

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

IA No. 2783 of 2023

In

C.P.(IB) No. 4563/IBC /MB/2019

*Application filed under Section 60(5) of the
Insolvency and Bankruptcy Code, 2016.*

IN THE MATTER OF

Peninsula Land Ltd.

Having its address at:- 503, 5th Floor,
Peninsula Tower-1, Peninsula Corporate Park,
Ganpatrao Kadam Marg, Lower Parel,
Mumbai – 400013

..... **Applicant**

V/s

**Kailash Shah, Resolution Professional of
M/s Jaatvedas Construction Co. Pvt. Ltd.**

Having its address at:- F 306,
Eastern Business District, L.B.S Road,
Bhandup (W), Mumbai - 400078

..... **Respondent**

IN THE MATTER OF

UltraTech Cement Limited

.....**Operational Creditor**

V/s

Jaatvedas Construction Co. Pvt. Ltd.

..... **Corporate Debtor**

Order delivered on: - 03.05.2024

Coram:

Anil Raj Chellan

Member (Technical)

Kuldip Kumar Kareer

Member (Judicial)

For the Applicant : Adv. Aditya Deshmukh I/b Adv. Mily Ghoshal

For the Respondent : Adv. Aniruth Purusothaman

ORDER

Per: - Coram

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('Code') to direct the Respondent to consider and admit their claim and further as per the Additional Affidavit to set aside the rejection of the claim by Resolution Professional and admit it and in alternative to above prayer, direct the RP to

expeditiously invoke arbitration proceedings against the Applicant and without prejudice include the Applicant in the Committee of Creditors furthermore direct the RP to release all rights, title, interest, charge encumbrance of any manner on the said 5 Flats provided to the Corporate Debtor and hand over vacant and peaceful possession of the said 5 Flats to the Applicant.

Facts of the Case:-

2. The Applicant vide work Order dated 30.12.2014 appointed the Corporate Debtor to carry on the civil and structural work for construction of Residential Tower A, Tower B, associated podium, Public Parking and clubhouse for “CELESTIA SPACES” at Sewri for a total contract value of Rs. 1,94,26,88,911 /-. The work was supposed to be completed on/by 07/07/2017. Further, a Masters Adjustment Agreement was entered between the Applicant and the Corporate Debtor on such terms and conditions particularly agreed between both the parties on 15.02.2020. The Applicant intimated the Corporate Debtor that as they had failed in fulfilling its obligations as per the contract, it terminated the work order on 30.08.2022.

3. The Hon'ble Tribunal ordered Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor on a petition filed by the Operational Creditor u/s 9 of the Code vide Order dated 16.09.2022 in the above-captioned company petition. Mr. Sitansh Magia was appointed as the Interim Resolution Professional (IRP). IRP issued Form A on 17.09.2022 and the last date for filing of the claims was 1.10.2022. However subsequently, vide a Communication to Creditors dated 06.10.2022 the last date of claim submission was revised to 15.12.2022. As per IA No. 23 of 2023, this Tribunal appointed Kailash T Shah as the Resolution Professional of the Corporate Debtor from 06.01.2023

Case of the Applicant in brief:-

4. The Applicant states that vide work order dated 30.12.2014 they appointed the Corporate Debtor to carry on the above-mentioned work for them and the project should have been completed on/before 07.07.2017 as per Clause 18 of General Contract Condition. The Applicant and Corporate Debtor entered into a Masters Adjustment Agreement on 15.02.2020 in which the parties the agreed as under:

- The parties had agreed and confirmed that the estimated value of the balance work to be performed by the Corporate Debtor at the said project site will be Rs.23,00,00,000/- (Rupees Twenty-Three

Crores Only). It was decided that Applicant shall hold a sum of Rs. 7,67,00,000/- (Rupees Seven Crores Sixty-Seven Lakhs Only) as retention money, an amount of Rs. 4,76,00,000/- (Rupees Four Crores Seventy-Six Lakhs Only) against performance guarantee and further an amount of Rs.34,00,000/- (Rupees Thirty-Four Lakhs Only) approximately towards retention money and performance guarantee for the bills to be certified in February 2020 and March 2020. Thus, the total retention money and performance guarantee amount shall be Rs. 12,77,00,000/- (Rupees Twelve Crores Seventy-Seven Lakhs Only).

