

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 3691 OF 2022

Under Section 60(5) r/w Section 35 & 36
of Insolvency & Bankruptcy Code, 2016

Avil Menezes
Liquidator of Sunil Hitech Engineers
Limited

...Applicant

V/s

Bharat Heavy Electricals Limited

...Respondent

In the matter of

C.P.(IB) No. 2295/MB/2018

American Express Bank Corp.

.... Financial Creditor

Vs.

Sunil Hitech Engineers Limited

...Corporate Debtor

Order delivered on: 09/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Liquidator : Mr. Viraj Parikh, Advocate

For the Respondent : None

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application IA 3691/2022 is filed on 04.08.2022 by Sh. Avil Menezes, the Liquidator (“Applicant”) in the Corporate Insolvency Resolution Process (“CIRP”) in the matter of M/s Suni Hi-tech Engineers India Limited [In Liquidation] (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 (“Code”), for direction to M/s Bharat Heavy Electricals Limited (“Respondent”). The Applicant seeks direction to the Respondent in relation to following –

A. To transfer physical possession and custody of all the movable assets belonging to the Corporate Debtor, as mentioned in Table A, located at the North Karanpura, Jharkhand, the Site of the Respondent;

B. To pay

- (i) Rs. 349.51 Lakhs with respect to Work Order/LOI No. BHEL:NR(SCT):HARDUAGANJ (EXT II): BLR-8&9:525 (547), and LOI dated 18.08.2008 in regard of the Harduaganj Site;
- (ii) Rs. 3686.55 Lakhs LOA dated 3.11.2009 in regard to the Sarni Satpura Site;
- (iii) Rs. 1,06,83,739/- LOA Dated 11.12.2009 & 14.09.2010 in regard to NTPC Rihand Site;

- (iv) Rs. 3,99,64,000/- LOA dated 27.1.2014 in regard to the NPCIL Kakrapar Site; and
- (v) Rs. 12,56,23,799/- LOA dated 27.8.2014, LOA dated 6.6.2017 and LOA dated 30.5.2013 with regard to various NTPC Mouda Sites Packages, to the Liquidation Account for the work carried out and completed by the Corporate Debtor; and
- C. Release Bank Guarantees in relation to work carried out and completed in respect of LOA dated 27.8.2014, LOA dated 6.6.2017 and LOA dated 30.5.2013 with regard to various NTPC Mouda Sites Packages.
2. The Corporate Debtor was admitted to CIRP process vide Order dated 7.09.2018 passed by this Tribunal. There being no concrete Resolution plan even after 270 days of admission into CIRP process, this Tribunal vide order dated 25.06.2019 allowed the Application for the Liquidation of the Company and appointed the Applicant as the Liquidator of the Corporate Debtor under the provisions of the Code.
3. The Respondents had entered into multiple contracts with the Corporate Debtor as sub-contractor since 2013, for construction work at various sites namely: NTPC Mouda, North Karanpura, Harduaganj, Sarni Satpura, NTPC Rihand and Kakrapar for which various Letter of acceptance and Letter of Intents were allotted to the Corporate Debtor. It is submitted by the Applicant that –
- 3.1. The construction work on all Sites as afore-stated have been completed by the Corporate Debtor in the designated period of time, as stipulated, however till date, the Respondent has failed

to release payments due and receivable by the Corporate Debtor for all the contractual work which was completed by the Corporate Debtor in a timely manner, despite various communications being addressed by the Corporate Debtor to the Respondent in the said regard.

- 3.2. There are certain movable assets in the form of equipment and machines belonging to the Corporate Debtor which is stationed in the warehouses of the Respondent at the North Karanpura site of the Respondent. The Corporate Debtor has time and again, vide various communications requested the Respondents to issue gate pass to the Corporate Debtor so that the Applicant/ Liquidator of the Corporate Debtor can evaluate and sell the same during the Liquidation period of the Corporate Debtor. However despite multiple communication addressed by the Corporate Debtor to the Respondents in the this regard, the Respondent has wilfully omitted and abstained from not only making the payments due and receivable by the Corporate Debtor for the completion of contractual work, but also wilfully abstained from issuing gate pass to the Applicant in order to have the goods of the Corporate Debtor, lying at the North Karanpura Site, removed, thereby causing grave prejudice the Liquidation process of the Corporate Debtor.
4. The Respondent has filed a reply dated 02.08.2023 stating that the Corporate Debtor is not entitled to seek the custody of all the moveable assets purportedly belonging to the Corporate Debtor, located at the site of the Respondent situated at North Karanpura, Jharkhand in view of the provisions in the contract entered into between the Respondent and the Corporate Debtor. The contract

