

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2



ITEM No303
IA/1003(AHM)2023
in
CP(IB) 232 of 2018

Order under Section 60(5) IBC

IN THE MATTER OF:

SUPERTECH ENGINEERS THROUGH SEETHARAM
NARAYAN SHEETY
VS
JBF PETROCHEMICALS LIMITED

.....Applicant

.....Respondent

Order delivered on 06/10/2023

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order

The order is pronounced in open Court vide separate sheet.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)



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

**IA No. 1003 / NCLT / AHM / 2023
IN
CP(IB) No. 232 / 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

SUPERTECH ENGINEERS Applicant

Versus

JBF PETROCHEMICALS LTD. Respondent

AND IN THE MATTER OF

IDBI Bank Limited ... Financial Creditor

Versus

JBF Petrochemicals Limited ... Corporate Debtor

Order pronounced on : 06.10.2023

Coram:

**Coram:
MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**



MEMO OF PARTIES

Supertech Engineers
D-5, Village Ghazipur,
New Delhi - 110096

... Applicant

Versus

JBF Petrochemicals Limited
Through
Mr. Sundresh Bhat
Chairman IMC
Having its registered office at
4-214, PB No.:001, Industrial Plot No.9,
Mangalore SEZ Ltd., Village: Bajpe,
Dakshin Kannada District,
Karnataka – 574142

... Respondent/Resolution Professional

Present:

For the Applicant : Mr. Amar Vivek, Adv. a.w Mr. Aditya Gauri, Adv.
For the Respondent : Mr. Monaal Davawala, Adv.

ORDER

1. The present application is being filed by Mr. G.R Pillai, the proprietor of Supertech Engineer (Applicant / Operational Creditor') under 60(5) of the Insolvency and Bankruptcy Code, 2016 inter-alia seeking direction upon the resolution professional of the JBF PETROCHEMICALS LTD (Respondent/Corporate Debtor') to handover the assets to the applicant.
2. The facts in nutshell are as under:
 - i. The Corporate Insolvency Resolution Process (CIRP) of JBF PETROCHEMICALS LTD (Corporate Debtor') was initiated by this Hon'ble Tribunal vide order dated 28.01.2022. Vide same order, Mr. Sundaresh Bhat, Insolvency Professional registered with the IBB1, was appointed as the Interim Resolution Professional of the Corporate Debtor.



The IRP made a public announcement in Form-A on 04.02.2022 and collated claims and constituted a Committee of Creditors ("CoC).

ii. The Applicant vide Form B dated 06.04.2022 had filed its claim with the RP of the Corporate Debtor for a sum amounting to Rs. 20.79 Crores. It is pertinent to mention that in the said Form-B the Applicant had furnished to the RP of the Corporate Debtor that the Operational Creditor had identified to the RP security interest/lien over such assets in favor of the Applicant. A Copy of Form B dated 06.04.2022 and list detailing these assets of the Applicant is annexed herewith

iii. The RP of the Corporate Debtor at no point of time disputed the security in favour of the Applicant claimed in terms of Form-B dated 06.04.2022. Further more the CoC in its first meeting held on 04.03.2022 resolved to appoint Applicant herein Mr. Sundaresh Bhat as Resolution Professional (IRP). It is stated that on 18.04.2022 the RP issued Form G Inviting Expression of Interest ("EoI") for submission of a resolution plan for the Corporate Debtor. The last date for submission of EoI was 03.05.2022, and the last date for submission of resolution plan was 17.06.2022.

iv. The RP in 17th CoC meeting held on 27.09.2022 placed before the CoC the compliant resolution plans received from the GAIL (India) Limited and IOCL - ONGC Consortium and decided to vote on the revised resolution plans. It is stated that the CoC further decided that the distribution to the creditors shall be carried out as per the Code and as specified under the approved resolution plan. The CoC had approved the resolution plan submitted by GAIL (India) Limited with 100% voting share.

v. The Resolution Professional of the Corporate Debtor filed an application under Section 31(1) of the Insolvency & Bankruptcy Code,




2016 (Code') for approval of the Resolution Plan submitted by GAIL (India) Ltd. and approved by Committee of Creditors of the Corporate Debtor. The said Application was numbered as IA No. 899/AHM/2022. It is pertinent to mention that this Hon'ble Tribunal approved the Resolution Plan of the Corporate Debtor vide its Order dated 13.03.2022. A Copy of the Order dated 13.03.2022 is annexed herewith.

