(2020) 07 NCLT CK 0061

In the National Company Law Tribunal

Case No : Interlocutory Appeal No. 696 Of 2019 In Company Petition (IB) No. 23/7/Hdb Of 2018

Navayuga Engineering Pvt. Ltd — APPELLANT

Vs

Devendra Prasad, Liquidator Of East Coast Energy Pvt. Ltd — RESPONDENT

Date of Decision : 30-07-2020

Acts Referred:
Insolvency And Bankruptcy Code, 2016 — Section 7, 38, 39, 42, 60(5)(a), 60(5)(b)

Citation : (2020) 07 NCLT CK 0061

Hon'ble Judges : K. Anantha Padmanabha Swamy, J;Dr. Binod Kumar Sinha, Member (Technical)

Bench : Division Bench

Advocate : Damalapati Srinivas, Vimal Vasireddy, D. Narendar Naik, Vikram C. Puttapaga, Deepa Yenna, Srinivas Goud

Final Decision : Disposed Of

Judgement

K. Anantha Padmanabha Swamy, J

1. Under consideration is an Interlocutory Application filed by M/s. Navayuga Engineering Private Limited (in short "Appellant/Operational Creditor") under section 42 read with 60(5)(a) & (b) of the Insolvency and Bankruptcy Code, 2016 (in short IB Code, 2016), against the above said Respondent/Liquidator, inter-alia seeking directions from this Adjudicating Authority to set aside the illegal and arbitrary decision taken by the liquidator as communicated by way of email dated 28.06.2019 rejecting a part of the claim submitted by the Appellant against M/s. East Coast Energy Pvt. Ltd., (the Corporate Debtor herein) amounting to Rs. 24,01,63,511/- towards idle charges as a part of termination payment due under the contract between the parties and to direct the Liquidator to admit the claim of the Appellant in its entirety.

2. The brief facts of the case as submitted by Appellant are as follows:

2.1. That this Adjudicating Authority admitted the Company Application filed under section 7 of the IB Code, 2016 vide its order dated 03.04.2018 in CP (IB) No. 23/7/HDB/2018 for initiating the Corporate. Insolvency Resolution Process (CIRP) against the Corporate Debtor (M/s. East Coast Energy Pvt. Ltd.) and appointed Mr. Devendra Prasad as Interim Resolution Professional (IRP) who was later confirmed as the Resolution Professional (RP).

2.2. That since no resolution plan was forthcoming for the Corporate Debtor, Financial Creditor (PFC) filed an application before this Adjudicating Authority seeking liquidation of the Corporate Debtor. This Adjudicating Authority vide its order dated 22.04.2019, ordered for liquidation and appointed Respondent herein as a Liquidator in the matter of Corporate Debtor i.e., M/s. East Coast Energy Private Limited.

2.3. That the Appellant was appointed by Corporate Debtor as an EPC Contractor to execute works for construction of a 1320 MW (2 x 660 MW) coal based thermal power project in Srikakulam District in the State of Andhra Pradesh for a total contract price of Rs. 751 Crores vide Agreement for Civil and Construction Works Contract dated 30.01.2010. Later on, Amendment Agreement was entered between Appellant and Corporate Debtor on 04.10.2013 being the Amendment Agreement for Civil and Construction Works dated 04.10.2013 bearing Contract No. ECEL/BTPP/NEC/C&C/011 whereby the Contract price was revised to Rs. 592,66,00,000/- and the Performance Retention provided in Appendix B of the Contract was reduced to 5% from 10% of running payments.

2.4. That from time to time the Progressive Payment Certificates (PPCs) were issued by Appellant for the works completed in terms of the Contract and were paid by Corporate Debtor. However, under PPC No. 46 issued by Appellant for a net amount of Rs. 14,60,09,776/-, Corporate Debtor released only part payment of Rs. 12,51,46,356/- and gave oral assurance that the remaining payment will be made at the earliest. 2.5. That the Appellant thereafter raised the following PPCs for net amounts detailed herein below, which PPCs remain unpaid (along with the unpaid amount under the PPC No. 46 supra):

2.6. That as per clause 4.6 of the Contract 'any amount' owed to either party which is not paid by the 'owing party' within 30 days after the date 'the amount is due' under the Contract, shall accrue interest at the rate of 12% per annum each day till such amount is paid.

2.7. That around September 2015, the Corporate Debtor suspended all works at the Project site for an indefinite period. While the Appellant completed the work which had commenced prior to suspension and raised PPCs as mentioned above, the sudden halt of work caused severe financial strain and outlays to Appellant due to the labour, material and machinery lying idle at the Project site.

