

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT NO. II**

**IA No. 501/AHM/2021
IN
CP (IB) 185/AHM/2018**

Under Section 60(5) (a) and (c) of the Insolvency and Bankruptcy Code, 2016
read with Rule 11 of the National Company Law Tribunal Rules, 2016.

IN THE MATTER OF

Mr. Babubhai Shrimali & Ors.

... Applicants

VERSUS

The Committee of Creditors & Anr.

... Respondents

AND IN THE MATTER OF

Indian Overseas Bank

... Financial Creditor

VERSUS

AMW Autocomponent Ltd.

... Corporate Debtor

Order Pronounced On: 19/10/2022

Coram:

**DR. DEEPTI MUKESH,
HON'BLE MEMBER (JUDICIAL)
AJAI DAS MEHROTRA,
HON'BLE MEMBER (TECHNICAL)**

MEMO OF PARTIES

IA No. 501/AHM/2021

1. Mr. Babubhai Shrimali

Director of the Suspended Board of Directors
of the Corporate Debtor (DIN 08253637)
Residing at 601, Somnath Apartment,
Hospital Road, Bhuj (Kutch)-370020.

2. Mr. Rakesh Jagetiya

Director of the suspended board of directors
Of the Corporate Debtor (DIN 08376368)
Residing at: House No. 4, Plot No.92.
Ward-7A, Gandhidham (Kutch) 370201.

3. Mr. Dinesh Bahadur Singh

Director of the suspended board of directors
of the Corporate Debtor (DIN 08376360)
Residing at: House No.361/1B, Street No.6,
Shakti Nagar, Junavas, Madhapar Kutch 370020.

... Applicants

Versus

1. The Committee of Creditors.

Represented through Lead Bank - Indian Overseas Bank,
763, Anna Salai, Chennai- 600002

2. Shri. Avil Menezes

Resolution Professional of AMW Autocomponent Limited,
416. Crystal Paradise Co-op Soc. Lid.
Dattaji Salvi Marg, Above Pizza Express,
Veera Desai Road, Andheri West,
Mumbai- 400053.

...Respondents

Present:

For the Applicant: Ms. Prachiti Shah, Advocate
For the Respondent: Mr. Rahul Sarda, Adv. For CoC
Mr. Prafful Goyal, Adv. For RP

ORDER

1. The instant Application is filed by the suspended board of directors of the Corporate Debtor AMW Autocomponent Ltd., Mr. Babubhai Shrimali, Mr. Rakesh Jagetiya and Mr. Dinesh Bahadur Singh ('Applicants'), against the CoC and Mr. Avil Menezes, Resolution Professional of the Corporate Debtor ('Respondents') under Section 60(5) (a) and (c) of the Insolvency and Bankruptcy Code, 2016 ('Code') seeking following reliefs:

- i) *Allow the present application;*
- ii) *As regards, Applicant No. 1, direct the Resolution Professional of AMW Autocomponent Limited i.e., the Corporate Debtor herein, to release the lawful dues of the Applicant No. 1 amounting to Rs. 7,53,000/- (Rupees Seven Lakhs Fifty-Three Thousand Only) and credit/make payment of TDS of Rs.45,000/- (Rupees Forty-Five Thousand Only) in respect of Applicant No.1 for the months of September 2020 and October 2020 towards salary during the CIRP period along with interest at the rate of 18% p.a. from the date when the payment was due till payment and/or realization.*
- iii) *As regards the Applicant No. 2, direct the Resolution Professional of AMW Autocomponent Limited i.e., the Corporate Debtor herein, to release the lawful dues of the Applicant No. 2 amounting to Rs. 8,09,718/- (Rupees Eight Lakhs Nine Thousand Seven Hundred and Eighteen Only) and credit/make payment of TDS of Rs. 1,86,786 / (Rupees One Lakh Eighty-Six Thousand Seven Hundred and Eighty Six Only), PT amount of Rs. 400/- (Rupees Four Hundred Only) and Provident Fund contribution of Rs. 36,000/- (Rupees Thirty-Six Thousand Only) in respect of Applicant No. 2 for the months of September 2020 and October 2020 towards salary during the CIRP period along with interest at the rate of 18% p.a. from the date when the payment was due till payment and/or realization.*
- iv) *As regards, Applicant No.3, direct the Resolution Professional of AMW Autocomponent Limited i.e., the Corporate Debtor*

