

National Company Law Appellate Tribunal, New Delhi
Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 1005 of 2021

(Arising out of Order dated 26.07.2021 passed by National Company Law Tribunal, Kolkata Bench, in in I.A. No. 41 (KB)/ 2021 in Company Petition (IB) No. 1214/KB/2018)

IN THE MATTER OF:

**Ranjeet Kumar Burnwal,
Son of JagdishLall,
Residing at Kanheipur, PO/ PS Jaipur
Road,'Orissa- 755026
Mail ID- rkburnwal@yahoo.co.in
Mob-9937867996**

...Appellant

Versus

**1. Committee of Creditors,
Through Mr. Supriyo Kumar Chaudhuri,
Resolution Professional of Rohit Ferro-Tech
Limited
Having his office at BDO Restructuring
Advisory LLP, C/O BDO India LLP, Floor 4,
Duckback House, 41, Shakespeare Sarani,
Kolkata-700017
Mobile--918582923928
Mail ID-SupriyoChaudhuri@bdo.in**

...Respondent No. 1

**2. Mr. Supriyo Kumar Chaudhuri,
Resolution Professional,
Having his office at BDO Restructuring
Advisory LLP, C/O BDO India LLP, Floor 4,
Duckback House, 41, Shakespeare Sarani,
Kolkata-700017
Mobile--918582923928
Mail ID-SupriyoChaudhuri@bdo.in**

...Respondent No. 2

**3. State Bank of India,
Having its Corporate Centre at: State Bank of
India,
State Bank Bhavan, Madame Cama Road,
Nariman Point, Mumbai, Maharashtra- 400021
Local/Dealing Branch Office at:
Stressed Assets Mangement Branch-II at**

**Jeevandeep Building (1st Floor) 1,
Middleton Street, Kolkata-700071, India
MailID-dgmsamb2.kol@sbi.co.in,
kaushik.das@sbi.co.in,
Agm1metal1.sarg@sbi.co.in,
Sbi.18192@sbi.co.in**

...Respondent No. 3

**4. Rohit Ferro Tech Limited,
A company having its registered office at:
35, Chittaranjan Avenue,
Kolkata-700012, West Bengal, India
Mob-9831005287
Mail ID-chairman@rohitferrotech.com**

...Respondent No. 4

Appellant: Mr. Iswar Mohapatra, Advocate.

Respondents: Ojasa Arya, Mr. Shubham Raj, Mr. Sabarni Mukherjee, Mr. Palzer Mokhtan & Ms. Swati Dalmia, for R-2.

J U D G E M E N T

[Naresh Salecha (T)]

1. The Instant Appeal has been preferred by Mr. Ranjeet Kumar Burnwal being aggrieved and dissatisfied vide Impugned Order dated 26.07.2021 passed by Adjudicating Authority (the National Company Law Tribunal, Kolkata Bench, Kolkata) in I.A. No. 41 (KB)/ 2021 in Company Petition (IB) No. 1214/KB/2018 filed by the Appellant, wherein, the Adjudicating Authority directed that leave encashment amount payable to the applicant shall be treated as part of CIRP cost and accordingly the I.A. No. 41 (KB)/ 2021 was disposed off.

2. **Submissions of the Learned Counsel for the Appellant:-**

- (i) The Appellant herein joined Rohit Ferro Tech Limited (under CIRP) as Head (Commercial) with effect from 21.11.2006, vide

appointment letter dated 20.11.2006 and posted at the Jajpur Plant, Orissa of the said company.

