IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

IA No.1840/KB/2019
in
CP (IB) No.148/KB/2018

In the matter of:
Applications under section 60(5) of the Insolvency and Bankruptcy Code, 2016, for directions upon the Resolution Professional to consider the claims

And

In the matter of:
State Bank of India ...Financial Creditor

Versus

Tantia Constructions Limited ...Corporate Debtor

And

In the matter of:
Tantia-MPPL (WILO) JV
Through WILO Mather and Platt Pumps Private Limited ...Applicant

Versus

Kshitiz Chhawchharia,
RP of Tantia Constructions Limited ...Respondent

Date of hearing: 07.07.2021

Date of pronouncement: 12.08.2021

Coram

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Harish Chander Suri		Member (Technical)

Appearances through video conferencing:

For the Applicant	:	Mr. Rishav Banerjee, Advocate Mr. Ritoban Sarkar, Advocate Ms. Madhuja Barman, Advocate
For the Resolution Professional	:	Mr Ratnanko Banerji, Sr. Advocate Mr. Deep Roy, Advocate Mr. Kshitiz Chawchcharia, erstwhile RP

For successful Resolution Applicant	:	Mr. Swatarup Banerjee, Advocate Mr. Avishek Guha, Advocate Mr. S.K. Sariful Haque, Advocate
For Income Tax Department	:	Mr. Moti Sagar Tiwari, Advocate

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. Preamble

1.1. I.A. No. 1840/KB/2019 is an application filed by Tantia-MPPL (WILO) JV through their lead partner WILO Mather and Platt Pumps Private Limited, against the Resolution Professional (RP) of Tantia Constructions Limited (the corporate debtor), seeking a direction upon the RP to include its claim of Rs.9.02 crore, and, pending disposal of the application, direct that no Resolution Plan be considered or approved.

2. Mr. Rishav Banerjee appearing on behalf of the applicant submits as follows:

2.1. The applicant and the corporate debtor entered into a Joint Venture Agreement (JVA) dated 03.02.2014[1] for completing construction of pumping stations in Begore Khal and Joka Tram Depot and construction of sewerage and drainage network within Diamond Harbour Road catchment. In terms thereof, the corporate debtor was to complete the entire civil work, while the applicant was required to complete the entire electro-mechanical work. The tender for the said work was awarded by the Kolkata Municipal Corporation (KMC) through Kolkata Environmental Improvement Investment Program (KEIIP) *vide* Contract Agreement dated 15.10.2014.

[1] Page 15, IA No.1840/KB/2019.

2.2. As per clause 4 of the said JVA,[2] the ratio of participation by the applicant and the corporate debtor was as follows:-

Applicant	:	20%
Corporate Debtor	:	80%

2.3. Under clause 5 of the said JVA, the liability of the applicant and the corporate debtor towards KEIIP was joint and several, whereas, the specific liability of work of the applicant was for the "Entire Electro-Mechanical Works" and for that of the corporate debtor was for the entire "Civil Works".[3]

2.4. The corporate debtor failed to execute the work due to financial difficulties due to which the remaining work was taken over by WILO Mather and Platt Pumps Private Limited. An amended joint venture agreement dated 29.11.2018[4] was executed.

2.5. Mr Rishav Banerjee took us through the terms of the said amended JVA, extracts of relevant paras of which have been reproduced below for better appreciation of facts:

The second para of the recitals on page 23 states that

> *"Tantia is yet to perform the activities like completion of entire civil works, along with laying of pipeline and additional works (both civil and electromechanical) for Behala Flying Club which was added by KEIIP at a later stage."*

Clause (1) (a) states that

> *"Tantia immediately foregoes its right to receive any payment, if any, that Tantia is yet to receive from the JV pursuant to invoices raised by Tantia upon the JV and invoices yet to be raised for*

[2] Page 16, IA No.1840/KB/2019.

[3] Page 16, IA No.1840/KB/2019.

[4] Page 21, IA No.1840/KB/2019.

