

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

IA 1304/NCLT/MB-IV/2020

IN

CP (IB) No.1712/NCLT/MB-IV/2019

Under Section 60(5) of the I&B Code, 2016

In the matter of:

Ultra Tech Cement Limited

...Applicant

V/s

Minita D. Raja

...Respondent/Resolution Professional

Order Dated: **5.05.2021**

Coram:

Mr. Rajesh Sharma

Mrs. Suchitra Kanuparthi

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) : Ms. Suchitra Valjeea/wMs

Sharanya Shivarmani/b Manilal Kher

Ambalal & Co., Advocates.

For the Respondent(s): Mr. S.R. Jariwala, CA i/b

Ms. Ami Jain, Advocate

ORDER

Per: Suchitra Kanuparthi, Member (Judicial)

1. This is an application being C.P. (IB) No. 1304/NCLT/MB-IV/2020 filed by Ultra Tech Cement Limited, the Applicant, under section 60(5) of Insolvency & Bankruptcy Code, 2016 (I&B Code)

against Minita D. Raja, Resolution Professional, for rejection of claim vide email dated 20.11.2019 filed by the Applicant before the Respondent in respect of operational debt due and payable by the Corporate Debtor.

2. The brief submissions on behalf of the Applicant is as under:
 - a) The admission order of Corporate Debtor was passed on 09.08.2019 and the Respondent was appointed as Interim Resolution Professional, accordingly the moratorium was declared in accordance with the section 14 of I&B Code, 2016.
 - b) Thereafter, the Respondent invited the claim from Operational Creditor and Financial Creditor of the Corporate Debtor in accordance with its duties under section 18 of the code.
 - c) The Applicant herein after file its claim of Rs.35,58,96,601/- (Rupees thirty-five crore fifty-eight lakh ninety-six thousand six hundred one only) in prescribed form before the Respondent on 24.10.2019 along with all relevant annexures interalia bills, invoices, bank statements and details as requested by the Respondent. The aforementioned documents set out the precise claim, as to how it became due and payable. The proof of the claim submitted by the Applicant is attached at p 12 as Annexure 'A' of the IA.
 - d) The Applicant further submitted that the Corporate Debtor initiated arbitration proceedings against the Applicant and the Applicant has filed cross claim in the pending matter, which was stayed pursuant to the operation of Moratorium in view of the admission order. Therefore to ensure that any prospective Resolution Applicant in the Resolution Process does not face unforeseen claims against the

Corporate Debtor, it is imperative that the Applicant's claim be admitted by the Respondent notwithstanding pending Arbitration Proceedings.

- e) However, the Respondent rejected the claim filed by the Applicant vide its communication dated 20.11.2019 stating therein that the amount claimed is disputed and is pending adjudication before Arbitral Tribunal & District Court. The copy of the said communication is attached at p 117 as Annexure 'B' of IA.
- f) The Applicant has relied upon the Judgement in *Swiss Ribbons Private Limited & Anr. Vs. Union of India & Ors. (2019 SCC Online SC 73)* as follows:

"88. It is clear from the reading of the code as well as the regulations that the resolution professional has no adjudicating powers.

89. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim. It is clear from a reading of these Regulations (Regulations 10, 12, 13 and 14) that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35-A, he is only to apply to the adjudicating authority for appropriate relief based on the determination.

90. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two-thirds majority, replace on resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution

process, whose administrative functions are overseen by the committee if creditors and by the Adjudicating Authority.”

- g) The Applicant further relied upon the Supreme Court Judgment dated 15.11.2019 in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors [Civil Appeal No. 8766-67/2019 and other petitions]* as follows:

*“27. The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and 3 Under Regulation 2(ha), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016-(ha)- “evaluation matrix” means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval decided by the Committee of Creditors. In fact, in *ArcelorMittal India (supra)*, this Court referred to the role of the resolution professional under the Code and the aforesaid Regulations, making it clear that the said role is not adjudicatory but administrative.”*