TRANSACTION OF APPICANT WITH THE CORPORATE DEBTOR

vi. Prior to the commencement of the CIRP the Corporate Debtor herein was engaged in the manufacture of polyester and, in the course of its business, desires to obtain certain fabricated tankages with engineering, fabrication, erection, and testing of the same. In view of the above requirement, the Corporate Debtor approached the Applicant to obtain and engineer the aforementioned products. Upon considering the Respondents requirement, the Applicant assured the Respondent of providing the product and services with desirable quality and efficacy. It is pertinent to mention that relying upon the representations and assurances made by the Applicant, the Respondent has proceeded to place orders with the Applicant for the provision of goods and services. Accordingly, the Applicant was granted access to the site of the Respondent at Plot No. 4-214, P.B No. - 01, Industrial Plot No. 9, Manglore SEZ Ltd., Village Bajpe, Dakshin Kannada Dist, Karnataka - 574142 (hereinafter to be referred to as "Mangalore Site") to supply and engineer the products and services and ensure the smooth functioning of the operations.

vii. Upon being granted access to the Mangalore site, the Applicant began supplying a substantial quantity of goods intended for engineering and facilitating the production of products and services at the Respondent's facility. The Applicant possesses gate passes for each delivery made to, the factory, which serve as evidence substantiating the entry of diverse goods



into the premises of the factory. A copy of the gate passes is herewith annexed

viii. Periodically, the Applicant provided assorted goods to the Mangalore site as per the demands made by the Respondent. It is pertinent to mention that after the initiation of the Corporate Insolvency Resolution Process (CIRP) for the Respondent on 28.01.2022, the Resolution Plan for the Corporate Debtor (herein referred to as the Respondent) was duly passed by the Committee of Creditors (COC) and subsequently approved by the Adjudicating Authority. The contention of the Applicant herein is that at the time when the Resolution Plan was passed and the Corporate Debtor was transferred to GAIL as a going concern, numerous assets belonging to the Applicant were present at the Mangalore site of the Respondent.

ix. The Applicant, acting in good faith and with the intention of complying with the order issued by the Respondent, possesses a substantial amount of material located at the Mangalore site. It is important to note that by virtue of Approval of Resolution Plan the assets cannot be acquired by the Resolution Applicant as the same have been excluded under the CIRP of the Corporate Debtor.

x. Currently the Applicant is in dire need of obtaining possession of all assets that rightfully belong to them and are currently in the possession of the Respondent at the Mangalore site. The existence of the Applicant's assets at the Mangalore site of the Respondent can be conclusively substantiated through the presentation of all the relevant gate passes that were duly obtained during the entry of said items into the premises of the Respondent. These gate passes serve as concrete evidence of the presence and rightful ownership of the Applicant's assets within the said location.




xi. The Applicant has also submitted a consolidated list of assets they are seeking to retrieve from the premises of the Respondent. This list serves as a comprehensive record of the specific assets that rightfully belong to the Applicant and are presently in the possession of the Respondent. It is pertinent to mention that the Applicant has already suffered significant losses as a consequence of the Insolvency proceeding involving the Respondent, and they cannot endure any further loss of the assets in question.

xii. This Hon'ble Adjudicating Authority should issue an order for the immediate release of the Applicant's assets from the premises of the Respondent. The order is sought in consideration of the Applicant's rightful ownership of the assets and the significant losses they have already incurred during the Insolvency proceeding. It is essential that the assets be returned to the Applicant without further delay to protect their interests and prevent any additional harm.

xiii. The said assets are 'third party asset' and therefore, cannot be considered as part of the 'assets' of the Corporate Debtor during CIRP which could have been included as part of the resolution plan. Reference shall be made to Explanation (a) to Section 18 of IBC which states that assets do not include within its ambit, the assets owned by a third party, which are in possession of a corporate debtor under contractual arrangements".

xiv. The expression "Property" as defined in Section 3 (27) of IBC, 2016 includes every description of interest including present or future or vested or contingent interest arising out of or incidental to property. It is pertinent to mention that in fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is



specifically kept out of the definition of the term "assets" under the Explanation to Section.

xv. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property".

xvi. The specific provisions of the Work Orders providing that the custody possession of the goods belonging to the Applicant was to remain with the Corporate Debtor till the successful commissioning of the plant. The possession remained with the Corporate Debtor.

xvii. The Applicant has made all reasonable efforts to obtain the assets and information pertaining to the aforesaid plots but failed to obtain them.


xviii The Applicant has no other remedy other than to file the present application. This Application is made bonafide and in the interest of Justice, it may be allowed.

