

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

IA No. 2777 of 2022

In

C.P.(IB) No. 1832/IBC /MB/MAH /2017

*Application filed under Section 60(5) of the
Insolvency and Bankruptcy Code, 2016.*

In the matter of

Mr. Abhijit Guhathakurta

Liquidator of EPC Construction (India) Ltd.,

.... Applicant

V/s

Arkay Logistics Limited

...Respondent

In the matter of:

IDBI Bank Ltd.

... Financial Creditor/Petitioner

V/s

EPC Constructions (India) Ltd.

.....Corporate Debtor /Respondent

Order Pronounced on: - 08.01.2024

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COURT-II

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Coram :

Anil Raj Chellan Kuldip Kumar Kareer

Member (Technical) Member (Judicial)

**For the Liquidator/Applicant : Advocate Shriraj Khambete a/w Adv.
Naman Jain and Adv. Aditya Singh**

**For the Respondent: Advocate Shyam Kapadia a/w Adv. Dhruva
Ghandhi**

ORDER

Per :- Anil Raj Chellan, Member Technical.

1. The present application is filed by Mr. Abhijit Guhathakurtha, Applicant/Liquidator of EPC Constructions (India) Limited (Corporate Debtor), under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, read with Rule 12 of the National Company Law Tribunal Rules, 2016, seeking necessary directions against Arkay Logistics Limited (Respondent) i.e. the respondent herein to pay an amount of INR. 18,10,00,000 (Rupees Eighteen Crores Ten Lakhs Only) to the Corporate Debtor.

Case of the Applicant in brief :

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2. The above-mentioned Company Petition No. (IB) No.1832/IBC/NCLT/MB/MAH/2017 was admitted by this Tribunal vide order dated 20.04.2018 and Mr. Abhijit Guhathakurta was appointed as the Interim Resolution Professional for the Corporate Debtor and later (subsequently) confirmed as the Resolution Professional for the Corporate Debtor. One of the two resolution plans received, was approved by the committee of creditors (Coc) and confirmed by this Tribunal on 25.11.2019. However, the successful resolution applicant failed to implement its plan. Inter alia, for the said reason, this Hon'ble Tribunal, vide order dated 7.05.2021 ("Liquidation Order") directed for the liquidation of the Corporate Debtor as a going concern, being made effective from 18.05.2021. Pursuant to the order, Mr. Abhijit Guhathakurta, the Applicant herein, was appointed as the Liquidator.

3. On 18.01.2017, vide Letter of Authorization No. GIGL/PROC/2017/BJPL/JAPL/LOA/01, GSPL India Gasnet Limited (GIGL) awarded the Corporate Debtor a contract for Pipeline and Associated Works for Jalandhar-Amritsar Pipeline Project, for an

amount of INR 211,73,00,000 (Rupees Two Hundred Eleven Crores Seventy-Three Lakhs Only). Pursuant to the said contract, the Corporate Debtor had to submit a Performance Bank Guarantee (PBG), amounting to INR 21,17,00,000 (Rupees Twenty-One Crores Seventeen Lakhs Only), to GIGL. Owing to the liquidity problems at that time, the Corporate Debtor requested the Respondent to arrange for issuance of the required PBG from their existing line of credit with Axis Bank. Such an arrangement was agreed to, and Axis Bank at the request of respondent issued PBG No. 13940100006735, on 02.03.2017 for of INR (Rupees Twenty-One Crores Seventeen Lakhs Only), to GIGL after marking a lien on the Respondent's fixed deposits.

4. The Corporate Debtor deposited sums, to the tune of INR 6,00,00,00 (Rupees Six Crores only) on 01.03.2017 and INR 60,00,000 (Rupees Sixty Lakhs Only) on 02.03.2017. It was assured by the Corporate Debtor that the balance amount of INR 14,57,00,000 (Rupees Fourteen Crores Fifty-Seven Lakhs Only) would be paid in due course of time. Since the Corporate Debtor was facing liquidity problems, (vide letter dated 18.04.2017), it requested the Respondent for a short-term advance of INR 3,00,00,000 (Rupees Three Crores Only).

Subsequently, the Corporate Debtor deposited amounts of INR 12,00,00,000 (Rupees Twelve Crores only), INR 50,00,000 (Rupees Fifty Lakhs Only) and INR 2,00,00,000 (Rupees Two Crores Only) on 05.01.2018, 09.01.2018 and 18.01.2018, respectively, with the Respondent. The short-term advance was repaid by the Corporate Debtor and a net amount of INR (Rupees Eighteen Crores Ten Lakhs Only) was deposited with the Respondent, in lieu of the margin money. The same was informed, vide letter dated 18.01.2018. The Corporate Debtor, through such letter, further assured the deposit of the balance amount of INR 3,00,00,000 (Rupees Three Crores Only) in due course of time.