executed between the Respondent and the Corporate Debtor, the Respondent has lien on all Tools and Plants, IMTES and other equipment of the Corporate Debtor brought to the site. The contract further provides that to meet further expenses including Respondent's overheads on the differential costs at 5%, over and above the liquidated damages/penalties arising out of "risk and cost," the Respondent is entitled to recover the said amount from any money due from the Corporate Debtor, or from any other money due to the Corporate Debtor, including Security Deposit or by forfeiting any tools and other material of the Corporate Debtor, as the Corporate Debtor failed to execute and complete the work of the subject site as per the contract and consequently, the Respondent was constrained to get the work completed by appointing other contractors at the risk and cost of the Corporate Debtor. Despite calling upon the Corporate Debtor to pay the amount incurred by the Respondent, at the risk and cost of the Corporate Debtor, Corporate Debtor failed and neglected to pay the same to the Respondent. It was submitted that as a result thereof and in view of the aforesaid provisions contained in the said contract, the Respondent was entitled to forfeit all moveable assets of the Corporate Debtor, including moveable assets as mentioned in Table A to the present Interim Application and also recover its dues from any amounts due to the Corporate Debtor under the present contract or any other contract entered between the Respondent and the Corporate Debtor. It is further stated that -

4.1. The total contractual dues recoverable from the Corporate Debtor is around Rs. 11,108.30 Lakh (approximately) under the Contract which is the subject matter of the present site.

Similarly, the Corporate Debtor is liable to pay to the Respondent huge sums under various other sites and therefore, the Respondent was entitled to forfeit and the Respondent has accordingly exercised its said right vide its letter dated 24th March, 2021.

4.2. It was also stated that in terms of Clause 2.7.3 of the General Conditions of the Contract entered into with the Corporate Debtor, the Respondent has a lien over the Tools and Plant and other materials of the Corporate Debtor. In exercise of the aforesaid provision, vide letter dated 24th March, 2021, the Respondent has forfeited the Tools and Plant and other materials of the Corporate Debtor lying at the aforesaid project site towards partial recovery of the amounts due from the Corporate Debtor. The aforesaid fact of Respondent forfeiting the Tools and Plants of the Corporate Debtor, a fact going to the root of the matter, has been deliberately not disclosed by the Applicant to this Tribunal. Thus, the Applicant has not come before this Tribunal with clean hands and on this ground alone, the application deserves to be dismissed.

4.3. The Respondent was constrained to issue Notice of Termination of the said Contract on 5th November, 2016, to the Corporate Debtor who gave notice of 14 days as required under the said Contract to terminate the aforesaid contract and get the balance work executed at the risk and cost of the Corporate Debtor as per contractual provisions.

4.4. The representatives of the Respondent also brought to the attention of the Applicant the provision contained in the Tender which had authorised the Respondent herein to have lien over the assets, machinery etc. of the Corporate Debtor

until the amounts due and payable by the Corporate Debtor are paid to the Respondent. The Applicant was also made aware of the provisions contained in the said contract that the Respondent has a right to forfeit the machinery and other equipment of the Corporate Debtor for recovery of its claims against the Corporate Debtor. Vide another letter dated 23rd June, 2020, the Corporate Debtor / Applicant had requested the Respondent to issue out gate pass to enable them to remove the Tools and Plant and other assets of the Corporate Debtor which were lying on the said site. Similar requests were made by the Corporate Debtor to the Respondent from time to time.

