IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

IA (I.B.C) No. 5526/MB/2024

in

CP (IB) No. 1126/MB/2019

[Under Section 12A of the Insolvency and Bankruptcy Code, 2016 r/w Regulation 30A(1)(a) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 & Rule 11 of the National Company Law Tribunal Rules, 2016]

MR. ANISH GUPTA

RP OF ANUPAM ELECTRICALS & ENGINEERING INDUSTRIES PVT. LTD. …**Applicant**

V/s

CG POWER AND INDUSTRIAL SOLUTIONS AND ANR. …**Respondents**

IN THE MATTER OF:

CG POWER AND INDUSTRIAL SOLUTIONS LIMITED

6th Floor, CG House, Dr. Annie Besant Road

Worli, Mumbai-400030, Maharashtra.

…Operational Creditor

V/s

ANUPAM ELECTRICALS AND ENGINEERING INDUSTRIES PVT LTD

Registered Office: 15 Dadiseth Agiary Lane

4th Floor, Kanchan Bhavan, Post Box No. 2512, Kalbadevi Road

Mumbai-400002, Maharashtra.

...Corporate Debtor

Pronounced: 11.12.2024

CORAM:

HON’BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON’BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Applicant: Adv. Mily Ghosal a/w Adv. Shweta Thanekar

Respondent No. 1: Adv. U.A. Patel

Respondent No. 2: CS Vijaykumar Tiwari

ORDER

[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. **BACKGROUND**

1.1 This IA (I.B.C) No. 5526/MB/2024 (IA) was filed on 10.11.2024 under Section 12A of the Insolvency and Bankruptcy Code, 2016 (IBC) r/w Regulation 30A(1)(a) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons Regulations, 2016 (CIRP Regulations) & Rule 11 of the National Company Law Tribunal Rules, 2016 by Mr. Anish Gupta, the Applicant/Resolution Professional (RP) against CG Power and Industrial Solutions Limited, the Respondent No. 1/Operational Creditor (OC) and Mr. Ramavatar S. Modani, the Respondent No. 2/Director of the Suspended Board of M/s. Anupam Electricals and Engineering Pvt Ltd, the Corporate Debtor (CD), which is presently undergoing Corporate Insolvency Resolution Process (CIRP).

1.2 The Applicant in the IA seeks relief against the Respondents for payment of Rs.4,00,021/- (Four Lakhs Twenty-One Rupees) as Corporate Insolvency Resolution Process Cost (Remuneration); and Rs. 32,000/- (Thirty-Two Thousand Rupees) against Respondent No. 2 separately as cost of filing the present IA. The Applicant/RP also prays for an order to the effect of ceasing the moratorium imposed under Section 14 of the IBC, *vide* Order of this

Tribunal dated 11.11.2019 (Admission Order) and another Order dated 14.05.2024.

1.3 The Applicant/RP was appointed as the Interim Resolution Professional (IRP) in CP(IB) No. 1126/MB/2019 (Main Application). The Respondent No. 1, is the OC, which had filed the Main Application against CD under Section 9 of the IBC for default of amount of Rs.36,03,571/- (Thirty- Six Lakh Three Thousand Five Hundred and Seventy-One Rupees) including interest. The said default amount was based on 4 (Four) unpaid invoices issued by the OC/Respondent No. 1 against the CD's purchase orders during the period of 31.12.2015 to 31.08.2018 in lieu of supplying industrial motors.

1.4 Unfortunately, in paragraph 8(f) of the Admission Order, the address and the registration number of the Applicant/RP was wrongly provided. However, the OC did not make any attempt to inform the Applicant/RP about his appointment as IRP. In short, during the period from 11.11.2019 to 23.04.2024, no action as to the CIRP of the CD was undertaken because of the above. Later, when the matter was listed before this Bench on 23.04.2024, pursuant to transfer from Court-V along with certain other matters, we found that no action had been initiated after the Main Application was admitted and moratorium declared on 11.11.2019. Since there was no record to show as to what transpired between 11.11.2019 and 23.04.2024, we issued notices to the parties including the Applicant/RP. The Applicant/RP who was appointed as IRP, on notice, appeared before us on 14.05.2024 and submitted that he had no knowledge of his appointment since no intimation was received by him; he, however, apologised for what had transpired, although not because of his mistake. We ordered the Applicant/RP to immediately take charge of the CD as IRP and take over its management. The Ld. Counsel appearing for the OC/Respondent No. 1 also appeared on 14.05.2024 and submitted that the OC/Respondent No. 1 is under new management as the erstwhile OC/Respondent No. 1 went into investigation by SFIO and it has been taken over by another group.