- The Applicant further states that payment of Rs.23,00,00,000/- (Rupees Twenty-Three Crores Only) and repayment of Rs. 11,00,00,000/- (Rupees Eleven Crores Only) of retention money and performance guarantee which are both aggregating to Rs.34,00,00,000/- (Rupees Thirty-Four Crores Only) was pending due. It was agreed that the Applicant shall allot 7 flats in one of its projects by and under the name of "CELESTIA SPACES" for a total agreed consideration of Rs.26,19,40,675/- (Rupees Twenty-Six Crores Nineteen Lakhs Forty Thousand Six Hundred and Seventy-Five Only) and total GST of Rs.

3,14,32,881/- (Rupees Three Crores Fourteen Lakhs Thirty-Two Thousand Eight Hundred and Eighty-One Only) thus aggregating to an amount of Rs. 29,33,73,556/- (Rupees Twenty-Nine Crores Thirty-Three Lakh Seventy-Five Thousand Five Hundred and Fifty-Six Only).

5. The Applicant vide its letter dated 21/07/2022 intimated Corporate Debtor about no progress of work at the project site and, therefore, the decision was taken for descoping of its work as per Clause no. 32 of the Work Order dated 30/04/2014. The Corporate Debtor continued to fail in commencing and completing its obligations as per the work contract in spite of receiving extra support by the Applicant. At the request of the Corporate Debtor, the Applicant had released an ad hoc payment of Rs. 75,00,000/- (Rupees Seventy-Five Lakhs Only) since Corporate Debtor was not in a position to clear the payments of its labours/staffs/suppliers. However, in spite of the said help, the Corporate Debtor failed to meet the revised completion schedule i.e. 30/06/2022.

6. The Applicant states that vide its letter dated 30/08/2022 work order was terminated as per clause 33 and further levied liquidated damages in accordance with clause 18 of the Work Order. The Corporate Debtor was levied liquidated damages at the rate of 5% in accordance with the clause

no. 41 of the contract and terminated the contract as per clause 33 of the contract. Not only this, due to the failure of the Corporate Debtor in executing and completing the work, the Applicant had to appoint other contractors at additional cost and consequences, which are rightfully being claimed from the Corporate Debtor and which the Corporate Debtor is liable to pay to the Applicant, amounting to Rs. 1,05,40,060/- (Rupees One Crores Five Lakhs Forty and Sixty Only).

7. Thus, taking into consideration the recovery of balance charges, additional charges, liquidated damages, losses including interest suffered by the Applicant due to wilful default by the Corporate Debtor in not discharging GST dues, as on and upto 31/08/2022, various other additional charges, loss of opportunity, interest reimbursed by the Applicant to the customers towards additional subvention period, the Corporate Debtor is liable to make payments of Rs. 46,55,48,715 (Rupees Forty-Six Crore Fifty-Five Lakh Forty-Eight Thousand Seven Hundred Fifteen Only) to the Applicant.

8. The Applicant further states that Form A was issued by the IRP on 17.09.2022 date and in accordance with Form A, public announcement and the last date for filing of the claims with the IRP was 01.10.2022. However, subsequently thereafter, vide Communication to Creditors

dated 6th Oct 2022, the last date of claim submission was revised to 15.12.2022 by the Interim Resolution Professional. Accordingly, the Applicant had submitted its claim for the total amount to the IRP on 14.12.2022, via email, and also served the physical printed and signed copy of the claim to the IRP on 15.12.2022, both of which were well within the time provided by the IRP as per the public announcement. However, despite the fact that the claim was submitted within time and with no delay of any manner whatsoever, the IRP failed to respond to the Applicant about the status of the claim for the best reasons known to the IRP. In spite of several reminders, the IRP has failed to revert to the Applicant herein pertaining to the status of the claim submitted by the Applicant.

9. Thus, the Applicant is genuinely aggrieved and in a state of dilemma to understand as to why the Interim Resolution Professional has not yet confirmed the status of the aforesaid genuine claim of the Applicant as rightful.