2.8. That further, the Corporate Debtor repeatedly failed to make payments of the amounts due under the PPCs raised by Appellant which caused increasing financial stress on Appellant as it was in turn not able to clear payments of its staff, workers, suppliers, sub-contractors et al. The liabilities of Appellant increased manifold due to the default in payment by the Corporate Debtor and due to the sudden halt of work on the project.

2.9. That the Appellant wrote several letters to the Corporate Debtor highlighting the financial difficulties being caused to Appellant due to non-payment of outstanding PPCs and the accruing idle charges. Appellant consistently wrote letters on 13.08.2015, 18.09.2015, 12.12.2015 and 25.01.2016 along with several reminder emails dated 19.08.2015, 15.10.2015 and 23.01.2016 requesting the Corporate Debtor to release the outstanding payments in terms of the Contract. Though the Corporate Debtor did not challenge/object to the PPCs or the above said reminder letters/emails received from Appellant, it however, did not respond to a single letter or email and thus defaulted in making payments.

2.10. That aggrieved by such breach of terms of the contract by Corporate Debtor, the Appellant herein issued a contractual notice dated 26.01.2016 under clause 15.2 of the Contract claiming payment of all outstanding PPCs and idle charges. Having not received any response from East Coast after the expiry of 30 days period provided under the Contract, the Appellant issued the second contractual notice in terms of the provisions of the contract, on 27.02.2016 claiming payments of all pending PPC due and idle charges at the earliest.

2.11. That upon receipt of the said notices, the Corporate Debtor held a meeting with Appellant on 06.04.2016 where, the Corporate Debtor informed the Appellant that the lenders have been intimated about the contractual notices issued by Appellant and assured Appellant that best efforts are being made to have the funds released from the lenders to clear all outstanding dues.

2.12. That both the lenders and the Corporate Debtor were duly informed about the Appellant's notice under clause 15.2 seeking to terminate the contract on account of defaults by the Corporate Debtor. However, neither the lenders nor the Corporate Debtor cured the default or challenged the termination or the outstanding dues and thus, in terms of clause 15.2, the contract was terminated 60 days after 06.04.2016 i.e., on 04.06.2016.

2.13. That as per the contract, upon termination of the same by the contractor/ Appellant, certain payments in addition to the outstanding PPCs and interest accrued thereon was due and payable to the Appellant from the Corporate Debtor. These payments included Retention Monies amounting to Rs. 56,45,27,768/- and termination payments including withheld amounts in the sum of Rs. 2,20,32,082/- and idling charges amounting to Rs. 24,01,63,511/-. Out of the aforesaid, the present Appeal only pertains to the 'idling charges' as claim to said payment has been rejected by the Liquidator.

2.14. That the Respondent/Liquidator sent an email on 28:06.2019 communicating his decision to admit the claim submitted by the Appellant except to the extent of Rs. 24,01,63,511/- claimed towards idling charges forming part of the Termination payment as mentioned above.

2.15. That the Appellant sought 2-3 weeks' time by way of email dated 01.07.2019 to show that the rejection is wrongful as the Rejected claim is payable in terms of the contract and urged the Respondent to reconsider his decision. However, instead of giving an opportunity to the Appellant to explain its position, the Respondent/Liquidator wrote an email dated 17.07.2019 apprising the Appellant of section 39 and 42 of the IB Code, 2016 and implying thereby that he was not J open to revisit his decision.

Reiterating the above, the counsel for the Appellant prayed to allow the instant Application.

3. The counsel for the Respondent/Liquidator filed counter stating as under:-

3.1 That there are no reasonable costs (or for that matter idle charges) payable under the construction contract dated 30.01.2010 executed between the Corporate Debtor and Navayuga Engineering. Company Pvt. Ltd. (Operational Creditor/Applicant herein), since Operational Creditor had never issued any notice of termination and failed to adhere to the process under Article 15.2 of the Contract, specified for termination of the Contract and did not submit any proof for the occurrence of the idle charges as a reimbursement cost to the Corporate Debtor as mandated under Article 15.7.1 of the Contract.

3.2 That the termination of the Contract was not proper and the charge including idle charges arising from such defective termination cannot be considered as termination charges under Article 15.7 of the Contract.

3.3 That the charges which have been claimed by Operational Creditor originate because of the machines and labour were lying idle and may only be claimed as a loss of revenue or a cost connected to interruption of operation i.e., consequential damage and which is governed under Article 9 of the Contract and not under Article 15.7.

