



**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)**

**IA No. 337 / NCLT / AHM / 2022
IN
CP(IB) No. 418 / NCLT / AHM / 2018**

**(Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with
Rule 11 of NCLT Rules, 2016)**

IN THE MATTER BETWEEN

Bharat Heavy Electrical Limited

.... Applicant

Versus

**Mr. Sudip Bhattacharya
Resolution Professional of
Reliance Naval and Engineering Ltd.**

.... Respondent

IN THE MATTER OF

IDBI Bank Limited

... Financial Creditor

Versus

Reliance Naval and Engineering Ltd.

... Corporate Debtor

Order pronounced on : /06/2023

Coram:

**DEEP CHANDRA JOSHI
HON'BLE MEMBER (JUDICIAL)**

**AJAI DAS MEHROTRA
HON'BLE MEMBER (TECHNICAL)**



MEMO OF PARTIES

Bharat Heavy Electrical Limited

BHEL House,
Siri Fort, New Delhi - 110049

... Applicant/Operational Creditor

Versus

Mr. Sudip Bhattacharya

Resolution Professional of
Reliance Naval and Engineering Limited
Having its registered office at C/o Duff & Phelps,
14th Floor, Raheja Tower, G Block,
Bandra Kurla Complex Mumbai – 400 051

... Respondent/Resolution Professional

Present:

For the Applicant : Mr. Aman Choudhary, Adv. a.w Mr. Parth Shah,
Adv., Ms. Mani Gupta, Adv & Mr. Shashvata
Shukla, Adv. for BHEL

For the Respondent : Mr. Navin Pahwa, Sr. Adv. a.w Mr. Dhruvad
Vaghani, Adv., Ms. Nandita Bajpai, Adv. & Mr. Ajiz
M.K., Adv.

ORDER

1. The present IA 337 of 2022 has been filed by the Bharat Heavy Electrical Limited (**hereinafter referred to as BHEL and/or Applicant/Operational Creditor**) on 05.04.2022 against the Resolution Professional of Reliance Naval and Engineering Limited Mr. Sudip Bhattacharya (**hereinafter referred to as RP of RNEL**) inter alia, seeking following reliefs:-

“(A) Direct the Resolution Professional to accept and admit the claim of Rs. 296 crores of the applicant as ‘operational debt’ of the Corporate Debtor and act accordingly;

(B) Pass any such other orders/directions as this Ld. Adjudicating Authority may deem fit and proper in the facts and circumstances of the case.”

2. The brief facts of the case leading to the present application as stated by the applicant are as under:

i. A contract dated 18.06.2013 was executed between the Operational Creditor and the Pipavav Defence and Offshore Engineering Company



Limited (acquired by the Corporate Debtor on 03.07.2016) (**hereinafter referred as the “Contract”**). True copy of relevant provisions of the contract dated 18.06.2013 is attached with the application.

- ii. An order having a total value of Rs.27014 lakhs was placed by the Corporate Debtor and the contractual deliveries to be made were during the period 2015-2019. The Operational Creditor dispatched the material worth Rs.16774 lakhs to the Corporate Debtor. Due to the financial difficulties, the Corporate Debtor accepted material worth only Rs.10806 lakhs from the Operational Creditor and material worth Rs.5968 lakhs were returned by the Corporate Debtor . The contract does not envisage return of material on the grounds of financial difficulties.

- iii. The Corporate Debtor had placed order for 05 Super Rapid Gun Mounts (**in short SRGMs**) for additional items and services with the applicant. To execute the order, the applicant had deployed resources for procurement of raw materials and bought out items, manufactured various components and assemblies required for delivery of finished goods to the Corporate Debtor. However, due to poor financial health of the Corporate Debtor, sale of balance SRGM shipsets and rendering of services in scope of contract remained unexecuted in January 2018. The Corporate Debtor had opened Letter of Credit (**in short LC**) for the 4th SRGM after a prolonged delay, following which the applicant had delivered the 4th SRGM shipset to RNEL. However, payment through LC could not be realized by the applicant because the Corporate Debtor did not give acceptance to the bank. Subsequently, on request of the Corporate Debtor, the applicant agreed to take back the materials (4th SRGM Shipset) and accepted closure of the LC. Further, LC for 5th SRGM Shipsets was also not put to effect by the Corporate Debtor. In the absence of the LC which perhaps was triggered by the poor financial health of the Corporate Debtor, despite multiple DP extensions by the Corporate Debtor, execution of balance deliverable was deferred. As a result, the applicant was unable to dispatch its readied finished goods and provide balance services.



- iv. Due to delay in furnishing the exemption documents and also because the Corporate Debtor had failed to accept deliveries under the contract, the Operational Creditor was unable to claim the relevant exemptions under the applicable Customs Law.
- v. Therefore, in terms of the Contract, the Corporate Debtor is liable to pay the following debts to the Operational Creditor.
- a. **Balance Contract Value not effected by the Corporate Debtor**
An amount of Rs.16208 lakhs i.e, the balance contract value not effected by the Corporate Debtor is outstanding as on the insolvency commencement date, i.e, 15.01.2020.
- b. **Interest on above balance Contract value not effected by the Corporate Debtor**
An interest of Rs.89 crores calculated at the rate of 15% against the balance contract value (Rs.16208 lakhs) not effected by the Corporate Debtor is outstanding as on the insolvency commencement date, i.e, 15.01.2020.
- c. **Custom duty & its interest liability**
A total of Rs.30 crores including an interest of Rs.13 crores calculated at the rate of 18% per annum upto 31.02.2016 and 15% from 01.04.2016 to 15.01.2020 against the non-supply of the equipment due to the failure in furnishing the exemption documents pursuant to the Clause 7.5 of the contract by the Corporate Debtor is outstanding as on the insolvency commencement date, i.e, 15.01.2020.
- d. **Live debtors & its interest liability**
The Operational Creditor was supplying Engineering services (as defined in the contract) to the Corporate Debtor since the execution of the contract after receipt of the advance from the Corporate Debtor in terms of the contract. A total of Rs.6 crores including an interest of Rs.2 crores calculated at the rate of 15% per annum against the supply



