

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

IA No.497/KB/2020
in
CP (IB) No.148/KB/2018

In the matter of:

Applications under section 60(5) of the Insolvency and Bankruptcy Code, 2016, for directions upon the Resolution Professional to consider the claims

In the matter of:

State Bank of India ... Financial Creditor

Versus

Tantia Constructions Limited ... Corporate Debtor

And

In the matter of:

Krishna Hi-Tech Infrastructure Private Limited ... Applicant

Versus

Kshitiz Chhawchharia, RP of
Tantia Constructions Limited ... Respondent

Date of hearing: 28.06.2021
Date of pronouncement: 15.07.2021

Coram:

Shri Rajasekhar V.K. : Member (Judicial)
Shri Harish Chander Suri : Member (Technical)

Appearances (through video conference):

For the Applicant	:	Mr. Akhilesh Shrivastava, Advocate Mr. Akash Sharma, Advocate
For R-5	:	Mr. Ramendu Agarwal, advocate
For erstwhile RP/Chairman of Monitoring Committee	:	Mr. Ratnanko Banerji, Sr. Advocate Mr. Shwetaank Nigam, Advocate Mr. Deep Roy, Advocate Mr. Kshitiz Chhawchharia, erstwhile RP

ORDER

Per Rajasekhar V.K., Member (Judicial)

1. Preamble

1.1. **IA No.497/KB/2020** is an application filed by Krishna Hi-Tech Infrastructure Private Limited, against the Resolution Professional (RP) of Tantia Constructions Limited (the corporate debtor), seeking direction upon the RP to reconsider and reverify the claim submitted by the applicant on 24.04.2019, which is before approval of the Resolution Plan.

2. Mr. Akhilesh Shrivastava, Ld. Counsel for application IA No.497/KB/2020 submits as follows: -

2.1. On 24.04.2019, the applicant filed its claim with the RP for a sum of ₹ 1,81,00,496/-¹. The RP *vide* his email dated 15.05.2019,² requested evidence showing that – (i) the corporate debtor has accepted the goods supplied by the applicant, (ii) the ledger

¹ Pages 18 to 73 of the Application.

² Page 74 of the Application.

statement (iii) details of the cost of material, and (iv) interest calculation sheet. The applicant supplied all the information *vide* email dated 31.05.2019.³

- 2.2. Thereafter, the RP, *vide* email dated 28.06.2019,⁴ requested for further documents and information to substantiate the claim, such as – (i) GSTR-1 to validate GST input given to the corporate debtor; (ii) cost of material supplied that has been claimed for which there is no specific clause in the agreement; (iii) agreement validity was only till 31.12.2017. The applicant replied *vide* email dated 02.07.2019,⁵ submitting all clarifications.
- 2.3. Thereafter, there was no communication from the RP without conveying either acceptance or rejection of the claim of the Applicant. The RP, however, uploaded the list of operational creditors (other than workmen or employees) on the website. From this, the Applicant came to know that the claim was “pending for information.”⁶
- 2.4. The applicant, *vide* email dated 30.01.2020,⁷ requested the RP to verify the claim of the applicant. But there was no response.
- 2.5. Under section 18 of the Code, the duty of the RP is to accept and collate the claims. The meaning of “collate” is to examine, verify and compare the documents. However, the RP has refused to accept the claim since he has denied accepting the Proforma Invoice which amounts to adjudication of the claim. However, if the claim is to be adjudicated, it has to come before the Adjudicating Authority.
- 2.6. Mr. Akhilesh Shrivastava relied on *Allahabad Bank v. Canara Bank*⁸ for the proposition that in a case of this nature, once the debt is proved, it cannot be reduced by any authority, much less the Resolution Plan.

³ Page 76 of the Application.

⁴ Page 76 of the Application.

⁵ Page 91 of the Application.

⁶ Page 95 of the Application.

⁷ Page 98 of the Application.

⁸ (2000) 4 SCC 406.

2.7. The present application has been filed on 03.02.2020 requesting direction on the RP to consider the claim of the Applicant.

