



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

IA. No. 2585/2024

In

Company Petition (IB) No. 360 of 2023

**Application filed Under Section 60 (5)
of the Insolvency and Bankruptcy Code,
2016 r/w Rules 11 & 14 of NCLT Rules,
2016**

Filed by

**Gujarat State Road Development
Corporation,**

Having its registered office at:-

Ground Floor, Nirman Bhawan, Sector 10-A,
Gandhinagar, Gujarat – 382 010.

... Applicant

Versus

Mr. Avil Menezes

The Resolution Professional of

Valecha Kachchh Toll Roads Limited and Ors.

Having its registered office at:-

Valecha Chambers, 4th Floor, Plot No. B-6, New
Link Road, Andheri (West), Mumbai
Maharashtra – 400 053.

... Respondent No. 1

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

Interlocutory Application No. 2585 of 2024
IN

C.P.(IB)/360(MB)2023

CANARA BANK

Having Branch Office at:

Makers Tower, F, 20th Floor, 85, Cuff Parade,
Colaba, Mumbai, Maharashtra – 400 005.

... Respondent No. 2

INDIAN OVERSEAS BANK

Asset Recovery Management Branch, 5th Floor,
Maker Tower E, Cuffe Parade, Mumbai –
400601.

... Respondent No. 3

In the matter of

The Canara Bank Limited

...Operational Creditor

Versus

Valechha Kachchh Toll Roads Limited

...Corporate Debtor

Order Pronounced on: - 09.10.2024

Coram:

Anil Raj Chellan
Member (Technical)

Kuldip Kumar Kareer
Member (Judicial)



Appearances:

For the Applicant : Sr. Counsel Vikram Nankani a/w Adv. Rishabh Jaisani, Adv. Shalin Janj, Adv. Swati Vyas, Adv. Siddhant Marathe and Adv. Amey Gokhale.

For the Respondent/RP: Adv. Nandita Bajpai a/w Adv. Rahul Sarda, Dhruvad Vaghani and Adv. Rakesh Gupta

ORDER

Per: Anil Raj Chellan, Member (Technical)

1. The present application is being filed under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 ('the Code') read with Rule 11 of the National Company Law Tribunal Rules, 2016 by the Gujarat State Road Development Corporation, the Applicant against the decision of Resolution Professional of Valechchha Toll Roads Limited (the 'Corporate Debtor') rejecting the claim of Applicant under Form-B as operational creditor of Corporate Debtor. The Applicant prays that the Adjudication Authority may:-
 - a. declare that the Applicant is a creditor in terms of the Code and direct Respondent No. 1 to admit the claim of the Applicant in terms of the Code and IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('the CIRP Regulations').
 - b. direct Respondent No. 1 to amend and re-issue the Information Memorandum to the Prospective Resolution Applicants, and the CoC to

correctly reflect the status of the Applicant as a Creditor in respect of the claim submitted in Form B.

- c. direct the Respondents to ensure that the resolution applicants modify their resolution plans accordingly, to deal with the interest of Applicant, and to provide the Applicant with such treatment which is in compliance with the Code and CIRP Regulations.

Facts of the case as stated in the Application:

2. The Applicant was authorized by the Government of Gujarat to augment the existing road on the Bhuj Bhachau section of the State Highway No.42 in the State of Gujarat (the 'Road Project'), by constructing it on build, operate and transfer basis (BOT).
3. In 2009, the consortium comprising Valecha Engineering Limited and PBA Infrastructure Limited as its Lead Member was selected for the work.
4. The Consortium promoted and incorporated the Corporate Debtor as a limited liability company under the Companies Act, 1956 as the entity which shall undertake and perform and exercise the rights of the Consortium under the LOA, including the obligation to enter into the Concession Agreement pursuant to the LOA, for executing the Road Project. Therefore, a Concession Agreement dated 12.07.2011 was executed with the Corporate Debtor for the execution of the Road Project. In order to execute the scope of



work as per the Concession Agreement, the Corporate Debtor took financial assistance from Respondent No.2 and 3.

5. Due to delays in the completion of the Road Project by the Corporate Debtor, extensions were granted. A Supplementary Agreement dated 12.05.2015 was executed between the Corporate Debtor and the Applicant. The Corporate Debtor was allowed to commence the toll collection for Section I of the Project Highway on the basis of the Provisional Completion Certificate issued by the Independent Engineer. However, a list of things was pending to be completed which the Corporate Debtor failed to complete.
6. The Corporate Debtor breached both Agreements as it failed to complete the work in time. Thereafter, the Applicant provided a one-time infusion of funds of Rs. 74,00,00,000 /- (Rupees Seventy-Four Crore) to complete the Road Project on the execution of a Tripartite Agreement dated 24.10.2017.
7. However, despite the infusion of funds by the Applicant, the Corporate Debtor failed to complete the work. As a result, the Applicant issued a notice dated 14.11.2019 to the Corporate Debtor directing to rectify its defaults. However, the Corporate Debtor did not take any remedial measures. The Applicant issued a second notice dated 31.03.2021, but the Corporate Debtor still failed to rectify the defaults.



