

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 3300 OF 2019

Under Section 42 of Insolvency &
Bankruptcy Code, 2016

Union Bank of India

...Applicant

In the matter of

C.P.(IB) No. 292/MB/2017

Edelweiss Asset and Reconstruction
Company Limited

.... Financial Creditor

Vs.

M/s Bharati Defence and Infrastructure
Ltd.

...Corporate Debtor

Order delivered on: 21/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Liquidator

:

Mr. Pulkit Sharma a/w Mr.
Naman Kamdar, Advocate

For the Applicant

:

Mr. Prakash Shinde a/w Ms.
Meghna Arvind, Advocate

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1. This Application MA 3300/2019 is filed by Union Bank of India, Hongkong Branch, in C.P. (IB) 292/Mah/2017 in the Liquidation Proceedings of M/s Bharati Defence & Infrastructure Limited (In Liquidation) (“Corporate Debtor”) u/s 42 of the Insolvency & Bankruptcy Code (“Code”) to seek following relief –
 - a. To set-aside the Impugned Order dated 25th September, 2019 passed by the said Liquidator;
 - b. to hold that the Applicant is a financial creditor of Bharati Defence, and that the Applicant's claim constitutes a 'financial debt' under the Code;
 - c. to direct the said Liquidator to consider and/ or verify the Applicant's claim in accordance with the provisions of the Code and the IBBI (Liquidation Process) Regulations, 2016 on the basis that the Applicant is a financial creditor of Bharati Defence, and that the Applicant's claim constitutes a 'financial debt' under the Code;
 - d. In alternative to prayer (c) Court is not inclined to grant prayer clause (c), then in that event, the Applicant be permitted to file its claim as an 'operational creditor', and that the said Liquidator be directed to consider and/ or verify such claim and/or admit the claim;
 - e. pending the hearing and final disposal of the present Application, to stay the process of liquidation in respect of Bharati Defence & Infrastructure Limited (formerly Bharati Shipyard Limited), including by staying the operation and effect of the Order dated 14th January, 2019 passed by this Hon'ble Tribunal;
 - f. pending the hearing and final disposal of the present Application, to restrain the said Liquidator from disbursing any monies whatsoever

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realized in furtherance of the liquidation of Bharati Defence & Infrastructure Limited (formerly Bharati Shipyard Limited);

2. By an Order dated 14.1.2019 passed by this Tribunal, liquidation proceedings commenced in respect of the Corporate Debtor, and Mr. Vijay Kumar V. Iyer was appointed as the Liquidator.
3. The Applicant filed a claim under Form 'D' for an amount of USD 29,417,287.91 (corresponding to Rs. 208,68,85,928.31 as on the date of the said Order dated 14.1.2019), and the same was rejected by the Liquidator holding that the same is not a financial debt, The Applicant submits that The Impugned Order is patently erroneous, misconceived, suffers from gross errors and complete non-application of mind, as is apparent from a bare reading of the same and is thus liable to be vacated and/or set aside.

3.1. It is the case of the Applicant that the said Liquidator does not dispute the fact that the Applicant is entitled to the amount of USD 29,417,287.91 (corresponding to Rs. 208,68,85,928.31 as on the date of the said Order dated 14th January, 2019). There is no rejection of the Applicant's claim and/ or objection raised in respect of the quantum of the Applicant's claim. However, the said Liquidator states that such claim in Form 'D' (which is reserved for financial creditors) cannot be admitted by the said Liquidator. Accordingly, it is respectfully submitted that the Applicant's entitlement is admittedly for an amount of USD 29,417,287.91 (corresponding to Rs. 208,68,85,928.31 as on the date of the said Order dated 14th January, 2019).

3.2. The said Liquidator has failed to appreciate the relationship between the various parties inter alia including Corporate Debtor, Great Offshore (International) Ltd. {a 100% subsidiary of GOL Offshore

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Limited where the Corporate holds 49.72% shares} and Norwegian Shipping Limited (NSL) {a subsidiary of Great Offshore (International) Limited}.

3.3. Great Offshore (International) Ltd. was sanctioned with a Term Loan for construction of three shipping vessels with Hul Nos. 371, 372 and 373, under a Facility Agreement dated 23.6.2011 by the Applicant (as the arranger, agent and security agent), through its office situated in Hongkong, as also certain other financial institutions as lenders.

