

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1887 OF 2022

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Bajju Pupala & Others

...Applicant

Vs.

Committee of Creditors of
Unity Infraprojects Limited & Anr.

...Respondent

In the matter of

C.P.(IB) No. 1058/MB/2017

Unity Infraprojects Limited

Corporate Applicant

Order delivered on: 21.11.2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Nausher Kohli, Advocate
For the Respondent : Mr. Karma Vivan a/w Adv.
Aradhana More, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application IA 1887/2022 is filed by Sh. Baiju Pupala and 21 Others (“Applicant”), in the Liquidation Process of M/s Unity Infraprojects Limited (“Corporate Debtor”) u/s 42 read with 60(5) of the Insolvency & Bankruptcy Code, 2016 (“Code”) for directions to Committee of Creditors of the Corporate Debtor (“Respondent No. 1”) and Sh. Alok Saksena (“Respondent No. 2” or “Liquidator”) to pay a sum of Rs. 2,66,60,014/- in respect of CIRP cost including the salaries/fees/dues of the Applicants and other employees of the Corporate Debtor; and to restrain the Respondents from alienation of assets of Corporate Debtor pending hearing of this Application.
2. The Applicants are ex-employees of the Corporate Debtor, whose employees is claimed to have ceased with the liquidation of the Corporate Debtor i.e. 8th April 2022.
 - 2.1. The Corporate Debtor was admitted to Corporate Insolvency Resolution Process (“CIRP”) in terms of Section 10 of the Insolvency & Bankruptcy Code, 2016 (“Code”) vide order dated 20.6.2017 passed by this Tribunal, and thereafter the Corporate Debtor continued its business as going concern during the CIRP period, accordingly, the applicants have claimed to be in employment of the Corporate Debtor, for which they were paid salaries besides other employees from time to time.
 - 2.2. It is further stated the Respondent No. 2 issued a notice of discharge to the Applicant on 14.3.2018 amongst other employees, and the said Order was challenged before this Tribunal in MA 189/2018, whereupon the Respondent No. 2 vide affidavit dated 28.8.2018 withdrew the notice of discharge dated 14.3.2018, as this Tribunal in its order dated 28.8.2018 noted that the Respondent No. 2, could not, under the Code discharge the workforce of the Corporate Debtor while discharging functions as the Resolution Professional.

- 2.3. The Applicants have claimed the Salary dues for the month of May, 2018 amounting to Rs. 16,61,326/-, and the salary dues for the period from 1.4.2020 to 31.3.2021 amounting to Rs. 2,49,98,688/- to be considered as CIRP costs and paid accordingly, as the Corporate Debtor was run as going concern during the CIRP period.
3. The Respondent Liquidator has filed the reply stating that the dues for the month of May, 2018 have been paid. As regards due for the month of April, 2020 to March, 2021 are concerned, the Liquidator has submitted that the said dues have been duly admitted as claim of the Applicants to be dealt as dues payable in terms of section 53(1)© i.e. “wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date” in accordance with the water-fall mechanism enshrined in Section 53 of the Code. The Respondent No. 2 has also submitted that the Corporate Debtor was engaged in execution of contracts, and the activities of the Corporate Debtor were being undertaken on outsourced basis through third parties on back to back basis even prior to the admission into CIRP, and the same were continued. Hence, these employees have not rendered any employment services, accordingly, their claim has been considered in terms of Section 53(1)© of the Code, and not as CIRP cost to be paid in terms of Section 53(1)(a) of the Code. The Respondent No. 2 has relied upon decision of Hon’ble Supreme Court in the case of *Sunil Kumar Jain & Ors. Versus Sundaresh Bhatt & Ors.* { **Civil Appeal No(s). 5910/2019**}, where the Supreme Court laid down the test for a claim for payment of wages/salaries before CIRP, during CIRP and in liquidation of a Corporate Debtor.
4. We have heard the Counsel and perused the material on record.
- 4.1. We find the main issue for consideration in this Application is whether the dues of the employees for the period of one year immediately preceding the Liquidation commencement date would fall u/s 53(1)(a) or 53(1)(c) of the Code. It is undisputed fact that dues of the employees for the period 1.4.2020 to 31.3.2021 have been admitted as claim by the Liquidator. Further the liquidator has

acknowledged that the employees are entitled to salary for the month of May, 2018, though the dispute remains whether it has actually been paid.