/ exchange rate variation (as per the contract) of the equipment by the Operational Creditor since 13.01.2016 is outstanding as on the insolvency commencement date i.e, 15.01.2020.

e. **Non-payment of the claims with respect to 06th Letter of Credit (IDBI-180004ILCU00046 dated 19.01.2018)**

An interest of Rs 9 crores calculated in terms of clause 8.8.9 of the contract at the rate of 15% per annum against the non-payment by the Corporate Debtor with respect to the 6th letter of credit is outstanding as on the insolvency commencement date i.e, 15.01.2020.

- 2.2 Vide order dated 15.01.2020, the Adjudicating Authority had admitted the application filed u/s 7 of IBC, 2016 by IDBI Bank Limited, thereby initiating Corporate Insolvency Resolution Process against the Corporate Debtor. The affairs, business and assets of the Corporate Debtor are being managed by Mr. Sudip Bhattacharya, Resolution Professional appointed by NCLT, Ahmedabad Bench by order dated 05.05.2020.
- 2.3 The respondent initiated necessary steps as required under IBC, 2016 and published a Public Annoucement in Form-A on 20.01.2020 inviting claims from creditors.
- 2.4 Accordingly, the applicant had submitted its proof of claim in Form B in accordance with the provisions of IBC, 2016. The annexures to the Form-B were not attached, because of its bulky nature and to avoid voluminous filing before the Adjudicating Authority. Nevertheless, the entire copy of the Form-B alongwith the annexures had been submitted to the RP while submitting proof of claims. The applicant sought leave and liberty to file the annexures to Form-B, if so required, at a later stage.
- 2.5 The total amount of the claim, as submitted by the Applicant in Form B is Rs. 296 crores including the interest calculated at 15% per annum as of insolvency commencement date. Currently, the RP has rejected the entire claim of the Applicant.
- 2.6 The Applicant has filed the present application for admission of the entire claim of the Operational Creditor on the grounds that it has been incorrectly rejected by the RP.



- 2.7 The Applicant had vide email dated 31.01.2020 submitted proof of claim along with annexures with respect to the claims of Applicant to the RP in reference to the Public Announcement. True copy of the email dated 31.01.2020 is attached as Annexure A-5 with the application. The particulars of the claim as submitted before the RP are as follows:

SR. NO.	DESCRIPTION OF CLAIM	AMOUNT INR/ CR	INTEREST INR/CR	TOTAL INR/CR
1.	Balance contract value not effected by Corporate Debtor	162	89	251
2.	Custom Duty	17	13	30
3.	Live Debtors	4	2	6
4.	Non-payment of Letter of Credit		9	9
	TOTAL LIABILITY	183	113	296

- 2.8 With regards to the operational claims submitted by the Applicant, the RP vide email dated 16.09.2020 had sought for clarifications to queries that came up during verification process. The RP, precisely, had sought for the basis of charging of interest. Accordingly, the Applicant vide email dated 29.09.2020 provided a detailed response along with supporting documents stating that the interest is charged as per Clause 2 of the invoices served to the Corporate Debtor which states that the “Interest will be charged on payment not effected within 30 days of this invoice @ 15% per annum or 1% higher than the rate charged to BHEL by bank on cash credit, which ever is higher.” Hence, an Interest Rate @15% p.a. had been considered for calculating Simple Interest as also mentioned in the Form-B. Additionally, the interest on delayed payment is also applicable as per Article 8.8.3 and 8.8.4 of the Contract. Further, the Applicant had also provided information regarding the invoices raised in the format as sought by the RP and the ledger extract of the Corporate Debtor in the



book of the Applicant was also attached in the said email. True copy of the emails dated 16.09.2020 and 29.09.2020 along with the attachments in the emails are attached as Annexure A-6 with the application.

- 2.9 Pursuant to the receipt of the documents submitted by the Applicant, the RP had sent email seeking further clarifications on additional queries and the Applicant diligently provided response to all the queries along with supporting documents. Subsequently, the RP vide email dated 26.02.2021 rejected the claims of the Applicant. The Applicant had sent an email dated 08.10.2021 to the RP seeking admission of the claims as the RP had misconstrued the terms of the Contract and wrongly rejected the claims of the Applicant. True copy of emails dated 24.12.2020, 16.01.2021, 26.02.2021, 08.10.2021, 06.12.2021 and 17.12.2021 are attached as Annexure A-7 with the application.
- 2.10 It is pertinent to note that the materials and services remained unexecuted due to precarious financial condition of the Corporate Debtor, this was despite having valid secure cash credits in form of Letter of Credits from IDBI Bank Limited. The Corporate Debtor has been deferring the balance deliverables due to which the Applicant was unable to dispatch the readied finished goods and unable to liquidate the balance services. True copy of letter of credits is attached as Annexure A-8. True copy of Corporate Debtor's emails seeking multiple DP extensions is attached as Annexure A-9 with the application.
- 2.11 The applicant submitted that RP has rejected the claims of the Applicant on baseless grounds, without any reasonable reasoning. The RP has simply considered that the goods have not been delivered to the Corporate Debtor and accordingly, are not in possession of the Corporate Debtor. The RP therewith rejected the liability along with interest as mentioned above at Point-1 in table without considering that the resources were procured by the Applicant specifically for Corporate Debtor's order. The Applicant had also provided Packing List and Inspection - Factory Acceptance Tests Report along with Inspection proofs to suffice that the goods were indeed manufactured for the Corporate Debtor. Further, appropriate attempts had been made on behalf of the Applicant to deliver the goods, however, it was due to the failure on part of the Corporate Debtor that the goods had to be taken back on Corporate



