NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Comp. App (AT) (CH) (INS.) No. 12 / 2023

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016,

(Arising out of the Impugned Order dated 02.12.2022 in IA(IBC) No. 155 / 2022 in CP(IB) No. 58 / 9 /AMR / 2021, passed by the `Adjudicating Authority', National Company Law Tribunal, Amaravati Bench)

In the matter of:

Anheuser Busch Inbev India Limited
Unit No. 301 – 302, Third Floor,
Dynasty Business Park, B Wing,
Andheru Kurla Road,
Andheri (East)
Mumbai - 400059 ….. **Appellant / Petitioner**

v.

Mr. Pradeep Kumar Sravanam
Resolution Professional
East Godavari Breweries Pvt. Ltd.
6-40, Plot No. 101,
Suprabhat Township
Venture 2M Kachavani,
West Merredpally
Hyderabad -500088 **..... Respondent / Respondent**

Present:

For Appellant : Mr. Promod Nair, Senior Advocate
For Mr. Amar Gupta, Advocate

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Comp. App (AT) (CH) (INS.) No. 12 / 2023 :

Background:

The `Appellant' / `Anheuser Busch InBev India Limited', has preferred the instant Comp. App (AT) (CH) (INS.) No. 12 of 2023, as an `Aggrieved Person', in respect of the `impugned order', dated 02.12.2022 in IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Amaravati Bench).

2. The `Adjudicating Authority' (`National Company Law Tribunal', Amaravati Bench), while passing the `impugned order' dated 02.12.2022 in IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021 (Filed by the `Petitioner'), under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016, r/w. Rule 11 of the NCLT Rules, 2016, wherein, at Paragraphs 12 to 15, had observed the following:

> *12. ``Even viewed from the logical point of view when the IBC only mandates that the RP shall collect and collate the claims and when a dispute is pending with regard to the amount due and the interest, the RP cannot admit the claim. If the RP admits the claim for a particular amount and later on if the Arbitral Tribunal decides otherwise it would result in conflicting judgments. No doubt the IBC under Section 3(6) of the Code defines claim as a right to payment whether or not such right is reduced to judgment fixed, disputed, undisputed etc. A Judgment of the Hon'ble Supreme Court which is relied upon by the Applicant's Counsel in Pioneer Urban Land and Infrastructure Limited Vs. Union of India reported in (2019) 8 SCC 416, no doubt held that claim can be made whether or not such right to payment is reduced to judgment and a debt is a liability or obligation in respect of a right to payment even it arises*

out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by judgment or decree or order. But the duty of the RP so far as collecting and collating the claims is complete. However, the claim is not yet admitted and is kept in abeyance only for the purpose of admission not for the purpose of collation. Hence, the mandate so far as collection and collating the claim stands complied with by the RP.

13. The judgment of the NCLAT in EXIM Bank Vs. Resolution Professional JEKPL Private Limited reported in (2018) SCC Online NCLAT 465 was relied upon, wherein it was held that any person who has a right to claim payment as defined under Section 3 (6) is supposed to file the claim whether matured or unmatured. The question as to whether there is a default or not is not to be seen. As already observed there is no quarrel with the said preposition. The judgment also held that as per Section 25 (2) (e) the Resolution Professional is required to maintain an updated list of all the claims. It was observed that the aforesaid fact suggests that the maturity of a claim or default of debt are not the guiding factors to be noticed for collating or updating the claims. It is observed that a person whose debt has not been matured also can file claim, which is very much done in this case. After extending the argument that as per Section 3(6), the claim includes disputed debt and that the RP is mandated according to Section 18(1)(v) to collate the claims, the Respondent seeks for a direction to the RP to admit his claim, which for valid reasons is kept in abeyance.

14. The judgment in Reliance Commercial Finance Limited Vs. Ved Cellulose Limited reported in 2017 SCC Online NCLT 185, no doubt held that the pendency of arbitration proceedings is not a hinderance under Section 7 of the Code for initiating the CIRP. But the same is not relevant in this case as the prayer is not for initiation of CIRP but for admission of claim. The contention of the Counsel for the RP that the claim of the Applicant cannot be admitted until the counter claim of the Corporate Debtor is decided, as the same may result in set off of the amounts payable to the Applicant though is sought to be rejected cannot be rejected, as a set off is very much possible while deciding the counter claim. The contention is that no set of is pleaded by the Respondent in its counter. Though a set off is not pleaded, when counter claim is admitted, the amount due from the claimant would get set off.

