

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

TA (AT) No.207/2021

Company Appeal (AT) (INS) No. 1353 of 2019

**(Arising out of the 'Impugned Order' dated 15.10.2019 in
IA No.204/2018 in IA No.56/2019 in CP(IB) No.111/7/HDB/2017, passed by
the 'Adjudicating Authority', (National Company Law Tribunal',
Hyderabad Bench)**

In the matter of:

M/s. FLSmidth Private Limited

FLSmidth House

34, Egatoor, Kelambakkam

Rajiv Gandhi Salai (OMR)

Chennai – 603 103

Tamilnadu represented by its

Authorised Signatory & Director

Mr. Sivasubramanian Natarajan

.... Appellant / Operational Creditor

v.

Lanco Infratech Ltd.,

Represented by its Liquidator

Ms. Anuradha Bisani,

Lanco House,

EPC Division, Plot No.397,

Udyog Vihar, Phase 3

Gurgaon - 122 016.

.... Respondent / Corporate Debtor

Present:

For Appellant : Mr. T. Ravichandran, Advocate

For Respondent : Ms. Anuradha Bisani, Liquidator for R1
For M/s. Shardul Amarchand Mangaldas & Co.

JUDGMENT
(Hybrid Mode)

[Per : Jatindranath Swain, Member (Technical)]

1. The instant appeal has been filed under section 61 of the Insolvency and Bankruptcy Code, 2016, challenging the Impugned Order of the Adjudicating Authority / National Company Law Tribunal, Hyderabad Bench dated 15.10.2019 filed in IA No. 204/2018 and IA No. 56/2019 under section 60(5) of Insolvency and Bankruptcy Code, 2016.

Brief Facts of the case:

2. Pursuant to an application filed by the financial creditor under section 7 of IBC, Corporate Insolvency Resolution Process (CIRP) proceedings were initiated against the Corporate Debtor (CD), Lanco Infratech Ltd. and the same was admitted on 07.08.2017 and the Respondent herein was appointed as the Resolution Professional (RP). On an application filed by the Resolution Professional (RP), the liquidation proceedings were initiated against the said CD and the Erstwhile Respondent Mr. Savan Godiawala was appointed by the Adjudicating Authority (AA), that is, NCLT, Hyderabad.
3. The Appellant herein, a company incorporated under Companies Act, 1956 is an engineering company engaged in supplying complete engineering solutions and products and the associated maintenance and support services.

4. This being so, the Corporate Debtor (CD) issued a purchase order on the Appellant for supply of certain systems including pipe conveyor system, firefighting system, and associated spares and accessories inclusive of design, engineering, manufacturing, testing, packing and forwarding, delivery and commissioning spares as applicable for external coal handling plant as per the technical specification of the CD and also awarded a work order for erection, supervision, commissioning and conducting of performance guarantee test of the said systems for a total value of Rs. 95.17 crore.
5. While the Appellant was engaged in executing the contract the CD did not open an irrevocable letter of credit equivalent to Rs. 73.602 crores, did not take delivery of supplies made ready and did not issue clearance for material dispatch of the manufactured items under various pretexts.
6. Meanwhile the CD was put under CIRP and the Appellant filed a claim before the Insolvency Resolution Professional (IRP) for a sum of Rs. 71.09 crore by filing Form-B on 21.08.2017. The same was examined by the IRP and he confirmed that a sum of Rs.13.47 crore is payable and asked the Appellant to clarify the difference of Rs. 57.65 crore with sufficient supporting documents to corroborate the same. This being so, the claim was later rejected by RP which was challenged by the Appellant before AA / NCLT, Hyderabad in I.A. No.204/2018. While

the said IA was pending, the CD went into liquidation as per orders of AA and the RP was appointed as the liquidator. Pursuant to the public announcement made by the Respondent as the Liquidator, the Appellant herein submitted a claim for sum of Rs. 31.71 crores in Form-C on 26.09.2018. The said claim was rejected by the Respondent vide his email dated 12.12.2018. Challenging the rejection, the Appellant filed an appeal under section 42 of IBC and the same was numbered as I.A. No.56/2019.