The Applicant also raised the demand from the Corporate Debtor with respect to the payment towards the premium as per the Concession Agreement vide letter dated 4.12.2021. It was recorded that as per the financial bid, which was submitted by the Corporate Debtor, it had quoted the premium share of 7.425% to be payable to the Applicant from the first year of the Commercial Operation Date (COD). However, the Applicant did not receive any payment towards the realizable fee, despite the issuance of several reminders.

9. The Applicant also communicated on 4.12.2021 to the Corporate Debtor that as per the Supplementary Agreement, it had agreed and acknowledged to deposit the payment towards negative scope for the reduction of project length. The Corporate debtor failed to adhere to it.
10. Subsequently, the Applicant vide letter dated 4.12.2021 referred to various review meetings and highlighted that even though the Corporate Debtor was previously informed that the expenses of the Independent Engineer are not reimbursed to it, in accordance with the Concession Agreement, no steps have been taken by the Corporate Debtor until date.
11. Considering the gross delays in the completion of the Road Project and numerous non-compliances of the Concession Agreement, Supplementary



Agreement and Tripartite Agreement (hereinafter collectively referred to as 'Project Agreements'), the Applicant vide letter dated 11.04.2022 informed the Corporate Debtor that Road Project cannot suffer due to their continuous defaults and, therefore, the balance works will be undertaken by the Applicant at the sole risk and cost of the Corporate Debtor.

12. The Applicant vide letter dated 25.07.2022 wrote to the Corporate Debtor seeking its rightful dues amounting to Rs. 416,27,42,969 as on June 2022, arising from the breaches on the part of the Corporate Debtor under the Project Agreements. The Corporate Debtor disputed the Letter of Claim and the matter was referred for conciliation as per Clause 44.2 of the Concession Agreement.
13. During the Pendency of the Conciliation proceedings, the Corporate Debtor filed an application under Section 9 of the Arbitration Act on 20.12.2022 (CMA No. 36 of 2022) before the Learned Commercial Court at City Civil Court, Ahmedabad, seeking, inter alia, directions to the Applicant not to issue any termination till the adjudication of arbitration proceedings. The application was dismissed and no interim relief was granted.
14. Subsequently, the Applicant terminated the Concession Agreement by issuing the Termination Notice dated 23.02.2023. The Corporate Debtor




objected to the notice vide letter dated 24.02.2023. In the above background, since the conciliation could not be resolved within the time period of 60 days as per the Concession Agreement, the Applicant issued the notice invoking arbitration dated 07.03.2023, nominating Hon'ble Justice (Retd.) Mr. K.S.P. Radhakrishnan, former Judge of the Supreme Court, for adjudication. The Applicant further requested the Corporate Debtor to nominate its arbitrator within 30 days of receipt of the notice. However, the Corporate Debtor vide letter dated 19.03.2023 denied the notice stating that invocation of arbitration is illegal since the conciliation proceedings were ongoing and the Hon'ble Commercial Court had yet not passed a final order proceedings under Section 9.

15. As the Corporate Debtor failed to appoint its nominee arbitrator, as mandated by the Concession Agreement, the Applicant was constrained to file an Arbitration Petition being IAAP No. 128 of 2023 under Section 11 of the Arbitration and Conciliation Act, 1996 before Hon'ble High Court of Gujarat seeking for appointment of the nominee arbitrator of the Corporate Debtor.
16. Subsequently, the NCLT, Mumbai vide order dated 09.10.2023 admitted the Corporate Debtor into the Corporate Insolvency Resolution Process



('CIRP'), and Respondent No.1 was appointed as Interim Resolution Professional (IRP).

