

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT NEW DELHI
Company Appeal (AT) (Insolvency) No. 264 of 2024

(Arising out of order dated 01.11.2023 in I.A.3392 of 2019 in CP (IB) No.2295/MB-I/2018 passed by the National Company Law Tribunal, Mumbai Bench-I, Mumbai)

In the matter of:

Avil Menezes

Liquidator of Sunil Hitech and Engineers Limited

106, 1st Floor, Kanakia Atrium 2, Cross Road A,
Behind Courtyard Marriott,
Chakala, Andheri East, Mumbai City,
Maharashtra - 400093

...Appellant

Versus

Tata Consulting Engineers Limited

Unit No. NB 1502 & SB 1501, Empire Tower,
Thane Belapur Road, Navi Mumbai – 400708

..... Respondent

Present :

For Appellant : Mr. J. Rajesh, Mr. Dhrupad Vaghani, Mr. J.S
Khurana, Mr. Aniket Mokherjee, Advocates.

For Respondents : Mr. Saswat Pattnaik, Advocate.

J U D G M E N T
(Hybrid Mode)

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 01.11.2023 (hereinafter referred to as '**Impugned Order**') passed by the Company Appeal (AT) (Insolvency) No. 264 of 2024

Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-I) in in I.A.3392 of 2019 in CP (IB) 2295/MB-I/2018. By the impugned order, the Adjudicating Authority directed the Appellant - Liquidator in the liquidation process of the Corporate Debtor to accept the claim of the Respondent- M/s Tata Consulting Engineers Limited relating to refund of an amount of Rs.56,80,000/- with interest paid by them to prevent invocation of their Bank Guarantee and an amount of Rs. 16,73,798/- for invoice dated 22.11.2017 raised by them. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. The salient facts of the case which are relevant to be noticed for consideration of the matter are as outlined below:

- On 13.01.2010, the Maharashtra State Power Generation Company Ltd (**'MSPG'** in short) issued a work contract in favour of Sunil Hitech Engineers Ltd (**'SHEL'** in short) following which SHEL appointed Tata Consulting Engineers Ltd (**'TCEL'** in short) as sub-contractor to provide engineering services.
- A Bank Guarantee (**'BG'** in short) for Rs.56.80 lakhs was submitted by TCEL on dated 01.07.2010, in terms of contract between SHEL – Corporate Debtor and TCEL – Respondent. The validity of the said bank guarantee was extended by the Respondent from time to time upto 30.09.2018.
- The Corporate Debtor was later admitted into Corporate Insolvency Resolution Process (**'CIRP'** in short) in September, 2018 and the Resolution Professional (**'RP'** in short) representing the Corporate Company Appeal (AT) (Insolvency) No. 264 of 2024

Debtor sought to invoke the BG of the Respondent on 06.03.2019. Before the BG could be invoked, the Respondent paid the guarantee amount equivalent of Rs.56.80 lakhs on 06.03.2019.

- The Corporate Debtor was brought under liquidation proceedings on 25.06.2019. The Respondent in the liquidation process filed their claim of Rs.79.73 lakhs before the Liquidator on 24.07.2019 which also included refund of Rs.56.80 lakhs being the equivalent of guarantee amount paid; Rs.16.73 lakhs towards invoice No. 171910023 raised on 22.11.2017 and Rs.15.48 lakhs against other invoices raised on 25.03.2015 and 16.02.2016.
- The Liquidator/Appellant rejected the claim of the Respondent on 03.10.2019 with respect to refund of Rs.56.80 lakhs being the equivalent of guarantee amount paid and Rs.16.73 lakhs towards invoice No. 171910023 raised on 22.11.2017 following which the Respondent filed I.A. No. 3392 of 2019 before the Adjudicating Authority on 16.10.2019 for issue of directions to the Liquidator to accept their claim.
- The Adjudicating Authority allowed the prayers of the Respondent contained in I.A. No. 3392 of 2019 on 01.11.2023.
- Aggrieved by the impugned order, the present appeal has been filed.

