

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1473 of 2023

(Arising out of Order dated 03.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Court No.II, Kolkata, in I.A. (IB) No.975/KB/2023 in C.P.(IB) No.830/KB/2018)

IN THE MATTER OF:

CA Jai Narayan Gupta
(Liquidator of Barcle Enterprises Limited)
YMCA Building, 2nd Floor,
25, Jawahar Lal Nehru Road,
Kolkata – 700087

... Appellant

Vs

Radhasiriya Properties Pvt. Ltd.
22A, Karnani Estate, 209, AJC Bose Road,
1st Floor, Kolkata- 700017

... Respondent

Present:

For Appellant: Mr. Anoop Prakash Awasthi, Advocate.

For Respondent: Ms. Swati Dalmia, Mr. Palzer Moktan, Ms. Safura Ahmed, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Liquidator of Corporate Debtor has been filed challenging the order dated 03.10.2023 passed by the National Company Law Tribunal, Division Bench, Court No.II, Kolkata in I.A. (IB) No.975/KB/2023 filed by Respondent. The Adjudicating Authority by the impugned order has directed the Liquidator to refund the amount of Rs.23,88,280/-, which was received from Respondent towards fee of

Liquidator and cost. The Appellant aggrieved by the said order has come up in this Appeal.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- (i) Liquidation process of the Corporate Debtor – M/s Barcle Enterprises Limited commenced by an order dated 24.01.2022. The Appellant was appointed as a Liquidator of the Corporate Debtor in terms of Section 33, sub-section (2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”).
- (ii) The Respondent – Radhasiriya Properties Pvt. Ltd. sent an intimation to the Liquidator, expressing its interest in submitting a scheme of compromise and arrangement. On 15.03.2022, Respondent No.1 submitted its scheme to the Liquidator. After certain correspondence, the Liquidator accepted the scheme on 12.05.2022 and I.A. (IB) No.495/KB/2022 was filed by the Liquidator before the Adjudicating Authority seeking a direction to the Liquidator to conduct a meeting of the Creditors under Regulation 2B of the IBBI (Liquidation Process) Regulation, 2016 (hereinafter referred to as the “**Liquidation Regulations, 2016**”) read with Section 230(1) of the Companies Act, 2013.

- (iii) The Liquidator sent different emails to the Proponent of the Scheme demanding various amounts from Respondent to be paid. Certain amounts were paid by Respondent to the Liquidator. The Liquidator sent various reminders asking the Respondent to make the payment towards cost and fee of the Liquidator as well as for depositing the estimated amount under the Scheme. A letter was written by Respondent to the Liquidator asking the provision of the Code under which the Liquidator is seeking payment of the entire amount proposed to be paid under the Scheme. On account of various letters issued by the Liquidator, further amounts were paid by the Respondent to the Liquidator. Total amount paid by the Respondent to the Liquidator was Rs.23,88,280/- from 20.04.2022 to 28.02.2023.
- (iv) Under the order of the Adjudicating Authority dated 06.01.2023, the Liquidator convened a meeting of Creditors on 17.02.2023. In the meeting of the Creditors held on 17.02.2023, the scheme submitted by Respondent was rejected by the Creditors. Respondent received an email from the Liquidator on 1st March, 2023 informing it that in the meeting of the Creditors, the scheme submitted by the Respondent has been rejected.

- (v) The Respondent, i.e. , the Scheme Proponent filed an Application before the Adjudicating Authority being I.A. (IB) No.975/KB/2023, where following prayers were made:

“a. That this Hon’ble Tribunal be pleased to direct the Respondent to forthwith refund the amount of Rs.23,88,280 (Rupees Twenty-Three Lakh Eighty-Eight Thousand Two Hundred and Eighty Only) to the Applicant or such other amount as this Hon’ble Tribunal may deem fit and proper.

b. That this Hon’ble Tribunal be pleased to pass such other and further orders as the Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case.”

- (vi) The Liquidator filed a reply to the Application, justifying the payments received from the Respondent. It was pleaded by the Liquidator that under the Liquidation Regulations, 2016, the Liquidator is entitled to receive his fee for the period of compromise and arrangement. It was pleaded that the amount deposited covers the fee from the Liquidation Commencement Date, i.e., 24.01.2022 till 25.02.2023 amounting to Rs.23,01,000/-. In paragraph 14 of the reply, details were given by the Liquidator regarding liquidation costs during the period of compromise.

