IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

IA 2738/2021
In
CP (IB) 2826/MB/2018

Under section 42, 35 and 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Regulation 20 of the IBBI (Liquidation Process) Regulations, 2016 and Rule 11 of National Company Law Tribunal Rules, 2016.

In IA 2738/2021

TVS Motors Company Limited

'Chaitanya', No. 12, Khader Nawaz Khan Road, Nungambakkam, Chennai – 600006.

…Applicant

Versus

Mr. Jagdish Ahuja

(Liquidator of Kalisma Steel Private Limited)

… Respondent

In the matter of

Welspun Steel Ltd.

… Petitioner

Versus

Kalisma Steel Limited

…Corporate Debtor

Order Delivered on 01.07.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retired)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant	:	Mr. Himanshu Vidhani, Counsel.
For the Liquidator	:	Mr. Darryl Pereira, Counsel.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The present IA is filed by TVS Motor Company Limited ("the Applicant") under Section 42 r/w section 35 of the Insolvency Bankruptcy Code, 2016 read with Regulation 20 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Rule 11 of the National Company Law Tribunal Rules, 2016 seeking to challenge the decision of the Liquidator of Kalisma Steel Pvt. Ltd. ("the Respondent") rejecting the Applicant's claim as i) Financial Creditor as well as ii) Operational Creditor.

   It is the case of the Applicant that the Applicant seeks an order from this Tribunal, inter alia, challenging the decision of the Respondent, recorded in email dated 23.06.2021, rejecting the Applicant's claim as (i) Financial Creditor; and as well as (ii) Operational Creditor of the Corporate Debtor.

2. This Tribunal vide an order dated 22.04.2021, ordered the commencement of the liquidation process of Kalisma Steel Pvt. Ltd, Corporate Debtor (hereinafter known as 'Corporate Debtor'). Accordingly, the Respondent was appointed as the Liquidator.

3. The Applicant submits that since the Applicant Company is Registered with RoC Chennai, Tamil Nadu, it was not aware of the order of liquidation dated 22.04.2021, as passed by this Tribunal it became aware of the commencement of the liquidation process of the Corporate Debtor, only

when it received email dated 19.06.2021 from one Mr. Modilal Pamecha, the valuer appointed by the Respondent.

4. The Applicant immediately upon receipt of email dated 19.06.2021, filed its claim before the Respondent on 22.06.2021. However, the Applicant was informed by the Respondent vide his email dated 23.06.2021 that the claim of the Applicant has not been accepted. The reason provided for the same, inter alia, was that the public announcement for filing of the claims by the creditors was done on 26.04.2021 and acceptance from all the stakeholders was open on or before 22.05.2021.

5. The Applicant further submits that since Applicant had no knowledge of the liquidation order and commencement of liquidation process; the delay caused in submission of the claims was unintentional. Applicant further states that there are several cases in which the delay in submission of claims have been condoned by the Hon'ble National Company Law Tribunal ("NCLT"). In support of his contention Applicant relies upon *UCO Bank V. Nicco Corporation Limited*, Company Application CA(IB)No.31KB/2018 in Company Petition CP(IB)No.03/KB/2017, the NCLT had held that the Tribunal has the power to grant relief in case there is a delay in submission of the claims and the same can be condoned.

6. The Applicant submits that by an email dated 8th February 2018 (page 40 of the Interlocutory Application) the Corporate Debtor informed the Applicant that they are facing financial difficulties and would be able to continue its supplied smoothly if the Applicant can support it by giving an advance of Rs.2 Crore.

7. The Applicant submits that he had rendered financial assistance to the Corporate Debtor and had on 15.02.2018 transferred a loan amount for

Rs.2,00,00,000/- (Rupees Two Crore Only) into the account of the Corporate Debtor and charged interest at the agreed rate of 12% per annum.

8. Further, by email dated 15.02.2018 (page 38 of the Interlocutory Application), the Corporate Debtor acknowledged that the Applicant advanced Rs.2 Crore as loan at 12% p.a. as interest which was to be repaid in 5 equal instalments. The Shareholder and Director of the Corporate Debtor in the very same mail mentioned that original shares worth Rs.2 Crore will be sent to the Applicant as a collateral security.