Debtor's request. The RP has failed to take into account that the Applicant had to incur losses caused due to the non-execution of the contract. True copy of Inspection Reports and Certificates is attached as Annexure A-10.

2.12 That the contract between the Corporate Debtor and the Applicant was an ongoing contract when the Corporate Insolvency Resolution Process ("CIRP") commenced between the parties. As an ongoing material contract for the Corporate Debtor, it was incumbent upon the RP to have continued the performance of the contract. It is equally pertinent to note that the contract has not been terminated either by the Applicant or by the Corporate Debtor, and the Applicant remains ready and willing to perform the contract. Since the contract is in force, it is the duty of the RP to adhere to the terms of the contract, as the Corporate Debtor, after the initiation of the CIRP, is required to function and continue its business activities as per the contract. Given that the main objective of the IBC is to keep the Corporate Debtor as a going concern, a duty is cast upon the RP to perform the functions accordingly. Therewith, the RP should have undertaken to continue the performance as specified under the contract between the parties. The consequences of non-performance as per the terms of the contract during the CIRP period have to be borne by the Corporate Debtor as its contractual due, as CIRP cost or otherwise. It is not open to the RP to not perform its part of contract, while the contract remains live during the CIRP period. Lastly, if the Corporate Debtor is ready and willing to take the performance of the contract, the Applicant is on its part ready to deliver the goods and provide its service. Therefore, the Applicant claim on the Corporate Debtor of Rs. 251 crores need to be accepted, and the Applicant remains ready and willing to perform its part of the contract.

2.13 It was submitted that the RP has also acknowledged that the contract between the Applicant and the Corporate Debtor continues to remain in operation. The RP informed that the NOPV contract was cancelled, however, in fact, despite termination of the NPOV contract by Ministry of Defense, the RP has chosen not to terminate the contract with BHEL, which goes on to show that the RP has deliberately chosen to continue with the contract as a going concern. The mere fact that the RP chose to file an application against the termination of NOPV contract by the Ministry of Defense does not automatically absolve the RP of his obligations under the contract with the Applicant. It is relevant to note that the NOPV contract and the contract with BHEL



are independent of each other and the termination of one does not lead to termination of the other, as also acknowledged by the RP. Having taken no steps to either perform, terminate or discharge the obligations of the Corporate Debtor under a live contract, the RP has clearly not acted to ensure that the corporate debtor remains a going concern.

- 2.14 It is improper on part of the RP to hide behind an application preferred against Ministry of Defense in denying the claims of the sub-contractor (the Applicant herein), particularly when the sub-contractor has no privity with Ministry of Defense. On the one hand, the RP has cited the lack of liquidity as a ground to deny discharge of the obligations under the contract, on the other hand, the RP is also not willing to take into account the consequence of such non-performance, namely the damages that directly flow from such non-performance by the Corporate Debtor.
- 2.15 In light of the above, the RP should either accept performance of the contract as a going concern, considering that the contract continues to remain in force, or accept the Applicant's claim for the amount that is due and payable.
- 2.16 Additionally, the RP has noted that the Corporate Debtor is SEZ unit and thereby exempted from taxes, duties, levies, entry tax, etc., as per Clause 7.5 and further sought from the Applicant to provide mutual acceptance of the amount claimed with respect to custom duty and in absence of such acceptance, the RP has on an incorrect interpretation rejected the claims of the Applicant. The RP has failed to consider that it is the Corporate Debtor who has failed to fulfill its contractual obligations.

Clause 7.5 of the Contract is reproduced herein for ready reference:

“The Buyer being SEZ Unit is exempted from taxes, duties, levies, entry tax etc. Buyer shall furnish necessary documents to Seller in time to avail the exemption benefits. In case of delay or failure of buyer in furnishing the relevant exemption documents, the implications on the Purchase Order Delivery schedule and cost thereof shall be mutually discussed and agreed between Buyer and Seller to find best way ahead.”