- (vii) The Adjudicating Authority after hearing the Counsel for the Respondent as well as the Liquidator, passed the impugned

order allowing the Application filed by the Respondent. The Adjudicating Authority in the impugned order held that Liquidator is not entitled to receive any fee. It was held by the Adjudicating Authority that since the Scheme was rejected, the liquidation cost including liquidation fee was wrongly claimed by the Liquidator from the Scheme Proponent, i.e., Respondent. The Adjudicating Authority, consequently directed the Liquidator to refund the entire amount of Rs.23,88,280/-.

Aggrieved by which order this Appeal has been filed.

3. We have heard Shri Anoop Prakash Awasthi, learned Counsel appearing for the Appellant and Ms. Swati Dalmia, learned Counsel appearing for the Respondent.

4. The learned Counsel appearing for the Appellant challenging the impugned order submits that the Appellant charged fee for the period from 15.03.2022 to 17.02.2023 as per the provisions of Regulation 4(2)(a) read with Proviso to Regulation 2B(3) of the Liquidation Regulations, 2016. It is contended that Regulation 2B has been prepared to balance the equity to encourage only the serious proposals of compromise or arrangement and hence, the time taken, is taken outside the liquidation period and where compromise or arrangement is not sanctioned by the Tribunal, the Applicant (Proponent of the Scheme) of such compromise or arrangement is burdened with the cost. It is submitted that if liquidation fee and cost is

not charged from Scheme Proponent, non-serious parties or parties with vested interest and malafide motives may come up and propose compromise and arrangement and will be able to successfully halt the liquidation process without any pecuniary consequences on them. The Appellant was not required to work free of cost during the period of consideration of the scheme of compromise and arrangement. It was the Scheme Proponent, who has to bear the liquidation fee. The terminology of “liquidation cost”, is not applicable to cases under Section 230 of the Companies Act, 2013. The Adjudicating Authority was utterly unjustified in depriving the Appellant of its legitimate fee and the order is against the provisions of the Code and Regulations.

5. The learned Counsel for the Respondent contended that amount of Rs.23,88,280/- was paid by the Respondent at the insistence of the Liquidator. The Liquidator pressurized the Respondent into making payment, which is clear from the email sent by the Liquidator on 23.12.2022. Even after the scheme was rejected on 17.02.2023, the Liquidator accepted the amount from the Respondent. It is submitted that as per Regulation 2B(3) of the Liquidation Regulations, 2016, cost in relation to compromise and arrangement is to be borne by the parties, who proposes compromise and arrangement. The term ‘cost’ only indicates cost incurred by the Liquidator in respect of compromise and arrangement and no other cost as sought to be asserted by the Liquidator could have been paid. In cases where scheme of arrangement submitted by a Propounder is rejected, then at the highest, such Propounder is liable to contribute

towards the expenses incurred in relation to such compromises or arrangements. The Liquidator is entitled to his fee as per Section 34, sub-section (9) of the Code for conducting the liquidation proceedings, out of the proceeds of the liquidation estate. The Liquidator has attempted to incorrectly and inaptly interpret Regulation 2B of the Liquidation Regulations, 2016. The Liquidator has wrongfully withheld the amount remitted by the Respondent. The present Appeal deserves to be dismissed with costs.

6. We have considered the submission of learned Counsel for the parties and have perused the records.

7. The facts and sequence of events between the parties have been noted by the Adjudicating Authority in its impugned order, which needs no repetition. It is admitted fact between the parties that the Respondent, who has proposed the scheme of compromise and arrangement dated 15.03.2022 was required by the Liquidator to pay various amounts from time to time and total amount paid by the Respondent was an amount of Rs.23,88,280/-, for refund of which amount an I.A. (IB) No.975/KB/2023 was filed, which was allowed by the Adjudicating Authority. The Liquidator has filed the reply to the I.A. (IB) No.975/KB/2023, where it has given the details of amount, which according to the Liquidator, the Respondent was liable to pay. It is useful to extract paragraph 14 of the reply, which contain all details regarding liquidation fee and the expenses as was claimed by the Liquidator. Paragraph 14 of the reply of the Liquidator is as follows:

