



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
KOCHI**

IA(IBC)/212/KOB/2022

IN

MA/9/KOB/2019

IN

IBA /689 OF 2017/CB

(Under Section 60(5)(c) along with Section 31(1), Section 74(3) of IBC, 2016 and Section 425 of the Companies Act, 2013)

In the matter of

Merchem Limited

MEMO OF PARTIES:

FINORCHEM LIMITED (Formerly known as Merchem Limited) having its Office at V0774, 141 Development Area, Edayar Muppathadom, Paravur – 683 110 Represented by its Authorized Signatory B Unnikrishnan Nair;

... Corporate Debtor/Applicant

-Versus-

THE GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION, represented by its Vice Chairman and Managing Director, Block 3/4/5 Udhog Bhavan, Sector – 11, Gandhinagar – 382 017, Gujarat.

... Respondent

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For Applicant : Mr. Ravi Rajagopalan,
Advocate

For Respondent : Mr. Pavan S Godiawala,
Advocate

Order reserved on: 08.12.2022

Order pronounced on:08.02.2023



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ORDER

1. This application has been filed by the Corporate Debtor under Section 60 (5) (c) along with Section 31 (1) & Section 74 (3) of the Insolvency and Bankruptcy Code, 2016 (“Code”) and Section 425 of the Companies Act, 2013 against the Gujarat Industrial Development Corporation seeking the following reliefs to:
 - i. Declare that the Applicant is entitled to the refund of the sum of Rs. 1,16,82,941/- paid under protest pertaining to the pre-CIRP period for which it had not filed its claim and which had been extinguished;
 - ii. Declare that the Respondent by withholding the sum of Rs. 1,16,82,941/- paid under protest for the pre-CIRP period had wilfully violated the Orders dated 06.11.2020 of this Hon’ble Adjudicating Authority in MA/9/KOB/2019 and MA/12/KOB/2020 and was in contempt thereof;
 - iii. Declare that the Respondent by withholding the sum of Rs. 1,16,82,941/- paid under protest for the pre-CIRP period was in violation of section 74 (3) of the Code and therefore, direct the IBBI/Appropriate Authority to take cognizance of the same and initiate action, read with Section 236 of the Code;
 - iv. Direct that the Respondent in addition to the refund so ordered, pay interest calculated at 15% on the amount paid from 06.11.2020 till date on which the amounts are refunded to the Applicant;
 - v. Direct that the Respondents shall pay a cost of Rs 100,000 to the Applicant;
 - vi. Direct the Respondent to issue no—dues certificate in respect of all taxes, charges and cess payable to it and its nodal agencies in relation to the periods prior to commencement of CIRP process;



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Brief fact of the case:

2. The Applicant Company is the Corporate Debtor (“CD”) which came to be admitted into Corporate Insolvency Resolution Process (“CIRP”) under the Insolvency & Bankruptcy Code 2016 (“Code”) under C.P. IB. No. 689 of 2017 on 15.01.2018, before the Chennai Bench of this Adjudicating Authority.
3. The CIRP came to an end upon the approval of the Resolution Plan submitted by Acme Chem Ltd, the Successful Resolution Applicant (“SRA”) by the Chennai Bench of this Adjudicating Authority under Section 31(1) of the Code, by its Order dated 23.01.2019 passed in MA 515 of 2018 in C P No. 689 of 2017. Pursuant to the approved Resolution Plan, the total Resolution Plan amount of Rs. 115.2520 Crores had been remitted by the SRA into the account opened with lead member of the Committee of Creditors, State bank of India, Palarivattom Branch, Kochi on 18.03.2019, for being disbursed to the stakeholders, by the Resolution Professional (“RP”) in accordance with the approved of Resolution Plan.
4. The said amount is being disbursed to all the stakeholders by the Resolution Professional, who is in charge of the disbursement of the Resolution Plan amount, as per the schedule specified in the Resolution Plan as approved by the Chennai Bench of this Adjudicating Authority, upon completion of the necessary documentation /formalities required on the part of the stakeholders. The aforesaid Resolution Plan has been implemented, with the management of the corporate debtor Company/Applicant having been taken over by the SRA and its nominees assuming office as its directors.
5. The applicant stated that the CD had two main production facilities one in Kerala and the other one at Gujarat being in GIDC’s Industrial Estate, having address: 24+24/1, G.I.D.C. Estate, Panoli, Taluka Ankleshwar. The land had been taken up by the CD from GIDC on lease for setting up its production facility. It is further stated that the Respondent Operational Creditor did not file its claim, towards the unpaid outstanding Notified Area Tax, Water charges and drainage cess due from the CD as of the CIRP



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Commencement date, during the CIRP of the CD with the Resolution Professional. Therefore, there was no admitted liability to be paid to the Respondent GIDC under the Resolution Plan which was approved by the Chennai Bench of this Tribunal under Section 31 (1) of the Code.