Case of Respondent in brief :-

10. The Respondent states that the construction of the residential project as specified above was being carried out in right earnest by the Corporate Debtor in terms of the work order by employing and using their

machineries, tools, tackles, construction materials and manpower on the said project site till September 2022.

11. The Respondent states that, on the alleged ground of failure to fulfil the obligation under the Master Adjustment Agreement and as per the work order, the Applicant unilaterally rescinded/terminated the work order vide letter dated on 30.08.2022. Further the Respondent denies all the averment and contentions raised in the letter dated 05.05.2023 and 30.08.2022.
12. The Respondent states that Clause GC-33 of the work order provides for the procedure to be followed on occurrence of any of the Events of Default specified in Clause GC-32 [Events of Default and Consequences]. The same is reproduced hereinbelow:
 - Upon the occurrence of any of the Events of Default specified in Clause GC-32 [Event of default and Consequences], the Owner shall be entitled to notify the Contractor in writing of the nature of the failure/breach and call upon the Contractor to remedy such failure/breach, within Fifteen (15) days of receipt of a notice from the Owner, if the default is curable, or sooner if safety is involved, failing which the Owner shall be entitled to forthwith terminate this Contract in full or in part. If the default is not curable, the Owner shall

be entitled to terminate the Contract in full or in part forthwith by giving a notice in writing to the Contractor.

13. The Respondent states that no such process was followed by the Applicant before issuance of the letter dated 30.08.2022 terminating the Work Order. The Respondent further presents Clause GC-52 of the Work Order dated 30.04.2014, which provides for Dispute Resolution. However, the same has not been invoked before termination of the Work Order. Without doing so, the unilateral termination of the Work Order dated 30.04.2014 cannot be sustained.

14. The Respondent states that the claim of the Applicant consists of liquidated damages/recovery which must be determined by a Court of Law which has power and authority to crystallize the amounts. The same cannot be crystallized by this Hon'ble Tribunal.

15. The Respondent states the Applicant is liable to pay an outstanding amount of Rs.10,71,54,932/- (Rupees Ten Crores Seventy-One Lakhs Fifty-Four Thousand Nine Hundred Thirty-Two Only) to the Corporate Debtor out of which the Applicant has unilaterally adjusted an amount of Rs. 8,71,09,436/- (Rupees Eight Crores Seventy-One Lakhs Nine Thousand Four Hundred Thirty-Six Only) against the alleged liquidated

damages and additional charges. Hence, the present Application deserves to be dismissed.

Reply of the Applicant in brief:-

16. The Applicant had filed the Interlocutory Application no. 2783 of 2023 in Company Petition being CP no. 4563 OF 2019 inter alia seeking admission of its claim amounting to Rs. 46,55,48,715/- (Rupees Forty-Six Crores Fifty-Five Lakhs Forty-Eight Thousand Seven Hundred and Fifteen Only). However, by an email dated 17.04.2023, the RP has rejected the said claim of the Applicant on the purported ground that the Applicant had terminated the Work order post CIRP of the Corporate Debtor. The RP has also alleged to have initiated arbitration proceedings against the Applicant. It is submitted that the aforesaid communication of the RP is ex- facie contrary to the record as well as the facts of the present case. The Applicant had terminated the Work Order by its letter dated 30.08.2022. The Corporate Debtor was admitted under CIRP only thereafter vide order dated 16.09.2022 which is later to the date of termination. Thus, the Resolution Professional has committed a grave error in rejecting the claim solely on this ground.

17. The Applicant states that the Resolution Professional has also alleged to have initiated arbitration proceedings against the Applicant for terminating the work order. However, till date, the Applicant has neither received any such notice invoking arbitration nor has the Applicant been served with any other proceeding filed by the Resolution Professional against the Applicant. In fact, the Applicant has not received any further communication from the RP after 17.04.2023.
18. The Resolution Professional addressed another email to the Applicant on the same date (17.04.2023) calling upon the Applicant to make payment of an amount of Rs. 10,71,54,932/- (Rupees Ten Crore Seventy-One Lakh Fifty-Four Thousand Nine Hundred Thirty-Two Only).
19. The Applicant states that on 27.03.2023 the Corporate Debtor gave reply to Applicant's termination notice of 30.08.2022 where PSN Legal were representing to act on behalf of the Corporate Debtor whereby they fraudulently personating to act on behalf of the Corporate Debtor and called upon the Applicant to pay an amount of Rs. 44,97,39,042/- (Rupees Forty-Four Crores Ninety-Seven Lakhs Thirty-Nine Thousand and Forty-Two Only). The letter of 27.03.2023 was issued despite the fact that CIRP had been initiated against the Corporate Debtor on 16.09.2022 which is