Particulars	Amount (Rs.)
Liquidator's fee for 13 months (Jan 2022 – Feb 2023)	23,01,000
Publication of Form B for initiation of liquidation	5,376
Drafting and Filing fee for IA 409/2022 – Extension of time period of scheme of compromise or arrangement	10,000
Drafting and Filing fee for IA 495/2022 – Approval to conduct meeting of creditors	10,000
Drafting and Filing fee for IA 1355/2022 – Progress report for 30.09.2022	10,000
Drafting and Filing fee for IA 358/2023 – Affidavit of Service u/r 12 of CAA Rules	10,000
Drafting and Filing fee for IA 521/2023 – Result of meeting of creditors	11,800
Publication of Form CAA 2	2,352
Audit fee for FY 2021-22	20,000
Bank charges till 17.02.2023	638
MSME registration of the Corporate Debtor	2,700
ROC filing fee	600
Sub-total	23,94,466
Other expenses	
Publication of sale notices dt. 27.02.2022, 22.03.2022 and 14.04.2022	10,626
E-voting charges	7,080
Total	24,12,172

8. When we look into the reply of Liquidator filed in the Application, the Liquidator has claimed Liquidator's fee for 13 months as Rs.23,01,000/- and rest of the amount included in total of Rs.24,12,172/- is the amount spent on various expenses incurred by the Liquidator . The question to be answered in this Appeal is as to whether the Liquidator's claim to retain the amount received from the Scheme Proponent is justified or not and as

to whether Adjudicating Authority committed any error in directing refund of the amount? Before we proceed to consider the rival submission of the parties, it is necessary to notice relevant provisions of the Code as well as the Liquidation Regulations, 2016 governing the payment of fee and costs of the liquidation. Section 34 deals with ‘Appointment of liquidator and fee to be paid’. Section 34, sub-sections (8) and (9), which deals with fee for the conduct of the liquidation proceedings, are as follows:

*“**34(8)** An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.*

(9) The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.”

9. The above statutory provision is clear that Liquidator fee for the conduct of the liquidation proceedings has to be paid from the value of the liquidation estate assets. The IBBI (Liquidation Process) Regulation, 2016 deals with all aspects of the liquidation process, including payment of fee and costs. Regulation 2(1)(ea) defines the ‘liquidation cost’, which is to the following effect:

*“**2(1)(ea)** “liquidation cost” under clause (16) of section 5 means-*

- (i) fee payable to the liquidator under regulation 4;*
- (ii) remuneration payable by the liquidator under sub-regulation (1) of regulation 7;*

- (iii) *costs incurred by the liquidator under sub-regulation (2) of regulation 24;*
- (iv) *costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor;*
- (v) *costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern;*
- (vi) *interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower;*
- (vii) *the amount repayable to contributories under sub-regulation (3) of regulation 2A;*
- (viii) *any other cost incurred by the liquidator which is essential for completing the liquidation process:*

Provided that the cost, if any, incurred by the liquidator in relation to compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013), if any, shall not form part of liquidation cost.”

10. The proviso to above definition makes it clear that cost, if any, incurred by the Liquidator in relation to compromise or arrangement under Section 230 of the Companies Act, if any, shall not form part of liquidation cost.

11. Regulation 2B of the Liquidation Regulations, 2016, deals with ‘Compromise or arrangement’, which is as follows:

“2B. *Compromise or arrangement. (1) Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of section 33.*

Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

(2) The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.

(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of section 230:

Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of section 230.”

12. Sub-clause (3) of Regulation 2B specifically provides that any cost incurred by the Liquidator in relation to compromise or arrangement shall be borne by the Corporate Debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of Section 230 and whereas such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned

by the Tribunal under sub-section (6) of Section 230. At this juncture, we may also extract sub-section (6) of Section 230 of the Companies Act, 2013, which is as follows:

“230(6) *Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company.”*

13. Regulation 4 of Liquidation Regulations, 2016, deals with ‘Liquidator’s fee’. Regulation 4, sub-section (2), which is relevant for the present case, is as follows:

“4(2) *In cases other than those covered under sub-regulation (1), the liquidator shall be entitled to a fee-*

(a) at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013); and

(b) as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:

