

## I. Case Reference

Case Citation	:	(2021) ibclaw.in 172 NCLAT
Case Name	:	K G Somani & Co Vs. Arvind Garg Liquidator in the liquidation process Carnation Auto India Pvt. Ltd.
Corporate Debtor	:	Carnation Auto India Pvt. Ltd.
Appeal No.	:	Company Appeal (AT) (Ins) No. 257 of 2021 [Arising out of Order dated 09.02.2021 passed by National Company Law Tribunal, New Delhi in IA No. IA/06/2019 in IB-302/(ND)/2017]
Judgment Date	:	01-Apr-21
Court/Bench	:	NCLAT New Delhi
Act	:	Insolvency & Bankruptcy Code 2016
Present for Appellant(s)	:	Shri Pawan Sharma and Shri Prashant Kashyap, Advocates
Present for Respondent(s)	:	Ms. Harika Shukla (Liquidator)
Member (Judicial)	:	Justice A.I.S. Cheema
Member (Technical)	:	Dr. Alok Srivastava

## II. Brief about the decision

This Appeal has been filed against Order passed by the Adjudicating Authority. The I.A. was filed by the Appellant claiming that it was appointed as Forensic Auditor of the Corporate Debtor - Carnation Auto India Pvt. Ltd. It was claimed before Adjudicating Authority that the Appellant was appointed earlier but was continued during CIRP (Corporate Insolvency Resolution Process) by the IRP/RP and has completed the forensic audit.

NCLAT held that the findings further go on to reject submissions made by then IRP. The learned Counsel for the Liquidator is submitting that there is no document as such to show that the Appellant was continued to be engaged during CIRP for the audit. By marking copy to IRP by Punjab National Bank, engagement cannot be presumed. It is stated by Liquidator that there was no COC (Committee of Creditor) Resolution to continue the Appellant. The Appellant acted at the behest of one of the Financial Creditors, i.e. Punjab National Bank and thus, the expenses sought as CIRP costs, are not payable. We have gone through the Impugned Order and even considering the emails which are stated to have been sent by Punjab National Bank, as well as the IBBI Proceedings pointed out (which would not be relevant for deciding the engagement during CIRP), we do not find that the Appellant makes out a case for us to interfere with the Impugned Order which has rejected the Application. Adjudicating Authority relied on IBBI Circular dated 12.06.2018 to see what is included and what is not included in CIRP costs and held that forensic audit is not included. Even the IBBI proceedings mention that it is not in fitness of things that the RP engages a Forensic Auditor who has been engaged by one of the stakeholders. This is apart from the lack of any document of engagement/continuation in favour of Appellant.

## III. Full text of the judgement

### **ORDER** **(Virtual Mode)**

**01.04.2021** Heard Counsel for the Appellant. This Appeal has been filed against Impugned Order passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) on 9th February, 2021 in IA No. IA/06/2019 passed in IB-302/(ND)/2017. The I.A. was filed by the Appellant claiming that it was appointed as Forensic Auditor of the Corporate Debtor - Carnation Auto India Pvt. Ltd. The Appellant claimed that the Respondent Liquidator should be directed to admit and pay

Rs.5,31,000/- as per Invoice as the fees of forensic audit done. It was claimed before Adjudicating Authority that the Appellant was appointed earlier but was continued during CIRP (Corporate Insolvency Resolution Process) by the IRP/RP and has completed the forensic audit.

2. The Application came to be rejected and thus the present Appeal.

3. The learned Counsel for the Appellant is submitting that the Appellant was engaged to conduct the forensic audit of the Corporate Debtor by the Punjab National Bank by a letter dated 18.07.2017. The CIRP got initiated on 25th September, 2017. The Appellant claims that the Appellant negotiated fees of Rs.3 Lakhs with Punjab National Bank on behalf of then IRP - Mr. Mukesh Mohan to conduct the audit under the provisions of IBC and this was communicated to the IRP vide e-mail dated 8th December, 2017. The learned Counsel for the Appellant is referring to document at Page - 91. The e-mail there is dated 30th November, 2017 which is stated to have been gone from LCB, i.e. Punjab National Bank to the partner of the Appellant. It is stated that copy was marked to the IRP. The e-mail reads as under:-

“With reference to the trailing mail, you are once again requested to visit our branch office urgently for discussion on fees on the extended scope of work and regarding the extended scope, the same will be discussed by RP.”