3.4. This facility agreement, as amended from time to time, stipulated that the monies disbursed under the Facility Agreement would be used instead for the construction of one shipping vessel being a 150T Anchor Handling Tug Supply Vessel bearing Hull No. V-383, and the said vessel was under construction for NSL, and the construction of the said Vessel was to be carried out by the Corporate Debtor, as the ship builder in terms of Shipbuilding Contract dated 21.10.2011. Accordingly, a Pre-delivery security Assignment came to be executed between NSL and the Applicant on 11.3.2014 whereby NSL assigned all its rights under the said Shipbuilding Contract in favour of the Applicant. The Corporate Debtor was notified about this assignment vide notice of assignment dated 11.3.2014, and the same was acknowledged by it. Accordingly, it is pleaded that the Applicant was entitled to exercise inter alia any of NSL's rights under the said contract, including the right to terminate the said Shipbuilding Contract.

3.5. Consequent upon admission of the Corporate Debtor into Corporate Insolvency Resolution Process, the Applicant by notice for termination dated 23.05.2018 cancelled/terminated the said Shipbuilding Contract and called upon the Corporate Debtor to

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refund all the monies remitted by NSL to the Corporate Debtor together with interest thereon.

- 3.6. The claim was filed in CIRP process, and the IRP informed that the same is in process and he will revert back, however, in the meanwhile the Corporate Debtor was ordered to be liquidated. The last date for submission of claim in the Liquidation proceedings was 13.02.2019, accordingly the Liquidator rejected the claim vide letter dated 19.2.2019 informing that “Claim may not be verified by the Liquidator and it liable for rejection considering that it has not been filed with the timeline specified in the Code. The said decision was challenged in MA 891 of 2019, which was disposed of vide order dated 29.08.2018 directing the Liquidator to either reject or admit the claim from seven days on merit.
- 3.7. It is further stated that letter dated 27.1.2014 unequivocally confirmed that the Corporate Debtor had received an amount of USD 17.66 million from GOL on behalf of NSL from the loan availed from the Applicant towards construction of the said Vessel. However, the Liquidator rejected the claim vide Order dated 25.9.2019 stating that “The claim is filed for refund of amounts paid in exchange of supply of goods under the said Shipbuilding Contract; accordingly, the Applicant’s claim would be an operational debt and not a financial debt under the Code.
4. We have heard the Counsel and perused the material available on record.
- 4.1. It is undisputed fact that the Corporate Debtor received the amounts under Shipbuilding Contract from Great Offshore (International) Limited, and the ship was to be constructed for NSL. Accordingly, the whole arrangement signifies that the money came to be paid to the Corporate for the building of a ship for NSL. This transaction is in nature of Operational Debt, as held by the Hon’ble Supreme Court

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in the case of *M/s Consolidated Construction Consortium Ltd. v. M/s Hitro Energy Solutions (P) Ltd.*, 2022 SCC OnLine SC 142 by stating that “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”.

- 4.2. Under the assignment agreement, the rights vested in the NSL came to be assigned to the Applicant in the event of the default. Accordingly, the Applicant stepped into the shoes of NSL qua Corporate Debtor. Hence, we do not hesitate to hold that the applicant is an Operational Creditor of the Corporate Debtor. As regards furnishing of the claim in form ‘D’, which is applicable in case of financial claim, we are of considered view that it was case of the applicant that the corporate debtor owed financial debt, and in case, the Liquidator determines such debt to be an operational debt, the same can not be rejected merely on the ground that the claim is filed in wrong form.
- 4.3. As regards applicant’s contention that the said debt is in nature of financial debt, we find that applicant’s argument is based on the relationship inter-se amongst the parties to the transaction, as aptly quoted in their own words “*It is unequivocally clear that the various parties were/ are related to each other. Accordingly, it is clear that the inter se transactions were for the benefit of the group/ group entities as a whole. This would have been a fit and proper case for the said Liquidator to pierce the corporate veil, while appreciating the Applicant's claim*”. However, we are of considered view that the relationship inter-se amongst the parties is not determinative of nature of the debt, and a debt to qualify as financial debt has to necessarily satisfy the test of section 5(8) of the Code, where the disbursal of the amount is sine qua non for holding an amount to be financial debt. In the present case, there is no disbursal of money qua Corporate Debtor, as undisputedly the money came to be received by the Corporate pursuant to an

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independent ship building contract. Accordingly, we do not find any merit in the contention of the Applicant in this regard.

- 4.4. To sum, we direct the Liquidator to admit the claim of the Applicant as Operational Debt to the extent amounts received by the Corporate Debtor in pursuance of shipbuilding agreement dated 21.10.2011, which came to be assigned in favor of the Applicant in the event of default, as evidenced vide letter dated 27th January, 2014 addressed by the Corporate Debtor to the Applicant whereby the Corporate Debtor has unequivocally admitted that it had received an amount of USD 17.66 Million from Great Offshore (International) Limited on behalf of NSL, from the loan availed from the Applicant.
5. With aforesaid directions, MA 3300/2019 is disposed of as partly allowed.

SD/-

Prabhat Kumar
Member (Technical)

SD/-

Justice V.G. Bisht
Member (Judicial)