

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 709 of 2019**

[Arising out of Order dated 26.06.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA 55/2019 and MA 802/2019 in C.P. (IB)- 1319/(MB)/2017]

In the matter of:

- 1. Invent Assets Securitisation & Reconstruction Pvt. Ltd.
Having its Registered Office at 107, Jolly Maker Chambers No. II, Nariman Point, Mumbai- 400021**Appellant No.1
- 2. Saraswat Co-operative Bank Ltd.
Having its registered Office at, Ekanath Thakur Bhavan, 953, Appasaheb Marathe Marg, Prabhadevi, Mumbai 400 025**Appellant No.2

Vs.

- 1. Rajmal Labhchand Mogra,
Interim Resolution Professional of the Corporate Debtor- Enviro Bulkk Handling Systems Pvt. Ltd.
24, 3rd Floor, Bombay Mutual Annex, Rustom Sidhawa Marg, Fort, Mumbai- 400 001** ...Respondent No.1
- 2. Enviro Bulkk Handling Systems Pvt. Ltd.
Through its Liquidator Mr. Rajat Mukharjee
(Reg. No. IBBI/IPA-002/IPN00493/2017-18-111723) Having its Office at Enviro House, Sector 26, Plot No. F/12,
Near Sambhaji Chowk, Pradhikaran, Pune- 411 044** ...Respondent No.2
- 3. Vipul Choksi
Resolution Professional of the Corporate Debtor- Enviro Bulkk Handling Systems Pvt. Ltd.
Having its Office at Enviro House, Sector 26, Plot No. F/12, Near Sambhaji Chowk, Pradhikaran, Pune- 411 044** ...Respondent No.3

For Appellants: Mr. Darpan Wadhwa, Sr. Advocate with Ms. Smriti Churiwal, Mr. Jaiveer Kant and Ms. Deepti Babel, Advocates.

For Respondents: Mr. Sankalp Anertwar, Advocate for R-1.

J U D G M E N T
(26th November, 2021)

Ashok Bhushan, J.

1. This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (“Code” for short) has been filed challenging the order dated 26.06.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA 55/2019 & MA 802/2019 in C.P. (IB)-1319/(MB)/2017. The brief facts and sequence of events which are necessary to be noted for deciding this Appeal are:-

A Company Petition under Section 9 of the Code was filed by ‘Elecon Engineering Co. Ltd.’ seeking to set in motion the Corporate Insolvency Resolution Process (‘CIRP’ for short) against ‘Enviro Bulkk Handling System Pvt. Ltd.’ (Corporate Debtor). The Adjudicating Authority by order dated 04.12.2017 admitted the petition. By subsequent order dated 18.06.2018 passed by the Adjudicating Authority, the Respondent- ‘Rajmal Labhchand Mogra’ was appointed as Interim Resolution Professional. The Respondent issued public announcement in local newspaper dated 26.06.2018. The first meeting of the Committee of Creditors (‘CoC’ for short) was held on 16.07.2018. One of the agendas of the meeting was to confirm and approve the appointment of Respondent as a Resolution Professional. The CoC was formed comprising of ‘Invent Assets Securitisation and Reconstruction Pvt. Ltd.’ with 72.56% and ‘Saraswat Co-operative Bank Ltd.’ with 27.44% voting rights. On Agenda Item No.11, ‘Invent Assets Securitisation and Reconstruction Pvt. Ltd.’

said that they have discussed with ‘Saraswat Co-operative Bank Ltd.’ to change the Interim Resolution Professional. The decision of the Agenda Item No.11 is as follows:-

“Agenda 11: To confirm and approve the appointment of Mr. Rajmal Labhchand Mogra (Registration No. IBBI/IPA-001/IP-P00344/2017-18/10912) as the resolution professional (“RP”) of the Corporate Debtor along with his fees and expenses.

On confirmation of IRP as RP; the representative of Invent Asset Securitisation Private Limited said that we have discussed and decided with Saraswat Co-Operative Bank Ltd. to change the IRP prior to the CoC meeting. Necessary application for the same will be filed. IRP Mr. Rajmal Labhchand Mogra said this matter you get it approved from the honourable NCLT.

