THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 1795 OF 2023

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

Asean International Limited

…Applicant

Vs.

Sanjeev Maheshwari
Liquidator of Corporate Debtor

…Respondent

In the matter of

C.P.(IB) No. 247/MB/2017

Indian Bank

Financial Creditor

Vs.

Varun Resources 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. Yakshay Chheda, Advocate
For the Respondent	:	Ms. Fatima Barodawalla, Advocate

ORDER

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

1. This is an Application IA 1795/2023 is filed on 27.03.2023 by M/s Asean International Limited ("Applicant"), seeking direction against Sh. Sanjeev Maheshwari, Liquidator of the Corporate Debtor ("Liquidator") in the Corporate Resolution Insolvency Process in the case of M/s Varun Resources Limited ("Corporate Debtor"). The Application has sought following reliefs –a. Admission of its claim of USD 364,257.29 (Three Hundred Sixty Four Thousands, Two Hundred Fifty Seven and Two Nine Cents) as CIRP costs;

   b. Set aside of e-mail communication dated 20.02.2023 issued by the Liquidator modifying the claim of the Applicant;

   c. Restrain on distribution of proceeds of Liquidation Estate to other Stakeholders; and

   d. Reimbursement of legal costs incurred in prosecuting this application.
2. The Applicant has been supplying bunkers and essential goods to Varun Resources Limited from at least on or about 2014 and the Corporate Debtor was admitted in the Corporate Insolvency

Resolution Process vide Order dated 14.06.2017 passed by this Tribunal commencing the process from that day. As resolution failed, the Corporate Debtor went into liquidation vide order dated 04.12.2018 passed by this Tribunal. Public advertisement was issued inviting claims from stakeholders, and the last date for submission of the claims under Liquidation Process was 02.01.2019. The Applicant filed its claim during the CIRP period for the supplies made prior to June 2017, however no claim was filed in Liquidation Process within the prescribed time.

2.1. The Resolution Professional, his email-dated 21.01.2019 drew the Applicant's attention to file their claim not later than 7 days from 21.01.2019 i.e. up to 28.01.2019. On 22.01.2019, the Applicant requested for 14 days to file the claim as the in-charge person was traveling. It is important to note that no such extension was given. However, the Applicant failed to file the claims even in the extended period and belatedly filed their claims on 23.03.2019 which was much beyond the permitted timeline. A rejection letter was sent 30.03.2019 conveying that the claims were filed 2 months after the due date. Nevertheless, as the Applicant had supplied the bunkers under CIRP period the Respondent accepted the Applicant's liability to the extent of Vamadeva (USS 37200), Shubhatreya (USS 41854.20) and Mahatreya (US$ 94128.97).

3. It is case of the Applicant that Asean International Limited ("Applicant") has supplied bunkers amounting to USD 173,182.97 (United States Dollars One Lakh Seventy-Three Thousand One Hundred and Eighty-Two and Ninety Seven Cents) to the vessels i.e. MV Maharishi Vamadeva, MV Maharishi Shubhatreya and

MV Maharishi Mahatreya ("Vessels") owned by Varun Resources Limited ("Corporate Debtor") During the corporate insolvency resolution process of the Corporate Debtor. Mr. Sanjeev Maheshwari, Liquidator of the Corporate Debtor ("Liquidator") despite accepting the invoices issued by the Applicant has now reneged from its earlier communication and unilaterally reduced the outstanding amount due to the Applicant.

3.1. The Applicant had provided bunkers & essential goods to the Corporate Debtor during the Corporate Insolvency Resolution Process and therefore is required to be paid in full and in priority as per Sec. 53(1) of the Insolvency and Bankruptcy Code, 2016 ("Code").

3.2. On 14th July, 201, Mr. Yudhishthir Khatau, the then Chairman and Managing Director of the Corporate Debtor addressed a letter to the Resolution Professional voicing his urgent requirement to replenish the vessels with bunkers, lube oil, fresh water, etc. in order to revive the shipping business of the Corporate Debtor. On 15th July, 2017, the Resolution Professional sent an email to Mr. Khatau acknowledging the contribution of the Applicant and assuring that the dues will be paid as soon as the funds are available from the lenders.

3.3. The Corporate Debtor placed requisitions for supply of bunkers and fresh water to the Applicant, who confirmed the order, and said that whilst the same will be provided, the payment has to be made within 15 days from the date of such supply. Accordingly, the Applicant, relying on the representation and assurances, supplied the bunkers and fresh water on board the vessel between 23.07.2017 and 27.07.2017.

