

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 229 of 2018

[Arising out of Order dated 24th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, in CP/511/IB/2017.]

IN THE MATTER OF:

M/s Dynepro Private Limited

Represented by its Authorized Signatory,
Mr. N. Ravichandran,
No. 4, Dindigul Road,
Tiruchirapalli – 620 001.

...Appellant

Vs

Mr. V. Nagarajan

Resolution Professional
In respect of M/s Cethar Limited
With office at New No. 29, Kavarai Street,
West Mambalam – 600 033.
(Near AMR Kalyana Mandapam)

...Respondent

Present:

For Appellant: Mr. M. A. Venkata Subramaniam and Mr. K. Moorthy, Advocates.

For Respondent: Mr. Shailesh Poddar and Mr. Arnav Dash, Advocates.

With

Company Appeal (AT) (Insolvency) No. 262 of 2018

[Arising out of Order dated 25th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, in CA 127 of 2018 in CP/511/IB/2017.]

IN THE MATTER OF:

M/s IU International Holdings PTE Ltd.

Through its Authorized Signatory,
UttamSucrotech International Pvt. Ltd.
Through
Mr. Vikram Singh Tandon,
H-194, Sector – 63,
Noida – 201 301.

...Appellant

Vs

Mr. V. Nagarajan

Resolution Professional

In respect of M/s Cethar Limited

With office at New No. 29, Kavarai Street,

West Mambalam – 600 033.

(Near AMR Kalyana Mandapam)

...Respondent

Present:

For Appellant: Mr. Abhinav Vasisht, Senior Advocate with Mr. Pragyan Pradip Sharma and Mr. Eeshan Pandey, Advocates.

For Respondent: Mr. Shailesh Poddar and Mr. Arnav Dash, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

A Corporate Insolvency Resolution Process was initiated against ‘M/s Cethar Limited’ (Corporate Debtor) when Mr. V. Nagarajan was appointed as Resolution Professional. In the said resolution process CA/65/IB/2018 was filed by ‘M/s Dynepro Pvt. Ltd.’ (Appellant in Company Appeal (AT) (Insolvency) No. 229 of 2018) with following prayer:-

“a) Direct the Resolution Professional i.e., the Respondent herein who is representing the Corporate

Debtor to release the materials received by the Corporate Debtor vide Inward Inspection Certificate dated 05.05.2017 vide IR No. 1/U5/R/001 to 007 to the Applicant herein;

b) To restrain the Resolution Professional (i.e.) the Respondent herein from acting as the Resolution Professional in respect of the Corporate Debtor (M/s Cethar Limited) in so far as the Applicant is concerned without the leave of this Hon'ble Tribunal pending disposal of the criminal complaint lodged against him before the Inspector of Police, Law and Order, Cantonment – Tiruchirappalli under CSR No. 29/2018. ”

2. It was submitted on behalf of the Applicant 'M/s Dynepro Pvt. Ltd.' that the material belongs to them which was sent to the Corporate Debtor who is 'M/s Cethar Ltd.' for doing job work at the instance of the Applicant Company and therefore the material in question do not belong to the Corporate Debtor. The application preferred by 'M/s Dynepro Pvt. Ltd.' was rejected by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai by order dated 24th April, 2018.

3. In the said Corporate Insolvency Resolution Process against 'M/s Cethar Ltd.' another CA/127/2018 was filed by 'M/s IU International Holdings PTE Ltd., Singapore' (Appellant in Company Appeal (AT) (Insolvency)

No. 262 of 2018) which was filed through 'Uttam Sucrotech International Pvt. Ltd.' with following prayer:-

“a. Direct the Corporate Debtor to hand over custody of the Materials as defined under Paragraph 4 of the Instant Application to the Applicant,

b. Restrain the Insolvency Resolution Professional from alienating and/or creating any third-party interest in the Materials as defined under Paragraph 4 of the instant Application.

c. Pass any other order, relief/reliefs, directions as deems fit for grant, in the interest of justice and equity.”

