

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 634 of 2020

[Arising out of judgment dated 29.05.2020 in CP (IB) No. 5/Chd/Hry/2019 And CA No. 519/2019 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh.]

IN THE MATTER OF:

1. RNY Healthcare Services Pvt. Ltd.

Registered Office at:

I-63, South City-1

Gurgaon –HR- 122009.

.... Appellant.

(Intervenor CA No. 519/2019)

Versus

1. Bourn Hall International India Pvt. Ltd.

Registered Office at:

Bourn Hall International Private Limited

Block –G, Greenwood City,

Sector -40, Gurgaon –HR – 122001.

..... Respondent No. 1.

(Corporate Debtor)

2. Sh. Madan Gopal Jindal

Interim Resolution Professional

IBBI Registration No. IBBI/IP-002/IPN00137/2017-18/10352

SCO 7-8, 4th Floor, Jandu Tower

Miller Ganj, G.T. Road, Ludhiana

Punjab -141003

Mobile : 9814170354

Email: mgjindal@gmail.com

....Respondent No. 2.

3. Mr. Gautam Chhabra

Director of the Company
 Bourn Hall International India Pvt. Ltd.
 R/o- S-60, Phase-1, Lig Flats
 Qutab Enclave, New Delhi – 110016
 Mob: 9560599999
 Email: g@utam.in

....Respondent No. 3.

Present:

For Appellant: Mr. Rakesh Kumar, Ms. Preeti Kashyap and Mr. Ankit Sharma, Advocates.

For Respondents: Mr. Gautam Singh (RP), for R-1 & 2.

J U D G M E N T

(21st October, 2021)

Justice Anant Bijay Singh;

This Appeal has been preferred by the Appellant (Intervenor, before the National Company Law Tribunal, Chandigarh Bench, Chandigarh) aggrieved and dissatisfied by the judgment dated 29.05.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh in CP (IB) No. 5/Chd/Hry/2019 And CA No. 519/2019 whereby and where under the application filed by the Respondent No. 1 (herein) under Section 10 of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) was admitted and appointed the Interim Resolution Professional and rejected the CA No. 519/2019 filed by the Appellant (herein).

2. The facts giving rise in the instant Appeal are as under:

i) That the Appellant is a Creditor and holds an Arbitral Award dated 06.02.2019 for a total sum of Rs. 3,48,41,071/- against the Respondent No. 1/ Corporate Debtor in lieu of the unpaid rents by the Corporate Debtor Company and a continuously accruing interest @ 12% per annum as the Appellant was the landlord of the Respondent / Corporate Debtor for the premises at Block G, Greenwood City, Sector 40, Gurgaon, i.e. the Registered Office address of the Respondent.

ii) The Corporate Debtor – Respondent No. 1 is the wholly owned subsidiary of a Foreign Company namely, M/s TVM Capital Healthcare Partners Ltd. The entire management and finances of the Corporate Debtor were being regulated through the said Parent Company.

iii) The Corporate Debtor – Respondent No. 1 was engaged in the business of providing assisted reproductive technology services, including in vitro fertilisation (IVF) to couples in need.

iv) Further case is that the Appellant had given the premises at Block G, Greenwood City, Sector 40, Gurgaon, i.e. the Registered Office address of the Respondent No. 1 on lease rent to the Corporate Debtor.

v) Further case is that the Corporate Debtor – Respondent No. 1 filed an application under Section 10 of the IBC (Annexure A-2, Colly, at page 59 to 196 of the Appeal Paper Book) before the Ld. Adjudicating Authority on the ground that the said petition was filed mischievously to defeat the lawful claims of the various creditors including the Appellant.

vi) The Appellant become Intervenor in the aforesaid proceeding, objected and brought to the notice of the Ld. Adjudicating Authority that the Intervenor has got an arbitral award which was constituted with consent of the Respondent / Corporate Debtor along with its holding company in its favour on 06.02.2019 in terms of which the intervenor has been held entitled to a total sum of Rs. 3,48,41,071/-

vii) In order to defeat the award, the Respondent No. 1 / Corporate Debtor filed application under Section 10 of the IBC and the Ld. Adjudicating Authority admitted the application on 29.05.2020. Hence this Appeal.

3. On 23.11.2020 this Tribunal directed the Learned Counsel for the Appellant is permitted to add 'Mr. Gautam Chhabra, S/o Sh. Ashok Chhabra' as Respondent No. 3 who filed Affidavit (Page 94-B) in support of the Application under Section 10 of the IBC needs to be heard with regard to the dispute being raised by the Appellant.