herein, to release the lawful dues of the Applicant No.1 amounting to Rs. 7,85,224/- (Rupees Seven Lakhs Eighty-Five Thousand Two Hundred and Twenty-Four Only) and credit/make payment of TDS of Rs. 2,69,710/- (Rupees Two Lakhs Sixty-Nine Thousand Seven Hundred and Ten Only), PT amount of Rs. 400/- (Rupees Four Hundred Only) and Provident Fund contribution of Rs. 36,122/- (Rupees Thirty-Six Thousand One Hundred and Twenty-Two Only) in respect of Applicant No.3 for the months of September 2020 and October 2020 towards salary during the CIRP period along with interest at the rate of 18% p.a. from the date when the payment was due till payment and/or realization.

- v) Such further reliefs as this Hon'ble Tribunal be pleased to grant as are necessary in the facts and circumstances of the present case.*
- vi) For costs of the present application.*

2. The brief backdrop of the case is that an insolvency application was filed by financial creditor Indian Overseas Bank under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process ('CIRP') against Corporate Debtor which was admitted on 01.09.2020 and Mr. Avil Menezes was appointed as Interim Resolution Professional (IRP). Thereafter Mr. Avil Menezes was confirmed as Resolution Professional.

3. The Applicant has made following submissions:

- i) The Applicant No. 1 was appointed as Resident Director and Occupier by appointment letter dated 01.09.2020 executed with Corporate Debtor, the Applicant No. 2 & Applicant No. 3 were appointed as Sr. General Manager, Finance and Accounts and Vice-President, Operations respectively by a separate employment contract dated 11.03.2020. The Applicant No. 1, 2 & 3 were drawing a salary of Rs. 3,00,000/-, Rs. 5,83,334/- and Rs. 6,17,980/-

per month respectively. Copy of appointment letters issued by Corporate Debtor are annexed.

- ii) After initiation of CIRP, on request of Resolution Professional the Applicant No. 1 has rendered service as Director, Legal and Administrative Head, Applicant No. 2 has rendered service as Director, CFO and Applicant No. 3 has rendered service as Director, Head of Operations and were assured that salaries during the period of CIRP would be paid. The CoC in its 1st meeting held on 01.10.2020 took note of engagement of Applicants by Resolution Professional. The CoC in its 1st and 2nd meeting discussed on the salaries of the Applicant but did not come to any conclusion. Thus, by notice dated 28.10.2020 Applicants had given their resignation from their respective posts / director of the Corporate Debtor to the Resolution Professional.
- iii) Since the Applicants had not received any communication with regard to their salaries, they had addressed a letter dated 02.02.2021 to the Resolution Professional and requested to clear their salaries. Copy of letter is annexed.
- iv) The payment to all other employees pending CIRP was made and only the salaries of Applicants were not made because Applicants were holding senior managerial / acting as vice President / director of the Corporate Debtor. Since no payment was made, hence this Application.

4. The Respondent No. 1 CoC has filed its reply and submits as under:

- i) The Applicants being the directors are the related party of the Corporate Debtor and any payment to them would fall under related party transactions as per Section 28(f) of the Code. In the 1st CoC meeting, resolution with respect to approval to undertake related

party transactions was rejected as it did not receive requisite votes i.e. 66 %.

- ii) The agenda with respect to the payment of the salaries of the Applicants was placed before the CoC during the 2nd CoC Meeting held on 19th October 2020, 3rd CoC Meeting held on 27th November 2020, 7th CoC Meeting held on 12th March 2021, 8th CoC Meeting held on 30th March 2021, 9th CoC Meeting held 20th April 2021, 11th CoC Meeting held on 3rd May 2021 and 15th CoC Meeting held on 9th July 2021. In the 8th, 9th and 15th CoC meetings it was deliberated that 50% of the dues should be paid during the CIRP and the balance 50% be paid as part of CIRP Cost under the Resolution Plan but no resolution was passed.
- iii) In the meantime, instant Application was filed on 23.07.2021 and thereafter in 19th CoC meeting held on 21.09.2021 once again the agendas with respect to salaries of Applicants were placed before CoC, which was deliberated and it was concluded that the Applicants fall within the definition of related party under the provision of the Code and the Corporate Debtor was already undergoing severe financial stress and that the amounts that were sought by the Applicants were exorbitant in comparison to the services rendered by them during the CIRP, thus the payments could not be approved.

