

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 23.02.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/448/2023 in CP (IB) No.294/7/HDB/2017
NAME OF THE COMPANY	IVRCL Limited
NAME OF THE PETITIONER(S)	State Bank of India
NAME OF THE RESPONDENT(S)	IVRCL Limited
UNDER SECTION	7 of IBC

ORDER

IA (IBC)/448/2023

Orders pronounced, recorded vide separate sheets. In the result, this application is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II**

IA.No.448 of 2023 in

CP (IB) No.294/7/HDB/2017

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016]

Between:

M/s.SBL Construction Private Limited
Represented by its Chief Executive Officer,
Shri.Nardev Singh,
Corporate Office: Plot No E-170, Sector-63,
Gautam Budha Nagar, Noida-201309, UP.

...Petitioner/Applicant

Versus

M/s.IVRCL Limited (in Liquidation),
Represented by its Liquidator,
Shri.Sutanu Sinha,
Mihir 8-2-350/5/A/24/1B, Road No.2,
Panchavati Colony, Banjara Hills,
Hyderabad-500034, TS.

...Respondent

Date:23.02.2024

Counsel/Parties present:

For the Applicant : Mr. Anil Kumar, Advocate
For the Respondent : Mr. Alay Razvi, Liquidator

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. The instant application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking the following reliefs:
 - i. To admit and release the claim amount of Rs.12,89,09,669/- to the Applicant on immediate and priority basis because the legal award was granted to the Applicant and the entire cost and expenditure for executing the works contract was incurred by the Applicant.

Date:23.02.2024

2. Brief facts, necessary to dispose of the present application, as stated, are that:
 - 2.1 The Respondent (Corporate Debtor) entered into an agreement on 17.08.2013 with Central Public Works Department (“CPWD”) for construction of academic cum residential building for IIT Bhubaneswar at Argul for contractual amount of Rs.148,92,61,288/- and out of this work, the Corporate Debtor vide agreement dated 04.12.2013 entrusted the work for an amount of Rs.74,81,02,562/- to the Applicant.
 - 2.2 The principal contract was terminated by the CPWD on 13.05.2015 and the sub-contract with the Applicant was cancelled on 03.06.2015.
 - 2.3 A dispute arose between the Applicant and Respondent about the payment and therefore both the parties agreed to refer the matter for arbitration. An award of Rs.8,23,02,793/- plus interest was passed in favour of the Applicant on 11.08.2017 and against the said award, the Respondent filed an appeal which was dismissed on 30.03.2022.
 - 2.4 In the meanwhile, the Respondent went into CIRP under Section 7 of the IBC vide order dated 23.02.2018 and then in liquidation vide order dated 26.07.2019.
 - 2.5 After the CIRP order, the Applicant filed claim before the Resolution Professional to remit the entire amount without any deduction as the amount to be received by the Applicant was not part of the assets of the Corporate Debtor.

Date:23.02.2024

- 2.6 However, the Resolution Professional failed to verify the claim of the Applicant as it was kept under the 'Verification Column'. Then the Applicant filed an IA No.403 of 2018 in CP(IB) No.294/07/HDB/2017 for making payment of the entire amount to the Applicant. In the said IA No.403 of 2018, this authority passed order dated on 01.04.2019.
- 2.7 The Applicant filed claim before the liquidator in Form-C dated 21.08.2019 for an amount of Rs.12,89,09,669/-. However, the liquidator did not remit the amount to the Applicant and therefore the present application has been filed.
3. The Respondent by filing reply has contended and contested the averments made in the application and submitted that:
- 3.1 However, it is admitted that the Project awarded to the Respondent by the CPWD was sub-contracted to the Applicant vide agreement dated 04.12.2013 and after dispute arose about the payment, the matter was referred to the arbitrator, who passed Award for Rs.8,23,02,793/- in favour of the Applicant. It is also not denied that the CIRP of the Corporate Debtor was ordered on 23.02.2018 and thereafter the liquidation.
- 3.2 Regarding the claim for an amount of Rs.12,89,09,669/- it is submitted that the award was passed prior to the initiation of CIRP and therefore it will be dealt as per Section 53 of the IBC.

Date:23.02.2024

4. We have heard both the Learned Counsels and have also gone through the entire records.
5. Indisputably, Award for an amount of Rs.8,23,02,793/- was passed in favour of the Applicant vide order dated 11.08.2017 and thereafter the Corporate Debtor went into CIRP on 23.02.2018. The Award was challenged by the Respondent under Section 34 of the Arbitration and Conciliation Act 1996, but the appeal was dismissed vide order dated 30.08.2022.
6. On the basis of the Award passed by the arbitrator, the Applicant filed claim of Rs.8,23,02,793/- before the Resolution Professional but the same was kept under the 'Verification Column'. After the Corporate Debtor was put into liquidation, the Applicant filed an IA.No.403 of 2018 in CP No.294/07/HDB/2017 praying for admission of the entire claim and further that this amount be paid in full without any deductions. This, IA No.403/2018 was disposed of vide order dated 01.04.2019 with the following directions:

“The claim submitted by the Applicant is based on a valid and legally issued award under the Arbitration and conciliation Act, 1996 hence, RP is not right in rejecting legally tenable claim of the Applicant. In such circumstances, the RP is hereby directed to admit the claim of the Applicant subject to the condition that the Applicant/claimant submit an irrevocable undertaking by way of Affidavit to the effect that he will place back the amount if in case, the Appeal relating to Arbitration proceedings is decided against Applicant's favour.”

