

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 574/KB/2021

In

Company Petition (IB) No. 176/KB/2018

***A Memorandum of Appeal under Section 42 read with Section
60(5) of the Insolvency and Bankruptcy Code, 2016.***

IN THE MATTER OF:

Impex Metal & Ferro Alloys Limited

And

IN THE MATTER OF:

TUF Metallurgical (P) Ltd

... Appellant.

Versus

Liquidator – Samir Kumar Bhattacharyya

... Respondent.

Date of Pronouncement: February 29, 2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

Appearance:

For Applicant:

Ms. Manju Bhuteria, Adv.

Ms. Srishti Agrawaal, Adv.

Mr. Vaibhav Mahajan, Adv.

For Liquidator:

Mr. Rishav Banerjee, Adv.

Mr. Rahul Auddy, Adv.

Mr. Aditya Gooptu, Adv.

Mr. Samir Kr. Bhattacharyya.

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ORDER

Per: D. Arvind, Member (Technical):

1. The Court congregated through hybrid mode.
2. Heard Ld. Counsel for the parties.
3. This is an application preferred by **TUF Metallurgical (P) Ltd.** (hereinafter referred as **Applicant/TUF**) under Section 42 read with 60(5) of the Insolvency and Bankruptcy Code, 2016, for brevity “IBC” against **Mr Samir Kumar Bhattacharyya** the liquidator of the corporate debtor **Impex Metal & Ferro Alloys Limited** (hereinafter referred as **Respondent/Liquidator**) seeking following reliefs:

a) Admit the claims of the Appellant to the full extent of Rs.4,94,11,490/- so submitted by the Appellant vide Form – G (Liquidation Process Regulations) dt. 14.03.2019 as ‘Insolvency Resolution Process Costs’ to be paid in priority as per Section 53(1)(a) of the Code at the time of distribution of proceeds from liquidation; and

b) Direct the Ld. Liquidator to immediately release and pay an amount of Rs.1,06,06,494/- as the admitted CIRP Costs and non-disputed portion of the aforesaid claim to the Applicant;

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c) Direct a Stay Order restraining the Liquidator from proceeding with further distribution of liquidation proceeds realized out of the sale of the liquidation assets, amongst the stakeholders, until the disposal of this Appeal;

d) Any other Order(s)/Direction(s) which this Hon'ble Adjudicating Authority may deem fit and proper in the facts of the present matter.

Factual Matrix:

- 4.** The corporate debtor M/s. Impex Metal & Ferro Alloys Limited was admitted into Corporate Insolvency Resolution Process (CIRP) by this Adjudicating Authority on 09.03.2018 and accordingly CIRP commenced.
- 5.** The applicant claims to have placed an order to purchase 2000 M.T. of Ferro Silico Manganese at the rate of INR 63,980/M.T. vide Purchase Order dated 25.06.2018 and the same was accepted by the corporate debtor to be supplied through its plant at Bobbili, Andhra Pradesh.
- 6.** It is the claim of the applicant that as per the delivery terms, the aforesaid quantity of 2000 M.T. was to be delivered in 4 lots of 500 M.T. each and all the 4 lots were to be completed by the end of September 2018.

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- 7.** As per the payment terms contained in the purchase order, an amount equivalent to 50% of the value of goods was to be paid as advance and balance at the time of accepting delivery of the goods. Accordingly, TUF claim to have paid a sum of Rs. 11,10,33,980/- to the corporate debtor.
- 8.** The corporate debtor supplied and delivered 1000 M.T. and raised 55 Tax Invoices in the month of August, 2018 for the said cumulative quantity of 1000 M.T. of goods delivered amounting to a contractual value of Rs. 6,40,44,000/-.
- 9.** The corporate debtor failed to supply the remaining quantity of 1000 M.T. of Ferro Silico Manganese to applicant as a consequence of which, as per the books and ledger maintained by the applicant an amount of Rs.4,41,73,463/- is lying as advance in excess with the corporate debtor.
- 10.** Corporate debtor has closed their plant and is no longer in a position to supply the remaining quantity of 1000 M.T. to the applicant. Meanwhile, applicant and corporate debtor entered and executed 3 'High Seas Agreements' during October 2018 to March 2019 wherein the applicant imported and supplied 1148.97 M.T. of Manganese Ore to the corporate debtor for a total sale value of INR 2,54,72,761/-.