4.5. The Respondent had also submitted its proof of claim before the Applicant herein, in Form C dated 22nd March, 2021. In the said Proof of Claim, the Respondent claimed principal amount aggregating to Rs.11,108.30 Lakhs approximately as more particularly set out in the said Proof Claim. However, vide email dated 23rd September, 2021, the Applicant herein intimated to the Respondent that the Applicant is not in a position to admit the claim of the Respondent since he required certain clarifications, analysis, etc. It was, inter alia, intimated to the Respondent that the amount of risk and cost due to the Corporate Debtor was under discussion and it was informed to the Respondent that the Applicant was not in position to admit the claim of the Respondent pending the completion of balance scope of project which was awarded to the third parties at the risk and cost of the Corporate Debtor. The tone and tenor of the said letter further establishes without doubt that the Applicant admits to the fact that the termination of the Contract was lawful and binding on the Applicant. It further

establishes that the Respondent is entitled to the risk and cost incurred by it account of having to award the works to third party agencies.

4.6. In the meanwhile, the correspondences were exchanged between the Respondent and the Applicant herein. During such correspondence it was brought to the attention of the Applicant that the Corporate Debtor was a secured creditor in view of the contractual lien over the Tools and Plant and materials of the Corporate Debtor

4.7. The Respondent has also placed reliance on the decision of Hon'ble NCLAT in the case of ***Shri Ramchandra D. Choudhary Vs. Bansal Trading Company*** in CA (AT)(Insolvency) No.810 of 2020, wherein it is held that *“Keeping in view the aforementioned ratio in ‘Gujarat Urja Vikas Nigam Limited’ (Supra), we hold 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. Keeping in view the submissions of the Respondents, to adjudicate whether the amount is due and payable by the ‘sundry debtors’ who have raised disputes, would require calling for evidence and cannot be proceeded under the Code. The Appellant is well within its powers to take appropriate steps to file legal proceedings, if the circumstances so warrant. The Code expressly provides for the Liquidator to institute or defend any Suit, Prosecution or other Legal Proceedings, Civil or Criminal, in the name or on behalf of the ‘Corporate Debtor’.*

4.8. The Respondent has also placed reliance on the decision of Hon'ble NCLAT in the case of decision of co-ordinate Jaipur

Bench in the case of *M/s Indus Container Lines Pvt. Ltd. Vs. Jadoun International Pvt. Ltd.* in IA (IBC)231/JPR/2019 in IB No. 707(PB)/2018 to contend that for adjudication of disputes and recovery of sums the RP is empowered to approach relevant competent authorities.

5. We have heard the Counsel and perused the material available on record.
 - 5.1. The issue for consideration in the present application is (a) whether the Corporate Debtor has right to claim for recovery of the amounts due from the Respondents in respect of the completed work, and restitution of its assets & tools lying in the premises of the Respondent at Karanpura Site; (b) whether the Respondent have a right of set off available to them during liquidation proceedings in respect of their claim for recompense in relation to work carried out through third parties; and (c) whether the Applicant Liquidator has abdicated his duty in not adjudicating the claim of the Respondents duly filed before it in Form C, and in failure of which, this Tribunal ought to adjudicate the claim of the Respondent.
 - 5.2. We find that the Respondent have made a counter claim, and the details of such counter claim were filed before the Applicant in the form the Claim form 'C' seeking admission of claim of Rs. 111.08 crores, which was disputed by the Applicant on the ground that certain clarifications are needed and some of the claims in relation to reimbursement of risks and costs amounts paid to third parties for getting the incomplete work from such third party in terms of each contract can not be processed due to non-availability of certain evidence(s) substantiating such costs. The details of the counter claim are as follows :