7. Both the IAs were heard by AA/ NCLT, Hyderabad and a common order was passed on 15.10.2019 dismissing both the applications.

Submissions by the Appellant

8. The Appellant states that the Respondent / CD, did not perform its part of the contract from its inception and did not establish the letters of credit as contemplated; further the CD did not take delivery of the materials made ready for dispatch at the Appellant's vendors' facilities and did not issue Material Dispatch Clearance Certificate to the Appellant for making dispatches under the purchase order even though the Appellant did not commit any breach of contract. Ultimately because of non-performance of CD, the end user TANGEDCO cancelled the contract. However, because of the contractual obligations and because of the works done pursuant to the work order given by CD for which payments

became due from the CD, the Appellant became an Operational Creditor (OC) to CD.

9. When the CD was moved into CIRP, the Appellant preferred a claim of Rs. 71.09 crore to RP. The RP replied to him admitting dues of Rs.13.47 crore as per the 'Books of records of CD' and asking him to justify the balance claim of Rs.57.65 crore with sufficient supporting documents to corroborate the same. Thus, this is a categorical admission on part of the Respondent that CD owes at least Rs. 13.47 crore to the Appellant. But this was later repudiated by the Respondent in the role of RP and later in the role of liquidator and instead, the Respondent / Liquidator issued a reply stating that a sum of Rs.1.51 crore was due and payable by the Appellant to the CD. It is the contention of the Appellant that after having accepted the claim in part, it is not open to the Respondent to reject the claim later and that he has failed in his duty as liquidator.
10. The Appellant further contends that the AA has erred by;

- a. overlooking the initial acknowledgement of the RP of the dues to the tune of Rs.13.47 crore, payable to the Appellant and by merely accepting the statement of the Respondent / Liquidator that the dues are disputed and there are claims and counter claims and, on that basis rejecting the application of the Appellant,

- b. not considering the fact that the Appellant had performed its obligations under the Contract and the CD cannot walk away from its obligations of payment for the work done,
- c. coming to a conclusion of rejection of application made by the Appellant by observing that the Liquidator cannot decide on the dues to the Appellant / OC when claims and counter claims are involved and that dispute if any between the CD and the OC has to be settled by the competent Civil Court without assigning any reason, even though power has been conferred on the AA under section 42 of IBC to adjudicate on the same.

11. On the above grounds the Appellant prays the Tribunal to set aside the orders of AA / NCLT, Hyderabad and to order fresh assessment of the claim of the Appellant.

Submissions by the Respondent:

12. The Respondent states that the Appellant first filed a claim of Rs. 71.09 crores before RP. The RP verified the claim and determined that in fact an amount of Rs.1.51 crore, is payable by the Appellant and therefore rejected the claim against which, the Appellant has filed IA No. 204/2018. The Respondent states, that there is no contradiction between earlier letter sent acknowledging a due of Rs.13.47 crore and this

rejection because the former was based on available materials and the latter was based on verification of all records of CD.

13. The Respondent has stated that the Liquidator has acted in accordance with the Code and IBC (Liquidation process) Regulations, 2016, in form of consolidation of claims, verification of claims and admission / rejection of claims without any lapse. In view of the provisions of the said Regulations, Liquidator is required to only verify the claims based on the information available and does not sit in adjudication of the disputes which may be pending between the CD and the OC and that adjudication of a dispute is not within the scope and ambit of the powers of the Liquidator. Accordingly, the new Liquidator would only be able to admit such claims as are borne out by the terms of contract entered into between the CD and the OC, or based on a statutory obligation or as reflected in a decree of a Court or Tribunal. In this case the claim of the Appellant is based on non-performance of its part by the CD and therefore the claim for damages would first need to be adjudicated upon by a Civil Court or Arbitrator for the 'Debt' to even come into existence. The new Liquidator has cited the decision of Hon'ble Supreme Court in the case of Union of India v Raman Iron Foundry AIR 1974 SC 1265, wherein, it has been held that *"it is only when a claim for damages is adjudicated upon by a civil court or an arbitrator and the breach of contract is established and the amount of damages ascertained and*

decreed that a debt due and payable comes into existence; till then it is nothing more than mere right to sue for damages...”. The Respondent contends that she has been guided by this principle and duly conducted the process of consolidation, verification and admission / rejection of claims.

