

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

INTERLOCUTORY APPLICATION NO. 3453 OF 2022

IN

COMPANY PETITION (IB) NO. 1374 (MB)/2017

*Application u/s 60(5) read with Sections 35(1)(b), (d)
& (n) of the Insolvency and Bankruptcy Code, 2016
read with Rule 11 of the National Company Law
Tribunal Rules, 2016.*

In the matter of:

Vineet K. Chaudhary

...Liquidator/Applicant

Versus

NTPC Limited

...Respondent

In the matter between

Kohinoor Crane Service

...Operational Creditor

v/s.

Petron Engineering Construction Limited

...Corporate Debtor

Order pronounced on 23.07.2024.

Coram:

Shri. Kuldip Kumar Kareer :

Member Judicial.

Shri. Anil Raj Chellan :

Member Technical.

Appearances (Hearing in Hybrid Mode)

For the Applicant: Counsel Mr. Soayib Qureshi appeared through V-C.

For the Respondent: Counsel Pulkitesh Dutt Tiwari.

ORDER

Per: Coram

1. This is an application filed by the Applicant/Liquidator under Section 60(5) read with Section 35(1)(b), (d) & (n) of the Insolvency and Bankruptcy Code, 2016 ('IB Code') read with Rule 11 of the NCLT Rules, 2016 seeking necessary directions from the Adjudicating Authority to direct the Respondent to release outstanding amount of Rs. 22,72,62,756/- (Rupees Twenty-Two Crores, Seventy-Two Lakhs, Sixty-Two Thousand, Seven Hundred and Fifty-Six only) along with interest at the rate of 18% p.a. which is due and payable by the Respondent in terms of Work Orders dated 12.07.2013, issued by the Respondent in respect of Kudgi, Super Thermal Power Station (STPP) at Kudgi Village, District: Bijapur, State: Karnataka.
2. The Facts of the case as pleaded by the Applicant in his application are briefly stated as under:
 - i. The Corporate Debtor is engaged in providing services in mechanical, erection, piping, electrical, instrumentation, painting, refractory & insulation work for Refineries & other industrial plants. The Respondent is an Indian public sector undertaking, incorporated under Companies Act 1956 and which is engaged in generation of electricity and allied activities.

- ii. The Respondent issued two Work Orders dated 12.07.2013 for supply of electrical equipment and installation and erection works respectively to the Corporate Debtors. The Corporate Debtor duly completed the installation and erection works in January 2020 and work of supply of electrical equipment in July 2020, however despite completion of work, the Respondent has failed to release pending dues of Corporate Debtor being an amount of Rs. 22,72,62,756/-. It is pertinent to mention that the Respondent has itself admitted an amount of Rs. 12,34,01,237 (Rupees Twelve Crore Thirty-Four Lakh One Thousand Two Hundred and Thirty-Seven Only) as due and payable to the Corporate Debtor during reconciliation of accounts, however, the Respondent is illegally withholding even the said admitted amounts on the condition that the Corporate Debtor provides a No-Demand Certificate to the Respondent.
- iii. In accordance with the terms of the said Contract, the Corporate Debtor raised RA Bills from time to time, out of which 10% was retained by the Respondent from the bill amount. In the meantime, the Corporate Insolvency Resolution Process ("CIRP") was initiated against the Corporate Debtor by Learned National Company Law Tribunal, Mumbai Bench ("Adjudicating Authority") vide Order dated 23.03.2018 in Company Petition (IB) No. 1374 of 2017. As the CIRP could not succeed, the Adjudicating Authority passed a liquidation order dated 23.01.2020 in the above-captioned Company Petition against the Corporate Debtor. Despite the initiation of CIRP and Liquidation, the Corporate Debtor duly completed the installation and erection works in January 2020 and work of supply of electrical equipment in July 2020.
- iv. Despite the completion of work, the Respondent failed to clear the bills raised by the Corporate Debtor towards the completed works. The

Corporate Debtor thus issued a letter dated 14.05.2020 to the Respondent informing the Respondent that the installation works has already been completed on 31.01.2020 and further requested the Respondent to certify its various bills regarding retention money which were pending. The Corporate Debtor issued a letter dated 05.07.2021 to the Respondent, requesting for granting completion certificate to the Corporate Debtor. However, the Respondent failed to even reply to the said letter and deliberately refrained from issuing a Completion Certificate to the Respondent with mala fide intention to escape from its own liabilities which would arise pursuant thereto.

