IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH

INTERLOCUTORY APPLICATION NO. 2472 OF 2023
IN
COMPANY PETITION (IB) NO. 4563 (MB)/2019

Application u/s 60(5) of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Eversmile Properties Private Limited

...Applicant

Versus

Mr. Kailash T. Shah,
The Resolution Professional of
Corporate Debtor

...Respondent

<u>In the matter between</u>

Ultratech Cement Ltd.

...Operational Creditor

v/s.

Jaatvedas Construction Co. Pvt. Ltd

...Corporate Debtor

Order pronounced on 10.01.2024.

Coram:

Shri. Kuldip Kumar Kareer	**:**	**Member Judicial.**
Shri. Anil Raj Chellan	**:**	**Member Technical.**

Appearances (Hearing in physical mode)

For the Applicant: Counsel Ayush Rajani a/w Mitali Bhatt.

For the Respondent: Counsel Aniruth Purusothaman.

ORDER

Per: Coram

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('IB Code') against the Respondent, who is the Resolution Professional ('RP') of the Corporate Debtor, impugning the conditional acceptance of his claim by the Respondent and seeking necessary directions from the Adjudicating Authority to the Respondent to admit the claim of the Applicant without any condition(s) attached to it.

2. The Facts of the case leading to the filing of this application are briefly stated as under:
   i. The Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor commenced on 16.09.2022 pursuant to the Order passed by the Tribunal in the above-captioned Company Petition. Mr. Sitansh Magia was appointed as the Interim Resolution Professional ('IRP') of the Corporate Debtor.
   ii. The Applicant filed its claim of Rs. 5,95,93,782/- (Rupees Five Crores, Ninety-Five Lakhs, Ninety-Three Thousand, Seven Hundred and Eighty-Two Only) on 10th January, 2023 before the IRP. The justification given by the Applicant for arriving at the aforementioned amount is Total

Claim of Rs. 6,90,33,264 less the amount already appropriated under the Letter dated 05th July, 2022 of Rs. 94,39,482/-. The Applicant vide Letter dated 19.01.2023 forwarded its claim dated 10.01.2023 to the Respondent upon coming to know of his appointment as Resolution Professional ('RP') vide Order dated 06.01.2023 in the above-captioned Company Petition.

iii. On 23rd January 2023, the Respondent by way of an e-mail acknowledged the receipt of the claim forwarded and informed that they are in the process of evaluating the same and will revert at the earliest.

iv. The Respondent vide his e-mail dated 13.05.2023 sent to the Applicant informed of the claim being admitted subject to condition that they be allowed to remove the machinery at the site of the Applicant and sought Applicant's confirmation. Being aggrieved by such condition to the acceptance of the claim, the Applicant herein has preferred the instant application seeking directions to the Respondent to unconditionally admit the Applicant's claim. Hence this application.

3. **<u>Reply of the Respondent</u>**

The Respondent has filed his Affidavit-in-Reply dated 21st July, 2023 on 25th July, 2023. The reply of the Respondent is summarized as under:

i. The Corporate Debtor is a company incorporated on 10.02.2011 under the Companies Act, 1956 and is engaged in the business of civil and building contractors in India. The Corporate Debtor is undergoing CIRP. The Respondent was appointed as the Resolution Professional ('RP') of the Corporate Debtor vide Order dated 06.01.2023 in I.A. No. 23 of 2023 in the above-captioned Company Petition.

ii. The Respondent says that the following plants, machineries and infrastructural setup belonging to the Corporate Debtor are presently located at the work-site of the Applicant situated at 'Kalpataru Shrishti', Mira Road, Thane: a.) Tower Crane-Make Potain- MC T85 2C, b.) Concrete Pump-SP1800 HDRD, c.) Porta Cabins for Labour Camps and Site Offices and d.) Infrastructural Setup.

iii. The Respondent had informed the Applicant vide Letter dated 21.02.2023 that the Kalpataru project site at Mira Road is not functional and certain assets of the Corporate Debtor were still situated at the said site. The Respondent also requested the Applicant to allow the three individuals to carry out the valuation of materials and assets on 28.02.2022. The Applicant allowed the valuation of assets and materials to be carried out without prejudice to its rights.

iv. The Respondent being a resolution professional of the Corporate Debtor is duty bound as per the provisions of the Code to take control and custody of all assets of the Corporate Debtor and take steps to keep the Corporate Debtor as a going concern. The Applicant's appropriation of the machinery of the Corporate Debtor is illegal since the Applicant has illegally appropriated the assets of the Corporate Debtor on 20.11.2022, which is after initiation of CIRP when the moratorium was in force. Further, the unilateral set-off is not permissible during the CIRP of Corporate Debtor. In this regard, the Respondent relies upon the judgment of Hon'ble NCLAT dated 13.07.2020 in the matter of Vijay Kumar Iyer, Resolution Professional for Aircel Ltd and Dishnet Wireless Ltd v/s. Bharti Airtel Ltd & Ors. [Company Appeal (AT)(Ins.) No. 530 & 700 of 2019].

v. The Respondent reiterates that the Applicant is liable to handover possession of the assets of the Corporate Debtor. The Respondent submits that the assets of the Corporate Debtor in possession of the Applicant is crucial to maintain the corporate health of the Corporate Debtor and as such, the resolution professional is empowered under the Code to take control and custody of all assets belonging to the Corporate Debtor and, as a corollary to the aforesaid fact, may admit a claim conditionally, as has been done in this case.

