(3)

IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

MA/1381/2019 in CP(IB)/1226(CHE)2018

(filed under Section 60(2)of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. RL Logistics ***Private Limited***

Mr.A.Arumugam (Resolution Professional)
In respect of M/s. R.L. Logistics Private Limited
Office at No.1/56, Market Road,
(Devi Stores Upstairs)
Kelambakkam,
Chennai 603103

... Applicant / Resolution Professional

-Vs-

1.M/s. Mahindra & Mahindra Limited
Represented by its General Manager (Sourcing)
Automotive Sector, Mahindra Towers 3rd Floor,
Akurli Road, Kandivali East
Mumbai 400101

2. The Office of the Principle Commissioner of GST & Central Excise,
Headquarters Preventive Unit,
Chennai North Commissionerate,
GST Bhavan, 26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai 600034

... Respondents

Order Pronounced on ***13th December 2023***

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL

For Applicant : *Mr.K.Moorthy, Advocate*
For Respondent 1: *Ms.Prapti Mehta, Advocate*
For Respondent 2: *Ms.Hema Muralikrishnan, Advocate*

ORDER

(Heard through Physical Mode)

The Applicant Mr. Arumugam who is the Resolution Professional for RL Logistics Pvt Ltd (CD/ Corporate Debtor) , having been appointed by Adjudicating Authority by its order dated 27.02.2019 has filed the application under Section 60(2) of Insolvency and Bankruptcy Code seeking following reliefs:

a) To direct the second respondent to refund the amount received from the 1st Respondent during CIRP Period on CD's behalf to the applicant.

b) To direct the 1st Respondent to pay the net balance sum of Rs.2,29,80,230 to the applicant which the Corporate debtor is entitled to.

c) To pass such other order as Tribunal deems fit.

SUBMISSIONS BY APPLICANT IN APPLICATION DATED 21.11.2019

2. It is stated that based on the application filed by a financial creditor, RL Logistics was admitted to CIRP process vide Tribunal's order dated 27.2.2019. The applicant was initially appointed as Interim Resolution Professional and later on confirmed as Resolution Professional.

3. The applicant states that Mahindra & Mahindra Ltd (1st Respondent) was one of the debtors of the Corporate Debtor (CD) to

whom CD had provided various services and raised invoices. It is stated that the CD had provided services not only to the 1st Respondent but also to its other subsidiaries namely M/s. Mahindra Vehicle Manufacturers Ltd, Mahindra Heavy Engine Private Limited, Mahindra Trucks and Buses Ltd, and Mahindra Electricity Mobility Limited. Towards the bills raised, the 1st Respondent is liable to pay a sum of Rs.2,29,80,230/- to the Corporate Debtor for the services availed by them from April 2017 to March 2018. The copy of the statement of net balance payable by the 1st Respondent to applicant is enclosed in application typeset as Annexure 1.

4. It is stated that the 1st respondent failed to make payments, even after repeated requests from the CD. Meanwhile , 1st respondent vide its letter dated 10.01.2019 informed the CD that since CD had not discharged its responsibility by depositing GST amount to the authorities since 1st July 2017, it has withheld the payment of all outstanding invoices of CD as security against the pending liability of GST. The copy of the letter is enclosed as Annexure 2.

5. It is stated that CD was admitted to CIRP on 27.02.2019 and the applicant had intimated the statutory authorities and the suspended board about the initiation of CIRP process. It is stated that the 1st Respondent sent an email dated 16.07.2019 to the suspended directors that 1st respondent has received a garnishee order from GST authorities i.e. the 2nd respondent to recover an amount of Rs.2,34,85,198/- along with interest of Rs.61,54,750/- against dues of CD to exchequer, since GST has not been deposited against the services provided from CD. The copy of notice is enclosed as Annexure 4.

6. It is stated that vide e-mail dated 07.08.2019, the 1st respondent intimated that they have remitted an amount of Rs.79,87,142/- to the exchequer on CD's behalf by enclosing the copy of the challan. Further it was mentioned that the said amount would be debited against applicable dues of the 1st respondent payable to CD.

REPLY OF 1ST RESPONDENT DATED 22.09.2020

7. It is stated that the 1st Respondent has a registered GST ID. It had availed certain services from CD. The amount of Rs.2,29,80,230/- claimed by the applicant against 1st Respondent for the services

provided is not correct. In fact CD owes money to 1st Respondent. Upon reconciliation, it was found that a sum of Rs.1,80,65,658/- was due and payable. Additionally 1st Respondent had paid an advance of Rs.73,81,600. Hence, the net amount due is Rs.1,06,84,058/-.