- h) The Applicant relied upon another Judgment of NCLAT in Mr. S.Rajendaran, Resolution Professional of PRC International Hotels Private Limited V/s Jonathan Mouralidarane, CA (AT)(Ins)1018/2019 wherein it was held that the Resolution Professional has no right to adjudicate claims and has to merely collate and admit all claims whether disputed or not, filed in prescribed form as required by the IBC.
3. The brief submissions on behalf of the Respondent are as follows:
- a) The Respondent was appointed as an Interim Resolution Professional vide order dated 09.08.2019 by this Tribunal and confirmed as Resolution Professional by the CoC at their first meeting held on 09.09.2019.
- b) As per section 15 of the code and Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016, the IRP published the public announcement in Form A in two newspapers on 18.08.2019 inviting claims from all creditors of the corporate debtor by 30.08.2019 i.e. within 14 days from the date of appointment of the IRP. The copy of the said publication is attached at p 18 as Exhibit 'A' of the reply filed by the Respondent.
- c) In response to the said public announcement inviting claim from all creditors of the corporate debtor, no claim was filed by the applicant in the prescribed form B for Operational Creditors at the relevant time. The last date for filing the claim was 07.11.2019 whereas the Applicant lodged its claim on 12.11.2019.

- d) The Applicants prayer seeking consideration of claim can not be entertained as same has been received/filed after expire of the time to receive such claim.
- e) The claim of the Applicant correlates with the counter claim filed by the Applicant in the pending Arbitration Proceedings. The Applicant vide their email dated 30.08.2019 requested the Arbitral Tribunal to keep the arbitral proceedings in abeyance till the completion of the CIRP of the Corporate Debtor.
- f) The amount claimed by the Applicant does not find place in the Books of Accounts of the Corporate Debtor. Further, there is no correspondence to show that the said amount has been acknowledged as debt by the Corporate Debtor, making it difficult to verify the claim.
- g) The Applicant filed his claim on 12.11.2019. The respondent had, on 20.11.2019, intimated the applicant as under:

“The undersigned has received your claim amounting to Rs. 35,58,96,601 claiming to be operational creditor of Corporate Debtor undergoing CIRP process. We have verified the documents submitted by you and upon verification it is observed by the Resolution professional that the amount claimed is disputed & is pending for adjudication with Hon’ble Arbitral Tribunal & District Court. In view of this fact, your claim can not be accepted at this moment pending adjudication.”

- h) Infact the facts of the pending Arbitration matter goes to show that the Corporate Debtor has received a service order from the Applicant for construction Limestone Crusher at mine area of Vikram Cement Works, Neemuch. Due to construction dispute

between the parties, the Corporate Debtor has filed Arbitration Proceedings against the Applicant and claimed Rs.52,40,93,628/- (Rupees fifty-two crore forty lakh ninety-three thousand six hundred twenty-eight only) against which the Applicant has filed its counter-claim of Rs.35,87,06,000/- (Rupees thirty-five crore eighty-seven lakh six thousand only). The Applicant has also filed a claim to the Respondent under CIRP amounting Rs.35,85,96,601/- (Rupees thirty-five crore eighty-five lakh ninety-six thousand six hundred one only), which was not accepted by the Respondent.

- i) The Respondent submitted that there is no dispute pending before the District Court Neemuch, Madhya Pradesh what is pending before District Court is Applicant's review application before the District Court for acceptance review of the claim of the Corporate Debtor as its right to seek adjudication of its claim had been terminated by the Arbitral Tribunal for non-payment of administrative expenses. The Applicant has delayed the filing of the instant IA for consideration of its claim, given that the Respondent rejected their claim on 20.11.2019 and it was fully aware of the provisions of the code since 30.08.2019 when it requested the Arbitral Tribunal to keep the proceedings in abeyance in view of the moratorium under section 14 of the code. The copy of the said email communication is attached at p 21 as Exhibit 'D' of the reply filed by the Respondent. Further, it is to note that the Resolution Plan approved by the CoC is already pending for approval in IA No. 1186/2020 filed by the Respondent.
- j) The Respondent relied upon the Supreme Court Judgment in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar*

Gupta & Ors. Supreme Court [Civil Appeal No.8766-67/2019 and other petitions] (“Essar Case”) 2019 SCC OnLine SC 1478 wherein the Supreme Court had observed as follows:

Para 88.

