

Appearances (Hearing in Hybrid Mode)

For the Applicant: Counsel Mr. Nausher Kohli a/w Sunil Vyas and Deep Morabia appeared through Video-Conference.

For the Respondent: Counsel Aniruth Purusothaman a/w Aditya Sharma.

ORDER

Per: Coram.

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('IB Code') against the Respondent, who is the Resolution Professional ('RP') of the Corporate Debtor, challenging the rejection of its claim by the Respondent and consequently, seeking necessary directions from the Adjudicating Authority to the Respondent to admit the claim of the Applicant and make suitable modification to the list of creditors of the Corporate Debtor vis-à-vis the Applicant.
2. The Facts of the case leading to the filing of this application are briefly stated as under:
 - i. The Applicant is part of Godrej Properties Limited ("GPL") which is inter-alia involved in the business of real estate in India having considerable experience and expertise in development/ redevelopment of real estate projects and have earned a goodwill in the market of real estate by acting as a developer for various real estate projects across different cities in India.
 - ii. The Applicant had undertaken a redevelopment project named and styled as "Godrej Upvan" ("Project") at Village Temghar, Taluka Bhiwandi,

District: Thane. The Applicant had floated a tender dated 20th February, 2021 with the subject "Notice inviting tender for civil shell and Core Works for Project at Kalyan". The Corporate Debtor submitted its bid and was appointed as the Works Contractor. Accordingly, the Applicant and the Corporate Debtor entered into a Contract Agreement bearing Contract Reference No. PDLLP/CGU/CIVILS&C/01 ("Agreement") in respect of Civil Shell and Core Works for Tower R and Tower 9 at the said Project ("Works").

- iii. The Corporate Debtor undertook to complete the Works as per the terms and conditions of the said Agreement. It is pertinent to note that the contract period was 17.67 months (i.e. 530 days) (including mobilization period) from the date of issuance of notice to proceed, which was issued on 24th June 2021. Therefore, the entire scope of Works was required to be completed by the Corporate Debtor by 6th December 2022 or thereabout. However, the Corporate Debtor failed to complete the work within the agreed timeframe.
- iv. The Corporate Debtor has from time to time issued 10 RA bills upon the Applicant. The Applicant had, after verification of the work done by the Corporate Debtor as per each RA bill, issued 10 Certificates of Payment from time to time and accordingly, the payments were made by the Applicant to the Corporate Debtor.
- v. The Applicant states that on account of failure on the part of the Corporate Debtor to complete the Works in accordance with terms of the said Agreement, the Applicant was constrained to invoke the provisions of the said Agreement and levy debits upon the Corporate Debtor on account of non-performance, miscellaneous infra, material supply, steel wastage and liquidated damages as per the General Conditions of

Contract ("GCC") and Special Conditions of Contract ("SCC") as per the said Agreement.

- vi. The Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor commenced on 16.09.2022 pursuant to the Order passed by the Tribunal in the above-captioned Company Petition. Mr. Sitansh Magia was appointed as the Interim Resolution Professional ('IRP') of the Corporate Debtor.
- vii. The IRP made public announcement dated 17th September, 2022 in FORM A as per Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") for inviting claims from the creditors of the Corporate Debtor.
- viii. Pursuant to the public announcement, on 15th December 2022, the Applicant through its Advocates had filed its claim along with all the supporting documents before the IRP in FORM B (Operational Creditor other than workmen and employees) of the CIRP Regulations. Vide email dated 15th December 2022, the Applicant raised a claim of Rs. 2,12,33,642/- (Rupees Two Crores, Twelve Lacs, Thirty-Three Thousand, Six Hundred and Fourty Two only) from the Corporate Debtor, out of which the amount of liquidated damages claimed is Rs. 2,09,55,478/-.
- ix. The IRP had filed updated List of Creditors of the Corporate Debtor as on 11th January 2023 with Insolvency and Bankruptcy Board of India. which reflected that the claim of the Applicant was under verification as on that date. The Applicant submits that meanwhile, vide an order dated 16th January 2023 passed in IA 23/2023 filed by one Pro Fin Capital Services Limited, being a financial creditor of the Corporate Debtor, Mr.