The fees for Interim Resolution Professional is decided and approved at Rs. 5,00,000/- (Rupees Five Lakhs) per month, applicable taxes and actual expenditure to perform his duties.”

There was another agenda in the meeting to authorise the Resolution Professional to hold the future meeting of the CoC at shorter notice of not less than three working days. It was resolved that since the confirmation of Resolution Professional’s appointment is not done, the matter was not decided. In view of the decision of the members of the CoC, an Application was filed to change the Resolution Professional before the Adjudicating Authority on 31.07.2018. The second meeting of the CoC was convened on 10.08.2018. Agenda No.5 was to ‘take note of the actions taken by the IRP under Code’.

When Agenda No.5 was taken, the representative of 'M/s. Invent Assets Securitization and Reconstruction Pvt. Ltd.' raised the issue of replacement of IRP and stated that meeting should be adjourned 'sine-die'. It was further stated in the meeting that since the Application for replacement for Respondent has been moved, they do not want to continue with Interim Resolution Professional and Interim Resolution Professional shall stop any proceedings under CIRP. In the meeting, Respondent has placed reliance in Regulation 17 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018. After the meeting dated 10.08.2018, an Application was also filed by the Respondent being MA 974/2018 seeking directions against the CoC's members to co-operate with Respondent for holding a meeting. The Adjudicating Authority passed an order on 09.10.2018 allowing MA 988/2018 by replacing Interim Resolution Professional-'Rajmal Labhchand Mogra' by appointing Shri Vipul K Choksi as Resolution Professional. The order further noted that the CoC with 100% voting rights approved the change of Interim Resolution Professional. The Application MA 974/2018 filed by the Interim Resolution Professional was dismissed as infructuous. In order dated 09.10.2018, the Adjudicating Authority has also directed the CoC to make the payment of the Interim Resolution Professional for the work conducted by him. In pursuance of the order dated 09.10.2018, vide notice dated 29.10.2018, the Respondent through its Advocate requested for clearing the total CIRP costs. In response to letter dated 09.10.2018, the Appellant forwarded a cheque dated 10.12.2018 for an amount of Rs. 5,40,000/- for the work conducted by the Respondent during the CIRP. The cheque was returned by the Respondent and thereafter an

Application has been filed before the Adjudicating Authority. MA 802/2019 filed by the Respondent before the Adjudicating Authority seeking action for violation of the order dated 09.10.2018 and further direction to CoC to make payment of an amount of Rs.40,20,600/-. The Adjudicating Authority took the view that as per Regulation 17(3) of the CIRP Regulations, 2016, the Interim Resolution Professional was bound to discharge duties till appointment of new Resolution Professional hence, the Interim Resolution Professional was entitled to receive the costs and expenses till 09.10.2018. The Application was allowed by order dated 26.06.2019 and CoC was directed to pay the same within 15 days. The present Appeal has been filed challenging the order dated 26.06.2019 by both the Financial Creditors.

2. This Tribunal heard the matter on 12.07.2019 and passed following interim order:-

“During the pendency of the appeal is the Appellant pays a sum of Rs. 10 lakhs to the 2nd Respondent (‘Interim Resolution Professional’). Interim Resolution Professional’ may accept the same subject to the decision of this appeal. In case of offer of payment in writing the impugned order dated 26th June, 2019 so far it relates to full payment in favour of the ‘Interim Resolution Professional’ is concerned shall be stayed.”

3. In pursuance of the order of this Tribunal dated 12.07.2019, the Appellants have made that the payment of Rs. 10 lakhs to the Respondent.

4. Learned Counsel for the Appellant in support of the Appeal contends that in very first meeting of the CoC dated 16.07.2018, it was resolved not to

approve the appointment of Respondent as Resolution Professional and he was asked not to carry any further process. It is submitted that Application for replacement of Interim Resolution Professional was filed before the Adjudicating Authority on 31.07.2018 hence, there is no entitlement of the Respondent to continue with CIRP or for payment of any emoluments. In the second CoC meeting dated 10.08.2018, specific Resolution was passed for adjourning the CoC meeting 'sine die' and Respondent was clearly indicated that he should not carry with the CIRP. It is submitted that the mere fact that Application which was filed on 31.07.2018 remained pending till 09.10.2018, the Respondent is not entitled to claim any emoluments till 09.10.2018. At best, the Respondent could claim emoluments only till first meeting of the CoC i.e. on 16.07.2018 and thereafter there is no entitlement to receive any emoluments by the Respondent.