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- 11.** The Corporate debtor hired the services of clearing and forwarding agent for handling the cargo with respect to the aforesaid transaction but did not make payment for such cargo handling services.

- 12.** The Corporate debtor paid an amount of Rs. 69 lacs to the applicant by lifting the quantity of only 298 M.T. out of total 1148.97 M.T. unloaded and supplied by the applicant in India after importing the same from Tanzania. Till date, corporate debtor has failed to accept delivery of the remaining quantity of Manganese Ore and consequently, failed to make payment of Rs.1,85,72,762/- out of total contract value of Rs.2,54,72,761/-, to the applicant as for as it relates to the 3 High Sea sales agreements.

- 13.** After several meetings and exchange of e-mails, corporate debtor indicated its inability to execute the remaining part of the transaction and therefore, in order to mitigate the losses of the corporate debtor, requested the applicant to sell the remaining goods to third parties and authorised the applicant to sell the same, for this purpose in this process, the applicant incurred a loss of Rs. 38,29,206/- as the rates of manganese ore became lower than the rates at which corporate debtor agreed to purchase the said goods.

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- 14.** Further applicant also incurred an additional loss for an amount of Rs. 5,27,691/- on account of payment to clearing and forwarding charges to Ramabrahmama & Sons (P) Ltd. on behalf of the corporate debtor. After adjusting all the losses, the applicant is claiming a total some of Rs. 43,56,897/- as the losses incurred by the applicant for which the corporate debtor is liable to pay as per the agreed terms and conditions, which includes a sum of Rs. 5,27,691/- paid to cargo handling agency.
- 15.** Meanwhile, this Adjudicating Authority *vide* order dated 12.02.2019, directed liquidation of the corporate debtor as a going concern and appointed Samir Kumar Bhattacharyya as the liquidator, consequent to which liquidator invited the claims of all the stakeholders of the corporate debtor on 15.02.2019.
- 16.** The applicant submitted its proof of claim in Form-G (other stakeholder) under Regulation - 20 for a total amount of INR 4,94,11,409/- emphasising that applicant has placed order for purchase of goods or supplied goods based on the terms and conditions agreed with the corporate debtor during CIRP period to support the business of the corporate debtor and run it as a going concern.

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- 17.** After protracted litigation before this Adjudicating Authority the adjudicating Authority vide Order dated 09.12.2019, disposed C.A. No. 615/KB/2019 filed by the applicant by directing the liquidator to consider the claim of the applicant as per law.
- 18.** This order was challenged before the Hon'ble NCLAT by the applicant and the Hon'ble NCLAT vide Order dated 31.01.2020, directed stay on disbursement of liquidation proceeds to the extent of Rs.4,50,54,512/- in the appeal filed by the appellant against the Order of the Adjudicating Authority vide Order dated 31.01.2020.
- 19.** Subsequently, on 03.02.2021 the Hon'ble NCLAT directed the liquidator to consider refund of advance amount paid by the applicant during the CIRP period and verify the claims of the Applicant within 30 days and deal with it as per law. Consequent to this order, the respondent liquidator issued the impugned communication dated 01.06.2021 by partly rejecting the applicant's claim of CIRP cost.
- 20.** The respondent/liquidator has classified Rs. 3,35,43,369/- as 'operational debt' and admitted only Rs.1,06,06,494/- as CIRP cost against the total claim of the applicant for Rs.4,41,49,863/- as CIRP costs.

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- 21.** The respondent also rejected the claim of interest calculated 8% per annum payable by the corporate debtor on account of non-supply of goods and breach of contract as damages and also rejected the claim for damages amounting to Rs.43,56,897/-, which is claimed by the applicant to be contractually provided in the agreement. Hence, this application seeks reliefs mentioned above.

Applicant's contentions:

- 22.** Ld. Counsel for the applicant claims that the issue in hand has been more or less settled by the Hon'ble NCLAT by way of a detailed order in Company Appeal No. 190/2020 dated 03.02.2021.
- 23.** He brought our attention para 44 of the said Order which is reproduced verbatim.