4. From the perusal of the order dated 09.04.2021 reveals that the Learned Counsel for the Appellant taken substituted service of notice by way of paper publication dated 27.02.2021 on Respondent No. 3, despite he failed to appear and the matter proceeded *ex-parte*.

Submissions on behalf of the Appellant

5. The Learned Counsel for the Appellant during the course of argument and his memo of Appeal as also Written Submissions submitted that the

Appellant is the Operation Creditor and having a claim of Rs. 3,48,41,071/- against the Corporate Debtor through the Arbitration Award.

6. It is further submitted that the Corporate Debtor registered office and operation office was at Block G, Greenwood City, Sector 40, Gurgaon, Haryana – 122001 (which is hereinafter referred to as “said premises”). The said premise was owned by the Appellant. The Appellant had given on lease the said premises to Corporate Debtor. It is due to the outstanding lease rent, the Appellant was the Operational Creditor of the Corporate Debtor.

7. It is further submitted that the Section 10 petition was filed by the Corporate Debtor on the basis of the EOGM held on the said premise on 31.10.2018 at 1PM. The contention of the Appellant was that no such EOGM had taken place as the premise was in the possession of the Appellant.

8. It is further submitted that the Section 10 of the IBC provides that while filing the petition there are certain mandatory requirements. The Section 10(3)(c) provides as under:

“(3) The corporate applicant shall, along with the application, furnish-

(c) **the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.**”

9. It is further submitted that the mandatory requirement of passing a special resolution for taking the decision of filing a petition under Section 10 of the Code. There was no EOGM took place on the documents which was furnished before the Ld. Adjudicating Authority is false documents.

10. It is further submitted that the Ld. Adjudicating Authority had also noted that no EOGM attendance sheet was produced by the Respondent in Para 16 of the impugned order.

11. Learned Counsel for the Appellant further submitted that these facts were not considered by the Ld. Adjudicating Authority in prospective manor, so the impugned order is set aside and the Appeal be allowed.

12. It is further submitted that this Tribunal vide order dated 23.11.2020 directed to add 'Mr. Gautam Chhabra, S/o Sh. Ashok Chhabra' as Respondent No. 3 who filed Affidavit (Page 94-B of the Appeal Paper Book)) in support of the Application under Section 10 of the IBC needs to be heard with regard to the dispute being raised by the Appellant. Despite valid service of notice and also substituted service of notice by paper publication, the Respondent No. 3 failed to appear.

13. It is further submitted that the Appellant is relying upon the judgment of this Tribunal in the case of **M/s Neesa Infrastructure Limited V/s State Bank of India (Company Appeal (AT) (Insolvency) No. 946 of 2020 dated 23.12.2020** wherein this Tribunal held as follows:

Company Appeal (AT) (Insolvency) No. 634 of 2020

“ We have perused the Application filed by the Appellant before the Adjudicating Authority and found that there is no Special Resolution passed by the shareholders of the Corporate Debtor or the Resolution passed by at least 3/4th of the total number of partners of the Corporate Debtor, as the case may be, approving filing of the Application.”

Submissions on behalf of Respondent Nos. 1 and 2.

14. Learned Counsel appeared on behalf of Respondent No. 1 and 2 and filed his status report. From the perusal of the status report it appears that on 29.05.2020 in CP (IB) No. 5/Chd/Hry/2019 admitted the application under Section 10 of the IBC and the Respondent No. 2 appointed as Interim Resolution Professional having IP registration No. IBBI/IPA-002/IP-N00137/2017-18/10352. Public announcement in the prescribed form ‘A’ inviting claims, were duly made by the IRP in two newspapers on 30.05.2020, in English in the “Financial Express” and in Hindi in “Jansatta” both editions were being published from Delhi.

15. On 01.06.2020, the IRP emailed a letter to Corporate Debtor i.e. Bourn Hall International India Private Limited and to the directors / members of suspended board of Corporate Debtor in respect to commencement of CIRP and appointment of Mr. Maadan Gopal Jindal as IRP and requested for providing following information / documents / handing over the control and custody of the assets:-

- a) particulars of directors of suspended board, key managerial persons, Statutory Auditors, company Secretaries and managers, Shareholders/members of Corporate Debtor, their addresses, email ids, phone/mobile numbers.
- b) Particulars of all bank accounts maintained by the Corporate Debtor as on 29.05.2020, along with complete addresses of branches, their email ids as well as their phone numbers or mobile numbers of the concerned executives.
- c) To provide complete details of cash and bank balances as on 29.05.2020.

