

**THE NATIONAL COMPANY LAW TRIBUNAL
COURT V, NEW DELHI**

I.A No. 2545/2021

IN

Company Petition No. (IB) – 706/(PB)/2018

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 read with Rule 11 of NCLT Rules, 2016.*

IN THE MATTER OF:

M/S ICICI BANK LIMITED

.... FINANCIAL CREDITOR

VERSUS

APEX BUILDSYS LIMITED

.... CORPORATE DEBTOR

AND IN THE MATTER OF-

ERA LABOURER UNION OF SIDCUL, PANT NAGAR
THROUGH ITS SECRETARY

.... APPLICANT

VERSUS

M/S APEX BUILDSYS LIMITED

.... RESPONDENT/CORPORATE DEBTOR

Order Pronounced on: 02.04.2024

MEMO OF PARTIES

Era Labourer Union of SIDCUL, Pant Nagar,

IA- 2545 of 2021

IN

CP(IB) No. 706/PB/2018

Order Delivered On: 02.04.2024

Through its Secretary, Dinesh Kumar,
R/o H. No. 358, Village - Fulasungi,
P.O. - Rudrapur, Teh - Rudrapur,
District - Udham Singh Nagar – 263153, Uttarakhand

Applicant

Vs.

M/s Apex Buildsys Limited
Through its IRP
B-292, Chandra Kanta Complex
Shop No. 7, Near Metro Pillar No. 161,
New Ashok Nagar, New Delhi, 110096

Respondent

CORAM:

**SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Applicant: Ms. Bhargavi Khanna, Mr. Ishaan

For the Liquidator: Abhishek Anand and Karan Kohli Advocates

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 by Era Labourer Union of SIDCUL ("Applicant Union"), a registered Trade Union comprising 103 workmen employed by the Corporate Debtor Apex Buildsys Ltd., seeking appropriate directions to the Liquidator for payment of the rightful dues owed to the members of the Applicant Union.
2. The applicant in the present application has prayed for the following reliefs: -

- a) *Allow this Application and declare that the Purported Closure Notice dated 31.07.2017 is illegal and non est;*
- b) *Declare that the Purported Transfer Notice dated 20.06.2017 is illegal and non est;*
- c) *Set aside the decision taken by the COC in its 16th meeting dated 02.09.2019 upholding the closure dated 31.07.2017;*
- d) *Set aside the decision of the Liquidator in his emails dated 23.03.2020 and 10.04.2020, rejecting the claims of the Applicant Union for wages for the period between 1st August 2017 and 9th January 2020 and the claims for bonus between 1st August 2017 and 20th September 2018;*
- e) *Direct the Respondent/Liquidator to admit the total claims raised by the Applicant Union for wages/salary between July 2017 and 09.01.2020, amounting to 3,96,12,285.53 (Rupees Three Crores Ninety-Six Lakhs Twelve Thousand Two Hundred and Eighty-Five. Five Three Only);*
- f) *Direct the Respondent/Liquidator to admit the total claims raised by the Applicant Union for bonus for the period 01.04.2016 to 31.03.2017; 01.04.2017 to 31.03.2018 & 01.04.2018 to 20.09.2018 amounting to Rs. 19,82,132(Rupees Nineteen Lakhs Eighty-Two Thousand One Hundred and Thirty-Two); and/or*
- g) *Grant any other relief that this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.*

3. Briefly stated the facts of the case as mentioned in the instant application, which are just and necessary for adjudication, are as follows: -

- i. The present application, I.A. 2545/2021, has been filed by the Era Labourer Union of SIDCUL, Pantnagar ("Applicant"), a registered trade union comprising 103 workmen of the factory of the Corporate Debtor located at Pantnagar, Uttarakhand ("Pantnagar Plant"). After liquidation commenced, the Applicant had raised certain claims, including for wages and bonus, which the Liquidator rejected for the periods subsequent to 31.07.2017. The sole basis for such rejection was the purported closure (factually a shutting down) of the Pantnagar Plant on 31.07.2017. After the closure of Pantnagar Plant, the workers did not work and did not go to Nagpur Plant where they were transferred.
- ii. The Applicant had promptly challenged the purported closure before the Hon'ble Uttarakhand High Court and Hon'ble Supreme Court, both of which directed the

Applicant to approach this Adjudicating Authority and raise all its contentions, including settlement of charge in relation to salary and wages.

