
(2021) 06 NCLT CK 0004

In the National Company Law Tribunal

Case No : IA/840/IB Of 2020 in MA/289 Of 2018 in TCP/10/IB Of 2017

Bharat Heavy Electricals Limited

APPELLANT

Vs

V. Mahesh Liquidator M/s. Nagarjuna Oil Corporation Limited

RESPONDENT

Date of Decision : 01-06-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 42

Citation : (2021) 06 NCLT CK 0004

Hon'ble Judges : R. Varadharajan, J;B. Anil Kumar, Member (Technical)

Bench : Division Bench

Advocate : Vidur Bhatia, S. Satish

Final Decision : Dismissed

Judgement

Anil Kumar B, Member (Technical)

1. IA/840/IB/2020 is an Appeal filed by Bharat Heavy Electricals Limited under Section 42 of IBC, 2016 seeking relief as follows;

(i) Set aside the decision of the Respondent rejecting the Appellant's claim as Operational Creditor of the Corporate Debtor and direct the Respondent to

admit the Appellant's claim; and

(ii) Pass such further and / or other orders as in the facts and circumstances of this application may be deemed necessary;

2. The Learned Counsel for the Appellant submitted that on 24.12.2010 the Appellant entered into Purchase Order No. SAP/0007/2009/SEIPL issued

by the Corporate Debtor viz. M/s. Nagarjuna Oil Corporation Limited, which was effective from 11.12.2009 pursuant to which the Appellant was

required to supply a hydrogen recycle gas compressor package to the Corporate Debtor for the Diesel Hydro Desuplurization Unit (DHU) for the

Cuddalore Refinery Project. As per the Purchase Order, a lump sum price of Rs.25,90,00,000/- (Rupees Twenty Five Crore and Ninety Lakh Only)

was fixed and as per Clause 7 of the Purchase Order, the payment was required to be made on the basis of the following schedule;

- a. 5% on signing the Purchase Order;
- b. 10% on submission of certain documents by BHEL;
- c. 20% on availability in BHEL's manufacturing location of major raw materials such as shafts and casing of compressor and casing of compressor and turbine;
- d. 60% on delivery of goods by BHEL at the delivery point; and
- e. 5% upon submission by BHEL of all final certified documents or three months of dispatch of compressor and turbine, whichever is earlier.

3. It was submitted that the payments as to above (a to c) were required to be released directly to BHEL within 30 days from the date of submission

of invoice and for the payments under (d to e) above, irrevocable letter of credit was required to be opened by NOCL two months prior to start of

dispatches. Further, it was submitted as per Clause 6 of the Purchase Order, the Appellant was required to deliver the goods at Hyderabad on or

before 10.06.2011. As per Clause 3 of the Purchase Order, it was specifically provided that transportation of goods from Hyderabad shall be arranged

and borne by NOCL. It was also submitted that as per Clause 2 of the Purchase Order, NOCL appointed Samsung Engineering India Private Limited

as its EPCM contractor to act on behalf of them in relation to the project.

4. The Learned Counsel for the Appellant submitted that they received payment of 35% of the Purchase Price as per the first three payment

scheduled as described hereunder;

(i) Rs.1,29,50,000/- by NEFT payment on 31.03.2010;

(ii) Rs.2,59,00,000/- by NEFT payment on 01.12.2010;

(iii) Rs.5,18,00,000/- by NEFT payment on 15.03.2011;

5. Further, it was submitted that the Appellant has completed fabrication of gas compressor, turbine and several other items as per its scope of work

and was ready to dispatch the goods as per the Billing Schedule. It was also submitted that the gas compressor package which was manufactured by

the Appellant was a customized product and was done specific to the Corporate

Debtor's requirement for the Project.

6. The Learned Counsel for the Appellant submitted that they requested the Corporate Debtor in the month of July 2011 to open the Letter of Credit

for the payment of 60% of the Purchase Price (i.e. Rs.15,54,00,000/- plus taxes) which was required to be opened two months prior to the start of

dispatches, the Corporate Debtor had failed to open the Letter of Credit and in the meeting held between the Corporate Debtor and the Appellant on

16.11.2011, the Appellant informed the Corporate Debtor that the recycle gas compressor was ready for dispatch but the Letter of Creditor had not

yet been opened, to which the Corporate Debtor replied to the Appellant that due to the revised project start up schedule, the equipment ordered for

the DHU unit would be under hold and requested the Appellant to hold the dispatch of the ordered compressor until such time a decision was taken by

the Corporate Debtor during April 2012.

7. The Learned Counsel for the Appellant submitted that they had sent a letter to the Corporate Debtor on 21.02.2013 indicating that the Corporate

Debtor had given several commitments to open the Letter of Credit for one and a half years but the Letter of Credit was yet to be opened and

requested the Corporate Debtor for urgent opening of the Letter of Credit. Thereafter, it was submitted that numerous communications were sent by

the Appellant to the Corporate Debtor stating that the material is ready for dispatch and requested the Corporate Debtor to open for the Letter of

Creditor, however all those requests by the Appellant remained to be futile.

