

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 846 of 2019

[Arising out of an order dated 26th July, 2019 passed by NCLT, Chandigarh Bench, Chandigarh in CA No. 171/2019 in CP(IB) No. 102/Chd/CHD/2018]

IN THE MATTER OF:

Orbit Lifescience Private Limited

7th Floor, Mehta Mahal,
15 Mathew Road, Opera House,
Mumbai- 400 004

.. Appellant

Versus

Raj Ralhan,
(RP of the CD)
PwC Professional Services LLP,
Building 10, 17th Floor, Tower C
DLF Cyber City,
Gurgaon – 122 002

.. Respondent

Present:

For Appellant: Mr. Rajiv Ranjan, Sr. Advocate along with Mr. Anirudh, Advocates

For Respondent: Mr. Sumesh Dhawan and Ms. Vatsala Kak, Advocates

Judgement

(4th February, 2020)

A.I.S. Cheema, J:

This Appeal has been filed by Orbit Lifescience Private Limited which had moved Application CA No. 171 of 2019 claiming to be Intervener in Insolvency proceeding – CP(IB) No. 102/Chd/CHD/2018. Appellant sought release of raw material/stock lying at the plant of

Corporate Debtor as belonging to it and sought further directions. The original proceedings were initiated by Operational Creditor M/s Weather Makers Pvt. Ltd. against the Corporate Debtor M/s Parabolic Drugs Ltd. who filed an Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') dated 23.08.2018. The Application filed by Appellant was disposed of by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench), Chandigarh passing the following operative order dated 26.07.2019:

...

"21. In the light of the discussion made above, next is the applicability of Section 18(1)(f). This issue is now settled by our order dated 26.04.2019 (*supra*). Following the ratio laid down and considering the evidence on record as well as the pleadings of the respective parties, **we hereby hold that the explanation annexed to Section 18(1) is to be applied.** The impugned asset shall not be treated as a property of the Corporate Debtor. The asset in question being owned by a third party but in possession of the R.P., that too due to a Contractual Arrangement, must not be retained but to be returned. So we hereby hold that the stock in question, being undisputedly perishable, is to be returned to the Intervener urgently. Side by side, we hold that the Intervener is required to reimburse to the Resolution Professional the Pre-CIRP cost incurred amounting to ₹ 2.30 Crores(apx.) being an expenditure agreed upon as per

Clause 11.2 of the said Agreement. On one hand the said payment be transferred by the Intervener to the account of the Corporate Debtor, on the other hand, the Resolution Professional is hereby directed that the delivery of stock be executed by handing over to intervener or its representative. Expenditure of transportation etc., if any, be borne by the Intervener. It appears that there should not be any misunderstanding among the parties about the impugned stock, because the same is claimed to have been earmarked by the stock auditor.

Before we part with, it is advisable to direct Resolution Professional to further take into account the position of stock and if possible segregate between pre and post moratorium. If the expenditure has nexus with pre-moratorium, the same is to be excluded out of the CIRP cost. The adjustment/set-off is to be made only for those expenditure which has relation to the stock supplied pre commencement of CIRP. “

...

[Emphasis supplied]

2. The present Appeal has been filed by the Appellant mainly seeking following reliefs:

..

(a) Notwithstanding any other issues concerning the alleged pending dues or otherwise, and considering

the perishable nature of the Raw Materials/Stock, pass appropriate orders for the immediate release of the Raw Materials/Stock lying with the Corporate Debtor;

(b) Pass appropriate orders to set aside the RP's claim for the alleged dues;

(c) Pass appropriate orders directing the RP to accept the difference amount in Debtor's Account and add the same to the admitted claim of the Appellant;

(d) Pass appropriate orders directing the RP to compensate the Appellant for the damages incurred by the Appellant on account of delay caused by the R.P. till date of release of goods which in turn has deteriorated the conditions of the Raw Materials/Stock."