9. Later by emails dated 29.05.2018 (page 47 of the Interlocutory Application) and 16.05.2019 (page 58 of the Interlocutory Application) the Corporate Debtor requested the Applicant to deduct Rs. 20 Lakhs instead of Rs. 40 Lakhs towards the instalment for loan amount.

10. It is submitted that the representatives of Corporate Debtor, on various time, told the Applicant to reduce or not deduct the installment money. However, at no time, the Corporate Debtor has denied its liability to pay back the debt amount received from the Corporate Debtor. In fact the Corporate Debtor has in above mentioned emails, acknowledged the loan liability to pay back the debt in instalments which proves that the Applicant had advanced a loan amount to be paid back with interest.

11. The Applicant submits that he also had time and again places several purchase orders with the Corporate Debtor. The Applicant and the Corporate Debtor had mutually agreed, inter alia, that the Corporate Debtor was to bear the freight charges.

12. The Applicant further submits that Corporate Debtor has failed and neglected to repay amount due towards the principal outstanding and the

interest. The Corporate Debtor has also not paid the freight charges due to the Applicant.

13. The Applicant submits that Corporate Debtor is liable to pay sum of Rs.1,70,64,572.31/- (Rupees One Crore Seventy Lakhs Sixty- Four Thousand Five Hundred Seventy-Two and Thirty-One Paisa Only); towards financial debt. A copy of proof of claim is annexed to Application as Annexure A-5.

14. In respect of the operational debt, the Applicant submits that the Parties mutually agreed that the Corporate Debtor was to bear the freight charges and the Purchase Order reflected such understanding between the parties. Clause 4 of Purchase Orders reads:

> *"4. Unless otherwise agreed to, all goods are to be supplied on "freight paid" basis to the Company's Factory or any branch or depot thereof or to such other place as may be directed by the Company."*

15. The Applicant had, in any case, at the time of calling for the supplies from the Corporate Debtor (under the Purchase Orders), has categorically mentioned in their emails dated 11.04.2018 (page 81 of the Interlocutory Application) and 15.09.2017 (page 84 of the Interlocutory Application), that the freight charges for such supplies were to be borne by the Corporate Debtor. The Applicant submits that all goods were to be supplied on "freight paid" basis to the Applicant or its any branch or depot.

16. Further, the Corporate Debtor and the Applicant also agreed that any cost incurred by the Applicant pursuant to the supply of material, towards (i) Manpower charges; (ii) freight for sending rejection material; (iii) rejection

of material; and (iv) re-work charges (to make material for good fit) on the material supplied by the Corporate Debtor; will also be borne by the Corporate Debtor. This understanding between the Parties was also recorded in the Purchase Order wherein the relevant Clause reads as under:

> *"9. All materials and goods shall in every respect be equal to description, specification, and to previous approved supplies (if any) and shall be subject to TVS Motor's inspection and approval within a reasonable time after delivery and if rejected shall be held at the suppliers risk and returnable at the expense of the Supplier and shall not count as having been delivered unless TVS Motor elects to make the materials and goods fit for its purposes in which case the supplier shall be debited with the cost of such improvement".*

17. The Corporate Debtor time and again assured the Applicant that the payment for these dues will be made at the earliest. However, the Corporate Debtor has failed and neglected to repay the Applicant certain amounts (which were due towards the charges mentioned above) towards the debit notes, till the date of initiation of CIRP. The Corporate Debtor is liable to pay to the Applicant sum of Rs. 73,21,933.19/- towards operational debt.

18. It is submitted that the transaction between the Applicant and Corporate Debtor was for the supply of goods and the Applicant has provided the details of the Operational Debt owed by the Corporate Debtor to the Application in the Interlocutory Application submitted by the Applicant, as **Exhibits "A"**, **"B"**, **"D"**, to **"J"** provided by the Applicant in **Annexure A-6** of the Interlocutory Application, which also includes the debit notes and the statement of accounts providing the total outstanding payable to the Applicant as an Operational Creditor.

19. The Respondent has failed to appreciate and verify the above-mentioned claims of the Applicant as Financial Creditor as well as the Operational Creditor.

20. Thus, the Applicant prays before this Tribunal to quash and set aside the communication dated 23.06.2021 and permit the submission as well as verification of the claims mentioned by the Applicant before the Respondent.