Kailash T. Shah was appointed as the Resolution Professional of the Corporate Debtor in place of Mr. Sitansh Magia.

- x. On 17th April 2023 i.e. after 4 months from the date of filing of claim by the Applicant, the Respondent addressed an email to the Advocate for the Applicant, thereby calling upon the Applicant to pay a sum of Rs. 1,06,20,476/- to the Corporate Debtor. The Applicant through its Advocates, vide e-mail dated 25th April, 2023 denied the contents of the email dated 17th April, 2023.
- xi. Thereafter, the Respondent vide his email dated 27th May, 2023 requested for documents for reconciliation of accounts. The Applicant was in process of collating and submitting the documents for reconciliation of accounts to the Respondent, however, vide his email dated 07th June 2023, the Respondent arbitrarily and illegally rejected the claim of the Applicant against the Corporate Debtor on the ground that the Respondent hadn't received the documents for reconciliation till then. The Applicant replied to the email dated 07th June, 2023 through its Advocates vide email dated 07th June, 2023 stating that the Applicant is in the process of submitting the documents for reconciliation of accounts and will submit the same shortly and also requested the Respondent to kindly consider the claim after receiving the documents. The Applicant through its Advocates, vide an email dated 04th July, 2023 submitted the ledger of the Corporate Debtor in the books of the Applicant along with necessary documents in support of the entries/transactions which have not been recorded by the Corporate Debtor.
- xii. By way of the present application, the Applicant assails the email dated 17th April, 2023 read with email dated 07th June, 2023 both addressed by the Respondent to the Advocate for the Applicant.

3. Reply of the Respondent

The Respondent has filed his Affidavit-in-Reply dated 23rd September, 2023.

The reply of the Respondent is summarized as under:

- i. The ledger account of the Applicant in the books of the Corporate Debtor show that an amount of Rs.1,06,20,476/- (Rupees One Crore, Six Lakhs, Twenty Thousand, Four Hundred and Seventy-Six Only) is due and receivable by the Corporate Debtor from the Applicant. The Applicant has not shared or communicated to the Respondent debit notes which show the GST component and hence, the debit notes have not been recorded in the books of accounts of the Corporate Debtor.
- ii. A reasonable time of not less than 10 days were provided to the Applicant to provide documents for reconciliation and since the Applicant did not revert within the said period, the Respondent was justified in rejecting the claim as CIRP is a time bound process.
- iii. The Applicant has claimed liquidated damages from the Corporate Debtor while lodging its claim. The Respondent states that liquidated damages have not yet been crystallised by a court of law and therefore, an insolvency professional cannot admit the same.

4. Rejoinder of the Applicant in brief:

- i. The Respondent has failed to establish any pre-existing dispute between the parties as on the date of filing of the claim by the Applicant. Therefore, in the absence of any pre-existing dispute between the Applicant and the Corporate Debtor, the claim of the Applicant cannot be termed as 'disputed' by the Respondent and thus, the claim of the Applicant is bound to be admitted by the Respondent as it is undisputed.
- ii. The Applicant submits in its rejoinder that the Respondent, who happens to be the resolution professional of the Corporate Debtor, has no

adjudicatory powers under the Code to reject the claim without verifying it first. In the present matter, the Resolution Professional/Respondent is yet to verify the claims and ultimately determine the amount of each claim. Without assigning any reason, the Resolution Professional/Respondent has rejected the claim of the Applicant as being disputed which manifests arbitrariness and non-application of mind.

- iii. The Applicant states that the debits levied upon the Corporate Debtor are in accordance with the terms of the agreement executed between the Applicant and the Corporate Debtor. The Applicant had provided all requisite clarifications to the Respondent with respect to the reconciliation of accounts while highlighting that it is the Respondent who is required to issue credit note with GST component upon the Applicant.
- iv. The Applicant further states that since the Corporate Debtor is undergoing corporate insolvency resolution process by virtue of section 14 of the Code, no proceedings can be filed or continued before a court of law to crystallize the claim of liquidated damages of the Applicant.