17. On 30.11.2023, after the initiation of CIRP, Respondent No. 1 filed his reply before the Hon'ble High Court in the Section 11 proceedings stating that the Corporate Debtor is aggrieved by the alleged unlawful termination of Project Agreements and the unjustified claims raised against it and claimed to have incurred losses amounting to Rs. 2000,00,00,000/- (Rupees Two Thousand Crores). Respondent no. 1 also nominated its nominee Arbitrator, Hon'ble Justice Mr. M.R. Shah (Retd.) on behalf of the Corporate Debtor.
18. On 08.12.2023, the Applicant filed its claim along with proof of claim for Rs. 95,38,92,409/- under Form C as a financial creditor in respect of the one-time infusion of funds made by the Applicant under the Tripartite Agreement. Out of this, Rs. 91,80,90,185/- was admitted by the Respondent No.1 in the CIRP of Corporate Debtor comprising of the principal amount of Rs. 73,33,40,197/- and interest amount of Rs. 18,47,49,988/-. The Respondent No. 1 communicated to the Applicant that the remaining principal amount of Rs. 47,21,160/- will be considered in OC claim.
19. The Applicant filed another claim in Form B as an Operational Creditor along with the proofs for Rs. 512,57,50,826/- which included the



abovementioned Rs.47,21,160/-. However, Respondent No. 1 vide email dated 08.01.2024 rejected the claim of the Applicant on the ground that the 'matter sub judice' before the Hon'ble High Court.

20. The Applicant has submitted that the rejection of the claim by Respondent No. 1 is absolutely arbitrary and ultra-vires to the provisions of the Code. Respondent No.1 was bound to admit the claim of the Applicant.

21. It is submitted that since the Applicant is an unsecured financial creditor of the Corporate Debtor on account of a loan granted to the Corporate Debtor under the Tripartite Agreement, the Applicant is part of the Committee of Creditors (CoC) holding a voting share of 7%. Therefore, the Applicant is aware that the CoC has received 3 resolution plans and CIRP is at the stage of approval of the Resolution Plan. None of the resolution plans has dealt with the interests of the Applicant in a manner compliant with provisions of the Code and CIRP Regulations.

22. The above facts led to the filing of the present Application.

Submissions of the Applicant:

23. While challenging the rejection of the claim filed in Form B by Respondent No.1, the Applicant has contended that the Application under Section 11 of the Arbitration Act for the appointment of an arbitrator is only pending and



not for adjudication of the dispute, on merits, which can only be adjudicated by the arbitration tribunal upon its constitution. Therefore, the claim as Operational Creditor is not “sub-judice” before Hon’ble Gujarat as only the matter of appointment of the nominee arbitrator is pending.

24. It is submitted that the Corporate Debtor has failed to discharge its obligations under the Project Agreements, and hence these monetary obligations have arisen qua the Corporate Debtor in favour of the Applicant. The Corporate Debtor is liable to pay an amount of Rs. 512,57,50,826/-. Therefore, the Applicant has submitted its claim for an amount of Rs. 5,12,57,50,836/- to Respondent No.1 under Form B. The Respondent No. 1 has, without application of mind, rejected the Applicant’s claim.
25. It is submitted that the definitions of ‘claim’, ‘debt’ and ‘operational debt’ under the Code make it clear that a right to payment even if disputed is a claim and liable to be admitted. The rejection of the claim by Respondent No.1 is arbitrary and against the provisions of the Code and CIRP Regulations.
26. It is submitted that in the circular bearing number IBBI/CIRP/47/2021 dated 24.11.2021 issued by the Insolvency and Bankruptcy Board of India, the format of list of creditors has been issued. The format of list of creditors,



as prescribed in the said circular, provides for a separate head of “Amount of contingent claim”. Still in the list of operational creditors issued by Respondent No. 1, Applicant's claim is shown under the head “Amount of claim not admitted”.

27. It is submitted that Respondent No.1, being the Resolution Professional, has not been vested with adjudicatory power and is legally expected to collate and verify the claims submitted before him and place the same before the CoC for its proper consideration under the provision of Section 21 of the Code. A plain reading of Section 18(b) and Section 25 of the Code clarifies that nowhere the IRP or RP has been vested with the adjudicatory power to accept or reject a claim.
28. It is submitted that the duty of the IRP or RP under the Code is limited to verification of the claims and determination of the claim amount under Regulation 12 and Regulation 14 of the CIRP Regulations. In the present case, it is alleged that Respondent No.1 rejected the claim of Applicant without any application of mind on a misconceived ground that it is sub-judice before the Hon’ble High Court.
29. The Applicant has submitted that adjudication of the claim of Applicant and/or the counterclaim of the Corporate Debtor should be allowed to be



continued under the Arbitration Act and should not be prohibited under the declaration of moratorium declared under Section 14 of the Code. It is submitted that as per the Hon'ble Supreme Court, in cases where the claim and counterclaim are so interlinked, the claim and counterclaim should be heard together by the Arbitral Tribunal. In the present case, the claim of the Applicant and the counterclaim made by the Corporate Debtor are required to be heard together by the Arbitral Tribunal in the absence of any bar under the Code.