5. Subsequently since the Corporate Debtor was admitted into insolvency on 20.04.2018, the balance amount was not deposited. Thus the Corporate Debtor has paid a net amount of Rs. 18,10,00,000 (Rupees Eighteen crore ten lakhs) after adjusting the advance taken by it to the Respondent in lieu of the margin money kept with Axis Bank in fixed deposit. The PBG has now been released by GIGL and has

been surrendered by the Corporate Debtor to Axis Bank, vide letter 24.03.2021.

6. Since the Respondent was obligated to return the deposited amounts after 24.03.2021, once the PBG had been cancelled and the lien over its fixed deposits removed, the Applicant, vide legal notice dated 09.07.2022, directed the Respondent to return the same. However, the Respondent did not return the amounts as required and also did not issue a response to the Applicant's legal Notice. Hence, the Application.

Reply of the Respondent

7. The Respondent submitted that the present application is not maintainable in law and on facts and hence the Respondent has filed the present Preliminary Reply which is limited to challenging the maintainability of the present application.
8. The Respondent further submitted that neither Section 60(5) nor Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules)

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would empower this Hon'ble Tribunal as a recovery forum and pass a decree in favour of the Applicant, as sought in the present Application.

9. The Respondent submitted that the IBC is a complete Code and has empowered the Liquidator, under Section 35(1)(k) to file Suits for and on behalf of the Corporate Debtor for recovery of monies.

10. The Respondent submitted that neither Section 60(5) nor Rule 11 of NCLT Rules can be invoked to override other provisions of the IBC. It is submitted that the residuary powers under Section 60(5) of the IBC and inherent powers under Rule 11 of NCLT Rules, can be invoked only when there are no explicit provisions in the IBC. If there is a specific provision in the IBC, neither Section 60(5) nor Rule 11 can be invoked inasmuch as an alternative remedy is available to the Applicant and only in the absence of such an alternative remedy, can inherent powers of the Ld. Authority be invoked.

11. We have heard the Ld. Counsels for the parties and perused the documents on record.

12. The Counsel for the Applicant submitted that the PBG issued by Axis Bank on behalf of the Corporate Debtor was released by GIGL and the original instrument of PBG has been surrendered by the Corporate Debtor to Axis Bank vide letter dated 24.03.2021. Consequently, the lien marked by Axis Bank on the fixed deposit of Respondent was also removed. Hence, in terms of the inter se arrangement between the two companies (the Corporate Debtor and the Respondent) which are related parties, the cash deposit of Rs.18.10 crore made by the Corporate Debtor to the Respondent was required to be returned by the Respondent. The Applicant further submitted that the said sum of Rs.18.10 crore forms a part of the liquidation estate as per Section 36 (3) (b) of the Code.
13. The Applicant further submitted that it is the duty of the liquidator/Applicant to take into his custody and control all the assets and property of the Corporate Debtor, and take measures to protect and preserve such assets. Thus, the liquidator has a fiduciary duty to recover and realise all assets and dues of the Corporate Debtor in a time bound manner for maximisation of value for the stakeholders.

14. On the other hand, the Respondent, without disputing or commenting upon the transaction, raised the preliminary issue of maintainability of the present application on the ground that neither the residuary powers under Section 60(5) of the Code nor the inherent powers of the Tribunal under Rule 11 of NCLT Rules can be invoked when there is no explicit provision in the Code. The Respondent further submitted that the liquidator cannot make the Tribunal a recovery forum and, in case the liquidator desires he can initiate suit as provided under Section 35(1) (k) of the Code for recovery of monies. To buttress the above contention, the Ld. Counsel has referred to the order of Hon'ble NCLAT in the case of Ramachandra D. Choudhary v. Bansal Trading Company and Others; 2022 SCC Online NCLAT 360 wherein it was held that the remedy for recovery of debts, disputed or not, cannot be determined in summary proceedings and the Code does not contemplate adjudication of any such nature. Any such steps taken under Section 60(5) of the Code before the Adjudicating Authority, would tantamount to bypassing/short-circuiting the judicial proceedings.

