

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

INTERLOCUTORY APPLICATION NO. 2432 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:

Godrej Projects Development Ltd.

...Applicant

Versus

Mr. Kailash T. Shah,

The Resolution Professional of

Corporate Debtor

...Respondent

In the matter between

Ultratech Cement Ltd.

...Operational Creditor

v/s.

Jaatvedas Construction Co. Pvt. Ltd

...Corporate Debtor

Order pronounced on 13.05.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (Hearing in Hybrid Mode)

For the Applicant: Counsel Mr. Nausher Kohli a/w Sunil Vyas and Deep Morabia appeared through Video-Conference.

For the Respondent: Counsel Aniruth Purusothaman a/w Aditya Sharma.

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, challenging the rejection of its claim by the Respondent and consequently, seeking necessary directions from the Adjudicating Authority to the Respondent to admit the claim of the Applicant and make suitable modification to the list of creditors of the Corporate Debtor vis-à-vis the Applicant.
2. The Facts of the case leading to the filing of this application are briefly stated as under:
 - i. The Applicant is a leading and highly reputed company, inter-alia, involved in the business of Real Estate in India. The Applicant has considerable experience and expertise in development/ redevelopment of Real Estate projects and have earned a goodwill in the market of Real Estate by acting as a developer/redeveloper for various redevelopment and/or development projects across different cities in India.
 - ii. The Applicant had undertaken a redevelopment project named as "Godrej RKS, Chembur" ("Project") at Sion Trombay Road, Chembur,

Mumbai. The Applicant had floated a tender dated 20th July, 2020 with the subject "Notice inviting tender for Shell and Core and Waterproofing Works". The Corporate Debtor submitted its bid and was selected as the successful bidder for the works. Accordingly, the Applicant and the Corporate Debtor entered into a Contract Agreement bearing Contract Reference No. GPDL/CRK/CIVILWORKS/2020/11/06 ("Agreement") dated 9th November 2020 ("Agreement") in respect of Civil Shell and Core Works at the said Project. The Corporate Debtor undertook to complete the Civil Shell and Core Works in respect of the said project as per the terms and conditions of the said Agreement. It is pertinent to note that the contract period was 17.9 months (including mobilization period) from the date of issuance of notice to proceed, which was issued on 9th November, 2020. Therefore, the entire scope of Works was required to be completed by the Corporate Debtor by 9th May, 2022 or thereabout. However, the Corporate Debtor failed to complete the work within the agreed timeframe.

- iii. The Corporate Debtor has from time to time issued 15 RA bills upon the Applicant. The Applicant had, after verification of the work done by the Corporate Debtor as per each RA bill, issued 15 Certificates of Payment from time to time and accordingly, the payments were made by the Applicant to the Corporate Debtor.
- iv. The Applicant states that on account of failure on the part of the Corporate Debtor to complete the Works in accordance with terms of the said Agreement, the Applicant was constrained to invoke the provisions of the said Agreement and levy debits upon the Corporate Debtor on account of non-performance, miscellaneous infra, material supply, steel wastage and liquidated damages as per the General Conditions of

Contract ("GCC") and Special Conditions of Contract ("SCC") as per the said Agreement. The details of the debits levied upon the Corporate Debtor by the Applicant are as follows:

<u>Sr. No.</u>	<u>Particulars</u>	<u>Amount debited (INR)</u>	<u>Relevant provisions</u>
1.	Debits against Non-Performance	1,27,46,655/-	20.10 of GCC
2.	Debits against Non-Performance WO administrative charges	32,07,408/-	6.1.1 and 6.1.2 of GCC and Sr. No. 16 and 17 of SCC
3.	Electricity & Water Recovery	42,68,067/-	6.1.1 and 6.1.2 of GCC and Sr. No. 16 and 17 of SCC
4.	Debit for Miscellaneous Infra	40,02,285/-	Sr. No. 67 of SCC
5.	Steel Wastage Beyond permissible limit recovery	2,79,39,000/-	GCC 12.3.2
6.	Liquidated Damages as per the contract	83,87,837/-	Sr. No. 36 of SCC and 14.7 of GCC

- v. 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.
- vi. The IRP made public announcement dated 17th September, 2022 in FORM A as per Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") for inviting claims from the creditors of the Corporate Debtor.
- vii. The Applicant states that in view of the initiation of CIRP of the Corporate Debtor, the Applicant, through its Advocates, filed its claim of

Rs. 3,81,83,960/- with the IRP in Form B vide email dated 15th December 2022 and the hard copy thereof was also filed with the IRP.