3.4 That Article 9 of the Contract excludes the liability of a party from all consequential damages like loss of revenue and cost due to interruption of works under the Contract and Operational Creditor and Corporate Debtor have expressly agreed to such terms. Therefore, as per Article 9.2 read with Article 9.6 of the Contract, it is clear that Operational Creditor and the Corporate Debtor had agreed mutually not to impose liability on the other party for any consequential damages and hence, the Corporate Debtor is not liable for the idle charges incurred by Operational Creditor, given that the same are in the nature of consequential damages.

3.5 That Idle charges are not 'claims' under the Code. The Code is not a mechanism for the recovery of damages, only in the case where the damages are adjudicated upon by any competent authority and there's subsequent failure of payment of the same only when it amounts to a cause of action under the Code. In this regard, reliance may be placed upon the Hon'ble Supreme court judgment in Union of India vs. Raman Iron Foundry (AIR 1974 SC 1265) wherein it was held that "9. ...now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority...."

3.6 That the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, as amended from time to time ('Liquidation Regulations') require that the Operational Creditor submits not only a contract for the supply of goods and services with the Corporate Debtor, but also required to demonstrate the 'debt due' to him by way of invoices demanding payment for the goods and services supplied and the financial accounts recording such debt being due.

3.7 That in the Form-C, claim was submitted by Operational Creditor for a total amount of Rs. 96,36,10,211/- as outstanding payments and termination payments, on 22.05.2019 i.e., the liquidation commencement date. The Liquidator via his email dated 28.06.2019 verified and accepted the claim to the extent of Rs. 72,34,46,700/- in accordance with the Code and rejected the claim relating to idle charges amounting to Rs. 24,01,63,513/-, since the Operational Creditor did not provide any invoice in relation to the idle charges amounting to Rs. 24,01,63,513/- nor submitted its financial accounts giving the reason; I that idle charge are 'uncertain revenues' and claimed that these idle charges are not required to be recorded in the financial statement of Operational Creditor.

Reiterating the above contentions, the counsel for the Respondent/Liquidator prayed to reject the instant Application.

4. Heard both the sides and perused the records.

5. The claim of the applicant has arisen out of the contract and amended contract entered into between the applicant and the Corporate Debtor on 30.01.2010 and 4.10.2013 respectively. It is also a fact on record that the amount claimed relates to the period between 01.06.2015 and 30.11.2015 covered under Progressive Payment Certificates (PPCs) 46 to 51. It is also not in dispute that the applicant herein has written several letters dated 13.8.2015, 18.9.2015, 12.12.2015 and 25.01.2016 and reminder emails dated 19.8.2015, 15.10.2015 and 23.01.2016 to the Corporate Debtor calling for payment of outstanding amounts as per the contract - between them. Thereafter, since no reply was received to any of the letters or reminder emails, it appears that the Applicant herein issued termination notices dated 26.01.2016 and 27.02.2016 intending to terminate the contract that existed between the applicant and the Corporate Debtor.

6. However, it was only on 06.04.2016, the Corporate Debtor had responded to the Applicant herein with regard to the payment of outstanding amounts. But even thereafter since nothing concrete materialized, the contract between the applicant and the corporate debtor came to be terminated on 04.06.2016 as per Article 15.2 of the Contract dealing with termination due to non payment of dues

by the owner, i.e., the Corporate Debtor herein.

7. It is important to note here that upon termination of contract in terms of Article 15.2, the Applicant/Contractor was entitled to receive (a) all payments relating to works completed through to the date of termination and (b) the termination payment as stipulated in Article 15.5.1 read with Article 15.7. In terms of Article 15.7, the Corporate Debtor was obliged to make the following payments to the Contractor/applicant herein:

15.7 Payment Upon Termination. Upon termination of all or part of the Works pursuant to Articles 15.1 or 15.2 hereof or by CCW-1 Contractor pursuant to Article 15.4 hereof, CCW-1 Contractor shall be entitled to receive payment within ten days of Owner's verification of such amount, in an amount by which (x) the sum of (a) that portion of the full Contract Price for all aspects of the Works properly completed by the CCW-1 Contractor through the date notice of such termination is received by CCW-1 Contractor, and (b) CCW-1 Contractor's reasonable costs occasioned by such termination and not previously paid for, including but not limited to (1)(i) costs incurred by CCW-1 Contractor as a direct result of such termination, including expenses incurred pursuant to Article 15.5.2 hereof, (ii) costs of CCW-1 Contractor's demobilization expenses and (iii) vendor cancellation charges (including, the cost of materials and Works already ordered) through the date of receipt of notice of termination that could not otherwise be avoided by CCW-1 Contractor exceeds (y) such amounts as the CCW-1 Contractor has already received on account of Works performed (the "Termination Payment"); provided that CCW-1 Contractor shall be entitled to submit a progress payment invoice for and receive payment for, all Works performed through the date of receipt of such notice of termination, which invoice shall be treated as a normal progress payment invoice pursuant to Article 4.2.1 hereof. If, at the date of such termination, CCW-1 Contractor has purchased, prepared, or fabricated off the Facility Site any item for subsequent incorporation at the Facility Site, and if CCW-1 Contractor delivers such item or that portion of such item prepared or fabricated to the Facility Site or to such other place as the Owner shall reasonably direct, the price of such item and the reasonable costs of delivery thereof shall be included in the Termination Payment. CCW-1 Contractor's right to the Termination Payment is subject to the condition precedent that CCW-1 Contractor shall execute and deliver all such papers as Owner may reasonably require for the purpose of assigning to and vesting in Owner all rights, title and interests of CCW-1 Contractor in and to all Subcontracts relating to the Facility to the extent provided for in Article 15.5.2 hereof. This Section 15.7 expressly survives the termination of the Agreement.

8. Thus the argument of the respondent regarding applicability of Article 9 instead of Article 15 does not hold any water. In fact, the claim made by the Applicant is not for any damages but of the cost incurred by the applicant due to sudden stoppage of work, non-payment of dues as per the PPCs referred to supra and ultimate termination of the Contract between parties after proper

notice as stipulated in the Contract itself.

9. It is further important to note that in the Principal Contract Agreement entered into between the parties, there is a specific Article 20 for Dispute Resolution. A reference to this Article reveals that the parties have agreed to first employ informal dispute resolution methods failing which Arbitration was to be resorted to.

10. It is a matter of record that the order of admission of the Corporate Debtor for CIRP was passed on 03.04.2018 and, subsequently, order of Liquidation was passed vide order dated 22.04.2019. However, in between the last PPC raised and the date of admission of CIRP (i.e. December, 2015 to March, 2018) the corporate debtor has neither disputed nor whispered anything contrary to the demand raised by the Applicant herein including the claim of 'idle charges'. From the records, it is also observed that the Corporate Debtor had not, at any point of time during the period December, 2015 to March, 2018, objected to the termination of Contract on 04.06.2016 by the applicant herein or raised any objection that such termination was not proper or was not as per the terms of the Contract.

11. Further, the respondent/Liquidator had not offered a chance to the applicant herein to substantiate the claim made by it, particularly, with regard to the 'idle charges' that has been rejected by him. Section 39 of IBC, 2016, imposes a mandate on the liquidator to verify the claims submitted before him:

Section 39 -- Verification of claims

(1) The liquidator shall verify the claims submitted under section 38 within such time as specified by the Board.

(2) The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim.

12. The liquidator ought to have offered an opportunity to the applicant herein to produce enough documentary evidence to verify the claim preferred by the applicant herein. Instead, the liquidator has proceeded to interpret the nature of the claim made under 'idle charges' and classified it as 'consequential damages' under Article 9 of the contract between the parties and not part of Cost incurred by the Applicant under Article 15.7 and took a stand that no liability arises for payment of 'consequential damages' in terms of Article 9.2 and 9.6 of the Contract.

13. In the absence of any material to show that the Corporate Debtor during the period between the date on which the last PPC was raised and the date of admission of CIRP, had either disputed or objected to the amounts claimed including the "idle charges" as part of termination payments under Article 15.7 or opted for any other legal recourse available against such claim, the Liquidator ought not to have rejected the claim under the caption 'idle; charges' on the

basis of his own interpretation of the such claim to be of nature of 'consequential damages'.

14. Further, the stand of the respondent/Liquidator that there was no invoice raised by the applicant herein with regard to the 'idle charges', this Adjudicating Authority observes that invoices could be raised only with regard to the work done in terms of the contract and that claiming of interest and other costs/ charges on the outstanding balances would be based only on the terms of the contract entered into between the parties.

15. In view of the foregoing discussions, this Adjudicating Authority holds that the instant application deserves to be allowed and accordingly, the application is allowed. Consequently, the liquidator is directed to include the amounts claimed under the head 'idle charges' to the admitted claim of the applicant.

16. Accordingly, instant Application bearing IA No. 696 of 2019 stands disposed.