unsustainable and contrary to the provisions of the Code. It is submitted that the said letter could not have ever been sent by the Corporate Debtor since the CIRP was very much in effect and the board stood suspended and in fact requires indulgence of this Tribunal against such illegal action initiated by the Corporate Debtor.

20. Even assuming and without admitting that there was any claim of the Corporate Debtor/RP against the Applicant, no proceedings have been initiated by the Corporate Debtor prior to the CIRP or even by the RP after the order of 16.09.2022. It is only after the Applicant filed its claim through Form B that the Resolution Professional by rejecting the said claim on 17.04.2023 asked the Applicant to pay an amount of Rs 10,71,54,932/- (Rupees Ten Crores Seventy-One Lakhs Fifty-Four Thousand Nine Hundred and Thirty-Two Only) without any basis and without providing any particulars whatsoever to the Applicant. The Resolution Professional failed to consider that the Applicant and Corporate Debtor entered into and executed a Master Adjustment Agreement dated 15/02/2020 wherein the properties worth Rs. 29,33,73,556/- (Rupees Twenty-Nine Crores Thirty-Three Lakh Seventy-Three Thousand Five Hundred and Fifty-Six Only) were already allotted in the favour of the Corporate Debtor, subject to completion of work by the Corporate Debtor, as per the work order dated 30.12.2014 and Master Adjustment Agreement dated 15.2.2020. Out

of the 7 (seven) properties that were allotted to the Corporate Debtor by the Applicant under Master Adjustment Agreement dated 15.02.2020, 5 (five) properties are already released and handed over to the Corporate Debtor. The Corporate Debtor has mutually agreed with the Applicant to cancel the allotment of one Flat bearing No. A-2501 under Master Adjustment Agreement dated 15/02/2020 vide Mutual Cancellation Letter dated 25th July, 2022. The Applicant states that balance Flat bearing No. 401 is not released by the Applicant to the Corporate Debtor, since the Corporate Debtor failed to perform his part of contract as per the work order and Master Adjustment Agreement dated. Thus, in the given scenario, the Applicant is entitled to receive either the amount against the said Flat or the free and vacant possession of the said Flats.

21. The Applicant prays the Resolution Professional be directed to withdraw his emails dated 17th April 2023 and admit the claim of the Applicant amounting to Rs. 46,55,48,715/- (Rupees Forty-Six Crores Fifty-Five Lakhs Forty-Eight Thousand Seven Hundred and Fifteen Only) and accordingly set aside the rejection of the claim by the Resolution Professional. In alternative to above prayer, direct the RP to expeditiously invoke arbitration proceedings against the Applicant and without prejudice include the Applicant in the Committee of Creditors; direct the RP to

release all rights, tittle, interest, charge encumbrance of any manner on the said 5 Flats provided to the Corporate Debtor and hand over vacant and peaceful possession of the said 5 Flats to the Applicant.

Analysis and Findings:-

22. We have heard the Counsel for the parties and gone through the record.
23. Counsel for the Applicant has argued that the RP has wrongly rejected the claim of the Applicant despite the fact that it was submitted in time. The total value of the claim was Rs. 46,55,48,715/-. Counsel for the Applicant has further argued that the Applicant had terminated the Work Order through notice dated 30.08.2022. According to the Counsel for the Applicant, the termination of the Work Order was prior to CIRP commencement date. He has further contended that no arbitration proceedings were invoked by the Corporate Debtor or the RP. The claim on Form-B was also filed within the time. Therefore, the Respondent/RP had no right or discretion to reject the claim especially, when the RP has no adjudicatory powers. Counsel for the Applicant has further urged that direction be issued to the Respondent/RP to admit the claim of the Applicant.

