

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH COURT III

I.A. 105/2023

In

C.P. No. (IB) 4087/MB/C-III/2018

Under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016

Vashi Steel Private Limited)
Having its registered office at:)
101, Nilgiri, N. S. Road, No. 9,)
Juhu Scheme, Vile Parle (West))
Mumbai - 400049) *... Applicant*

Vs.

1. Mr. Dinesh Kumar Aggarwal)
(Resolution Professional of Dolphin)
Offshore Enterprises Pvt. Ltd.))
Having office at:)
1507, B-Wing, One BKC, G-Block,)
BKC, Bandra (East),)
Mumbai – 400051) *... Respondent 1*

2. State Bank of India)
(Represented by Mr. Ravi Prakash)
(Manager) & Mr. Saurabh Dal)
(Chief Manager))
Having office at:)
Commercial Branch 3, Tulsiani)
Chambers, 1st Floor, B Wing,)
Nariman Point, Mumbai – 400021) *... Respondent 2*

3. Canara Bank)
(Represented by Mr. Manoj S. R.)
(Chief Manager))
Having office at:)
G Block, Near Indian Oil, Opposite)
Godrej, Bandra Kurla Complex,)
Bandra (East), Mumbai- 400051) *... Respondent 3*

IN THE MATTER OF

Supreme Hydra Engineering Pvt. Ltd. *... Financial Creditor*

Vs

Dolphin Offshore Enterprises (India) Ltd.

... *Corporate Debtor*

Order pronounced on: 23.04.2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

Appearances:

For the Applicant : Adv. Shyam Kapadia & Mr.
Suddhasattwa Roy i/b DSK Legal

For the Resolution Professional : Adv. Amir Arsiwala i/b
Adv. Manish Jha

For the Successful Resolution Applicant : Adv. Amay Hadwale a/w
Adv. Geeta

Per: Ms. Lakshmi Gurung, Member (Judicial)

ORDER

1. The above I.A. is filed by the **Applicant**, Vashi Steel Private Limited, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("the Code"), seeking following reliefs:
 - a) *To direct the Respondents to pay a sum of Rs.1,03,72,224/- (One Crore Three Lakhs Seventy-Two Thousand Two Hundred and Twenty-Four Only) to the Applicant as CIRP Costs for utilizing the said premises during the course of CIRP of the Corporate Debtor;*
 - b) *In the alternate to prayer (a), in the event the Resolution Plan is approved by this Tribunal, to direct the Resolution Applicant of the Corporate Debtor to pay an amount to the tune of Rs.1,03,72,224/- (One Crore Three Lakhs Seventy-Two Thousand Two Hundred and Twenty-Four Only) as CIRP cost to the Applicant;*

- c) *To direct the Respondent No.1 to admit the claim of the Applicant lodged before the RP as on 18th August 2020 towards the PRE-CIRP costs amounting to the tune of Rs.4,05,91,038/- (Rupees Four Crores Five Lakhs Ninety-One Thousand and Thirty-Eight Only);*
- d) *In the interim, during the pendency of the present Application, this Tribunal be pleased to stay the approval and the implementation of the Resolution Plan;*
- e) *Interim reliefs as prayed in prayer clause (d);*
- f) *Cost of the application.*

Facts of the Case:

2. The Applicant was in possession of a plot of land admeasuring at about 3870 sq mtrs in Thane (**the said land**) by virtue of an Indenture of Lease dated 30.09.1992 executed between the Applicant and Maharashtra Industrial Development Corporation (MIDC) for a term of 95 years for industrial purposes. On the said land, there exists a crane which holds the shed on the land and is fixed to the land and cannot be removed from it.
3. On 22.05.2019, the Applicant and the Corporate Debtor entered into a Leave and License Agreement (**Land Agreement**) whereby the Corporate Debtor was allowed to use and occupy the said land, purely on license basis, for an initial period of 12 months plus additional period of 12 months, commencing from 01.03.2019 to 28.02.2021. Another leave and license agreement (**Crane Agreement**) was also entered into on same date thereby enabling the Corporate Debtor to use the crane fixed to the land.
4. Clause 21 of the Crane Agreement specifically states that the Corporate Debtor agrees and undertakes not to terminate the said Crane Agreement and shall not return the cranes while the said Land Agreement is subsisting.