4. The Resolution Professional filed his reply dated 13.06.2023 stating that The Applicant attempts to circumvent the provisions of law as it attempts to have its claim adjudicated under section 60 (5) of the IBC, whereas the reliefs are in the nature of section 42 of the IBC and the Applicant fails to disclose how the same is within limitation and when did the cause of action actually arise for the very first time. As the Applicant has failed to challenge the rejection letter dated 30.03.2019, the Applicant is conveniently filing the present application under the cloak/disguise of section 60(5) of the IBC, as the Applicant is also very well aware that the time period to challenge the rejection letter dated 30.03.2019 is inordinately delayed. Moreover, failure to challenge the rejection letter and failure the claim during the liquidation process, results in crystallization of the claim as per the invoices no. 11239/17, 11240/17 and 11241/17, aggregating to USD 172,182.97 by the Respondent. Thus, the Applicant cannot seek to revive its claim by filing the application under section 60(5) of the IBC.

4.1. The Applicant sourced the essentials from Dushyant Patel and Gujarat Mariner. The Applicant supplied bunkers to VRL on the vessels i.e. (a) Vamadeva worth US$ 37200; (b) Shubhatreya worth US$ 41854.20; and (c) Mahatreya US$ 94128.97.

4.2. In the interregnum, the Applicant's suppliers i.e. Gujarat Mariners and Dushyant Patel filed their claims before the Hon'ble Bombay High Court i.e. in Admiralty Suit no. 37 of 2017 and 38 of 2017. Gujarat Mariners has filed to the extent of US$ 89,198 plus legal charges and Dushyant Patel to the extent of USS 40,294 plus legal charges.

4.3. From 30.09.2022 onwards, the Respondent has been repeatedly requesting the Applicant to consider issuing a no-objection so that the dues of Gujarat Mariners and Dushyant Patel could be settled before the Admiralty Court to ensure an early resolution of the admiralty matters with respect to the cases filed by Gujarat Mariners and Dushyant Patel. It is relevant to note that the NOC was requested (i) only with regards to the vessels, i.e. Shubatreya and Mahatreya and not Vamadeva and (ii) only with regards to the extent of the claims of Gujarat Mariners and Dushyant Patel and the balance share of the Applicants claim as per their invoices would be paid under the IBC. However, the reply of the Applicant came on 21.02.2023.

4.4. In the meantime, the Commercial Admiralty Suit no. 37 of 2017 and 38 of 2017 was settled along with Commercial Admiralty Suit no. 33 of 2018, Commercial Admiralty Suit no. 14 of 2019, Commercial Admiralty Suit no. 39 of 2018, Commercial Admiralty Suit no. 55 of 2018, Commercial Admiralty Suit (L) no. 40 of 2018, vide settlement agreement dated 27.04.2023, wherein dues of the parties in their respective suit along with Dushyant Patel and Gujarat Mariners shall be paid in terms of the settlement agreement.

4.5. Even prior to taking on record the settlement agreement dated 27.04.2023, the Advocate for the Applicant appeared and objected to the settlement agreement on the grounds as mentioned in the present application. After granting sufficient hearing to the Applicant, the objections raised were not considered by the Admiralty Court and the settlement agreement was taken on record. The reason for not considering the objections raised by the Applicant is because the settlement agreement did not affect the claim of the Applicant and also taking into account the fact that the Applicant shall be provided under IBC.

4.6. The CIRP costs can be paid only when the funds are available with the Corporate Debtor, and immediate source of funds was sale of assets of the Corporate Debtor, which stuck on account suit before the Admiralty Court, which got delayed on account of Applicant's non co-operation and non response to the Respondent request to issue its NOC from so that the claims of the Dushyant Patel and Gujarat Mariners could be settled. Considering, the suppliers of the Applicant i.c. Dushyant Patel and Gujarat Mariners had already filed their claim before the Hon'ble Admiralty Court, it was imperative for their claims to be adjudicated so as to reach a logical conclusion with respect to the claims of the Applicant. However, the Applicant failed to comprehend the urgency and kept withholding/denying granting the NOC for reasons best known to them, although the Applicant was assured and repeatedly conveyed orally and in writing that Dushyant Patel and Gujarat Mariners would only and only be settled with respect to their claims and not with respect to the share of the Applicant in the invoices. Moreover, requests to withdraw the claim was only in respect to the monies which shall be paid to Dushyant Patel and Gujarat Mariners directly and not otherwise. In fact, it is rather strange and unexplained by the Applicant as to why the Applicant was insisting on releasing the monies to themselves in entirety although its suppliers i.e. Dushyant Patel and Gujarat Mariners had already applied in the Admiralty Court directly.

4.7. the Applicant is claiming an exaggerated amount of USD 364,257,29 as against its invoice amount of USD 173,182.97 which is unacceptable. The Applicant is claiming the sum of USD 173,182.97 along with the interest component of 2% p.a. amounting to USD 1,91,074.32 which was never agreed between the parties. Thus, as on today, the Applicant is only entitled to USD 43,691.17 (amount shall be crystallised in INR on the basis of the rate on 04.12.2018 in accordance with Regulation 26 of IBBI(Liquidation Process) Regulations, 2016) after taking into consideration the settlement of the claims of Dushyant Patel and Gujarat Mariners in the Admiralty Court in accordance with the settlement agreement dated 27.04.2023 taken on record vide order dated 28.04.2023.

