

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (COURT NO. II), KOLKATA

CONTEMPT APPLICATION No. 2 /KB of 2022

In I.A. NO. 1519 OF 2019

In C.P. (I.B.) NO. 1684 OF 2018

IN THE MATTER OF:

JAYANTA BANERJEE.

..... Operational Creditor

-Versus-

INCAB INDUSTRIES LIMITED.

..... Corporate Debtor

And

IN THE MATTER OF:

PROBIR SARKAR AND ANR.

...Applicants

-Versus-

**PANKAJ KUMAR TIBREWAL, RESOLUTION
PROFESSIONAL OF INCAB INDUSTRIES LIMITED.**

..... Respondent/ Contemnor

Date of Pronouncement of order: 18.04.2024

CORAM:

Smt Bidisha Banerjee : Member (Judicial)

Shri D. Arvind : Member (Technical)

Counsel appeared physically / through video Conferencing

ORDER

Per Bidisha Banerjee, Member (Judicial):

1. The Court convened through hybrid mode.
2. Learned Counsels for parties were heard on several occasions.
3. This application has been preferred by 11 applicants claiming themselves as employees and workmen of the Corporate Debtor, Incab industries limited. The applicant no. 1 claims that he is engaged in the accounting activities of the Corporate Debtor, whereas applicant 2 is involved in secretarial work. Similarly applicant 3 is engaged in computer data processing and in the Corporate Debtor, while applicant Nos. 4 and 5 are engaged in Accounts, Provident fund activities, as well as administration activities, of the Corporate Debtor. Applicant Nos. 6 to 10 claim to be the office staff of the Corporate Debtor. Applicant No. 11 a typist. The applicants have jointly prayed for the following reliefs:

- a. ***Direction upon the respondent No. 1 to release a sum of Rs. 5,00,359 /- due and owing to the applicants as on October 31, 2019;***
- b. ***Direction upon the respondent No 1 to release interim finance in favour of the applicants along with interest at the rate of 18% per annum on and from August 1, 2019;***
- c. ***Direction upon the respondent No 1 to consider and verify the proof of claims lodged by the applicant nos. 1, 3, 4 and 5 and update their names in the List of Creditors of the corporate debtor;***
- d. ***Direction upon the Respondent no. 1 to immediately make payment of the outstanding dues of the applicants towards Employees Provident Fund, Employees State Insurance dues and/ or other related taxes;***
- e. ***Direction upon the Respondent No. 2 not to take any coercive steps against the Applicants till the pendency of the CIRP in respect of the Corporate Debtor.***

f. Ad-interim orders in terms of Prayers above.

4. The applicants contend that by an order dated 17th August, 2019, passed by the Adjudicating Authority the CIRP was initiated in respect of the corporate debtor. The respondent was appointed as resolution professional. That the applicants have been receiving regular telephonic reminder from the Provident Fund Authorities. Respondent No 2 herein, for payment of their contributions since after July 2019. They have been threatened of coercive steps by invoking provision under Section 406 and 409 of the IPC 1860.
5. The applicants further claim that their salaries or wages from part of CIRP costs, and failure to release the same have rendered the applicants unable to contribute towards the Employment Provident Fund. The applicants claim that they are in the employment of the Corporate Debtor, since long and much prior to the insolvency commencement date.
6. The applicants assert that they have been paid their wages and/or remuneration, salary, and bonus, since initiation of the CIRP and although they have been instrumental in running of business of the Corporate Debtor, their fees for the services rendered by them are due and such expenses directly relate to the CIRP and necessary for the insolvency process. Hence they are entitled to be paid out of disbursement of interim finance from the interim resolution professional. The applicants claim that the total dues of the workers and employees are Rs. 5,00,359 /- as on 31st October 2019.
7. Learned Counsel Ms. Urmila Chakraborty appearing for the applicants, in support of their claim would take us through the following documents:
 - a. Pages 10 to 11 of the rejoinder to the reply affidavit of the erstwhile RP which is a letter dated 13/09/2019 from the erstwhile RP, to Alok Sen the applicant No 2, asking for the following:
 - i. ***All Statutory Reports of the company.***
 - ii. ***GSTIN with used id Password.***
 - iii. ***List of Employee/ workers at Jamshedpur, Pune and Kolkata.***

- iv. List of staff/ officers at Kolkata, Pune and Jamshedpur along with the appointments letters.**
- v. Letter of appointment, usage for using accommodating/ premises of the company if any.**
- vi. Complete sets of Audited accounts and any provisional balance sheets if available.**
- vii. Draft copy of Financial position as on 06.08.2019.**
- viii. Copy of deed/ agreements relating to all accommodations and properties of the company.**
- ix. Minutes of the meetings held by the company in the pasts.**