FINDINGS

5. We have heard the learned counsel for the parties and have also gone through the record.
6. It has been submitted by the Counsel for the Applicant appointed the Corporate Debtor as a contractor for the project namely Godrej Upvan at village Temghar, District: Thane. The Corporate Debtor raised as many as 10 RA bills in respect of the work carried out by it. The Applicant issued 10 certificates of payment against the said bills and also made the payments to the Corporate Debtor. The Counsel for the Applicant has further argued that after the initiation of CIRP

against the Corporate Debtor on 16.09.2022, the Applicant raised various debit notes on account of various non-performance, wastage of material and other shortcomings in the work carried out by the Corporate Debtor. The said debit notes were duly acknowledged by the Corporate Debtor as per the terms and conditions of the contract. Accordingly, the Applicant filed its claim of Rs.2,12,33,642/- along with the supporting documents with the IRP. However, the Respondent/IRP failed to verify the claim of the Applicant within the statutory period and instead sent an e-mail on 17.04.2023 asking the Applicant to explain certain discrepancies etc. The Respondent further asked for certain documents vide his e-mail dated 27.05.2023. Ultimately, the respondent, vide his e-mail dated 07.06.2023, rejected the claim of the Applicant without assigning any legitimate reason.

7. The Counsel for the Applicant has further argued that the rejection of the claim on the part of the RP is illegal especially when the debit notes sent by the Applicant were duly accepted by the Corporate Debtor. Moreover, the Respondent has no adjudicatory powers to assess the claim on merits. Therefore, the rejection of the claim by the RP be set aside and the direction be issued to the Respondent/RP to verify and admit the claim of the Applicant.
8. On the other hand, the Counsel for the RP has argued that the application filed by the Applicant is not maintainable considering the fact that as per the ledger account of the Corporate Debtor, a sum of Rs 1,06,20,476/- is due and payable by the Applicant to the Corporate Debtor. The Counsel for RP has further pointed out that vide e-mail dated 27.05.2023, the Applicant was informed that upon reconciliation of the ledger of the Applicant in the books of the Corporate Debtor till 16.09.2022, a significant difference was found in respect of the amount claim by the Applicant.

9. The learned Counsel for the Respondent/RP has further argued that the Applicant has claimed unliquidated damages of Rs.1,63,32,582/- but the damages, which are not pre-agreed, are to be assessed by a court of law after the breach of the contract and simply by alleging a breach, the Applicant cannot be held entitled to claim unliquidated damages. According to the Counsel for the Respondent, liquidated damages cannot be claimed unless and until the same are crystalized by a court of law or by an Arbitrator. In support of his contentions, the counsel for the RP has relied on Union Of India v/s. Raman Iron Foundry [1974 SCC (2) 231] whereby it has been held by the Hon'ble Supreme Court that the damages are compensation which a court of law gives to a party for the injury which he has sustained on account of breach of contract, therefore, the party gets compensation as a result of the fiat of the court and no pecuniary liability arises till the court has determined that the party complaining of breach is entitled to damages. In the light of the law laid down in the cited case, the Counsel for the RP has urged that the claim of the Applicant has been rightly rejected and there is no merit in the application.
10. We have considered the contentions raised by the counsel for the parties.
11. It is the case of the Applicant that it awarded a work order to the Corporate Debtor amounting to Rs.41,91,09,564/-. As against this order, the Corporate Debtor carried out some work at project Godrej Upvan and issued 10 RA bills amounting to Rs. 13,58,59,702/-. However, the Corporate Debtor failed to complete the work in accordance with the agreement. As a result, the Applicant issued debit notes upon the Corporate Debtor on account of non-performance, miscellaneous infra material supply, steel wastage and liquidated damages as per the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). The details of the debit notes are as under:

Total Debit	Amount
1. Debit for electricity bill till 31.10.2022	-20,97,830
2. Debit against JCC scope material supply	-86,08,490
3. Debit against Safety	-1,80,000
4. Hold Against Post Pour, MM hoist, labour compliance and camp maintenance	-17,29,867
5. Steel and concrete material excess wastage recovery	-37,16,395

12. The Debit note for electricity till 31.10.2022 has been raised on the basis of Clause No 6.2.1 which simply says that the contractor shall be responsible for the arrangement of uninterrupted supply of electricity as its cost for the contract period unless otherwise stated in these special conditions of contract. There is reference to serial no. of SCC that the company shall provide electricity connection at one point at a designated location but the same shall be on chargeable basis at the prevailing rates and meters installed by the contractor through a licensed electrician with all the safety precautionary norms followed. However, in the application, no detail has been given by the Applicant justifying the issuance of the Debit note of Rs.20.97 lakhs on account of electricity supply by the Applicant to the Corporate Debtor.

13. Similarly, the debit note of Rs. 86.08 lakhs is claimed to have been issued on account of JCC Scope Material Supply as per GCC Clause 20.10.1 and 20.10.3 which simply provides a right to the company to refuse to approve any payment or nullify any payment previously approved because of subsequently discovered evidence of any loss caused by the Corporate Debtor. Again, no detail has been given to substantiate the claim on which the debit note was raised. Therefore, this part of the claim does not stand substantiated.
14. Another amount of Rs. 1.80 lakhs has been claimed as debit invoking Clause 11 and 11.1.5 of GCC which provides that the contractor shall provide for all safety requirements prescribed and all costs related to safety at site as directed by the company as required and not limited to the items listed. Here again, the applicant has not furnished any evidence to justify the claim of Rs. 1.80 lakhs and this part of the claim is also not substantiated.
15. The applicant has further raised a debit note of Rs. 17.29 lakhs on the basis of GCC Clause 20.10 post pour, MM Hoist, Labour Compliances and can maintenance. Clause 20.10 of GCC gives right to the company to refuse to approve payments in certain events. Here again no justification has been coming forward as to on one account this part of the claim was raised against the Corporate Debtor or was chargeable upon him.
16. Lastly, an amount of Rs. 37.16 lakhs have been claimed on account of steel and concrete material excess wastage recovery as per Clause 12.3.2 of GCC. This Clause provides that in case the contractor's consumption of material supplied by the company exceeds the theoretical quantity plus permissible wastage, the company shall be entitled to recover the cost of excess wastage from the contractor. Here again the claim is on account of damages and is also subject to an enquiry with regard to the fact as to whether the contractor exceeded the permissible limits of wastage or not. Therefore, the RP could not possibly have

admitted this claim even if some evidence might have been produced before him, as the RP has no adjudicatory powers. Even otherwise, the claim is in the nature of damages which are yet to be crystalized.

17. From a perusal of the above referred debit notes, it is evident that the Applicant has raised certain claims against the Corporate Debtor on the basis of GCC and SCC. Most of the claims are in the nature of damages which can be crystalized only through a process of adjudication by a court of law or by an Arbitrator. Learned Counsel for the RP has rightly relied on Union of India v/s. Raman Iron Foundry (supra) which clearly provides that any claim for damages does not give rise to debt until the liability is adjudicated and damages are assessed by a decree or Order of Court or other Adjudicatory Authority. It is equally well settled that even this Authority is not in a position to adjudicate upon the claim in summary proceedings. Therefore, it was imperative for the applicant to first get his claim crystalized through Court of arbitration proceedings and since the RP has no adjudicatory powers, he was not in a position to admit the claim. Therefore, no fault can be found in the action of the RP in case he has not admitted the claim of the Applicant on whatsoever grounds.

18. As a result of the above discussion, we find the application to be without any merit and the same is hereby **dismissed** with no order as to costs.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)