21. The Respondent submits that vide order dated 09.03.2021 this Tribunal in MA No. 1078 of 2020 filed by the then Resolution Professional (RP) Mr. Bhuta directed the commencement of the Liquidation process of the Corporate Debtor and appointed Mr. Jagdish Ahuja as Liquidator. Copy of order dated 09.03.2021 is annexed as "Exhibit A" to the Affidavit in Reply of the Liquidator.

22. The Liquidator made Public Announcement under Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 in two newspapers, 'Business Standard' and 'Navshakti' inviting submissions of Claims from Creditors of Corporate Debtor. The last date for submission of Claims was 22.05.2021. Copy of Public Announcements dated 26.04.2021 is annexed as "Exhibit "B" to the Affidavit in Reply of the Liquidator.

23. The Respondent submits that the Applicant herein was required to file their Claims on or before 22.05.2021. The Applicant did not file its claim on due date and accordingly, on the basis of claims received, the Liquidator proceeded with filing the list of Stakeholders Report before this Tribunal on 28.06.2021 without the claim of the Applicant. The 1st Stakeholders meeting was held on 14.07.2021.

24. Via email dated 22.06.2021 through their lawyers the Applicants filed 2 Claims (1) as Financial Creditors in "Form D'' dated 10th June, 2021 which is annexed as Annexure A-5 to the IA and (2) as Operational Creditor in 'Form C' dated 10th June, 2021 which is annexed as Annexure A-6 to the IA.

25. The Liquidator considered both claims filed by the Applicants as Financial Creditor and Operational Creditor. He then proceeded to inform the Applicants Advocate and also the Applicant vide email dated 23rd June, 2021 which is annexed as Annexure A-3 to the IA that as per the Public Announcements Claims from all Stakeholders were required to be filed on or before 22.05.2021 whilst the claim from the Applicant was received on 22.06.2021 (a month's delay). Based on the Claims received on 22.05.2022 and verified the Liquidator has constituted the Stakeholders Committee as per Liquidation Regulation. In his response the Liquidator informed the applicants that any Claim received after the last date of submission can be admitted only after specific orders from this Tribunal. The Liquidator in the said email proceeded to add observations:

A. <u>Claim as Financial Creditor in ''Form D''</u>

The Liquidator informed the Applicants that classifying the Claims as secured creditor is incorrect as the underlying security is shares of the Promoters which is not an asset of the Corporate Debtor. The said shares are pledged by the Promoters in personal capacity. Secondly, it cannot be classified as Financial Debt as the said debt is in the nature of advance for the supply of goods. **<u>It is neither a Financial Debt nor Operational Debt</u>.** Moreover, the following documents which are the backbone of any Financial Debt under Insolvency and Bankruptcy Code, 2016 are missing.

a) Loan Agreement

b) Promissory Note

c) Board Resolution of Corporate Debtor

B. <u>Claim as Operational Creditor in 'Form C'</u>

In relation to the Claim filed by the Applicant as Operational Creditor, the Liquidator proceeded to inform the Applicant that as per the Audited Books of Accounts of the Corporate Debtor, an amount is receivable from TVS Motors and hence TVS Motors is a Debtor and not a Creditor as claimed by the Applicant.

The Liquidator then proceeded to inform the Applicant that both their Claims are not admitted and that Claims can only be admitted with the approval of this Tribunal. Accordingly, the Liquidator rejected the Claims as filed by the Applicant.

26. The Respondent has relied on **The Deputy Commissioner Division-VII, Central CST Vs Mr. Kiran Shah RP of Victor Stainless Pvt. Ltd:**

Decision of the Appellate Tribunal

Decision of the Appellate Tribunal is summarized in the following points:

- The Section 21(1) envisage the collation of claims which are received against the Corporate Debtor. It cannot be interpreted that the IRP/RP should collate the claims even if they are received outside the prescribed time limit. Had the Appellant submitted the claim within the time frame and the IRP had not chosen to collate this claim as provided for in the Code, only then can it be stated that there is some material irregularity. In the instant case, the facts on record do not in any manner show that the Resolution Professional was not diligent in performing his duty as envisaged under the Code.