4. **Rejoinder of the Applicant in brief**:

i. The appropriation of assets under the letter dated 05.07.2022 took place much prior to the insolvency commencement date and prior to the appointment of the Respondent. Therefore, the provisions of moratorium u/s 14 are not applicable. Further, it is denied that such appropriation was illegal.

ii. The Hon'ble Tribunal does not possess the jurisdiction under the Code to adjudicate on contractual disputes, if any, between the Applicant and the Corporate Debtor. Appropriation of machinery after the termination of contract under the Letter dated 05.07.2022 prior to the CIRP has not been challenged by the Respondent acting on behalf of the Corporate Debtor.

iii. The Respondent cannot attach a condition to admit the claim of the Applicant.

FINDINGS

5. We have heard the learned Counsels for the Applicant and the Respondent and we have carefully gone through the pleadings and the documents and materials placed on record.

6. The only point of law which needs to be determined in order to decide the controversy between the parties herein is whether the Resolution Professional is entitled to conditionally accept or reject a claim and whether such condition can include returning the plant and machinery belonging to the Corporate Debtor which is in possession of the Applicant.

7. Counsel for the Applicant submits that there is no provision in law whereby the Respondent can put such a condition to acceptance of its claim. Counsel for the Applicant further submits that the act of the RP in withholding the claim of the Applicant and subjecting it to such a condition is nothing but an arm-twisting tactic to recover the possession of the assets allegedly belonging to the Corporate Debtor de hors the provisions of law. Counsel for the Applicant submits that the assets of the Corporate Debtor at its project site have been appropriated and adjusted against the Applicant's claim in view of the Letter dated 05th July, 2022 for continuous defaults and breach by the Corporate Debtor. According to the counsel for the Applicant, such appropriation has been made prior to CIRP to which the Corporate Debtor had never objected. Counsel for the Applicant further submits that grave and irreparable injury will be caused to the Applicant if its claim is not unconditionally admitted by the Respondent.

8. The Learned Counsel for the Respondent submitted that the Respondent is duty bound to take possession of the assets belonging to the Corporate Debtor and therefore, as a necessary corollary, the Resolution Professional is entitled to admit a claim subject to the condition of returning the assets belonging to the Corporate Debtor by the Applicant.

9. We have examined the aforesaid submissions, perused the record and have given our thoughtful consideration to it.

10. As per section 18(1)(b) of the Code, the IRP is duty bound to receive and collate all the claims submitted by the creditors to him/her, pursuant to the public announcement u/s 13 and 15. Further, u/s 25(2)(e) of the IBC, the Resolution Professional is mandated to maintain an updated list of claims. The manner in which such duties which are cast upon the IRP and the RP are to be performed, have been prescribed under Regulation 10 to 14 of the CIRP Regulations, 2016. Regulation 13 of the CIRP Regulations deals with verification of claims. Regulation 13 states that the IRP/RP, as the case may be, shall verify every claim, as on the insolvency commencement date, within 7 days from the last date of the receipt of claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims and update it. We find that there is no provision of law whereby the IRP/RP can conditionally accept or reject the claim. We also observe that such "verification" of claims should be made based on the information that is furnished by the creditor as well as the records of the Corporate Debtor. It is settled position in law that the Resolution Professional is not an adjudicator but merely a facilitator and therefore, the powers conferred on the resolution professional for this purpose is merely an "administrative power" and the same cannot be used by the professional to act like an "adjudicating authority" which power is exclusively conferred on the NCLT and NCLAT by the IBC. Once the claim of the creditor is substantiated and verified, the IRP/RP has to accept the claim and in our considered view, the IRP/RP is not entitled to admit the claim

by subjecting it to any condition, much less the condition of returning the property belonging to the Corporate Debtor in the instant case.

11. Further, if the Applicant is refusing to handover the custody of the assets belonging to the Corporate Debtor to the Respondent/RP, then the Respondent/RP is at liberty to move a suitable application before the Adjudicating Authority seeking directions to the Applicant for custody of such assets. In our opinion, the Respondent/RP cannot resort to an arm-twisting tactic of conditional acceptance of the Applicant's claim in order to seek custody of the plant & machineries in possession of the Applicant which according to the RP, belongs to the Corporate Debtor.

12. In view of the above discussion, we are of the considered opinion that this application deserves to be allowed and it is ordered accordingly. Hence, we pass the following orders:

ORDER

i. **I.A. No. 2472 of 2023 is partly allowed**.

ii. The Respondent (i.e. the Resolution Professional of the Corporate Debtor) is hereby directed to consider and verify the claim of the Applicant of Rs. 5,95,93,782/- on its merits in accordance with law forthwith and in any case, not later than 7 working days from the date of this order.

iii. This I.A. accordingly stands disposed of on above terms.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)