6. The learned counsel for the applicant submitted that even as the Resolution Plan had been approved without having filed its claim, GIDC the Respondent herein chose to file a writ petition SCA 22599 of 2019 before the Hon'ble Gujarat High Court seeking to annul the Resolution Plan. The Hon'ble High Court found no merit at all in the case of GIDC and proceeded to dismiss the same Vide its Orders dated 20.12.2019. Despite the same NAA, GIDC, Panoli did not allow the CD and the SRA to implement the Resolution Plan and restart the operations of its plants in 24+24/1, G.I.D.C. Estate, Panoli, Taluka Ankleshwar pursuant to the approved Resolution Plan.
7. Aggrieved by the actions of GIDC in refusing to write-off the claim which it did not file during the CIRP, the CD Company had initiated action under the Code before this Tribunal as Company Application No. MA/9/KOB of 2019. GIDC too filed a cross- Application before this Tribunal, numbered as MA/12/KOB of 2020. Even while the proceedings were pending the CD & SRA, had to restart operations in the Gujarat facility. Given that GIDC was not allowing the Plant to restart, left with no other option they remitted to GIDC under protest a total sum of Rs.1,58,91,329/-. The breakup of the aforesaid sum is as under:

Head	Amount pertaining to pre CIRP Commencement (prior to 23-01-2019)	Amount pertaining to Post CIRP Commencement (after 23-01-2019)	Total
Water charges	55,62,549	13,58,909	69,21,458
Drainage Cess	22,065	6,05,104	6,27,169
Notified Area Tax - Plot No. 24	36,16,155	14,38,054	50,54,209
Notified Area Tax - Plot No. 24/1	24,82,172	8,09,321	32,91,493
Total	1,16,82,941	42,11,388	1,58,94,329



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8. It is further submitted that this Tribunal pronounced its order in MA/9/KOB/2019 and its connected matters dated 06.11.2020 by upholding the contention of this applicant/CD that no amounts were due and payable, the claims, if any of the Respondent against the CD stood discharged and the entries in the books of GIDC ought to be reversed.
9. It is stated that the CD Company issued letters to the Respondent calling upon it to refund the sums paid under protest pertaining to the pre-CIRP period for which it must lodged its claim. The Applicant further submits that it also caused a Legal Notice to be issued to the Respondent ahead of filing this Application, which too remained un-replied. As of date the Respondent has not refunded the said sums.
10. Respondent in its reply stated that the claim of the Respondent is in respect to the charges levied for the supply of water, and drainage facility and in lieu of municipal taxes by the Notified Area Authority of the GIDC amounting to Rs. 1,58,94,329 are payable in full. That the said charges are liable to be paid by the Corporate Debtor and thereby the RP to the Respondent. That such charges arose out of the Lease Agreement entered between the Corporate Debtor and the Respondent and that it was not unknown to the RP of the Corporate Debtor that the dues of the Respondent are dutifully required to be paid.
11. It is further stated that under the IB Code the object is to keep the Corporate Debtor as a going concern and in such eventuality, a continuing liability is required to be paid/ discharged towards the Statutory dues. That the learned counsel for the Respondent submitted that in the very judgement of the Hon'ble Supreme Court of India the claim of the Statutory creditors is declared as secured creditors where their dues are required to be paid off in priority of all other unsecured creditors. It is submitted that the lease deed in clause (3) states that all sums payable by the lessee shall be recoverable by the lessor under the provisions of the Gujarat Industrial Development Act 1962 as arrears of land revenue under either Section 283 or Section 41 of the Act. These dues shall be recoverable from every subsequent transferee



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stepping into the shoes of the original lessee until they have been paid in full.

12. The learned counsel for the Respondent stated that the applicant on 06.11.2020 consciously opted under the OTS Scheme in terms of the letter dated 05-11-2020 and sought the restoration/reconnection of the water supply at the Plot Of 24 and 24/1 GIDC Panoli, Taluka: Ankleshwar Dist: Bharuch to restart the production. It is submitted that upon getting a reconnection after opting for OTS Scheme based on the letter of 06.11.2020 itself the applicant as an afterthought after a substantial time of 2 years preferred the present application as an arm-twisting process to get back the amount already paid. The applicant if was aware that the said claim amount was not required to be paid as per the approved resolution plan and in case of non-compliance the applicant could have preferred the application immediately before this Tribunal rather than making a payment under purported protest and after 2 years filed the present application seeking execution of the order and praying for violation of Section 74(3) of the IBC.
13. The learned counsel further submitted that submitted that the letter of 06.11.2020 though worded as payment made under the protest but at the same time the applicant was conscious that such payment is made under the OTS Scheme. Further, it is needless to reiterate that the GIDC being a State Government undertaking rendered the various facilities during the moratorium period as a going concern since the admission of an order dated as stated above is entitled even otherwise as the CIRP cost while the present applicant has wilfully ignored the fact that the dues which become due and payable from the date of admission till the resolution plan approved will be a part of the CIRP cost and the applicant is obliged to pay the same to the respondent. It is submitted that the applicant cannot force the respondent to write off the dues from its books. It is also an established position of law that even when the dues are not claimed within the stipulated time, but when such dues are duly being reflected as debts in the books of the CD then the RP cannot ignore the same.