4.8. Conceding to the exaggerated claim of the Applicant would ultimately result in duplication of claims i.e. for the same set of supplies, 2 vendors cannot be paid i.e. to the extent of USD 1,29,492 viz. claim of Dushyant Patel and Gujarat Mariners.

5. The Applicant filed its rejoinder dated 21.07.2023 stating that that Section 42 of the IBC is not applicable in the present case for two reasons-firstly, the Applicant is not a 'creditor' as defined under Section 3(10) of the IBC and secondly, the claim of the Applicant has never been 'rejected' by the Liquidator; the Applicant had never agreed for dispensing with the levy of interest; the captioned application has been filed assailing the email dated 20 February 2023 as per which the Respondent insisted the Applicant for issuing its NOC in order to accept the a lesser amount towards its CIRP costs as the balance is being paid to Gujarat Mariner and Dushyant Patel; the payment terms stated on the invoices clearly mandates payment of interest @ 2% p.m in case of delay in payment beyond

15 days; in such circumstances, assuming not conceding, even if the dues of the Applicant's vendors i.e. M/s Dushyant Patel and Gujrat Mariners are settled through Admiratry Proceedings, then too the amounts along with interest therein are liable to be paid to the Applicant as per the invoices raised on the Corporate Debtor

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

6.1. We find that the Applicant has not filed any claim within the prescribed time under the Liquidation Process Regulations. However, the fact of supply of the Bunkers was within the knowledge of the Liquidator, who had contested the claim from the suppliers of the Applicant before Admiralty Court. It is not disputed that the Applicant had issued debit note levying interest on the delayed payment on 25.09.2019, and the claim was filed by the Applicant on 23.03.2019, however no interest was claimed in such claim form. Nonetheless, the Liquidator admitted the claim of Principal amount of the Applicant, after deducting therefrom the value of supplies made by Dushyant Patel and Gujarat Mariners settled before Admiralty Court.

6.2. We find that the fact of the suit having been filed by the suppliers of the Applicant was brought to its knowledge by the Resolution Professional, and it never bothered to take note of same. Due to pendency of the suits, the concerned Ships could not have been disposed off, thus putting the realisation of the assets of the Corporate Debtor qua those ships in suspension. Since, the Resolution Professional/Liquidator is obligated to preserve the assets of the Corporate Debtor, we do not find any infirmity in act of the Resolution Professional/Liquidator in settling the dues of the Suppliers of the Applicant before

Admiralty Court and deducting the same therefrom at the time of admission of Applicant's belated claim.

6.3. This leaves us the issue of levy of interest on the original outstanding as claimed by the Applicant. We find that the claim of interest was not advanced at the time of filing of the claim by the Applicant back on 23.03.2019, while the Applicant must have been conscious of the statement in the invoices, issued by it from time to time, about the levy of interest. In this back drop, we are not able to reconcile the fact if the stipulation of interest was mere a statement to act as deterrent against the delayed payment or it was in actual meant to be enforced. Accordingly, we do not find any merit in the claim of the Applicant for payment of the interest. Further, the delay in settlement of the claim of the Applicant, including other stakeholders, is partly attributable to the conduct of the Applicant, in so far its failure to expedite the issues with its suppliers settled before Admiralty Court. In fact, in the email dated 20.02.2023 by the Respondent, it is clearly mentioned as follows:

> "*I have requested you time and again to either give a NOC for settlement of Gujarat Mariner & Dushyant Patel dues in Admiralty court to the extent of USD 1,29,492/- (40,294/-+ 89198/-), and your balance of USD 6491/17 (1560/20+ 4930/97), can be settled through IBC mechanism*."

6.4. We also find merit in the submission of the Resolution Professional that the present application is to circumvent the specific remedy embodied in Section 42 of the Code, in case any claimant is aggrieved by the decision of the Liquidation in respect of admission of their claim. Accordingly, this application deserve to be dismissed on that ground also because even if this application is taken as an Appeal u/s 42 of the Code, the same would be beyond the statutory period provided u/s 42 of the Code. We agree with the contention of Liquidation that the prayer for setting aside email dated 20.02.2023 is nothing but an route discovered to seek remedy against the rejection of the claim. The act of the Resolution Professional in seeking NOC in respect of the dues of suppliers of Applicant was within scope of his duties to protect the assets, and have the claim of the Applicant settled expeditiously.

7. In view of the foregoing, we are of considered view that the present application IA 1795/2023 deserve to be dismissed.

Sd/-	Sd/-
Prabhat Kumar	**Justice V.G. Bisht**
Member (Technical)	Member (Judicial)