

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 515 of 2022

[Arising out of the order dated 22.03.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Allahabad Bench in CA No.169/ALD/2019 in CP (IB) No. 124/ALD/2018]

IN THE MATTER OF:

Pankaj Khetan
(Erstwhile Resolution Professional of
Kushal International Ltd.)
Registered Office at:
K-37/A, Basement, Kailash Colony,
Near Kailash Colony Metro Station, Delhi - 110048 ...Appellant

Versus

Jammu & Kashmir Bank Ltd.
Registered Office at:
M A Road,
Srinagar 190001
Jammu & Kashmir ...Respondent

Present:

For Appellant: **Mr. G.P. Madaan, Mrs. Harimohana N., Advocates with Mr. Pankaj Khetan, Appellant in person.**

For Respondent: **Mr. Pallav Saxena, Mr. Syed Arsalan Abid, Mr. Prateek Khaitan, Mr. Chatanya Sharma and Mr. Shitij Chakravarty, Advocates**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated

22.03.2022 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench) in CA No.169/ALD/2019 in CP (IB) No. 124/ALD/2018. By the Impugned Order, the Adjudicating Authority had decided on the quantum of fees and other expenses payable to the Resolution Professional and in the course of determination of fees/expenses had also made some adverse observations on the conduct of the Resolution Professional in respect of insolvency proceedings of M/s Kushal International Limited which had entered into liquidation. The Resolution Professional (present Appellant) being aggrieved with the negative comments made on his professional conduct as also by the reduced quantum of fees/expenses as determined by the Adjudicating Authority in the impugned order, the present appeal has been preferred.

2. Throwing light on the factual background of the present case, the Learned Counsel for the Appellant submitted that following a Section 7 petition having been admitted by the Adjudicating Authority on 08.05.2018 bringing M/s Kushal International Limited/Corporate Debtor under the rigours of Corporate Insolvency Resolution Process ('**CIRP**' in short), Shri Pankaj Khetan, was appointed as Interim Resolution Professional ('**IRP**' in short) who was later confirmed as Resolution Professional. Initiating the CIRP, the Appellant/IRP published a public announcement on 10.05.2018 seeking claims from the creditors of the Corporate Debtor. Having received only one claim from a single Financial Creditor, a one-member Committee of Creditors ('**CoC**' in short) was constituted by the IRP.

3. It is submitted by the Learned Counsel for the Appellant that the IRP who was later appointed as Resolution Professional conducted his duties diligently and with reasonable care. As part of conduct of CIRP, four CoC meetings were held by which the CoC was kept apprised of the CIRP developments. Regular communications were also sent to the CoC apprising them of the financial status of the Corporate Debtor and the conduct of the suspended management. It was further added that several progress reports were submitted to the Adjudicating Authority. Listing out the other manifold CIRP activities undertaken by the Appellant, the Learned Counsel for the Appellant submitted that the Resolution Professional had visited the office of the Corporate Debtor to obtain the records but was provided selective documents without the books of accounts or ledgers. Reminder emails having drawn blank response from the suspended management, the Resolution Professional made further efforts to obtain the details from the banks in which the Corporate Debtor held accounts. Due to non-availability of information and documents, the Resolution Professional had filed an application before the Adjudicating Authority under Section 19 for directions to be issued to the Corporate Debtor to cooperate and provide material records. The Adjudicating Authority vide orders dated 04.07.2018 and 16.07.2018 issued directions to the suspended management and the statutory auditor to extend cooperation to the Appellant. The Resolution Professional thereafter sent emails to them but to no avail. Faced by persistent non-cooperation and non-compliance to orders on the part of suspended management, the Resolution Professional thereafter filed a contempt application before the Adjudicating

Authority on 23.08.2018, following which the suspended management agreed to provide all documents by 30.09.2018 but later belied their assurance. It is further added that besides the contempt application, a complaint petition under Section 70 of IBC was also filed by the Resolution Professional against the suspended management on 23.08.2018 to punish their officers for not disclosing property and other related details of the Corporate Debtor. Furthermore, since the Sub-Divisional Magistrate concerned was also not cooperating in sharing land details of the Corporate Debtor, an application under Section 19 was filed against him which was taken on record by the Adjudicating Authority in its order dated 18.09.2018.

