

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No.32 of 2022

IN THE MATTER OF :

**Income Tax Department,
Assistant Commissioner of Income tax
Central Circle-12 (1),
C.R. Building, Delhi-110002.**

... Appellant

Versus

**M/s. Indianroots Shopping Limited,
207, Okhla Industrial Estate,
Phase-III, New Delhi-110020.**

... Respondent No. 1

**Mr. Ashok Kumar
Indianroots Shopping Limited
Resolution Professional,
A-263/1, First Floor, Derawal Nagar,
Delhi-110009.**

... Respondent No. 2

**Deputy E.T.O., Gurugram,
O/o D.E.T.C. (GST), Gurugram (South),
Plot No. C-1, Infocity, Sector-34,
Gurugram.**

... Respondent No. 3

Present

**For Appellant: Mr. Vipul Agarwal, Mr. Parth S. Jr. Standing
Counsel**

For Respondent: Ms. Prachi Johri, Vatsalya Kumar, Advocates.

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With

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In the matter of:

**Excise and Taxation Department,
Government of Haryana,
(Through Excise & Taxation Officer,
Gurugram (South)
Haryana.**

... Appellant

Versus

**Ashok Kumar, Resolution Professional,
Address: RP of Indianroots Shopping Limited,
A-263/1, First Floor, Derawal Nagar,
Delhi-110009.**

... Respondent

Present

**For Appellant: Mr. Hemant Gupta, Mr. Varun Goel,
Advocates**

For Respondent: Ms. Prachi Johri, Advocate

**JUDGMENT
(Date: 17.11.2022)**

[Per.: Dr. Alok Srivastava, Member (Technical)]

The two appeals being disposed of through this common judgment are filed under sub section 61(1) of the Insolvency and

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Bankruptcy Code, 2016 (in short 'IBC') assailing the order of the Adjudicating Authority (National Company Law Tribunal, New Delhi) dated 23.8.2021 (hereinafter called 'Impugned Order') in IA No. 182/2020 in CP (IB) No. 1411/ND/2018 [which is assailed in CA (AT) (Ins.) No. 32/2022] and in IA No. 182/2020 in CP (IB) No. 1411/ND/2018 [which is assailed in CA (AT) (Ins.) No. 1132/2022].

2. The Applicant (Ashok Kumar, Resolution Professional of the corporate debtor Indianroots Shopping Limited) had filed IA No. 182/2020 before the Adjudicating Authority seeking directions to the Income Tax Department and the Excise and Taxation Department, Government of Haryana to pay the Corporate Insolvency Resolution Process (in short 'CIRP') dues and expenses by the Resolution Professional (in short 'RP') in proportion to its voting share in the Committee of Creditors (in short 'CoC').

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3. Bereft of the unnecessary details, the case of the Appellant Income tax Department in CA (AT) (Ins) No. 32 of 2022 is that the 7th meeting of the CoC was held, after adjournment, on 6.12.2019

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when the Appellant could not be present in the meeting. The Appellant holds 85.226% voting rights in the CoC and many decisions were taken in this meeting are relating to payment of CIRP dues. The Appellant has further stated that the decision taken in the 7th CoC meeting in the absence of the Appellant is not legally correct in view of sub-section 8 of section 21 of the IBC.

4. The Appellant Income Tax Department has further stated that the expenses claimed by the RP amounting to Rs. 31,10,796 are disproportionately large in relation to the assets of the corporate debtor, which are presently valued at Rs.1,50,00,000/- and these expenses are not reasonable in terms of Regulation 15 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Circular no. IBBI/IP/013/2018 issued by the Insolvency and Bankruptcy Board of India on 12.6.2018 on the subject 'Fee and Other Expenses incurred for CIRP'. He has lastly stated that the Income Tax Department will be gravely prejudiced if such a high CIRP cost was recovered from the Department and moreover, the power to approve such payments with the Assessing Officer is only upto Rs. 2,00,000/-.