- v. The Corporate Debtor again vide letter dated 15.07.2021 informed the Respondent regarding the factum of CIRP as well as Liquidation against the Corporate Debtor and requested the Respondent to release the outstanding amounts and Bank Guarantees of Corporate Debtor held up by the Respondent. Instead of making payment towards the legitimate dues of the Corporate Debtor, the Respondent immediately issued a letter dated 16.07.2021, in a completely illegal and blatant manner levying Liquidated Damages ("LD") on the Corporate Debtor of an amount of Rs. 5,74, 64, 442/- (Rupees Five Crore Seventy-Four Lakh Sixty-Four Thousand Four Hundred and Forty-Two Only) along with GST [i.e., Rs.1,03,43,560/- GST]. It is pertinent to mention that the abovesaid LD was imposed by the Respondent after a period of more than one year of completion of work by the Corporate Debtor.
- vi. The Respondent subsequently on 03.01.2022 & 18.01.2022, illegally encashed three Bank Guarantees submitted by Corporate Debtor for amount of Rs. 14,69,53,711/- (Rupees Fourteen Crores Sixty-Nine Lakh

Fifty-Three Thousand Seven Hundred and Eleven Only) for alleged recovery of certain baseless amounts.

- vii. The Respondent issued an email dated 04.06.2022 to the Corporate Debtor regarding reconciliation of accounts along with the reconciliation sheet, whereby the Respondent has made several illegal deductions from the amounts due to Corporate Debtor, without any basis. All such deductions made by Respondent are completely wrongful, illegal and objected to by the Corporate Debtor. However, despite such deductions, the Respondent itself admitted an amount of Rs. 12,34,01,237 (Rupees Twelve Crore Thirty-Four Lakh One Thousand Two Hundred and Thirty-Seven Only) as due and payable to the Corporate Debtor by the Respondent towards the retention amount. Further, for making the payment of admitted dues, the Respondent raised a condition from the Corporate Debtor to issue a No Demand Certificate with respect to the remaining dues. Thus, it becomes clear from the email dated 04.06.2022 that despite admitting the due amounts owed by the Respondent to Corporate Debtor, the Respondent is deliberately withholding admitted legitimate dues of the Corporate Debtor by raising frivolous issues.
- viii. Despite repeated requests and several reminders by the Applicant, the Respondent is illegally and without any cause or dispute is withholding the unpaid dues of the Corporate Debtor. It is further submitted that the process of liquidation is time bound process and if the amounts are not distributed to the other creditors within the requisite period, the liquidation proceedings will fail to reach its logical conclusion. Thus, this Hon'ble Court have requisite jurisdiction under the Code to direct the Respondent to release the monies. Hence this application.

3. Reply of the Respondent

The Respondent has filed his Affidavit-in-Reply dated 27th January, 2023. The reply of the Respondent is summarized hereunder:

- i. The NCLT vide Order dated 23.01.2020, directed Liquidation of the Corporate Debtor. The Liquidator has today come up with certain claims on behalf of the Corporate Debtor by directly filing the present Application and not seeking remedy available to it under law. The Liquidator is conveniently trying to circumvent the laws in regard to recovery of money and the various remedies available to it by wrongly invoking the residuary powers of this Tribunal. The recovery of any sum of money, even if payable, is not a dispute that is either arising out of or in relation to the liquidation or insolvency of the Corporate Debtor. The Liquidator or the Corporate Debtor cannot ask this Tribunal to act beyond its jurisdiction and become a fact-finding court to decide disputes in relation to recovery of money. Recovery matters are matters of fact and law and require extensive adjudication and evidence which is neither practical before this Tribunal nor permitted in law. Therefore, in the present case, the Liquidator/ Applicant cannot come before this Tribunal to invoke its residuary jurisdiction to adjudicate upon any and every dispute which neither relates to nor arises out of the Liquidation proceedings of the Corporate Debtor.
- ii. The Corporate Debtor has not completed the works of supply and erection as per the scope of the contract. It is submitted that as per the Minutes of Meeting dated 27.11.2019 held at NTPC Kudgi with the Corporate Debtor's representatives, the Respondent had informed that it will procure the material which the Corporate Debtor had not supplied at its risk and cost as these are required for completion of works. The

Corporate Debtor had agreed to the same. Further, it is denied that the Respondent had admitted any amount of Rs.12,34,01,237/- as payable. This amount was only a reconciliation amount which the Respondent had asked the Corporate Debtor to check and sign. For any amount to be released, the Corporate Debtor has not submitted a "No Demand Certificate" which is a contractual obligation for smooth closing of contract. Hence, any claim of the Corporate Debtor/Liquidator that the Respondent is illegally withholding amounts is factually incorrect.

- iii. The Respondent, vide mail dated 08.12.2021, informed the Corporate Debtor that for release of Bank Guarantees, as per terms and conditions of the contract, all contractual obligations are to be fulfilled. However, the Corporate Debtor neither responded to the mail nor extended the validity of the Bank Guarantees. In order to safeguard the interest of the works to be executed and as per the terms of the contract, the Respondent, upon the Corporate Debtor's failure to fulfil the contractual conditions, invoked the Bank Guarantees. Further supplies and works were delayed w.r.t. contractual work schedule and, therefore, as per the contract terms and conditions, Liquidated Damages were imposed.
- iv. In view of the facts and circumstance of the present case, the Respondent most respectfully prays that the application of the Applicant be rejected.