4. In the said application also giving references to the same purchase order similar prayer was made and plea was taken that the steel plates were supplied to the Corporate Debtor for fabrication of the steam and mud drums. The said application has been also rejected by the Adjudicating Authority by another order dated 25th April, 2018 which is under challenge in Company Appeal (AT) (Insolvency) No. 262 of 2018.

5. Before deciding the issue it is desirable to notice the position of the parties as per counsel for the Appellants. According to the Appellants, 'M/s IU International Holdings PTE Ltd.' supplied the material to 'M/s GB

Engineering Enterprises Ltd.’, who in its turn supplied it to ‘M/s Dynepro Pvt. Ltd.’ and ‘M/s Dynepro Pvt. Ltd.’ in its turn further supplied the steel plates to ‘M/s Cethar Ltd.’ (Corporate Debtor) for manufacture of boilers steam drums.

6. The case of ‘Dynepro Pvt. Ltd.’ is that it is engaged in the manufacture, supply, erection and commissioning of boiler/power plants and other products connected thereto. The Appellant Company is taking orders from third parties and the orders are executed based on the specification and requirements of the end users. In the process, the Appellant Company has engaged several other companies for doing job work which is used in the completion of boilers. Further, case of ‘M/s Dynepro Pvt. Ltd.’ is that one of the customer ‘M/s G. B. Engineering, Trichy’, has placed orders for manufacturing boilers steam drums by its order dated 18th April, 2017 as amended on 20th April, 2017. In order to execute the works, the Appellant ‘M/s Dynepro Pvt. Ltd.’ obtained materials from ‘M/s G. B. Engineering’, which was sent to the Corporate Debtor ‘M/s Cethar Ltd.’ for doing job work at the instance of the Appellant Company.

7. According to the Appellant the material in question do not belong to the Corporate Debtor and it belongs to ‘M/s G. B. Engineering’ which was entrusted to ‘M/s Cethar Ltd.’ (Corporate Debtor) for doing job work and therefore, it do not come within the meaning of “asset” of the Corporate

Debtor. It is further submitted that the supply of boilers to third party was time bound, which having delayed the parties have already suffered and there are evidence on record including Inward Inspection Certificate dated 5th May, 2017 vide IR No. 1/U5/R/001 to 007 where the vendor's name is printed as M/s DPL/G.B. Engineering, which establishes the ownership of the materials supplied by M/s G. B. Engineering to the Corporate Debtor. FIR has also been lodged against the Resolution Professional for his ill treatment and misbehavior and matter has also been referred to the IBBI.

8. The Resolution Professional submitted that an email was sent to him on 3rd January, 2018 by the Managing Director of the Appellant Company (M/s Dynepro Pvt. Ltd.) referring letter dated 12th January, 2018 for said job order dated 6th October, 2017. But the said letter has not been enclosed with the said email. It was further pleaded by the Resolution Professional that the Corporate Debtor's factories have no HT power for over a year and there are no workmen for production work as well, and in such circumstances, the question of Corporate Debtor doing any job work in May or October, 2017 does not arise. Further, according to the Resolution Professional the Managing Director is aware of materials at Corporate Debtor's site due to the information received from her father. Further plea taken by the Resolution Professional is that the raw material inventory of the Corporate Debtor is shown as Rs.125 Crores. However, on physical inventory, it revealed less than 20% of the same, which is evidencing

that the materials have been siphoned off from the premises of the Corporate Debtor under false documents.

9. The Adjudicating Authority has noticed the above, and taking into consideration all the facts and the letter written by the Executive Chairman of the Corporate Debtor to all the creditors as also the inventory of the Corporate Debtor, rejected the claim of the Appellant for releasing the material during the Resolution Process.

10. The case of 'M/s IU International Holdings PTE Ltd.' was that purchase order dated 11th April, 2017 was made with 'M/s G. B. Engineering Enterprises Ltd.' for procurement of boiler plate materials for the Steam Generation Plant. The purchase order was bifurcated into two parts, viz., the supply component for supply of materials worth Rs.4.40 Crores, and the job work component amounting to Rs.4.04 Crores. The total value of the purchase order was thus, Rs.8.44 Crores.

