

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -II**

IA No. 2300/2023

In

C.P. (IB) No. 4676/MB/2018

Under Section 60(5) of Insolvency and
Bankruptcy Code, 2016

1. Kalyan Janata Sahakari Bank Ltd.

Having address at- Om Vijaykrishna
Apartments, Adharwadi, Kalyan (West)-
421301

2. Thane Bharat Sahakari Bank Ltd.

Having address at- Ground Floor,
Sahayog Mandir, Sahayog Mandir Path,
Ghantali, Thane- 400602

.... Applicants

Versus

Arun Kapoor,

**Resolution Professional of CICIL
Biochem Private Limited**

Having address at- C-703, Marathon
Innova, Off G.K. Marg, Lower Parel West,
Mumbai- 400013

.... Respondent

In the matter of

Kalyan Janata Sahakari Bank Ltd.

...Financial Creditor

Versus

Cicil Biochem Private Limited

...Corporate Debtor

Order Delivered on :- 11/03/2024

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**

Appearances:

For the Applicant : Counsel, Devashish Godbole
a/w Omakr Kanegaonkar, Anuj Joglekar

For the Respondent : Counsel, Arjun Sathees

ORDER

Per: - Anil Raj Chellan, Member (Technical)

1. The instant Application has been filed by the Financial Creditors of Cicil Biochem Private Limited ('the Corporate Debtor') seeking a direction with respect to the profits accrued during Corporate Insolvency Resolution Process

('CIRP') period and a direction to withdraw the letter dated 01.02.2023 issued by the Respondent regarding utilization/distribution of the profit accrued during the CIRP period.

Facts leading to the filing of the Application as stated in the Application:-

2. The Corporate Debtor was in the business of oil trading and was admitted to insolvency vide order of this Tribunal dated 01.10.2019 wherein the Respondent herein came to be appointed as Interim Resolution Professional and subsequently as Resolution Professional (RP). During the CIRP, as decided by the Committee of Creditors ('CoC') the facilities in the Corporate Debtor were given on a job work arrangement to M/s. Shri Ganesh Enterprises on a monthly compensation of Rs 5,50,000/- plus GST and electricity expenses at actuals to reduce the CIRP cost and to keep the Corporate Debtor as a going concern.
3. The resolution process culminated in passing of a Resolution Plan in the 9th CoC meeting held on 06.3.2021 with 98.34% voting. In the 11th CoC meeting held on 24.05.2022 ie, much after approval of Resolution Plan, it came be noted that the compensation for job work paid by M/s. Shri Ganesh Enterprises significantly exceeded the total CIRP Costs and thus the question arose with regard to the utilization of this money once the Resolution Plan is approved. Since the Resolution Plan as well as the request for Resolution Plan is completely silent on this aspect, the Respondent, on the basis of a legal opinion, advised the Applicants vide a letter dated 19.01.2023 that the said amount would go to the Resolution Applicant.

4. Under the circumstances, the Applicants have filed the present Application claiming that any profit earned during the CIRP period should go to the Financial Creditors.

Submissions of the Respondent:-

5. The RP of the Corporate Debtor, the Respondent filed his reply and submitted that the letter dated 01.02.2023 was issued as per the legal advice as it is not within the power of the RP of the Corporate Debtor to decide on whom to distribute the surplus amount in the account of the Corporate Debtor. The Applicants have wrongly interpreted the contents of the said letter dated 01.02.2023 to mean that the surplus amounts would go to the Respondent.
6. It is stated that no substantial profits were generated during the period spent in approval of the Resolution Plan by the CoC and hence no decision or deliberation was taken regarding the entitlement to the profits accrued during the CIRP period.
7. The Respondent also referred the decision of the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta wherein it was held that the profits made during the CIRP shall be distributed as per the provisions of the RFRP. It is further submitted that there is no direct legal authority as regards CIRP profits in a scenario where the RFRP and the Resolution Plan are both silent on the allocation of profits generated during CIRP.