- iii. The Applicant had approached this Adjudicating Authority by way of C.A. 1497/(PB)/2019 preferred under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking quashing of the purported closure. This Adjudicating Authority referred the matter to the Committee of Creditors, vide order dt. 02.08.2019. However, since the validity of the closure is yet to be decided and formed the sole basis of the rejection of the Applicant's claims, the Applicant has preferred the present I.A. 2545/2021, once again challenging the validity of the purported closure and, consequently, praying for admission of the entirety of claims for wages and bonus. The total wages claimed are for the period between 1.07.2017 to 9.01.2020 which amount to INR 3,96,12,285.53 and the total bonus claimed are for the period between 1.04.2016 to 20.09.2018 which amounts to INR 19,83,132.
- iv. Despite the validity of the purported closure having not been adjudicated till date, the Liquidator had, in his email dated 10.04.2020 incorrectly deemed the purported closure to be valid to justify the rejection of the Applicant's claims.
- v. In arriving at this conclusion, reliance has been placed on the order of the Ld. Secretary, Labour Commission, Uttarakhand dated 02.02.2018. Such reliance is incorrect as, in the factual narration preceding this conclusion, the Liquidator had noted that this order dated 02.02.2018 had been challenged before the Hon'ble Uttarakhand High Court which had disposed of the matter without adjudicating upon the same and had given the liberty to the Applicant to raise its contentions before this Adjudicating Authority. The vires of the order dated 02.02.2018 were still in abeyance when the Liquidator sent this email dated 10.04.2020 and reliance on the same is contradictory to contents of the email itself.
- vi. The scope of adjudication before the Labour Secretary was limited only to the determination of the number of workmen which were rendering their services at the Pantnagar Plant at the relevant time. The only purpose of this proceeding, culminating in the order dated 2.02.2018, was to determine whether the legal threshold of section 6V of the Uttar Pradesh Industrial Disputes Act, 1947 had

been fulfilled and, as such, there was no adjudication whatsoever on the validity of the purported closure dated 31.07.2017. Thus, any reliance placed upon this order dated 2.02.2018 by the Liquidator is incorrect.

- vii. The Applicant had, at first, challenged the validity of the purported closure before the Hon'ble Uttarakhand High Court in W.P. (M/S) No. 2020/2017. Since there were disputes over the number of workmen rendering services at the Pantnagar Plant before its closure, this factual issue was referred to the Labour Secretary vide order dated 5.10.2017. Vide its order dated 02.02.2018, the Labour Secretary found that the number of workmen at the Pantnagar Plant on avg. per working day was less than the statutorily prescribed number of 300. Subsequently, the Applicant had challenged the order dated 2.02.2018 passed by the Labour Secretary and the purported closure dated 31.07.2017 itself before the Hon'ble Uttarakhand High Court in W.P. (M/S) 462/2018.
- viii. The Applicant had then filed C.A. No. 1497/(PB)/2019 dated 2.08.2019 before this Adjudicating Authority praying that the purported closure be set aside and this Adjudicating Authority disposed of the CA vide order dated 8.08.2019 with the direction that this issue of closure should be placed before the COC for consideration.
- ix. The issue of closure was thereafter considered by the COC in its 16th meeting dated 2.09.2019. The COC unanimously resolved that this issue be left for the Prospective Resolution Applicant to provide for in its resolution plan, which would then again be considered by the COC. However, no resolution plan was approved and liquidation was commenced against the Corporate Debtor on 9.01.2020, which resulted in this issue of closure being kept in abeyance.
- x. Through a Writ Petition [W.P. (C) 1270/2019] dated 3.10.2019 the Applicant had challenged the closure even before the Hon'ble Supreme Court of India contending, inter alia that the initiation of proceedings before this Adjudicating Authority would not oust the jurisdiction of the labour courts under the Industrial Disputes Act, 1947. Vide order dated 13.11.2019, the Applicant was directed to raise all its issues before this Adjudicating Authority.
- xi. In liquidation, sec 53(1)(b) places workmen at the highest priority (amongst creditors) in the waterfall distribution mechanism. U/s 36(4)(a)(iii), statutory dues

of workmen are excluded from the liquidation estate and are to be paid in priority over all other dues, even above the liquidator's costs. Further, if the secured creditor has chosen to realize its security interest in terms of sec 52, such a secured creditor is bound to pay as much towards the amount payable for the workmen dues under sec 53(1)(a), as it would have shared in the event it had relinquished security interest to the liquidation estate. Even in CIRP, operational creditors (including workmen) cannot be paid less the liquidation value due to them, under the resolution plan [sec 30(2)(b)]. Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that, in a resolution plan, the operational creditors shall have to be paid in priority over the financial creditors and is said to be a 'mandatory content' of the resolution plan.