5. Learned Counsel for the Respondent refuting the submissions of the Appellant contends that the CoC in its meeting dated 16.07.2018 has specifically approved the fee of Rupees Five Lakh per month as fee of the Interim Resolution Professional. Hence, the Respondent is entitled to claim the fee with the said rate till 09.10.2018 when Adjudicating Authority decided to replace the Interim Resolution Professional. The Respondent was willing to carry on the work and he has also filed an Application but due to the fact that he was obstructed in his working by the Appellant, it cannot be reason for denying his fee. It was submitted that as per Regulation 17(3) of the CIRP Regulations, 2016, where the appointment of Resolution Professional is delayed, the Interim Resolution Professional is entitled to perform the functions

of the Resolution Professional from the fortieth day of the insolvency commencement date till a Resolution Professional is appointed under Section 22. The Resolution Professional having been appointed under Section 22 only on 09.10.2018, the appointment of Interim Resolution Professional was to continue till 09.10.2018 with entitlement of his fees also.

6. We have considered the submissions of the parties and perused the record.

7. The Adjudicating Authority by impugned order has directed calculation of fee of the Interim Resolution Professional upto 09.10.2018 when the Interim Resolution Professional was changed. The question for consideration in this Appeal is as to in the facts of the present case Respondent was entitle for his fee upto which date. Whether when CoC decided to replace the Interim Resolution professional he ceased to entitle to any fee?

8. 'Insolvency Resolution Process Cost' is defined in Section 5(13) of the Code which also includes the fees payable to any person acting as a Resolution Professional. We have noticed above that in the first meeting of the CoC dated 16.07.2018, the CoC has approved the fees of Interim Resolution Professional @ 5 lakh per month. The CoC having approved the aforesaid fees, in the facts of the present case, we proceed to examine the claim of Respondent for payment of fees as per the Resolution of CoC dated 16.07.2018. It is also relevant to notice that in the very first meeting of the CoC, it was decided to change the Interim Resolution Professional. Necessary Application for the same was filed on 31.07.2018. When second meeting of the CoC dated 10.08.2018 was held,

it was objected by the Appellants and request was made to adjourn the meeting sine die and ultimately the meeting was declared over and no other business was transacted. The Interim Resolution Professional filed Application in end of August, 2018 before the Adjudicating Authority seeking direction to the CoC to co-operate with Resolution Professional to continue the proceeding, in which Application no order could be passed as Application was ultimately rejected as infructuous on 09.10.2018. Thus, substantially after the first meeting of the CoC, no work was conducted by the Interim Resolution Professional as noted above. The issue before us is as to whether the Respondent is entitled to receive his fees till 09.10.2018 when he was replaced or he was entitled for his fees upto an early date.

9. Section 22 of the Code deals with ‘appointment of resolution professional’. Section 22 which is relevant for the present case is as follows:-

“22. Appointment of resolution professional. -

(1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

*(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than **[sixty-six]** per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.*

(3) Where the committee of creditors resolves under sub-section (2)-

- (a) to continue the interim resolution professional as resolution professional [subject to a written consent from the interim resolution professional in the specified form], it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or*
- (b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional [along with a written consent from the proposed resolution professional in the specified form].*
- (4) The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board.*
- (5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.”*

10. The present is not a case where CoC in first meeting resolved to appoint the Interim Resolution Professional as Resolution Professional rather they in the first meeting resolved to replace the Interim Resolution Professional by another Resolution Professional. The present case is covered by Section 22 (3)