5. The license fees under the Land Agreement and the Crane Agreement was Rs. 5,61,330/- and Rs. 4,04,250/- per month respectively plus the requisite taxes. Thus, the total rent payable by the Corporate Debtor under both the agreements is Rs. 11,39,385 per month [(Rs. 5,61,330/- + Rs. 4,04,250/-) + 18% GST].
6. The Corporate Debtor defaulted in the payment of said license fees subsequent to which the Applicant terminated both the above agreements vide Letter dated **14.10.2019** and called upon the Corporate Debtor to pay the outstanding amount of Rs. 3,30,68,171/- for arrears prior to July 2019 and Rs. 34,18,155/- being arrears for period between August 2019 to October 2019.
7. The Corporate Debtor, through its letter dated 25.10.2019, admitted its liability to pay Rs. 3,60,36,800/- to the Applicant being arrears arising out of both the agreements. However, the Corporate Debtor neither paid the outstanding amount nor vacated the premises.
8. On **16.07.2020**, the Corporate Debtor was admitted into CIRP and the Applicant lodged its claim of Rs. 4,05,91,038/- on 18.08.2020 which was duly accepted by the erstwhile Resolution Professional.
9. The applicant had taken back the control and possession of the said land and the shed while the assets of the Corporate Debtor were inside, and the keys were with the Applicant. Vide order dated 09.10.2020 passed in I.A. 1525/2020, RP was directed to take inventory of the assets of the Corporate Debtor that was lying in the premises of the Applicant and to lock the premises after taking the inventory and keep the keys with the RP until further order. The RP was further directed to engage security guards for the premises of the Applicant to safeguard the assets belonging to the Corporate Debtor.

10. Aggrieved by the said order, the Applicant filed I.A. No. 1883/2020 on 27.10.2020 seeking recall of the order dated 09.10.2020 and prayed for directions to the RP to remove the lock/seal from the premises and restore possession of the Applicant. In the said application, the Applicant also sought payment being license fees payable under both the agreements as storage charges since the premises of the Applicant was to be used by the Corporate Debtor during the CIRP period.
11. While the said IA No. 1883/2020 was pending final adjudication, the Committee of Creditors, in its 4th CoC Meeting held on 22.12.2020, had resolved to pay the Applicant license fee under only the Land Agreement amounting to Rs. 5,61,397 per month instead of the total amount of Rs. 11,39,385 arising out of the Land Agreement and Crane Agreement on the ground that the Corporate Debtor does not require the use of crane. Disagreeing with same, the Applicant sent a notice dated 13.05.2021. On 30.09.2021, the possession of the premises was handed over to the Applicant.
12. This Court passed the order dated 10.05.2022 in IA 1883 of 2020 wherein it is recorded that the lock and seal has been removed and possession handed over to the Applicant. During the course of the hearing, the Counsel for Resolution Professional further submitted that the Applicant submitted its claim which has been accepted as storage charges as part of CIRP cost. The IA was accordingly disposed of.
13. It is the case of the Applicant that it did not receive any amount from the Respondents and therefore issued a demand notice dated 05.11.2022. On 19.12.2022, Rs. 73,26,231 was sent to the Applicant in lieu of CIRP costs. However, the Applicant realized that the amount paid to the Applicant was only in respect of the Land Agreement and not included the charges under the Crane Agreement. The amount paid

also did not include the GST charges under the Land Agreement. Consequently, the present IA was filed on 25.12.2022.

14. In the meantime, the Resolution Plan submitted by M/s Deep Industries Limited (**Successful Resolution Professional/ SRA**) was approved by this Tribunal on 29.09.2022, which provided for an amount of Rs. 4,059/- (for pre-CIRP claim) to be paid to the Applicant which is 0.01% of the claim amount.