- xii. As a result, this Adjudicating Authority may direct the Liquidator to admit the Applicant's claim for wages amounting to INR 3,83,19,238 (for the period 1.08.2017 – 9.01.2020) and the claim for bonus amounting to INR 7,35,600.22 (for the period 01.08.2017 – 20.09.2018).

4. Briefly stated that the reply on behalf of Respondent are as follows:

- i. The entire edifice of the Applicant in the present Application is to assail the Order/ Email/Communication dated 23.03.2020 and 10.04.2020 issued by the Liquidator in respect of partial rejection of claim of the Applicant. In respect to the same it is humbly submitted that Section 42 of the Code specifically provides for an appeal against the rejection of claim by the Liquidator.
- ii. It is pertinent to mention here that if the Applicant was aggrieved by the decision of the Liquidator, then the I & B Code provides the remedy of an appeal under Section 42 of the Code. That Section 42 of the Code provides that a creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claim within fourteen days of the receipt of such decision. That admittedly, the Applicants are challenging the decision of the Liquidator dated 23.03.2020 (wherein the Liquidator informed the Applicant that their claim to the tune of Rs. 1,09,70,698 has been admitted) and 10.04 2020 (reasons for non-admission of claim was given) and the present application has

been filed under 60 (5) of the I & B Code, whereas the Applicant was required to file an appeal under Section 42 of the Code and therefore, the present application is not maintainable.

- iii. The Applicant is also assailing the legality of Closure Notice dated 31.07.2017 issued by the Corporate Debtor under Section 2(ee) and 6 (V) of the Uttar Pradesh Industrial Disputes Act, 1947 much prior to the initiation of CIRP of the Corporate Debtor which is not the subject matter which can be decided by this Adjudicating Authority in summary jurisdiction and therefore, the present Application deserves to be dismissed with exemplary costs.
- iv. That Section 39(1) of the Code stipulates that the Liquidator shall verify the claims submitted under Section 38 of the Code within such time as specified by the Board. Furthermore, Section 40(1) stipulates that the Liquidator may after verification of claims under Section 39, either admit or reject the claim, in whole or in part, as the case may be, and the proviso to Section 40(1) of the Code stipulates that where the liquidator rejects claim, the reasons for rejection shall be recorded.
- v. It is pertinent to mention herein that the claim of the Applicant has been partially admitted till 31.07.2017 being the cut off date instead of the Liquidation Commencement date for the reason that the unit of the Corporate Debtor was under lockout since 31.07.2017, therefore, upon verification of the claims, the amount prior to 31.07.2017 has been verified and duly admitted by the Answering Respondent and therefore, the amount claimed post the cutoff date i.e. 31.07.2017, could not be verified in the absence of any operations due to lockout having been declared with respect to the unit of the Corporate Debtor.
- vi. The Liquidator has verified the claim of the Applicant and admitted to extent which could be verified in view of the fact, that the Pant Nagar unit was under closure in view of the closure notice dated 31.07.2017. That the legislature has not endowed the Answering Respondent being the Liquidator to decide any question of law and furthermore, the question with respect to the validity of the Closure Notice dated 31.07.2017 which was before the initiation of Corporate Insolvency Resolution Process.

vii. The Respondent does not have any jurisdiction with respect to the decision taken by the committee of creditors. Moreover, the Committee of Creditors after detailed discussion and deliberations had decided in the 16th meeting of COC dated 02.09.2019, as under:

"Thereupon, detailed discussion and deliberations took place amongst the members of the CoC when all the aspects of the matter were considered in light of the present states of CIRP process, viz cessation of activity at Pantnagar plant w.e.f. January 2017, present operations at Umred (Nagpur) Plant where capacity utilization is around 15-20% for the present for want of working funds, NPA status of the account, present stage of CIRP. Post discussions and deliberations and considering all the pertinent aspects, CoC was of unanimous view that since the insolvency resolution process is on the verge of final stages where though two resolution plans have been submitted, other eligible are being called upon to submit resolution plans for the CD within the extended timeline in view of the order of Hon'ble NCLT dated 23.08.2019, therefore considering the stake/interest of the Prospective Resolution Applicant(s), who submit resolution plans, the appropriate call of Resolution Applicant would be of the prime importance. In view of the above order dated 02.02.2018 on the legality of the lock out by Labour Department, Govt. of Uttarakhand, coupled with the present stage of CIRP process where resolution plans have been called to be considered and approved, if anyone is found viable/satisfactory by CoC the members of the CoC decided that this matter be left for Resolution Applicant, if anyone is decided/approved to be successful, upon receipt/consideration of resolution plans, by CoC and thereupon by Hon'ble NCLT, for taking appropriate call in the light of their resolution plan."