<i>Amount of Realisation/ Distribution (In Rupees)</i>	<i>Percentage of fee on the amount realized/ distributed</i>		
	<i>in the first six months</i>	<i>in the next six months</i>	<i>thereafter</i>
<i>On the first 1 crore</i>	<i>5.00</i>	<i>3.75</i>	<i>1.99</i>
<i>On the next 9 crore</i>	<i>3.75</i>	<i>2.80</i>	<i>1.41</i>
<i>On the next 40 crore</i>	<i>2.50</i>	<i>1.88</i>	<i>0.94</i>
<i>On the next 50 crore</i>	<i>1.25</i>	<i>0.94</i>	<i>0.51</i>
<i>On further sums realized</i>	<i>0.25</i>	<i>0.19</i>	<i>0.10</i>
<i>Amount Distributed to Stakeholders</i>			
<i>On the first 1 crore</i>	<i>2.50</i>	<i>1.88</i>	<i>0.94</i>
<i>On the next 9 crore</i>	<i>1.88</i>	<i>1.40</i>	<i>0.71</i>
<i>On the next 40 crore</i>	<i>1.25</i>	<i>0.94</i>	<i>0.47</i>
<i>On the next 50 crore</i>	<i>0.63</i>	<i>0.48</i>	<i>0.25</i>
<i>On further sums distributed</i>	<i>0.13</i>	<i>0.10</i>	<i>0.05"</i>

14. We may now examine as to whether the Scheme Proponent, who has submitted scheme for compromise and arrangement is liable to pay any liquidation fee, since in the present case, Liquidator is claiming a liquidation fee of Rs.23,01,000/- from the Scheme Proponent.

15. We have already noticed the provision of Section 34, sub-sections (8) and (9), which deals with fee of Liquidator for conduct of liquidation proceedings. The payment of fee, thus, has to be as per the statutory provisions under Section 34 sub-sections (8) and (9). Regulation 2B, which deals with 'compromise or arrangement' specifically provide for payment of cost incurred by the Liquidator in relation to compromise and arrangement. Sub-regulation (3) of Regulation 2B is to the following effect:

“2B(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of section 230:

Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of section 230.”

16. The sub-regulation (3) of Regulation 2B, makes it clear that Liquidator is entitled to receive the cost incurred by the Liquidator in reference to compromise and arrangement from the Corporate Debtor and from the Proponent of the Scheme. In case the compromise is sanctioned, the cost shall be borne by the Corporate Debtor and in case compromise is not sanctioned the cost shall be borne by the parties, who proposed compromise or arrangement. The statutory provision is, thus, clear that Liquidator can only claim cost incurred from the parties who proposed the compromise or arrangement.

17. We have also noticed Regulation 4 of the Liquidation Regulations, 2016, which deals with Liquidator's fee. The Regulation 2B, only refers to cost incurred by the Liquidator. Regulation 2B, does not include fee. Regulation 4 of Liquidation Regulations, 2016 deals with fee. Thus, the Rule making Authority is fully aware of the difference between the cost and fee. Regulation 2B does not indicate that any fee by Liquidator can be charged from the Scheme Proponent. The Liquidator is entitled to his fee

as per the statutory provision of Section 34, sub-section (8) and (9) as noted above read with Regulation 4 of Liquidation Regulations, 2016. No fee can be charged from the Scheme Proponent, who has submitted the Scheme under Section 230 of the Companies Act, 2013 read with Regulation 2B of Liquidation Regulations, 2016. Thus, the insistence of Liquidator and defense taken by the Liquidator in reply to I.A. (IB) No.975/KB/2023 that he is entitled to fee of Rs.23,01,000/- is wholly erroneous and unsupported by any statutory scheme.

18. The learned Counsel for the Appellant contended that in event the Scheme Proponent is not saddled with liquidation fee and cost, non-serious Scheme Proponent will be encouraged and shall be wasting time of the liquidation. The consideration of the scheme submitted by a Scheme Proponent for comprise or arrangement is governed by statutory provisions, which is required to be completed within 90 days of the order of liquidation as per Regulation 2B. The statutory provision itself provide a period for completion of the process, hence, it cannot be said that the said provision can be misused by a Scheme Proponent. Further, as per Regulation 2B, the Scheme Proponent is liable to pay the cost, if the Scheme is not sanctioned. Thus, a Scheme Proponent, who according to the Appellant is non-serious can be saddled with the cost, which may be a deterrent factor for any non-serious Scheme Proponent to submit a Scheme. We, thus are of the view that submission of the Appellant that Scheme Proponent should be saddled with liquidation fee is clearly contrary to the statutory scheme. Further, the definition of 'liquidation

cost' as contained in Regulation 2(ea) clearly provides that cost incurred by the Liquidator in relation to compromise or arrangement under Section 230 of the Companies Act, if any, shall not form part of liquidation cost. The said provision when read with Regulation 2B, clearly makes it clear that cost incurred with regard to compromise or arrangement has to be borne by the Corporate Debtor or Scheme Proponent. However, the said provision does not indicate that the Liquidator is not entitled to claim his fee during the period compromise or arrangement is under consideration. Since the Liquidator is entitled for his fee as per the provision of Section 34, sub-sections (8) and (9) and Regulation 4, it cannot be said that Liquidator is left high and dry with regard to his fee during the period compromise or arrangement is under consideration. However, whether Liquidator is entitled to fee beyond the period of 90 days for completion of compromise or arrangement is a different question, which need no answer in the present Appeal.