24. On the other hand, Counsel for the RP has argued that the application is without any merit. According to the Counsel for the RP, the claim of the Applicant is based on liquidated and unliquidated damages which are required to be adjudicated and ascertained by a competent Court of Law and the RP has no adjudicatory power. Counsel for the RP has further pointed out that the Applicant wrongly adjusted a sum of Rs. 8.71 crores against the payment which was based upon invoices raised by the Corporate Debtor. Counsel for the RP has further relied upon the judgment of the Hon'ble Supreme Court in the matter of *Union of India vs. Raman Iron Foundry, 1974 AIR SCC 1265* whereby it was held that damages are compensation which a Court of Law gives to the party for the injury which he has sustained. The party does not get damages or compensation by reason of any existing obligation on the part of the person who has committed breach of contract. It was further held that such party get compensation as a result of the fiat of the court. Counsel for the Respondent/RP has prayed for the dismissal of the application.

25. Having thoughtfully considered the contentions raised by the Counsel for the parties and after carefully gone through the record, we find that the instant application has been filed by the Applicant against the rejection of his claim by the RP. It is the case of the Applicant that the Corporate

Debtor was given civil and structural work for construction of residential Tower A and Tower B etc. for a total contractual value of Rs. 1.94 crores vide Work Order dated 30.12.2014. It is the case of the Applicant that the Corporate Debtor was initiated into CIRP on 16.09.2022 whereas the contract with the Corporate Debtor was terminated by the Applicant vide notice dated 30.08.2022. As per the case of the Applicant, the RP was supposed to admit the claim and the rejection of the claim of Rs. 46.55 crores on the part of the RP is legally not sustainable.

26. On perusal of the claim Form-B submitted by the Applicant, it is revealed that the Applicant claimed a sum of Rs. 4.85 crores on account of loss input credit due to default by the Corporate Debtor in payment of the GST and interest thereon. The Applicant has further claimed that a sum of Rs. 1.47 crores on account of an additional charges incurred towards excess reinforced consumed by the Corporate Debtor. Another amount of Rs. 3.26 crores have been claimed on account of an additional charges incurred by the Applicant towards Corporate Debtor shortcomings and defects in works. Apart from this, a sum of Rs. 4.62 crores and Rs. 9.46 crores have also been claimed as an additional charge towards structural strengthening etc. and a sum of Rs. 23.27 crores has been claimed on account of interest reimbursed by the Applicant to the customers due to delay and non-

performance on the part of the Corporate Debtor. Another amount of Rs. 4.78 crores has been claimed on account of damages and loss of opportunity due to certain non-compliances by the Corporate Debtor.

27. From the above referred facts, it is clear that the claim lodged by the Applicant with the RP was based upon compensation and damages. It is pertinent to mention that originally the contract and construction was awarded to the Corporate Debtor vide Work Order dated 30.12.2014 which is annexed with application as Annexure (A). Admittedly, the said agreement remained in force till 30.08.2022 when the termination notice was given by the Applicant. Apart from the Work Order dated 30.12.2014, one Master Adjustment Agreement was also executed between the parties on 15.02.2020. Under this agreement, the parties agreed and confirmed that the estimated value of the balance work to be done by the Corporate Debtor amounted to Rs. 23 crores and the Applicant had made the payment for the services provided by the Corporate Debtor up to 31.12.2019. It has further been recorded in this agreement that the Applicant was holding a sum of Rs. 7.67 crores as retention money and a sum of Rs. 4.76 crores against performance guarantee. By virtue of this very agreement, the Applicant has agreed to allot 7 flats to the Corporate Debtor for the total sale consideration of Rs. 29.33 crores which included

GST of Rs. 3.14 crores. Strangely enough, no dispute was raised at any point of time by the Applicant with regard to the work carried out by the Applicant till 15.02.2020 when the Master Adjustment Agreement was executed. Surprisingly, the termination notice was given only on 30.08.2022 just before the commencement of CIRP on 16.09.2022. Even in the said notice, only general and wide allegations have been made with regard to the fact that the Corporate Debtor has failed to comply with its contractual obligations and further that several critical works remained incomplete despite repeated reminders without specifying the exact nature of the default and inadequacies committed by the Corporate Debtor.

