

(2023) 05 NCLT CK 0011

In the National Company Law Tribunal

Case No : I.A No. 193 of 2020 In C.P (I.B) No. 710/KB/2017

?Jaiprakash Overseas Finance Limited Vs Techno Fab Manufacturing Limited ?

Date of Decision : 01-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 9, 40, 42
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2023) 05 NCLT CK 0011

Hon'ble Judges : Bidisha Banerjee, Member (J); Balraj Joshi, Member (T)

Bench : Division Bench

Advocate : Anirban Ray, Prantik Garai, Sweta Mukherjee, K. Banerjee, S. Chakraborty, R. Auddy, M. Manot, A. Gooptu, R. Banerjee, A. Khan, P. Choudhary, R. Banerjee

Final Decision : Disposed Of

Judgement

Balraj Joshi, Member (Technical)

1. The Court convened through hybrid mode.
2. This is an application filed by Mr. Abhay Kr. Behuria, Chief general Manager on behalf of Steel Authority of India Limited ('Applicant' or 'Appellant') under Section 42 of the Insolvency and Bankruptcy Code, 2016 ('Code') against Mr. Hrisikesh Dasgupta, Liquidator of Technofab Manufacturing Limited ('Respondent No.1' or 'liquidator') inter alia praying for the following reliefs;
 - a. The claims of the Applicant contained in the letter dated 03 October, 2018 [Annexure – L] of Rs.51.86 crores, is a crystallized claim on account of cost overrun in execution of balance work pursuant to Risk and Cost Tender(s).
 - b. The Order dated 16 January, 2020 by passed by the liquidator rejecting the claim of the Applicant be set aside.
 - c. To declare the purported claim of Technofab Manufacturing Limited ('Corporate debtor') as un-crystallized contractual claim and accordingly, is a separate and independent claim having no bearing on the Risk and Cost claim of the Applicant.

3. Submissions by the Ld. Counsel appearing on behalf of the Applicant submits as follows:

3.1 The Applicant had initiated an open global tender dated 01 November 2010 for installation/ up gradation of conveyor and crushing/ screening buildings (package-2B) for enhancement of production capacity of Bolani Ores Mines to 10 MTPA, Bolani, District - Keonjhar, Odisha. The Corporate Debtor had participated in the tender process and was found to be successful bidder.

3.2 Thereafter, the Applicant awarded a Letter of Acceptance dated 05 December 2011, which was followed by a contract document dated 18 January 2012 and an amendment thereto by an agreement dated 03 August 2012, only to the extent of the price schedule. The effective date of the contract was 04 January 2012. The contract was due to be performed over a period of 24 months, which made 03 January 2014, the date of completion of performance of the contract by the Corporate Debtor.

3.3 The Corporate Debtor has been in breach of the various terms of the Agreement. The Corporate Debtor failed to mobilize the necessary men, equipment and material, which was necessary for the performance of the contract. Upon requests being made from time to time by the Corporate Debtor, the Applicant has without prejudice to its right and contentions extended the period of completion of the contract on five separate occasions by letters dated 20 January 2014, 30 August, 2014, 20 November, 2014, 01 July, 2015 and 02 July, 2016. The last extension was granted by the letter dated 02 July 2016 and this extension made the period of performance of the contract upto 30 June 2017.

3.4 In spite of the fact that the Corporate Debtor was afforded numerous opportunities to perform the contract, it failed to take necessary steps for that purpose. The said delay in performance by the Corporate Debtor coupled with the fact of the non-extension of the performance Bank Guarantee ultimately resulted in the Applicant encashing the Bank Guarantee.

3.5 The Applicant became entitled to compensation for reason of the loss and damage suffered by the Applicant for reason of the breaches on the part of the Corporate Debtor. Accordingly, by a letter (Risk Purchase Notice) dated 22 February 2017, the Applicant recorded that it would conduct risk purchase in terms of the contract dated 18 January 2012 as amended on 03 August 2012. The loss and damage which has been incurred by the Applicant is of a sum of Rs.51.86 Crores.

3.6 The Corporate Debtor had filed an application being Misc. Case No. 3324 of 2017 before the Learned City Civil Court at Calcutta under Section 9 of the Arbitration and Conciliation Act, 1996 which was ultimately dismissed for default on 28 August 2019. It is in the course of that proceeding before the Learned City Civil Court at Calcutta that the Applicant became aware of the presence of the Respondent No. 1.

3.7 The Applicant accordingly by a letter dated 05 July, 2018, submitted its claim before the Interim Resolution professional. The same was rejected by the IRP by a letter dated 23 July, 2018. Being aggrieved by the aforesaid rejection, the Applicant filed an application before this Adjudicating Authority being CA(IB)No.731/KB/.

3.8 In the meantime, the aforesaid company went into liquidation vide order dated 05 September, 2018, passed by this Adjudicating Authority. The Applicant accordingly without prejudice to its rights and contentions in the aforesaid application lodged its claim before the Liquidator being the Respondent no. 1 herein, vide its letter / e-mail dated 03 October, 2018.