Analysis and decision:-

8. We have heard the counsel for the Parties and perused the records.
9. There is no dispute among the parties regarding the letting out of Corporate Debtor's facilities on job work basis to M/s. Shri Ganesh Enterprises during the CIRP period and the compensation received for the job work exceeded the total CIRP costs substantially at around Rs. 77 lakhs. It is also submitted that the RFRP and the Resolution Plan are silent on allocation of profit earned during CIRP and the question regarding the distribution of the said amount arose for consideration for the first time after approval of the Resolution Plan by the CoC at its meeting held on 06.03.2021. In this backdrop, the only issue arising for our consideration is as to how and to whom the profits, earned during CIRP period, should be distributed when the RFRP and the Resolution Plan are silent on the same.
10. It is submitted that the Hon'ble Supreme Court in Essar Case (Supra) held that the profits made during the CIRP shall be distributed as per the provisions of RFRP. The Hon'ble NCLAT in JSW Steel Ltd v. Mahender Kumar Khandelwal & Ors. reiterated that profits made during CIRP shall be distributed in accordance with RFRP as held by the Hon'ble Supreme Court in Essar Case. It is pertinent to note that both the said decisions do not deal with the issue of allocation of profits earned during CIRP when the RFRP and the Resolution Plan are silent. There appears to be no reported decision dealing with this issue.

11. It has also been brought to our notice that the Report of the Insolvency Law Committee dated 20th February, 2020 highlighted the lack of clarity on who should be the beneficiary of such profits. The committee noted two primary views that are generally advanced in relation to the distribution of operating profits generated by a corporate debtor during its CIRP – First, that the creditors of the corporate debtor should generally take up any profit that may have accrued or any loss that the Corporate Debtor may have suffered during the CIRP. This is because payments due towards interest accruing for Creditors' debts are not paid during the insolvency resolution period and losses, if any, suffered due to a fall in valuation of the company are borne by the Creditors by taking haircuts. Second, there is another view that the operating profits that accrue during the CIRP are an asset to the Company and stay within the Company. Thus, when a resolution applicant takes over the Company, it factors in such operating profits, which are reflected in the value of a resolution plan, and hence these are also acquired by the resolution applicant. Upon consideration of this issue, the Committee noted that the law should remain flexible on whether the creditors or the Resolution Applicant should enjoy the benefits of the operating profits and the Resolution Plan should provide as to how the operating profits or losses are to be applied or distributed. Therefore, the Committee recommended to mandatorily include a definite provision in the Resolution Plan.
12. Against the above background, we are confronted with a situation as to whom such profits should ensure where the RFRP and the Resolution Plan are silent on the issue. In the absence of specific term in RFRP and Resolution Plan, we consider it appropriate to evaluate the commercial consideration of the parties while approving the Resolution Plan. We notice that the following

clauses form part of the Resolution Plan passed by CoC and approved by this Tribunal:

“In the event of increase in the unpaid CIRP cost beyond Rs. 0.30 crore, the amount available for distribution to the stakeholders will be reduced to that extent. However, in case the unpaid CIRP Cost is less than the amount proposed then the remaining amount will be distributed among the secured financial creditors”

‘Receivables’ as defined in the Resolution Plan shall mean any and all monies/amounts received and/or to be received by the Corporate Debtor on and from the NCLT approval date, directly or indirectly from any source in any form, including cash, cheques, demand drafts, pay order, electronic transfer or in any other form whether evidenced as book debts or otherwise, due and payable to the Corporate Debtor.....’

A minute perusal of the Resolution Plan, particularly the aforesaid clauses indicate that there is a commercial stipulation of overall cap on the total financial outgo to ring fence the liabilities under the Resolution Plan and pass on the benefits within the overall cap, to secured financial creditors in the event of lesser CIRP expenses. Furthermore, the Resolution Applicant proposes to acquire the Receivables of the Corporate Debtor only from the NCLT approval date.

13. While the commercial considerations of the Applicant are reflected in the Resolution Plan as stated above, the approval of the Resolution Plan by the CoC, cannot be treated as a commercial satisfaction of the debts by stakeholders which is evident from keeping open the remedies against the guarantors and other recoveries from avoidable transactions. Furthermore, voting in favour of a resolution plan or acceptance of a resolution plan is more like an exercise of compulsory choice between resolution or liquidation of the Corporate Debtor and the haircut/sacrifice undertaken by the stakeholders is substantial. Another factor which, in our opinion, needs consideration is that

the assets which generated income during CIRP period is created out of the funds provided by the Financial Creditors which were deployed without any return on account of interest etc.

14. Therefore, in our considered view, under the peculiar facts and circumstances of this case, it would be just, fair and equitable if the surplus profits earned during the CIRP period are ordered to be enured to the Financial Creditors of the Corporate Debtor which appears to be more in sync with the stipulation in the Resolution Plan which provides that all receivable shall go to the Resolution Applicant after the plan approval date and not prior to that. Accordingly, **IA No. 2300/2023** stands allowed with an order that profits accrued during the CIRP shall be appropriated by the Financial Creditors.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)