8. Thereafter, it is seen that the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor viz. M/s. Nagarjuna Oil Corporation

Limited (NOCL) was initiated by this Tribunal vide order dated 25.09.2017 in TCP/10/IB/2017 and one Mr. V. Nagarajan was appointed as the

Interim Resolution Professional (IRP) and subsequently Mr. S. Rajendran was appointed as the Resolution Professional (RP) of the

Corporate Debtor with effect from 22.09.2017. It was submitted by the Learned Counsel for the Appellant that they have filed the claim before the

RP on 20.01.2018 and the RP has partly admitted the claim of the Appellant. Subsequently, the Corporate Debtor was ordered for Liquidation by this

Tribunal vide order dated 11.12.2018 passed in MA/289/2018 and the Respondent herein was appointed as the Liquidator, who has issued public

announcement to submit the claim forms on or before 10.01.2019. It was submitted by the Learned Counsel for the Appellant that they have submitted the claim before the Liquidator in Form "C" by way of email on 09.01.2019 within the prescribed period for a sum of Rs.15,73,52,709/- comprising of a Principal amount of Rs.9,00,60,000/- and interest for an amount of Rs.6,72,92,709/-. It was submitted that by an e-mail dated 23.02.2019, the Respondent has stated that the claim of the Appellant is still under verification and thereafter the Appellant has received no information about its claim. However, on 28.08.2020, it was stated that the Respondent informed the Appellant for the first time that its claim had been rejected in its entirety and the reason stated by the Respondent was that "Recycle compressor manufactured by the Operational Creditor were not delivered at site and hence not admitted." Thereafter, it is seen that the Appellant has sent an e-mail to the Respondent that they have not received about their rejection of claim prior to 28.08.2020 and that they dispute the rejection of its claim. Aggrieved by the decision of the Respondent in rejecting its claim, the Appellant has filed the present Appeal challenging such rejection made by the Respondent.

9. The Respondent has filed counter and the Learned Counsel for the Respondent submitted that even as per the documents submitted by the Appellant, the total value of the Purchase order is Rs.25.90 Crore and the Respondent has paid a sum of Rs.9.06 Crore to the Appellant and it was submitted that the Appellant was required to deliver the entire goods as per the purchase order on or before 10.06.2011; however they had failed to do so. Further, it was submitted that in spite of collecting the advance amount for the total value of the purchase order, the Appellant themselves have raised invoice only for a value of Rs.18.07 Crore as against the total purchase order value of Rs.25.90 Crore and hence it was submitted that the Appellant has not fulfilled the terms of the Purchase order in spite of collecting a sizable advance amount as per the Purchase order. It was also submitted by the Learned Counsel for the Liquidator that the Appellant is also required to give Performance Bank Guarantee for a sum of Rs.2.59 Crore, two month before the delivery date valid up to 30 days of the guarantee period, which they have failed to give so.

10. The Learned Counsel for the Respondent submitted that as per the terms of the Purchase Order, the Corporate Debtor shall be entitled to

terminate the Purchase order, if any or all of the goods do not reach the place of delivery on the day that the maximum amount of liquidated damage

has been reached. Further, it was also contended that the Corporate Debtor is entitled to liquidated damages in the amount of one percent (1%) of the

Purchase Order price, subject to a maximum of 10% if any or part of the goods do not reach the place of delivery on or before the delivery date

mentioned in the Purchase Order.

11. Further, it was submitted by the Learned Counsel for the Respondent that the Corporate Debtor has paid a massive sum of Rs.9.06 Crore to the

Appellant, for which there is no supply of material being made by the Appellant. It was also submitted that even during the CIRP stage, the Resolution

Professional has stated that the claim amount may be admitted only on fulfillment of the terms of the Purchase order. Hence, it was submitted by the

Learned Counsel for the Respondent that the Appellant is liable to repay the advance amount of Rs.9.06 Crore which is paid to the Appellant by the

Corporate Debtor with atleast 18% interest till the date of payment. Under such circumstances, the Respondent has sought for the dismissal of the

present Appeal.

12. The Appellant has filed rejoinder and it was submitted by the Learned Counsel for the Appellant that the Respondent has raised various grounds in

their counter for the first time which was not stated at the time of rejection of the claim on 28.08.2020 and thus the Respondent cannot seek to justify

its rejection on the Appellant's claim for entirely new reasons. Thus, the Appellant in their rejoinder has sought to contend and reject each and

every defence raised by the Respondent in their counter.

13. Heard the submissions made by the Learned Counsel for both the parties. Before venturing to the merits of the submission made by the Learned

Counsel for the Appellant, it is pertinent to note here that the Scheme in relation to the Corporate Debtor viz. NOCL which has been proposed under

Section 230 of the Companies Act, 2013 read with the attendant provisions of Insolvency and Bankruptcy Code, 2016 was approved by this Tribunal

vide its order dated 18.03.2021 passed in CP/546/CAA/2020. As per the said Scheme proposed by the Scheme proponent viz. M/s. Haldia

Petrochemicals Limited, the Project Assets of the Corporate Debtor stands vested with the Scheme Proponents and as such the Scheme as

sanctioned by this Tribunal in respect of the Corporate Debtor is also binding upon the stakeholders of the Corporate Debtor which also includes the

Appellant herein. Further as per the decision of the Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited âVs- Satish

Kumar Gupta &Ors. in Civil Appeal No. 8766 â 67 of 2019, the successful scheme proponent cannot be suddenly faced with an âundecidedâ

claim, which would amount to an hydra head popping up.

14. Further, eventhough the claim of the Operational Creditor is admitted then as per the waterfall mechanism which has been provided under the

Scheme none of the Operational Creditor would have been paid and only the dues of the Financial Creditors have been settled by the Scheme

proponents. Thus, taking into consideration the aforesaid reasons and the decision of the Supreme Court in the matter of Committee of Creditors of

Essar Steels (supra), the Appeal as filed by the Appellant stands dismissed, however without costs.