1.5 In the above background, actual CIRP of the CD began only on 14.05.2024 when we ordered the Applicant/RP to take over management of the CD. The Applicant/RP has been reporting progress of the conduct of CIRP of the CD from time to time and on 12.08.2024, it was reported by the Ld. Counsel for the Director of the Suspended Board of the CD that he wanted to settle with the OC/Respondent No. 1 for an amount of Rs. 25,00.000/- (Twenty-Five Lakhs Rupees). As the Ld. Counsel for the Applicant/RP submitted that she was yet to receive Form FA from the OC, we gave last chance for the CD for settlement. Thereafter, the present IA is filed by the Applicant/RP for withdrawal of the Main Application under Section 12A of the IBC read with Regulation 30A of the CIRP Regulations on 10.11.2024.

2. CONTENTIONS OF APPLICANT/RP

2.1 Pursuant to our order dated 14.05.2024, the Applicant made public announcement on 22.05.2024. The Applicant/RP filed Interlocutory Application No. 3092/2024 seeking formation of Committee of Creditors (CoC) as well as exclusion of 1647 days in the CIRP from 11.11.2019 to 14.05.2024, which was allowed by us *vide* order dated 14.06.2024. Pursuant to this Bench’s order dated 14.06.2024, the CoC was constituted on the same date. In the CIRP of the CD, the CoC comprises of only one OC/Respondent No. 1 and none else.

Since the Directors of the Suspended Board of the CD did not cooperate with CIRP, the Applicant/RP filed IA 3465/2024 under Section 19(2) of the IBC which was allowed and the Directors of the Suspended Board were issued notice *vide* order dated 05.07.2024. Subsequently, the Directors of the Suspended Board appeared before us on 18.07.2024 and undertook to extend cooperation with the Applicant/RP. On 12.08.2024, the Counsel for the Respondent No. 2 submitted that the CD conveyed its willingness to settle the matter with the OC.

2.2 Meanwhile in the 2nd CoC meeting dated 29.07.2024, the CoC approved resolution, *inter alia,* fixing the remuneration of the Applicant/RP to be Rs.1,00,000/- per month plus applicable taxes for the tenure of the IRP and that it shall be part of the CIRP Cost. In the 3rd CoC meeting dated 25.10.2024, the CoC approved filing of withdrawal application before the Adjudicating Authority (AA) under the provisions of the IBC with 100% voting and authorised the Applicant/RP to file application for the same. However, the CoC rejected the resolution for payment of Rs. 3,04,521/- being the CIRP Cost with 100% voting.

2.3 On 30.10.2024, the Applicant/RP received settlement agreement executed between the OC/Respondent No. 1 and the CD dated 10.10.2024 and Form FA. Since Form FA did not contain bank guarantee as required under Regulation 30A(2) and CIRP Cost including Resolution Professional Costs under Regulation 34 of the CIRP Regulations, the Applicant/RP, on 04.11.2024, requested the CoC to arrange the same and provide new Form FA for filing before the AA. To the dismay of the Applicant/RP, the representative of the CoC on 05.11.2024 informed the Applicant/RP by email that the CoC is not bound by any regulation of IBC. He further stated that there was catena of judgments of NCLT, NCLAT and the Supreme Court on the issue. It was further informed by the representative of the CoC that its decision cannot be challenged before AA. In view of the above, the Applicant/RP prays that the Respondent No. 1 and 2 be directed to pay CIRP Cost of Rs.4,00,021/- along with cost of the present IA of Rs. 32,000/- against Respondent No. 2. Since it has been specifically agreed that the responsibility and cost of filing joint application before AA is on the CD, Respondent No. 2 is liable to pay Rs. 32,000/- towards the expenses of filing the present IA.

