

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
SPECIAL BENCH
KOLKATA

C.P. (IB) No. 148/KB/2018

IA (IBC) No. 773/KB/2021

***An application under Section 60(5) of the Insolvency and Bankruptcy Cod,
2016 for directions upon the Resolution Professional to consider the claims.***

In the matter of:

(1) **State Bank of India**, a body corporate constituted under the State Bank of India Act, 1955 having its registered office at 14th Floor, Corporate Centre, Madame Cama Road, Nariman Point, Mumbai, Maharashtra – 400021.

... Financial Creditor

-Versus-

(1) **Tantia Constructions Ltd.**, a company having its registered office at 25/27, N.S. Road, Kolkata – 700092.

... Corporate Debtor

In the matter of:

(1) **Krsishna Hi-Tech Infrastructure Pvt. Ltd.**, an Operational Creditor having its registered office at 637, Rajdanga Main Road, Kasba, Kolkata – 700107.

... Petitioner

-Versus-

(1) **Kshitiz Chhawchharia**, Resolution Professional of Tantia Constructions Limited, having his office at 8A & 8B, Satyam Tower, 3 Alipore Road, Kolkata - 700027.

... Respondent

Date of hearing: 04/01/2023

Date of pronouncing the order: 10/11/2023

Coram:

Smt. Bidisha Banerjee	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

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Appearances (via video conferencing/physically):

Mr. Ratnanko Banerji, Sr. Adv.	:	For Chairman of Monitoring Committee
Mr. Deep Roy, Adv.	:	
Mr. Rahul Auddy, Adv.	:	
Mr. Aditya Gooptu, Adv.	:	
Mr. Swatarup Banerjee, Adv.	:	For the SRA
Mr. Avishek Guha, Adv.	:	
Mr. Sariful Haque, Adv.	:	
Mr. Chitresh Saraogi, Adv.	:	
Ms. A. Dutta, Adv.	:	
Mr. S.K. Tiwari, Adv.	:	For Income Tax Authority
Mr. Diptomoy Taluker, Adv.	:	In IA 1378/2022
Mr. Triptimoy Talukder, Adv.	:	
Mr. A.K. Srivastava, Adv.	:	For Krishna Hi-Tech Infrastructure Pvt. Ltd. in IA/773/2021 & IA/239/2022
Mr. Akash Sharma, Adv.	:	
Mr. Ajay Gaggar, Adv.	:	For SBI
Ms. R.P. Paul, Adv.	:	

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Heard Ld. counsels for parties.
2. This application has been preferred by Krishna Hi-Tech Infrastructure Private Limited and Operational Creditor of Tantia Constructions Ltd., to seek the following reliefs, inter alia: -
 - (a) Direction to the Ld. Resolution Professional to pay the lease rent from 14.03.2019 till date for the materials supplied by the Applicant at the project site of M/s. Tantia Constructions Limited, as per the rental order dated

25.11.2016 and also release the materials immediately or in the alternative pay the market value of the materials.

3. At hearing it transpired that in **C.P. (IB) No. 148/KB/2018** in **IA No. 497 of 2020** was filed by the present applicant Krishna Hi-Tech Infrastructure Pvt. Ltd., seeking direction upon the RP of Tantia Constructions Ltd. to consider and reverify the claim submitted by the applicant on 24.04.2019 which is before approval of the Resolution Plan. The matter was taken up on 15.07.2021 and 28.06.2021 an order was pronounced by this Tribunal which records the following, as extracted as relevant adjournment to the present lease.

Mr. Akhilesh Shrivastava, Ld. Counsel for application in IA No. 497/KB/2020 submits as follows: -

“2.1. On 24.04.2019, the applicant filed its claim with the RP for a sum of Rs. 1,81,00,496/-. The RP vide his email dated 15.05.2019, requested evidence showing that – (i) the corporate debtor has accepted the goods supplied by the applicant, (ii) the ledger statement (iii) details of the cost of material, and (iv) interest calculation sheet. The applicant supplied all the information vide email dated 31.05.2019.”

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“4.3. The facts of this application lie within a very narrow compass in terms of hire/rental agreement dated 25.11.2016. The applicant has supplied a ‘Z’ section of steel shoring materials at the project site of the corporate debtor on a monthly hire/rental basis at the Calcutta Metro Railway viaduct between Noapara and Dumdum Cantonment. In terms of the agreed conditions in the said rental order dated 25.11.2016, the basic rent of Rs. 2,70,060/- per month was required to be paid for 77.16 MT of the said materials. Mr. Shrivastava argued that this constitutes service by entrustment of movable properties.”

