

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT - I, MUMBAI BENCH

*** **

IA 1218/MB/2020

in

CP (IB) 1137/MB/2017

(Application u/s 60(5) of the I&B Code r/w Rule 11 of the NCLT
Rules, 2016 and Regulation 12(2) of CIRP Regulations)

Dy. Commissioner of Customs
DEEC (Monitoring Cell)
C/o. The Commissioner of Customs (Export)
New Custom House, Mumbai, Zone-I, Mumbai-I
... Applicant

V/s

1. Jyoti Structures Limited
2. Vandana Garg
3. Sharad Shanghi

... Respondents

In the matter of:

State Bank of India ... Financial Creditor

V/s

Jyoti Structures Limited ... Corporate Debtor

Order Dated: 05.10.2020

Coram:

Hon'ble Member (Judicial), Janab Mohammed Ajmal

Hon'ble Member (Technical), Shri V. Nallasenapathy

Appearances (Via Video Conference):

For the Applicant : Ms Maya Majumdar, Advocate

For the Respondent(s): Ms Ankita Singhania with Ms Nidhi Pathania
and Ms Amruta Modak, Advocates i/b.
Linklegal Indian Law (For R1 & R2)
Mr Zal Andhyarujina (Sr. Advocate) with Mr
Mahak Bhatt Advocate (For R3)

ORDER

Per: V. Nallasenapathy, Member (Technical)

1. This is an Application filed by the Applicant for the following reliefs:
 - a) *Condone the delay of 1111 days in submitting the proof of claim by the Applicant against the Corporate Debtor, M/s Jyoti Structures Ltd., in the light of non-disclosure by the party and due diligence not practised by the Resolution Professional.*
 - b) *Accept and admit the claim of the Applicant against the Corporate Debtor and enlist the Applicant in the list of Operational Creditor or Corporate Debtor.*
 - c) *Recall the order dated 27.03.2019 passed in MA No.1129/2019 in this CP or in the alternative declare that the Clause (L) and (O) of the Resolution Plan dated*

25.03.2018 as unauthorized and violative of the provisions of the law for the time being in force and as such be deleted or struck off from the Resolution Plan so far it relates to the claim of the statutory authorities not participating in the resolution process.”

2. The Applicant submits that Corporate Insolvency Resolution Professional (“CIRP”) of the Corporate Debtor was ordered by this Bench on 04.07.2017 and Ms. Vandana Garg was appointed as Interim Resolution Professional (IRP) of the Corporate Debtor and subsequently she was confirmed as the Resolution Professional (RP) of the Corporate Debtor. It is submitted that the last date for filing of proof of claim before IRP/RP was 26.07.2017.

3. The Applicant submits that 6 nos. of Duty Exemption Entitlement Certificate (DEEC) licences were issued by Director General of Foreign Trade (DGFT) in favour of the Corporate Debtor to avail concessional rate of customs duty upon import of goods in terms of notification No.96/2009-customs dated 11.09.2009 and 48/1999 customs dated 20.04.1999. Subsequently, the Corporate Debtor executed bonds during registration of the license. By virtue of the above said bonds and conditions of the notification, the Corporate Debtor was bound to inform the Applicant on their own within 30 days and submit documents related to fulfilment of export obligations, failing which they were required to deposit customs duty on the goods imported under the licences along with interest. The Corporate Debtor did not produce the documents supporting the

fulfilment of export obligations to the applicant and due to this failure, they are liable to pay customs duty along with applicable interest to the Applicant. The Applicant issued a show cause notice to the Corporate Debtor in file number CIU/GEN/miscellaneous-129/2010 dated 07.04.2015 for violating the conditions of advance licence. The Applicant also sent bond enforcement demand notice to the Corporate Debtor on 03.08.2017 and reminders dated 22.11.2017, 03.01.2018 and 18.01.2018. Consequent to the issue of show cause notice and the demand notice, the Applicant passed an Order-in-Original (OIO) on 31.10.2018.

4. The Applicant submits that the Respondent Resolution Professional filed a Writ Petition on the file of the Hon'ble Bombay High Court in WP No. 2441 of 2019 challenging the OIO dated 31.10.2018 passed by the Applicant, on the ground that the said order was passed during the period of moratorium of the Corporate Debtor. It is submitted that, at that time only the Applicant came to know about the CIRP order against the Corporate Debtor. The Applicant submits that the OIO was in fact passed after the CIRP period of 270 days including the extension.

5. The Applicant submits that the customs duty amounting to Rs.43,44,45,400/- along with applicable interest of Rs.53,44,76,342/- and penalty of Rs.27,28,10,783/- found to be due and recoverable from the Corporate Debtor in respect of 6 nos. of advance licences and thus total claim amount is Rs.124,17,32,525/-. The Applicant further submits that they

have filed claim in Form-B to the Resolution Professional on 31.12.2019.

