

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,(Court-II)
KOLKATA**

*I.A No. 116/KB/2022
In
C.P (I.B) No. 364/KB/2017*

In the matter of:

Jenson & Nicholson (India) Limited,

....Corporate Debtor (in liquidation)

And

In the matter of:

Vivid Colors Private Limited

....Applicant

Versus

Vinay Talwar, Liquidator of Jenson & Nicholson (India) Limited,

...Respondent

Date of hearing: 07/12/2022

Order Pronounced on : 16/05/2023

Coram:

ShriBidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing / Physical)

Mr.Shaunak Mitra, Adv.] For Vivid Colors Pvt. Ltd.

Ms. Anamika Pandey, Adv.]

Ms.AritraBasu, Adv.] For Liquidator

Ms.Arka Banerjee,Adv.]

ORDER

Per: Balraj Joshi, Member (Technical)

1. The Court convened through hybrid mode.
2. This is an application by Vivid Colors Private Limited (**'Applicant'**) against Vinay Talwar, Liquidator of Jenson & Nicholson (India) Limited (**'Liquidator'**) seeking the following reliefs;
 - a) *Direction on the Respondent for refund of Rs.42,71,443/- paid by the Applicant towards the CIRP Cost along with interest at rate of 8% p.a.*
 - b) *Direction on the Respondent for refund of Rs.13,054/- paid by the Applicant towards publishing public notices; and,*
 - c) *Direction on the Respondent to furnish to the Applicant full details and particulars of the CIRP Costs incurred and also of all payments received from sundry debtors on or after the date of commencement of CIRP i.e., 07 August, 2017.*
3. **Submissions by the Ld. Counsel appearing for the Applicant**
 - i. This Adjudicating Authority vide its order dated 07 August, 2017 admitted Jenson & Nicholson (India) Limited (**'Corporate debtor'**) into Corporate Insolvency Resolution Process (**'CIRP'**) under section 7 of the Insolvency and Bankruptcy Code, 2016 (**'Code'**). After initiation of CIRP in respect of the Corporate Debtor, the Respondent, who was then the Interim Resolution Professional, constituted the Committee of Creditors (**'CoC'**) with the Applicant as sole member.
 - ii. In the first meeting of the CoC held on 06 September, 2017, the Respondent was appointed as the Resolution Professional. The CoC in this first meeting inter alia approved Rs.21,335/- incurred by the IRP, a remuneration of Rs. 2 lakhs a month for the IP and a lumpsum remuneration of Rs. 10 lakhs plus expenses for the Resolution Professional.
 - iii. The second and last meeting of the CoC was held on 08 January, 2018 in which inter alia a remuneration of Rs. 1 lakh plus taxes if any were approved for an auditor. In this meeting consent of the CoC was accorded to liquidate the

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Corporate Debtor and also the decision of the Applicant to realize its security interest under section 52 of IBC was recorded.

- iv.* From the above two minutes of CoC meetings it can be seen that the total expense on account of CIRP that was approved by the CoC was Rs.13,21,335/- Ultimately, the Corporate Debtor was ordered to be liquidated by an order dated 12 February, 2018 and the Respondent was appointed as the Liquidator. Pursuant to Regulation 37 of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (*'Liquidation Regulations'*), the Applicant intimated the Respondent by letter dated 28 March, 2018 that it intended to realize its security interest in the land and building situated at Sikandrabad, U.P.
- v.* The Respondent invited Expressions of Interest (*'EOI'*) by advertising in two newspapers but failed to receive any response. Consequently, by letter dated 17 April, 2018, the Respondent permitted the Applicant to go ahead with sale / realization of the asset. By the said letter the Respondent also informed the Applicant that a sum of Rs.13,054/- was incurred as expenditure for issuing public notices for inviting EOI. In the said letter the Respondent also referred to section 52(8) of the Code and asked the Applicant to deduct the amount of CIRP cost due from it from the proceeds of any realization and transfer the same to the Respondent for being included in the liquidation estate.
- vi.* The sale of the land and building situated at Sikandrabad, U.P. took place under sub-regulation (4) of Regulation 37 as the Respondent was not able to identify any alternative buyer as envisaged under sub-regulation (2) of Regulation 37. From sub-regulation (6) of Regulation 37 it is clear that where the secured asset is realized under sub-regulation (4), the Respondent shall bear the cost incurred to identify the buyer. Hence, the Respondent's claim that Rs. 13,054/- purportedly incurred by him for publishing public notices for inviting EOI is to be reimbursed by the Applicant is baseless and untenable.
- vii.* The Respondent by letter dated 12 August, 2019 claimed that the total CIRP cost is Rs. 44,13,560/- and that the Applicant needs to bear 96.78% thereof, being Rs.42,71,443/- including the amount of Rs. 13,054/- incurred for advertisement, the letter asked the Applicant to pay Rs. 42,84,497/-.

