

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

I.A. 535 OF 2022

Under Section 60 (5) of Insolvency &
Bankruptcy Code, 2016

Mr. Abdul Quddus Khan

...Applicant

V/s

Avil Menezes, Liquidator of Sunil Hitech
Engineers & Anr.

...Respondents

In the matter of

C.P.(IB) No. 2295/MB/2018

American Express Bank Corp.

.... Financial Creditor

Vs.

Sunil Hitech Engineers Limited

...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 Applicant : Mr. Amit Tungare, Advocate

For the Respondent : Mr. Viraj Parikh, Advocate

ORDER

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Per: V.G. Bisht, Member (Judicial)

1. This Application IA 535/2022 is filed on 25.02.2022 by Sh. Abdul Quddus Khan, (“Applicant”) in the Liquidation Proceedings (“Liquidation”) in the matter of M/s Sunil High Tech Engineer Limited [In Liquidation] (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 (“Code”), for direction to the Liquidator Mr. Avil Jerome Menezes as well as direction to the erstwhile Resolution Professional Mr. Ashish Arjumkumar Rathi (“Respondents”), for admission of claims as CIRP Cost in terms of Section 53(1)(a) of the Code and disbursal of said claim of Rs. 1, 36,41,854/- along with the interest of @ 18 p.a. from the month of April 2019.

2. The Applicant is in the business of execution of fabrication and erection works of CW ducts. The Corporate Debtor is stated to have approached the applicant in February 2018 and after due negotiations, the Corporate debtor executed a work order in favour of the applicant for the amount of Rs 2,73,20,814/- on 27th February 2018.
 - 2.1. The Corporate Insolvency Resolution Process was initiated against the Corporate Debtor vide Order dated 10th September 2018 passed by this Tribunal. Thereafter, the National Thermal Power Corporation Limited thereafter made direct payments, at the request of the Corporate Debtor, to the Applicant herein for a total sum of Rs 1,36,41,854/- against the work done by the Applicant. A sum of Rs. 1,25,84,250/- was still pending to be paid to the Applicant.
 - 2.2. The application for the liquidation of the Corporate Debtor was allowed by the Tribunal vide Order dated 25th June 2019 and the respondent was appointed liquidator for the Corporate Debtor. The

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applicant owning to the said knowledge filed Proof of Claim for sum of Rs 1,36,41,854/-.

2.3. Thereafter the Applicant filed an Interlocutory Application No. 162 of 2021 in January, 2021 seeking the same relief as prayed in this Interlocutory Application, which was disposed of with a direction to the Applicant to submit its claim with the Respondent No. 1, who was further directed to process the amount claimed on merits as per the Rules and Regulations.

2.4. In compliance with the order dated 14th December, 2021 the Applicant through its Advocate has sent an email to the Respondent No. 1 to abide by the order and consider the claim and release the admitted liability on merits at the earliest. However, the same has not been admitted as Insolvency Resolution Process cost and will be paid in accordance to the Section 53 of the Code.

3. The Respondent Liquidator has filed the Reply submitting that upon perusal of the documents submitted along with the claim form and based on the information provided by the personnel of the Corporate Debtor, he became aware that the Corporate Debtor was awarded a contract by National Thermal Power Corporation Limited ("NTPCL") at the site Darliparli ("Site"). In this regard, Applicant had entered into work order dated 27.02.2018 ("Work Order") for the purpose of Fabrication & Erection Works of CW system on back-to-back basis with respect to the site at Darlipali ("Site") as the sub-contractor with the Corporate Debtor. It was also submitted that -

3.1. Pursuant to the Liquidation Commencement date and taking charge of the affairs and management of the Company, the estimated CIRP Costs incurred during the CIRP was provided by the Resolution Professional.

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- 3.2. Considering a substantial difference in the CIRP Costs provided by the Resolution Professional and the costs as recorded in the books of the Corporate Debtor during the CIRP, the same was discussed in various Consultation with Secured Creditors ("CSC"). Further, in one of the meetings held on 23.09.2019, after due discussion, the CSC opined that a meeting should be held between the Resolution Professional, the Liquidator and top four secured creditor by value to discuss the issue.
- 3.3. Accordingly, a meeting was held with the Resolution Professional and top four secured creditors of the Corporate Debtor on 19.11.2019, whereat the Resolution Professional provided the following note *"As approved by the Committee of Creditors, vendors/labour contractors of active sites were to be paid out of the cash flows accruing from that Project. Accordingly, the vendor payments/other payments paid so far from that particular project have been considered as CIRP costs."* and stated that as per Section 5(13) of the Code, the term "insolvency resolution process costs", inter alia, means any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. Since these project(s)/site including the site were terminated during CIRP despite the work being completed during the CIRP, in light of the definition stated above, the same was not treated as CIRP Costs.
- 3.4. The CIRP Cost provided by the Resolution Professional at the time of handover were subsequently revised upwards by the Resolution Professional on multiple occasions. I submit that the meeting was also facilitated with the Company officials to arrive at the actual CIRP Costs and issues were raised by me from time to time in consultation with the secured creditors.