8. It is stated that the 1st respondent during a routine audit noticed that the applicant had not paid any statutory dues to GST Department. Accordingly, 1st respondent sent communications including but not limited to communications dated 01.10.2018 and 10.01.2019. In the letter dated 10.01.2019 addressed to the applicant company, the 1st respondent notified it that GST dues to the tune of Rs.1,30,04,679/- were due and payable by it since July 2017. It is stated that due to continued failure to pay GST Dues, the payments from the 1st Respondent were withheld until proof of remittance of GST dues was produced by the applicant company.

9. It is stated that 1st respondent received a garnishee notice dated 28.06.2019 issued by 2nd respondent. By invoking its power of recovery of government dues under Sec 79 of GST Act 2017, the 2nd Respondent

demanded a total sum of Rs.2,96,39,948/- for the period from July 2017 to January 2019.

10. It is stated that 1st respondent intimated the applicant company vide e-mail dated 16.07.2019 about the garnishee notice and requested for GSTN login credentials of the applicant company in order to make payments as demanded by the garnishee order. It was further advised that statutory dues being paid would be adjusted against the outstanding dues of the 1st respondent against the applicant company. It is stated that vide email dated 20.07.2019, ***directors*** of the applicant company **provided GSTIN login credentials of the CD** for both the State of Tamil Nadu and Maharashtra and further confirmed that the payments towards GST dues would be set off against the outstanding of 1st respondent. On 30.07.2019, the 1st respondent worked out the details pertaining to the outstanding and GST dues and sent it across to the Applicant Company, for which there was no response.

11. It is stated that on 05.08.2019, 1st respondent paid GST dues to the tune of Rs.79,87,143/- to TNGST department and a receipt bearing no CPIN 19073300527417 was generated and the same was intimated to the

applicant company vide email dated 07.08.2019. The GST dues related to the applicant company as regards State of Maharashtra and also to the 1st respondent's group companies worked out to Rs.1,05,25,454/- and details are furnished in Annexure 3 of the counter.

12. The 1st respondent states that it was not aware of initiation of CIRP proceedings against the applicant company since 27.02.2019. On 10.08.2019, the director of the CD sent an email to the 1st respondent revealing that CD was undergoing CIRP and that Mr. Arumugam has been appointed as Resolution Professional for CD. Even as late as 27.11.2019, directors of the applicant company sent email through official company mail ids.

13. It is stated that only on 01.10.2019, the 1st respondent received email from Mr. Arumugam , RP informing that applicant company is undergoing CIRP and demanded alleged dues of Rs.2,29,80,230/- to be paid. The copy of the email dated 01.10.2019 is enclosed as Annexure 5 in the counter.

14. In this regard, it is stated that RP failed to perform his duties. He should have been proactive in ensuring that suspended directors were

not issuing instructions regarding payments during CIRP process. Further RP failed to furnish any invoices, relevant documents to substantiate the claim against the 1st respondent.

15. It is stated that the 1st respondent issued a letter dated 22.10.2019 bringing on record the factual scenario and demanding the rightful dues. It is stated that an amount of Rs.78,28,539/- along with applicable interest is due from the applicant company. The details are furnished in para 18 of the counter.

16. It is stated that the dues payable to the second respondent was not an asset of the CD but it was a form of debt related to compliance and in the present circumstance, where the claim has already been settled, it would be unviable to seek refund of the same.

WRITTEN SUBMISSIONS BY RESPONDENT NO 2 DATED 09TH OCTOBER 2023

17. It is stated that under Section 88(1) of CGST Act 2017, every person appointed as receiver of any assets of a company should within thirty days of his appointment give intimation of his appointment to the Commissioner. It is stated that neither the public announcement nor the

order dated 27.02.2019 admitting CD into CIRP process were communicated to jurisdictional Principal Commissioner, CGST, Chennai North in time either by IRP or liquidator. The 2nd respondent became aware of this only on 21st November 2019.

18. It is stated that as CD had not filed GSTR 3B Return from July 2017, CD was asked vide letters dated 14.06.2018, 28.06.2018, 10.07.2018, a Caution Notice dated 10.12.2018 and a letter dated 17.04.2019 to pay appropriate tax and file the monthly returns.