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However, no breakup or basis for the CIRP cost nor the basis for the 96.78% proportion was disclosed in the letter.

- viii.* Whereas, from the financial reports of the Corporate Debtor submitted by the Respondent before this Adjudicating Authority, it is evident that the internal sources of the Corporate Debtor were more than sufficient to meet the entire CIRP cost claimed by the Respondent. The Liquidator claims that the total CIRP cost incurred is Rs. 44,13,560/- and that the Applicant's proportionate share thereof is 96.78% being Rs.42,71,443/-. The Respondent has additionally claimed Rs.13,054/- from the Applicant for publishing public notices during the liquidation period, making a total claim of Rs. 42,84,497 / - on the Applicant.
- ix.* The Applicant in good faith and in the bona fide belief that such claim of the Liquidator was as per extant laws and regulations, had paid Rs. 42 lakhs without protest and the balance Rs.84,497/- under protest. The sum of Rs. 13,054/- paid by the Applicant for publishing public notices is also not payable by the Applicant as per Regulation 37 of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (*'Liquidation Regulations'*). Thus, the entire amount of Rs.42,84,497/- which has been paid by the Applicant is actually not payable as per law and the same is liable to be refunded by the Respondent.
- x.* Despite requests, the details of the CIRP cost and the basis for claiming money from the Applicant have not been disclosed by the Respondent and only irrelevant, insufficient and inadequate facts have been disclosed by the Respondent.
- xi.* The Applicant has requested the Respondent to protect and preserve the assets of the Corporate Debtor, though the same may vest with the Applicant; however the Respondent has refused to take any action on the grounds that the said assets do not form part of the liquidation estate. This is causing impairment of the assets that will eventually be detrimental to the secured creditor or to the liquidation estate.
- xii.* In good faith and without prejudice to its rights, the Applicant paid Rs.22 lakhs on 23 October, 2019 and a further Rs.20 lakhs on 15 February, 2020

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aggregating to a total of Rs.42 lakhs as against the claim of Rs.42,84,497/- made by the Respondent as share of CIRP cost purportedly to be borne by the Applicant. Subsequently, the balance Rs. 84,497/- has also been paid by the Applicant, without prejudice to its rights and contentions, by demand draft no. 079189 dated 06 February, 2021.

- xiii.** However, later the Applicant became aware of Circular No. IBBI/IP/013/2018 dated 12 June, 2018 issued by IBBI which in para 7(c) clarifies as follows:
'7. The Code read with regulations made there under specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-(c) only the IRP, to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.'
- xiv.** The above circular is unambiguous that CIRP costs have to be first paid out of the internal sources of the Corporate Debtor. Balance amount, if any, *'shall be'* paid either by the Resolution Applicant (under section 30 of IBC) in case of successful resolution or by the liquidation estate (under section 53 IBC) in case of liquidation. No third scenario is envisaged.
- xv.** Section 52(8) of the IBC states:
'(8) The amount of insolvency resolution process costs, due from secured creditors who realize their security interests in the manner provided in this section, shall be deducted from the proceeds of any realization by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.' The meaning of the phrase 'due from secured creditors' used in this section has not been given in the Code.
- xvi.** Notably, Regulation 21A was inserted by Notification No. IBBI/2019-20/GN/REG047 dated 25 July, 2019 which made inter alia clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53 applicable to secured creditors who realize their security interest. By this amendment the amount due from secured creditors as envisaged under section 52(8) has been clarified. In effect after this amendment, as far as CIRP costs are concerned, whether a secured creditor realizes its security interest or relinquishes it to the liquidation

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estate makes no difference. The amount as per Circular No.IBBI/IP/013/2018 would apply in either case.