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- 3.5. In addition to elucidating the provisions of the Code to the Applicant from time to time, The Liquidator, vide email dated 07.10.2020, responded to the legal notice of the Applicant explaining that the dues of the Applicant were not classified as CIRP Costs by the Resolution Professional and accordingly during the admission of the claims of the Applicant, the dues of the Applicant could have not been treated as CIRP costs and the same would be distributed in accordance with Section 53 of the Code subsequent to the sale of the assets of the Corporate Debtor.
- 3.6. The Applicant has come with the same contentions in the captioned matter as Interlocutory Application No. 162 of 2021 and thus the captioned matter should be dismissed on this ground alone.
- 3.7. The claim of the Applicant was admitted in accordance with the provisions of the Code and Liquidation Regulations. However, as stated above, since the CIRP costs estimated by the Resolution Professional during the CIRP did not classify the Applicant's claim amount of Rs. 1,18,49,261/-, the same is also not being treated as CIRP Costs in terms of the distribution under Section 53 (1)(a) of the Code. The same has also been further discussed and confirmed with the secured financial creditors.
- 3.8. The Applicant has been duly informed from time to time that the claims of the Applicant have been admitted as an operational creditor of the Corporate Debtor, and the Liquidator is currently in the process of selling the assets of the Corporate Debtor and accordingly on the completion of the same, the sale proceeds shall be distributed amongst the stakeholders in accordance with the waterfall mechanism laid down under Section 53 of the Code.
4. We have heard the Counsel and perused the material on record.

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- 4.1. We find from the minutes of meeting held on 19.11.2019 to discuss the Unpaid CIRP costs, that the Liquidator had explained that *“the Resolution Professional has not considered the costs associated with closed projects including those terminated / abandoned during the CIRP period like the Firozabad Medical College, Kanpur Development Authority, Darliparli to name a few. He informed that the Resolution professional has provided the following note **“As approved by the Committee of Creditors, vendors / labour contractors of active sites were to be paid out of the cash flows, accruing from that Project. Accordingly, the vendor payments / other payments paid so far from that particular project have been considered as CIRP costs.”*** It is further recorded in these minutes that *“He (Liquidator) further informed that since the Resolution Professional was incharge of the business, it was his duty to provide the estimate of the CIRP Costs incurred during the period. Replying to which the resolution Professional stated that as per his understanding and on the basis of legal advice received by him, running costs shall be considered as CIRP costs and not otherwise. He stated that the costs of those projects which were running during the CIRP period have been considered and it is open to the Liquidator to consider a suitable treatment of other costs. The Liquidator enquired if the Resolution Professional denies that the costs incurred and recorded in the books is incorrect. The Resolution Professional stated that as a professional he has taken a considered stand on the matter and any aggrieved creditor may approach the NCLT for redressal, if any”*.
- 4.2. We further find from these minutes that the legal counsel of the Liquidator stated that Corporate Debtor as a whole needs to be considered as going concern and not parts of the Corporate Debtor and updated the members about the decision of this Tribunal (NCLT) in the case of Southern Engineers Vs Innoventive Industries Limited (MA 441/2018 in CP (IB)-01(MB)/2016) wherein it was held that the amount due on account of supply of goods made by the creditor to the Corporate Debtor company during CIRP, in

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compliance of the order given by the Resolution Professional to keep the Corporate Debtor company as a going concern shall form part of the CIRP costs as defined u/s 5(13) of the Code.

4.3. From the perusal of these minutes, we find that the Liquidator rejected the claim of the Applicant to be considered as CIRP cost on sole ground that the Resolution Professional has not considered the same to be so. There appears to be no dispute that these costs came to be incurred during the CIRP process for completion of unfinished work at the behest of the Resolution Professional, accordingly merely because this contract stood completed during the CIRP period can not take it away from the scope of CIRP costs on the ground that the completed projects do not contribute to the going concern status of the Corporate Debtor. On the contrary, we are in agreement with the legal opinion quoted in the minutes that Corporate Debtor as a whole needs to be considered as going concern and not parts of the Corporate Debtor. Accordingly, applying this principle to the present facts of the case, and the decision passed by this Bench in the case of Southern Engineers Vs Innoventive Industries Limited (MA 441/2018 in CP (IB)-01(MB)/2016) holding that the amount due on account of supply of goods made by the creditor to the Corporate Debtor company during CIRP, in compliance of the order given by the Resolution Professional to keep the Corporate Debtor company as a going concern shall form part of the CIRP costs as defined u/s 5(13) of the Code, we do not hesitate to hold that the charges attributable to work carried out by the Applicant during the CIRP period shall form part of the CIRP costs, irrespective of the fact that such contract, in relation to which work was carried out, were completed during the CIRP period. Accordingly, we direct the Liquidator to ascertain these facts and admit the claim of the Applicant after applying the aforesaid principle.

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- 4.4. As regards direction for payment, we are in agreement with the Liquidator that the payment of claims admitted during the Liquidator period has to be made out of funds available with the Corporate Debtor and has to be made in the manner laid down in section 53 of the Code. Accordingly, no special treatment or direction can be issued by this Tribunal to prioritise applicant's payment.
5. In view of aforesaid discussion, we dispose of this IA 535/2022 as partly allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)