30. It is submitted that the claim of the Applicant, whether contingent or not, has to be taken into consideration while preparing the Information Memorandum under Section 29 of the Code read with Regulation 36 of CIRP Regulations. The information memorandum is supposed to encompass all the information affecting the finances of the Corporate Debtor. Since the claim of the Applicant is reflected as 'not admitted' in the Information Memorandum, Respondent No.1 has faulted in not maintaining information symmetry with secured creditors (Respondent No.2 & 3).

31. It is submitted that the resolution plans submitted by prospective resolution applicants (PRAs) are non-compliant with the Code and CIRP Regulations as they fail to balance the interest of the Applicant as an operational creditor. A resolution plan must deal with the interest of all stakeholders of the



Corporate Debtor. None of the resolution plans provide for the resolution of the Applicant's claim in a manner compliant with the Code and CIRP Regulations.

Reply and submissions of Respondent No. 1: -

32. Respondent No.1 has stated that on perusal of documents made available by the erstwhile management, the Corporate Debtor had faced various issues in the construction and timely completion of the Project Highway on account of issues relating to right of way, govt. approvals etc., which were in the domain of the Applicant. Accordingly, the Corporate Debtor kept filing its compensation claims with the Applicant citing various failed contractual obligations.
33. After the issuance of the Termination Notice dated 23.02.2023, the Applicant issued the Notice of Invoking the Arbitration dated 07.03.2023 and subsequently filed an application under Section 11 of the Arbitration Act before the Hon'ble High Court seeking direction for appointment of the arbitrator. After the initiation of CIRP, Respondent No.1 filed the reply to the section 11 application nominating an arbitrator to the arbitration panel as stipulated in the Concession agreement and has filed a counterclaim to the



tune of Rs.2000 crore. The amount of damages must be ascertained by a competent court or arbitral tribunal.

34. It is submitted that the Applicant has failed to prove the existence of debt under Regulation 7 of the CIRP Regulations in support of its claims. Thus, the rejection of the claim as per the email dated 8th January 2024 was valid and in accordance with the Code and CIRP Regulations.
35. It is submitted that the Applicant is a member of the CoC and is well aware that the resolution plans submitted by the Resolution Applicants are in the initial stage and are still being discussed by the members of the CoC.
36. It is submitted that the Applicant has filed this frivolous application at a time when the CoC is considering the resolution plans submitted by the PRAs is nothing but a tactic to delay the CIRP of the Corporate Debtor.

Analysis and finding

37. We have heard the Counsel for the parties and have perused the documents on record.
38. The implementation of the concession granted by the Applicant to the Corporate Debtor for implementation of the Project Highway is stated to have been delayed as per the terms of the Concession Agreement. The



Applicant and the Corporate Debtor, therefore, entered into a Supplementary Agreement to facilitate the completion of the Project Highway and allowed the Applicant to start commercial operation on Section 1 of the Project Highway. Thereafter, the Applicant, as per the terms contained in the Tripartite Agreement, provided financial assistance to the Corporate Debtor by way of a one-time infusion of funds of an amount of Rs.74 crore to enable/facilitate the completion of the remaining works on the Project Highway. However, the implementation of the Project Highway got into further delays resulting in the issue of Cure Notice-1 dated November 14, 2018, and Cure Notice -2 dated March 31, 2021, by the Applicant to rectify and remedy the defaults stated in the aforesaid Notices. The Applicant also issued a letter dated 04.12.2021 raising a demand for payment towards the premium/realizable fee and expenses of the independent Engineer as per the Concession Agreement. Following this, the Applicant issued a Notice of Intimation to Terminate the Concession Agreement and Tripartite Agreement dated 12.05.2022. The Applicant vide its claim letter dated 25.07.2022 called upon the Corporate Debtor to pay Rs.416,27,42,969/- towards expenses incurred by the Applicant in order to keep the Project Highway in a motorable condition. The Applicant states that the defaults continued to subsist and the Respondent failed to make payment. Owing to



the above, the Applicant terminated the Concession Agreement and Tripartite Agreement by issuing a Termination Notice dated 23.02.2023.