“44. A perusal of Section 20 of IBC makes it clear that after the CIRP initiated, the IRP/RP is required to manage the Corporate Debtor's operations as a going concern. Section 20(2)(e) gives power to the IRP (Subsequently RP) to take all actions as are necessary to keep the Corporate Debtor as a going concern. In such a process of managing the business operations of the Corporate Debtor, if advance payments for supply of goods is received, it cannot be treated as raising an

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interim finance. It is an advance for payment of goods which the Corporate Debtor as a going concern may be manufacturing. The goods are either to be supplied, or the amount should be returned. If the goods are not supplied, the purchaser cannot be made to run for his money. If this approach as in the present matter is not changed, it will become difficult to keep the Corporate Debtors as a going concern. Such amount received as an advance payment for the supply of goods during the CIRP would have to be treated as CIRP costs.”

- 24.** Therefore, in view of the above, he pleaded that the entire claim of the applicant to be treated as CIRP cost and the same will have to be treated accordingly when it comes to distribution of assets in terms of Section 53(1) of IBC.

Respondent’s submissions per contra:

- 25.** Ld. Counsel for the respondent submits that the entire advance paid by the applicant to the corporate debtor during CIRP period is Rs.31,36,72,372/- whereas, the supply during the CIRP period by the corporate debtor is valued at Rs.30,30,65,878/- and accordingly, the unadjusted advance of Rs. 1.06 crore has been classified as unpaid CRIP cost.
- 26.** With reference to the claim for rejection towards interest to the tune of Rs.8,81,049/-. Ld. Counsel for the respondent submits

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that in terms of purchase order, there is no expressed provision for interest. He submits that it is settled principle of law that unless the interest is agreed upon expressly between the parties in writing, the parties cannot claim interest and accordingly, he submitted that the claim for interest has been rejected. He took us to the relevant papers of the purchase orders in this regard.

- 27.** With reference to the claim for damages to the tune of Rs. 43,56,897/-, he submits that damages suffered by the applicant cannot be Suo motu calculated and recovered. If OC has suffered any damages he could appeal before the Civil Court for appropriate decree to that effect and then make a claim before the liquidator. Having not done so, the question of admitting Rs.43,56,897/- for recovery of damages does not arise.
- 28.** He further relies on the order of Hon'ble NCLAT dated 24.02.2020 in the case of **Neeraj Jain Vs Choudhwalker Streaming Technologies Pvt. Ltd.** in appeal No. 1354 of 2019, where the Hon'ble Tribunal held that in the absence of any provisions for interest and the loss and damages if any not quantified or crystallised in a transaction, the same could not be part of or even considered as 'operational debt' as defined under Section 5(21) of IBC.

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- 29.** He further submits that the balance lying credit in the account of the operational creditor has been classified and admitted as operational debt, after deducting Rs.1.06 Cr which has been considered as CIRP Costs and therefore the admission of Rs.3,35,43,369/- out of Rs.4,94,11,490/- as operational debt is legally correct and the same cannot be assailed.

Analysis and Findings:

- 30.** We find that liquidator has admitted Rs.1,06,06,494/- as CIRP cost and classified Rs.3,35,43,369/- as operational debt against the total claim of the applicant for Rs. 4,41,49,863/-. We also find that applicant's claim of interest an amount of Rs. 8,81,049/- has been rejected. We also note that the applicant's claim for damages amounting to Rs.43,56,897/- arising out of High Sea Sales contract made between October 2018 to March 2019 has been rejected completely.
- 31.** In view of the above we will have to examine whether action of liquidator:
- a)** Admitting Rs. 1,06,06,494/- CIRP cost.
 - b)** Admitting Rs. 3,35,43,369/- as operational debt.
 - c)** Rejecting claim towards interest to the tune of Rs.8,81,049/- and
 - d)** Rejecting balance claim for damages amounting to Rs.43,56,897/- is correct and legally sustainable.