3. The Learned Counsel for the Appellant making submissions contended that the Corporate Debtor had been regularly making payments to the Respondent against invoices raised by them from time to time. Subsequently, however, the Respondent started defaulting in the discharge of its obligations

under the contract. Due to delayed submissions of drawing and design documents by the Respondent, the entire project of MSPG got delayed which in turn had led to invocation of BG of the Corporate Debtor by MSPG. Due to this loss suffered by them arising on account of non-performance by the Respondent, the RP of the Corporate Debtor, during the CIRP period, invoked the BG of the Respondent. The Respondent made payment without making any protest or raising any objections to the invocation of the BG. Later when the liquidation proceedings of the Corporate Debtor commenced and the Respondent sought refund of the BG amount of Rs.56.80 lakhs by filing a claim, it was contended by the Learned Counsel of the Appellant that the Liquidator rightly rejected the claims made in this respect since this amount had been paid against the BG without raising any objections. Having made the payment without protest, the Respondent had therefore waived their right to seek refund from the Corporate Debtor and therefore could not have filed their claim for the same amount before the Liquidator. It was vehemently contended that it does not stand to reason how the Adjudicating Authority could have directed the Appellant/Liquidator to allow this claim.

4. It is further contended that the Adjudicating Authority had exceeded its jurisdiction under Section 42 of IBC while passing the impugned order without appreciating the fact that BGs constitute a separate, distinct and independent contract and hence the Adjudicating Authority did not have the jurisdiction to grant relief with respect to such claim. Adjudicating a breach of contract falls outside the scope of the insolvency of the Corporate Debtor and therefore the Adjudicating Authority did not enjoy the power to decide

such contractual disputes which could only be determined by way of arbitration as set out in the contract.

5. As regards rejection of the claim filed in respect of invoice No. 171910023 dated 22.11.2017, it was contended that the same was not certified by MSPG and hence the Respondent was not entitled to receive the said amount. Moreover, when the Plant handover to MSPG could not take place, the Respondent was not entitled for payment against this invoice. The liquidator had therefore not committed any error in rejecting the claim for payments with regard to invoice No. 171910023 raised on 22.11.2017.

6. The Learned Counsel for the Respondent rebutting the arguments canvassed by the Appellant submitted that TCEL had successfully fulfilled their contractual obligations for which it raised invoices as stipulated in the contract. Admittedly in terms of the contractual clauses, TCEL had also provided BG amounting Rs. 56.80 lakhs which was extended from time to time. Though payments to TCEL remained outstanding, the Corporate Debtor proceeded to invoke the BG on 06.03.2019 without sufficient cause. While admitting that TCEL made payment of Rs.56.80 lakhs for reversal of BG, it was vehemently contended that the same was done under duress so as to avoid any harm being caused to their professional image and market reputation. Since this amount was wrongly held back by the Corporate Debtor, the Respondent was justified in filing their claims before the Liquidator. However, the Liquidator wrongly rejected their claim by citing that the amount had been paid without protest. It was added that the Adjudicating

Authority rightly directed the Liquidator to accept the claim since they had rejected the claim without proper substantiation.

7. It was further asserted that despite having provided satisfactory services, the Corporate Debtor had failed to make payments against invoices raised by them. The Learned Counsel for the Respondent denied that TCEL had delayed the submission of drawing and designing documents or that they had failed to perform the contract in time. Neither had the Corporate Debtor ever sent any adverse communication to TCEL suggesting any deficiency in the quality of the work output. It was also stoutly contended that the Corporate Debtor had not cleared payment for the last invoice on 22.11.2017 which payment they were entitled to receive. Under such circumstances, it was wrong on the part of the Liquidator to reject the claim filed by them in respect of invoice no. 1719100023. The allegation of delayed and under-performance being levelled now by the Liquidator to justify their rejection of the claim of TCEL is contrived and an after-thought. Hence, the Respondent was constrained to file the IA before the Adjudicating Authority challenging the rejection of their claim by the Liquidator.

8. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

9. The main limbs of the Appellant's case are, firstly, that the Respondent had failed to comply with the terms of the contract. The delayed submission of drawings and designs documents by TCEL had affected the overall

performance of the Corporate Debtor in the main contract with MSPG leading to invocation of their BG of Rs.83.30 crores by MSPG. Hence the Corporate Debtor had rightly invoked the BG of the Respondent having suffered losses. Following invocation of BG of TCEL, the reversal amount of the BG was paid by TCEL by their own volition and not under protest. That being the case, no right accrues to them at the liquidation stage to claim the reversed amount of Rs.56.80 lakhs from the Liquidator. The second limb of argument is that TCEL had raised their final invoice on 22.11.2017 bearing no. 1719100023 on the Corporate Debtor without the invoice having been certified by MSPG. Furthermore, since the project handing over to MSPG could not be effectuated on account of delay in the performance of TCEL, the invoice was therefore not cleared. Both being quite inter-related, we propose to deal with them in a conjoint manner.

10. To appreciate the issue at hand, we may first have a quick look at the statutory role and responsibility of the Liquidator in the context of handling of claims. However, before we start our journey of glancing at the statutes, we must add here that it is well settled that IBC treats CIRP and the liquidation process as two separate stages. Liquidation order signifies the end of CIRP and the marks the beginning of the liquidation process. Proofs of claim are required to be filed separately at both these stages. While in the resolution phase, the submission of claims and verification thereof is with respect to primarily determining the eligibility to be a member of the Committee of Creditors, under the liquidation process, the verification is done with the

primary objective to determine the total amount of dues and priority thereof to be paid out of the liquidation estate.

11. The relevant statutory provisions are as outlined below:

“35. Powers and duties of liquidator. - (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: -

(a) to verify claims of all the creditors;

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53:

Provided that any such consultation shall not be binding on the liquidator:

Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

38. Consolidation of claims. - (1) The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.

(2) A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility:

Provided that where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner provided for the submission of claims for the operational creditor under sub-section (3).

(3) An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.

(4) A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt in the manner as provided in sub-section (2) and to the extent of his operational debt under sub-section (3).

(5) A creditor may withdraw or vary his claim under this section within fourteen days of its submission.

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.

40. Admission or rejection of claims. - *(1) The liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part, as the case may be:*

Provided that where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.

(2) The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims.

41. Determination of valuation of claims. - *The liquidator shall determine the value of claims admitted under section 40 in such manner as may be specified by the Board.*

42. Appeal against the decision of liquidator. - *A creditor may appeal to the Adjudicating Authority against the decision of the liquidator¹[accepting or] rejecting the claims within fourteen days of the receipt of such decision.”*

It may not be out of place to notice the relevant provision of IBBI (Liquidation Process) Regulations, 2016 (**‘Liquidation Regulations’** in short) which is as hereunder:

“23. Substantiation of claims. – *The liquidator may call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim.”*

12. From the above statutory scheme, it becomes clear that for the purpose of liquidation, the liquidator has some special powers which are significantly different from those of the RP. Under Section 36 the liquidator forms a liquidation estate where liquidator holds all the properties of Corporate Debtor as a fiduciary, for the benefit of the creditors. Another major function of the liquidator is the consolidation and verification of the claims submitted to him