11. It was submitted on behalf of the Appellant – 'M/s IU International Holdings PTE Ltd.' that pursuant to order dated 11th April, 2017, 'M/s G. B. Engineering Enterprises Ltd.' placed purchase order with 'M/s Shah Brothers Ispat Pvt. Ltd.' (hereinafter referred to as 'Supplier') for a consideration of Rs.87,77,899/- for procurement of the boiler quality steel plates for fabrication of the steam and mud drums. As per clause 10 of the purchase

order dated 11th April, 2017 upon payment of the consideration of the materials, the goods, whether supplied or not irrespective of the stage of production, would become the property of the Appellant. Further, case of the Appellant 'M/s IU International Holdings PTE Ltd.' is that 'M/s G. B. Engineering Enterprises Ltd.' had released work order dated 18th April, 2017 in favour of 'M/s Dynepro Pvt. Ltd.' for consideration of Rs.1.47 Crores. In pursuance of the sub-contract, work order dated 18th April, 2017, 'M/s G. B. Engineering Enterprises Ltd.' forwarded the said supplies by way of the same lorry to 'M/s Dynepro Pvt. Ltd.'. 'M/s Dynepro Pvt. Ltd.' is stated to have further sub-contracted the fabrication of the steam and mud drums to 'M/s Cethar Ltd.'. In this fashion the materials have been handed over to 'M/s Cethar Ltd.' (Corporate Debtor).

12. It was submitted that in the MOU, 'M/s G. B. Engineering Enterprises Ltd.' had admitted that it has completed a portion of the work as mandated under the purchase order dated 11th April, 2017 and semi-finished goods are with 'M/s G. B. Engineering Enterprises Ltd.' and it holds the title of the same. The MOU provided that 'M/s IU International Holdings PTE Ltd., Singapore' had assigned one USIPL with responsibility of completion of work on the semi-finished goods acquired from 'M/s G. B. Engineering Enterprises Ltd.'. As per said MOU, all legal and economic rights in the semi-finished goods from 'M/s G. B. Engineering Enterprises Ltd.' are of the Appellant Company, therefore,

the title and possession of the goods which is stated to be delivered by 'M/s G. B. Engineering Enterprises Ltd.' to 'M/s Dynepro Pvt. Ltd.' belongs to them.

13. The Adjudicating Authority noticed that there is no proof placed on record to establish that the materials were delivered by the Appellant - 'M/s IU International Holdings PTE Ltd.' or by 'M/s Dynepro Pvt. Ltd.' to the Corporate Debtor under contractual arrangement including bailment and looking to the facts and circumstance of the case in hand thereby rejected the claim of the Appellant by order dated 25th April, 2018.

14. During the pendency of the case, the Resolution Professional was asked to make inspection in the presence of the Appellant. Different complains have been made by the Appellant against the Resolution Professional but we are not going to decide the same having no connection with the merit of this appeal.

15. Learned counsel appearing on behalf of the Appellant submits that the materials have been identified but the Resolution Professional after marking materials held that the material belongs to the Corporate Debtor. The Resolution Professional allowed to take the marked materials, as identified, on payment of Rs.2,16,58,000/-. Learned counsel appearing on behalf of 'M/s IU International Holdings PTE Ltd.' submits that the Appellant is ready to deposit Rs.2,16,58,000/- and to take possession of the aforesaid materials

subject to its rights and contentions. Learned counsel for the Resolution Professional submits that other parties have also made claim that the material belongs to them.

16. In '*Binani Industries Limited Vs Bank of Baroda & Anr. and other appeals*' in *Company Appeal (AT) (Insolvency) No. 82 of 2018, etc.* this Appellate Tribunal held that Corporate Insolvency Resolution Process is not a money claim nor a suit or a litigation, therefore, we are of the view that the Adjudicating Authority cannot decide the disputed question of fact including claim and counter claim made by one or other party qua, any material in current case.