3. Reply by Mr Ratnanko Banerji, Ld. Sr. Counsel appearing for the answering respondent: -

3.1. The answering respondent has filed his reply dated 13.01.2021 to the application, wherein he has stated that the reply is being filed in the capacity of Chairman of the Monitoring Committee since the RP is no longer in office following the approval of the Resolution Plan by this Adjudicating Authority.

3.2. Mr Ratnanko Banerji, Ld. Sr. Counsel submits that the RP has accepted the claim of the Applicant to the tune of ₹ 3,26,538/- against the claim of ₹ 1,81,00,496.⁹

3.3. Certain materials which were given on hire by the applicant were being used for the Metro work. It is a fact that the materials are still in the possession of the Metro, and arbitration is going on. Metro has not paid the corporate debtor beyond October 2017. The contract was terminated by Metro on 26.02.2018 and the corporate debtor was admitted into CIRP on 13.03.2019.

3.4. So far as the claims are concerned, in the books of the corporate debtor, it was found that payment was made towards the rental amount up to February 2017. The applicant's second set of claims is from March 2017 to March 2019. The RP has an amount of – ₹ 3,26,000/- for June, July and August 2017 towards rent only.

3.5. The reason claims only for June, July and August have been allowed is that the tax invoice only for June, July and August have been produced. The rest were proforma invoices.

3.6. The applicant has also annexed the invoices with their application at pages 31 to 34. At pages 34 to 36 tax invoices for June, July and August, that have been admitted, are annexed. At page 37, unsigned invoices for September 2017 to March 2018 have been annexed and so on. The agreement itself came to an end in December 2017, however,

⁹ Para 2 at page 3 of the Reply.

at pages 38 to 49 proforma invoices from April 2018 to March 2019 have been annexed.

3.7. Moreover, the Resolution Plan of the corporate debtor has been approved by this Adjudicating Authority *vide* order dated 24.02.2020,¹⁰ therefore, the present application needs to be rejected as infructuous. Any acceptance at this stage will be completely prejudicial to the other stakeholders.¹¹

4. Analysis and findings

- 4.1. we have heard the learned Counsel appearing for the applicant and learned senior Counsel appearing for the answering respondent and perused the documents.
- 4.2. The issue of maintainability of the present applications was taken up as a preliminary issue and orders were reserved thereon on 16.03.2021. Thereafter, *vide* order dated 17.05.2021 this Adjudicating Authority held that the present application was maintainable. That order has since attained finality. The matter was fixed for argument on merits on 18.06.2021. Mr. Akhilesh Shrivastava, learned Counsel appearing for the applicant took us through the pleadings.
- 4.3. The facts of this application lie within a very narrow compass in terms of hire/rental agreement dated 25.11.2016. The applicant has supplied a 'Z' section of steel shoring materials at the project site of the corporate debtor on a monthly hire/rental basis at the Calcutta Metro Railway viaduct between Noapara and Dumdum Cantonment. In terms of the agreed conditions in the said rental order dated 25.11.2016, the basic rent of Rs.2,70,060/- per month was required to be paid for 77.16 MT of the said materials. Mr. Shrivastava argued that this constitutes service by entrustment of movable properties.

¹⁰ Page 14 of the Reply.

¹¹ Para 6 at page 4 of the Reply.

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4.4. This Adjudicating Authority had initiated CIRP against the Corporate Debtor *vide* an order dated 13.03.2019. Following this, the applicant filed Form 'B' along with supporting documents with the Resolution Professional on 24.04.2019. The total amount claimed was Rs.1,81,00,496/- (Rupees One crore eighty-one lakh four-hundred ninety-six only) as per the following break up:-

S. No.	Particulars	Amount
(a)	Monthly rental due	Rs.74,55,544/-
(b)	Interest as at Insolvency commencement date calculated at compound interest at 3 times of the bank rate as per the MSME Samadhan (interest on delayed payment) under MSME Act, 2006	Rs.56,82,790/-
(c)	Cost of materials lying at the site of the Project of the Corporate Debtor	Rs.49,62,162/-
	Total	Rs.1,81,00,496/-

Out of the aforesaid amount, the RP allowed a claim of Rs.3.26 lakh.