[Emphasis supplied]

3. In short, the case of the Appellant is that on 01.05.2018 a Bailment Agreement was executed between the Appellant and the Corporate Debtor. In view of the Bailment Agreement, the Appellant was to deliver Raw Material/Stock to the Corporate Debtor for converting the same into finished products. The Corporate Insolvency Resolution Process (in short '**CIRP**') was initiated on 23.08.2018 and on 15.11.2018 the Appellant filed Form-B (Annexure-E, page-108) with the Resolution Professional. The Appellant claims that out of the claim filed by the Appellant, Resolution Professional rejected claim of approximately Rs. 8 Crores, due to

shortcomings of the Accounts Team of the Corporate Debtor. According to the Appellant, as per the Bailment Agreement (Annexure-B page 52), Appellant had delivered Raw Materials/Stocks to the Corporate Debtor before CIRP started. The said stock is perishable in nature with Expiry Date. When CIRP started, the Appellant requested IRP for permission to remove the said Raw Materials/Stocks as the same were exclusively owned by the Appellant and moratorium did not apply to the same stocks. It was denied and consequently Intervention Application was required to be filed for immediate release of goods and to direct Resolution Professional to release admitted dues.

4. It is stated that in Form-B, the Appellant claimed Rs. 16,06,33,009/-. The statement of the Appellant was published as Operational Creditor on the website of the Corporate Debtor and the Appellant realised that only a part of the claim had been admitted by the Resolution Professional. According to the Appellant the bifurcation of the claim submitted and the amount admitted are as follows:

Sr. No.	Type of Claim	Amount of Claim (in Rs.)	Comments	Admitted Amount (In Rs.)	Difference Amount (in Rs.)
1.	Debtor's Account	11,01,32,696/-	(hereinafter referred to as the "Account Claim")	8,08,40,571/-	2,92,92,125/-
2.	Raw Materials/ Stocks	5,05,00,313/-	(hereinafter referred to as the "Stock Claim")	3,53,64,529/- (this much worth of Raw Materials/Stocks already retrieved)	1,51,35,784/- (the value of these raw materials/stocks still lying with Corporate Debtor)
	TOTAL	16,06,33,009/-		11,62,05,100/-	4,44,27,909/-

5. The Appellant claims that reasons for rejecting the difference amount was due to Books of Entries of the Corporate Debtor and he was told that Debtor's account was missing from the Books of the Corporate Debtor. The Appellant claimed that in spite of efforts put in by the Appellant, the Resolution Professional did not agree to release the claim. The Appellant applied to the Resolution Professional to recover Raw Materials which were lying at the Plant of the Corporate Debtor but he could not get back the Stocks and the Committee of Creditors (in short 'CoC') did not accord permission to remove Raw Materials/Stocks lying with the Corporate Debtor. CoC on 05.01.2019 passed resolution to appoint Stock Auditor for conducting stock audit and verify the stocks. The Appellant claimed that the stocks lying had expiry date after which it would lose value. According to the Appellant, the Adjudicating Authority in the Impugned Order raised following two issues as under:

- b) *"The Hon'ble Tribunal may be pleased to pass an order directing the Corporate Debtor/RP/COC to release the Intervener's raw material/stock lying at the Corporate Debtor's plant immediately.*
- c) *The Hon'ble Tribunal may be pleased to pass an order directing the Corporate Debtor/RP/COC to accept the Difference Amount and add the same to the admitted claim amount of the Intervener."*

6. The Appellant is submitting that although the Impugned Order is in favour of the Appellant with regard to the issue mentioned in "b", the

issue referred as “c” was not decided and the conditions put in paragraph-21 of the Impugned Order should not have been put.