viii. This Adjudicating Authority had directed the Answering Respondent vide its order dated 08.08.2019 to place the issue before the Committee of Creditors and therefore, in view of the decision of the Committee of Creditors, the Answering Respondent being the then Resolution Professional could not have acted against the decision of the Committee of Creditors.

5. We have gone through documents on record filed and arguments advanced by counsel for the Applicant and Respondent.

6. In the present case, as per the records of the Corporate Debtor, the Corporate Debtor declared a lock-out on 31.07.2017 under the Industrial Dispute Act, 1947 at the Pantnagar Unit of the Corporate Debtor prior to initiation of CIRP of the Corporate Debtor. Further, Hon'ble Principal Bench, NCLT, vide order dated 20.09.2018 initiated Corporate Insolvency Resolution Process against the Corporate Debtor. However, after the liquidation commencement, the Applicant had raised certain claims, wages and bonus, which the Liquidator rejected for the periods subsequent to 31.07.2017. The sole basis for such rejection was the purported closure (factually a shutting down) of the Pantnagar Plant on 31.07.2017. After the closure of Pantnagar Plant, the workers did not work and did not go to Nagpur Plant where they were transferred.
7. However, it is pertinent to mention that the claim of the Applicant has been partially admitted till 31.07.2017 being the cut off date instead of the Liquidation Commencement date for the reason that the unit of the Corporate Debtor was under lockout since 31.07.2017. Further, with respect to the amount claimed post cut off date i.e. 31.07.2017, could not be verified in the absence of any operations due to lockout having been declared with respect to the unit of the Corporate Debtor. Hence, the Liquidator has verified the claim of the Applicant and admitted to extent which could be verified in view of the fact, that the Pant Nagar unit was under closure in view of the closure notice dated 31.07.2017.
8. Moreover, vide a letter dated 20.06.2017 issued on behalf the Corporate Debtor, the workmen were informed that they are being transferred from the Pantnagar Plant to the Nagpur Plant, since the Pantnagar Plant had received no orders for production and that the factory was suffering continuous losses. The Transfer Letter also stated that the factory had been closed down from February 2017, as a result of which the workmen were being transferred to Nagpur in terms of paragraph 12 of the respective employment letters issued to the workmen. However, the workmen never went to continue their work in Nagpur Plant.
9. At this stage, it is pertinent to mention Section 39 (1) of the Code wherein it is stipulated that the Liquidator shall verify the claims submitted under Section 38 of the Code within such time as specified by the Board. Furthermore, Section 40(1) stipulates that the Liquidator may after verification of claims under Section 39,

either admit or reject the claim, in whole or in part, as the case may be, and the proviso to Section 40(1) of the Code stipulates that where the liquidator rejects claim, the reasons for rejection shall be recorded.

10. Therefore, this Adjudicating Authority is of the view that, due to lockout 31.07.2017 under the Industrial Dispute Act, 1947 at the Pantnagar Unit of the Corporate Debtor, the claims could not have been verified as the business operations were suspended. Moreover, the reason for rejection of such claim was also conveyed by the Respondent to the instant Applicant. Hence, the claim by the Applicant post the lock out period in the instant case does not hold ground in the instant case.
11. Further, the Hon'ble High Court of Uttarakhand in the Writ Petition M/s No. 2020 of 2017 and 462 of 2018 observed as under: -

“11. In these circumstances, these two writ petitions are closed with a direction that the petitioners, who are already participating in proceedings under Section 7 of the Act before the National Company Law Tribunal, may raise all their contentions including the settlements of their charge in relation to the salary and wages before the National Company Law Tribunal, before who the proceeding is pending.

12. Consequently, the writ petitions are closed with aforesaid liberty to the petitioners to raise all their contentions as sought to be redressed by them by the present writ petitions.”