- 2.17 The Applicant had received Advance License for duty-free import of Input material under Advance Authorization Scheme, for manufacturing of SRGMs for supply to the Corporate Debtor, which is an SEZ unit. However, the Corporate Debtor did not fulfil its obligations under the Contract by opening LCs; as a result of which the Applicant could not supply balance goods to the Corporate Debtor and fulfil its export obligations required for redemption of Advance License at DGFT. Due to the failure on part of the Corporate Debtor to accept the material and issue of Bill of Export, the Applicant was not able to close the Advance License against import of goods while the contract was still alive till 31.03.2020. Hence, the liability i.e., penalty and interest on account of Custom Duty lies with the Corporate Debtor.
- 2.18 The custom duty liability on the Applicant is a consequence of the Applicant's constraint in executing the contract due to the failure on part of the Corporate Debtor in honouring the LC payments and establishing LCs as per the Contract. Meanwhile, the Corporate Debtor had proposed to the Applicant vide letter dated 14.01.2019 to take deliveries of the balance supplies. True copy of the letter dated 14.01.2019 was annexed as Annexure A-11.
- 2.19 As noted earlier, the contract between the parties remains live even after commencement of the CIRP. It is clearly provided in Clause 7.5 of Contract that the Buyer (the Corporate Debtor herein) is required to furnish necessary documents to the Seller (the Applicant herein) to enable the Seller to avail exemption benefit. In case of delay, the cost is to be mutually discussed and agreed between the Seller and the Buyer. It is incumbent upon the RP to perform the contract as if it would have been performed by the Corporate Debtor prior to admission under CIRP. For a contract that remains live, it is not open to the RP to hide behind the inaction of the Corporate Debtor prior to commencement of the CIRP, in so far as those actions can be taken by the RP after commencement of the CIRP. Mutual acceptance if any can be provided by the RP, particularly when the contract remains in force. Therefore, the Applicant's claim on the Corporate Debtor, as mentioned at above at Point-2 of the table, of Rs. 34 crores as on 31.05.2021 needs to be admitted.
- 2.20 Furthermore, the clause of the Contract in question was not only referred to by the Applicant but is also in the personal acknowledge of the RP, as evident from his email dated 26.02.2021. It is not in question that the Buyer was under an obligation to provide



the necessary documents, and the consequence of delay was on the Buyer. Merely the quantum of the cost is to be agreed. In verifying the quantum, and agreeing to the cost and consequences, the RP is obligated to do so under Clause 7.5 of the Contract.

2.21 Lastly, the Applicant had also provided comprehensive details regarding the liabilities mentioned above at Points-3&4 of the table. The detailed invoices with respect to live debtors, pertaining to supply of equipment, as available with the Applicant were shared. Further, the interest is calculated in terms of Clause 8.8.9 of the Contract, against non-payment with respect to LC and for that, the Applicant had submitted communications between the Applicant and the Corporate Debtor, bill of exchanges and invoices along with the acknowledgment of concerned bank.

2.22 It was submitted that the RP, as per its duty and responsibility under IBC, is expected to follow the principles of natural justice, even in administrative action, as held priorly in *Numetal v. Satish Kumar Gupta*, which has also been confirmed by the Hon'ble Supreme Court in *Arcellor Mittal v. Satish Kumar Gupta*. It is pertinent that the RP does not step into the shoes of an adjudicator to go over and beyond the scope of verification and determination as laid down under Regulations 13 and 14 of Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016. It is not correct to hold that the claims of the Operational Creditor be rejected simply because the RP has failed to continue the contract between the parties and is in complete ignorance of the documents submitted as proof of claim by the Applicant and hence, the Operational Creditor should be left to suffer the consequences of the non-admission of claims, for no fault of its own. At best, a decision should have been taken after reasonable investigation or enquiry. The determination of amount of claim where the amount claimed by a Creditor is not precise due to any contingency, the RP shall make the best estimate of the amount of the Claim based on the information available.

2.23 It is not in dispute that there was a Contract between the parties, and accordingly, two options arise, firstly, that the performance as per the Contract be accepted or secondly, that the payment be made for the default for breach of Contract. If the RP does not wish to continue the Contract on behalf of the Corporate Debtor, the consequences arising out of such non-performance are also to be borne by the Corporate Debtor. It is incorrect to make the Operational Creditor suffer losses for no fault of its own, given that the



Operational Creditor is ready and willing to perform its part of the Contract. The RP is required to act as an administrator in charge of the business whereby the RP is required to take a commercial call on whether to continue with the Contract or to accept the financial consequence of non-performance.

2.24 It is submitted that the RP has not appreciated the fact that by continuing with the contract with BHEL, the RP has to discharge the contractual obligations under the contract. Along with the obligation to discharge the contractual obligations comes the responsibility to also accept the financial and other consequences of failure to discharge those obligations. It was prayed that the RP be asked to admit the claim of the Applicant against the Corporate Debtor, without any deduction.

3 The Respondent/RP has filed its affidavit in reply and averred as under:-

3.1 That in order to deal with the contents of the present Application, it is important to place on record the true and correct facts of the case:

- a. That a contract dated 27th May 2011 was executed between the President of India, through the Joint Secretary, Ministry of Defence, Government of India (“MoD”) and M/s. Pipavav Shipyard Limited (“PSL”) for construction and delivery of 5 NOPVs to the Indian Navy at the ‘Firm and Fixed’ Project Cost of INR 2794.5835 Crores (“NOPV Contract”). Pursuant to the same, a contract dated 18th June 2013 (“said Contract”) was executed by and between PSL and the Applicant for the procurement of 5 SRGMs.
- b. That the 5 NOPVs were to be constructed by a group entity of PSL, viz., M/s. Pipavav Defence and Offshore Engineering Co. Ltd. (“PDOECL”) at its shipyard located at Pipavav, Gujarat (“Shipyard”) as per the specifications and requirements of the Indian Navy and were to be delivered at the designated ports of the Indian Navy post completion.
- c. That the timelines envisaged under the Contract for delivery for NOPVs could not be adhered to by the original contractor, PDOECL during the years 2011-2015, on account of various factors and reasons, including financial distress



and liquidity crunch. The progress on the NOPV Project had come to a complete standstill since the year 2014-2015 on account of various challenges and hurdles being faced by PDOECL.