16. Status report further reveals that the members of suspended board of Corporate Debtor, provided some information and the last financial statement for year ending 31.03.2018 which was unaudited vide their emails dated 08/09.06.2020. However, complete information was not provided.

17. Status report further reveals that in response to IRP's emails and letters, members of the suspended board of Corporate Debtor intimated that Corporate Debtor's assets / records, pertaining to their business i.e. running of Hospital and clinics are laying as under:

- i) Registered Office and Hospital: Block-G, Greenwood City, Sector-40, Gurgaon (Haryana) -122001 – Medical Equipment / Instruments, plant and machinery related to hospital, Furniture and fixture and statutory records / books of accounts. IRP verified by visiting on 09.06.2020 that registered office and hospital is in the control and custody of M/s RNY Healthcare Services

Private Limited. The Corporate Debtor had taken the said premises on leasehold basis and running its hospital. It is pertinent to mention that Mr. Parmanand Yadav, intimated that he is maintaining properly 400 approx. embryos pertaining to Corporate Debtor.

ii) Clinic at suite No. 101, Ist Floor, 29, Link Road (Lala Lajpat rai Marg) Lajpat Nagar-III, new Delhi-110024, owned by M/s M M Eyetech Private Limited. The Corporate Debtor had taken the premises on lease and at present Dr. Rishi Mohan is the owner and having possession and control over it and he declined to have any assets pertaining to the Corporate Debtor.

iii) Clinic at Flat No. 109, 29, Feroze Gandhi Road, Lajpat Nagar-III, New Delhi-110024. The Corporate Debtor had taken the premises on lease from Dr. Sonali Kohli and presently Dr. Sonali Kohli is the owner and having possession and control over it and she declined to have any assets pertaining to the Corporate Debtor.

18. Status report further reveals that the assets of Corporate Debtor are in the control and custody of M/s RNY Healthcare Services Private Limited. The IRP visited the registered office of the Corporate Debtor on 09.06.2020 and met Mr. Parmanand Yadav, who is one of Directors of M/s RNY Healthcare Services Private Limited, which has presently control and custody of maximum assets (including 400, approx.) embryos as well as records of the Corporate Debtor. Mr. Yadav informed the IRP that he has obtained the same by virtue of getting an award from the Arbitrator in favour of M/s RNY Healthcare Services Private Limited, as the Corporate Debtor, owed to it lease

money. In fact, M/s RNY Healthcare Services Private Limited is the owner of premises, whereat, the registered office of the Corporate Debtor is situated, was taken on lease by the Corporate Debtor. Resolution Professional has made M/s RNY Healthcare Services Private Limited as one of the party at the time of filing an application under the provisions of Section 19(2) of IBC, 2016 against the Corporate Debtor and others.

19. Status report further reveals that on 02.06.2020, the IRP emailed a letter to the statutory auditors of the Corporate Debtor i.e. Bourn Hall International India Private Limited about the commencement of its CIRP and appointment of IRP and sought the audited financial statements up to date and provisional financial statement as on 29.05.2020, being the insolvency commencement date and other relevant information/documents. The auditors provided financial statements for the year ending 31.03.2017 (audited) and 31.03.2018 (unaudited) and for the rest, they declined, as they were not having any access to the books of accounts.

20. Status report further reveals that the Resolution Professional verified that Corporate debtor is not a going concern and there was no employee at any level since October, 2018.

21. Status report further reveals that it came to the notice of Resolution Professional that Corporate Debtor is maintaining following Bank Accounts and has made correspondence with the respective Bank, Resolution Professional is successful in getting details, which are as under:

I. Bank of India, I G/52, B.P.NIT, Opposite Daulat Ram D, Near Bus-stand, Faridabad-121001

Amount in Rs.

S.N o.	FDR No.	Balance (As on date)	Lien* Amount	Available balance
1.	670845110000019	43,10,594.78	24,15,000.00	18,95,594.78
2.	850145110001115	1,56,917.13	75,000.00	81,917.13
3.	670845110000004	1,28,87,088.03	62,50,000.00	66,37,088.03
	Current Bank A/Cs			
4	670820110000011	45,568.95	0.00	45,568.95
5.	850120110000102	15,398.00	0.00	15,398.00
	TOTAL	1,74,15,566.89	87,40,000.00	86,75,566.89

The Bank of India, the above mentioned Faridabad Branch, is not honouring the instructions of RP for liquidation of the said FDR accounts and transfer the amounts to the current account of the Corporate Debtor, with the contention that there was lien of Customs Departments and other commercial authorities, by way of providing of bank guarantees to the said departments, Moreover, the Banker has also refused to liquidate the FDRs containing the available amounts and to transfer the same to the current Account unless the discharge letters are received from the said departments.