> *work contract done. The payments will however be made to the vendors as agreed elsewhere in the contract."*

Clause 1(c)(a) states

> "*Tantia acknowledges that it has appropriated a sum of ₹ 3693.16 lakh towards the work done so far by Tantia…"*

Clause 1(c)(b) states that

> *"In the event of Tantia's inability to refund the sum aforesaid amount as set out in the preceding clause of this Agreement, then Tantia waives its right to receive any payment that Tantia is to receive from the JV in lieu of the work done by Tantia for the JV and for which Tantia's invoice(s) are pending payment from the JV."*

Clause 1.6 at page 24 states that

> *"Since MPPL is taking over the project work on behalf of Tantia, due to present financial difficulties of Tantia and their inability to compete the balance work on time, MPPL agrees to undertake completion of balance work of the contract of their own with the support of selected staff from the existing manpower and machinery of Tantia construction at site as per the list provided by MPPL till completion of the project..."*

Clause 2.2(a) states that

> *"Tantia agrees that the participation ratio of Tantia and MPPL in the JV shall be Tantia- 40%, (Forty percent) and MPPL - 60% (sixty percent)."*

2.6. Therefore, to amend the JVA dated 03.01.2014 and the supplementary agreement dated 04.12.2014, WILO Mather and Platt Pumps Private Limited and the corporate debtor entered into an agreement dated 31.01.2019. In the last para on page 29 of the agreement dated 31.01.2019, it is mentioned that

> *"AND WHEREAS there was delay in performing the balance work by Tantia and additional works (both civil and electro mechanical) for Behala Flying Club, which was added at a later stage by KEIIP authority after contract was awarded to JV in compliance of Tantia's obligation."*

2.7. Clause 3 of the said agreement dated 31.01.2019 also mentions the ratio of participation as 40% for the corporate debtor and 60% for the WILO Mather and Platt Pumps Private Limited.

2.8. In the 54th Annual Report of the Company[5] for the year 2018-2019, as uploaded on the BSE, the "Standalone Balance sheet as at 31.03.2019" at page 85 of the application, has been signed by the RP in the capacity of the RP. Further, on page 115 of the application (continuation of the 54th Annual Report), the corporate debtor acknowledges the relationship between the applicant and itself as "investment in the joint venture". Furthermore, at page 116 (continuation of the 54th Annual Report), in the "Tantia MPPL (WILO)" column in the second row against the "Outstanding Balance Payment" column it is recorded that 907 lakh is pending to the applicant. This is an unconditional and unequivocal admission in the balance sheet, without any riders.

2.9. The applicant came to know that the corporate debtor had been admitted into CIRP vide order dated 13.03.2019. On 04.10.2019, the applicant submitted their claim through email before the RP in Form B for an amount of Rs. 907 lakh. The RP replied to the email on 09.10.2019 requesting the applicant to provide relevant documents substantiating the amount claimed. The applicant replied to the RP that the JVA and other agreements along with the relevant extract of the 54th Annual Report of the corporate debtor were already submitted with Form B. The applicant further sent the entire 54th Annual Report with the said reply email.

2.10. On 26.11.2019, the RP replied to the email raising queries in respect of the claim and sought the basis of proof of claim filed towards the corporate debtor to substantiate the claim. The applicant through email dated 27.11.2019,

[5] Page 32, IA No.1840/KB/2019

reiterated that all the relevant documents were submitted along with Form B and that the financial statement of the corporate debtor was provided *vide* email dated 15.10.2019. On 29.11.2019, the RP replied to the applicant that the claim amount of Rs.907 lakh was inappropriate in terms and understanding arrived at between the applicant and corporate debtor *vide* minutes of meeting dated 12.11.2018 and under the terms of the additional agreement. The applicant then replied to this email on 04.12.2019 and stated that the claim amount is based on the Annual Report of the corporate debtor for the year ending on 31.03.2019. The applicant also provided the details of the works that ought to have been completed by the corporate debtor and the work that was actually completed by it.

2.11. On 07.12.2019, the RP replied that the claim could not be accepted.

2.12. Mr Rishav Banerjee submits that what the RP has done is adjudication and not just collation. This goes against the grain of ***Swiss Ribbons v Union of India***[6] he further relies on ***Prasad Gempex v. Star AgroMarine Exports Pvt Ltd and Ors.,***[7] and ***Indian Overseas Bank v. D.C. Industrial Services Pvt. Ltd. (In Liquidation)***[8] stressing on the role of RP in the collation of claims.

2.13. The 54th Annual Report of the corporate debtor for the year 2018-19 acknowledges the debt owed by the corporate debtor to the joint venture company, as Rs.9.07 crore. The name of Tantia MPPL (WILO), the applicant herein, appears under the heading "Note 42-Related Party Disclosures" in the Standalone Financial Statements for the year ending on 31.03.2019 under the sub-heading, "Outstanding balance payable."