- d. That in the year 2015, the Reliance Group of companies initiated the process of taking over the management of PDOECL by buying equity stake in PDOECL. The change in management from erstwhile management of PDOECL to the Reliance Group was finalized in January 2016. Accordingly, on 29th February 2016, the name of PDOECL was changed to Reliance Defence and Engineering Limited (“RDEL”) in compliance with the Companies Act, 2013. Subsequently, on 22nd August 2017, the name of RDEL was changed to M/s. Reliance Naval and Engineering Limited (“RNEL”), i.e., the Corporate Debtor herein, in compliance with the Companies Act, 2013.
- e. That the erstwhile management of the Corporate Debtor could not complete the milestones under the NOPV Contract for the reasons beyond the control of the Corporate Debtor and hence the Corporate Debtor incurred heavy financial loss during this period.
- f. That on Insolvency Commencement Date, the Corporate Debtor was in financial distress and cash crunch and was unable to sustain itself. This Respondent has taken every effort from thereon to run the Corporate Debtor as a going concern.
- g. That even after various efforts from the side of this Respondent to revive the NOPV Contract through proposals, the MoD went ahead and terminated the NOPV Contract vide termination letter dated 21st September 2020 (“Termination Letter”). The Termination Letter has been challenged before this Tribunal in an Interlocutory Application bearing no. 732 of 2020. The same is pending adjudication before this Hon’ble Tribunal as on date of this Reply. A copy of the Termination Letter was annexed as Exhibit “A”.
- h. That the IRP on 31st January 2020 received the claim in Form B of the CIRP Regulations from the Applicant as an operational creditor claiming for an



amount of INR 296,00,00,000/- (Indian Rupees Two Hundred and Ninety Six Crores Only) including an interest calculated at 15% per annum as on the Insolvency Commencement Date (“Purported Claim”).

- i. That for the purpose of verification of the Claim, this Respondent had on 16th September 2020 and 24th December 2020 sought clarifications from the Applicant on certain information and documents in relation to the Purported Claim. Copies of emails dated 16th September 2020 and 24th December 2020 were attached as Exhibit “B”.
- j. That based on the information/clarification and documents provided by the Applicant vide emails dated 29th September 2020 and 16th January 2021, this Respondent rejected the Purported Claim and informed the Applicant regarding the same along with reasons for rejection vide an email dated 26th February 2021. A copy of email dated 26th February 2021 was attached as Exhibit “C”.
- k. That as against the response of the Applicant to the communication dated 08th October 2021 regarding rejection of the Purported Claim, this Respondent again sent clarificatory emails dated 06th December 2021 and 08th February 2022 to the Applicant explaining once again the reasons for the rejection of the Purported Claim. A copy of the email dated 06th December 2021 and 08th February 2022 were attached as Exhibit “D” and Exhibit “E” respectively. The emails dated 26th February 2021, 06th December 2021 and 08th February 2022 are hereinafter referred to as “Rejection Emails”.

3.2 That the Applicant in the present Application has prayed for the admission of the Purported Claim. The Purported Claim has been divided by the Applicant as following:

- a. Balance contract value not effected by the Corporate Debtor
- b. Customs Duty
- c. Live Debtors
- d. Non-payment of Letter of Credit

3.3 Each part of the Purported Claim is dealt separately hereunder:-



A. BALANCE CONTRACT VALUE

- a. With respect to the balance contract value, the RP submitted that the Applicant has claimed the contract value of the 4th SRGM and 5th SRGM which was not delivered to the Corporate Debtor. The non-delivery of the SRGMs has been accepted by the Applicant in the present Application [Paragraph 17 of the Application].
- b. Thus, the claims with respect to the balance contract value could not be admitted as a claim against the Corporate Debtor.
- c. The RP submitted that pursuant to the Termination Letter of the NOPV Contract by MoD, an application has been filed by this Respondent challenging the Termination Letter which is pending adjudication since September 2020.
- d. Therefore, since the matter being sub-judice in respect of the cancellation of NOPV Contract, the Corporate Debtor was neither in a position to terminate the said Contract nor was in a position to take delivery of the goods and the same has been pointed out to the Applicant vide Rejection Emails.
- e. With respect to 2nd SRGM, I say that upon testing of the 2nd SRGM delivered by the Applicant, the Corporate Debtor learned that the said SRGM malfunctioned due to reasons beyond the control of the Corporate Debtor. The same was deliberated and was discussed during 7th Apex Steering Committee Review Meeting held on 16 April 2019. A copy of the minutes of meetings of the 7th Apex Steering Committee Review Meeting held on 16 April 2019 are marked and annexed as Exhibit "F". Therefore, it is pertinent to mention that the 2nd SRGM was returned to the Applicant. However, the advance paid by the Corporate Debtor to the Applicant was never returned to the Corporate Debtor.
- f. Further it is important to note that in pursuance of the same and several other payments made by the Corporate Debtor an amount of INR 80,02,06,737/- (Indian Rupees Eighty Crores Two Lakhs Six Thousand Seven Hundred and Thirty Seven Only) is liable to be paid by Applicant to the Corporate Debtor



as on the Insolvency Commencement Date. A copy of the relevant parts of the books of the Corporate Debtor reflecting the receivables from the Applicant were marked and annexed as Exhibit “G”. A copy of the summary of payments made on each SRGM and status of the same was marked and annexed as Exhibit “H”.