4.2. We find that the Hon'ble Supreme Court in the case of Sunil Kumar Jain & Ors. Vs. Sundaresh Bhatt & Ors (Supra) has held that -

".....Therefore, while considering the claims of the concerned workmen/employees towards the wages/salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the corporate debtor was a going concern and that the concerned workmen/employee actually worked while the corporate debtor was a going concern during the CIRP. The wages and salaries of all other workmen/employees of the Corporate Debtor during the CIRP who actually have not worked and/or performed their duties when the Corporate Debtor was a going concern, shall not be included automatically in the CIRP costs. Only with respect to those workmen/employees who actually worked during CIRP when the Corporate Debtor was a going concern, their wages/salaries are to be included in the CIRP costs and they shall have the first priority over all other dues as per Section 53(1)(a) of the IB Code. Any other dues towards wages and salaries of the employees/workmen of the Corporate debtor shall have to be governed by Section 53(1)(b) and Section 53(1)(c) of the IB Code. Any other interpretation would lead to absurd consequences and violate the scheme of Section 53 r/w Section 5(13) of the IB Code. If any other interpretation, more particularly, the interpretation canvassed on behalf of the appellants is accepted, in that case, the wages/salaries of those workmen/employees who had not worked at all during CIRP shall have to be treated and/or included in the CIRP costs, which cannot be the intention of the legislature."

4.3. The Applicant, in their rejoinder, have contested the submission of the Respondent No. 2 that they had not worked during the CIRP period, and pleaded that if that be so, why they were paid salaries for other months during the CIRP period. This Bench feels that the

Respondent no. 2 has also not disputed that the applicants were not in employment upto liquidation commencement date. What has been disputed is whether they actually worked during the CIRP period. The Respondent No. 2 has clearly demonstrated how the business activities of the Corporate Debtor were carried out during CIRP period by stating that all contracts continued to be executed on back to back outsource basis and none of the employee of the Corporate Debtor worked on those contract. This fact has not been disputed by the Applicants. This Bench finds that the Hon'ble Supreme Court had made a distinction between employees in employment during the CIRP period, who worked to keep the Corporate Debtor as going concern, and employees in employment during the CIRP period who have not actually worked to keep the Corporate Debtor as going concern to explain the context of section 53(1)(c) of the Code. We find that if whole of salary of employees who have worked actually to keep the Corporate Debtor as going concern during the CIRP period is considered as CIRP period, it would render Section 53(1)(c) as otiose, as CIRP precedes the Liquidation Commencement date.

- 4.4. We find that the Liquidator has not disputed their employment, but what question is whether the employees have actually worked during that period. We find that the applicant have failed to bring on record any cogent evidence, except proof of payment of salary of CIRP period to them during CIRP period in lieu of their employment which is not disputed, to demonstrate that they actually worked to keep the Corporate Debtor as going concern. Accordingly, we do not find merit in the prayer of the Applicants that their dues of salary for the period from 1.4.2020 to 31.3.2021 be treated as CIRP costs payable in terms of section 53(1)(a) of the Code, and not in terms of Section 53(1)(c) of the Code as proposed by the Liquidator.
- 4.5. The Applicants have sought proof of payment of salary for month of May, 2018 in their rejoinder, which this Bench feels that the Respondent no. 2 is under bounden duty to satisfy them.

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Accordingly the Respondent No. 2 shall provide necessary explanation and proof to substantiate that their payment for month of May, 2018 salary has been made.

5. In view of aforesaid discussion, IA 1887 of 2022 is dismissed with the directions to provide proof of payment of salary for month of May, 2018.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)