12. Further, the Hon'ble Supreme Court in order dated 13.11.2019, in Writ Petition [W. P.(C) 1270/2019] has held as under:

“As insolvency proceedings against the third respondent are pending before the National Company Law Tribunal, the petitioner can raise all contentions and issues before the Tribunal or in appellate proceedings. Accordingly, we are not inclined to issue notice in the writ petition, but we leave it open to the petitioner to raise the grievance, if any, in accordance with law, after the decision of the appellate tribunal.”

13. The Applicant in light of Hon'ble Supreme Court's judgement in **Arcelormittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1** contends that this

Adjudicating Authority has the jurisdiction to entertain or dispose of “any questions of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate persons”. The Hon’ble Supreme Court has held that Section 60(5)(c) begins with a non-obstante clause, which ensures that this Adjudicating Authority alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

14. Further, the Applicant contends that this Adjudicating Authority has wide residuary jurisdiction under Section 60 (5). However, this Adjudicating Authority is of the view that, this Adjudicating Authority does not have jurisdiction to decide dispute de-hors IBC, in light of the decision of the Hon’ble Supreme Court in **Gujarat Urja Vikas Nigam Limited Vs Mr. Amit Gupta & Ors in Civil Appeal No. 9241 of 2019**. The relevant extract of the said judgment is reproduced hereunder for ready reference:

*“87 The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a going concern’. **We hasten to add that our finding on the validity of the exercise of residuary power by the NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by the NCLT. However, it is pertinent to mention that the NCLT cannot exercise its jurisdiction over matters de hors the insolvency proceedings since such matters would fall outside the realm of IBC. Any other***

interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in Satish Kumar Gupta (supra).”

15. Therefore, in light of the above decisions, it is evidently clear that the Hon’ble Supreme Court and the Hon’ble High Court of Uttarakhand, have not directed this Adjudicating Authority to examine the validity of lockout and closure notice dated 31.07.2017. However, there are appropriate forums, which is created by law to examine such dispute, and this Adjudicating Authority does not have jurisdiction to examine dispute with respect to closure notice.
16. Moreover, the Applicant has referred to the decision of the Hon’ble Supreme Court in **Kunhayammed v. State of Kerala [(2000) 6 SCC 359]** regarding doctrine of merger and Article 141 of the Constitution. The Applicant has also referred to the order of Hon’ble Supreme Court dated 13.11.2019 regarding jurisdiction of this Adjudicating Authority. It emerges that the Hon’ble Supreme Court has given liberty to the Applicant in accordance with law. Admittedly, this Adjudicating Authority can exercise the jurisdiction in respect of issues which are related to or arises out of insolvency proceeding. The validity of the closure notice and transfer order which was passed prior to the CIRP proceeding which cannot be decided by this Adjudicating Authority while exercising power under IBC, 2016. Further, the contention of the Applicant that despite the specific provision under the Industrial Dispute Act, 1947 and Uttar Pradesh Industrial Dispute Act, 1947, this Adjudicating Authority should exercise its powers under Section 60(5) to examine the issue of closure notice, is not a correct view.
17. Further, the Hon’ble Supreme Court in **“Embassy Property Developments Pvt. Ltd. V/s. State of Karnataka in Civil Appeal No. 9170 of 2019”** has stated that decision taken by a government or statutory authority in relation to a matter which is in the realm of public law, cannot by any stretch of imagination, be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution” as appearing in Section 60(5) (c) of IBC, 2016.
18. Therefore, with respect to the contention of the Applicant with regards to the claims of the workmen, has been adjudicated upon, as discussed in Para 10. Further, the dispute with respect to the legality of the Closure Notice dated 31.07.2017 issued

by the Corporate Debtor under Section 2 (ee) and 6 (V) of the Uttar Pradesh Industrial Disputes Act, 1947, much prior to the initiation of Corporate Insolvency Resolution Process, is not a subject matter which this Adjudicating Authority has jurisdiction to adjudicate upon. Therefore, the contention of the Applicant with this regard does not hold ground. Also, this Adjudicating Authority have not made any observation regarding legality of closure notice and transfer order.

19. In light of the above observations, this Adjudicating Authority is of the view that, the instant Application bearing I.A. 2545 of 2021, lacks merit and is hereby **dismissed**.

20. Accordingly, IA 2545 of 2021 in CP (IB) /706/(PB)/2018 stands disposed off.
Let a copy of the order be served to the parties.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)