- g. That the resolution plan submitted by Hazel Mercantile Limited (“Successful Resolution Applicant”) has been approved by CoC in its 28th CoC meeting held on 23rd February 2022 and Interlocutory Application No. 292 of 2022 is pending before this Tribunal. A copy of the minutes of the 28th CoC meeting was marked and annexed as Exhibit “I”. The plan was subsequently approved by Special Bench, NCLT, Ahmedabad on 23.12.2022.
- h. That as per the contents of the resolution plan, the Successful Resolution Applicant intends and endeavours to revive the NOPV Contract subject to the outcome of pending I.A. No. 732 of 2020.

B. CUSTOMS DUTY

- a. With respect to the customs duty claimed by Applicant, the RP stated that according to clause no. 7.5 of the said Contract, the Corporate Debtor being a Special Economic Zone (“SEZ”) unit is exempted from taxes, duties, levies, entry tax etc.
- b. RP further stated that clause no. 7.5 of the said Contract has stipulated that in case of delay or failure in furnishing documents by the Corporate Debtor, cost shall be mutually discussed and agreed between the Corporate Debtor and the Applicant. It is important to mention that the Applicant has not provided any such mutually accepted arrangement on the amount claimed as customs duty by the Applicant even after frequent enquiries by this Respondent. The relevant portion of the said Contract is herein reproduced for ease of reference:

“Clause 7.5 – The Buyer being SEZ Unit is exempted from taxes duties, levies, entry tax etc. Buyer shall furnish necessary documents to Seller in time to avail the exemption benefits. In case of delay or failure of buyers in furnishing



the relevant exemption documents, the implications on the Purchase order Delivery schedule and cost thereof shall be mutually discussed and agreed between the Buyer and Seller to find best way ahead.”

- c. Furthermore, the RP stated that the Corporate Debtor continues to be a SEZ unit and is eligible for the exemptions, and the same was also informed to the Applicant by this Respondent in Rejection Emails.
- d. Therefore, the claim filed by the Applicant could not be admitted in light of the above provisions of the said Contract and the Purported Claim was accordingly rejected by this Respondent.

C. LIVE DEBTORS

- a. That the Applicant in its Purported Claim has claimed the payment for supplying the equipment to the Corporate Debtor since the execution of the said Contract.
- b. Clause 8.3 of the said Contract deals with the foreign exchange rate variation and stipulates separate invoice to be raised supported by the following documents:
 - i. 3 copies of Sellers Invoice;
 - ii. Work sheet for exchange rate variation;
 - iii. Copies of Seller’s Banker’s Certificate detailing foreign exchange paid and the exchange rate; and
 - iv. A verification certificate to be issued by internal audit / practicing Charter Accountant / Cost Accountant.
- c. RP stated that the Respondent has time and again requested the Applicant to provide with the documents/ invoices in support of its claim. However, the Applicant, has till date, failed to provide any supporting documents. Hence, this Respondent was not in a position to admit the same and accordingly it was rejected by Rejection Emails.

D. NON-PAYMENT OF LETTER OF CREDIT



- a. That the Applicant in its Purported Claim has claimed interest at the rate of 15% per annum on the non-payment of the claims with respect to 6th letter of credit dated 19th January 2018 bearing reference no. 180004ILCU00046.
- b. That Applicant is relying on clause no. 8.8.9 of the said Contract and this Respondent did not recognise any provision under the abovementioned clause which obligates the Corporate Debtor to pay the interest on the non-payment of the letter of credits.
- c. That the Applicant is misleading this Hon'ble Tribunal with false and incomplete information. It was submitted that the Corporate Debtor vide its letter dated 14th January 2019 bearing no. RNAVAL/MUM/NOPV/026 had communicated the decision taken in meeting held on 13th November 2018 between the Corporate Debtor and the Applicant. One of the terms discussed during the meeting was on return of one of the SRGM along with additional items to the Applicant and the Applicant must reverse the claim under letter of credit bearing no. 180004ILCU00046. It is pertinent to mention that in the said letter, the Corporate Debtor had put a condition that after receipt of the materials, the Applicant shall withdraw its claim under the letters of credit bearing no. 180004ILCU00046 and 180004ILCU00047. A copy of the letter dated 14th January 2019 was marked and annexed as Exhibit "J".
- d. Moreover, the discussions held on 13th November 2018 and also the letter sent by the Corporate Debtor dated 14th January 2019 were accepted by the Applicant vide a letter dated 17th January 2019 bearing reference no. ID/DB/A004. Further, there has not been any decision regarding the interest which would be levied against the Corporate Debtor with respect to the above-mentioned letter of credit. A copy of the letter dated 17th January 2019 was annexed as Exhibit "K".
- e. In light of the above, the Applicant has withdrawn the outstanding claims under letter of credit no. 180004ILCU00046 vide the Applicant's letter dated 11th March 2019. A copy of the letter of withdrawal of claims dated 11th March 2019 annexed as Exhibit "L".



- f. That this Respondent has time and again requested the Applicant to provide with the documents in support of this part of the Purported Claim. However, the Applicant did not provide any supporting documents. Hence, this Respondent was not in a position to admit the claim and it was accordingly rejected.

3.4 That the resolution professional of the Corporate Debtor is not empowered as an adjudicator and merely has to collate and verify the claims in accordance with provisions of the Code. The same has been reiterated in various decisions of the Hon'ble Supreme Court of India in the case of *Swiss Ribbons v. Union of India [(2019) 4 SCC 17]*. Thus, this Respondent in its role being the RP of the Corporate Debtor cannot decide on the merits of the case and can only verify the documents which are provided by the Applicant. The RP submitted that this Respondent has time and again requested the Applicant to provide the documents in support of this part of the Purported Claim. However, the Applicant has failed to provide any supporting documents that were asked for by the Respondent. Hence, the Respondent was not in a position to admit the same and it was accordingly rejected.