14. The new Liquidator has further stated, that she has not allowed the claims made against the items ‘goods ready for dispatch but not actually delivered’, ‘claim against work in progress’, claim against goods under manufacturing’, ‘GST when no tax invoice issued’ and ‘interest’, as there is no invoice or any other document to establish liability on part of CD as on 27.08.2018. She has stated that in the absence of invoices / dispatch documents existing in the records of CD, the claims of Appellant could not be substantiated. Moreover, strictly as per the terms and conditions of the Purchase Order, no amount was found to be payable by the Respondent. She has further stated that the email informing the Appellant that an amount of Rs.13.47 crore was showing as due to the Appellant does in no manner communicate the determination made by the RP on the claim submitted by the Appellant as the job of RP is not to simply rely on the books of the CD to determine the claims and that, had that been the case the entire exercise of submission and subsequent verification of claims would not be required at all.

15. In her further submissions she has stated that the Corporate Debtor (CD) has been sold as a Going Concern in auction on as is where is basis in form of an Acquisition Plan and the Plan has been approved by AA in its order dated 26.09.2022 in IA561/2022 of CP(IB)No.111/7/HDB/20217. Accordingly, the Board of CD has been reconstituted and she as Liquidator has no powers to entertain any claim received at this point of time. Hence the present appeal is a futile exercise with the aim to set off the receivables against the payables and that is why the appellant has not made the Acquirer, a necessary party.

16. Finally, the Respondent cites the order passed by Hon'ble Supreme Court in the matter of Arun Kumar Jagatramka Vs. Jindal Steel and Power Ltd. & Anr., in Civil Appeal No. 9664 of 2019 and states that the doctrine of 'clean slate' is applicable to this case, also.

Analysis & Findings

17. It is the Appellant's case that the CD having awarded the purchase order and the work order failed to honor its obligations and therefore, the Appellant could not get the expenditure incurred by it on these accounts to the tune of Rs.31.71 crore from the CD and therefore, it should be considered a debt due to be repaid by the CD and that the RP having admitted an amount of Rs.13.47 crore, payable by CD, to the Appellant, later changed his position to Rs.1.51 crore, as receivable from the

Appellant to CD in contravention of the provisions of Insolvency and Bankruptcy Code, 2016 and the Liquidation Regulations. It is also the grievance of the Appellant that the Liquidator did not adjudicate the claims contrary to the provisions contained in sections 38,39 & 40 of Insolvency and Bankruptcy Code, 2016.

18. The Respondent / Liquidator fairly addresses these points by stating that the items of claim not admitted by her as 'due payable' are those for which no documents such as invoice / dispatch documents were available in the records of CD and which were not also provided by the Appellant. She has also fairly answered the point by stating that the disallowed claims could be due to non-performance of CD which will require adjudication by a competent Civil Court / Arbitrator, before they can be translated into 'Dues' within the framework of IBC and has cited the relevant law in form of a decision by the Hon'ble Apex Court to support her assertion. It is also seen that the Respondent / Liquidator has given sufficient reasons for disallowing the claim of the Appellant in her letter to the Appellant.

19. It is also seen that the AA / NCLT, Hyderabad have dealt on these issues in detail and given succinct reasons as to why they have accepted the submission and reasoning of the Liquidator as to why she has rejected the claim of the Appellant. They have rightly held that when claim and

counter claims are involved Liquidator cannot decide the same and therefore the Liquidator rightly rejected the claim.

20. In view of the above, it is concluded by this 'Tribunal', that the instant Appeal in TA (AT) No. 207/2021 (CA (AT) (INS) No.1353/2019) is devoid of merits and deserves to be dismissed and is accordingly dismissed with liberty given to the Appellant to pursue his remedies in appropriate forums. No costs.

[Justice M. Venugopal]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)



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03.05.2024

VG/TM