as has been prescribed by Section 35 of the IBC. After their appointment, the liquidator has to issue a public announcement within 5 days from the appointment in Form B of Schedule II of the Liquidation Regulations. The purpose of the public announcement is to call upon the creditors and other such persons to submit their claims in relation to the corporate debtor. After the receipt of the claims, the liquidator shall verify those claims submitted by the creditors and may also ask the creditors to submit any evidence in relation to their claims for the purpose of verification. A liquidator is empowered to either admit or reject the claims on the basis of verification. If the liquidator rejects or admits a claim of a creditor, he has to communicate the same to the creditor within seven days from such decision. In the liquidation process, the liquidator has the power to reject claims raised and if a claim is rejected, a creditor can appeal against this decision to the Adjudicating Authority. After all the required claims have been admitted by the liquidator, he is required to determine the value of the claims for the purpose of distribution of the assets of the Corporate Debtor. This clearly entails the responsibility of more than merely collating claims but verification of claims and determination of their value.

13. Having noticed the scheme of IBC, with respect to role of the Liquidator, we may now see how the Liquidator in the present factual matrix has handled the claims lodged by the Respondent on 24.07.2019. The Liquidator informed the Respondent by email on 03.10.2019 partly rejecting their claims as follows:

“Bank Guarantee Claim of INR 56,80,000

We have perused the claim and communication with the Resolution Professional Mr. Ashish Rathi in relation to the invocation of Bank Guarantee of INR 56,80,000. In this regard, we wish to point out the email dated 6th March 2019 sent by Mr. Sachin Mishra (annexed as Page No. 127 to your claim) which clearly states that the amount paid against the bank guarantee is not under protest. Hence, in view of this, the claim of INR 56,80,000 is rejected.

Invoices dated 22.11.2017

We understand from the company that the invoice no. 1719100023 dated 22.11.2017 is not certified as the plant handover to Mahagenco did not take place. Hence in view of this, the claim for this invoice for INR 16,73,798/- is rejected.

Invoices dated 16.02.2016 and 25.03.2015

The company has accepted the invoices and paid INR 15,48,065/- against the said invoices. The same is also corroborated in your claim filed with us. In view of this, we accept your outstanding claim of INR 6,19,947/- against the above-mentioned invoices.

Summary

In view of the reasons stated above, the Liquidator is admitting your claim for INR 6,19,947”.

14. Aggrieved by the rejection of their claims, the Respondent filed their grievance before the Adjudicating Authority which reversed the rejection of the claims by the Liquidator. The principal conclusive findings contained in the impugned order as to why the Adjudicating Authority directed the Liquidator to accept the claims is as follows:

“5.1 We find that there are series of email communications from each side in relation to development of designs and none of such mail suggests any deficiency in the work of the Applicant, who had been forthright in modifying the design/drawings in accordance with the discussion between the parties. The Liquidator has not brought on record any substantive evidence that the invocation of Bank Guarantee by MAHAGENCO was attributable to deficiency in work on the part of the Applicant or any evidence suggesting that the Applicant failed to deliver

what it was supposed to. We feel that the action of the Resolution Professional in invoking Bank Guarantee was reaction to invocation of Corporate Debtor's Bank Guarantee by MAHAGENCO. Accordingly, we do not hesitate to hold that the Applicant is entitled to refund of Rs. 56,80,000/, being the amount of Bank Guarantee paid by it, alongwith the payment due in respect of Invoice dated 22nd November, 2017, bearing Ref. No. 1719100023."

15. Coming to our analysis, we find that no material has been placed on record by the Appellant which shows that the Corporate Debtor had on any earlier occasion denied making payments against the invoices raised by the Respondent. This gives sufficient room to believe that the Corporate Debtor was satisfied with the level of services performed by TCEL. We also find that the Respondent had been sending repeated emails on a regular basis to the Corporate Debtor seeking payment against various invoices including Invoice No. 171910023. These emails dated 06.10.2017, 13.10.2017, 02.11.2017, 21.11.2017, 13.12.2017, 16.01.2018, 16.02.2018, 11.04.2018, and 08.01.2019 are available at pages 154 to 157 of Appeal Paper Book (**'APB'** in short). There is nothing to show that the Corporate Debtor had disputed their liability to pay the last invoice No. 171910023 of 22.11.2017 raised by the Respondent. No communication appears to have been sent by the Corporate Debtor to TCEL regarding balance or pending work. There is also substance in the contention of the Respondent that the emails dated 14.11.2013, 02.06.2014 and 10.11.2014 referred to by the Appellant were at best in the nature of reminder emails from the Corporate Debtor but do not indicate any delays committed by the TCEL or any complaint being lodged against them. No specific grievances with regard to inferior quality of work have either been placed on record by the Corporate Debtor. The Corporate Debtor had Company Appeal (AT) (Insolvency) No. 264 of 2024