3.5 That this Respondent has rejected the Purported Claim vide Rejection Emails and the Applicant has now come before this Hon'ble Tribunal with an ulterior motive to delay the process of CIRP of the Corporate Debtor. The CIRP of the Corporate Debtor is at the last stage as this Respondent has already filed I.A. No. 292 of 2022 for approval of the resolution plan which is pending before this Hon'ble Tribunal.

4 The applicant has filed a rejoinder in reponse to the reply filed by the Respondent and made the following averments.

4.1 That the applicant had provided all the relevant records, documents and information to the respondent for the verification of its claim. However, the respondent did not properly verify the documents and rejected the claim based on frivolous grounds without providing any cogent reason.



- 4.2 That the equipment supplied by the applicant was illegally returned by the respondent despite the fact that there was no provisions for return of the supplied equipment in the contract dated 18.06.2013 which was executed between the applicant and the Pipavav Defence and Offshore Engineering Company Limited (acquired by the Corporate Debtor on 03.03.2016). It is further submitted that the return of equipment was executed pursuant to the letter dated 14.01.2019 sent by the Corporate Debtor to the applicant. The said letter clearly mentioned that the Corporate Debtor has returned the equipment due to its precarious financial condition. The Corporate Debtor vide the said letter had also implied that the contract would continue and the due payments would be made, however, the Corporate Debtor has failed to make such payments till now. The applicant herein had invested a lot in supplying the equipment which were returned and the same should be reimbursed by the Corporate Debtor by making payments in terms of the contract.
- 4.3 That the respondent is under obligation to perform the terms of the contract as has been done by the applicant herein. The applicant never refused to deliver any equipment as it was under obligation to do under the contract. The applicant has suffered losses due to return of goods which were procured by the applicant for respondent.
- 4.4 That the Corporate Debtor is neither in a position to terminate the contract nor is in a position to take delivery of the goods. It is submitted that the termination of the NPOV contract by the Ministry of Defence vide termination letter dated 21.09.2019 cannot be used as an excuse by the Corporate Debtor to wriggle out of its obligation under the contract with the applicant. the contract was not contingent upon the term of the NPOV contract and therefore, the applicant shall not be denied its claims on the basis of the termination of NPOV contract which was due to the Corporate Debtor's own deeds and misdeeds.
- 4.5 That as mentioned in the minutes of the 7th Apex Sterring Committee Review Meeting, the 2nd SRGM malfunctioned due to the faulty ammunition provided by the Indian Navy to the applicant. The applicant had nothing to do with such malfunction and still the goods were returned by the Corporate Debtor. It is pertinent to note that the applicant had incurred substantial costs in procuring these goods and therefore, the Corporate Debtor is liable to make payments for them as per the terms of the contract.



- 4.6 It is submitted that the clause 7.5 of the contract casts a duty on the Corporate Debtor to furnish necessary documents to the applicant to avail the exemption benefits that are available to SEZ units with respect to taxes, duties, levies, entry tax etc. However, the Corporate Debtor failed miserably to provide any such documents to the applicant. The abovementioned negligence by the Corporate Debtor in not providing the necessary documents has led to incurring of extra costs by the applicant which should be reimbursed by the Corporate Debtor.
- 4.7 It is submitted that the applicant has provided the respondent all the relevant documents and information along with claim form that are required for verification of the claims of the applicant. Further the applicant had also sent emails dated 29.09.2020 and 16.01.2021 and letter dated 17.12.2021 for providing clarification regarding queries of the Resolution Professional with respect to the claims. As per clause 8.3 and 8.8.1 of the contract, the Corporate Debtor was under obligation to make payment for foreign exchange variation within 30 days, which has not been done by the Corporate Debtor.
- 4.8 It is submitted that interest is charged as per clause 2 of the invoices served by the Corporate Debtor which states that the *“interest will be charged on payment not effected within 30 days of this invoice @ 15% per annum or 1% higher than the rate charged to BHEL by Bank on cash credits, which ever is higher.”*
- 4.9 It is submitted that the applicant had agreed for the reversing of the claim under letter of credit bearing number 1800041LCU00046 pursuant to the letter dated 14.01.2019 sent by the Corporate Debtor to the applicant wherein the Corporate Debtor had implied that the contract would continue, and the due payments would be made, however, the Corporate Debtor has failed to make such payments till now.
- 4.10 The Hon'ble Supreme Court in *Arcelor Mittal India Private Limited V. Satish Kumar Gupta (2019) 2 SCC 1 and Swiss Ribbons Pvt. Ltd. and Ors. Vs. Union of India and Ors. (2019) 4 SCC 17*, clearly laid down that the 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 at all, by the Resolution Applicant and be finally negotiated and decided by the Committee of Creditors. Further, it was held that his role is not adjudicatory but administrative. However, the respondent in the instant matter is acting



like an adjudicating authority for the purpose of denying the rightful claims of the respondent at any cost.