39. Due to the dispute between the parties, the Applicant issued notice invoking arbitration dated 07.03.2023 and appointed a former judge of the Hon'ble Supreme Court, and requested the Corporate Debtor to nominate its arbitrator within 30 days in order to constitute an arbitral tribunal. Since the Corporate Debtor failed to appoint its nominee arbitrator, the Applicant filed an Arbitration Petition before the Hon'ble High Court of Gujarat which issued a notice in Section 11 Proceedings against the Corporate Debtor on 29.09.2023. During the pendency of the said proceedings, the Corporate Debtor was admitted to CIRP and the Respondent. No.1 was appointed as IRP. Respondent No.1 filed its reply dated 30.11.2023 whereby the Corporate Debtor has stated that it is aggrieved by the alleged unlawful termination of the Concession Agreement and Tripartite Agreement and the unjustified claims raised against it and, therefore, incurred losses amounting to Rs.2000 crores. Respondent No.1 made a counterclaim of Rs.2000 crore and appointed its nominee arbitrator on behalf of the Corporate Debtor. Arbitral Tribunal is yet to be constituted.
40. The Applicant filed a claim for Rs.95,28,92,409 under Form C as a financial creditor which relates to the one-time infusion of funds made by the Applicant



under the Tripartite Agreement. Out of the above, an amount of Rs.91,80,90,185/- has been admitted by Respondent No.1. The Applicant has also filed a claim for Rs.512,57,50,826 under Form -B as an operational creditor in the CIRP which was rejected by the Respondent No.1 vide his communication dated 15.05.2024. The rejection of the claim as operational creditor is the subject matter of dispute in this Application.

41. The Applicant has contended that Respondent No.1 has erroneously adjudicated the Applicant's claim while overstepping its authority under the Code. The Ld. Counsel appearing for the Applicant challenged the rejection of the claim filed by the Applicant stating that a bare perusal of Form B would show that, out of the Claim Amount of Rs.5,12,57,50,826/- certain amounts were already incurred as costs and expenses by the Applicant and the remaining were damages levied due to various breaches and failures of the Corporate Debtor to complete the Project Highway. Even if the claim of the Applicant is the subject matter of arbitration proceedings between the Applicant and the Corporate Debtor, the same is still a Claim, as defined in the Code and, therefore, falls within the definition of 'Debt' under the Code.

42. It has further been contended on behalf of the Applicant that there is no quarrel between the parties as regards the need to determine the liability and obligation of parties under the Concession Agreement and the pendency of



arbitration proceedings. However, the primary contention of the Applicant arises from the premise that the determination of the claim by the Respondent/RP cannot be influenced by the fact that it is forming subject matter of arbitration between the Applicant and the Corporate Debtor. To buttress the above, the Applicant has referred to the definition of 'claim' provided in Section 3 (6) of the Code which covers **a right to payment, whether or not such right is reduced to judgment, or disputed or undisputed**. In other words, it is argued that the definition of claim is wide enough to cover unadjudicated and disputed claims. In support of the above argument, the Ld. Counsel for the Applicant has relied upon the judgement of the Hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India (2019) 8 SCC 416* and has submitted that debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgement or decree or order.

43. On the contrary, Counsel for Respondent No.1 has contended that the alleged claim of the Applicant is for damages and the same requires adjudication by a competent court or forum. It is further contended that the alleged claim submitted by the Applicant does not satisfy the definition of 'operational debt'



and 'claim', as defined in Sections 5 (21) and 3(6) respectively of the Code.

The Counsel for Respondent No. 1 has further submitted that admittedly many heads of claim under Sr. Nos. 4,5,7,9,11 to 16 & 18 aggregating to Rs.356,04,38,816/- constituting 69.46% of the alleged claim have not even been actually incurred by the Applicant. Even as per the Applicant, only the amounts under the remaining heads of claim aggregating to Rs.156,53,12,010/- constituting 30.54% of the alleged claim have been incurred. It is submitted that the amount, if any, spent by the Applicant was towards remedying the failure of the Corporate Debtor and/or the defect/deficiency and the same also requires adjudication. The Ld. Counsel for the Respondent has relied on the ratio laid down by the *Hon'ble Supreme Court in the case of Union of India v. Raman Iron Foundry (1974) 2 SCC 231*.

44. We have considered the rival contentions of the parties and the decisions relied upon by the Counsel appearing for them. It is noticed that the term 'claim' has been defined in Section 3(6) of the Code as under:

"Claim" means-

- (a) *A right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
- (b) *Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not*

such right is reduced to judgement, fixed, matured, unmatured, disputed, secured or unsecured.



45. The definition of claim categorically states that it includes a right to payment, whether or not such right is reduced to judgement. The wording of the definition in the Code, in our opinion, does not give scope for a limited interpretation on the basis of the following sentence used in the Judgement of Raman Iron Foundry (supra):

“11.....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 adjudicating authority.”

In Pioneer Urban Land (supra), the Hon’ble Supreme Court considered the decision of Raman Iron Foundry and observed:

“39. It is precisely to do away with judgements such as Raman Iron Foundry that “claim” is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgement. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgement or decree or order.....”