17. Section 18 deals with duties of Interim Resolution Professional, who is required to collect all the information relating to assets, finances and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor, including information relating to business operations of the previous two years; financial and operational payment for previous two years, etc., as quoted below:-

“18. Duties of interim resolution professional. –

(1) The interim resolution professional shall perform the following duties, namely:-

- (a) *collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –*
 - (i) *business operations for the previous two years;*
 - (ii) *financial and operational payments for the previous two years;*
 - (iii) *list of assets and liabilities as on the initiation date; and*
 - (iv) *such other matters as may be specified;*
- (b) *receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;*
- (c) *constitute a committee of creditors;*
- (d) *monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors.*
- (e) *file information collected with the information utility, if necessary; and*
- (f) *take control and custody of any asset over which the corporate debtor has ownership rights as*

recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –

- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
- (ii) assets that may or may not be in possession of the corporate debtor;*
- (iii) tangible assets, whether movable or immovable;*
- (iv) intangible assets including intellectual property;*
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*
- (vi) assets subject to the determination of ownership by a court or authority;*
- (g) to perform such other duties as may be specified by the Board.*

Explanation. – For the purposes of this sub-section, the term “assets” shall not include the following, namely:-

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;*
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and*
- (c) such other assets as may be notified by the Central Government in consultation with any financial section regulator.”*

As per the explanation for the purpose of Section 18(1), the term ‘assets’ do not include assets owned by a third party in possession of the corporate debtor held under contractual arrangements including bailment. It also do not include assets of any Indian or foreign subsidiary of the corporate debtor and such other assets as may be notified by the Central Government.

18. The Interim Resolution Professional/ Resolution Professional while collecting all the information relating to assets and finances of the Corporate Debtor has already given its finding that the material does not belong to the Appellants but to the Corporate Debtor.

19. The question arises for consideration as to whether in such case, is it permissible for the Adjudicating Authority to decide the claim and counter claim?

20. Sub-section (5) of Section 60 empowers the National Company Law Tribunal (Adjudicating Authority) to entertain or dispose of any application or proceeding by or against the Corporate Debtor or Corporate Person; any claim made by or against the Corporate Debtor or Corporate Person including claims by or against any of its subsidiaries situated in India; apart from any question of priority or any question of law and facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor or corporate person under the code. Relevant portion of Section 60 is quoted below:-

“60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

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(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National

Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

From sub-section (6) of Section 60 it is clear that after period of moratorium, a suit or application can be filed against the Corporate Debtor

for which an order of moratorium has been made under the Part II and in such case, the period during which such moratorium is in place shall be excluded for the purpose of counting the limitation.

21. In the present case the dispute relating to claim and counter claim as made by one or other parties, is brought to our notice by the Resolution Professional. The Resolution Professional while held that the material belongs to the Corporate Debtor, apart from the Appellants, other parties have also made claim that the same very material belongs to them. As the claim is not against the Corporate Debtor or its subsidiaries but includes inter-se claim for the same very material, such dispute cannot be decided by the Adjudicating Authority under Sub-section (5) of Section 60 of the I&B Code. It is only after completion of the period of moratorium and it is finally decided that the material belongs to the Corporate Debtor and order is accordingly passed, it is open to the persons to file a suit before appropriate forum claiming right and title over the material in question and for filing such suit claiming right over the material the moratorium period has to be excluded for the purpose of counting the period of limitation.

22. In view of the aforesaid discussion, we hold that the Adjudicating Authority has no jurisdiction to decide the claim or counter claim with regard to the parties and therefore the Adjudicating Authority has rightly not passed any order on the applications preferred under sub-section (5) of Section 60.

However, observations as made above and findings made in this appeal will not come in the way of the Appellant(s) or any party to take the possession of the materials in terms of the decisions of the Resolution Professional subject to their rights and contentions or filing suit subsequent to the period of moratorium. Both the appeals are dismissed with aforesaid observations. However, there shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

30th January, 2019

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