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14. It is submitted that after making a wilful payment to the Respondent towards its rightful dues, the Resolution Applicant now cannot claim the refund after it has started its activities. It is submitted that by merely writing word under protest and making a payment and there after waiting for 2 years cannot on the basis of such a letter urged for a refund when the purpose of the applicant got fulfilled. The Resolution Applicant paid the dues of its volition and with the object of starting the factory operations, now that everything has been brought back into order, the question of refund should not arise.

The point for consideration is:

Whether the applicant is entitled to get back the amount of Rs.1,16,82,943/- from the respondent?

15. In this application there is no dispute regarding the facts narrated above. The respondent operational creditor of corporate debtor not filed any claim before the RP, and Resolution plan was approved by the Adjudicating Authority on 23.01.2019. After the approval of resolution plan the applicant filed an application M.A.No.9/KOB/2019 for declaration that the approved resolution plan is binding on the stakeholders including every one of the respondents and for other reliefs against 25 respondents in which the respondent herein is arrayed as 20th respondent. The Respondent herein filed an application M.A.No.12/KOB/2019 for declaration that the COC and appointment of RP is time barred and plan submitted by them is barred under section 12 of IBC 2016 and for other reliefs. This adjudicating Authority heard both applications along with M.A.No.16/KOB/2019 to M.A.No.19/KOB/2019 jointly and common order was passed on 6.11.2020. By the common order the Adjudicating authority allowed the application filed by applicant M.A. No.,9/KOB/2019 and dismissed the M.A. No 12/KOB/2019 filed by respondent.
16. In the meanwhile, on 6.11.2020 the applicant paid a sum of Rs.1,58,91,329/- to the respondent under protest, now he wants the refund



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of the said paid amount. On the applicant side it is argued that the respondent by coercion and duress collected the amount. On the respondent side denies the allegation of coercion and stated that the applicant on his own volition paid the amount in order to get instant water connection and get the interest concession under the OTS scheme. The applicant sent notice dated 09.10.2020 proposing to pay debt amount under protest to restore the reconnection immediately and to restart commercial production of company without waiting for outcome of NCLT order have decided to pay the amount urgently. The proposal was sent by the applicant on its own seeking permission of the respondent to accept the amount under protest. The respondent not responded to the request of applicant, then the applicant paid the amount on 06.11.2020. The above factor clearly shows that there were no elements of coercion in this regard as alleged by the applicant.

17. Even though in the letter dated 06.11.2020 it is mentioned that payment was made under protest, but reading of the letter reveals differently. In the letter the applicant stated that” **without waiting for outcome of the NCLT order decided to pay the arrear demand under Protest**” this clearly reveals that the applicant with full knowledge irrespective of pending proceeding and its outcome paid the amount on its own to avail OTS proposal hoping to get immediate restoration of water connection and also got the immediate reconnection. The respondent not indulged in any coercive action to recover the amount; he kept silent awaiting the orders of NCLT. The applicant hoping that it will take some time for passing order, and without any patience decided to part with the amount with sole idea of getting lightning restoration.
18. The applicant after the pronouncement of order on 06.11.2020 and subsequently the applicant had not claimed the refund of amount. The applicant filed this application after the expiry of two years. After the dismissal of I.A.No.12/KOB/2020 and allowing I.A.No.9/KOB/2020, since the applicant already paid the entire due amount, the respondent has not made any attempt to prefer an appeal and there was no necessity arose



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to the respondent to prefer an appeal against the common order dated 06.11.2020, but after the expiry of appeal period only this application has been filed. The respondent lost his right to file an appeal in time. That being so, the applicant is being estopped by his conduct from claiming the refund of amount.

19. In the protest letter the applicant has not reserved his right to reclaim the amount or mentioned that subject to outcome of NCLT order but he made the payment under protest without waiting for outcome of NCLT order it shows that the applicant on its own paid the amount expecting to avoid delay and to avail 50% interest benefit and reconnection of water supply on the day itself. The tenor of the letter shows there was no coercion on the part of respondent. In the peculiar circumstances it is answered to the point that applicant is not entitled for refund of amount.
20. In fine the Application is **DISMISSED**.
21. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
24. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.02.08 15:52:28 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ
Date: 2023.02.08 14:46:15 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 08th day of February, 2023.

Supriya_P.S_