Submissions of the Applicant:

15. The Applicant submits that the decision of the CoC to pay fee under only the Land Agreement is arbitrary and lacks rationale. The Code does not empower the CoC to unanimously take decisions in a manner to injure third-party rights.
16. It is further submitted that Clause 21 of the Crane Agreement states that the two agreements were to be read together, and the Corporate Debtor had agreed to not terminate the Crane Agreement during the subsistence of the Land Agreement. The Respondents ought not to have ignored the contract on the basis of which the land was agreed to be used by the Corporate Debtor. The license fee under the Crane Agreement is to be paid as CIRP costs similar to the license fee under the Land Agreement since it was a composite liability. Further, under Clause 11 of the Land Agreement, the Corporate Debtor is liable to pay GST with respect to license fees under the Land Agreement. In view of the same, the Applicant is entitled to receive a sum of Rs. 1,03,72,224/- from the Respondents.

Submissions of Resolution Professional/Respondent No. 1 and the Successful Resolution Applicant:

17. M/s Deep Industries Limited, the Successful Resolution Applicant (**SRA**) of the Corporate Debtor, filed IA No. 2230/2023 seeking

intervention in the present case as the Applicant has also sought alternate relief against the SRA. The said IA was allowed by the Tribunal vide order dated 14.09.2023.

18. The Resolution Professional and the Successful Resolution Applicant made their respective submissions which are common in law and facts. The submissions are summarized below:

- i) Relying on the judgment of ***Ghanashyam Mishra and Sons Pvt. Ltd. vs. Edelweiss Asset Reconstruction Company Limited and Ors. [Civil Appeal No. 829/2019]***, it was submitted that the application for payment of license fee under crane agreement is not maintainable as the same is filed after the approval of the Resolution Plan by the Adjudicating Authority.
- ii) The claim of the Applicant was duly considered by the CoC in its 4th CoC Meeting held on 22.12.2020 and an amount of Rs. 81,40,257/- towards storage charges and Rs. 7,25,000/- towards shifting charges was approved by the CoC as CIRP Cost. The same was again considered and finalized in the 11th CoC Meeting held on 27.07.2021.
- iii) Thereafter, when IA 1883/2020 was listed before the Tribunal on 10.05.2022, the said IA was disposed of for the reason that all grievances of the Applicant stood resolved.
- iv) The Resolution Professional submits that as per Regulation 31 of the IBBI (Insolvency Resolution Process for Corporate Persons), 2016, only those costs which are ratified by the CoC come under the purview of 'insolvency resolution process cost'.
- v) Further, the Corporate Debtor is not liable to make payment under the Crane Agreement as both the agreements stood

terminated by the Applicant vide letter dated 14.10.2019. Furthermore, the Corporate Debtor never used the crane during the CIRP period. It is specifically stated in the 4th CoC meeting dated 22.12.2020 that the RP had restricted access to the licensed premises and it was only after the Tribunal's order dated 09.10.2020 that the RP was able to conduct inspection of the assets of the Corporate Debtor.

- vi) It is submitted that the licensed premises were only utilized to the extent of storing the assets of the Corporate Debtor and the crane was not put to use by the Corporate Debtor. In view of the same, the CoC decided to pay the amount of Rs. 5,61,397 per month towards license fees under the Land Agreement. Thus, the decision of CoC is not arbitrary.

FINDINGS/OBSERVATIONS

19. Heard Ld. Counsel for the Applicant, Resolution Professional and the Successful Resolution Applicant and perused the record.
20. The Applicant is an operational creditor of the Corporate Debtor who had executed two Leave and License Agreements, i.e. Land Agreement dated 22.05.2019 and Crane Agreement dated 22.05.2019, thereby allowing the Corporate Debtor to use and occupy the said land with shed on it and the crane holding the shed.
21. It is to be noted that the both land and crane agreements stood terminated on 14.10.2019, i.e. prior to the initiation of the CIRP of the Corporate Debtor. It is mentioned by the Applicant in the Claim Form that *"the Corporate Debtor addressed a letter dated 25th October 2019 admitting the liability of Rs. 3,64,86,326/- and handed over the said premises back to Vashi Steels Pvt. Ltd."* Thus, the possession of the said

land along with crane was handed back to the Applicant in October 2019 itself.