3. CONTENTIONS OF RESPONDENT No.1 & 2

3.1 Respondents have not filed any reply to the present IA before this Bench. The Ld. Counsel for the Respondents challenged the maintainability of the IA on ground of suppression of material facts and contended that the Applicant/RP is not entitled for the aforesaid amount claimed as his fee since the CoC has rejected the resolution for CIRP Cost, including the fee as claimed by the Applicant/RP during the 3rd CoC meeting held on 25.10.2024. Further, the Applicant/RP has no vested right to claim any amount as his fee. It is for the CoC to either approve or reject fee of a Resolution Professional. Such decision of the CoC taken in commercial wisdom is non-justiciable. Further, the fee claimed by the CD is exorbitant as he has not done any substantial work in the CIRP of the CD.

3.2 The Ld. Counsel sought intervention of this Bench to reduce/fix the remuneration of the Applicant/RP and CIRP Cost. On the other hand, the

Respondent No. 2 contended that it shall not be liable to spend any money on account of filing this IA.

4. ANALYSIS AND FINDINGS

4.1 Having perused the records and heard both the Counsel for the Applicant/RP and the Respondent No. 1 & 2, the following issues arise for consideration and determination by us, viz., (i) whether it is necessary for NCLT to decide CIRP Cost and quantum of professional fee payable to the IPs, where there is express provision available under the law; (ii) whether it is mandatory to pay CIRP Cost, including the fee payable to the IRP/RP ratified by the CoC, under Regulations 33, 34 and 34B read with Schedule-II to Regulation 34B of the CIRP Regulations; and (iii) whether the CoC possess commercial wisdom to violate a regulation made by the IBBI in exercise of the powers conferred on it by the IBC.

4.2 As regards issue (i), the term “fee” denotes the remuneration demanded by a professional for professional services. The quantum of fee demanded by a professional is based on one’s own professional abilities and the quality of services rendered, where there is no law relating to chargeable fee by a professional. The party who seeks or obtains professional services would get an opportunity to consider whether the demanded fee is adequate or on the higher side. In that case, the fee is always negotiable between the professional service provider and the person to whom service is provided. If the client feels that the fee demanded is on the higher side, it can very well decline to pay. However, once a decision is taken to pay a certain fee to the professional, it is binding on the parties. Further, if there is a law governing payment of certain minimum fee for certain professional service, the parties are bound by the same. In the instant case, we find that the 2nd CoC meeting dated 29.07.2024 ratified the CIRP Cost and resolved to pay the fee due to the RP. Further, Regulations 34 and 34B read with the Schedule-II to the CIRP Regulations provide adequate provisions as to CIRP Cost and remuneration to be paid to the IRP and the RP. Further, since the 2nd CoC meeting has already ratified both the above, the CoC has no reason to reject the earlier decision in the 3rd meeting of the CoC. In the insolvency ecosystem under the IBC, the insolvency professional, in varied roles, is an essential stakeholder. The fee payable to an Insolvency professional is included in the CIRP Cost only to protect the interests of Insolvency Professional, who is one of the important stakeholders of the processes under the IBC. Since there is an express provision of law available for remuneration of the Insolvency Professional, we hold that the AA need not fix remuneration of the IRP or RP, as the case may be, and the CIRP Cost. In view of the above, this issue is decided accordingly.

4.3 As regards the second issue, we find that the CoC of the CD in the instant case comprises of only one OC, and there are no other creditors. In the 1st CoC meeting conducted on 20.06.2024, it is seen that the remuneration payable to the Applicant/RP as IRP and the CIRP Cost were not considered passed, since the CoC did not vote after giving various extensions sought for voting as reflected in the minutes. However, in the 2nd CoC meeting held on 29.07.2024 (wrongly written on the cover page of the minutes as First CoC meeting), the CoC approved with 100% voting the IRP fee as Rs.1,00,000/- p.m. plus applicable taxes and also resolved that it shall form part of the CIRP Cost. Mr. Shashi Shekar, authorised representative of the OC/Respondent No. 1 (lone

CoC member) was present in the said meeting along with Mr. Ramavatar Modani, the Director of the Suspended Board of the CD. Thus, ratification of fee of the Applicant/RP and CIRP Cost has not been disputed by the Respondents.

