authority.



16. **Under such circumstances, in our considered view, the applications filed by the applicants under Section 60 (5) of IBC, 2016 are not maintainable under the law.**

17. So far as the application under Rule 11 of NCLT Rules, 2016 is concerned, in our considered view, during the pendency of any matter before the Tribunal, when there is no specific provision provided under the Act/Code, only then the Tribunal may exercise its power under Rule 11 of the National Company Law Tribunal Rules. But here in the case in hand, no such matter is pending after the approval of Resolution Plan by the Adjudicating Authority. Therefore, a separate application to deal with a new issue cannot be entertained under Rule 11 of the NCLT Rules, 2016. **Therefore, in our considered view, Rule 11 of NCLT Rules, 2016 is also not applicable to the case in hand and hence, the application filed by the applicants under Rule 11 of NCLT Rules is also not maintainable.**

18. **For the reasons discussed above, in our considered view, both the applications i.e. IA/4843/2020 & IA/1333/2021 are not maintainable and the same stand Dismissed.**

- Sd -

(L.N. GUPTA)

Member (T)

- Sd -

(ABNI RANJAN KUMAR SINHA)

Member (J)