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Company Appeal (AT) (Ins) No. 1123 of 2022 (Appeal II)

5. The Appellant Excise and Taxation Department, Government of Haryana in Company Appeal (AT) (Insolvency) No.1123 of 2022 has stated in the appeal that it filed its claim for an amount Rs.2,67,96,740 and the Respondent Resolution Professional has raised a big amount Rs.12,14,855 as the proportionate share of the Excise and Taxation Department in the total CIRP cost. He has claimed that Regulation 34 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 merely authorizes the CoC to fix the expenses, but does not authorize the RP/Respondent to actually recover the same from the creditors, whereas by the Impugned Order II passed in IA No. 182/2020, the Adjudicating Authority has directed the Appellant Excise and Taxation Department, Government of Haryana to deposit this amount immediately with the liquidator.

6. The Company Appeal (AT) (Insolvency) No.32 of 2022 and Company Appeal (AT) (Insolvency) No.1123 of 2022 are both filed

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against the same Impugned Order dated 23.8.2021 passed by the Adjudicating Authority. The Appellants in both the appeals are operational creditors of the corporate debtor M/s. Indianroots Shopping Limited. Both the Appellants are aggrieved by the fact that the 7th CoC meeting held in the CIRP of the corporate debtor, the respective shares of the Appellants in the CIRP cost were fixed and the Appellants were directed through the Impugned Order to pay them immediately. Thus, the Appellants in both the appeals have similar grievance against the Impugned Order, and therefore, both the appeals captioned above are being disposed of through this common judgment.

7, We heard the arguments advanced by the Learned Counsels for Appellants and Respondents in both the appeals and perused the respective records.

8. The Learned Counsel for Appellant Income Tax Department has submitted that a departmental representative could not attend the 7th meeting of the CoC held on 6.12.2019 and the CoC comprises only of operational creditors, as there is no financial creditor in the CIRP. He has further submitted that the Income

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Tax Department has voting share of 85.226% in the CoC and another operational creditor, the Excise and Taxation Department, Government of Haryana have a voting share of 11.53% in the CoC, and thus these two operational creditors possess a total voting share of 96.750% in the CoC. The relevant CoC meeting in which the decision regarding fixing of CIRP cost as well as its proportionate allocation for payment by the two Appellants was taken in the 7th meeting of the CoC held on 6.12.2019. He has submitted that, in view of section 21(8) of the IBC, all decisions of the CoC shall be taken by a vote of 51% or more of the voting share, and in the present case, the said decision fixing share in CIRP cost was taken by a small percentage with around 4% vote share only.

9. The Learned Counsel for Appellant Income Tax Department has further argued that Regulations 31, 33 and 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'CIRP Regulations') stipulate various components of insolvency resolution process cost and the fees of Interim Resolution Professional/RP. In particular, Regulation 34 provides that the CoC shall fix the

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expenses to be incurred in the CIRP including the fees of RP and such expenses which shall constitute insolvency resolution process cost. He has argued that, in view of the fact that the decisions taken in the 7th meeting of CoC were not in accordance with the requirement of the minimum threshold voting percentage in favour of the resolution as required by section 21(8), such a resolution is null and void and the Appellants cannot be called upon to pay very high CIRP cost on the basis of such a non-est decision, which is not taken in accordance with law.

10. The Learned Counsel for Respondent Resolution Professional has argued in Appeal I that Regulation 25(3) of CIRP Regulations stipulates that the RP shall take vote of the members of CoC present in the meeting and in such a situation, there is no threshold voting percentage necessary in deciding general issues relating to CIRP. She has further argued that notice for the 7th CoC meeting was issued to the Appellant on 1.12.2019 and since the Appellant was not present in the CoC meeting on 5.12.2019, it was adjourned and the adjourned meeting took place on 6.12.2019, when again the Appellant neither attended the meeting nor informed the RP regarding his absence or the reason thereof.

She has stated that in such a situation, when the CIRP was going on and timely payment of RP's fees and CIRP cost was necessary, a decision was taken in the 7th CoC meeting regarding the proportional share of various operational creditors and the amounts due from each operational creditor, which are included in the minutes of the meeting was communicated to the operational creditors including the Income Tax Department and the Excise & Taxation Department, Government of Haryana.