- xvii.* The receipts and payments account statement for the period 14 February, 2018 to 30 June, 2018 of the Corporate Debtor submitted by the Respondent to this Adjudicating Authority as part of his 2nd progress report. The CIRP period of the Corporate Debtor was from 07 August, 2017 to 12 February, 2018.
- xviii.* From the aforementioned receipts and payments account statement it can be seen that for the period 14 February, 2018 to 30 June, 2018:
- a) The Corporate Debtor at the end of CIRP had a cash balance of Rs. 2,46,816/-.
 - b) The Corporate Debtor had receipts of Rs. 33,67,225/- during the period, all of which are from internal sources of the Corporate Debtor.
 - c) Total fund availability for the period is Rs. 36,14,040/-, all from internal sources of the Corporate Debtor.
 - d) Total payments for the period is Rs. 13,88,402/- of which only RP fee of Rs. 4,26,978/- appears to be a CIRP cost.
 - e) After making all the payments the CD had a closing cash balance of Rs. 22,25,638/-
- xix.* It is evident from the above that in the instant case the internal sources of the Corporate Debtor were sufficient to meet the entire CIRP cost and most if not all the CIRP costs have been paid from the internal sources of the CD.
- xx.* As can be seen from the CoC minutes, the CoC has approved a total of Rs. 13,21,335/- towards CIRP expense. The Respondent is claiming Rs. 44,13,560/- as total CIRP cost, i.e., more than 3 times of the approved amount. On account of GST alone the Respondent is claiming Rs. 24,56,785/-. The information shared by the Respondent is not sufficient to make a determination if the CIRP costs incurred by the Respondent required CoC approvals or not.
- xxi.* The Applicant in its letter dated 03 July, 2020 has also reminded the Respondent that the Debtors of the Corporate Debtor are among the assets of the Corporate Debtor secured with it and any payments received from Debtors pertaining to the period prior to 08 August, 2017 vest with the Applicant. As

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per the receipts and payments account statement for the period 14 February, 2018 to 31 December, 2019, Rs.27,54,287/- has been received in this period alone from Sundry Debtors.

4. Submissions by the Ld. Counsel appearing for the Respondent

- i.* The Applicant vide its letter dated 30 October, 2019, after the discussion, agreed to pay the CIRP Cost of Rs.42,84,597/- to the Respondent. The CIRP Cost was paid by the Applicant in two instalments, details of which are as follows;

<i>SI. No.</i>	<i>Details</i>	<i>Amount</i>
i.	NEFT on 23 October, 2019	Rs.22,00,000/-
ii.	NEFT on 15 February, 2020	Rs.20,00,000/-

- ii.* The Application has been filed with malafide intention. The concerns raised by the Applicant in this Application were also raised in their letter dated 05 February, 2021, and the same were duly addressed by the Respondent in its letter dated 17 February, 2021.
- iii.* As envisaged under 5(13) of the Code ‘*Insolvency Resolution Process Costs*’ means— (a) the amount of any interim finance and the costs incurred in raising such finance; (b) the fees payable to any person acting as a resolution professional; (c) ***any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern***; (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and (e) any other costs as may be specified by the Board;
- iv.* Further as per Regulation 31 of Insolvency And Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016;
- “31. Insolvency resolution process costs” under Section 5(13)(e) shall mean- (a) amounts due to suppliers of essential goods and services under Regulation 32; (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d); (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;*

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

- v. As per the Circular No.IBBI/IP/013/2018 dated 12 June, 2019 it directs only the Insolvency Resolution Process Cost to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be. The said circular stipulates the process of recovering any unpaid insolvency resolution process cost (IRPC), if any. The share of IRPC to be paid by the secured creditor realizing the security interest independently is not governed by this circular nor by the Section 30 or Section 53 the Code. The share of IRPC falling to the share of the Secured Creditor and recoverable from it, is governed by the provisions of Section 52 (8) of the Code, which says as follows:

“(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.”