II. Bank of India, MGF Plaza,

Rs. 70,267.44 (Credit)

Sector-40, Gurgaon (Haryana)

III. HDFC Bank Ltd.

Rs. 88,281.71 (Credit)

Sector-31, Gurgaon (Haryana).

22. In response to public announcement on 30.06.2020, the IRP received only one claim from M/s Aryan Wellness Private Limited, through its director Mr. Rajesh Kumar Arya, being the Operational Creditor. The IRP admitted its claim of Rs. 20,47,722/- and he is the only creditor and member of Committee of Creditors.

23. Status report further reveals that the Resolution Professional convened first meeting of Committee of Creditors, which was held on 10.07.2020, wherein, the Respondent No. 2 – Sh. Madan Gopal Jindal, IRP was confirmed as Resolution Professional (RP) and thereafter 2nd and 3rd COC meetings were held on 30.09.2020, 23.11.2020 respectively through video conferencing meet and the fourth and the last meeting was held on 12.02.2021 at Gurgaon, where at only member of CoC was present physically besides the Chairman of the meeting i.e. RP.

24. Status report further reveals that due to not handing over the control and custody of assets, the Resolution Professional could not make compliance of the various Sections of the IBC, 2016 and Regulations made thereunder, as details given below:

a. Pursuant to Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations,

Company Appeal (AT) (Insolvency) No. 634 of 2020

2016, the RP has not appointed registered valuers for the determination of fair value and liquidation value of the assets of Corporate Debtor.

b. Pursuant to Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP has not prepared and submitted any Information memorandum, since RP is yet to receive books of accounts, audited financial statements ending 31.03.2018, 31.03.2019, 31.03.2020 and provisional financial statement as on 29.05.2020 (the date of commencement of insolvency process).

c. Pursuant to Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP did not form any opinion for the preferential payments and other transactions covered under Sections 43, 45, 50 or 66 of the IBC, 2016.

d. Pursuant to Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP did not published form G, inviting of Expression of interest from the prospective resolution applicants, as in the absence of control and custody of assets of Corporate Debtor, the purpose of inviting of expression of interest will be defeated.

25. Status report further reveals that the Corporate Insolvency Resolution Process cost incurred / to be incurred, as details given below, is yet to be paid to the Resolution Professional:

S. no	Particulars of Expenses	Amount (Rs)	Payment received by RP	Net Amount payable to IRP/RP
1.	IRP'S Professional Fee including other expenses (IRP period 29.05.2020 to 28.06.2020)	1,27,470.00	45,000.00	82,470.00
2.	RP's Professional Fee including other expenses (RP 29.06.2020 to 15.08.2021). (RP Period)	15,78,576.00	1,75,000.00	14,03,576.00
3.	Consolidated Legal Fee of various Advocates to represent cases before NCLAT, NCLT and District Court	1,44,000.00	68,250.00	75,750.00
4.	Other Misc. Exp.	2,000.00	0.00	2,000.00
	TOTAL	18,52,046.00	2,88,250.00	15,63,796.00

26. Status report further reveals that the CIRP cost amounting to Rs. 18,52,046/- has been incurred / to be incurred till date (duly approved by COC) and out of which Rs. 15,63,796/- is payable to Resolution Professional.

That the COC at its first meeting held on 20.07.2020, recorded in its minutes that it would not incur any CIRP cost, since it is an Operational creditor, whose payment for more than Rs. 20.00 Lakh is pending towards the Corporate Debtor.

27. The Resolution Professional after getting due authorization from COC, by passing of resolution at its meeting held on 30.09.2020, filed an application against the members / directors of suspended board of Corporate Debtor and other before the NCLT, Chandigarh Bench, Chandigarh for non-cooperation to Resolution Professional.

28. Further, M/s RNY Healthcare Services Private Limited filed execution petition against M/s Bourn Hall International India Private Limited – Corporate Debtor before the District Judge, Gurgaon in view of Arbitration Award passed by Ld. Arbitrator Mr. R.S. Baswana, District & Session Judge (Retd.) on 06.02.2019 in Arbitration No. 87/2018 against M/s Bourn Hall International India Private Limited & Others and next date in the matter on 19.08.2021.

29. Status report further reveals that M/s Bourn Hall International India Private Limited filed a petition under Section 34 of the Arbitration Act, challenging the Award of the Ld. Arbitrator for an amount of Rs. 3,48,41,071/- on 06.02.2019 in favour of M/s RNY Healthcare Services Private Limited in Arbitration No. 87 /2018, which is pending.