6. The Applicant submits that the R2 refused to accept the claim of the Applicant on the ground that the CIRP period of 270 days was over on 08.04.2018 and the Resolution Plan for the Corporate Debtor was also approved by this Tribunal on 27.03.2019.
7. Heard the counsel for the Applicant as well as for the Resolution Professional. It is an admitted fact that the Applicant has filed the claim with R2 after the approval of the Resolution Plan.
8. The Counsel for the Applicant submits that by virtue of Section 18(1)(a) and 18(1)(b) of the Code, the R2/RP is duty bound to identify the liabilities of the Corporate Debtor and should have sent the notice to the Applicant enabling them to file a claim. The said provision is extracted below:

"The interim resolution professional shall perform the following duties, namely: —

- a) "Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—*
 - i. Business operations for the previous two years;*
 - ii. Financial and operational payments for the previous two years;*
 - iii. List of assets and liabilities as on the initiation date; and*
 - iv. Such other matters as may be specified;*

- b) *Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15*
- c)
....."

9. Upon perusal of the above provisions, we are unable to accept the contentions of the Counsel for the Applicant that Resolution Professional is bound to send notice to the Creditors requiring them to file their claim. In fact, it is the responsibility of the creditor concerned to file claim within the time after the issue of public notice inviting claims by the Resolution Professional. In this regard, Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Regulation Process for Corporate Person) Regulation, 2016 provides that the Insolvency Professional shall make public announcement in "Form-A" within 3 days from date of his appointment as IRP, inviting claims from the public and the claimant should file claim within the stipulated time. Admittedly, in this case the Applicant has filed claim after the completion of CIRP period of 270 days and also the after the approval of the Resolution Plan by this Tribunal.
10. The Counsel for the Applicant submits that this Tribunal can invoke inherent powers of the Tribunal as provided under Rule 11 of the NCLT Rules, 2016 for allowing this Application. Per contra the Senior Counsel appearing for R3 submits that inherent powers of the Tribunal cannot be exercised in violation of the express provisions of the Code. To buttress his point, he relied on the Judgment of the Hon'ble Supreme Court in the

case of *Arjun Singh ...V/s... Mohindra Kumar and Ors (1964) 5 SCR 946* wherein, it was held as below:

"It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with the particular topic and the expressly or by necessary implications exhaust the scope of the power of the Court or the Jurisdiction that may be exercised in relation to a matter by inherent power of the Court cannot be invoke in order to cut across the powers conferred by the Court. The provisions contained in the Code need not be expressed but may be implied or the implicit from the very nature of the provisions that it makes for covering the contingency to which it relates".

11. The Counsel for the Applicant relied on the Judgment of the Principal Bench of NCLT in the case of *Col. Sanjeev Dalal (Retd.)...V/s...M/s International Recreation & Amusement Ltd.* bearing CA No. 1361, CA No. 1365, CA No. 1476, CA No. 1477, CA No. 1478 (PB) of 2019 wherein, the Tribunal directed the Resolution Professional to consider the claim of the creditors which were filed belatedly and dismissed by the RP. However, this judgment will not be applicable to the case on hand in view of the fact that the Resolution Plan has already been approved in this case, unlike the case dealt with by the Principal Bench of NCLT.
12. The Counsel for the Applicant relied on the Judgment of the Hon'ble NCLAT in the case of *NUI Pulp & Paper Industries Pvt Ltd....V/s....M/s Roxcel Trading GMBH dated 17/07/2019* to say that Rule 11 of the NCLT Rules, 2016 can be invoked in this

case. However, the case cited by the Counsel is distinguishable from this case and hence that ruling will not be applicable in this case.

13. The Ld. Counsel for the Respondent refers to Section 31 of the Code as well as Regulation 12, wherein, it is clearly stated that the claims were to be filed within the stipulated period and any claims submitted after the said period cannot be accepted. Hence inherent powers of the Tribunal cannot be exercised in this case.
14. The Ld. Senior Counsel appearing for R3 further submits that the admission of claims of creditors post approval of the Resolution Plan is impermissible and illegal. To buttress this point, he relied on the Judgment of the Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited ...V/s... Satish Kumar Gupta (MANU/SC/1577/19)* wherein at Para Nos. 66 & 67 it was held as below:

"66. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution Applicant starts running the business of the corporate debtor on a fresh slate as it were. In State Bank of India v. Ramakrishnan, MANU/SC/0849/2018: 2018 (9) SCALE 597, this Court relying upon Section 31 of the Code has held:

22. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be

binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, Under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.

Following this judgment, it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, the NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in State Bank of India (supra), is set aside.

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."

15. The Counsel for the RP submits that the Applicant has filed the claim after a long delay that too after the approval of the Resolution Plan and in these circumstances the Application cannot be entertained by this Tribunal.

16. After hearing the parties and on going through the pleadings and the law discussed, this Bench is of the firm view that this Application is not maintainable and the same is rejected. No Costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Mohammed Ajmal
Member (Judicial)