22. Subsequently, the Corporate Debtor was admitted to CIRP on 16.07.2020. However, some of the machineries belonging to the Corporate Debtor remained inside the shed/said land. Therefore, the Resolution Professional (RP) filed IA No. 1525/2020 seeking direction to allow the RP to conduct inventory of the materials of the Corporate Debtor lying in the premises of the Applicant. This Tribunal vide order dated 09.10.2020 allowed IA 1525/2020 and further directed the RP to lock the said with a view to protect the assets of the Corporate Debtor. Thus, it can be seen that land agreement as well as crane agreement stood terminated, however, due to directions of this Tribunal during CIRP, the possession of the said land was given back to the corporate debtor for the limited purpose of taking inventory and for shifting purpose.
23. Aggrieved by the same, the Applicant filed IA 1883/2020 (**Recall Application**) praying for recall of the order dated 09.10.2020. While the final adjudication of the recall application was pending, the 4th CoC Meeting held on 22.12.2020 decided that an amount of Rs. 5,61,397/- per month shall be paid to the Applicant as per the Land Agreement.
24. Aggrieved by the decision made in the 4th CoC Meeting, the Applicant had sent a notice dated 13.05.2021 to the RP. Relevant portion of the said notice is reproduced below:
- ***
- i. ... It was further put to the attention of the Hon'ble Tribunal that an amount to the tune of Rs. 5,61,397/- has been erroneously appropriated towards the License Fees payable to our Client, which is almost the half of the license fees actually payable by the Corporate Debtor to our Client for utilizing our Client's premises.*
- ***
- v. ... Further, you are also requested to intimate our Client the next date of the meeting of the CoC and further allow our Client to*

participate in the said meeting, in order to enable our Client to put forth a detailed proposal before the CoC which shall be suitable to both the parties.”

25. Accordingly, the representatives of the Applicant had participated in the 9th CoC meeting held on 21.05.2021 to place their proposal of shifting the machineries of the Corporate. The CoC decided to keep the proposal on hold. However, in the said meeting, the CoC was also asked to consider paying 50% of the total agreed amount of Rs. 5,61,398 per month to the Applicant as license fee from June 2021 onwards and the residual 50% to be accumulated on accrual basis as a part of the CIRP cost. Accordingly, the following resolution was passed by the CoC with 88.99% of voting:

*“**Resolved that** the members of Committee of Creditors be and hereby approve that the COC will contribute towards payment of 50% of the monthly license fees of the Vashi Steel Private Limited amounting to Rs. 2,80,699/- from June 2021 onwards and residual 50% of license fee will continue to be accumulated on accrual basis as hitherto. The monthly license fee shall form a part of the CIRP Cost.”*

26. When the recall application being IA No. 1883/2020 was called for hearing on 02.06.2021, the decision of the CoC was recorded. The relevant portion of the order is reproduced below:

“***

I.A. No. 1883/2020

**** It is submitted by RP and the Counsel appearing for him that the CoC in its meeting dated 20.05.2021 had resolved to pay Rs. 2,80,699/- i.e. 50% of the admitted rent (the claimed rent is Rs. 9.40 Lakhs) commencing from the month of June 2021. Upon hearing both the sides the Bench suggested that this reduced amount (50%) of rent as resolved by the CoC may be paid at least from the date of order of admission i.e. 19.07.2020.”*

27. Pursuant to the order dated 02.06.2021, 11th CoC meeting was held on 27.07.2021 wherein it was resolved to pay the admitted amount of Rs. 5,61,397 per month from the CIRP initiation date i.e. 16.07.2020 till the

date of shifting as CIRP costs. It is stated in the minutes of the meeting that the proposal of the Applicant which was placed before the CoC in the 9th meeting was approved which was also communicated to the Applicant on 09.07.2021 and that the Applicant has sent a reply dated 11.07.2021 providing its consent to extend necessary assistance for shifting of the machineries of the Corporate Debtor. Again, there were no deliberations or negotiations between the parties regarding the amount to be paid to the Applicant.