5. The Respondent No. 2 Resolution Professional has filed its reply and submits as under:

- i) Post initiation of CIRP, the Applicant Directors extended support to the Resolution Professional for the management of the Corporate Debtor during the CIRP of the Corporate Debtor, as required under the Code. Though the Applicants resigned from

their respective positions from of the Corporate Debtor but continued in the employment as employees and continued to draw salary.

- ii) Since, any payment to the Director or Senior managerial posts who are involved in running business of the Corporate Debtor would qualify as a 'related party transaction' under the Code (Section 28(1)(f) read with Section 5(24)(a)), the approval of the CoC is required by way of resolution. However, the CoC, in exercise of its powers, did not approve the said related party transaction on the ground of it being exorbitant as the Corporate Debtor was under severe financial distress.

6. The Applicants filed rejoinder and submit that the salaries payable to the Applicants should be treated as CIRP Costs as the Applicants were professionally associated with the Corporate Debtor and are not the promoters or contributors of the Corporate Debtor. The Respondents are not entrusted with the power to consider whether the same should be paid or not. The Applicants further submit that even though the Applicants being the directors of the Corporate Debtor fall within the ambit of related party as defined under Section 5 (24) (a) of the Code, the salary/remuneration which they are entitled to receive does not qualify as related party transaction under the Code.
7. Thereafter in compliance of Order dated 02.11.2021 the Respondent No. 2 Resolution Professional had filed an affidavit and submitted that proposal for payment of salaries of the Applicant was placed once again before CoC in its 23rd meeting held on 26.11.2021 and majority of the members of the CoC in their wisdom decided to contest the Application.

8. The Applicant has filed its written submissions and reiterated the submissions already made in its pleadings.
9. The Respondent No. 1 CoC filed written submissions and made following submissions:
 - i) The Applicant No. 2 & 3 has admitted in Form DIR- 12 filed by the Corporate Debtor that they are promoters. Form DIR-12 is annexed with the Application.
 - ii) The CoC has on at least five occasions, after deliberations, rejected the proposal for payment of salaries to the Applicants. Once the CoC has rejected or approved a related party transaction, the same is not justiciable before court of law.
 - iii) The payment sought by the Applicants in the present Application is towards work done for Corporate Debtor, which the Applicant are statutorily bound to do.
10. The Respondent No. 2 Resolution Professional filed written submission and reiterated the contentions made in its pleadings.
11. Heard submissions and considered the arguments of the parties and also perused the documents placed on record. It is necessary to understand who falls under the category of related party under the Code. Section 5(24) which defines the term ‘related party in relation to a corporate debtor’ is reproduced below:

“Section 5 (24) “related party”, in relation to a corporate debtor, means-

 - (a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;*
 - (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;*

- (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;*
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;*
- (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid- up share capital;*
- (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;*
- (g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;*
- (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;*
- (i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;*
- (j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;*
- (k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;*
- (l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;*
- (m) any person who is associated with the corporate debtor on account of-*
 - (i) participation in policy making processes of the corporate debtor; or*

- (ii) having more than two directors in common between the corporate debtor and such person; or*
- (iii) interchange of managerial personnel between the corporate debtor and such person; or*
- (iv) provision of essential technical information to, or from, the corporate debtor;”*

12. It is an admitted fact that the Applicants were part of suspended board of directors of the Corporate Debtor on the date of initiation of CIRP of the Corporate Debtor and even after initiation of CIRP as they had resigned from the post of directors on 28.10.2021. Thus, in view of Section 5(24) (a) the Applicants fall under the category of related party of the Corporate Debtor.

13. Section 188 of the Companies Act, 2013 is reproduced below:

“Section 188. Related party transactions. —

(1) Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to—

- (a) sale, purchase or supply of any goods or materials;*
- (b) selling or otherwise disposing of, or buying, property of any kind; (c) leasing of property of any kind;*
- (d) availing or rendering of any services;***
- (e) appointment of any agent for purchase or sale of goods, materials, services or property;*
- (f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and*
- (g) underwriting the subscription of any securities or derivatives thereof, of the company;*

Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions exceeding such sums, as may be

prescribed, shall be entered into except with the prior approval of the company by a resolution.