4.5. Mr. Shrivastava argued that the duty of the RP under section 18 of the Code is to accept and collate and not to adjudicate the matter.

4.6. Mr. Ratnanko Banerji, Ld. Sr. Counsel for the Resolution Professional argued that certain materials which were given on hire by the claimant for being used for the Metro work are still in the possession of Metro Railway and arbitration proceedings between Metro Railway and the corporate debtor represented by the RP are going on. The main contract itself was terminated by the Metro Railway on 26.02.2018. The RP had examined the documents attached with the claimant in Form 'B' and concluded that only 3 (three) invoices for June, July and August 2017, are complete

in all respect with signatures. In the case of other dues, either a proforma invoice or tax invoice had not been authenticated by the claimant. Therefore, all of these invoices were ignored.

- 4.7. In response to the query posed by the court as to why the RP did not allow even the basic rent, the Ld. Sr. Counsel for the RP did not have any proper answer. Since it was a case of service by entrustment of movable property, the RP was not right in asking for acceptance of the corporate debtor in all tax invoices and copy of the purchase order and other relevant documents to substantiate that the goods were delivered and that the corporate debtor had accepted such goods. This is a case where the RP himself was aware from the records that there was only one time supply of materials by the applicant and the monthly charge was towards the hiring cost of those materials. It is also admitted by the RP that the materials are still lying at the project site and have not been returned so far to the applicants.
- 4.8. In this scenario, while the RP could not properly have paid the tax on the supply of goods without a proper tax invoice, there was nothing that prevented him from factoring in the basic rent in respect of the materials which are already technically under the corporate debtor's custody but physically lying within the Metro Railway Project site.
- 4.9. Further, the applicant is not a party to the contract between the Metro Railway and the corporate debtor. There is also no condition either in the work order or in any of the invoices or in any other documents on record that indicate that this was in the nature of back to back contract, or in other words, the payment to the applicant is conditional upon payment being received from the principal employer *i.e.* Metro Railway. While there may be a good ground to argue that Proforma Invoice cannot be a substitute for a proper tax invoice, the RP ought to have factored in at least the basic rent and collated the claim on that basis with a rider that tax component can only be factored in once the proper tax invoice has been raised. This has not been done in the present case.

- 4.10. The sheer anchor of the defence raised by the answering respondent is that once a Resolution Plan is approved all undecided claims are extinguished. As we have already held in our order dated 09.06.2021, an act of Court cannot prejudice a litigant who has diligently pursued his claim with the RP and upon its resolution promptly filed the application before this Adjudicating Authority for a direction upon the RP to consider the claim afresh. In fact prayer 'A' specifically seeks a direction on the RP to reconsider and reverify the claim of the applicant before the approval of the resolution plan.
- 4.11. We are satisfied that the applicant has diligently pursued his claim for acceptance and collation by the RP and if it could not be taken up by this Adjudicating Authority before the approval of the resolution plan it cannot be said that the RP extinguishes all such claims. We find merit in the contention of the Ld. Counsel appearing for the applicant.
- 4.12. At this juncture while those invoices which do not contain a signature cannot be accepted in so far as the tax component of the bill is concerned, there is nothing that prevented the RP from considering payment of the basic rent since the materials of the applicant were at all material times in the custody of the corporate debtor and being used at the site of the project awarded to the corporate debtor. Therefore, there is no doubt in our mind that the applicant was indeed entitled to the basic rent without his having to submit any proof other than the work order in this respect. As far as the cost of materials supplied component is concerned, the RP was right in not accepting this part of the claim because no proof for arriving at such a value was provided by the applicant in Form 'B'. The RP was also right in disallowing the tax component since the invoices were only proforma invoices and not duly signed.

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4.13. In this view of the matter, the answering respondent is hereby directed to collate the claim of the applicant afresh on the basis of the above observations and include it in the list of operational creditors from which payments will be made by the successful Resolution applicant.

4.14. **IA No.497/KB/2020** stands **disposed of** with the aforesaid directions.

4.15. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

15.07.2021

VC/SR(LRA)