7. The Resolution Professional has filed reply and it is argued by the Resolution Professional that in terms of clause 11(2) of the Agreement dated 01.05.2018, the Appellant had agreed to pay all monthly expenses to run the plant i.e., power, salary, consumable and other routine items. The Resolution Professional has claimed that as per Books of Accounts of the Corporate Debtor between May, 2018 to August, 2018, the Appellant paid an amount of Rs. 1,34,60,644/- towards the expenses payable in terms of the Agreement but that balance amount of Rs. 2,22,39,356/- alongwith an amount of Rs. 31,86,651/- paid from cash flows of the Corporate Debtor towards salary expenses in the month of September in terms of the Agreement is still pending to be cleared by the Appellant. Resolution Professional states that the issue of dues payable by the Appellant was taken up in the first meeting of CoC on 27.09.2018 and CoC was informed that non-payment of dues by the Appellant to the Corporate Debtor was adversely affecting the liquidity of funds. It is also stated that the CoC in Fourth Meeting dated 05.01.2019 objected to the request of the Appellant for returning of goods on the ground that as per the Agreement, the Appellant was required to pay the running expenses (including electricity dues) which it failed to honour and in view of the same the Appellant should not be permitted to take stock lying with the Corporate Debtor.

8. It is the further defence of the Resolution Professional that CoC was informed on 07.03.2019 that aggregate amount of Rs. 2,54,26,007/- as due till September, 2018 which was yet not paid by the Appellant towards the operational expenses incurred on account of manufacturing of goods belonging to the Appellant for the period starting from 01.05.2018 till 30.08.2018 along with an amount of Rs. 31,86,651/- paid from the cash flows of the Corporate Debtors towards salary expenses for the month of September in terms of the Agreement. As per Resolution Professional, CoC resolved that the Appellant should clear the outstanding dues of the Corporate Debtor in terms of the Agreement dated 01.05.2018 before the issue of return of goods belonging to the Appellant could be taken up.

9. The Resolution Professional has further taken a stand as per Section 170 of the Indian Contract Act, 1872, that the Corporate Debtor has right to retain the Raw Materials provided for converting the Raw Materials into finished product as the Appellant has not cleared the pending dues. It is further argued by the Resolution Professional that the Appellant did not press the difference amount before the Adjudicating Authority and it was only now that the same is being pressed. From the claim submitted in Form-B, the Resolution Professional could verify the claim of Rs. 8,08,40,571/- in terms of the supporting documents and Books of Account of the Corporate Debtor.

10. At the time of argument before us for the Resolution Professional it has been further submitted that the Appellant never came to the Resolution Professional after the Impugned Order was passed and now

the Resolution Plan has been approved and thus there cannot be any order which would de-rail further developments.

11. We have gone through the matter and heard learned Counsel for both the sides. We have carefully gone through Impugned Order and we notice that the Adjudicating Authority has painstakingly discussed in full the cases put up by the parties and after due analysis of the provisions of Sections 14 and 18 found that there were goods owned by the Appellant lying at the plant of the Corporate Debtor but at the same it also found that there were dues payable by the Appellant. There was some overlapping as the Appellant appears to have acted in terms of the Agreement dated 01.05.2018 between 22.06.2018 to 04.10.2018. It must be remembered that Section 9 Application was admitted on 23.08.2018 and thus there were occasions which were required to be taken note with regard to pro or post moratorium. In view of this, the Adjudicating Authority passed orders as noted in paragraph -21 which has been reproduced above. We do not find that the Appellant can find fault with the Resolution Professional if the claim as made by the Appellant did not get support from the Books of Accounts of the Corporate Debtor. At the time of argument, learned Counsel for the Resolution Professional submitted that as there were dues payable by the Appellant, the Corporate Debtor could exercise lien on the goods which were available with the Corporate Debtor and thus, according to the learned Counsel, the Adjudicating Authority rightly protected the interest of the Appellant as well as Corporate Debtor by directing that while returning the goods,

side by side the dues payable by the Appellant should come to the Corporate Debtor. Having gone through records and Impugned Order, we do not find any fault with the directions of the Adjudicating Authority as recorded in paragraph-21 of the Impugned Order. The actions taken by the Resolution Professional were placed before the CoC and even CoC had found that the Appellant should clear the outstanding dues of the Corporate Debtor before goods could be returned. We do not find any reason to interfere with the decisions taken by the Resolution Professional, CoC and the Adjudicating Authority to protect the interest of the Corporate Debtor while considering the interest of the Appellant.

12. There is no substance in the Appeal. Appeal is dismissed. No order as to cost.

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

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

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