4. Due to non-compliance of statutory requirements and persistent non-cooperation from the suspended management in allowing CIRP to proceed, the 4th CoC meeting held on 12.10.2018 recommended that an application for the liquidation of the Corporate Debtor be filed before the Adjudicating Authority by the Resolution Professional. Accordingly, an application under Section 33 of the IBC was filed by the Appellant following which the Adjudicating Authority passed liquidation order on 28.02.2019. It is submitted that though the matter of appointment of new liquidator was listed for hearing on 11.03.2019, the Adjudicating Authority finally issued orders for appointment of a liquidator on 20.12.2021, after a gap of nearly three years.

5. The Learned Counsel for the Appellant further submitted that in the order dated 20.12.2021, the Adjudicating Authority had noted that as the appointment

of liquidator remained pending due to various reasons, the Resolution Professional during the period from the date of passing of liquidation order till 20.12.2021 had discharged the functions of Resolution Professional cum liquidator. Enumerating the series of activities undertaken by the Resolution Professional between the passing of the order of the liquidation on 28.02.2019 until the orders for appointment of liquidator on 20.12.2021, it has been stated the Resolution Professional had appointed security guards for safe custody of assets of the Corporate Debtor. Several visits were also undertaken to the factory site besides handling all third party notices and communications. The Resolution Professional had also served notice on the suspended management on 04.06.2021 to scuttle their illegal attempt to lease out the assets of the Corporate Debtor. Steps had also been taken to inform the Adjudicating Authority about an OTS offer received from one member of the suspended management for the Respondent. Furthermore, the Resolution Professional had appeared several times before the Adjudicating Authority through a legal counsel to pursue various applications filed by him including pressing for the appointment of the liquidator.

6. It has also been claimed by the Learned Counsel for the Appellant that following a meeting of the Resolution Professional with the Respondent, it had been assured to the Appellant to pay the outstanding CIRP costs for the period from 01.03.2019 till the appointment of the liquidator out of the liquidation estate. However, since the Appellant was not paid his fees/expenses since the passing of the liquidation order, an application was filed before the Adjudicating

Authority claiming reimbursement of fees/expenses. However, the Adjudicating Authority on 22.03.2022 vide impugned order not only arbitrarily reduced the quantum of fees and other expenses payable for the period he functioned as Resolution Professional cum Liquidator but also passed adverse and derogatory observations against him on the discharge of his duties as Resolution Professional cum Liquidator. It was further contended that the Adjudicating Authority passed this impugned order so as to circumvent its own shortcomings of having inordinately delayed the appointment of the liquidator.

7. It was further pointed out that the impugned order contains certain negative comments viz. that Resolution Professional was more focussed on remunerations rather than closure of CIRP; that unnecessary expenditure was incurred on appointment of security guards; that no progress reports on liquidation process was submitted; that the fees/expenses claimed were exorbitant and disproportionate and that certain illegal action was taken in attaching the asset of a subsidiary of the corporate Debtor without seeking legal opinion. It was vehemently contended that these derogatory remarks are unwarranted and that there is sufficient material on record to prove to the contrary and hence these observations ought to be expunged.

8. The Learned Counsel for the Respondent refuting the submissions of the Appellant asserted that inaction and inability on the part of Resolution Professional to follow the various steps in CIRP is clearly evident from the fact that no Resolution Plan emerged. There was failure on the part of Resolution

Professional to prepare and submit Information Memorandum before the CoC and issue of Expression of Interest as required under IBC and regulations framed thereunder. The Resolution Professional was also unable to elicit any successful resolution plan for the Corporate Debtor within 180 days from the initiation of CIRP. It was also contended that the Adjudicating Authority has rightly disallowed the payment of any fee/expenses demanded by the Resolution Professional for the period 28.02.2019 till 20.12.2021 since no substantial steps were taken to discharge the duties of a liquidator. In support of their contention, it has been pointed out that the Adjudicating Authority had taken due cognizance of the fact that no status report was filed by the Resolution Professional on what actions or efforts were made by him during the period when the liquidator had remained to be appointed. Further, when the Adjudicating Authority had decided to appoint another person as liquidator, the Resolution Professional should not have tried to continue functioning as liquidator. Instead, the Resolution Professional should have taken active steps to fill the vacuum and ensured early appointment of liquidator to enable timely conduct of liquidation proceedings rather than cling on to that position himself. It was also contended that, in any case, the Appellant could not have claimed the same fee as that of Resolution Professional while functioning as liquidator. The CoC had also never approved any fee of the Appellant for his suo-moto work as Resolution Professional cum liquidator. It has been submitted that the Adjudicating Authority had rightly concluded that the Resolution Professional was only focused upon making monetary benefits thereby derailing the objectives of the

IBC and that the present appeal has been preferred to stave off the reference of his conduct to the Insolvency and Bankruptcy Board of India (**'IBBI'** in short) as made by the Adjudicating Authority.

9. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

10. The short issue for determination before us is whether in light of the facts of the present case the Adjudicating Authority had erred in disallowing the fees/expenses claimed by the Appellant and in refixing the same and whether the negative remarks made on the conduct of the Appellant stands to reason. As the issues outlined above are closely intertwined, we have chosen to examine them conjointly.

11. Coming to the payment of the fees and expenses of the Resolution Professional for discharging duties till the date of issue of liquidation order, we note that it has been admitted by the Appellant that a sum of Rs. 10,00,000/- plus Rs. 2,50,935/- being IRP expenses from 08.05.2018 to 04.06.2018 was reimbursed by the CoC. The 2nd CoC meeting held on 26.06.2018 approved an expenditure of Rs.50,000/- incurred from 05.06.2018 to 18.06.2018. The 3rd meeting of CoC on 13.08.2018 approved the remuneration and fee of the Resolution Professional at the rate of Rs.3,50,000/- per month besides ratifying reimbursement of expenses of Rs.2,27,614/- for the period 06.07.2018 to 12.08.2018. It is also noted that the Resolution Professional on having filed an

application under Section 60(5) of the IBC for issue of directions to the Respondent for payment of outstanding fees and expenses, the Adjudicating Authority in its order dated 19.08.2020 had noted that the CoC had claimed to have paid the entire outstanding dues for the period till 28.02.2019. That the fees/expenses of the Resolution Professional have been cleared up to 28.02.2019 i.e. up to the date of the passing of the liquidation order is an undisputed fact and has also been admitted by Resolution Professional which has been excerpted at para 13 of the impugned order, which is as reproduced below: -

“10. That the Sole Financial Creditor, Jammu & Kashmir Bank, has obligation to pay the Fee of RP and expenses incurred by the RP since inception till 20.12.2021 and the CoC in October 2020, has paid the Fee of RP and Legal expenses upto 28.02.2019 i.e. upto the date of passing of the Liquidation Order by this Hon’ble Tribunal.....”

(Emphasis supplied)

12. This now brings us to the contentious issue of fees/expenses claimed as Resolution Professional from the date of liquidation order i.e. 28.02.2019 onwards. It is the case of the Respondent that since no liquidator was appointed at the time of passing of liquidation order, the Resolution Professional therefore continued in the position of Resolution Professional, only technically, and hence he cannot be allowed to claim fees/expenses without performing the obligatory duties of a liquidator. No status report was either filed on what action or efforts were made by Resolution Professional during the course of period when the liquidator had remained to be appointed. It has been further submitted by the

Respondent that the Adjudicating Authority while passing the liquidation order dated 28.02.2019 had clearly held that in the interest of smooth functioning of the liquidation process, it is necessary to replace the Resolution Professional by another insolvency professional to act as liquidator as is seen at page 178 of Appeal Paper Book ('**APB**' in short). The Appellant on the other hand has contended that he had undertaken several steps including appointment of security guards to protect the assets of the Corporate Debtor including prevention of harm to it being aimed at through unauthorized leased deeds, besides making several visits to the factory site etc. Beyond being a custodian of assets of the Corporate Debtor, the Resolution Professional could not have taken any action in furtherance of the liquidation process having not been appointed as regular liquidator. Moreover, the CoC members had assured the Resolution Professional that they shall pay the CIRP cost for the period from 01.03.2019 till the appointment of Liquidator, out of the liquidation estate. Furthermore, since he was not responsible for the delay in appointment of liquidator, he cannot be denied his legitimate claims and fees.

13. For better appreciation of the facts, we may notice the facts and circumstances leading to the passing of the liquidation order on 28.02.2019. The 4th CoC meeting was held on 12.10.2018 wherein the CoC with 100% vote share decided that liquidation of the Corporate Debtor should be initiated having denied the request made by Resolution Professional to file an application seeking extension of CIRP. The Resolution Professional had thereafter filed an application before the Adjudicating Authority for passing of liquidation order. We find that

the Adjudicating Authority had noted complaints of bias and corrupt conduct as well as allegations of inaction and inability raised against the Resolution Professional by the suspended management, while also observing that no material was however placed on record by the suspended management to substantiate their allegations of bias against Resolution Professional. However, in deference to the wisdom of CoC, vide its order of 28.02.2019, it was held by the Adjudicating Authority that for “smooth functioning of the liquidation of the Corporate Debtor”, the Appellant should not continue as liquidator. In other words, the Adjudicating Authority had taken a conscious decision not to appoint the Resolution Professional as the Liquidator.