28. The case can be looked at from another angle also. As per the Work Order dated 30.12.2021, more particularly clauses GC-32 and GC-33, the Applicant could terminate the contract only on the basis of some default committed by the Corporate Debtor. Clause GC-32 lists the events of default and consequences in specific terms. It further provides that upon occurrence of any event of default, the owner has right to take remedial measures which includes termination of the contract. Clause GC-33, further provides that if the default is not curable, the owner shall be entitled to terminate the contract in full or in part forthwith by giving a notice in writing to the contractor.

29. We have perused the notice dated 30.08.2022 carefully. However, in the notice dated 30.08.2022, the Applicant has not elaborated any events of default referred to clause GC-32 of the Work Order in exact and specific terms. It has been simply mentioned vide letter dated 21.07.2022, the Applicant notified to the Corporate Debtor that there are various defects in the works carried out by the Corporate Debtor which requires rectification. It has further been mentioned that the delay on the part of the Corporate Debtor has affected the overall project completion adversely since it pushed the completion of external development work, lift and MEP work etc. leading to further delay in obtaining Occupancy Certificate. It has further been mentioned that all this has led to severe financial losses to the Applicant including but not limited to additional cost to rectify the defects and shortcomings in the execution of works, additional cost due to descoping of the works and modifications and an additional claim from other contractors etc. apart from reputation loss for which the Applicant reserves its right to claim from the Corporate Debtor. It is further stated in the notice dated 30.08.2022 that several critical works remained incomplete despite repeated reminders and assurances from the Corporate Debtor. Lastly, it is stated in the notice that the Applicant is constraint to levy liquidated damages of 5% under GC Clause-41 of the contract and further terminates the contract under the clause GC -33.

30. A perusal of the work order, however, reveals that as per clause GC-41 for liquidated damages, the provisions of special conditions contained in Annexure 2 shall apply and supersede the provisions of this clause. As per SC-17, if any dispute or difference arises out of the contract whether during progress of work or after its completion or whether or before after the termination, abandonment or breach of contract and such dispute or difference cannot be resolved by contract and owner, either party shall within 30 days give the other party notice in writing of existence of such dispute which will be followed by the arbitration in the matter and the dispute is liable to be referred to arbitration which shall conducted by three arbitrators, one each to be nominated by the contractor and the owner and the third to be appointed by the two arbitrators.

31. Therefore, in our considered view, as per the contract between the parties, if there was dispute between the parties, as has been highlighted in the notice dated 30.08.2022, the dispute was required to be referred to arbitration, as provided for the contract itself. The Applicant has not been able to justify and prove the exact amount which may be due from the Corporate Debtor in terms of liquidated damages in respect of which the claim was lodged by the Applicant with the RP. The Applicant was required to get the liquidated damages crystalized and quantified from the

arbitrator, as provided for the contract itself. Here, it cannot be forgotten that RP has no adjudicatory power. Apart from this, in the matter of *Union of India vs. Raman Iron Foundry* (Supra), it has been unequivocally held by the Hon'ble Supreme Court that the liquidated or unliquidated damages in the shape of compensation can be claimed by the party only under the fiat of the court and without proving the claim in respect of damages in a Court of Law, a plaintiff cannot fasten any liability upon the defendant as a claim for damages for breach of contract. The Applicant herein has not resorted to arbitrations nor has initiated any civil litigation with regard to his claim. Therefore, the RP was right in not accepting the claim. Further, in our considered view, since the claim is based upon compensation and damages, the RP at the most could have admitted the claim on notional basis only. Similarly, the other reliefs prayed for in the application can also not be granted.

32. As a result of the above discussions, we do not find any merit in the application and the same is hereby dismissed. However, the RP is directed to treat the claim as a contingent claim on notional value of Rs. 1 subject to production of some award or decree obtained by the Applicant from a competent Court of Law/Arbitrator and in the meanwhile the Resolution Professional shall be at liberty to initiate arbitration proceeding as per the

contract between the parties. **IA No. 2783 of 2023 is dismissed** in the aforesaid terms.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)