---

[6] 2019 SCC OnLine SC 73, decided on 25.01.2019

[7] Company Appeal (AT) (Insolvency) No.291/2018 alongwith 591/2018, decided on 01.02.2019.

[8] IA (IB) 1832/KB/2019, decided on 16.04.2021.

2.14. The applicant has filed a proof of claim with the RP in Form B on 04.10.2019. After much correspondence, the RP communicated his non-acceptance of the claim *vide* email dated 07.12.2019. The present application was, therefore, filed on 13.12.2019, immediately after the rejection of the claim by the RP.

2.15. To sum up, Mr. Rishav Banerjee submits that two reasons militate against the RP's stand, *viz.,*

(a) There is no adjudication that the corporate debtor has suffered losses due to the delay on the part of the applicant. The grievance, if at all, has to be raised with the client – KEIIP.

(b) The acknowledgements of liability made in the balance sheet will bind the corporate debtor.

3. ***Mr Ratnanko Banerji, learned senior counsel appearing for the erstwhile RP submits as follows:***

3.1. The applicant filed a claim in the CIRP of the corporate debtor in Form B. In support of its claim, the applicant had provided the JVA, the Revised Agreement, and an extract of the 54th Annual Report of the corporate debtor claimed INR 907 lakh (Rupees nine crore seven lakhs only). This claim had two elements, the additional amount and the vendor debt. Therefore, the RP on 09.10.2019 requested relevant documents to substantiate the claim.

3.2. In response to this, the applicant by email dated 15.10.2019, reiterated that the basis for its claim is the acknowledgement of liability in the Annual Report of the corporate debtor, however, the applicant did not provide any further documentation to substantiate the same.

3.3. On 26.11.2019, the RP replied to the applicant that if there were any liability of the corporate debtor towards the applicant in light of the provisions of the

JV Revised Agreement, the same would be adjusted in accordance with the provisions of clause 1(c) of the JV Revised Agreement which is as follows: -

> *"(a) Tantia acknowledges that it has appropriated a sum of INR 3693.16 lakhs (Rupees thirty six crores ninety three lakhs sixteen thousand only), towards work done by Tantia. Of the 3693.16 lakhs (Rupees thirty six crores ninety three lakhs sixteen thousand only), Tantia acknowledges that it was paid an extra sum of rupees 869.65 lakhs (Rupees eight crores sixty nine lakhs sixty five thousand only) to facilitate project continuity. This extra sum will be reduced to the extent of TDS certificates to be issued by Tantia to MPPL and to the extent of work done by Tantia but not certified by KEIIP. The additional payment was done with the assumption that it will get adjusted by the end of the Project through the future billings of Tantia.*
>
> *(b) In the event of Tantia's inability to refund the aforesaid amount as set out in the preceding clause of this Agreement, then Tantia waives its right to receive any payment that Tantia is to receive from the JV in lieu of the work done by Tantia from the JV and for which Tantia's invoices) are pending payment from the JV"*

3.4. In response to this, the applicant vide email dated 27.11.2019 replied that no further work had been completed by the corporate debtor, and the corporate debtor had illegally appropriated the additional payment to itself concerning the Project and accordingly the additional payment would be required to be refunded to the applicant, however, the applicant did not provide any additional documentation to substantiate its claim. After another round of clarification/confirmation, the RP rejected the claim of the applicant on 07.12.2019.

3.5. Mr. Ratnanko Banerji submitted that while he agrees with Mr Rishav Banerjee that the RP's role should only be collation and not adjudication. In this case, the facts remain that the corporate debtor and the applicant were to perform the terms of a contract awarded by KEIIP. 9.07 crore appears to be an excess payment made by KEIIP to the corporate debtor which has to be adjusted by the internal working of the JV.

3.6. Mr. Ratnanko Banerji refers to page 23 of the application and submits that Tantia has acknowledged that it has appropriated a sum of ₹ 36.93 crores towards the work done so far by Tantia. Out of this, Tantia acknowledges that it was paid an extra sum of ₹ 869.55 lakh to facilitate project continuity. In terms of the agreement, this extra amount will be reduced to the extent of TDS certificates to be issued by Tantia to MPPL and to the extent of work done by Tantia but not certified by KEIIP. The additional payment was done with the assumption that it will get adjusted by the end of the project through the future billing of Tantia. It is clear from this that the applicant has not correctly understood the point; there is no undertaking to pay on the side of the corporate debtor.

