

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.545 of 2019

[Arising out of Order dated 07.03.2019 passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad in IA No.673/2018 in CP (IB) No.294/7/HDB/2017]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Mr. R. Balarami Reddy
S/o Sri R. Audisesha
Reddy,
R/o Plot No.D-116,
Road No.8,
Hill Ridge Villas,
Gachibowli,
Hyderabad – 500032

Applicant

Respondent

Versus

Mr. Sutanu Sinha,
Resolution Professional
of IVRCL Limited
Floor No.4,
Duck Back House,
41, Shakespeare Sarani,
Kolkata – 700017

Appellant

Respondent

For Appellant:

**Shri Sumesh Dhawan and Ms. Vatsala Kak,
Advocates**

For Respondent:

**Shri Niraj Kumar and Shri Shashank Agarwal,
Advocates**

J U D G E M E N T

(27th January, 2020)

A.I.S. Cheema, J. :

1. The Appellant filed Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating

Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) numbered as IA No.673/2018 in CP (IB) No.294/7/HDB/2017. The matter related to insolvency proceedings with regard to Corporate Debtor – IVRCL Ltd. of Hyderabad. The Appellant has given particulars as to how the Appellant came to be appointed as General Manager Finance of the Corporate Debtor in 1994 and was subsequently appointed as Director in the Board and designated as Director - Finance. According to him, he had additional charge as Company Secretary in 1999 and was re-designated Director – Finance and Group Chief Financial Officer in 2005 and promoted as Executive Director Finance and Group CFO in 2008. He claimed that he was reappointed Executive Director Finance in 2013. The Appellant claimed that the amount paid as salary to the effect of Rs.33,84,835/- for period 26.09.2013 to 30th June, 2014 had been recovered by the Corporate Debtor from him in November, 2017. He had been promoted as Joint Managing Director with 10% increase in salary which had been approved by lead lender State Bank of India. According to the Appellant, salary recommended by Nomination and Remuneration Committee of the Board was approved by AGM in September, 2016 but the same was not paid for period of June, 2016 to June, 2017. Salary paid from July, 2017 was recovered back by the Corporate Debtor to the extent of Rs.21,69,702/-.

2. The Appellant claims that when CIRP process started, he submitted Form – D (Annexure 2 – Page 52) to the Resolution Professional claiming

amount of Rs.1,06,28,584/-. According to him, in February, 2018 while others were paid, he was not paid. Appellant claims that he repeatedly moved Respondent – Resolution Professional to release his salary but was told that the matter was before COC and later sent e-mail dated 21.05.2018 that managerial remuneration in excess of approved prescribed limit under the Companies Act, cannot be paid in the absence of approval of Central Government.

3. The Appellant claims that his Application was considered by the Adjudicating Authority but the Adjudicating Authority wrongly rejected the same.

4. The Respondent – Resolution Professional has filed Reply and stated that with the Form – D, the Appellant claimed dues payable prior to the commencement of CIRP. The same was placed before COC and after deliberating the payment of the salary arrears in the COC meeting, the Respondent had sent e-mail dated 21st May, 2018 informing that considering the provisions of the Companies Act, 2013, in the absence of approval from Central Government or a 'No Objection Certificate' from the lenders, the remuneration paid in excess to the amount prescribed under the Companies Act, cannot be released in favour of the Appellant. The Respondent has referred to provisions of Section 197(1) of the Companies Act, 2013 to state that remuneration higher than the amount prescribed under the said Section required approval of the Central Government. According to the Respondent, the Corporate Debtor had earlier proceeded