- It has been clarified by the Hon'ble Supreme Court in 'Ghanshyam Mishra and Sons Private Limited' Vs. 'Edelweiss Asset Reconstruction Co. Ltd. (2021) ibclaw.in 54 SC' that with respect to statutory dues owed/ claims raised in relation to the period prior to amendment, the Resolution Plan shall still be binding on the statutory Creditors concerned, and the statutory dues owed to them, which are not included in the Resolution Plan, and such claims shall stand extinguished. In 'Director General of Income Tax' Vs. Synergies Dooray Automotive Ltd. (2019) ibclaw.in 443 NCLAT', this Tribunal has observed that once the Resolution Plan is approved, it shall be final and not subject to modification even if the statutory claims are not included in the Plan.

- It is a matter of public record that in the public announcement dated 18.03.2020, the last date for submission of claims was mentioned as 31.03.2020. Additionally, the email dated 28.07.2020, kept the Appellant informed about the CIRP. The material before us does not show any response to this email. Hence, the delay of 19 days in filing the claim cannot be attributed to lack of knowledge. As regards administrative delays, the Hon'ble Supreme Court in a catena of Judgements has laid down that the entire time frame within which the CIRP ought to be completed strictly mandatory in nature and cannot be extended. In Ebix Singapore Pvt. Ltd. Vs. CoC of Educomp Solutions Ltd. & Anr. (2021) ibclaw.in 153 SC, the Hon'ble Apex Court while dealing with the issue of withdrawals or modifications of the Resolution Plan, once submitted to Adjudicating Authority, after due compliance with procedural requirements stressed on the importance of adhering to the prescribed timelines, keeping in view the scope and objective of the Code.

- In the Instant case the Resolution Plan was approved by 91.02% of the Members of CoC and is pending approval before the Adjudicating Authority and was last listed for hearing on 16.06.2021. The literal language of Section 12 mandates strict adherence to the time frame it lays down. Time and again, the Hon'ble Supreme court has noted that the model timelines provided in Regulation 40A of the CIRP Regulations should be followed as closely as possible. In this case, on account of lockdown and pandemic the last date was extended from 31.03.2020 to 16.08.2020 to facilitate all creditors to file their claims. In the background of this factual matrix, we hold that the delay/latches are on behalf of the Appellant and there is no dereliction of duty on behalf of the IRP/PR.

- At the cost of repetition, we hold that the Resolution Professional was not duty bound to collate claims which are belatedly received after the last date thereby delaying the entire CIRP which is a time bound process and further having regard to the fact that the claim of the Appellant was incorporated in the Information Memorandum which was circulated to the Prospective Resolution Applicant and the Members of the Committee of Creditors for their consideration, there is no dereliction of duty on behalf of the IRP/RP as provided for under Sections 18 and 21(1) of the Code. For all the aforenoted reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

27. In this matter, delay has not been the cause of Rejection of Claims filed by the Applicant. On perusal of the claim, the Liquidator found that the Claims submitted in '**Form D'** cannot be considered as Financial Debt and all the communications exchanged between the parties clearly states it as advances for the supply of goods. Besides there are no documentation entered between the parties to reflect the legal backing of a Loan like a Loan Agreement, Demand Promissory Note, etc. TVS Motors is a customer of the Corporate Debtor to whom a Financial Guarantee was provided by the Promoters and hence the transactions is clearly advance against the supply of those goods. Even in the Audited books of Accounts of the Corporate Debtor on as 31st March 2020, the amount is nowhere reflected as borrowing (short term or long term) but as advances from suppliers.

28. The Respondent submits that the claim cannot be considered as Operational Debt since the Applicant is not the supplier of goods or services to the Corporate Debtor and the advance does not fall within the meaning of definition of Operational Debt as defined in Section 5(21) of Insolvency and Bankruptcy Code, 2016. Here reliance can be placed on the views expressed by The Hon'ble National Company Law Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 752 of 2019 in the matter of Smt. Andal Bonumalla Vs. Tomato Trading LLP and Anr.

29. One of the claims submitted by the Applicant was in respect to the Claim as an Operational Creditor. Here, the Liquidator has pointed out that as per the Audited Books of Accounts as on 22.07.2019 (being Corporate Insolvency Resolution Process commencement date) TVS Motors i.e. the Applicant is reflected as a Sundry Debtor from whom an amount is

receivable and not as a Sundry Creditor. Hence, the Claims of Applicant as Operational Creditor is also rejected by the Liquidator.