3.7. So far as the entry in the balance sheet is concerned, Mr. Ratnanko Banerji relied on para 10 (as reported on Manupatra) of ***Bengal Silk Mills Co v Ismail***[9] and ***Kashinath v New Akot Cotton Ginning and Pressing Co Ltd.***[10] to contend that the balance sheets do not amount to acknowledgements of liability because they are prepared under compulsion of law.

*4. **Analysis and findings:-***

4.1. Succinctly put, the case of the parties is that the applicant which is a Joint Venture of the corporate debtor and WILO Mather and Platt Pumps Private Limited had entered into a contract. The Joint Venture Agreement entered into between the parties on 03.02.2014 was revised vide an agreement dated

---

[9] AIR 1962 Cal 115; MANU/WB/0033/1962.

[10] *ILR 1950 Nag 562; AIR 1951 Nag 255.*

29.11.2018. The initial ratio of participation in the Joint Venture was 20% for the applicant and 80% for the corporate debtor which was revised to 60% to the applicant and 40% to the corporate debtor in terms of the agreement dated 29.11.2018. The civil work was accepted to be completed by the corporate debtor while the other works at the site were to be completed by the applicant.

4.2. Due to default, the bank guarantee given by the corporate debtor was forfeited by KEIIP which also entrusted the completion of the work under the terms of the contract to the applicant herein. The agreement dated 29.11.2018 records that the corporate debtor had provided a sum of Rs.3693.16 lakh which was to be treated as advance payment and to be reconciled at a later date.

4.3. Since it was an ongoing project and final accounts could not have been drawn up either at the stage of invitation of claims or the stage of approval of the resolution plan, the RP would have been well advised to make provision for a contingency in case the corporate debtor owed any dues to the applicant after finalization of accounts.

4.4. There was a gross error of judgment on the part of the Resolution Professional, who is also a qualified Chartered Accountant, in not doing so. What compounds the problem is the same Resolution Professional has acknowledged the liability in the books of accounts of the corporate debtor while functioning as RP. Therefore, it does not stand to reason as to how this claim could not be included with the dues payable to the Operational Creditors.

4.5. We are dissatisfied with the explanation tendered by the RP that no part of the claim could be included until the crystallisation of the same upon completion of the project.

4.6. Here again is a case where immediately after the RP refused to accept the claim, the applicant knocked on the doors of this Adjudicating Authority seeking a determination of the claim of the applicant even before the approval of the Resolution Plan. While both matters *i.e.,* this application as well as the application for approval of the resolution plan were heard and reserved for orders together, the erstwhile Bench approved the Resolution Plan alone while posting this application for hearing once again on 24.03.2020. No reason has been adduced in that order as to why this particular application was also not decided.

4.7. We cannot conscientiously shut the doors of justice on a litigant who has diligently pursued his remedies under the law, and who is now being rendered remediless only on account of the approval of the Resolution Plan. There cannot be a situation in law where a litigant is left remediless. The Hon'ble Supreme Court's judgment ***Ghanashyam Mishra and Sons (P) Ltd.*** **v.** ***Edelweiss Asset Reconstruction Co. Ltd.***[11] can only apply to a situation where a litigant has not filed his claim or agitated his grievances in a manner known to law. It would be a travesty of justice to apply the ratio of that judgment to the facts of the present case and leave the present applicant battered, bruised and none the wiser as to what went wrong in his pursuit of justice.

4.8. The Resolution Professional's obduracy in denying the applicant's claim while at the same time admitting the liability in the capacity of Resolution Professional in the books of accounts, is completely inexplicable. If accounts were subject to verification and reconciliation, then this contingency should have been provided for, especially when the RP was a chartered accountant himself.

4.9. In any case, we have held, *vide* our order dated 17.05.2021, that the application is maintainable even though the resolution plan has been approved.

[11] 2021 SCC OnLine SC 313, decided on 13.04.2021.

The applicant has approached this Adjudicating Authority on 31.12.2019 itself, even before the approval of the resolution plan application was filed before this Adjudicating Authority.

4.10. In these circumstances, the RP is hereby directed to draw up final accounts between the corporate debtor and the Joint Venture and include any claim payable to the applicant, in the list of operational creditors and also make payments under the resolution plan.

4.11. With these directions **I.A. No. 1840/KB/2019** shall stand disposed of.

4.12. 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.

4.13. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

Signed on 12th August, 2021

VC/SR(LRA)