11. The Learned Counsel for Resolution Professional has further submitted that all the other operational creditors except the Income Tax Department and the Excise and Taxation Department, Government of Haryana have deposited their due shares in the CIRP costs and RP's fees with the RP, and after passing of the liquidation order, the Liquidator, who was the erstwhile RP, is unable to make any progress in liquidation process for want of funds to cater to necessary expenses. She has also submitted that the Income Tax Department did not challenge the decision taken in the CoC meeting on 6.12.2019, and it is only when the Impugned Order was passed on an application bearing No. IA No. 182/2020 that was filed by the RP, that the Income Tax Department has

raised the issue of illegality of the decision taken regarding fixing of payment of CIRP cost in the 7th CoC meeting.

12. The Learned Counsel for Respondent Resolution Professional has also argued that when IA 182/2020 was pending before the Adjudicating Authority, an opportunity was given to the Income Tax Department to discuss the issue of CIRP costs vide order dated 30.9.2020. When the meeting to discuss these issues took place, it was attended by the RP, Assistant Commissioner (IT) and Deputy Commissioner (IT) and the Standing Counsel of the Income Tax Department. She has pointed out that the issue of CIRP costs was discussed in the meeting wherein the Income Tax Department was explained the components and details of various items in the CIRP costs and RP's fees. Since no clear decision could be taken in this meeting, the RP was left with no option but to pursue his application IA No. 182/2020, wherein the Adjudicating Authority has given clear directions to the Income Tax Department and the Excise and Taxation Department to immediately pay in proportion to the voting share in the CoC the expenses incurred by the RP, which has been ratified by the 7th meeting of the CoC.

13. The Learned Counsel for Respondent RP has cited the judgment dated 10.1.2020 of NCLAT in the matter of **Committee of Creditors, M/s. Smartec Build Systems Pvt. Ltd. vs. B. Santosh Babu & Ors. [CA (AT) (Insolvency) No. 48 of 2020]** to point out that the CoC is bound to pay the fees and cost incurred by the IRP/RP. She has also rebutted the claim made of the Learned Counsel for Appellant on the requirement of taking decisions with votes of more than 50% mandatorily by citing judgment in **K. Sashidhar v. Indian Overseas Bank (2019 12 SCC 150)** case, by stating that the judgment relates to voting to approve resolution plan, where the threshold voting percentage is stipulated in section 30(4) of the IBC, whereas in the matters of approval of CIRP cost and RP's fees, no such threshold in voting share is explicitly stipulated in the IBC.

14. The Learned Counsel for Appellant Excise and Taxation Department (in Appeal II) has brought to our attention the provision in sub-section (13) of section 5 of the IBC, wherein various elements of CIRP cost have been defined. He has also adverted to regulation 31 (d) to point out that the expenses

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incurred by the RP, which are fixed under regulation 34, are also part of CIRP cost. He has argued that the duty of CoC is to fix the expenses related to CIRP and the fees of RP as provided in Regulation 34, but the payment of CIRP cost has to be made in accordance with the 'water fall mechanism' given in section 53 of IBC, where the CIRP cost and the liquidation cost get the first priority in payment and such payment has to be made once the liquidation process is completed. He has claimed that payment against the claims of Excise and Taxation Department have not accrued to the department and hence for the department to pay a substantial amount as its share of CIRP cost is not only unfair and but also prejudicial to the interest of the department. He has lastly argued that once the liquidation process is completed, the CIRP cost and liquidation process cost shall get first priority in payment from the sale of the liquidation estate.

15. The relevant sub-section 8 of section 21, including the proviso thereto, and relevant clauses of Regulations 31, 33 and 34 of CIRP Regulations are reproduced hereunder for easy reference: -

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I. “Section 21 (8) of IBC
21. Committee of Creditors –

xx xx xx xx

(8) *Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors:*

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.”

II. “Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)

31. Insolvency resolution process costs. *“Insolvency resolution process costs” under Section 5(13)(e) shall mean-*

Xx xx xx xx

(c) *expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*

(d) *expenses incurred on or by the resolution professional fixed under Regulation 34; and*

(e) *other costs directly relating to the corporate insolvency resolution process and approved by the committee.*

33. Costs of the interim resolution professional.-

xx xx xx xx

(4) *The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.*

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Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.]