- viii. The IRP had filed updated List of Creditors of the Corporate Debtor as on 11th January 2023 with Insolvency and Bankruptcy Board of India. which reflected that the claim of the Applicant was under verification as on that date. The Applicant submits that meanwhile, vide an order dated 16th January 2023 passed in IA 23/2023 filed by one Pro Fin Capital Services Limited, being a financial creditor of the Corporate Debtor, Mr. Kailash T. Shah was appointed as the Resolution Professional of the Corporate Debtor in place of Mr. Sitansh Magia.
- ix. On 17th April 2023 i.e. after 4 months from the date of filing of claim by the Applicant, the Respondent addressed an email to the Advocate for the Applicant, the contents whereof read as follows:
*“Dear Sir,
We have gone through your claim. As per the discussion with suspended management of the corporate debtor and review of records in the books of JCCPL, it is observed that your claim is disputed. RP has gone through the recovery process. Your claim has been rejected hereby.”*
- x. The Applicant was completely shocked and surprised to note that the Respondent has, illegally, arbitrarily and without giving any opportunity to the Applicant to give any clarification or to substantiate its claim, rejected its claim as against the Corporate Debtor. The Respondent failed to give any substantial reason for such unilateral rejection of claim by the Respondent. The Impugned Email Communication has not even provided any detail about the records in the books of the Corporate Debtor and the amount reflecting in the books to be payable by the Corporate Debtor to the Applicant. The Impugned Email

Communication is cryptic and provides no reasons and details for the alleged rejection of the claim filed by the Applicant. Hence this application.

3. Reply of the Respondent

The Respondent has filed his Affidavit-in-Reply dated 08th August, 2023. The reply of the Respondent is summarized hereunder:

- i. The claim of the Applicant arises from the debits, recovery and Liquidated Damages levied by the Applicant amounting to Rs.6,05,51,252/-. The claim of the Applicant was rejected due to pending disputes with the Applicant. There are disputes between the Applicant and the Corporate Debtor with respect to the accounts regarding the Project and its reconciliation and the same is borne out by the correspondence between the officials of the Applicant and the Corporate Debtor.
- ii. An official of the Corporate Debtor sent an email dated 01.07.2023 to the Applicant informing them that the Corporate Debtor was awaiting details for settling the accounts for a long period of time. An official of the Applicant proposed for a meeting for discussion on debits and payables. The RP sent an email dated 24.07.2023 to the Applicant stating that he has gone through the communications between the Corporate Debtor's employees and the project managers of the Applicant which have been continuing for a long time. However, the parties were not able to reach at any conclusion. Thus, the Respondent/RP requested the Applicant to sit with the managers of the Corporate Debtor and conclude the dispute and remit the final payment to the Corporate Debtor at the earliest. The emails placed on record clearly show that there is an unresolved dispute as to the accounts between the Applicant and the Corporate Debtor.

- iii. The Respondent submits that the Applicant, the Respondent and the employees of the Corporate Debtor are still making an effort to resolve the dispute and thus, it would be premature and undesirable to admit the claim of the Applicant. Hence, the claim rejection by the Respondent is fully justified and as such, it warrants no interference from the Tribunal.

4. Rejoinder of the Applicant in brief:

- i. The emails relied upon by the Respondent are addressed much after the date of rejection of Applicant's claim and therefore, those emails are irrelevant for adjudication of the present IA.
- ii. Respondent has failed to establish any pre-existing dispute between the parties as on the date of filing of the claim by the Applicant. Therefore, in the absence of any pre-existing dispute between the Applicant and the Corporate Debtor, the claim of the Applicant cannot be termed as 'disputed' by the Respondent and thus, the claim of the Applicant is bound to be admitted by the Respondent as it is undisputed. The email communications held with a view to reconcile the accounts cannot be termed as an unresolved dispute.
- iii. The Applicant submits in its rejoinder that the Respondent, who happens to be the resolution professional of the Corporate Debtor, has no adjudicatory powers under the Code to reject the claim without verifying it first. In the present matter, the Resolution Professional/Respondent is yet to verify the claims and ultimately determine the amount of each claim. Without assigning any reason or giving any opportunity to provide clarifications, the Resolution Professional/ Respondent has rejected the claim of the Applicant as being disputed which manifests arbitrariness and non-application of mind.