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Debt	Amount
A portion of job was withdrawn from M/s SHEL and awarded to other agency vide LOI ref: BHEL PSER:NKP:CVL:MJCPL: LOI:3243 dated 24.09.2019 for Contract Value	Rs. 19.99 Lakh
A portion of job was withdrawn from M/s SHEL and was executed through other agency BHEL PSER:NKP:CVL:ACC-SIL:3137 vide dated approximate contract value	Rs. 502.72 lakh
A portion of job was withdrawn from M/s SHEL and awarded to other agency vide WO ref: BHEL-PSER:NKP:CVL:MJCPL:WO:3101 dated 16.12.19 for Contract value	Rs. 19.99 Lakh
A portion of job was withdrawn from scope of M/s SHEL vide letter ref no: PSER SCT-NKP-C1629:19/Scope Withdrawal/7755 dated 08.01.2020. Subsequently the withdrawn portion of job were awarded to new agencies Vide LOI ref PSER:SCT:NKP-C1999:20:LOI:7781 dt 13.1.2020 & LOI no PSER-SCT:NKP-C2000: 20:LOI:7782 dated 13.1.2020. The same was intimated to M/s SHEL vide letter ref: PSER-SCT:NKP-C1629:20/New Contract Intimation 17932 dated 07.03.2020	Rs.765.35 Lakh
A portion of job was withdrawn from scope of M/s SHEL vide letter ref PSER-SCT:NKP-C1629:19/Scope Withdrawal/75861 dated 17.02.2020. Subsequently the withdrawn portion of job was awarded to new agency Vide LOI no:PSER-SCT:NKP-C2011-20:LOI:7864 dated 17.02.2020 at Contract Value	Rs. 271.00Lakh
A portion of job was withdrawn from scope of M/s SHEL vide letter ref PSER SCT:NKP-C1629:19/Scope Withdrawal/7902 dated 27.02 2020. Subsequently the withdrawn portion of job was awarded to new agency Vide LOI no:PSER-SCT:NKP-C2016:20:LOI:7910 dated 02.03.2020 at Contract Value	Rs. 3260.01 Lakh
Finally, BHEL was compelled to terminate the entire contract of M/s Sunil Hitech with effect from 05.06.2020. The same was intimated to M/s SHEL vide letter ref no: PSER:SCT:NKP-C1629:20/TERMINATION dated 06.06.2020. Balance scope of work was awarded Vide LOI no:PSER:SCT:NKP-C2093:21:LOI:8491 dated 26.02.2021 at Contract Value	Rs 5644.94 Lakh
Debt against Issued materials(Steel & Cement) BHEL issued Steel and Cement to M/s SHEL for consumption in construction work. However, only part of the issued materials were consumed by M/s SHEL and the remaining portion was neither utilized nor returned to BHEL. The recovery against unutilized & non-returned materials is approximate (Rs.)	2711.60 Lakh
Debt against issuance of T&Ps As per contractual provisions, recovery made against non-deployment of T&Ps approximate (Rs.)	100.00 Lakh
Debt against Direct payment to labours approximate (Rs.)	135.807 Lakh
Debt against Liquidated Damages(LD) approximate (Rs.)	858.23 Lakh
Debt due to Other Miscellaneous Recoveries approximate (Rs.)	1404.48 Lakh
Total Claim	Rs. 15694.117 Lakh

5.3. Further the respondent has made the following appropriation against the above claim:

Retention Amount (Rs).	4,96,18,462
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LD Withheld Amount (Rs.)	88,84,787
Security Deposit BG (Rs.) encashed	8,72,20,000
Unpaid RA Bill (Rs.) at site (both verified and un verified work done gross value)	2,11,85,000
Total (Rs.) available with BHEL 16,69,08,249	
Note: This total amount Rs.1669.08 Lacs has been set off in the calculation of claim (Refer Annexure-2 to the Reply)	

5.4. We also find that the Respondents have categorically stated in their reply that *“the Corporate Debtor never took any initiative in the joint verification process for determining the total work carried out despite several reminders. Therefore, the final bills were never processed for the want of such certification of actual work done”*. It is further claimed that thereafter the work was awarded to third party agencies at the risk and cost of the Corporate Debtor in accordance with clause 2.7.2 of the General Conditions of the Contract (‘GCC’). The balance works with respect to work order bearing ref no. : PSER:SC:NKP:C1629:15:WO:4640 dated 13th of August, 2015 (NTPV North Karanpura, at Jharkhand) were awarded to third party agencies due to the failure of the Corporate Debtor in carrying out the said works at its risk and cost. We find that “Clause 1.11 of the GCC pertaining to works awarded to the Corporate Debtor vide

work Order bearing ref no.
PSER:SCT:NKP:C1629:15:WO:4640 dated 13.08.2015
categorically states that all security deposits/Bank Guarantees
issued in favour of the Respondent would be released to the
Corporate Debtor only after deducting all the expenditures /
other amounts due to the Respondent under the said Contract
or any other contracts entered by the Corporate Debtor with
the Respondent.