4.4 It is noted that the IRP has claimed only Rs. 3,050/- as CIRP Cost as Item 6 of the minutes of the 1st CoC meeting. The CoC took note of the same and confirmed payment on raising invoice. Further, the CoC resolved with 100% voting share and fixed the remuneration payable to the IRP as Rs.1,00,000/- p.m. excluding taxes for his tenure in the CIRP, in terms of Schedule-II to Regulation 34B of the CIRP Regulations. Under the said Schedule-II, a minimum fee of One Lakh Rupees is fixed by the IBBI as against quantum of admitted claims equal to or below Fifty Crore Rupees. In the instant case, the total claim received by the IRP is Rs. 4,00,021/-. Hence, the fee claimed and payable to the RP from the period of his appointment as IRP (say 14.05.2024) until he submits application for approval of resolution plan is in accordance with Schedule-II to Regulation 34B. Further, Sub-regulation (5) of Regulation 34B of CIRP Regulations clearly provides that the fee to the IRP/RP may be paid*, inter alia,* from the funds contributed by the members of the CoC. Mr. Modani, Director of the suspended Board is also a member of the CoC. His virtual presence was recorded in the meeting of the 2nd CoC. Moreover, under Regulation 33(1) of the CIRP Regulations, the Applicant (OC/Respondent No. 1 herein) has to fix the expenses to be incurred on or by the IRP. Under Regulation 33(4) of the CIRP Regulations, the amount of expenses ratified by the CoC shall be treated as CIRP Costs. Regulation 33 explains that the fee payable*, inter alia,* to the IRP shall include the term “expenses” referred to in that Regulation. Hence, it is crystal clear that Rs.1,24,371/- being CIRP Cost ratified by the CoC in its 2nd meeting held on 29.07.2024 with 100% voting share forms part of the CIRP Cost. This amount remains to be unpaid as reflected in 'Item No. 5' of the minutes of the meeting of the 3rd CoC meeting dated 25.10.2024. It is noted that The CoC also confirmed the appointment of IRP as RP in the 2nd CoC meeting dated 29.07.2024. The fee payable to the RP was also fixed in accordance with Regulations 33 and 34A of the CIRP Regulations under 'Item No. 4' of the Minutes dated 29.07.2024. However, in the 3rd CoC meeting held on 25.10.2024, the CoC resolved to withdraw CIRP of the CD in terms of Section 12A of the IBC by filing an application before the AA, as 'Item No. 6' of the minutes. However, the CoC rejected the proposal to reimburse the CIRP Cost as reflected in the said minutes under 'Item 5'. It was argued by the Ld. Counsel appearing for the OC/Respondent No. 1 that the CIRP Cost was denied because, the RP has mentioned Rs.4,72,000/- as fee for the 'Liquidator' in the 'Table to Approve the Payment of CIRP Cost and Expenses to RP' under 'Item 1' of the minutes of the 3rd CoC meeting, whereas no decision was taken for liquidating the CD but only filing an application for withdrawal of the Main Application before the AA. However, the Ld. Counsel appearing for the Applicant/RP submitted that mentioning 'Liquidator' was only a clerical error and that the intention of the RP was only to include fee payable to the RP and not to the Liquidator.

4.5 Meanwhile, a settlement was entered into on 10.10.2024 between the Director of the Suspended Board of the CD and the OC/Respondent No. 1 for an amount of Rs.25,00,000/-, *vide* payment to the OC/Respondent No. 1 by cheque No. 241342 dated 09.10.2014 drawn on Kotak Mahindra Bank. The settlement was reported to the Applicant/RP by the authorised representative of the OC/Respondent No. 1 by email and Form FA was signed and handed over by the OC//Respondent No. 1 to the RP on 21.10.2024. Since bank guarantee was not attached with Form FA, the Applicant/RP requested the OC/Respondent No. 1 by email dated 04.11.2024 to provide a new Form FA along with Bank Guarantee as per the law. Strangely enough, the OC/Respondent No. 1 replied to the Applicant/RP by email on 05.11.2024 as follows:

> *"It is respectfully submitted that the decision of the CoC is final and the same is not bound by any regulations of IBC*. *There is a catena of Judgment of NCLT, NCLAT and the Supreme Court on this issue. Further, CoC decision cannot be challenged before adjudicating authority. I believe you are conversant about this issue. COC takes decision based on its conscious commercial wisdom."*

To the above email, the Applicant/RP by return email on the same day highlighted the provisions of Regulation 30A of the CIRP Regulations and the deficiency contained in Form FA forwarded by the OC/Respondent No. 1 before filing before this Bench.