19. We, thus, are fully satisfied that the Adjudicating Authority committed no error in directing the Liquidator to refund fee, which was wrongly realized from the Respondent. The Appellant himself has brought on record various emails and reminders sent by the Liquidator to Respondent where Liquidator has asked Respondent No.1 to make various payments and the payments were made. According to the Liquidator himself these were the payments towards fee of the Liquidator. We may refer to email dated 02.08.2021 sent by the Liquidator to the Respondent wherein in paragraphs 3, 4 and 5, following has been stated:

3. *In Para 9.4 of the scheme submitted by you, you have indicated the final shareholding pattern of the Corporate Debtor after implementation of the scheme. However, you have not indicated the treatment of the existing shares of the Corporate Debtor, i.e. whether the existing shares will be transferred to you, or will they be extinguished and you shall be issued new shares. Request you to clarify the same in the same undertaking as required in Para (1) of this email.*
4. *You have already paid Rs.7,88,280 pertaining to the liquidation costs and fee of the liquidator for the anticipated 90 day period of the scheme of compromise and arrangement. However, since the scheme is taking longer to be approved by the Adjudicating Authority, we call upon you to contribute the fee of the liquidator for the period 24.05.2022 – 23.09.2022 as indicated in regulation 4(2)(a) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“Liquidation Regulations”) @ Rs.1.50 lacs per month plus GST amounting to Rs.7.08 lacs.*
5. *As discussed in our mail dt. 21.03.2022, in compliance with Rule 3(6)(b) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, please make the deposit as required to the bank account being operated by the Liquidator. The estimated amount of deposit as evaluated by the Liquidator on the basis of the proposal submitted by you is as follows:*

<i>CIRP Costs</i>	<i>Rs.11,70,302</i>	<i>As given in the proposal</i>
<i>Secured Financial Creditors</i>	<i>Rs.1,50,00,000</i>	
<i>TOTAL</i>	<i>Rs.1,61,80,302</i>	
<i>Amount to be deposited</i>	<i>Rs.80,85,151”</i>	

20. Thus, the Liquidator asked Respondent No.1 to pay his liquidation fee and has claimed the fee.

21. We, thus, are satisfied that Liquidator was not entitled to claim any liquidation fee from Respondent for the period during which compromise and arrangement scheme was under consideration. As noted above in paragraph 14 of the reply, the Liquidator has claimed a fee of Rs.23,01,000/-, which is clearly unsustainable. Liquidator in paragraph 14 has given the details of all expenses and fee payable totaling to Rs.24,12,172. At the highest, the Liquidator was entitled to expenses. Thus, even if we allow all expenses claimed in paragraph 14 of the reply of the Liquidator, he was not entitled to a fee of Rs.23,01,000/- and after deducting the amount of Rs.23,01,000/- in total amount, the Liquidator at best is entitled for amount of Rs.1,11,172/- towards all expenses claimed by the Liquidator.

22. In view of the foregoing discussions and our conclusion, we are of the view that the Adjudicating Authority has rightly directed the Liquidator to refund of the amount. As observed above, the Liquidator at best is entitled to expenses as claimed by him in the liquidation process and if the amount of all expenses claimed by the Liquidator are deducted, still the Liquidator is liable to refund the amount of Rs.22,77,108/-, as per his own

calculation. We, thus, are of the view that direction to refund the amount of Rs.23,88,280/- be modified for refund of the amount of Rs.22,77,108/-. Ordered accordingly.

23. From the facts which have been noticed and the manner in which the Liquidator has conducted the liquidation process, raises question on understanding of the liquidation process, liquidation regulations and the manner in which the Liquidator has demanded liquidation fee from the Scheme Proponent. We are of the view that copy of this order be forwarded by the Registry of this Tribunal to the Insolvency and Bankruptcy Board of India for information and appropriate action.

24. Subject to what has been directed above, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

8th December, 2023

Ashwani