- (ii) On 21.03.2016 the Appellant was promoted and appointed as Executive Director (Works) of the said Corporate Debtor for a period of three years i.e. upto 23.03.2019.
- (iii) The Appellant tenure of as Executive Director (Works) was renewed and he was reappointed as Executive Director (Works) with effect from 13.02.2019. at monthly salary of Rs. 2,14,000/- (Rupees Two Lakh Fourteen Thousand Only) and he was also entitled to payment of bonus, leave encashment and gratuity.
- (iv) The terms of the agreement dated 13.02.2019 for the re- appointment of an Executive Director (Works) is marked as Annexure-B at Page- 40 to 43 of the 'Memo of Appeal'.
- (v) Keeping in view, the compliance with the Factories Act, 1948 with regard to appointment and/ or naming of a director as occupier of the factory/plant, he was also working as designated Director for said purpose reproduced as hereunder:-

“2. (n) “occupier” of a factory means the person who has ultimate control over the affairs of the factory:-

(ii) in the case of a company, any one of the directors shall be deemed to be the occupier;”

- (vi) The petition filed by the State Bank of India as Financial Creditor against Corporate Debtor was admitted and the Corporate Insolvency Resolution Process (CIRP) commenced on

07.02.2022 and Mr. Surpiyo Kumar Chaudhuri was appointed as Interim Resolution Professional (IRP).

- (vii) On 26.03.2020 after initiation of the CIRP, the Resolution Professional (RP) intimated that he, on behalf of the company had terminated the appointment of the Appellant as Executive Director (Works).
- (viii) The RP invoked clause No. 13 of the agreement dated 13.02.2019 i.e. after notice period of one month.
- (ix) The Appellant agrees to have received his remuneration till 30.04.2020 but did not receive the leave encashment of Rs. 5,67,100/-, and the gratuity to be calculated as per the Gratuity Act.
- (x) Further, he has also claimed for compensation for loss of his office as Executive Director and interest on outstanding dues.
- (xi) The Appellant prayed for the following :-
 - (a) Compensation of an amount of Rs. 25,68,000/- lakhs as he has been out of employment since 30.04.2020.
 - (b) Payment of interest on such amount at the rate of 6% per annum.

3. The Appellant also claimed that his termination of employment is arbitrary and unfair.

4. The Appellant further submits that the RP ascertained the leave encashment amount of Rs. 5,67,100/- is due and payable as per the policy

of the Corporate Debtor. This was brought to the notice of CoC in the meeting held on 07.12.2020.

5. The Appellant further submitted that he is neither related to the promoters nor part of the promoters group whose presence and/ or employment in the company will affect the resolution proceedings.

6. He further stated that in terms of Section 202 of the Companies Act, 2013, the Appellant is entitled for compensation amounting to Rs. 25,68,000/- which is produced at Page-26 which is mentioned as under:-

“Section 202: Compensation for loss of office of a Managing Director Or Whole Time Director Or Manager

(1) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

(2) No payment shall be made under sub-section (1) in the following cases, namely:

a) where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;

b) where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

c) where the office of the director is vacated under sub. section (1) of section 167;

d) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director;

e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs

of the company or any subsidiary company or holding company thereof; and

f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

(3) Any payment made to a managing or whole-time director or manager in pursuance of sub-section (1) shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period:

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the shareholders the share capital, including the premiums, if any, contributed by them.

(4) Nothing in this section shall be deemed to prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity.”

7. He further relied on the Judgement passed by this Hon'ble Tribunal vide Order dated 07.05.2019 in Company Appeal (AT) No. 320/ 2018 titled as '*CADS Software India Pvt. Ltd. & Anr. Vs. KK Jagdish & Ors.*' Whereby, the NCLAT upheld the NCLT decision to give compensation along with the interest from the date of remuneration as Managing Director which marked from Page- 28 to 30 in 'Memo of Appeal'.

Submissions on behalf of the Respondent No. 2.

8. We have also perused the Reply Affidavit filed on behalf of the Respondent No. 2 given the following initial arguments :-