4.6 The OC/Respondent No.1 has cited the decision of the Hon'ble NCLAT in *Bharat Hotels Ltd. Vs. Tapan Chakraborty*, [Company Appeal (AT) (Insolvency) No. 1074/2022], in which the Appellate Tribunal has held that the question of cost and its approval lies in the domain of the CoC. The issues may be decided in the meeting of the CoC and are not to be examined by the AA even before the CoC takes a decision. However, we find that in the instant case, the CoC had once ratified CIRP Cost including remuneration payable to the Applicant/RP in the 2nd CoC meeting held on 29.07.2024 and then reversed the decision in the 3rd meeting held on 25.10.2024. Hence, the facts and circumstances are different and the said decision of the Hon'ble NCLAT is inapplicable in the present matter. In view of the above discussions in the foregoing paragraphs, it emerges that the CoC is bound by the law for the time being in force. We hold that it is mandatory for the CoC to follow Regulations 34 and 34B and Schedule-II to the CIRP Regulations and that they are not directory in nature. The CoC cannot be permitted to violate the regulations lawfully made by the IBBI in exercise of its powers under the IBC. Thus, this issue goes against the OC/Respondent No. 1.

4.7 As far as the third issue is concerned, the CoC has to exercise commercial wisdom in taking business decisions relating to insolvency resolution of the CD. Commercial wisdom refers to the feasibility or viability of resolution plans to revive, restructure or resolve the insolvency of a corporate debtor. The commercial wisdom of the CoC, as identified by the Hon'ble Supreme Court and applied by other Courts in CIRP cannot be allowed to be misused or misinterpreted by the CoC for not paying the statutory CIRP Cost including the remuneration to the Insolvency Professional. We feel that the CoC cannot be permitted to fix a minimum remuneration other than the one prescribed in Schedule-II to Regulation 34B of the CIRP Regulations. The CoC is also bound by the CIRP Cost once ratified. The CoC cannot be permitted to flout or alter any law for the time being in force. Minimum fee payable to the IRP/RP is already laid down under Schedule II to the CIRP Regulations. The CoC has no wisdom available to go beyond the legal provisions while fixing remuneration of IRP/RP. No CoC is permitted to take a position that their commercial wisdom is above the extant law. We thus hold that commercial wisdom of the CoC is subject to the law laid down under the statutory regulations and hence, this issue is decided against the OC/Respondent No. 1.

4.8 It is not out of context to mention here that the IBBI has made Code of Conduct for CoC generally applicable to all creditors. However, it may be time for making detailed single-creditor specific, especially single-OC specific code of conduct to avoid unnecessary litigation leading to delay and pendency in NCLTs.

ORDER

In the result, Form FA filed by the CoC is found to be defective, invalid, and not as per law. The CoC/Respondent No. 1 is directed to pay the CIRP Cost including the remuneration as asked for by the Applicant/RP in this IA before the next date of listing and submit new Form FA in terms of the Settlement Agreement arrived at between the OC/Respondent No. 1 and the Director(s) of the Suspended Board of the CD dated 10.10.2024, and in accordance with the law. The Respondent No. 2 is directed to pay Rs. 32,000/- to the Applicant/RP on account of filing the IA and as prayed for. A settled matter cannot be allowed to continue in litigation for long. However, in the meantime, the Applicant/RP is directed to continue in the CIRP of the CD as per law until withdrawal of the Main Application is allowed by us under Section 12A read with Regulation 30A of the CIRP Regulations.

The designated Registrar is directed to forward an electronic version of this Order to the IBBI for information and record.

List **I.A. No. 5526/MB/2024 for filing new Form FA. List on 16.12.2024.**

Sd/-	**Sd/-**
SANJIV DUTT	**K. R. SAJI KUMAR**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Tanmay Jain // Alka Siwach