15. We have weighed the rival contentions of the parties.
16. As per Section 36 of the Code, the liquidator, for the purposes of liquidation, shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor, and the assets mentioned in sub-section (3) include, inter alia, assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets. In the present case, there appears to be no dispute as to the amount of Rs.18.10 crore forming part of the liquidation estate of the Corporate Debtor.
17. In the above background, the brief point arising for consideration is whether this Tribunal can invoke the residuary powers under Section 60(5) of the Code or inherent power under Rule 11 of the NCLT Rules to direct Respondent to return Rs. 18.10 core being an asset forming part of the liquidation estate to the Corporate Debtor without initiating a suit for recovery.
18. The nature of jurisdiction exercised by NCLT can be elucidated from the institutional framework under the Code which established a single forum to deal with all matters of insolvency, which were distributed

earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the assets of the corporate debtor and hamper the prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner.

19. As per the scheme envisaged under the Code, the liquidator once appointed by the Tribunal, is duty bound under Section 36 of the Code to form a liquidation estate of assets of the Corporate Debtor, for the benefit of all creditors. The prospects of a successful liquidation depend on a timely and effective formation of liquidation estate of the Corporate Debtor. Recognising the above, the Code also empowers the liquidator and cast upon him the duty to take into his possession all the

assets of the Corporate Debtor whether in the possession of Corporate Debtor or not.

20. It is pertinent to note that the Hon'ble Supreme Court in the case of *Innoventive Industries Limited v. ICICI Bank Limited* and another (Civil Appeal No. 8337-8338 of 2017) observed that —*one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process.* The said principle was reiterated in *Arcelor Mittal India Private Ltd v. Satish Kumar Gupta* (Civil Appeal Nos. 9402 – 9405 of 2018) where the Hon'ble Supreme Court held that —the non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT 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.
21. The Ld. Counsel for the Respondent relied on the order of Hon'ble NCLAT in the case of *Ramachandra D. Choudhary v. Bansal Trading Company and Others*; 2022 SCC Online NCLAT 360 wherein it was held that the remedy for recovery of debts, disputed or not, cannot be

determined in summary proceedings and the Code does not contemplate adjudication of any such nature. Any such steps taken under Section 60(5) of the Code before the Adjudicating Authority, would tantamount to bypassing/short-circuiting the judicial proceedings. However, it is observed from the facts of the above case that it is an application for recovery of outstanding amounts from Sundry Debtors who contended that the corporate debtor failed to supply the requisite goods despite entering into a transaction for supply of Crude Edible Oil and Palm Oil, thereby causing huge losses to the Sundry Debtor and eventually these amounts were squared off and adjusted against the dues of the Corporate Debtor. It was also observed that the issue whether any amounts are due or not by the Sundry Debtor would require adjudication after calling for evidence and therefore can be proceeded only in a civil court. Thus, the facts of the said case warranted adjudication of dispute by adducing of evidence by the parties which could not be done in a summary proceeding. We are, therefore, of the view that the above decision is not applicable in the present case.

22. In the present case, the Respondent has not disputed its liability to pay back the cash deposit of Rs.18.10 crore made by the Corporate Debtor nor has denied its obligation under the arrangement between the companies to return the said amount to the Corporate Debtor. Hence, we do not see any issue which needs adjudication by a civil court after recording the evidence in detail. The framework of liquidation process envisaged under the Code empowered the Tribunal to deal with all issues relating to insolvency, specifically with the aim of avoiding a multiplicity of fora. If the liquidator is required to approach civil court or other jurisdictions in all scenarios when the asset of the Corporate Debtor is in the possession of third party, the object of avoiding multiplicity of fora will be defeated. It is also relevant to mention that once an application is admitted by Tribunal, it is conferred with the jurisdiction to deal with all assets of the Corporate Debtor unless an exclusive jurisdiction is created under another statute or involves issues which cannot be decided in summary proceedings. The application for seeking direction to return the undisputed amount, more so by the related party, to the Corporate Debtor cannot be refused merely on the

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pretext that the Liquidator is required to file a recovery suit despite the fact that the respondent has not even disputed or denied its liability.

23. Based on the above discussions and considering the text of Section 60(5) (c) of the Code and Rule 11 of the NCLT Rules, we are of the view that this Tribunal has jurisdiction in the facts and circumstances of the case, to direct the Respondent to return the asset forming part of the liquidation asset of the corporate debtor.
24. In view of the above, IA No. 2777 of 2022 is allowed and the Respondent is directed to return an amount of Rs.18.10 crore to the Corporate Debtor.

Sd/-

ANIL RAJ CHELLAN
MEMBER TECHNICAL

Sd/-

KULDIP KUMAR KAREER
MEMBER JUDICIAL