14. It is also noted that the Adjudicating Authority on 20.12.2021 also did not find the Resolution Professional fit to be appointed as liquidator and replaced him with another insolvency professional. It is pertinent to add here that the order of the Adjudicating Authority dated 20.12.2021 while directing the Resolution Professional to hand over all documents/assets of the Corporate Debtor to the newly appointed liquidator also noted that since liquidator had not been appointed earlier, the period from 28.02.2019 till 20.12.2021 is excluded from the liquidation process period. In such circumstances, we notice that there is consistency in the stand of the Adjudicating Authority that the Resolution Professional was never appointed as the Liquidator. Given this background, the decision of the Adjudicating Authority in the impugned order dated 22.03.2022 that the Resolution Professional not having actually performed the duties of the

liquidator and hence not entitled to the hefty fees as claimed appears to be reasonable and justified.

15. We note that on the application filed by the Resolution Professional demanding payment of fee for the period 28.02.2019, being the date of order of liquidation, till 20.12.2021, being the date of appointment of liquidator, the Adjudicating Authority has reduced the claimed amount. However, this reduction has not been done arbitrarily but on the grounds that he had not performed the full-scale duties of a liquidator during this period in terms of the IBC and related regulations. The Adjudicating Authority in the impugned order noted that no progress report on liquidation was filed by the Resolution Professional with the Adjudicating Authority for this period. No status report is found to have been filed on what action or efforts were made by him during the course of period when the liquidator had remained to be appointed. The Adjudicating Authority has noted that the Resolution Professional was fully aware that he had not been appointed as liquidator nor was any other person appointed as liquidator. The Respondent has further submitted that the Adjudicating Authority had come correctly to the conclusion that the Resolution Professional never filed any clarification application on the vacuum which arose due to non-appointment of liquidator.

16. We have noticed that the Resolution Professional while discharging the function of liquidator had claimed the same fees as that of Resolution Professional. This was not in order since the fees of the Resolution Professional

and that of a liquidator cannot be equated as their duties are different and therefore the matrix for evaluating the reasonability of their fees would also differ. In any case, the Resolution Professional was at best technically continuing in the absence of appointment of liquidator. Further by his own admission, beyond being a custodian of assets of the Corporate Debtor, the Resolution Professional could not have taken any action in the commencement or furtherance of the liquidation process having not been appointed as regular liquidator. In such exceptional circumstances, the Adjudicating Authority has therefore taken a well-considered decision to pay a lump sum amount of Rs. 2,00,000/- only to the Resolution Professional for the entire period starting from 01.03.2019 till the passing of the order. It has also correctly noted that since no major legal services have been rendered during this period except for pursuing applications before the Adjudicating Authority, a consolidated fee of Rs.50,000/- only for the legal advisor would suffice. The decision to allow payment of salary of security guards for the period their services was utilized and payment of Rs.50,000/- towards meeting expenses to visit factory site is also found reasonable. We find no error in the proportionate reduction of fees/expenses as carried out by the Adjudicating Authority as the rationalization has been done with proper application of mind. Further, to our mind, this decision of the Adjudicating Authority is in conformity with the ratio laid down by the Hon'ble Supreme Court of India in ***Devarajan Raman v. Bank of India Ltd. (2022) 3 SCC 254*** since the Adjudicating Authority has assigned detailed reasons while making an assessment of fees and expenses payable to Resolution Professional

for the core activities performed during the period claimed by him as that of a liquidator.

17. This now brings us to some objections raised by the Learned Counsel for the Appellant on the adverse observations made by the Adjudicating Authority on the discharge of professional duties by the Resolution Professional. One such negative comment is that the Adjudicating Authority has opined that Resolution Professional was more focused on getting remuneration and other expenses reimbursed instead of fruitful discharge of legal duties in completing CIRP in a time bound manner. We note that the Adjudicating Authority in its order dated 28.02.2019 has observed, after perusal of the progress report filed by the Resolution Professional, that there are no signs of preparation of Information Memorandum or publication of invitation for Expression of Interest and that there were no resolution applicants who had filed Resolution Plan and we cannot but agree to these findings. The Adjudicating Authority has also noted that Resolution Professional had wrongly proceeded against the assets of a subsidiary of the Corporate Debtor and held that such action shows his lack of understanding of the provisions of IBC. We agree that this action was beyond the jurisdiction conferred upon the RP by the IBC. However, this action alone cannot tarnish the overall image and professional conduct of the Resolution Professional. We cannot ignore the fact that several steps were effectively taken by him as Resolution Professional towards conduct of CIRP like making of public announcement, formation of CoC, collection of financial records and data of the Corporate Debtor, holding of 4 CoC meetings in which CIRP progress reports