3.9 Accordingly, the aforesaid application was disposed of by an order dated 01 November 2018, with a direction upon the liquidator to consider the said claim as per rules. In spite of the order dated 01 November 2018, the respondent no. 1 failed to take into consideration the claims lodged by the Applicant.

3.10 The Applicant being aggrieved by the said inaction on the part of the respondent no. 1, challenged the same before this Adjudicating Authority by way of an application being CA(IB) no. 344/KB/2019. The said application was heard from time to time and finally on 03 January 2020 this Adjudicating Authority was pleased to dispose of the same with directions upon the respondent no. 1 to consider the claim lodged by the Applicant within a period of two weeks from the date of said order.

3.11 The Respondent no. 1 pursuant to the said direction once again rejected the claim of the Applicant by an order dated 16 January 2020 received by the Applicant on 17 January 2020 mechanically, in a complete Arbitrary manner and without any application of mind

4. Submissions by the Ld. Counsel appearing on behalf of the Respondent No.1 submits as follows:

4.1 Vide order dated 05 September, 2018 this Adjudicating Authority had appointed the Respondent No.1 as the Liquidator of the Corporate Debtor.

4.2 The claim of the Applicant has neither been crystallised till date nor has the nature of damages been proved by the Applicant. The nature of damages still continues to be unadjudicated as the Applicant has not proved before any court of law that it had suffered loss which entitles the Applicant to claim damages. Further, it is a settled law that damages or compensations is not to be given for any remote and indirect losses and in estimating the loss or damage arising from a future contract.

4.3 The Applicant has not produced any iota of evidence to show that the Applicant has suffered losses. The Applicant has failed to prove that the Corporate Debtor failed to complete the project within the time stipulated under the contract on account of its own default. There was delay on the part of the Applicant to fulfil its reciprocal obligations under the contract in question; hence,

the Applicant is not entitled to claim any damages.

4.4 The main issue is that whether the Applicant, who committed delay in fulfilling its reciprocal obligations under the contract, is entitled to claim liquidated damages.

4.5 It is not the first time the Applicant has filed an application seeking admission of their claim. The Applicant had also filed an application being CA(IB) No.731/KB/2018 and CA(IB) No.344/KB/2019, under different provisions of the Code. However, this Adjudicating Authority was pleased to dismiss such applications vide its orders dated 01 November, 2019 and 03 January, 2020. Hence, this application is vexatious, malafide and not maintainable in law.

4.6 The CD, along with other consortium of contractors comprising of M/s. SMS Meer GmbH of Germany ('SMS Meer'- consortium leader and contractor), M/s Siemens Limited, M/s Mukand Limited and M/s. Techno Fab Manufacturing Ltd, had participated in a tender floated by Applicant for setting up of Universal Section Mill (Package - 14) under 2.5 MT New Stream Expansion at IISCO Steel Plant, Burnpur, Burdawan, West Bengal ('Consortium').

4.7 With respect to the Contract No.PEDD/EXPB/2007/USM/037, as per clause 8.1 of the Contract, the project was initially to be completed within 24 months from the effective date but the said time period has never been considered to be mandatory in as much as the same was all along subject to extension (clause 42 of the Contract).

4.8 The interplay and intervention of various facts were beyond the control of the Corporate Debtor. As per the contract, the Applicant had several reciprocal obligations to fulfil. The erection fields, 1 to 5 in sequence was not handed over by the Applicant until 2010 i.e., three years of signing the Contract without the erection the work could not be started[Annexure R3].

4.9 The Corporate Debtor has incurred interest loss on the retention money for 9 years and above and has not been compensated for the additional work that they have performed for the Applicant. In various minutes of meetings, the Applicant acknowledged the delay [Annexure - R5]. Moreover, due to blockage of fund, the Corporate Debtor could not execute other orders which were in their hands during that period.

4.10 The consortium, including the Corporate Debtor from time to time sought extension of time for completing the project. The Applicant was fully aware that the project could not be completed due to reasons beyond the Corporate Debtor's control. It is pertinent to mention that the Applicant vide letter dated 04 April, 2014 extended the time for completion without imposition of liquidated damages[Annexure - R6].

4.11 Despite all the hurdles faced by the Corporate Debtor, the Corporate Debtor completed the work and a commissioning certificate was also issued by the Applicant. The Applicant has duly accepted the work and has never raised an

issued with regard to the quality and/or quantity of the work carried out by the Corporate Debtor. Time and again the Corporate Debtor raised invoices upon the Applicant while executing the work and no objection was raised by the Applicant.

4.12 SMS Meer, the consortium leader requested the Applicant for release of payments of the consortium towards additional work, extra claim on account of operation and maintenance job and commission charges. In spite of repeated assurances, such payments were never released in favour of the consortium members including the Corporate Debtor.