- (a) The CIRP of Rohit Ferro-Tech Limited (Corporate Debtor) has been initiated on 07.02.2020 .He was appointed as IRP and subsequently was confirmed as Resolution Professional. Thereafter, Respondent No. 2 has managed the company on a going concern basis.
- (b) Resolution Professional stated that soon after his taking over the charge of the affairs of the Corporate Debtor, several instances of mismanagement at the Jajpur plant of the Corporate Debtor had been brought to his notice, example- unauthorized lifting of raw material from the plant premises, sale of scrap at under value, e.t.c.
- (c) Based on this, decisions was taken to terminate the service of Applicant (Appellant herein) in accordance with the terms of the Agreement at 13.02.2019 which was approved by CoC.
- (d) On 27.03.2020 one month notice had been given to the Appellant in accordance with the terms and conditions of the agreement dated 13.02.2019.
- (e) He further stated that the Appellant has been holding office of Director of Corporate Debtor and falls with the purview of 'related party' and therefore, all payments made to the Appellant including salary has to be made with the approval of CoC Members.
- (f) He also stated that the payment of salary the month of April, 2020 Rs. 2,14,000/- had been paid to the Appellant after obtaining approval of the CoC.
- (g) Respondent No. 2 has also stated in his 'Reply Affidavit' that Appellant had moved to the Adjudicating Authority for termination of the

appointment of the Resolution Professional which was dismissed by the Adjudicating Authority.

(h) He further stated that Rs. 8,02,500/- was remitted to the Appellant herein by the Corporate Debtor as payment of gratuity.

- With regard to Appellant leave encashment an amount aggregating to Rs. 5,67,100/- was calculated and placed on record and Adjudicating Authority vide its Order dated 26.07.2022 directed the aforesaid amount be treated as part of CIRP cost.

(i) Resolution Professional has brought out that CoC has approved the Resolution Plan and the same is pending before the Adjudicating Authority for its approval.

(j) In accordance with the provisions of the IBC, the Corporate Insolvency Resolution Cost is to be paid in priority in comparison to all other claims of the Corporate Debtor, therefore, the amount due to the Appellant on account of leave encashment is secured and would be considered as soon as the Resolution Plan is approved by the Adjudicating Authority .

(k) Resolution Professional brings out that the Appellant has also claimed compensation of an amount of Rs. 25,68,000/- which was denied.

(l) Reply Affidavit filed on behalf of the Respondent No. 2 that is Resolution Plan as stated :

“...due to the requirement of the Factories & Boilers Act to designate a director as occupier of the factory he was appointed as director. As such being the Executive Director (Works), the appellant

is named as occupier of the factory at Jaipur plant, Orissa.”.

- (m) Respondent No. 2 mentioned that in terms of the agreement the Corporate Debtor was entitled to terminate the appointment of the Appellant after giving one month notice which was duly fulfilled and therefore the mandate complied with.
- (n) Respondent No. 2 also bring to the notice that at no juncture the Appellant has pleaded, relied upon or argued the provisions of Section 202 of the Companies Act, 2013 before the Adjudicating Authority and therefore the Adjudicating Authority did not consider and adjudicate upon the same since it was never the case of Appellant before the Adjudicating Authority.
- (o) Respondent No 2 stated that in the present appeal Section 202 is not applicable the IBC is a complete code and possesses an overriding effect
- (p) Respondent No. 2 also mentioned that Appellant has conveniently suppressed the provisions as contained under sub-rule (3) of Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014 which proscribes such payment of compensation under Section 202 in certain cases.

“17. Payment to director for loss of office, etc. in connection with transfer of undertaking, property or shares.—(1)No director of a company shall receive any payment by way of compensation in connection with any event mentioned in sub-section (1) of section 191 unless the following particulars are disclosed to the members of the company and they pass a resolution at a general meeting approving the payment of such amount —

- (a) name of the director;
- (b) amount proposed to be paid;
- (c) event due to which compensation become payable;
- d) date of Board meeting recommending such payment;
- (e) basis for the amount determined;
- (f) reason or justification for the payment;
- (g) manner of payment – whether payable in cash or otherwise and how; (h) sources of payment; and
- (i) any other relevant particulars as the Board may think fit.

(2) Any payment made by a company by way of compensation for the loss of office or as a consideration for retirement from office or in connection with such loss or retirement, to a managing director or whole time director or manager of the company shall not exceed the limit as set out under section 202.