8. Placing the same Learned Counsel would vociferously submit that the letter shows that Alok Sen was in employment at the material time and so he was asked to furnish the details of all the staff at Jamshedpur, Pune, and Kolkata office of the Corporate Debtor.

b. The response of said Alok Sen of the dated 17.09.2019, in the letter head of the company, which shows that he is an employee of the Corporate Debtor and as such he was asked for and he had given the documents that were asked for and as available with the company, which includes the following:

- i. List of present employees at Kolkata, Jamshedpur Works and Pune Works.**
- ii. List of employees along with their last payment of salaries and bank account details**
- iii. Current paid staff salaries at Registered office, Kolkata.**

- c. Ld. Counsel will also refer to the Bio-metric attendance sheet of Alok Sen and Pabir Sarkar, at pages 127 to show that they had attended the office on the given dates;
- d. The Affidavit filed by erstwhile R.P at page 87 of the rejoinder, paras 11 to 13 whereof reads as under:

“11. I say that the applicant has filed their claim before this Hon’ble Tribunal. Out of the said claim filed by around 1629 worker/ employees including the said 11 applicants. On receipt of claim he claims details including bank details, details have been computerized.

12. It is pertinent to state that the all claims have scanned in pdf i.e. converted into soft copy. The claims are pending for final settlement as information’s have called from the worker/ employees through email/ sms. Further, after lockdown is lifted, letter will be issued to all worker/ employees of the Company in Liquidation.

13. All the claims will be disbursed in accordance with the provisions of the insolvency and Bankruptcy Code, 2016.”

9. We have considered the rival contentions and perused the following documents:

- a. The auditor’s comment/statement which says that:

“We have examined the attached Balance Sheet of INCAB INDUSTRIES LIMITED as at 31st December 1999 and the annexed Profit and Loss Account for the nine months period ended on that date which are in agreement with the books of account and records.”

b. The details depicted there, clearly demonstrate that the employees namely Nukul Basu, Rajat Chowdhury, Dipankar Roy, Alope Sen, Bijoy Barik have challenged their termination of 2013 onwards, which goes to prove that they were not in employment as on the date of CIRP.

c. Page 40, however, shows the following:

STATUTORY/GOVT. DUES OF REGISTERED OFFICE AS ON

07.08.2019

<u>SL.NO.</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>	<u>REMARKS</u>
1	PROVIDENT FUND CONTRIBUTION	62848	DUES FOR THE MONTH OF JUN'19 & JUL'19 COPY OF ECR ENCLOSED (ENCL:1)
2	EPF INTEREST & DAMAGES U/S 14b & 7Q	48263	INTEREST & DAMAGES AGAINST DELAYED PMT. COPY OF CHALLAN ENCLOSED (ENCL: 2)
3	EMPLOYEES' STATE INSURANCE CORPORATE	71759	ESCI CONTRIBUTION DUES FOR THE MONTH JAN'18 AND MAR'19 TO JULY'19 COPY OF CHALLANS ENCLOSED (ENCL: 3)
4	INTEREST & DAMAGES	241343	INTEREST AND DAMAGES AGAINST DELAYED PAYMENT OF ESIC CONTRIBUTION FOR THE PERIOD FEB'15 TO SEPT'17. COPY OF ESIC DEMAND NOTICES ENCLOSED (ENCL:4)

**d. Page 41 shows dues of Employment Provident Fund Organizations
dues for the wage month June 2019 as under:**

Establishment Code & Name	WBCAL0005138000 INCAB INDUSTRIES LIMITED,,		Dues for the wage month of		June	2019
<u>Address :</u>	9, HARE STREET,, CALCUTTA, KOLKATA, WEST BENGAL					
	EPF		EPS		EDLI	
Total Subscribers:	11		10		11	
Total Wages:	1,25,950		1,05,650		1,05,650	

SL.	PARTICULARS	A/C. 01(Rs.)	A/C. 02 (Rs.)	A/C. 10 (Rs.)	A/C. 21 (Rs.)	A/C.22(Rs.)	TOTAL
1	Administration Charges	0	718	0	0	0	718
2	Employer's Share Of	7,213	0	7,901	531	0	15,645
3	Employee's Share Of	15,114	0	0	0	0	15,114
Grand Total : Thirty-One Thousand Four Hundred Seventy-Seven Rupees Only							31,477