34. Resolution professional costs.-

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”

16. We now examine the contention of the Learned Counsels for Income Tax Department and Excise and Taxation Department respectively wherein they have claimed that the decision taken in the 7th CoC meeting held on 6.12.2019 were taken in their absence and such decisions are not legal in view of the requirement stipulated in section 21(8) of IBC and also prejudicial to their interest. Section 21(8) of the IBC stipulates that all decisions of the CoC shall be taken by not less than 51% of voting share in the CoC. We note that the notice for 7th CoC meeting was sent and delivered to both the Appellants viz. Income Tax Department and

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Excise and Taxation Department and they chose not to be present in the said meeting, whereupon the RP adjourned the meeting to hold it with their participation. It is noted that both the Appellants again chose to be absent in the re-assembled 7th CoC meeting, which was taking place after being adjourned once, and wherein decision regarding the CIRP cost, RP's fees, etc. were taken. We also note that in compliance of the decision taken, the other operational creditors have deposited their respective share of the CIRP cost, without raising any demur as has been claimed by the Learned Counsel for Respondent and also that both the Appellants have not challenged the decision taken in the 7th meeting of CoC in the stipulated time period.

17. The 7th CoC meeting took place on 6.12.2019 and the minutes of the meeting, which record the proportional shares of all the operational creditors towards CIRP cost and RP fees, were duly communicated to operational creditors, including the Appellants. It is also a fact that both the Appellants did not challenge the decision of the CoC and thus accepted it without any objection or demur. When the Appellants did not pay their share of CIRP cost, the erstwhile RP (later appointed as Liquidator) was forced to

prefer IA No. 182/2020 seeking directions to the Appellants to pay their respective shares of the CIRP cost. It is at this stage that both the Appellants raised the issue of illegality of the decision taken in the 7th meeting of CoC, which is after a lapse of substantial period of time.

18. We are thus of the view that the erstwhile RP took necessary care to ensure the presence of two most important members of the CoC viz. the Income Tax Department and Excise and Taxation Department, Government of Haryana, who jointly controlled a vote share of 96.756% in the CoC. We are also aware of the fact that if both these Appellants had chosen not to participate in the CoC meeting, any decision taken in this meeting would not have been taken with more than 51% voting share. Thus, the compliance of section 21(8) of IBC would have an impossibility. We are of the view that in the given circumstance, necessary care and caution was exercised by the RP in holding of the CoC meeting.

19. Regulation 22(2) and 22(3) of CIRP Regulations provide that when a meeting could not be held for want of quorum, the meeting automatically stand adjourned at the same time and place on the

next day and regulation 22(3) provide that when the adjourned meeting takes place with the members attending the meeting, it shall be quorate, Thus, we find no illegality in either holding of the 7th meeting of CoC dated 6.12.2019 and in the decisions taken in the meeting regarding the payment of CIRP cost and RP fees. It is also reasonable and prudent to expect that if the two Appellants had refused to participate in the CoC meeting thereby causing a stalemate, the RP was correct in approaching the Adjudicating Authority for necessary directions to the Appellants to pay the CIRP costs and RP's fees as decided by the CoC.

20. We have also taken note of the statement of the Learned Counsel for Respondent Resolution Professional that the Liquidator is unable to move ahead in the liquidation process for want of funds and the liquidator, who is erstwhile RP, has been working with meagre funds ever since the CIRP was initiated against the corporate debtor. We have also taken note of the fact that both the Appellants duly filed their claims with the Liquidator and shall get their due payments in accordance with section 53 of IBC, once the sale proceeds of liquidation estate become available with the liquidation. It is, therefore, absolutely necessary that the

liquidation process is completed at the earliest, so that all the creditors and stakeholders can receive their due payments in accordance with section 53 of the IBC. This means that the two major operational creditors viz. Income Tax Department and Excise and Taxation Department of Government of Haryana should deposit their dues with the RP for completion of liquidation process at an early date.

21. In view of the detailed discussion in aforementioned paragraphs, we are of the view that RP and the CoC have acted in the true spirit of the law for fixing of the shares of the operational creditors in the CIRP cost and RP's fees (since there are no financial creditors) which are required to be deposited with the liquidator immediately. The Impugned Order does not suffer from any error and, therefore, needs no interference. There is no merit in the two appeals, namely, Company Appeal (AT) (Insolvency) No.32 of 2022 and Company Appeal (AT) (Insolvency) No.1123 of 2022 and both the appeals are accordingly dismissed.

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22. There is no order as to costs.

(Justice Rakesh Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

17th November, 2022

/aks/

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