

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No. 886 of 2019

IN THE MATTER OF:

Umaia Shanmuga Pandian & Anr.

...Appellants

Versus

EPC Constructions India Ltd.

...Respondent

(formerly known as Essar Projects India Ltd.)

Through its Resolution Professional Abhijit Guhothakurta

**For Appellants: Ms. Malvika Kalra and Shri Pranav Sarthi,
 Advocates**

For Respondent: Shri Aakarshan Sahay, Advocate

O R D E R

15.11.2019 1. Heard Advocate - Ms. Malvika Kalra for the Appellant and Shri Aakarshan Sahay for the Respondent/Resolution Professional. This Appeal has been filed by the Appellants who claim to be employees against Impugned Order dated 2nd August, 2019 passed in MA 680/2019 in CP No.1832/IBC/NCLT/MB/MAH/2017. The matter relates to insolvency proceedings initiated by IDBI Bank Ltd. against EPC Constructions India Ltd. – Corporate Debtor. The Section 7 Application is stated to have been admitted on 20th April, 2018. The Respondent was appointed as Resolution Professional.

2. The Impugned Order was passed in MA 680/2019 filed by the Appellants seeking stay to the hearings on approval of Resolution Plan and seeking order to ensure payment of outstanding dues. The Appellants claimed

that under the HR Programme, the Corporate Debtor has a pre-defined HR policy with Annual Performance Linked Incentive (APLI) which was being followed by the Corporate Debtor for several years. The APLI policy varied from 12% to 40% of the total salary depending on the grade of the employee and performance of each of the employees was measured in terms of the employee's achievement against targets in the given financial year. The Appellants claimed and are claiming before us also that APLI was inseparable component of employee's total salary. The Appellants state that they have received APLI for financial year 2016 – 2017 but the same had not been paid for the financial year 2017 – 2018 since CIRP process started. They claim it even for 2018 – 2019.

3. Before the Adjudicating Authority, the RP represented and the Counsel for the Resolution Professional is also submitting before us that entire salary of the employees which arose and accrued during the CIRP period including of statutory payments which includes contribution under the terms of Employees Provident Fund Act, 1952 and National Pension Scheme, have been paid. The RP Stated before the Adjudicating Authority that the RP has ensured payment of statutory bonus for 2017 – 2018.

Counsel for Resolution Professional states that the statutory bonus for the financial years 2017 – 2018 has already been paid.

4. The learned Counsel for the Appellant is submitting that the Appellant has filed Rejoinder and referred to para – 7 of the Rejoinder, portion of which is as follows:-

“The objectives of the APLI Policy include “*contribute to the overall delivery of results as per ABP of the Company*”. The Annual Business Plan (**‘ABP’**) of the company is finalized at the beginning of each financial year based on macro factors like industry scenario, competition, economic outlook, market demand & supply etc.; as well as micro factors, like company’s strategy and long term plans, resources at disposal, financial strengths, customers, etc. It is pertinent that the profit/loss are only one of the criteria given weightage to in the ABP. As already explained, the ABP is a business plan prepared by management at the beginning of each financial year considering macro and micro factors. In the ABP, the revenue and cost on account of exceptional and extraordinary items are not considered, as these cannot be anticipated at the beginning of the financial year. Further more, it is not necessary that the performance target for a particular year be one of profit only. Sometimes, one of the performance targets can be a loss figure too. In fact, as per the ABP of FY 2017-2018, one of the targets i.e. PBT was Rs.350 crore loss. It is significant that the target itself was a loss figure. The actual PBT was Rs.2,167 crores loss. However, this included a one-time, and exceptional cost aggregating to Rs.1,573 crores. This figure is not to be considered for like to like comparison with the ABP set out at the beginning of the financial year. Thus, it has not been considered in the performance evaluation for FY 2017 -2018 at the end of the year.”

5. The learned Counsel referring to the above paragraph of the Rejoinder is submitting that the Annual Business Plan is material and the Annual Business Plan sets out the targets for the employees and when the employees achieve the targets, they are entitled to the APLI. It is stated that the CPO of the Company sent note for approval to the IRP (this is, after start of the CIRP process) recommending release of employees APLI payment for financial year 2018 -2019. The document pointed out is at Page – 197 of the Paper Book. Relying on the same, the Counsel submitted that APLI should have been released for the employees. According to the learned Counsel, it forms part of

the component of salary and reference to letter of 27th April, 2007 (Page – 51) was made to show as to how compensation had been arrived at.