3. In this regard, a reference is drawn to IA No. 759/NCLT/AHM/2023 in CP (IB) 232 of 2018 wherein, a Tribunal has passed an order along with brief facts of the case. While approving the resolution plan vide IA 899 of 2022 on 13.03.2023, the following order was made in Para 20, clause (vii) which is reproduced below:-

“This order is subject to outcome come of interlocutory applications regarding claims presented pending before the adjudicating authority, such creditors will be entitled to pro rata

amount as per the respective category in accordance with the resolution plan.”

4. It is observed from the application that he had filed form B dated 6.4.2022 with the RP of the RP of the Corporate Debtor for a sum amounting to Rs.20.79 crores in Form B showing security interest/lien over such assets in favour of the applicant. The stated claim seems to be on the material supplied on requisition basis for the purpose of the corporate debtor facilitating the production of products and services at the Respondent's facility. It is stated that the said assets are of third party asset and therefore cannot be considered as part of the assets of the Corporate Debtor and a separate contract for payment of the same by the Corporate Debtor has not been established. The claim made by the applicant before the RP is a financial claim which has been examined verified and admitted/not admitted by the RP. The applicant has also stated that the claim was not disputed but however, the facts of the matter whether it was considered or not is not clear from the application.
5. In this regard the duty of the RP is specified in Sec 18(1) of the IBC and in the explanation for the purpose of the Section, the term “assets” shall not include the following namely:- *“(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment”*:
6. From the submissions made in the application and the documents annexed any material left over which are part of the work order have to be accounted and returned and there will be no cause of a financial liability in making a claim unless there is a separate agreement in this regard. The application also states that the custody possession of the goods belonging to the Applicant was to remain with the Corporate Debtor till the successful commissioning of the plant and it remained with the CORPORATE DEBTOR. If the work order has been executed with a payment invoice the same should have been submitted to the RP when the claim was made. However, this applicant is for



return of assets used which are not part of any financial claim due. The applicant has also not stated if the RP has rejected the claim. There are no documents which could be perused or verified in submission from Annual Financial Statement of the Corporate Debtor as to whether the stocks or items sought in application were accounted as items belonging to the applicant and if it was considered by the RP for release during the CIRP. The items listed could have been handed over or left with the corporate entity (on open basis), and the Corporate Entity which has been resolved now by a successful Resolution Applicant (GAIL) on whom any other financial claim cannot be raised other than that approved in the Resolution Plan.

7. In the Resolution Plan submitted by the RP, it has been confirmed that the amount due to the operational creditors under resolution plan shall be given priority in payment over financial creditors. If the claim as stated and the amount if payable would have been considered and approved by COC in the Resolution Plan which has been approved with the requisite majority as per the IBC Act 2016.. The resolution plan submitted by the Successful Resolution Applicant, GAIL was approved by the CoC on 15.10.2022 and by this Tribunal on 13.03.2023 and has been implemented.
8. It has been held by the Hon'ble Supreme Court in the case of Swiss Ribbons Pvt. Ltd. & Another vs. Union of India & Ors. (Civil Original/Appellate Jurisdiction Writ Petition (Civil) No.99 of 2018 that Resolution Professional is given administrative as opposed to quasi-judicial powers. Relevant portion of the said judgment is extracted below:-

“59...It is clear from a reading of these Regulations 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 35A, he is only to apply to the Adjudicating Authority for appropriate relief.”



9. We have considered the submissions made by the applicant and perused the documents available on record.

10. We further noticed that the present claims and counter claims are due to unclear terms and conditions of the stated work order contract (which are certain movable assets as enumerated) executed between the parties for any such performance and such assets if any cannot be a matter resolved under IBC 2016 under the present application. If these assets were to have been released after the work was completed or at any time if it had been kept unused not forming part of the assets, the applicant could have taken possession of the same. Hence, we are inclined to hold that it is not for us to decide on the release of such assets while dealing with an application filed u/s 60(5) of IBC, 2016. No directions to the Successful Resolution Applicant, and no admission of any financial claim after the approval of Resolution Plan. However, the applicant may approach the SRA, who may if any such items are found or traced which are stated to have been kept in the corporate debtor's premises identified to be not belonging to the assets of the earlier management, which could be returned to the applicant. No liability, in this regard is ordered.

11. 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.

-SD-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

Mehul

-SD-

CHITRA HANKARE
MEMBER (JUDICIAL)