- vi. The Respondent received the intimation with respect to the secured assets situated at Plot No 22 UPSIDC Industrial area, Sikandrabad, District Bulandshahr UP- 203205 vide the letter dated 28 March, 2018 by the Applicant. The same letter was responded to by the liquidator vide his letter dated 17 April, 2018 intimating the Secured Creditor of the fact that there is no party which has shown interest with respect to the advertisement put out by him and advised the Secured Creditor that it can sell it on its own, at a price not less than the offer shared by it with the liquidator.
- vii. As per the records of the Respondent i.e., the Liquidator, the calculation of the amount due/Refundable is as under:

<i>Vivid Excess Amount Received</i>			
A.	Amount Received from Vivid towards CIRP		
	<i>Date</i>	<i>Mode</i>	<i>Amount</i>
	04.12.2019	Wrongly credited amount of Jenson & Nicholson Colors Private Limited by UPSRTC	57,403/-
	23.10.2020	NEFT Payment	22,00,000/-

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	13.02.2019	Cheque from Debtor Secures to Vivid	49,500/-
	15.02.2020	NEFT	20,00,000/-
	02.05.2021	Demand Draft	84,497/-
		Total	43,91,400/-
B.	Amount Due to Vivid toward CIRP		
	CIRP Cost		42,71,443/-
	Advertisement Cost		13,054/-
		Total	42,84,497/-
		EXCESS	1,06,903/-

- viii.* The Liquidator vide its letter dated 17 February, 2021 has already confirmed to the Secured Creditor that the amount of Rs1,06;903/- is due to be paid to the Secured Creditor, however, out of the same a sum of Rs 57,043/- belongs to M/s Jenson & Nicolson Colors Private Limited for which the Liquidator has asked the Secured Creditor to get a letter from M/s Jenson & Nicolson Colors Private Limited permitting the Liquidator to pay
- ix.* Further, the Liquidator submits that since he had duly intimated the secured creditor of there being no buyer for the said property, as per the regulations, the provision of Regulation 37 sub-regulation 4, of IBBI (Liquidation Process) Regulations, 2016 would not be applicable in the current case.

“37. Realization of security interest by secured creditor

(1) A secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset.

(2) The liquidator shall inform the secured creditor within twenty one days of receipt of the intimation under sub-regulation (1) if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation under sub-regulation (1), at a price higher than the price intimated under sub-regulation (1).

(3) Where the liquidator informs the secured creditor of a person willing to buy the secured asset under sub-regulation (2), the secured creditor shall sell the asset to such person.

(4) If the liquidator does not inform the secured creditor in accordance with sub-regulation (2), or the person does not buy the secured asset in accordance with sub-regulation (2), the secured creditor may realize the

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secured asset in the manner it deems fit, but at least at the price intimated under sub-regulation (1).

(5) Where the secured asset is realized under sub-regulation (3), the secured creditor shall bear the cost of identification of the buyer under sub-regulation (2).

(6) Where the secured asset is realized under sub-regulation (4), the liquidator shall bear the cost of incurred to identify the buyer under sub-regulation (2).

(7) The provisions of this Regulation shall not apply if the secured creditor enforces his security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) or the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993).”

- x. The Liquidator clearly specified in its letter dated 17 April, 2018 that the cost of such advertisement shall need to reimburse to the liquidator under the provision of regulation 37 of IBBI (Liquidation Process) Regulations, 2016.
- xi. The conduct of the Applicant clearly shows that it had agreed to and had no objection in paying its share towards CIRP Cost and advertisement Cost. The Applicant, who is also the Secured Creditor, did not dispute this aspect at the time before realizing the secured asset through sale.

Analysis & Findings

- 5. We have heard the Ld. Counsel appearing on behalf of the Applicant and the Ld. Counsel appearing on behalf of the Respondent and perused the records.
- 6. After becoming aware of the liquidation process Regulations issued on 29 June, 2018 it is clear that the cost of the liquidation as deemed by the liquidator and as paid by him does not correspond to the said Regulations. He has referred the circular from IBBI dated 12 June, 2018 to support his case. He has referred us to point No. 7 ‘c’ of the circular which states that only the IRP to the extent not paid during the CIRP from the internal resources of the Corporate Debtor thereby made in a manner provided in Section 30 or Section 53, as the case may be needs to be contributed.
- 7. Ld. Counsel for the applicant has also led us to page 16 para 35 of the pleadings whereupon his requirement the liquidator has given a break up of the CIRP cost which shows that the said amount of Rs. 44,13,560/- comprises of GST paid depreciation and other expenses

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S. No.	Particular	Amount
1	GST Paid	Rs. 24, 56,785/-
2	Depreciation	Rs. 9,14,838/-
3	Other Expenses	Rs. 10,41,937/-
Total		Rs. 44,13,560/-

8. Ld. Counsel appearing for the liquidator states that whereas this said circular dates back to 12 June, 2018 despite that the payment has been released by the applicant which later in two tranches of 25 Lacs and 20 Lacs respectively and therefore he has acquiesced to the proposal of the liquidator and as such he is estopped from raising the instant claim at this stage.