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“4.4. This Adjudicating Authority had initiated CIRP against the Corporate Debtor vide an order dated 13.03.2019. Following this, the applicant filed Form ‘B’ along with supporting documents with the Resolution Professional on 24.04.2019. The total amount claimed was Rs. 1,81,00,496/- (Rupees one crore eighty-one lakh four hundred ninety-six only) as per the following break up: -

S. No.	Particulars	Amount
(a)	Monthly rental due	Rs. 74,55,544/-
(b)	Interest as at Insolvency commencement date calculated at compound interest at 3 times of the bank rate as per the MSME Samadhan (interest on delayed payment) under MSME Act, 2006	Rs. 56,82,790/-
(c)	Cost of materials lying at the site of the Project of the Corporate Debtor	Rs. 49,62,162/-
	Total	Rs. 1,81,00,496/-

Out of the aforesaid amount, the RP allowed a claim of Rs. 3.26 lakh.”

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“4.7. In response to the query posed by the court as to why the RP did not allow even the basic rent, the Ld. Sr. Counsel for the RP did not have any proper answer. Since it was a case of service by entrustment of movable property, the RP was not right in asking for acceptance of the corporate debtor in all tax invoices and copy of the purchase order and other relevant documents to substantiate that the goods were delivered and that the corporate debtor had accepted such goods. This is a case where the RP himself was aware from the records that there was only one time supply of materials by the applicant and the monthly charge was towards the hiring cost of those materials. It is also admitted by the RP that the materials are still lying at the project site and have not been returned so far to the applicants.”

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“4.8. In this scenario, the RP could not properly have paid the tax on the supply of goods without a proper tax invoice, there was nothing that prevented him from factoring in the basic rent in respect of the materials which are already technically under the corporate debtor’s custody but physically lying within the Metro Railway Project site.”

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“4.12...xxx...Therefore, there is no doubt in our mind that the applicant was indeed entitled to the basic rent without his having to submit any proof other than the work order in this respect. As far as the cost of materials supplied component is concerned, the RP was right in not accepting this part of the claim because no proof for arriving at such a value was provided by the applicant in Form ‘B’. the RP was also right in disallowing the tax component since the invoices were only proforma invoices and not duly signed.”

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“4.13. In this view of the matter, the answering respondent is hereby directed to collate the claim of the applicant afresh on the basis of the above observations and include it in the list of operational creditors from which payments will be made by the successful Resolution applicant.”

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*“4.14. IA No. 497/KB/2020 stands **disposed of** with the aforesaid directions.”*

4. It is submitted by the Ld. Counsel for the applicant that pursuant to the order dated 15.07.2021 in IA No. 497 of 2020, the applicant sent an email to the Resolution Professional on 26.07.2021 demanding payment of rent and release of materials, but the RP on 06.08.2021 replied to the said email stating that: -

*“As you are aware, that the Hon’ble NCLT Kolkata (“**Hon’ble Tribunal**”), has pronounced an order on July 15, 2021 (“**Order**”), on the application filed by*

you, wherein they have provided clear directions to the respondent for revision of you admitted claim amount. The undersigned will place the said Order before the members of the Monitoring Committee for further consideration and due compliance of the Order.

Separately, as duly recorded in the Order, we once again deny that the corporate debtor has received any payment from the Kolkata Metro Railway, in relation to your goods, since October 2017.

We shall update you on your claim once the MC instructs the undersigned for further course of action.”

5. It is the contention of the Ld. Counsel for the applicant that the Corporate Debtor along with the RP are deemed to have earned and appropriated rental or are otherwise liable to pay the rental to the applicants irrespective of the fact that the materials have been allowed to be used by another contractor for the Metro Railway and the RP has failed to communicate with Metro Railway and the new contractor. It is also alleged that the RP has failed to re-verify the claims of applicant and neglected to pay heed to the email seeking compliance of the directions of this Tribunal.
6. The applicant further claims that the rental amount of Rs. 2,70,060/- kept accruing per month with effect from 14.03.2019 and accumulated to Rs. 1,26,90,000/- till January, 2023, payable to the applicant out of the CIRP costs, for the rental and also the market value of the materials lying at the site of the Metro Railway.
7. In support of his contentions Ld. Counsel has referred to a decision of the **Hon’ble NCLAT in Company Appeal (AT)(Insolvency) No. 104 of 2019** where having noted that the Adjudicating Authority had directed the parties to pay rent irrespective of the moratorium, that accrued with effect from 1st December, 2018 till the date of moratorium to be paid with a specific date, the NCLAT upheld the order.

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8. Neither reply has been filed by the RP, nor notice of arguments have been filed by the RP.
9. In absence of any justification on the part of the RP to hold back the amount that has accrued in terms of the rent that was directed to be paid and having noted that the materials of the applicant have been used at Metro Railway site without paying rent to the applicant, as also the order passed by the Tribunal in IA No. 497 of 2020 to include Metro in the list of operational creditors with further direction to the payments, we dispose of the IA with a direction upon the SRA to see that the directions already given by the Tribunal on 15.07.2021 are complied with, within a period of four weeks and to report to this Tribunal.
10. Accordingly, IA thus stands **disposed of**.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 10th day of November, 2023.

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