Provided further that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party.

Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent. or more members, in number, are relatives of promoters or are related parties.

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis:

Provided also that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

Explanation.— In this sub-section,—

(a) the expression “office or place of profit” means any office or place—

(i) where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(ii) where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(b) the expression “arm's length transaction” means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

(2) Every contract or arrangement entered into under sub-section (1) shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement. (3) Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting under subsection (1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board or, as the case may be, of the shareholders and if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

(4) Without prejudice to anything contained in sub-section (3), it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

(5) Any director or any other employee of a company, who had entered into or authorized the contract or arrangement in violation of the provisions of this section shall—

(i) in case of listed company, be liable to a penalty of twenty-five lakh rupee; and

(ii) in case of any other company, be liable to a penalty of five lakh rupees.”

14. Section 28 of the Code prescribes which are the acts where COC approval is required to be taken by IRP /Resolution Professional. For ready reference the same is reproduced below deals with approval of CoC:

Section 28. Approval of committee of creditors for certain actions. –

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.

15. It is the contention of the Applicants that the Resolution Professional had asked the Applicants to render services and assured that the salaries which they were drawing before the initiation of CIRP will be paid. The Applicants being the related parties had agreed and rendered service to the Corporate Debtor for the month of September and October 2020. It is contended by the Respondents that availing of services from the Applicants would amount to related party transactions and therefore the Resolution Professional is bound under Section 28 of the Code to take approval of CoC. The term related party transaction is not defined under the Code, therefore we referred to Section 188 of the Companies Act, 2013. On reading of Section 188 of the Companies Act, 2013 it is understood that related party transaction includes any contract or arrangement with a related party with respect to availing of any services. Therefore, availing of services from the Applicants would amount to related party transactions.

16. The Code has given ample power to the CoC and one of the powers as provided under Section 28(1) (f) includes to take commercial decision to undertake or not to undertake related party transactions during the CIRP of the Corporate Debtor. Accordingly, the Resolution

Professional in various CoC meetings had placed a resolution for payment of salary to the Applicants but the CoC in its commercial decision has rejected the resolution.

17. The Hon'ble Supreme Court in its recent judgment in ***Vallal RCK Vs. M/s Siva Industries and Holdings Ltd. & Ors (Civil Appeal No. 1811-1812 of 2022)*** dated 03.06.2022 observed as under:

“21. This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts.”

18. In light of the observations of Hon'ble Supreme Court, we are of the opinion that the decision of COC should not be interfered with, since the Resolution Professional had time and again placed proposal before CoC for payment of salaries to the Applicants and CoC after detailed deliberations rejected the proposal. If in commercial wisdom the CoC has rejected the resolution for payment of salary to the Applicants, the question of reversing the decision cannot be considered. Moreover, the Applicants being the promoters and persons associated with the management of the Corporate Debtor are statutorily obligated to extend all assistance to the Resolution Professional in managing the affairs of the Corporate Debtor.

19. Section 19 of the Code provides as under:

Section 19. Personnel to extend co-operation to interim resolution professional. –

(1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.

(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.

(3) The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

20. It is noted from the master data available on MCA portal that Applicant No. 1 was holding position of director since 30.11.2018 and Applicant No. 2 & Applicant No. 3 had held position of directors since 07.07.2019. In addition to the post of directors, the Applicant No. 2 & 3 were also holding the post of General Manager-Finance & Accounts and Vice President- Operations since 30.11.2013 & 03.12.2014 respectively and drawing the salaries of Rs. 5,06,452/- p.m. and Rs. 5,45,728/- p.m. This reflects that Applicants had considerable control over the management of affairs of the Corporate Debtor and in view of Section 19 of the Code are bound to extend all assistance and cooperation to the Interim Resolution Professional / Resolution Professional as may be required by him in managing the affairs of the corporate debtor.

21. In view of the above discussion, the contentions of Applicants are not acceptable to grant any relief as sought in application. The Applications are therefore rejected & disposed of accordingly.
22. Copy of order be served to the parties by registry.

-Sd-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-Sd-

DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

Mansi J./LRA