5.5. We find that the corporate debtor vide letter dated 3rd March 2021 has informed the respondent that consequent to termination of our contract vide your letter Ref: PSER SCT:NKP-C1689-20 TERMINATION Dated 06/06/2020, we have completed reconciliation of free issue material from our end and submitted to you, and have also submitted final bill for both civil and Structural works after measurement of works executed till the date of termination of contract. The corporate debtor also asked the respondents to take over the custody of balance free issue materials which are lying with us at North Karanpura site, and to depute an authorized representative to take over the free issue Material. It is the case of corporate debtor that the respondent failed to depute representative to take over free issue materials.

5.6. We further find that the applicant vide letter dated 23.09.2021 rejected the claim of the respondent stating that we are not in the position to admit your claim for the following grounds stated as under:

	Particulars	Claimed	Accepted	Notes
A	Claim			
	Differential Cost	42,59,11,396	0	1
	LD 5% of Work order	8,58,22,955	0	2
	Overhead 5% of awarded	5,63,10,762	0	3
	Free issue material	27,11,59,720	0	4
	T&P Issued by BHEL	1,00,00,000	0	5
	Direct payment by BHEL	1,35,80,692	0	6
	Other Recoveries	14,04,48,000	0	6
B	Less:	16,69,08,249,		
	Retention Money	4,96,18,462	0	
	LD Withheld amount	88,84,787	0	7
	SD BG encashed	8,72,20,000	0	
	Unpaid RA bills	2,11,85,000	0	
A-B	Outstanding	83,63,25,276	0	
	Interest on principal outstanding	9,39,22,699	0	8
	GST 18% on A	18,05,82,035	0	9
		1,11,085,30,010	-	

5.7. We find from the notes appended to the above table in the email of the Applicant that the Liquidator has assigned one reason in all cases i.e. Pending reconciliation, analysis or clarification, we are not in a position to accept your claim, but none of the

reasons contain a categorical statement that the Corporate Debtor is not liable to a sum under that head as not payable or recoverable from it in terms of the Contract, except interest on the amounts claimed. This implies that the Liquidator is also of the view that the Corporate Debtor is liable, but only the determination of exact liability may be disputed. Accordingly, we consider it appropriate to direct the Respondent to provide necessary clarification, and engage the Liquidator to have it completed within one month. The Liquidator shall verify the claim within 15 days after receipt of information under each of head of claim. We clarify that the Corporate Debtor shall be liable to compensate to the respondent in relation to incomplete contracts only to the extent the engagement of third contractor results into additional burden on the respondents.

5.8. As regards Applicant's claim over the assets lying at project site and Respondent's exercise of lien thereupon, we note that a lien means "*a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied.*" In the present case, Respondent's claim is in nature of damages in so far as claim on account of balance work, carried out through 3rd party is concerned. We find that the respondents have a lien over the tools and equipment of the Corporate Debtor lying in their premises, however, lien over such tools and equipment cannot be allowed to be exercised in relation to claim for damages, because such claim is in nature of a general claim to appropriate the damages and cannot override the security interest of the lenders over such assets. Accordingly, we are of considered opinion that such tools and equipment ought to be released to

the Applicant and the claim of the Respondent shall be dealt with as unsecured debt after its finalisation. As regards the Applicant's prayer for pending amounts receivable by the Corporate Debtor from the Respondents under the completed works, we are of considered opinion that the Respondents shall have specific lien over such receivables of the Corporate Debtor as the claim of the Applicant as well as claim of the Respondents arises from the same work order and right of set off in liquidation proceedings is permissible to the Respondents.

6. In view of the foregoing discussion, we dispose of the IA 3691 of 2022 with aforesaid directions as partly allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)