19. It is stated that in response to the above, CD vide its letter dated 18.06.2019 informed that one of their main clients viz. M/s. Mahindra & Mahindra Ltd, Mumbai (first respondent) had to settle around Rs.3.50Cr which included GST amount of Rs.1.55Cr. It is stated that CD had requested the 2nd respondent to instruct M/s. Mahindra & Mahindra Ltd to settle the outstanding GST liability of the assesse to the GST Department directly on behalf of them.

20. It is stated that a notice dated 28.06.2019 was issued to the 1st respondent under Section 79 of CGST Act of 2017 directing them to pay

the amount on behalf of CD immediately in accordance with the provisions contained in GST Act. M/s. Mahindra & Mahindra Ltd, Mumbai remitted a sum of Rs.79.87 lakhs into GST account of the CD on 05.08.2019.

<u>RESPONSE BY APPLICANT TO THE COUNTER FILED BY RESPONDENT 1 DATED 21.01.2021</u>

21. It is stated in the counter that 1st respondent had paid an advance of Rs.73,81,600/- to CD, however the respondent has not provided any documentary evidence to that effect.

22. It is stated that as per the books of CD, an amount of Rs.2,29,80,230/- was payable by 1st Respondent. The 1st respondent had not commented about the status of bills of Rs.1.23Cr which were pending for approval by them.

23. It is stated that on 05.08.2019 an amount of Rs.79,87,142/- was paid by 1st respondent to CD's GST account without the approval, authorisation and concurrence of RP, since CIRP commenced on 27.02.2019. The applicant submits that the above payment is in violation of Sections 14(b), 17(2) and 18 of IBC 2016. Hence the above payment is not binding the CD.

24. It is stated that the GST Commissioner had also filed claims on GST dues belatedly on 27.10.2020 awaiting approval of Adjudicating Authority for its acceptance.

25. It is stated that 1st respondent had made payment of Rs.79,87,142/- with an ulterior motive of utilising the same amount as input credit and thereby benefitting them directly. The said action of 1st respondent attracts Sec 43, 49 and 66 of the IBC, 2016. Further the 1st respondent had not filed any claims during CIRP and even after expiry of 1 year period of liquidation.

WRITTEN SUBMISSION BY APPLICANT DATED 10.10.2023 (ADDITIONAL POINTS)

26. It is stated that Rs.2,29,80,230/- stands recoverable from 1st Respondent and its other subsidiaries. The subsidiaries being not made party in the current application is a curable irregularity.

27. The applicant submits that pursuant to the Order of Tribunal dated 27.02.2019, the applicant had made public announcement under Section 15 of the Code in the newspapers. Hence, both the Respondents cannot take the plea of allegedly being unaware of CIRP process.

28. The applicant submits that 1st respondent ought not to have made payment to the second respondent when moratorium under Sec 14 was in force and the remedy for 2nd respondent would have been to file a claim with the applicant as per the provisions of IBC.

POINTS FOR DETERMINATION

29. Based on the pleadings and arguments made by the applicant and both the respondents, we propose to analyse the reliefs sought by the applicant as under:

Relief 1

To direct the second respondent to refund the amount received from the 1st Respondent during CIRP Period on CD's behalf to the applicant.

30. To recapitulate, the sequence of events is as under:

i) Date of initiation of CIRP is 27.02.2019.

ii) Garnishee notice was issued by Second Respondent i.e. GST Department to 1st Respondent i.e. Mahindra & Mahindra Ltd on 28.06.2019.

iii) On 05.08.2019, 1st respondent remitted Rs.79.87,143/- on behalf of the CD, out of the amount withheld by 1st respondent.

(b) It is clear from the above chart that 2nd respondent issued garnishee order and 1st respondent made payment to GST out of the amounts due to Corporate Debtor post initiation of CIRP, when the moratorium imposed under Section 14 of IBC Code was in force.

(c) **Section 14(1) of IBC** states that on insolvency commencement date, the Adjudicating Authority by order shall declare moratorium prohibiting the following activities-

> *'a) 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'.*
>
> *'b) transferring, encumbering , alienating or disposing off by the Corporate Debtor any of its assets or any legal right or beneficial interests there in'.*

(d) Where moratorium has been imposed on the assets of the corporate debtor under the Code, no action can be taken against its assets under any other statute by virtue of section 238 of the IBC, 2016.