on the basis that Central Government would give the requisite approval under Section 197 of the Companies Act, paid the Appellant remuneration in excess of what was permissible under the said Act with effect from June, 2017. The same was shown in the books of accounts of Corporate Debtor as advance/recoverable from the Appellant. The Respondent has stated that on earlier occasion, the remuneration paid in excess to the Appellant, in anticipation of the approval of the Central Government/NOC from the lender, was actually recovered to the extent of Rs.33,84,835/- in November, 2017. Yet, again remuneration in excess was paid from July, 2017 which was recovered by the Corporate Debtor amounting to Rs.21,69,702/-. The Respondent claims in Reply and it has been argued that the Appellant was aware that excess remuneration was being paid and had even agreed to repay the excess in absence of approval from Central Government/NOC from lender. According to the Resolution Professional, Corporate Debtor being non-performing asset, the Central Government directed the Corporate Debtor to obtain approval from the lenders of the Corporate Debtor under Schedule V of the Companies Act. According to the Respondent - Resolution Professional, the lenders did not approve the payment of such remuneration to the Appellant. The RP has referred to the resolution of COC dated 26th April, 2018 (Annexure A – Diary No.13436) to show that COC did not approve the excess payment. Resolution Professional has stated that to file Application for approval of managerial remuneration, he had informed COC in the 6th meeting held on 07.08.2018 to make requisite application for approval to the Central Government but

the said resolution was rejected. For the period of CIRP process, the remuneration as approved for CFO was, however, paid.

5. We have heard Counsel for both sides. They have made submissions on above lines referring to the contents in the Appeal and as appearing in the Reply filed by Resolution Professional. The Adjudicating Authority in Paragraphs – 25 and 26 of the Impugned Order observed as under:-

“25. With regard to the admission of claim of the Applicant for the period prior to CIRP, this Adjudicating Authority has found that the said excess remuneration to the Applicant was only on anticipation by the Applicant that the Lenders and Government would approve the same, but the Lenders have not approved the same. This Adjudicating Authority is not empowered to interfere the sanity of the decision of the Lead Banker with regard to the approval by the Lenders for managerial remuneration in excess of the prescribed limits for further approval by the Central Government for all remuneration payments in excess of the prescribed limits under provisions of Companies Act, 2013, prior to the initiation of the CIRP.

26. In view of the above observations, this Adjudicating Authority directs the RP to make payment of salary to the Applicant for the services provided during the CIRP period and further admit the claim of the Applicant to the tune of amount not admitted in relation to transaction with Indravati Investments Private Limited of which the Applicant was Director but not to the tune of amount which was paid by CD in excess on anticipation that Lender and Central Government would accord its permission and which is also shown as receivable in the books of Accounts of the Corporate Debtor.”

6. We have gone through the matter and considered the submissions of the Resolution Professional while informing rejection to the Appellant. In the e-mail dated 21st May, 2018, the Resolution Professional mentioned to the Appellant as under:-

“Dear Sir,

I refer to the From D submitted by you under which an amount of INR 1,06,28,584 (Rupees One Crore Six Lakh Twenty-Eight Thousand Five Hundred and Eighty-Four only) (Claim Amount) has been claimed by you from IVRCL Limited (Company).

Based on the current legal position under the Companies Act, 2013, managerial remuneration in excess of the prescribed limits thereunder, cannot be paid by the Company, unless Central Government approval has been received for all remuneration payments in excess of the prescribed limits. Further, if any excess payments have been made by the Company to any managerial person, then such person is required to refund such payments to the Company. In the present case, no Central Government approval is available in connection with the abovementioned points.

Accordingly, the Claim Amount (whether it relates to excess remuneration refunded by you or amounts withheld by the Company) is hereby rejected.”

7. It is matter of record that COC dealt with the claim of the Appellant in meeting dated 26.04.2018 as well as 07.08.2018 but did not support the Appellant with regard to his claim for salary in excess of what is permissible under Section 197 of the Companies Act. The Appellant appears to have been aware that he was drawing excess salary which was being picked up on the basis that approval of Central Government was

awaited and on two occasions, admittedly the excess drawn was returned. Being in managerial position, this may have happened in the Company (which is now stated to have gone in liquidation) because of being related party. The Appellant was related party as reflected from the minutes of COC meeting dated 26.04.2018 (Annexure - A of Reply) in Item No.9. The COC which includes the lead and other lenders did not approve and there is nothing to show that Central Government permitted payment of excess remuneration and when this is so, there appears to be no reason to find fault with the Impugned Order and we do not find any reason to interfere. We do not find any substance in the argument that it was responsibility of this Resolution Professional to move the Government for necessary permission. When the claim is submitted in Form – D, the amount claimed must have support from record to spell out dues payable and the Applicant cannot expect the Resolution Professional and COC to go and get the necessary permissions. There is no substance in the Appeal.

The Appeal is dismissed. No orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md