“For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable Company Appeal (AT) (Insolvency) No. 319 of 2020 7 of 11 by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in Order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”

k) The Respondent further relied upon the Judgment of NCLAT in *State of Haryana V/s Uttam Strips*, wherein it was observed that:

“13. That insofar any contingent liabilities or claims are concerned, or any creditors who failed to file any claim during CIRP, the same were duly accounted for in the Resolution Plan of the corporate debtor and were given a

NIL value. It is to be noted that the liquidation value of the Appellant's claim, in any case, would have been NIL.

The Successful Resolution Applicant is to be provided with a company free from past liabilities. It has been rightly understood that a Successful Resolution Applicant cannot be saddled with past liabilities indefinitely. Such an act will make it impossible for the Successful Resolution Applicant to run the business of the Corporate Debtor effectively. In fact, saddling a Resolution Applicant with past claims will defeat the entire purpose and mechanism set out under the I&B Code, mainly when all claims have been appropriately dealt under the Resolution Plan itself."

"14. Relevant clauses of the approved Resolution Plan is as under:

"iii. The Operational Creditors shall not have any rights or claims against the Company relating to the period prior to the Effective Date. The Company shall not have any liability towards Company Appeal (AT) (Insolvency) No. 319 of 2020 9 of 11 Operational Creditors for the amounts owed prior to the Effective Date."

v. Any and all legal proceedings initiated by any of the Operational Creditors whether admitted or not, due or contingent, asserted or unasserted, crystallised or uncrystallised, known or unknown, disputed or undisputed, present or future against the Company towards rights or claims relating to the period prior to the Effective Date shall also be withdrawn, and shall be of no legal consequence insofar as Company is concerned."

4. The Applicant has filed its Re-joinder dated 07.12.2020 as submitted as follows:

- a) There is no delay in filing the claim as the proof of claim was dispatched by the Applicant on 05.11.2020, however due to logistical issues it was delivered on 12.11.2020. It is pertinent to note that the question of the claim filed belatedly has never been raised by the Respondent.
 - b) The Applicant submitted that the RP does not have Adjudicating Powers to admit or reject a claim, his/her job is confined to collecting and collating of claim and incorporation the same in the Information Memorandum.
 - c) On one hand the Respondent mandates the claim of Applicant to be adjudicated upon by the Arbitrator and on such basis has declined to accept Applicant's claim and on other hand there is a continuing moratorium on the adjudication of any and all disputes pertaining to the Corporate Debtor including the concerned Arbitration Proceedings.
 - d) As per section 3(6) of the code, a "claim" is a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured. Thus, there is absolutely no cogent reasoning provided by the Respondent for not considering the claim of the Applicant.
5. The Written Submissions of the Applicant are based on the following grounds:
- a) A Bonafide claim by the operational Creditor cannot be rejected by a virtue of a dispute, especially prior to determination of veracity of claim in the pending proceedings.

- b) The Respondent has failed to verify the claim of the applicant in accordance with the CIRP Regulation 14. The information memorandum prepared by the Respondent contains the statement as follows:

“UTCL had lodged the claim with the RP as operational creditor for Rs35,58,96,601/. The RP is of the opinion that the amounts claimed by UTCL were neither appearing in the books of the Corporate Debtor nor any correspondence issued by the Corporate Debtor has been provided by UTCL, whereby the claims of UTCL have been acknowledged by the Corporate Debtor. Hence, from the perusal of the records of the Corporate Debtor, there is no means of verifying claim of UTCL.

Furthermore, on a bare perusal of the claim filed by the UTCL, it was clear that the same coincided with counter-claims filed before the Learned Arbitral Tribunal.”

- c) Without prejudice to the proceeding in question, the Applicant entitled to an award in terms of counter claim before the Arbitral Tribunal.
- d) Even otherwise, a disputed claim ought to have been admitted by the Resolution Professional and notional value ought to have ascribed to the same submit to subject to the determination of amount before the Arbitral Tribunal.
- e) There has been no delay in filing claim before the Resolution Professional.
- f) Non-admission of claim will cost prejudice to the Applicant.