5 The Respondent filed its written submission wherein it is submitted that the purported claim submitted by the applicant before the respondent / RP can be divided into four category:

- a. Balance contract value not effected by the Corporate Debtor
- b. Customs Duty
- c. Live Debtors
- d. Non-payment of Letter of Credit

5.1 It is further submitted that the Resolution Professional of the Corporate Debtor is not empowered as an adjudicator and merely is entrusted with the duty to collate and verify the claims in accordance with provisions of the Code. The Respondent has time and time again approached the Applicant to submit proof with respect to the purported Claim which they have failed to do. Thus, the Respondent was not in a position to admit the purported claim.

5.2 Moreover, the resolution plan submitted by Hazel Mercantile Limited (“Resolution Plan”) has been approved by the Committee of Creditors (“CoC”) of the Corporate Debtor on 23rd February 2022 and the same was approved by this Hon’ble Tribunal vide an order dated 23rd December 2022. A copy of the Resolution Plan and the order of this Hon’ble Tribunal dated 23rd December 2022 were annexed and marked as “Annexure A” and “Annexure B” respectively.

5.3 It is pertinent to note that all the claims towards operational creditors shall be treated as per the Resolution Plan and the contents of the Resolution Plan is binding on all the creditors and stakeholders of the Corporate Debtor including the Applicant in light of Section 31 of the Code. The relevant portion of Section 31 of the Code is reproduced herein below for the sake of convenience.

“31. Approval of resolution plan. -

If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order



approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.”

(Emphasis Supplied)

5.4 It is further submitted that the resolution plan provides for treatment of all operational creditors of the Corporate Debtor. Clause No. 13.3.9 of the Resolution Plan states that all the claims or demand towards operational creditors, whether admitted not admitted, crystallised or uncrystallised, known or unknown, disputed or undisputed, shall on and from the Closing Date be written off in full and be deemed to be permanently extinguished and waived off. The relevant portion of the Resolution is reproduced herein below for the sake of convenience.

“13.3.9 Other than the Admitted OC Claims which the Resolution Applicant proposes to pay, all other Claims or demands made by, or liabilities or obligations owed or payable to (including but not limited to any Operational Debt, any demand for any losses or damages, indemnification, principal, interest, compound interest, penal interest, liquidated damages, and other charges already accrued / accruing) any actual or potential creditor, vendor, contracting counterparty, Government Authority, claim ant or any other person whatsoever, whether admitted or not, due or contingent, asserted or un-asserted, crystallized or un-crystallized, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the balance sheet of the Corporate Debtor or the profit and loss account statements of the Corporate Debtor or the List of Creditors, claims submitted or not submitted, claims admitted or not admitted , in relation to any period prior to the ICD, shall on and from the Closing Date be written off in full and be deemed to be permanently extinguished and waived off, subject to the other terms of this Resolution Plan, by virtue of the Order of the Adjudicating Authority approving this Resolution Plan and neither the Corporate Debtor nor the Resolution Applicant shall, at any point of time be, directly or indirectly, held responsible or liable in relation thereto.”



5.5 Furthermore, the Hon'ble Supreme Court of India in the matter of CoC of the *Essar Steel India Limited Through Authorised Signatory v. Sathish Kumar Gupta and Ors. [(2020) 8 SCC 531]*, while discussing the topic of the extinguishment of undecided claims after the approval of resolution plan approved by the adjudicating authority, held that the successful resolution applicant cannot be faced with undecided claims. The relevant extract of the decision of the Hon'ble Supreme Court of India in the abovementioned matter is reproduced below for sake of convenience.

“67. 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 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.”

(Emphasis Supplied)

6. We have considered the submissions made from both the sides and perused the documents available on record. It is noticed that the claim is rejected by the RP mainly on the following grounds:-

- i. The Corporate Debtor had placed an order of 05 (Five) SRGMs along with additional items and services with the Applicant, from which the Applicant had not delivered the 4th and 5th SRGM. The Applicant had also accepted the non-delivery of the same (reference made to paragraph 17 of the application). Thus, the purported claims of the Applicant could not be admitted in respect of the undelivered items.



- ii. That the 2nd SRGM delivered by the Applicant was returned since it had malfunctioned due to reasons beyond the control of the Corporate Debtor. The same was discussed in the 7th Apex Steering Committee review meeting held on 16th April 2019 (Refer Exhibit F @ Pg No. 37 of the Reply).
 - iii. Clause 7.5 of the Contract states that the Corporate Debtor is a Special Economic Zone (“SEZ”) unit exempted from tax, duties, levies, etc. It is also stipulated in Clause 7.5 of the Contract that in case of delay or failure in furnishing documents by the Corporate Debtor, any cost shall be mutually discussed and agreed between the Corporate Debtor and the Applicant. There was no such mutual agreement/arrangement between the Corporate Debtor and the Applicant till date.
 - iv. The Corporate Debtor had pending claim of Rs.80,02,06,737/- against return of one SRGM along with additional items, on its malfunctioning.
7. We note that the resolution plan has already been approved by the Adjudicating Authority on 23.12.2022 and the resolution plan, in para 13.3.9, provides for write off/ extinguishment of claims not specifically provided for in the plan. We further noticed that the present claims and counter claims are due to unclear terms and conditions of the contract executed between the parties and non performance of contract by the parties. Hence, we are inclined to hold that it is not for us to to decide on the disputed terms and conditions of the contract and consequences of non performance of contract, while dealing with an application filed u/s 60(5) of IBC, 2016.
8. In view of the above discussion, the application is rejected. A copy of the order be served to the parties concerned by the Registry. Application stands disposed of in terms of above order.

S/d-

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

S/d-

**DEEP CHANDRA JOSHI
MEMBER (JUDICIAL)**

Rahul/LRA and Prakash/Steno