4. It is stated that the trail e-mail dated 8th December, 2017 is on the same page which is again from the Punjab National Bank and it is sent to then IRP Mr. Mukesh Mohan where the Punjab National Bank conveyed that:-

“We have negotiated fee of Rs.3.00 lakhs with Forensic Auditor for additional scope of work. Auditor has been asked to contact you to start the work immediately”.

5. The learned Counsel for the Appellant is relaying on these communications to submit that even after the CIRP started, the Appellant was continued to be engaged in the forensic audit.

6. Reliance is also placed on Order of Disciplinary Committee dated 23rd August, 2018 of the IBBI (Insolvency Bankruptcy Board of India) (Annexure A-12 Page 106 @ 115). It is stated that some enquiry was started against the IRP - Mr. Mukesh Mohan and in that context, these minutes are being referred to claim that the Appellant was continued during CIRP period and thus is entitled to the fees as claimed. The concerned portion reads as under: -

**“2.2.6 Contravention:** Instead of appointing one, Mr. Mohan used the services of a forensic auditor, who was earlier appointed by one of the financial creditors in the same account. Further, the forensic audit report had adverse findings with regard to irregular transactions - preferential transactions, undervalued transactions, extortionate transactions and fraudulent trading or wrongful trading. The CoC directed Mr. Mohan, in its meeting dated 5th January, 2018, to file an application in respect of irregular transactions before the AA. Mr. Mohan, however, failed to do so.

**Submission:** On coming to know that a forensic auditor appointed by one of the financial creditors had already started the said audit, Mr. Mohan decided to continue with the same auditor as the appointment of a new one would incur additional cost and time. He, however, extended the scope of the work. Further, the CoC in its meeting held on 10th January, 2018

granted time to the members of the suspended Board of Directors to submit clarifications on the findings in the forensic audit. In its meeting on 16th February, 2018, the CoC granted one more opportunity to them to submit their comments on the forensic audit by 19th February, 2018. The members of the suspended Board of Directors submitted their comments on the forensic audit on 5th March, 2018. Since the CoC accepted Mr. Mohan's resignation on 5th March, 2018, he was neither in a position to not obligated to proceed further in the matter.

**Finding:** The DC finds as under:

(a) An IP is duty bound under section 20 the Code to protect and preserve the value the assets of the Corporate Debtor. He is also duty bound under section 25(2)(j) read with section 43, 45, 50 and 66 of the Code to identify and recover the assets lost in irregular transactions. These are inherent powers of the RP and the Code does not envisage any role of the CoC in irregular transactions. He may engage the services of professionals, including forensic auditor, to assist him for this purpose. It is pertinent to note the thinking of the Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Insolvency and Bankruptcy Code, 2016, in respect of such transactions as under: .....

7. The findings further go on to reject submissions made by then IRP. The learned Counsel for the Liquidator is submitting that there is no document as such to show that the Appellant was continued to be engaged during CIRP for the audit. By marking copy to IRP by Punjab National Bank, engagement cannot be presumed. It is stated by Liquidator that there was no COC (Committee of Creditor) Resolution to continue the Appellant. The Appellant acted at the behest of one of the Financial Creditors, i.e. Punjab National Bank and thus, the expenses sought as CIRP costs, are not payable.

8. We have gone through the Impugned Order and even considering the emails which are stated to have been sent by Punjab National Bank, as well as the IBBI Proceedings pointed out (which would not be relevant for deciding the engagement during CIRP), we do not find that the Appellant makes out a case for us to interfere with the Impugned Order which has rejected the Application. Adjudicating Authority relied on IBBI Circular dated 12.06.2018 to see what is included and what is not included in CIRP costs and held that forensic audit is not included. Even the IBBI proceedings mention that it is not in fitness of things that the RP engages a Forensic Auditor who has been engaged by one of the stakeholders. This is apart from the lack of any document of engagement/continuation in favour of Appellant.

We do not differ from Adjudicating Authority.

There is no substance in the Appeal. The Appeal is dismissed.

**[Justice A.I.S. Cheema]  
Member (Judicial)**

**[Dr. Alok Srivastava]  
Member (Technical)**

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