7. In view of the order dated 01.04.2019 in IA No.403/2018, the Ld. Counsel for the Applicant submitted that he is entitled for payment of the entire amount of Rs.8,23,02,793/- along with the interest.

Date:23.02.2024

8. On the other hand, Ld. Counsel for the Respondent submitted that the Applicant is entitled for an amount as per the provisions of Section 53 of IBC.
9. Once the Arbitral Award becomes final, it can be executed in the same manner as if it was a decree of the Civil Court. As the award was passed prior to the CIRP period, therefore the moratorium applies and in the present context, it is section 14(1)(a) which is applicable.

“14. Moratorium

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;”

10. In view of the moratorium, the Arbitral Award passed is to be taken as valid claim by the Resolution Professional/Liquidator and that is why Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the amount payable under Resolution Plan to the Operational Creditors and Financial Creditors are mandatorily required to be mentioned.
11. The Arbitral Award would be considered either as Financial or Operational Debt and here we may profitably refer to the decision in The Hon’ble Madras High Court in the case of ***Cholamandalam Investment and Finance Company Ltd. versus Navrang Roadlines Private Limited (O.S.A (CAD) no. 115 of 2022***, following the decision of Hon’ble Supreme Court in case of ***Kotak Mahindra Bank Ltd. versus A. Balakrishnan and Another (2022)9 SCC 186*** held in para 12 that –

Date:23.02.2024

“ A mere perusal of the above observations of the Hon'ble Supreme Court in the decisions cited supra, shows that the liability in respect of a claim arising out of a recovery certificate issued by the DRT would be considered as “financial debt” within the ambit of Section 59(8) of Insolvency and Bankruptcy Code, 2016. It has also held that the underlying claim of the Bank/Claimant under the lending documents would have to be categorised as a “financial debt” under Insolvency and Bankruptcy Code, 2016. Therefore, a recovery certificate issued in respect of the same claim, which is essentially a crystallization of the claim through the process of adjudication, had also be classified as a “financial debt” under Insolvency and Bankruptcy Code, 2016. Consequently, the nature of the underlying claim of the creditor, would determine the categorisation of the amount payable under the final decree passed adjudication of the same claim. **The liability arising out of an arbitral award or a court decree would be categorised as either financial or operational debt depending on the nature of the underlying claim which stands crystallised through the arbitral or court proceedings.**

Own emphasis

12. Hon'ble Supreme Court of India in *Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330* has laid down that any arbitral award for payment of money, if not satisfied, would constitute a financial debt, thereby enabling the Financial Creditor to initiate proceedings under Section 7 of the Code.
13. Thus, it is clear that the Arbitral Award is either a Financial Debt or an Operational Debt basing on the nature of the underlying claim. In the instant case the Arbitral Award is an Operational Debt due to the nature of the contract with the Principal Employer.
14. Another contention of the Applicant is that the Award should not be settled in accordance with Section 53 of the IBC, as it falls within the scope of

Date:23.02.2024

Section 36(4) of the IBC. In this regard, it is relevant to refer to Section 36 of the IBC which says:

Section 36 Liquidation estate.

“(1) XXX

(2) XXX

(3) XXX

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

15. In view of Section 36(4), we are of the view that Arbitral Award would fall within the purview of this provision on the basis of nature and terms of the subcontract executed with the corporate debtor. Section 36(4) of the IBC excludes certain assets from the liquidation estate of the Corporate Debtor,

Date:23.02.2024

such as, assets owned by a third party, assets in bailment, assets or funds held on trust, sums due to any workman or employee from the provident fund, pension fund, and gratuity fund. Therefore, if the subcontract involves the transfer or use of any of these assets by the Corporate Debtor, then it would fall under Section 36(4) of the IBC and would not be part of the liquidation estate.

16. However, both the parties have not relied upon the sub-contract. The bare understanding of the contract between the Applicant and Corporate Debtor does not align with any of the assets outlined in Section 36(4) of the IBC, which determines the exclusion of the Arbitral Award amount from the Liquidation Estate.
17. Therefore, the provisions of moratorium would apply to all the proceedings against the Corporate Debtor.
18. In view of the provisions of law and the judicial precedent, we have to interpret the order dated 01.04.2019 in IA No.403/2018. It is relevant to note that the Applicant approached this Authority in that IA on the plea that the Resolution Professional has not admitted its claim and further prayed that the RP be directed to remit the entire claim amount. The claim was admitted by the Liquidator by intimating the Applicant vide email dated 12.11.2019 after the decision in the IA No.403 of 2018 on 01.04.2019.
19. Having regard to the overall facts and circumstances of the case, we think that vide order dated 01.04.2019 in IA No.403/2018, the RP was asked to admit the claim in view of the pendency of the appeal against the Arbitral Award. Once the appeal was decided in favour of the Applicant, the

Date:23.02.2024

company is entitled for the payment of the amount as per the provisions of Section 53 of the IBC. The Applicant cannot be allowed to bypass the mandatory provisions of law so as to remit the entire amount of the Arbitral Award to the prejudice of other creditors.

20. As such, the application is without any merits and accordingly dismissed.

Sd/-

**(SANJAY PURI)
MEMBER (TECHNICAL)**

Sd/-

**(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)**

Apoorva