While it is settled that the claim as defined in the Code includes a disputed right to payment, it is necessary to examine the procedure to be followed by the IRP/RP for admission of the claim. Regulations 7, 8, 8A, 9 and 9A of



the CIRP Regulations specify filing of relevant Form i.e., a person claiming to be an operational creditor (other than workmen or an employee) in Form B, a person claiming to be a financial creditor in Form C, a person claiming to be a creditor in class in Form CA, a person claiming to be a workman or an employee of the corporate debtor in Form D **with proof** to the interim resolution professional. The case of the Applicant is that it filed its claim, along with proof of claim, for Rs.512,57,50,826 under 'Form B' as an operational creditor of the Corporate Debtor. However, Respondent No.1 vide its email dated 08.01.2024 rejected the claim of the Applicant on the ground of 'matter subjudice' before the Hon'ble High Court which is being challenged in this Application. As we have taken a view that the definition of claim under the Code is wide enough to cover a right to payment, whether or not such right is reduced to judgement and disputed or not, the issue arising for our consideration is as to the role of an interim resolution professional after submission of a claim.

46. The Applicant has contended that Respondent No.1, being the resolution professional is legally expected to collate and verify the claims submitted before him and place the same before the CoC, for its proper consideration under Section 21 of the Code and Regulation 12 & 14 of the CIRP Regulations. It is further submitted that Respondent No.1 is not required to



adjudicate claims, rather, only verify and collate claims as per the applicable provisions of the Code and CIRP Regulations. It is vehemently argued that Respondent No.1 has travelled beyond its power as it is a settled position of law that a resolution professional has no adjudicatory power.

47. It is relevant to notice the duties of interim resolution professional (IRP) and resolution professional (RP) laid down under Sections 18 and 25 of the Code, which include, inter alia, receiving and collating “all claims submitted by creditors to him’. Further, Regulation 13 of CIRP Regulations provides for *verification of the claims* and maintenance of a list of creditors by an IRP or RP, as the case may be. A conjoint reading of the aforesaid Sections and Regulation makes it clear that the duty cast upon the interim resolution professional or resolution professional as the case may be, is not confined to the administrative function of the collection of claims but to verify the claims submitted by the creditors. This is further evident from Regulation 10 which provides that “*the interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.*” It is also relevant to notice from CIRP Regulations (Regulations 7, 8, 8A, 9, and 9A) that the persons claiming to be a creditor of the Corporate Debtor, depending upon the category it falls, to file the respective form along with proof and also the



documents specified therein based on which such debt due to the person is in existence. Thus, it is amply clear that the creditors/claimants are bound to submit proof that establishes a debt which can be verified by IRP/RP based on the documents submitted by the claimant.

48. The subject matter of the present application being an operational debt, we may notice the relevant CIRP Regulations.

“7. Claims by operational creditors.

(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit claim with proof to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule-I:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the operational creditor under this Regulation may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents, including –

(i) a contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;



(iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or

(iv) financial accounts.

(v) copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Services Tax and the copy of e-way bill wherever applicable:

Provided that provisions of this sub-clause shall not apply to those creditors who do not require registration and to those goods and services which are not covered under any law relating to Goods and Services Tax.

It is pertinent to note that the aforesaid Regulation specifies the documents, though not exhaustive, which can be the basis for proving the claim submitted. The nature of the documents specified in the aforesaid Regulations is such that claimants can substantiate their claim and the IRP/RP can verify the claim without a need for adjudication. It is worthwhile to note that while verification is a process of establishing the truth, accuracy, or validity of the debt, adjudication is a formal process of giving a judgment or decision on the debt. It is a settled position of law that the IRP/RP cannot adjudicate the claim. Hence, we are of the considered view that a debt not capable of verification by the IRP/RP based on the documents cannot be admitted. We are also conscious of the fact that admission of every claim, just because, it



falls within the wide definition of claim, would seriously prejudice the entire CIRP process.

49. Another argument raised by the Respondent for non-admission of the claim filed by the Applicant is that the claim does not meet the definition of ‘operational debt’ as it has not provided any goods or services to the Corporate Debtor and the claim is not in respect of the provision of goods or services to the Corporate Debtor.

It is, therefore, necessary to notice the definition of operational debt:

“Section 5 (21) –

‘operational debt’ means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”

Admittedly, the Corporate Debtor entered into a Concession Agreement with the Applicant to augment the existing road on the Bhuj- Bhachau section of the State highway in the State of Gujarat by constructing it and operating & maintaining the road on build, operate, and transfer basis. For granting the concession for the above purpose, the Applicant was entitled to receive various concession fees & premium in terms of the Concession Agreement. Thus, it is noticed that the alleged claim arises from the concession granted



by the Applicant without which the stated operations would not have been possible. Having regard to the above, we are of the view that the concession granted by the Applicant is in the nature of service to the Corporate Debtor and falls within the definition of operational debt.