(e) The Hon'ble Supreme Court in the matter of **ABG Shipyard Vs. Central Board of Indirect Taxes and Customs** has held that IBC would prevail over the Customs Act, 1962 and once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC, the Custom authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies.

(f) Based on the existing legal provisions and case laws as mentioned above, it was not correct on the part of the 2nd Respondent to have issued the Garnishee notice and on the part of 1st Respondent to remit the amount of Rs.79,87,143/- on behalf of Corporate Debtor during moratorium period.

(g) The plea taken by both the respondents that they became aware of the initiation of CIRP process of the Corporate Debtor only later and IRP/RP had failed to inform them is not sustainable since under **Section 15 of IBC, 2016 Public announcement of CIRP had been made by Interim Resolution Professional.** The Applicant has confirmed the issue of public notice in an English news Paper and a Tamil News Paper. Once Public announcement is made in the newspapers, it is deemed to be a notice to all the general public.

31. <u>Relief 2</u>

To direct the 1st Respondent to pay the net balance sum of Rs.2,29,80,230 to the applicant which the Corporate debtor is entitled to.

(i) **Section 25 of IBC** imposes duty on the Resolution Professional to represent and act on behalf of the Corporate Debtor with third parties, exercise rights on behalf of the Corporate Debtor in judicial, quasi-judicial and arbitral proceedings. The relevant portions are extracted as under:

> *25. **Duties of resolution professional.** -*
> *(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*
>
> *(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -*

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.

(ii) In the instant case, instead of initiating legal proceedings against 1st Respondent in Civil Court, Resolution Professional has filed the present Application under Section 60 (2) of IBC, 2016 before this Tribunal.

(iii) The issue, whether NCLT has powers to pass orders under Sec 60(5) for recovery of amounts from sundry debtors has been decided by the NCLAT in **Shri Ramachandra D. Choudhary RP of M/s. Oasis Tradelink Limited –Vs- Bansal Trading Company in Company Appeal (AT)(Ins.) No. 810 of 2020, it has been held;**

> 14. The only point which is to be examined is whether the Adjudicating Authority was justified in dismissing the Applications preferred by the Liquidator as not maintainable. The Resolution Professional is required under Section 18 of the Code to take control and custody of the assets of the 'Corporate Debtor'. The amounts stated to be 'due and payable' to the 'Corporate Debtor' by other Sundry Debtors are required to be included in the Information Memorandum and when included, the person/entity purchasing the assets of the 'Corporate Debtor' would have knowledge of the value of the assets/Liquidation Value as stated in the Information Memorandum.
>
> 15. Keeping in view the aforenoted ratio in 'Gujarat Urja Vikas Nigam Limited' (Supra), we hold that the remedy for recovery of debts, disputed or not, cannot be determined in summary proceedings and the Code does not contemplate adjudication of any such nature. Any such steps taken under Section 60(5) of the Code before the Adjudicating Authority, would tantamount to bypassing/shortcircuiting the Judicial Proceedings. Keeping in view the submissions of the Respondents, to adjudicate whether the amount is due and payable by the 'sundry debtors' who have raised disputes, would require calling for evidence and cannot be proceeded under the Code. The Appellant is well within its powers to take appropriate steps to file legal proceedings, if the circumstances so warrant. The Code expressly provides for the Liquidator to institute or defend any Suit, Prosecution or other Legal Proceedings, Civil or Criminal, in the name or on behalf of the 'Corporate Debtor'.

(iv) We find that for the realisation of sundry debtors of the Corporate Debtor, the applicant has filed a petition under Section 60 of IBC, 2016 before this Tribunal. As observed by Hon'ble NCLAT *(supra)*, the remedy for recovery of debts, cannot be determined in summary proceedings before this Tribunal. The Code does not contemplate adjudication of any such nature. The remedy lies in civil court.

CONCLUSION:

32. **Relief 1** is allowed for the reasons mentioned in para 31 above. The 2nd Respondent i.e. Office of the Principal Commissioner of GST and Central Excise should refund the money of Rs.79,87,143/- recovered from 1st Respondent i.e. Mahindra & Mahindra Ltd to the Liquidator of RL Logistics Ltd.

33. **Relief 2** as prayed for is not allowed for the reasons mentioned in para 32 above.

34. The application stands **disposed of.**

– Sd –

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

– Sd

SANJIV JAIN
MEMBER (JUDICIAL)