Similarly 42 is about dues for July 2019

10. At hearing, Learned Counsel Ms. Urmila Chakraborty placing the above would vociferously contend that the present R.P. with a mala fide attempt has straight away denied the claim of the applicants who were working during the CIRP period although the erstwhile R.P has never denied or disputed their engagement during the CIRP period.
11. Per contra Ld. Counsel Mr. Kuldeep Mallik appearing for the erstwhile RP would vehemently oppose the claim and submit that the erstwhile R.P. has never admitted their engagement with the Corporate Debtor. He would submit that since the employees were restraining the RP to entire office after the liquidation order was passed, a Police complaint was lodged on 25.02.2022 which also says that all the employees stood discharged as on the date of complaint. Ld. Counsel would vehemently oppose the prayer on the ground that the Applicants have failed to bring on record any convincing document that would prove their engagement with the Corporate Debtor during the CIRP period. Learned Counsel would submit that in absence of any contemporaneous documents to prove their engagement during the CIRP period, no relief as sought for can be granted.
12. We have noted that other than the purported Bio metric attendance sheet no other documents have been produced in support of the applicant's claim that they were engaged by the R.P. during the CIRP period.
13. Learned Counsel Mr. Shaunak Mitra appearing for the present R.P. would very fairly submit that during the period they were engaged to assist the present R.P. in running the Administrative Office, they were paid regular

salaries/ wages, however, payments from September 23 are still due which would be cleared immediately upon receipt of funds by the R.P towards CIRP costs.

14. Ld. Counsel Ms. Urmila Chakraborty, would refer to the order dated 20.12.2021 whereby this Adjudicating Authority has directed for payment. Further pages 117,119, and 122 of the rejoinder were placed. Ld. Counsel would assertively submit that there could not be a termination of their employment without a formal discharge letter or upon liquidation.

15. We are of the considered opinion that neither the letters dated 13.09.2019 nor the biometric attendance given by Mr. Alok Sen at 3 P.M. every day, with no entry or exit timings noted, can be considered as proof of their engagement during the CIRP period.

16. In Sunil Kumar Jain and Others Versus Sundaresh Bhatt and Others reported in 2022, 7 Supreme Court Cases 540, The Hon'ble Apex Court has held that:

"If on adjudication of the claims made by the respective workmen/employees, if it is established and proved that during CIRP, the corporate debtor was a going concern and the workmen/employees concerned actually worked during CIRP when the corporate debtor was a going concern, the wages and salaries of such workmen/employees to be included in CIRP costs as defined under Section 5(13) IBC and they will have to be paid such wages/salaries as per Section 53(1)(a) IBC as part of CIRP costs in full before making any payment as per priorities mentioned in Section 53(1) IBC.

"It is true that under Section 20 IBC, it is the duty of the RP to manage and run the operations of the corporate debtor as a going concern. However, the words

used in Section 20 are “the interim resolution professional shall make every endeavor to.... Manage the operations of the corporate debtor as a going concern”. Therefore, even if it is found that the corporate debtor was not a going concern during CIRP despite best efforts by the resolution professional, it cannot be presumed that still the corporate debtor was a going concern during CIRP period. It depends on the facts of each case. IN a given case, the corporate debtor may be a going concern and in a given case, the corporate debtor might not be a going concern. Therefore, submission on behalf of the appellants that as the RP managed the operations of the corporate debtor as a going concern and therefore the workmen/employees are entitled to their wages and salaries during CIRP, as their wages/salaries to be included in CIRP costs cannot be accepted. However, the wages and salaries of the workmen/employees of pre-CIRP period will have to be governed as per the priorities mentioned in Section 53(1) IBC.”

17. The perusal of the aforesaid extract clearly indicates that the onus is upon the employees who have come up with their claims towards wages for a particular period, to prove convincingly that they were engaged in a given organization during that period. Their engagement can neither be presumed from the letters annexed nor the biometric attendance sheet placed before us. In absence of any formal engagement letters, duty roster, formal discharge letters etc. this Tribunal cannot direct payment of wages to such incumbents.
18. In view of such, the claim of the applicants for their wages during CIRP period, being not substantiated in any manner, fails.
19. However, the payment towards Provident Fund / Gratuity which fell due during CIRP is directed to be cleared in two months.

20. Any pre CIRP dues towards salary, PF, and Gratuity is bound to take its course in accordance with Section 53 of IBC.
21. With The aforesaid directions, this **I.A. (IB)No. 1519/KB/2019 stands disposed of.**
22. **No Costs.**
23. Consequently, we find no deliberate or contumacious violation of our order. Hence the **CONTEMPT APPLICATION No. 2 /KB of 2022 filed in IA In I.A. (IB)No. 1519/KB/2019** also stands dismissed, notices if any issued are discharged.
24. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
25. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**Arvind
ember (Technical)**

**Bidisha Banerjee,
Member (Judicial)**

Signed on this the 18th day of April, 2024

A.D.(Steno)/ M. Jana (P.S.)