(3) No payment shall be made to the managing director or whole time director or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement if —

- (a) the company is in default in repayment of public deposits or payment of interest thereon;
- (b) the company is in default in redemption of debentures or payment of interest thereon;
- (c) the company is in default in repayment of any liability, secured or unsecured, payable to any bank, public financial institution or any other financial institution;**
- (d) the company is in default in payment of any dues towards income tax, VAT, excise duty, service tax or any other tax or duty, by whatever name called, payable to the Central Government or any State Government, statutory authority or local authority (other than in cases where the company has disputed the liability to pay such dues);
- (e) there are outstanding statutory dues to the employees or workmen of the company which have not been paid by the company (other than in cases where the company has disputed the liability to pay such dues); and

(f) the company has not paid dividend on preference shares or not redeemed preference shares on due date.”

[emphasis supplied]

- (q) It has been argued that Section 202 is only enabling provision and it does not mandatory necessary payment of compensation of a managing or whole time director or manager of a company under all or any circumstances.
- (r) It has been brought to the notice that CIRP commenced on 07.02.2020 due to default of the Corporate Debtor to pay its consortium of lenders including State Bank of India the amounting to Rs. 40,85,04,73,838/- towards financial creditors and Rs. 1,28,20,97,771/- towards statutory dues and Rs. 9,91,38,241/- towards workmen and employees.
- (s) Therefore, under Rule 17 precludes the Corporate Debtor from making any payments towards the alleged compensation claimed by the Appellant herein.
- (t) He has also denied allegations made by the Appellant that termination of Appellant was not a decision of the CoC but of RP. He stated that the CoC meeting held on 05.03.2020 expressed their intension that the senior personnel of the Corporate Debtor be changed.
- (u) As per record the leave encashment of Rs. 5,67,100/- which is due to the Appellant who continued to act as the Director of the Corporate Debtor and as per the provisions of the IBC, Appellant falls within the purview of the definition of ‘related party’. After determining the

amount due to the Appellant on account of leave encashment, the aforesaid issue was placed before the members of the CoC in its meeting held on 07.12.2020 for their approval. However, the same was not approved by the members of the CoC.

- (v) Respondent No. 1 admit that gratuity amount of Rs. 8,02,500/- due to the Appellant has been paid by the Corporate Debtor.
- (w) Due to various reasons brought out above and stated that Adjudicating Authority disposed off I.A of the Appellant without considering the prayers in I.A. No. 41 (KB)/ 2021.

FINDINGS:

We have pursued the record available and also heard Learned Counsel for the Parties based on which we observe the following:-

- (i) Admittedly, the gratuity amount of Rs. 8,02,500/- has been paid, during the pendency of the I.A before the Adjudicating Authority.
- (ii) Leave Encashment of Rs. Rs. 5,67,100/- has been admitted to be payable and since being Director he has been treated as related party and therefore, the Adjudicating Authority has rightly recorded that leave encashment amount payable to the applicant shall be treated as part of CIRP cost and as the Resolution Plan finalized by CoC the approval is pending before the Adjudicating Authority, once approved, the leave encashment will be considered in accordance with law.

- (iii) We are of the view that the compensation amount of Rs. 25,68,000/- claimed by the Appellant is not payable in terms of the agreement dated 13.02.2019.
- (iv) Further, we also place reliance on the terms of sub-rule (3) of Rule 17 of Companies (Meetings of Board and its Powers) Rules, 2014 reproduced as hereunder:-

“17. Payment to director for loss of office, etc. in connection with transfer of undertaking, property or shares-

(3) No payment shall be made to the managing director or whole time director or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement if —

(b) the company is in default in redemption of debentures or payment of interest thereon;

- (v) Keeping in view the aforementioned rules and the Agreement dated 13.02.2019, we hold that there is no provision for payment of compensation to the Appellant.
- (vi) Further, we observe that even the stipulated one month notice period has been complied with and admittedly the salary payment of Rs. 2,14,000/- has also been paid. Since, payment has been settled in accordance with law, the payment of any further interest does not arise.

For the aforementioned reasons we do not find any merit in this Appeal. Hence, this Appeal fails and is accordingly dismissed. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Ms. Shreeshha Merla]
Member (Technical)**

**[Mr. Naresh Salecha]
Member (Technical)**

**NEW DELHI
3rd June, 2022**

Simran