Findings/Conclusion:

6. *The question for consideration is whether the non-admission of claim by the Respondent stating it to be a disputed claim pending adjudication by the Hon'ble Arbitral Tribunal is bad in law.*
- a) The admission of CIRP of the Corporate Debtor was passed on 09.08.2019. The IRP was confirmed as RP by the CoC as its first meeting on 09.09.2019. The IRP issued public announcement in Form "A" to receive claim from creditors of Corporate Debtor. The last date for filing of the claim as per the public announcement was 07.11.2019, whereas the applicant lodged its claim on 12.11.2019.
- b) Ld. Counsel for the Applicant relied upon the judgment of Hon'ble Supreme Court in *Swiss Ribbons Private Limited and anr. Vs. Union of India and anr.* Wherein it was held that the role of Resolution Professional is precisely to collate the claim and where he is unable to quantify the claim due to existence of dispute, he has required to admit the claim for notional value in order to ensure all present & future claims accorded to him for protection of resolution plan and another resolution applicant is not faced with any unexpected claims. The Respondent performing administrative role cannot exclude and entirely a legal claim. Therefore, non-admission of claim on the account of pending Arbitration Proceedings is in contradiction of IBC and ultra-virus of the powers conferred upon the Resolution Professional.
- c) Ld. Counsel for the Applicant also relied upon the judgment by the Hon'ble Supreme Court in *Committee of Creditors (CoC) of Essar Steel India Limited Vs. Ateesh Kumar Gupta and anr.* reported in 2019 SCC online SC, 1478, wherein the Hon'ble Supreme Court held that the successful Resolution Applicant cannot certainly be faced with

undecided claim after Resolution Plan submitted by him which has been accepted as this amounts to an extra amount coming up for payment after the debts have been dealt by the Resolution Applicant and the Resolution Plan has been approved. This would through into uncertainty amount payable by prospective Resolution Applicant who successfully takes over the business of Corporate Debtor.

- d) Ld. Counsel for the Applicant also relied upon the judgment of Hon'ble NCLAT in the matter *State of Haryana Vs. Uttam Strips Ltd*, wherein it was held that in so far as the contingent liability of claim concern or any creditors who failed to file any claim during CIRP, the same were duly accounted for its Resolution Plan of the Corporate Debtor and will be given a NIL value. The successful Resolution Applicant is to be provided with the Company free from past liabilities. The Resolution Applicant cannot be saddled with past liabilities indefinitely.
- e) Ld. Counsel for the Applicant also relied upon the judgment of the Hon'ble High Court in the matter of *Tata Steel Bsl Limited Vs. Varsha W/O Ajay Maheshwari* reported in (2019) 3 AIR Bombay (R) 351, wherein Hon'ble High Court considered the scenario, where the Operational Creditor therein sought to pursue a suit after the moratorium ceased to remain in force. The Operational Creditors claim was admitted for a notional value in the Resolution Plan. Acknowledging the admission of a disputed claim, The Hon'ble High Court of Bombay stated as follows:

'the sub judice claims like that of Respondent no.1 operational creditor have been taken into consideration under the resolution plan and since the amount due is yet to be finalised or crystallized, it has been shown as an admitted amount of INR1, subject to determination of the amount upon finalization of the proceedings before the Civil Court. It is because the claim

of the respondent no.1/operational creditor is yet to be crystallized and it is sub judice that the exact amount has not been stated in the resolution plan, although liability to make payment to respondent no.1 as recognized as operational creditor has been preserved.”

- f) In the instant case the arbitration proceedings were initiated by the Corporate Debtor and a counter claim was filed by the Applicant herein and the same was pending adjudication before the Arbitral Tribunal. The said claim was filed on 12.11.2019 and whereas the last date of submission of claim was 07.11.2019, this Bench condones the delay of four days of filing the claim before the IRP.
- g) It is relevant to refer the provisions of IBC which includes the claim under section 3 (6), the Claim means the right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. Section 3 (6) of the Code read as follows;

(6) “claim” means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Upon perusal of the above provisions of the law and the scheme envisaged in the IBC and judicial precedents laid down by Hon’ble Supreme Court, it can be said that the Applicant who has filed a counter claim before the Arbitral Tribunal is said to have a claim and

is contingent upon adjudication by the Arbitral Tribunal and hence, such a claim is necessarily to be declared as contingent claim by the Resolution Professional in the information memorandum. In view of the above, observation the IA is **partly allowed and disposed of**.

Sd/-

Rajesh Sharma
Member (Technical)

05.05.2021

Sd/-

Suchitra Kanuparthi
Member (Judicial)