(b) where CoC decided to replace the Interim Resolution Professional and it had filed an Application before the Adjudicating Authority for appointment of proposed Resolution Professional on 31.07.2018. Sub-section (4) of Section 22 requires that the Adjudicating Authority shall forward the name of the Resolution Professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board. The most relevant provision is sub-section (5) of Section 22 which empowers the Adjudicating Authority to pass an order for the Interim Resolution Professional to continue to function as the Resolution Professional where the Board does not confirm the name of the proposed Resolution Professional within 10 days. The present case is not a case where Adjudicating Authority has passed any order after 31.07.2018 to continue the Interim Resolution Professional till the confirmation of the Board is received. Sub-section (5) of Section 22 requires an order by the Adjudicating Authority to continue Interim Resolution Professional as the Resolution Professional. When Resolution is passed by the CoC to replace the Interim Resolution Professional, requirement of order to continue Interim Resolution Professional in such cases is a statutory scheme delineated by the provisions. Conversely when no order is passed by the Adjudicating Authority to continue Interim Resolution Professional under Section 22(5), he cannot claim continuance of the Interim Resolution Professional his claim of continuance will be contrary to the statutory scheme.

11. In the light of the above, now we come to Regulation 17 on which reliance has been placed by the learned Counsel for the Respondent. Regulation 17 is as follows:-

“17. Constitution of committee.- (1) The interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims received under sub-regulation (1) of regulation 12.
(2) The interim resolution professional shall hold the first meeting of the committee within seven days of filing the report under this regulation.
(3) Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed under section 22.”

12. Sub-regulation (3) of Regulation 17 provides that when appointment of the Interim Resolution Professional is delayed, the Interim Resolution Professional shall perform the functions of the Resolution Professional from the fortieth day of the insolvency commencement date till a Resolution Professional is appointed under Section 22. Regulation 17(3) cannot be read in a manner which may have effect of defeating the purpose and object of Section 22(5) by allowing the Interim Resolution Professional to continue without there being any order of the Adjudicating Authority in a case where decision has been taken to replace the Interim Resolution Professional. The provision of sub-section (5) of Section 22 requiring an order of the Adjudicating Authority to continue the Interim Resolution Professional to continue to function will become redundant

and otiose if it is held that even without an order under Section 22(5), he can continue by virtue of Regulation 17(3). Regulation 17(3) being sub servient to provisions of the Code cannot be interpreted in a manner to defeat the scheme as delineated by sub-section (5) of Section 22. Regulation 17 may cover other situation but not a case covered by Section 22 (3)(b) read with Section 22 (5).

13. In view of the above, after 10 days of sending the name of Resolution Professional to Board by the Adjudicating Authority, there being no order of the Adjudicating Authority to continue the Interim Resolution Professional as Resolution Professional, the Interim Resolution Professional has no right to continue to function as the Resolution Professional after such date. Obviously, the claim of the Respondent to continue to function as Resolution Professional till 09.10.2018 cannot be accepted.

14. The Adjudicating Authority have erred in allowing the claim of fee of Resolution Professional till 09.10.2018. The effect of Resolution of CoC to replace the Interim Resolution Professional as well as the effect of filing of the Application before the Adjudicating Authority had not been considered by the Adjudicating Authority at all. The Adjudicating Authority proceeded to mechanically direct for payment of professional fee till 09.10.2018 without taking into consideration what was effect of the above scheme of the statutory provision and as to what actual work conducted by the Interim Resolution Professional. From the material on record, it does appear that after first meeting of the CoC dated 16.07.2018 when a decision was taken to replace the Interim Resolution Professional, no substantial work has been done. The second meeting was convened by the Interim Resolution Professional on 10.08.2018

which too was objected and no business was transacted in the said meeting also. Thus, effectively the Interim Resolution Professional could function only till 16.07.2018 and, as noted above, legally he could not have continued after 10 days from sending the proposal of new Resolution Professional by Adjudicating Authority as per Section 22 of the Code.

15. This Tribunal passed an interim order on 12.07.2019 subject to condition of payment of Rs. 10 lakh to Respondent No.2 which has been accepted by Respondent. Looking to the sequence of events, as noted above, and actual work conducted by the Respondent, the amount of Rs. 10 lakh is sufficient to cover the fee payable to the Interim Resolution Professional including the cost for Insolvency Resolution Process. We are of the view that the amount paid to Respondent under interim orders sufficiently cover the Insolvency Resolution Process costs and no further payment is required to be made.

16. The Appeal is allowed. The order passed by the Adjudicating Authority dated 26.06.2019 is set aside to the above extent.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice Jarat Kumar Jain]
Member (Judicial)**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

New Delhi
Anjali