THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 2909 OF 2023

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016 r/w Rule 34 of NCLT Rules, 2016

Sainik Industries Private Limited (formerly known as Sainik Foods Private Limited)

…Applicant

Vs.

Mr. Ritesh Raghunath Mahajan

…RP/Respondent

In the matter of

C.P.(IB) No. 162/MB/2023

Saisidha Sugar Equipments and Engineering Company Private Limited

Financial Creditor

Vs.

Indian Sugar Manufacturing Company Limited

Corporate Debtor

Order delivered on: 17.10.2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Yakshat Chheda, Advocate

For the Respondent/RP : Mr. Rohit Gupta, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application IA 2909/2023 is filed on 08.07.2023 by M/s Sainik Industries Private Limited ("Applicant), seeking direction against the Rishi Raghunath Mahajan, the Interim Resolution Professional in the Corporate Resolution Insolvency Process in the case of Indian Sugar Manufacturing Company Limited (Corporate Debtor). The Application has sought following reliefs –
   a. Admission of claim of INR 34,65,36,490/- (Indian Rupees Thirty-Four Crores Sixty-Five Lakhs Thirty-Six Thousand Four Hundred & Ninety Only) as Financial Debt;
   b. Setting aside of email dated 1.6.2023 sent by the Respondent IRP.

2. The Corporate Debtor was admitted in Corporate Insolvency Resolution Process vide Order dated 23 March 2023 by this

Tribunal and accordingly the Respondent was appointed as IRP for the Corporate Debtor.

3. It is the case of the Applicant that it executed a Supply Agreement/Loan Agreement with the Corporate Debtor wherein the Corporate Debtor agreed to sell and deliver to the Applicant 5200 Metric Tonnes of white crystal sugar S-30 grade at a fixed price of Rs. 3215 per quintal inclusive of all charges before 20.11.2016. In order to ensure performance and security collateral, the Corporate Debtor pledged 10% of its equity share capital with the Applicant vide a separate agreement dated 20.07.2016.

    3.1. Subsequently, on account of certain disputes, the Applicant filed a Commercial Suit No. 474 of 2019 against the Corporate Debtor seeking inter alia grant of a money decree in the amount of INR 19,55,30,723/- (Rupees Nineteen Crores Fifty-Five Lakhs Thirty Thousand Seven Hundred Twenty-Three Only). The Applicant also took out a Summary Judgement application which was allowed by the Hon’ble Delhi High Court and accordingly granted a summary judgment in favor of the Applicant and against the Corporate Debtor for an admitted amount of Rs. 3,75,35,765/- (Rupees Three Crores Seventy-Five Lakhs Thirty-Five Thousand Seven Hundred & Sixty-Five Only).

3.2. The Applicant also filed a Company Petition No. 469 of 2020 against the Corporate Debtor under Section 9 of the IBC, however, during pendency of said application, the Corporate Debtor was admitted into CIRP vide Order dated 23.03.2023 passed in another Application by this Tribunal. The Applicant claims that, upon examination of law with regards to advances and 'time value of money', the Applicant realised that if an advance/debt has 'time value of money', then it would be considered as a Financial Debt, accordingly, it has filed present application seeking consideration of its claim as Financial Debt.

3.3. On 1.6.2023, the Applicant submitted its claim for INR 34,65,36,490/- (Indian Rupees Thirty-Four Crores Sixty-Five Lakhs Thirty-Six Thousand Four Hundred & Ninety Only) inclusive of liquidated damages, penalty and interest as levied under the terms of the Equity Pledge Agreement dated 28 July 2016 ("said Agreement") in form "C", however, the same was rejected by the IRP vide his email dated 5.6.2023 alleging that the debt of the Applicant is an Operational Debt.

4. We heard the Counsel and perused the material available on record.

4.1. We find that the limited issue for consideration in the present application is whether the amount of advance given by the Applicant to the Corporate Debtor is in nature of Financial Debt or an Operational Debt?

4.2. The Applicant has relied upon clause 1 and 4 of the Loan Agreement dated 28.07.2017, which reads as follows –

"*1. The second party shall deliver the quantity of 5200 MT of sugar produced in the crop year 2016-17, Grade s-30 Dry and fresh sugar packed in the PP bags of 50 kg to the party of the first part at a confirmed sale price of Rs. 3215 per quintal i.e. (3020 (ex-factory) + 195 (Excise duty & Cess)). In case if there is any increase or decrease in the excise duty/cess/any tax, the same shall be on the buyer's account.*"

"4. That is also agreed and confirmed by the second party that besides the above-mentioned amount, the party of the first part shall be entitled to receive and recover the difference in price (i.e. market price of sugar minus the agreed price of this contract), if any applicable, in case the price of sugar increases from the present agreed price and the party of the second part refuses / fails to supply the sugar at such increased rates on or before the due date, on the quantity not delivered and supplied by the second party."