50. The Applicant has stated that certain amounts were already incurred as costs/expenses by the Applicant and the same need to be admitted. Refuting the said argument, the Respondent has stated that the amount, if any, incurred by the Applicant towards remedying the alleged failure of the Corporate Debtor and/or the defect/deficiency requires adjudication and cannot be admitted.

51. It is noticed that some of the heads of the claim submitted by the Applicant are related to the actual costs and expenses incurred by the Applicant as per the Concession Agreement and the Tripartite Agreement. Some of these are as under:-

(a) ***Remuneration, etc of Independent Engineer.***

Clause 23.3 of the Concession Agreement provides that one-half of the remuneration, cost, and expenses of the Independent Engineer shall be reimbursed by the Corporate Debtor within 15 days of receiving a Statement of Expenditure from the Applicant.

(b) ***Maintenance expenses incurred by the Applicant.***



As per clause 17.9 of the Concession Agreement, if the Corporate Debtor is in breach of its obligation to repair and maintain the road in accordance with the maintenance requirements, the Applicant shall be entitled to undertake the same and recover the damages at the rate specified therein and as assessed by the Independent Engineer.

(c) *Payments to sub-contractors.*

As per Clause 6.7 of the Tripartite Agreement, in case of non-payment to any of the sub-contractors, the Applicant may make payment directly to the sub-contractors on behalf of the Corporate Debtor for completion of the project, and such payments made directly to the sub-contractors shall be adjusted/set off/recovered from the Corporate Debtor.

Having regard to the above, we are of the view that a part of the claim, if substantiated with proof, is capable of verification by the Respondent.

52. As far as the arbitration proceeding is concerned, the Applicant states that it had, prior to the initiation of CIRP of the Corporate Debtor, invoked arbitration proceedings under the Concession Agreement in relation to the amounts payable by the Corporate Debtor to the Applicant. However, no arbitrator was nominated by the Corporate Debtor and as such, the Applicant was constrained to file IAAP under Section 11 of the Arbitration Act, before the Hon'ble High Court of Gujarat, inter alia, seeking for appointment of the nominee arbitrator of Corporate Debtor. Thus, the arbitration invoked by the Applicant under the Concession Agreement is at a pre-referral stage, and the



arbitral tribunal has not yet been constituted. It is submitted that the object of moratorium under Section 14 of the Code is to save the corporate debtor from protracted and/or expensive litigation which would further deteriorate the financial health of the corporate debtor. It is a settled position of law that the proceedings under the Arbitration Act, which may result in adjudication of the claim of Applicant and /or counterclaim of Corporate Debtor and quantification thereof, shall be allowed to be continued and will not be prohibited under Section 14 of the Code, however, any recovery proceedings after quantification thereof, should be prohibited under the Code. In any case, moratorium under Section 14 of the Code, has effect only till the completion of CIRP and there is no restriction on continuation/execution of arbitration proceedings or awards post-completion of CIRP, subject to the treatment of the liabilities as set out under the approved resolution plan. The Applicant has relied on the order passed by the Hon'ble NCLAT in *Jharkhand Bijli Vitran Nigam v. IVRCL Ltd & Anr. (Company Appeal (AT) No. 285 of 2018)* where the Arbitral Tribunal was allowed to proceed during CIRP with the claim and counter claim of the parties and record appropriate order of award, but to keep it in a sealed cover till the decision of Appeal by the Hon'ble NCLAT.



On the other hand, Respondent No.1 states that the bar of Section 14 of the Code, which prohibits the institution or continuation of legal proceedings against the Corporate Debtor is very well applicable to arbitration proceedings. The Respondent has refuted the contention of the Applicant that on account of the nomination of one arbitrator on behalf of the Corporate Debtor, Respondent No.1 is estopped from placing reliance on Section 14 of the Code. It is submitted that there cannot be any estoppel against the statute. Further, Respondent No.1 has placed reliance on the judgement of the Hon'ble Supreme Court in *Alchemist Asset Reconstruction Company Ltd v. M/s. Hotel Gaudavan Pvt. Ltd & Ors. (Civil Appeal No. 16929 of 2017, dated 23.10.2017)* where it was observed that the mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against the Corporate Debtors.

54. We observe that no prayer has been sought to continue the Arbitration proceedings during the moratorium, Hence, any discussion on the merits of allowing arbitration proceeding during CIRP is academic in nature and hence we refrain from expressing any view on the same.