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- 32.** We have examined the statement of debits and credits (ledger account) of Impex Metal & Ferro Alloys Limited maintained in the books of TUF Metallurgical (P) Ltd. (The Applicant) in Annexure 'C' to the application.
- 33.** We find that total payment made by the applicant after CIRP commencement is approximately Rs.31.13 crores and the corporate debtor has supplied goods worth approximately Rs. 29.95 crores leaving approximately Rs. 1.18 crore as due and payable by the corporate debtor to the applicant based on the transactions effected during the CIRP period.
- 34.** However, we find that the liquidator has approved only Rs.1.06 crore as CIRP cost as against approximately Rs. 1.18 crore as per ledger maintained by OC. Apparently, there is a mismatch between the ledger maintained by the applicant and the ledger maintained by the respondent. Therefore, we direct the liquidator to reconcile the same and admit additional claim if any, arising out of such reconciliation.
- 35.** With regard to interest payment, we find no provision in the contract made between the parties in the purchase order and therefore, the same has been rightly rejected by the liquidator.

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- 36.** With regard to claim for damages, the same being compensatory in nature will have to be lightened in a Civil Court for appropriate decree for the applicant, particularly, in the absence of any agreement between the parties to the agreement to pay any damages. Therefore, the liquidator has rightly rejected the claim of the damages of the applicant. However, out of the damages claimed, Rs.5,27,691/- is for payment made by operational creditor on behalf of corporate debtor to the cargo handling agency in respect of High Sea Sale contracts. The said amount will have to be treated as operational debt and the same will have to be included as operational debt.
- 37.** The amount of Rs. 3,35,43,369/- has been admitted as operational debt. The admission as operational debt in respect of advances paid by the customer to corporate debtor is legally correct. In this regard, we rely on the judgment of Hon'ble Supreme Court in **Civil Appeal No. 2839 of 2020**, in the case of **M/s. Consolidated Construction Consortium Limited Vs M/s. Hitro Energy Solutions Private Limited**. We reproduce relevant paragraphs verbatim to strengthen our stand: -

“43. First, Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without

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specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Finally, the judgment of this

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*Court in **Pioneer Urban** (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that "examples" given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". Hence, 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.*

44. In **Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd.**, a three-judge Bench of this Court purposively interpreted Section 21(2) of the IBC in order to understand who should be excluded from the CoC due to their being a "related party". The Court held:

"99. Accepting the submission of Mr Viswanathan would allow the statutory provision to be defeated by a related party of a corporate debtor creating commercial contrivances which have the effect of denuding

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its status as a related party, by the time that the CIRP is initiated. The true test for determining whether the exclusion in the first proviso to Section 21(2) applies must be formulated in a manner which would advance the object and purpose of the statute and not lead to its provisions being defeated by disingenuous strategies.

[...]

104. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC. those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a "related party" before the corporate debtor undergoes CIRP, so as to be able to enter

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*the CoC and influence its decision making at the
cost of other financial creditors."*

Thus, the Court struck a balance between the text of the statute and the purpose which it sought to achieve by excluding those related party financial creditors who ceased to be related parties only in order to circumvent the exclusion under the first proviso to Section 21(2).

45. Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC."

(Emphasis Added)

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- 38.** Therefore, in view of the above, we hold that the liquidator's action in rejecting the claim of interest to the tune of Rs. 8,81,049/- as well as applicant's claim for damages amounting to Rs. 38,29,206/- is legally sustainable and cannot be interfered with, whereas sum of Rs. 5,27,691/- paid by TUF on behalf of corporate debtor to cargo handling agency will have to be treated as operational debt.
- 39.** On admission of only Rs.1,06,06,494/- as the CIRP cost we have already found that there is a mismatch between the ledger maintained by the applicant and the respondent and the mismatch is approximately of Rs. 12 lacs. The liquidator is directed to reconcile this difference and if found that an additional claim has to be admitted as CIRP cost, respondent may do so.
- 40.** The respondent's action of treating the balance amount which was not admitted as CIRP cost as "operational debt" is legally correct and supported by the judgment rendered by Hon'ble Supreme Court referred above.
- 41.** Accordingly, this application being **I.A. (IB) No. 574/KB/2021** is **disposed of**.

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- 42.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

The order is signed on the 29th Day of February, 2024.

PH [PS]
Bose, R. K. [LRA]