15. As regards the contention that there is no concept of keeping the claims in abeyance, this court is not in agreement as there need not be a specific provision for keeping the claims in abeyance. In the given circumstances if such exigency is necessary it can be invoked. There are instances where the RP has kept the claims in abeyance for various reasons. One such instance can be seen in the judgment of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (INS) No.871-872/2019 between Santosh Wasantrao Waloker Vs. Vijay Kumar V Iyer and others, wherein the RP kept the claim filed by the Appellant in abeyance pending verification of the documents. In the case of Anamika Singh and others Vs. Shinhan Bank and others decided by the National Company Law Appellate Tribunal, New Delhi also it can be seen that the claims were kept in abeyance by the RP as the claims of the interest therein were not accepted by the RP. Hence, in view of the above this Tribunal is of the opinion that since, the claim of the Applicant is collected and collated by the RP and is also considered and kept in abeyance and in view of the arbitration proceedings pending with regard to the counter claim of the Corporate Debtor after which alone the claim amount of the Applicant can be decided with certainty, the reliefs claimed by the Applicant for admission of the claim cannot be granted.''

and `dismissed' the `Application'.

Appellant's Submissions:

3. Questioning the `validity', `propriety' and `legality' of `impugned order', dated 02.12.2022 in IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, the `Adjudicating Authority' (`National Company Law Tribunal', Amaravati Bench), the Learned Counsel for the `Appellant / Petitioner', submits that the `Appellant', is a `Financial Creditor' of the

`Respondent' / `Corporate Debtor', and is owed a total `Financial Debt' of INR 33,98,16,438.35/-.

4. It is represented by the Learned Counsel for the Appellant submits that the `Appellant / Petitioner' and `Respondent / Corporate Debtor', had entered into a `Brewing Agreement', dated 06.02.2015 and that the `Appellant', gave an advance of INR 17.50 Crores to the `Corporate Debtor', a receipt of which is recorded at `Clause 6.12' of the `Brewing Agreement'. Moreover, in terms of Clause 6.14, the `Respondent / Corporate Debtor', is liable to `repay the advance', with interest, on `Termination' of the `Brewing Agreement', for any reason.

5. It is the version of the Appellant that the `Brewing Agreement', was `terminated', as per `Termination Notice', dated 03.08.2018, following which, the `Corporate Debtor', became liable, to `repay the Advance with interest'. Also that, the `Appellant', had initiated `Arbitration Proceedings', against the `Respondent / Corporate Debtor', to recover the aforesaid `Financial Debt' and `Compensation', for damages, in respect of the `Violation', of the `Brewing Agreement'.

6. According to the Appellant, as a `Financial Creditor', it submitted its `Claim', on 01.12.2021, in Form-C, when the `Corporate Insolvency

Resolution Process', had commenced, to `resolve' the `Insolvency' of the `Corporate Debtor'. Indeed, in the `List of Creditors', made by the `Respondent / Resolution Professional' of the `Corporate Debtor', he had not admitted the `Financial Claim' of the `Appellant', and instead kept it in `abeyance'.

7. The Learned Counsel for the Appellant points out that the `Appellant / Petitioner', filed the IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, before the `Adjudicating Authority' / `Tribunal', among other things, seeking directions, being issued to the `Resolution Professional', to admit the `Appellant' / `Petitioner's Financial Claim', to revise and update the `List of Creditors' and to admit the `Appellant', to the `Committee of Creditors' (`CoC'), with voting right proportionate to its `Claim'. In fact, the `Adjudicating Authority' / `Tribunal', had `dismissed', the IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, inter alia, on the ground that the `Resolution Professional', was justified, in keeping the `Claim', in `abeyance', because of the pending `Arbitration Proceedings', and the `counterclaim' of the `Corporate Debtor'.

8. The Learned Counsel for the Appellant contends that the `Adjudicating Authority' / `Tribunal', had failed to appreciate that the

`Appellant's Financial Claim', is an `admitted' and `acknowledged liability'.

9. It is projected on the side of the Appellant that the `Appellant's Financial Claim', is a Sum i.e. presently `Due and Payable', and further that the Resolution Professional, had failed to consider that a `Claim', as per Section 3(6) of the I & B Code, 2016, includes `Disputed Claims', as well.

10. The Learned Counsel for the Appellant takes a stand that in view of the `Resolution Professional's categorical admission that the `Agreement' and `Default' of the `Corporate Debtor', are matters of record and that `no further adjudication', was required.

11. The plea of the Appellant is that, the `Adjudicating Authority' / `Tribunal', had failed to consider that the `Advance', together with interest is `Financial Debt', and the `Corporate Debtor', is in `Default', in repayment of the same.