4.13 The dues outstanding against the bills raised is Rs.20,85,285/- and the money receivable against the Bank Guarantee, as specified in clause 13.1.5 of the Contract id Rs.6,04,45,341/- due and payable by the Applicant to the Corporate Debtor. The Applicant had illegally and unlawfully encashed the Bank Guarantee provided by the Corporate Debtor.

4.14 Moreover, the Corporate Debtor had to carry out several extra works under the project in question which was not under the scope of the work of the Corporate Debtor as per the contract. The Corporate Debtor has submitted a delay analysis which shows that the delay was for reasons attributable to the Applicant [Annexure – R18]. The plant was already put into commercial operation since 2015 and is running successfully and a commissioning certificate with regard to BHS and BHMS was also issued by the Applicant dated 29 March, 2018. [Annexure – R19].

4.15 After the Corporate Debtor wrote to the Applicant about the pending payments under the contract in question by letter. The Applicant for the first time, as an afterthought, decided to impose liquidated damages for no fault of the Corporate Debtor as delay. As on date, barring losses suffered by the Corporate Debtor, the Corporate Debtor has a claim of Rs.24,29,16,863.00 and Rs.51,22,61,531.00 against the Applicant under the contract.

4.16 In above mentioned facts and circumstances, the Corporate Debtor was suffering from financial distress and one of the main reason was due to non - payment of bills of the Corporate Debtor. This in turn led to commencement of CIRP initiated by one of the Financial Creditor of the Corporate Debtor. Further, on perusal of the records of the Company it transpired that certain amounts was payable by SAIL as per contract No. PEDD/EXPN-B/2007/USM/037 dated 15 November, 2007 and PEDD/EXPN-B/BOF(SHS)/2009/92 dated 04 March, 2009 and as such the Respondent No 1 herein vide letters dated 30 March, 2018 and 02 April, 2018 demanded payment of the outstanding dues.

4.17 The Applicant, fraudulently and vexatious, vide reply dated 30 April, 2018, wrongly stated that the scope of work of the Corporate Debtor has not concluded, despite being aware of the commissioning certificates awarded to the Corporate Debtor by SAIL itself, and further stated that the claims of the Corporate Debtor are being examined.

Analysis and Findings

5. The applicant has claimed an amount of Rs.51.86 crores from the liquidator on account of a work that was done at the risk and cost of the corporate debtor which was presumably provided within the realm of the original contract. It was brought out by the Ld. Counsel appearing for the applicant that Steel Authority of India Ltd. (SAIL) had given certain contracts to the Corporate Debtor which it failed to perform and considering the failure of the corporate debtor, the applicant viz. SAIL had to get these works executed on their own but at the risk and cost of the Corporate Debtor.

6. After having coming to know that Corporate Debtor has been put to CIRP, the applicant viz. SAIL has preferred its claim. The claim was rejected by the RP, but before the matter could be pursued further, the CD was put under liquidation. The claim was again raised by the applicant before the liquidator, who rejected the same and hence this application.

7. Ld. Counsel appearing for the liquidator has submitted that a detailed reasoned reply to the claim of the applicant was given by him in which the reasons for rejections have been duly elaborated. He also mentioned that to gauge the extent of reasoning given by him, suffice it to say that the answers setting out details reasons for rejection of the claim runs in two volumes. As such the liquidator has complied with the requirements of section 40 of the Code. It was also submitted by the Ld. Counsel appearing for the applicant that matter has also been referred to arbitration which is yet to be culminated.

8. We have heard the rival contentions and observe that there were several allegations and counter-allegations by the parties against each other during the course of execution of the work, there by holding each other responsible for the lack of progress of the work. These differences resulted in the impeded progress of work and consequently the Operational Creditor decided to get the work done himself, through other agencies at the risk and cost of the Corporate Debtor. Since the issue of getting the work done by a Principal through another agency due to the non-performance of Corporate Debtor, is an issue which has roots in the performance of a contract, this inter-alia envisages analysing the chronology of the events and examination of rights and duties of each of the parties as per the contract, in that conspectus.

9. Be that as it may, as has been contended by the liquidator, that the claim of the applicant has not been crystallised and under such circumstances the liquidator has rejected the claim of the applicant. It is also contended that the matter is before an arbitrator, who would naturally go into these questions. Thus, it is correct to conclude that the claim if any, has not yet been crystallised. While noting the same we have no inhibition in holding that since the liquidation like the insolvency resolution, is a time bound process and with each passing day, there is every likelihood of the value of the assets getting eroded, as such we cannot put a hold on to the process as the same would go against the well-

defined and by now well-accepted precepts of the Code regarding maximisation of the value of the assets.

10. Thus the present matter cannot be adjudicated in a summary proceeding like IBC and the remedy of the applicant lies elsewhere and not with this Adjudicating Authority.

11. In view of the above, this application is hereby rejected. However, the applicant is free to resort to other remedies that may be available to him under any other law.

12. In view of the above IA No. 193 of 2020 in C.P (I.B) No. 710/KB/2017 stands rejected and the IA is accordingly disposed of.

13. Files be consigned to records.