30. Status report further reveals that on the directions of COC and duly authorised, by passing an resolution with 100% voting share at the meeting

held on 12.02.2021, the RP filed an application under the provisions of Section 33(1) and 33(2) of IBC, 2016 before the Ld. Adjudicating Authority for initiation of liquidation process against the Corporate Debtor subject to Appeal pending before this Tribunal.

FINDINGS

31. After hearing the parties and having gone through the records of the case and also Written Submissions on behalf of the Appellant along with Status Report filed on behalf of the Respondent Nos. 1 and 2, we are of the considered view that the following facts are admitted in the instant Appeal.

- The Respondent No. 1 – Bourn Hall International India Pvt. Ltd. filed application under Section 10 of the IBC before the NCLT, Chandigarh Bench, Chandigarh which was numbered as CP (IB) No. 5/Chd/Hry/2019 in provisions of prescribed Form-6 and the Form was signed by Respondent No. 3 - Shri Gautam Chhabra, Director of Bourn Hall International India Pvt. Ltd.
- It is also an admitted fact that as per resolution dated 31.10.2018 in EGM of members of Bourn Hall International Pvt. Ltd., any one of the directors is authorised to sign and execute all necessary documents, applications and returns for the purpose of giving effect to the Special Resolution according to consent of the members of Barun Hall to the Board of Directors to make an application for initiating CIRP.

- In Part-III of Form No. 6, the names of the Financial / Operational Creditors are given. There is only one Financial Creditor i.e. HDFC Bank Ltd. 127 suppliers of goods and services have been detailed.
- RNY Healthcare Services Pvt. Ltd. filed CA No. 519 of 2019 stating that the landlord of the corporate applicant for the premises at Block G, Greenwood City, Sector 40, Gurgaon.
- It is also an admitted fact that the Bourn Hall International Pvt. Ltd. has been funded by M/s TVM Capital Healthcare Partners Ltd. (owning 100% equity in Bourn Hall International Pvt. Ltd. Cyprus) through M/s Bourn Hall International Pvt. Ltd. Cyprus (holding 99.99% equity of Bourn Hall).
- As they failed to pay the lease rent and arbitral award by the Arbitral Tribunal constituted with consent of Bourn Hall International Pvt. Ltd. along with its holding company in favour of the intervenor on 06.02.2019 in terms of which the intervenor has been held entitled to a total Rs. 3,48,41,071/- as lease rent.
- The Appellant have taken objections, no special resolution in terms of Section 10(3)(c) of the Code have been filed by the Respondent No. 1 – Corporate Debtor which is evident at page 1097, Vol.- VI of the Appeal Paper Book.
- The Ld. Adjudicating Authority has given finding that the intervenor – Appellant herein has not produced any proof that no meeting of the shareholders ever took place on 31.10.2018.

- It is also an admitted fact that from the Status Report filed on behalf of the Respondent No. 2 it is crystal clear that the Appellant – RNY Healthcare Services Pvt. Ltd. have filed an Execution Petition against M/s Bourn Hall International India Pvt. Ltd. – Corporate Debtor before the District Judge, Gurgaon in view of Arbitration Award passed by Ld. Arbitrator Mr. R.S. Baswana, District & Session Judge (Retd.) on 06.02.2019 in Arbitration No. 87/2018 against M/s Bourn Hall International India Private Limited & Others and next date in the matter on 19.08.2021.
- Further, Ld. Adjudicating Authority dismissing the intervention application filed by the Appellant herein and directed the intervenor to file claim before the IRP and the IRP was directed to consider the claim during CIRP. But this direction was not complied by the Appellant herein and he has not filed any claim as it is apparent in the status report filed by the Respondent No. 2.
- Taking all these facts and circumstances and the judgment (*supra*) is not applicable in the facts of the case. We are of the considered view that the Appellant have not come with clean hand before this Tribunal and despite directions passed by Ld. Adjudicating Authority the Appellant has not filed claim before the IRP.

ORDER

32. We are of the considered view that there is no illegality in the impugned order and we hereby affirm the judgment dated 29.05.2020 passed by the

Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh and Ld. Adjudicating Authority has rightly rejected the application filed by the Appellant (herein) in CP (IB) No. 5/Chd/Hry/2019 And CA No. 519/2019. There is no merit in the instant Appeal, the Appeal is hereby dismissed. No order as to costs.

33. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh, forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

21st October, 2021

R. Nath.