6. The learned Counsel for the Resolution Professional referred his Affidavit (Diary No.14435) where the Resolution Professional has mentioned:-

“It is hereby submitted that while as on the Insolvency Commencement Date there were 477 employees and 3 advisors working for the Corporate Debtor, as on date, the number of employees of the Corporate Debtor has reduced to – 163. It is apposite to mention that the Respondent by way of an Affidavit-in-Reply to the Miscellaneous Application 680/2019 in CP No.1832/IBC/NCLT/MB/MAH/2017 filed by the Appellant before the Adjudicating Authority, has stated before the Adjudicating Authority, as also duly recorded in the order dated 02.08.2019 issued by the Adjudicating Authority, that the entire component of salaries of all employees of the Corporate Debtor who are working, that has arisen and accrued throughout the duration of the corporate insolvency resolution process (“**CIRP**”) has been paid, including all statutory payments such as contributions under the terms of the Employee’s Provident Fund Act, 1952, contributions to the National Pension Scheme, and payment of the statutory bonus for F.Y. 2017-18 as per the Payment of Bonus Act, 1965. It is herein submitted that as on date the entire component of salaries of all employees of the Corporate Debtor who are working, that has arisen from the Insolvency Commencement Date till the month of August 2019 has been paid, including all statutory payments such as contributions under the terms of the Employee’s Provident Fund Act, 1952, contributions to the National Pension Scheme, contributions to the superannuation fund and payment of the statutory bonus for F.Y. 2017-18 as per the Payment of Bonus Act, 1965. A break up of the components of the employee’s salary being paid by the RP on a monthly basis is as below:

- Salary in hand i.e. Net Salary disbursed directed to the employees (includes various components of Salary like Basic Salary, House Rent Allowance, other Allowances);
- Contribution towards Employee Provident Fund;

- Contribution towards National Pension Scheme;
- Contribution towards superannuation fund;
- Taxes Deducted at Source from Employee's Salary;
- Food Coupons and Wallet Payments;
- Business Expense Reimbursement"

7. The learned Counsel for Resolution Professional arguing on the above lines is submitting that APLI cannot be stated to be part of the salary and it is based on the performance. The Counsel has submitted that he has filed copy of the Policy relating to APLI which is filed at Annexure – R1 of the Affidavit and it is stated that in the Affidavit, relevant clauses of the Policy are referred as follows:-

- a.** Clause 4 of the APLI dealing with 'Eligibility' states that "APLI is a part of the employees total compensation as shown on their appointment letter or annual increment letter, payable strictly on the basis of individual performance and company performance, as determined each year after the competition of Annual Performance Review Process".
- b.** Clause 7(1) of the same further amplifies the discretionary nature of APLI in stating that "The Company makes decisions on Annual Performance Linked Incentive based on absolute and relative performance of the Company / employees' respective division/ function, as well as pre-agreed individual performance objectives of employees".

8. We have seen the Policy (Annexure – R1) also. The Counsel for the Resolution Professional is submitting that eligibility for APLI is based on individual performance as well as the Company performance and admittedly

in 2017 – 2018, the Company suffered losses of Rs.2167.23 Crores and thus APLI was not due and not payable.

9. Learned Counsel for the Appellant is claiming that the employees did what they could and they performed and if the Company did not perform, they should not be made to suffer.

10. Going through the material available and hearing the submissions and keeping in view the policy concerned, when it can be seen that APLI is linked with not merely performance of the employees but also the Company and when the Company is in loss, it would be too much to expect that APLI should have been paid. Again, as the Policy shows it is also linked with “pre-agreed individual performance objectives of employees” also. Learned Adjudicating Authority has mentioned in the Impugned Order – paragraphs 9 and 10 as follows:-

- “9. We have gone through the submission made by the applicant as well as the RP. Prima Facie, it is understood that the major part of the dues of the employees has already been paid by the RP. What is being sought by the employees is over and above the salaries, an amount which depends upon the individual employees’ performance and the performance of the Corporate Debtor. It will not be correct to say that APLI is an integral part of the employees’ salary as the APLI policy of the Corporate Debtor is based on the absolute and relative performance of the Corporate Debtor as well as the individual employee’s performance.
10. The RP has mentioned in his written submissions that during 2016-17 and 2017-18, the Corporate Debtor’s Company made a loss of ₹3,500 crores and ₹2167.23 crores respectively and had defaulted on contractual obligations also. Therefore, it would be unfair to press for performance linked payment to employees which

in terms of policy is, inter-alia, majority dependent upon the financial health and cash flow of the Corporate Debtor. Since, the Corporate Debtor was insolvent and cash flow was precarious, the employees cannot press for the payment of APLI.”

11. We do not find that there is any reason to take a different view. As the name itself suggests, it is performance linked and the policy as is pointed out to us shows performance linked not only to the employees but also to the Company, for the employees to be eligible. We do not find any reason to interfere with the Impugned Order. The Appeal is dismissed. No costs.

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

[Kanthi Narahari]
Member (Technical)

/rs/md