Another plea raised by the Applicant is that the success of CIRP largely hinges on the availability of correct information to relevant stakeholders, particularly the CoC and the resolution applicants (RAs). It is alleged that Respondent No.1, by categorizing the Applicant's claim as 'not admitted' failed in his obligation to reflect the correct position of claims in the list of creditors (and consequently, in the Information Memorandum), and as such, has faulted in not maintaining information symmetry with financial creditors (Applicant is also a financial creditor along with Respondent No.2 and 3) and the PRAs insofar as the position of Applicant's claim filed under Form B against the Corporate Debtor is concerned. In the list of operational creditors, mentioned in the Information Memorandum, there is no disclosure whatsoever of the claim submitted by the Applicant, which is contrary to the letter and scheme of the Code. It is, therefore, submitted that its claim may be characterized as a contingent claim and be included in the Information Memorandum.

56. The Applicant has further submitted that on account of non-admission of the claim of the Applicant as operational debt or contingent debt, none of the resolution plans provide for the resolution of the Applicant's claim in a manner compliant with the Code. Furthermore, it is essential to recognize the fact that the Corporate Debtor operates as an SPV specifically established



for the construction of a project allocated by the Applicant. As a result, the Corporate Debtor does not possess its own assets and relies predominantly on the Concession Agreement. Thus, rejection of the claim of the Applicant by Respondent No.1 would unjustly prejudice the Applicant as its claim would get extinguished while counterclaims shall remain, thereby undermining the purpose of the arbitration proceedings.

57. The Applicant has further submitted that three resolution plans have been received for the revival of the Corporate Debtor. All the three plans, on the one hand, provide for the continuation of the already terminated Concession Agreement with the Applicant for the successful revival of the Corporate Debtor, while simultaneously extinguishing the claim amount of the Applicant at Nil /notional value. Thus, there can not be a unilateral continuation of an already terminated contract. Furthermore, there cannot be a unilateral extinguishment of the rights of one party in a contract, while keeping the rights of the other party in the contract alive. It is submitted that PRAs under the garb of approving the resolution plan, cannot modify a private contractual agreement entered into between two commercial parties unilaterally.

58. With respect to the above contentions raised by the Counsel for the Applicant, we are of the considered view that the treatment of claims and



counterclaims under the Resolution Plan falls within the domain of commercial wisdom of CoC and at this stage, this Tribunal refrains from making any observation with regard to the treatment of claims and counterclaims that require adjudication by the appropriate authority/forum.

59. It is also a settled position of law that admission of subsequent claim or modification of claim admitted by the IRP/RP, as the case may be, cannot have the effect of re-running the CIRP *de novo*. If such a request is allowed, no CIRP would be completed within the timeframe envisaged in the Code, which is one of the salient features and objectives of the Code. Hence, there is no merit in the submission for revision of the Information Memorandum or for giving directions to revise the Resolution Plans, already submitted by the PRAs except for considering the interests of the Applicant in case some part of the claim is verified/admitted at this stage. Even otherwise, as per Regulation 13 of the CIRP Regulations, the RP has to put up the additional or subsequently verified claims before the CoC for considering such claims in the resolution plan.

60. In view of the foregoing discussions, we are of the view that Respondent No.1 has erred in dismissing the entire claim of the Applicant on the ground that the matter is *sub judice* before the Hon'ble High Court. As per CIRP Regulations, Respondent No.1 is duty-bound to verify the claim submitted



by the Applicant based on the proof, if any, submitted in accordance with Regulation 7 of the CIRP Regulations. At the same time, the IRP/RP cannot adjudicate a claim in the process of verification. Further, admission of every claim, just because, it falls within the wide definition of 'claim', would seriously prejudice the entire CIRP process. Therefore, under the circumstances, we deem it appropriate to direct the RP/Respondent No. 1 to consider that part of the claim submitted by the Applicant which can be verified on the basis of documents submitted by the Applicant along with claims/form-B and the other part which is not capable of verification and substantiation based on the documents can be treated otherwise. We further make it clear that modification of Applicant's claim by Respondent will not impact/invalidate the process already undertaken except to the extent that the revised claim of the Applicant, if any, is to be placed before the CoC for appropriate consideration as per its commercial wisdom.

61. Resultantly, we **partly allow prayer (B) of I. A No. 2585 of 2024 in the aforesaid terms** to the extent of directing the RP/Respondent No. 1 to consider that part of the claim submitted by the Applicant which can be verified on the basis of documents submitted by the Applicant along with claims/form-B and the other part which is not capable of verification and substantiation based on the documents can be treated otherwise on notional

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

Interlocutory Application No. 2585 of 2024
IN

C.P.(IB)/360(MB)2023

basis and the rest of the prayers made in the Application are hereby declined.

In view of the nature of the Application, there shall be no order as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)