themselves communicated to TCEL that the project timeline of the contract between the parties for the balance work had been extended upto 31.12.2017. If we go by the extended timelines, the related work was completed by the TCEL within time as the invoice was raised by them on 22.11.2017. It therefore does not stand to reason for the Liquidator to have summarily rejected the claim of Rs.16.73 lakhs by simply citing that the project handing over to MSPG had not taken place. The Liquidator has clearly side-stepped undertaking appropriate verification of the claims.

16. Coming to the issue of invocation of BG by the Corporate Debtor, it is the case of the Respondent that having duly performed their obligations arising out of their contract with the Corporate Debtor, and in the absence of any claim for defect or otherwise, action on the part of the RP to invoke the BG of Rs. 56.80 lakh was without any basis. It has also been submitted that the Respondent wanted to avoid the spectre of invocation of their BG to protect their market reputation and hence paid the equivalent amount. Moreover, since this amount of Rs.56.80 lakh was paid while CIRP proceedings were going on and moratorium was in force, the Respondent was estopped from initiating legal proceedings to claim the said amount. The first chance that the Respondent got to recover the BG equivalent amount which was wrongfully retained by the Corporate Debtor was when the liquidation process commenced and the Respondent acted accordingly.

17. It is the counter-point of the Appellant that when the Respondent had made the payment of Rs.56.80 lakhs to the Corporate Debtor in lieu of the

BG, without any protest or reservations, they are estopped from seeking refund of the same before the Liquidator.

18. The liquidator is required to admit or reject a claim, basis documentary evidence. The liquidator is required to independently assess the merits of such claims based on the documents/evidence adduced by each such creditor. When we analyse the material on record, we notice that while sending the initial communication to the Bank of Baroda to encash the BG, the RP had not specified the default or non-compliance on the part of TCEL. The communication contained a very general statement that TCEL had defaulted under the contract and failed to comply with the terms and conditions of the contract. There seems to be no supporting documents to substantiate that the invocation of BG by MSPG was attributable to deficiency in work on the part of the Respondent or failure to achieve the deliverables on their part. Given this backdrop, we are of the considered view that the Liquidator has tried to justify the wrongful invocation of BG by raising the feeble defence that the BG equivalent had been paid without any demur or protest which seems to be more of an after-thought to cover the action of the RP.

19. In such circumstances, we have no hesitation in holding that the Respondent cannot be faulted in following the due process in filing its claim with the Liquidator. Furthermore, in the liquidation process, if a claim is rejected by the Liquidator, a creditor can appeal against this decision before the Adjudicating Authority. The Adjudicating Authority enjoys complete jurisdiction under Section 42 of the IBC to deal with the decision of the

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Liquidator rejecting the claim filed by the Respondent under Section 38 of IBC. This is in consonance with the statutory position set out under the IBC.

20. In view of the foregoing reasons, we are of the considered view that the Adjudicating Authority after perusing all material on record has rightly come to the conclusion while passing the impugned order that the Respondent is entitled to refund of Rs. 56.80 lakh being the amount of BG paid by it, alongwith the payment of Rs. 16.73 lakh due in respect of invoice dated 22.11.2017 and accordingly directed the Liquidator to accept these claims. We find no reasons to interfere with the impugned order. The Appeal fails and is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 28th May, 2024

Harleen Kaur