28. On 10.05.2022, the IA No. 1883/2020 filed by the Applicant was disposed of in following terms:

“I.A. 1883/2020

After briefly hearing the parties, the counsel appearing for the Applicant submits that the reliefs claimed in terms of Prayer Clause (a) and (b) have already been complied by the Resolution Professional. Learned counsel appearing for the Resolution Professional submits that the Applicant has also submitted his claim in respect of the storage charges during the CIRP period and the same is accepted. In view of above, nothing survives in the above Application as all the grievances of the Applicant are resolved. Therefore, the above Application is disposed of accordingly.”

(Emphasis Provided)

29. It is the case of the Applicant that during the final hearing of IA 1883/2020, when the RP submitted that the prayers sought in the recall application is complied, the Applicant believed that the RP admitted the entire claim of Rs. 11,39,385/- considering its letter dated 13.05.2021. However, when the entire amount was not paid, the Applicant has filed the instant application seeking payment of the balance claim amount.
30. It is pertinent here to note that decisions regarding CIRP costs remain in the domain of the CoC and it is also not for the Adjudicating Authority to make an analysis of the same. Regulation 31 of the Insolvency and

Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that costs relating to CIRP is to be approved by the CoC. Relevant portion of the said Regulation is reproduced below:

“31. Insolvency resolution process costs.

*(e) other costs directly relating to the corporate insolvency resolution process and **approved by the committee.**”*

(Emphasis provided)

31. Reference shall also be made to **Bharat Hotel Ltd. vs. Tapan Chakraborty [Company Appeal (AT) (Ins) No. 1074/2022]** wherein the Hon’ble NCLAT observed as follows:

“Question of cost and its approval lays in the domain of the CoC. The CoC may ratify, modify or set aside the cost claimed. These issues may be decided in the meeting of the CoC and are not to be examined by the Adjudicating Authority even before the CoC takes a decision. It shall be always open for the appellant to raise issue regarding the cost in the meeting of the Committee of Creditors.”

32. Further, it is clear from the minutes of the 9th CoC Meeting held on 21.05.2021 wherein representative of the Applicant had also participated that resolution was passed to pay 50% of the monthly license fee i.e. amounting to Rs. 2,80,699/- and residual 50% to be accumulated to form part of CIRP costs. On the date of hearing on 10.05.2022, the Applicant was very much aware of the CoC decision and it is recorded in the order dated 10.05.2022 that *“all the grievances of the Applicant are resolved”*. Therefore, the contention of the Applicant cannot be accepted that he was under mistaken belief that his entire claim of Rs.11,39,385 was admitted by the Resolution Professional.
33. We further note that the Resolution Plan approved by CoC on 07.02.2022 has been approved by this Adjudicating Authority on

29.09.2022. The present application has been filed on 09.01.2023, much after the sanction of approval of the Plan by this Adjudicating Authority. In view of the above discussions, this Tribunal cannot allow prayer (a).

34. During the course of hearing of the case, the Applicant fairly conceded that prayer (b) sought against the Successful Resolution Applicant is not being pressed which was also recorded in Order dated 05.01.2024. Even otherwise, in view of ***Committee of Creditors of Essar Steel Limited vs. Satish Kumar Gupta [Civil Appeal No. 8766-67]*** and ***Ghanashyam Mishra and Sons Pvt. Ltd. vs. Edelweiss Asset Reconstruction Company Limited and Ors. [Civil Appeal No. 829/2019]***, the said prayer cannot be granted.
35. Prayer (c) seeking admission of pre-CIRP claim has become infructuous for the reason that the same has been admitted by the RP and an amount of Rs. 4,059 has been paid to the Applicant in accordance with the Resolution Plan. Further, prayer (d) seeking stay of approval and implementation of Resolution Plan has also become infructuous as the Resolution Plan has been already approved and implemented.
36. Thus, for all the reasons discussed above, the present IA No. 105/2023 is **dismissed**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

Uma, LRA

Sd/-

Lakshmi Gurung
Member (Judicial)