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. It has been contended by the Counsel for the Applicant that the Respondent wrongly rejected the claim of Rs. 3,81,83,906/- filed by the Applicant with the IRP with all these important documents and the Act of the IRP in rejection of the claim vide e-mail dated 17.04.2023 on the grounds that the claim was disputed is illegal and the same is liable to be set aside and RP be directed to verify and admit the claim of the applicant.
7. On the other hand, the Counsel for the RP has argued that the claim of the Applicant arises out of the debit notes and the claim was rightly rejected by the RP pending disputes between the applicant and the corporate debtor which is clearly borne out from the e-mails exchanged between the applicant and the Corporate Debtor. The Learned Counsel for the RP has further argued that even otherwise the claim of the applicant is based upon the liquidated and unliquidated damages which are required to be first adjudicated by a court of law or an Arbitral Tribunal before the same can be admitted by the RP who has no adjudicatory powers. In support of his contentions, the counsel for the RP has relied on Union of India v/s. Raman Iron Foundry 1974 (2) 231 whereby it has been held by the Hon'ble Supreme Court that the damages are compensation which a court of law gives to a party for the injury which he has sustained on account of breach of contract therefore the party gets compensation as a result of the fiat of the Court and no pecuniary liability arises till the court has determined that the party complaining of breach is entitled to damages. In the light of the law laid down in the cited case, the Counsel for the

RP has urged that the claim of the applicant has been rightly rejected and there is no merit in the application.

8. We have weighed the contentions raised by the Counsel for the parties and carefully gone through the record.
9. It is evident from the averments made in the application that the claim of the applicant is based on the certain debit notes detail of which has been given para no. 4 of the application which is under:

Sr.	Particulars	Amount debited	Relevant Provisions
1.	Debits against Non-performance	Rs.1,27,46,655/-	20.10 of GCC
2.	Debit against non-performance WO administrative charges	Rs. 32,07,408/-	6.1.1 and 6.1.2 of GCC and Sr. No.16 and 17 of SCC
3.	Electricity and water Recovery	Rs. 42,68,067/-	6.1.1 and 6.1.2 of GCC and Sr No.16 and 17 of GCC
4.	Debit for Miscellaneous Infra	Rs. 40,02,285/-	Sr. No. 67 of SCC
5.	Steel Wastage Beyond permissible limit recovery	Rs. 2,79,39,000/-	GCC 12.3.2
6.	Liquidated Damages as per the contract	Rs. 83,87,837/-	Sr. No. 36 of SCC and 14.7 of GCC

10. A perusal of the above detail of debit notes is that an amount of Rs.1,27,46,655/- has been raised on account of non-performance by invoking Clause 20.10 of GCC which confers right upon the applicant to withhold payments or approval of the payments on various factors such as, defective

work etc. A debit note of Rs. 32,07,408/- has been raised on the basis of Clauses 6.1.1 and 6.1.2 of GCC which provides that the Contractor shall be responsible for uninterrupted supply of water at the site at his cost during the contract period and shall maintain distribution of water at the site on his own costs. There is further reference to Clause nos.16 and 17 of SCC which also provide the duty of the Contractor to provide water at the site.

11. Thirdly, a debit note of Rs. 40,02,285/- on account of miscellaneous infra is shown to have been issued on the basis of Clause 67 of SCC which enjoins the duty upon the Contractor to install one material hoist for each tower. Another debit note of Rs. 2,79,39,000/- has been raised on account of steel wastage beyond permissible limit invoking Clause 12.3.2 of GCC. Lastly, a claim of damages of Rs.83,87,837/- has been raised on account of liquidated damages.
12. It is evident that all the debit notes, on the basis of which the claim was lodged by the Applicant with the RP, are based on some breach of the conditions GCC and SCC and are thus, in the nature of damages which are required to be crystalized by way of adjudication by some competent court of law or Arbitral Tribunal. An amount of Rs. 83.87 lakhs has been claimed on account of liquidated damages. In this regard, Learned Counsel for the RP has rightly relied on Union of India v/s. Raman Iron Foundry [1974 (2) SCC 231] whereby the Hon'ble Supreme Court has held that any claim for damages does not give rise to a debt until the liability is adjudicated and damages are assessed by a decree or order of court or other Adjudicatory Authority. Even this authority is not in position to adjudicate upon the claim of the Applicant in summary proceedings. Therefore, it was imperative for the Applicant to first get his claim crystalized through court or arbitration proceedings and since the RP has no adjudicatory powers, he was not in a position to admit the claim. Therefore, no

fault can be found in the action of the RP in case he has not admitted the claim of the applicant on whatsoever grounds.

13. In view of the above discussion, we are of the considered opinion that this application deserves to be dismissed and it is ordered accordingly:

ORDER

- a. I.A. No. 2432/2023 is hereby dismissed;
- b. Parties to bear their own costs;
- c. The above-caption I.A. accordingly stands disposed of on above terms.

Sd/-

**ANIL RAJ CHELLAN
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**