FINDINGS

4. We have heard the learned Counsels for the Applicant and the Respondent.
5. During the course of the arguments, the counsel for the Applicant has argued that the respondent itself has admitted that an amount of INR 12.34 crores is due and payable to the Corporate Debtor. In this regard, the Counsel for the

Applicant/Liquidator has referred to the email dated 04.06.2022 (Exhibit I of the Application) and the payment reconciliation statement annexed with the said email whereby the Respondent has admitted its liability to the extent INR 12,36,28,455/-. According to the counsel for the Applicant, since there is no dispute with regard to the liability of the Respondent to the extent of INR 12.36 crores for which no adjudication is required, a direction can be issued to pay this amount invoking the provisions of Section 60(5) of the Code. In support of his contentions, the counsel for the Applicant has relied upon the judgment of Hon'ble Supreme Court of India in Gujarat Urja Vikas Nigam Ltd v/s. Amit Gupta [Citation: (2021) 7 SCC 209] whereby it was held that all disputes pertaining to the issues of insolvency of the Corporate Debtor can be resolved u/s 60(5) of the Code.

6. Per contra, the learned Counsel for the Respondent has argued that the dispute with regard to the payment of outstanding dues, if any, by the Respondent to the Corporate Debtor has to be resolved by resorting to either arbitration proceedings or by filing appropriate proceedings in a civil court of competent jurisdiction and the provisions of Section 60(5) cannot be invoked as the disputes between the parties are purely contractual in nature which cannot be resolved under the residuary jurisdiction of this Tribunal. In this regard, the learned Counsel for the Respondent has relied upon Ramachandra D. Chaudhary v/s. Bansal Trading Co. & Ors. [2022 SCC Online NCLAT 360] whereby it has been held by the Hon'ble NCLAT that remedy for recovery of debts, disputed or not, cannot be determined in summary proceedings and the Code does not contemplate adjudication of any such nature. It was further held in this very case that any steps taken u/s 60(5) of the Code before the Adjudicating Authority would tantamount to bypassing/short-circuiting the judicial proceedings.

7. Having heard the counsel for the parties and after going through the records, we are of the considered view that the Respondent has candidly and unequivocally admitted in the email dated 04.06.2022 its liability to pay a sum of INR 12,36,28,455/- to the Corporate Debtor. Therefore, there is not even a semblance of dispute so far as this amount is concerned. In Gujarat Urja Vikas Nigam Ltd (supra), it has been held by the Hon'ble Supreme Court that one of the important objects of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up the insolvency process. It was further observed in the aforesaid case that the non-obstante clause in Section 60(5) of the Code is designed for a purpose i.e. to ensure that NCLT alone has the jurisdiction when it comes to applications or proceedings by or against the Corporate Debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings and therefore, NCLT has jurisdiction to adjudicate disputes which arise solely from or which relate to the insolvency of the corporate debtor.
8. It can also not be disputed that the process of undergoing CIRP or liquidation under the IB Code is a time bound process. Any delay in the process tends to defeat the objects of the Code, as the value of the assets gets eroded with passage of time. Therefore, in our considered view, if the Applicant is relegated to civil court(s) or arbitral proceedings even in respect of admitted dues, it would definitely defeat the objects of the Code and the objective of concluding the process in a time bound manner would never be possibly adhered to. Even otherwise, in the context of this case, undisputedly, the Corporate Debtor continued to render services to the Respondent despite initiation of CIRP against it and against those services, the Liquidator is seeking to realize the dues. Therefore, it cannot be said by any stretch of imagination that there is no

nexus of the dues sought to be recovered or the relief(s) being claimed in the application with the insolvency/liquidation process.

9. So far as the law laid down in *Ramachandra D. Chaudhary v/s. Bansal Trading Co (supra)* relied upon by the counsel for the Respondent is concerned, in our considered view, the same cannot be applied to the facts and circumstances of the instant case, as in the said case there was a genuine dispute between the parties with respect to the payment of the outstanding dues. On the contrary, in the instant case, there is no such dispute to the extent of admitted liability of INR 12,36,28,455/- and for undisputed liabilities, the parties cannot be driven to unnecessary and lengthy litigation.
10. So far as the outstanding dues beyond the admitted dues of INR 12,36,28,455/- are concerned, the necessary permission can be granted u/s 33(5) of the Code to the liquidator to initiate appropriate legal proceedings.
11. In view of the above discussion, we are of the considered opinion that this application deserves to be partly-allowed directing the Respondent to pay the admitted liability of INR 12,36,28,455/- to the Applicant forthwith. For the remaining amount, permission is hereby granted to the Liquidator u/s 33(5) of the Code to initiate appropriate legal proceedings. The Application is **partly-allowed** to the extent indicated above, leaving the parties to bear their own costs

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)