30. We have heard the arguments of both the parties and perused the records. It is noted that the Applicant being located out of the State was unaware of the order of liquidation dated 22.04.2021 as passed by the Tribunal, against the Corporate Debtor. The Applicant came to know of the commencement of liquidation process on 19.06.2021 from Mr. Modilal Pamecha, the valuer appointed by the Respondent. Therefore, the delay on part of the Applicant was unintentional and hence, this Bench hereby condones the delay, ordering the liquidator to consider the claims.

31. This Tribunal is of the opinion that as per the document annexed in Exhibit C by the Applicant, the Corporate Debtor admits that the Applicant has made an advance against supplies with the interest @12% for an amount of Rs. 2 Cr. This shows that there was clearly a relationship of Debtor and Creditor between the Corporate Debtor and Applicant. Hence, the claim of the Respondent that it is neither a financial debt nor an operational debt is erroneous.

32. This Tribunal relies upon the Supreme Court's Judgement in ***M/s Consolidated Construction Consortium Ltd. v. M/s Hitro Energy Solutions (P) Ltd., 2022 SCC OnLine SC 142,*** where in dealing with a case involving two controversial terms; "operational debt" and "operational creditor" of IBC, the 3-judges Bench explained that the appellant would be an operational creditor under the IBC, since an 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor. The Bench expressed,

> *"…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."*

33. Thus, we conclude that the appellant is an operational creditor under the IBC, since an 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor.

34. The Corporate Debtor had in the e-mail dated 15.02.2018 annexed in Exhibit C, specifically mentioned that the original shares worth Rs.2Cr. will be sent to the Applicant as a collateral security for the loan and the same will be returned once the amount is returned to the Applicant. In another email sent on 15.02.2018 the Corporate Debtor has written that they are sending a scanned copy of the "Collateral Security letter from Kalisma dt. 15th Feb".

35. The Tribunal finds it pertinent to note the decision of Hon'ble Supreme Court in Khivraj Motors vs. Gaunellian Society, (2011) 15 SCC 294 where the president of the Guanellian Society had entered into a joint development agreement with the appellant developer for the development of certain portion of land. However, a resolution was passed subsequently by the Guanellian Society that the President was not authorised to deal with the property and enter into the development agreement. The question before the apex court, among others was whether the agreement was entered into by the appellant in its personal capacity. The Hon'ble Supreme Court observed that: "8. *An examination of the photocopy of the joint development agreement shows clearly that it was not executed by Father A. John Bosco in his individual capacity. The document describes 'Father A. John Bosco, President, Gaunellian Society, as the first party or the owner.* *The said agreement is also signed by Mr. Pushpchand Chordia as the power of attorney holder of the partners of the Appellant.* *There are*

only the said two signatories to the agreement, that is the Society represented by its President and the Appellant represented by its Attorney Holder. Fr.A. John Bosco has not executed the joint development agreement in his personal capacity. ….We may also note that if Father A. John Bosco was executing the joint development agreement in his personal capacity, there was no need for him to describe himself as the "President of the Gaunellian Society"and sign the document for and on behalf of the Gaunellian Society, as its President…

36. Thus, it clearly shows that the above shares were supplied by the Promoter in his official capacity to provide security for the loan amount therefore this Tribunal is of the opinion that the submission of the Respondent that the shares were pledged by the Promoter in its personal capacity is not justified. Thus, a security interest was created in the favour of Applicant due to which the Applicant stands in the position of Secured Creditor to the Corporate Debtor in terms of Section 3 (30) of IBC,2016.

37. Further, the Tribunal holds that there is no clarity regarding the second operational debt from both parties. We hereby direct the respondent to verify the claim of the Corporate Debtor and submit the balance sheet of the Corporate Debtor showing the relevant transactions and the Applicant is hereby directed to submit the copy of the Purchase Orders along with all the relevant clauses.

38. With the aforesaid directions the Application is disposed of.

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**JUSTICE P.N. DESHMUKH**
Member (Technical)	**Member (Judicial)**

01.07.2022
SAM