have been furnished, filing of section 19 and 70 IBC applications against the concerned parties before the Adjudicating Authority etc. Moreover, the Respondent never raised any qualms against the conduct of the Appellant throughout the tenure of the CIRP. Further we cannot be unmindful of the constraints faced by the Resolution Professional on the ground that delay in the closure of CIRP was caused due to withholding of information and non-cooperation by the suspended management in spite of clear directions of the Adjudicating Authority. On the activities undertaken post passing of the liquidation order, we notice that the Adjudicating Authority has returned the findings that no progress report was filed by the Resolution Professional on the efforts made by him during the period when the liquidator remained to be appointed. While this is factually correct, it also cannot be discounted that he had undertaken several steps including appointment of security guards to protect the assets of the Corporate Debtor, prevented the suspended management from causing harm to the property of the Corporate Debtor by way of unauthorized leased deeds, undertook several visits to the factory site, made several appearances for hearings before the Adjudicating Authority etc. This finding of the Adjudicating Authority has also been challenged on the ground that in the absence of his regular appointment as liquidator, the liquidation process could not have moved forward and therefore there was no question of submitting progress report. We find that these explanations offered by the Resolution Professional are not totally unfounded and it would, therefore, be unfair to cast aspersions on the conduct of the Resolution Professional.

18. The second principal ground on which the Resolution Professional's conduct has been found questionable is his having continued to function even after passing of the liquidation order. It has been held that the Resolution Professional chose to mechanically continue on even though the liquidation order had not provided for his appointment as liquidator and that no conscious efforts were taken by him to move the Adjudicating Authority to press for appointment of a liquidator. We note that the Adjudicating Authority in the impugned order has narrated the chronology of hearings and stated that though the matter was heard 22 times, in none of the hearings the expeditious appointment of liquidator without delay was emphasized. In fact there were numerous adjournments either on request of the parties or on grounds of settlement being under consideration between parties. The delays were compounded by the lockdown imposed on account of Covid pandemic during the intervening period. Though it has been contended that the Resolution Professional had agitated the non-appointment of the liquidator before the Adjudicating Authority several times, material facts on record do not show that adequate efforts were made by the Resolution Professional to either seek a pointed clarification from the Adjudicating Authority on his role after the issue of the liquidation order or pursue the appointment of a liquidator with more vigour. Be that as it may, for the sluggishness in the appointment of the liquidator, it is not the Resolution Professional alone who can be held solely responsible but the responsibility equally devolves on the CoC and as much on

the Adjudicating Authority which took an inordinately long time in making the appointment.

19. Another adverse observation was that security guards were appointed and huge expenditure incurred thereon while no valuation of the property has been done by the Resolution Professional. In his defence, the Learned Counsel for the Appellant has stated that the appointment of security guards has no correlation to non-appointment of valuers and that in any case the valuers could not be appointed due to non-cooperation in providing requisite information by the suspended management and the statutory auditor. Moreover, when the suspended management was itself trying to interfere with the property and unauthorisedly attempting to dispose it off, it became incumbent upon the Resolution Professional to protect the same being the custodian of the assets of the Corporate Debtor. Hence, we are of the considered view that the conduct of the Resolution Professional cannot be assailed on this score either.

20. We are therefore satisfied with the findings of the Adjudicating Authority that the fees/expenses claimed by the Resolution Professional for the period following the passing of the liquidation order is exorbitant and not commensurate with the work performed by him as is clearly borne out from material on record. We are also of the considered view that the Adjudicating Authority while re-fixing the fees/expenses has determined the same having kept the reasonability quotient in mind. However, we are not persuaded to agree with the adverse observations made by the Adjudicating Authority on the professional

conduct of the Resolution Professional in view of the attendant reasons and peculiar circumstances as cogently explained by him.

21. In result, we concur in the directions of the Adjudicating Authority as contained in the impugned order with respect to the determination of the fees of the Resolution Professional; expenses incurred by him on site visits; fees of the legal advisor and salary of the security guards and direct that the same shall be paid by the CoC within ten days from the date of uploading of this order. Further all the adverse observations made on the conduct of Resolution Professional in the impugned order is expunged. The appeal is disposed of with the above observations. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 28.02.2023

PKM