4.3. For the purpose of 'time value of money' the Applicant has relied on Clause 5 of the Loan Agreement, which provides for interest at the rate of Rs. 30/- PMT per day till the Corporate Debtor refunded the advance amount to the Applicant from the date of the Loan Agreement i.e. 28.02.2017.

4.4. We find that the Supply Agreement/Loan Agreement – 1 dated 28.07.2016 recites that "*Whereas the Party of second part (Corporate Debtor herein) has approached the party of the first part (Applicant herein) and requested for supply of 5200 MT's of sugar against the advance amount of Rs. 10,00,00,000/- (Ten Crore) by way of this agreement*". It further recites that "*Now the Second Party has issued a sale order no. Ref No. ISMCL/Acct/Sugar sale/2016-17/0198 dated 27.7.2016 and attached as Annexure-1 to this agreement*".

4.5. We find the clause no. 5 reads as "*That it is also agreed between the parties that in case of default by the second party in adjustment of advance, the second party of the second part shall also pay the above mentioned-amount along with interest at the rate of Rs. 30/- PMT per day till refund of the advance amount from the date of this agreement up to 28.02.2017. The payment of interest remain independent and in addition of the second party commitment to supply agreed quantities of sugar at the agreed prices as mentioned above*.

4.6. We further find that the Hon'ble Delhi High Court in its Order dated 12.01.2023 in I.A. 15185/2021 (U.O. XIII-A.R. 6 r/w S. 151 CPC) has recorded the fact at para 2 that "*It is 'hoever, alleged that the defendant only supplied 1942.9 M.T. of sugar. The price payable for the said quantity* *undisputedly was Rs. 6,24,64,235/- only. In respect of the balance advance amount of Rs. 3,75,35,765/- which was retained, no sugar was ultimately supplied by the defendant within the period stipulated and agreed upon. It is in this backdrop that the plaintiff asserts that the balance amount of Rs. 3,75,35,765/- has been retained by the defendant and not refunded till date*."

4.7. The above averments/statements clearly demonstrate that the arrangement between the parties was for supply of goods, and for that purpose, the Applicant had made advance of Rs. 10.00 Crores, which was adjustable against the supply of the agreed goods at pre-agreed price. Further, in case of failure to supply the goods in whole or in part, the remaining amount was refundable along with the costs i.e. price difference between the agreed price and market price on the last day of delivery as compensation, and interest on the default amount @ Rs. 30/- PMT per day for the period of default. The Ld. Counsel emphasised that this advance was secured by the pledge of 10% of equity shares of the Corporate Debtor, hence it would necessarily partake the character of Financial Debt. We do not find force in this argument, as the security was intended to securitize the obligations under the arrangement i..e refund of principal alongwith the interest. The interest was payable only on unappropriated advance amount, as can be seen from the findings in the decision of Hon'ble Delhi High Court.

4.8. The Hon'ble Supreme Court in the case of ***M/S Consolidated Construction V/s M/S Hitro Energy Solutions*** in ***Civil Appeal No 2839 of 2020*** held that "*this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt*". Accordingly, advance paid by the Petitioner for supply of goods shall qualify as an Operational Debt. We find that existence of stipulation of payment of interest can not make a debt as Financial Debt, as there is stipulation of payment of interest even in case of contract for supply of goods in case of default. What is important is the essence of the contract, and its principal object which is supply of goods in the present case. The payment of Rs. 10.00 crores to be adjustable against such supply is an advance payment against the agreed supply only. Accordingly, we hold that the said debt is in nature of Operational Debt.

4.9. Nonetheless, it is undisputed fact that the Corporate Debtor owes the amounts which remain unappropriated and affirmed in the order passed by Hon'ble Delhi High Court as well as various components of costs i.e. price difference, the interest etc which the applicant is entitled to claim. These claims have been made via Form C, which is a prescribed form for making a claim by the Financial Creditors, and are explained therein. Merely because, the Applicant interpreted the terms of the agreement that it could be classified as Financial Creditor, which was also a position in so far as few decisions rendered by Hon'ble NCLAT on the issue of the advance against supply of goods is concerned, the applicant can not be denied the rightful claim over the amount which is due from the Corporate Debtor. We feel that claim under the wrong form can not be rejected by the IRP, where such claim is otherwise admissible. It is the duty of IRP to admit the claim after the verification to the extent and under the class, which IRP considers it appropriate under the provision of the Code. Accordingly, we direct the IRP/RP to verify the claim of the Applicant considering it as a claim by an Operational Creditor, and decide on such premises the extent of the admissible claim, and thereafter include accordingly in the list of the Creditors.

5. In terms of aforesaid directions, the IA no. 2909 of 2023 is disposed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)