9. We have heard the Ld. Counsel and perused the record. The liquidator in his written notes as well as in the reply affidavit has emphasized the point of estoppel. We deem it appropriate to first deal with this aspect .The liquidator (respondent herein) has cited (2011) 10 SCC 420 between Cauvery Coffee traders Mangalore Vs. Horner resources to impress upon his contention that the applicant is estopped , since he had first made the payment and merely by writing the words “ Without Prejudice” he can not now blow hot and cold at the same time. This contention has been rightly negated by the applicant by citing (2022) 8 SCC 712 between Krishna Rai(Dead) through legal representatives V. Banaras Hindu University wherein it has been held at para 24 ... “ It is settled principle of estoppel cannot override law”. This assertion is actually supported by the case law cited by the liquidator himself where it has been inter-alia held as under

“2. In R.L. Kalathia v. State of Gujarat, (2011) 2 SCC 400, this court considered a similar issue and held:

(i) Merely because the contractor has issued "no- dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising

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claims which are genuine at a later date even after submission of such "no-claim certificate.

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning 'without prejudice' or by issuing "no-dues certificate."

Thus there is no substance in the contention of the liquidator that since the applicant has already paid the money, he can not claim a refund just because this wisdom dawned on the applicant at far too late a stage.

- 10.** In regard to the table above, which is given on page 16 of the application in reply to the Applicant's supplementary affidavit, emailed on 07.04.2021 by the respondent in Para 7 we observe that while the payment of GST is a verifiable expense, for which necessary documents should be shared with the applicant, being a secured creditor and an affected party. Regarding the depreciation we tend to agree with the applicant that the Depreciation is not an expense and should not be shown as a CIRP expense. This amount needs to be refunded forthwith.
- 11.** In regard to the expenses of Rs. 13,054 on account of Paper advertisements, the same has also to be considered as a CIRP cost in so far as the current issue at hand is concerned and must be given the same treatment as given to other CIRP expenses.
- 12.** We are constrained in making comment on the 'Other expenses', as no details have been furnished. It would behove that this expense is approved by the CoC, after taking into consideration various heads under which these expenses have been made. This is essentially required for the reasons of transparency, particularly when the applicant has asserted that the same amount has been shown in the profit and loss account of the balance-sheet of the relevant period which inter-alia means that the liquidator has tried to recoup the losses made by the Corporate Debtor thus far from the Financial Creditor which is a violation of the said circular of the spirit of IBC.

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- 13.** In this regard we make it clear that only legitimate expenses as mandated by law are to be included in the CIRP expenses, and even though the applicability of the IBBI circular has been contested on the point of its manifestation on a particular date, the ingredients mentioned there in are in rem and should be followed considering the provisions of Regulation 34A of the CIRP regulations. This is also borne out of the stipulations of regulation 39B(3) of the CIRP regulations, which provides that in case the estimated value of the liquid assets under sub-regulation (2) is less than the estimated liquidation costs under sub-regulation (1), the committee shall approve a plan providing for contribution for meeting the difference between the two. This stipulation also supports the assertion of the applicant that as long as the CIRP costs can be met with from the internal resources of the CD, there should not be any need for such a contribution by the creditors.
- 14.** In view of the above, we hereby direct the liquidator to carry out a reconciliation of the account outlining the CIRP expenses and the accruals to the CD during the relevant period, with a copy provided to the applicant and refund the eligible amount as brought out herein above to the applicant. For removal of doubt, it is clarified that only that amount as falls short of total cash accruals and deposits that the CD may have, shall be contributed by the financial creditors towards the CIRP/liquidation cost and excess if contributed must be refunded.
- 15.** IA 116/KB/2022 is disposed off accordingly, with liberty to the applicant to approach this Adjudicating Authority in case of any difficulty in implementation of the above.
- 16.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This order is pronounced on 16th day of May, 2023

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