12. The Learned Counsel for the Appellant, raises an argument that the `Adjudicating Authority' / `Tribunal', had not taken into account of the fact that the `existence of dispute' or `pendency of arbitration', are relevant factors, to be considered for `Admission' of `Claim'. In short, the

pending `Arbitral Proceedings', do not impede the `Admission' of the `Appellant's Financial Claim' or its `participation', in the `Committee of Creditors', in any manner.

13. The other contention, advanced on behalf of the Appellant is that, it is the duty of the `Respondent / Resolution Professional', to admit the `Appellant's Financial Claim', in terms of Section 18 of the I & B Code, 2016, and the `Appellant', is entitled to participate in the CoC as per Section 21.

14. The Learned Counsel for the Appellant proceeds to point out that the `non-consideration' of the `Appellant's Financial Claim', because the same is a `Disputed Claim' or `Pending Adjudication', is `unlawful' one and `opposed' to `Law',

15. The Learned Counsel for the Appellant vehemently submits that a `Claim', for damages, `does not give rise to a Debt, until the Liability, is adjudicated and Damages, assessed by a Decree or Order of a Court or other `Adjudicating Authority', as per decision of the Hon'ble Supreme Court of India in the matter of Union of India v. Raman Iron Foundry (1974) 2 SCC 231, at Spl. Pgs. 243 & 244, wherein, at Paragraph 11, it is observed as under:

11. ``Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts: The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Sec. 74 of the Indian Contract Act eliminates the some-what elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in

Jones v. Thompson[1] "Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O'Driscoll v. Manchester Insurance Committee[5], Swinfen Eady, L. J., said in reference to cases where the claim was for unliquidated damages : "..... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given''. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Jabed Sheikh v. Taher Mallik[6], S. Milkha Singh v. N. K. Gopala Krishna Mudaliar[7] and Iron & Hardware (India) Co. v. Firm Shamlal & Bros[8]. Chagla, C. J. in the last mentioned case, stated the law in these terms: (at pp. 425-26)

"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of Clause 18, the purchaser is entitled to exercise the right conferred under that clause

only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.''

16. The Learned Counsel for the Appellant projects an argument, that the `impugned order', is contrary to `Law', that even if a `Financial Debt', is `Disputed', it must be recognised as such, if there is a `Default', in its `Payment'.

17. The Learned Counsel for the Appellant, adverts to Regulation 14 of the `Corporate Insolvency Resolution Process Regulations', the `Resolution Professional', is mandated to determine the Sum `Claimed by a Creditor which is not precise due to any contingency or other reason', based on `best estimate of the amount of the claim based on the information available with him'.

18. The Learned Counsel for the Appellant comes out with a plea that the Resolution Professional, under the I & B Code, 2016, has `no Adjudicatory Powers', and instead is given only the `Administrative Powers'. Also that, the `Resolution Professional', has no `Jurisdiction', to `Decide', the `Claim', and he could only `Collate', the `Claim', based on `Evidence and Record' of the `Corporate Debtor'.

19. The Learned Counsel for the Appellant, refers to the decision of this `Tribunal', in S. Rajendran, Resolution Professional of PRC International Hotels Private Limited v. Jonathan Mouralidarane, reported in 2019, SCC Online NCLAT 758, wherein at Paragraph 3, it is observed as under:

> *3. ``Having heard learned Counsel for the Appellant, we are of the opinion that the 'Resolution Professional' had no jurisdiction to "determine" the claim as pleaded in the Appeal. He could have only "collated" the claim, based on evidence and the record of the 'Corporate Debtor' or as filed by Jonathan Mouralidarane ('Financial Creditor'). If an aggrieved person thereof moves before the Adjudicating Authority and the Adjudicating Authority after going through all the records, comes to a definite conclusion that certain claimed amount is payable, the 'Resolution Professional' should not have moved in Appeal, as in any manner, he will not be affected.''*

20. The Learned Counsel for the Appellant, while summing up, points out that there is no provision under I & B Code, 2016, or `Corporate Insolvency Resolution Process Regulations', empowering the `Respondents', to keep a `Claim', under `abeyance', and because of the fact that the `Respondent / Corporate Debtor', had not denied the `Debt', as well as `Default', and prays for `allowing' of the instant `Appeal', for meeting the `ends of Justice'.

Appellant's Citations:

21. The Learned Counsel for the Appellant, cites the decision of the Hon'ble Supreme Court of India, in Innoventive Industries Limited v. ICICI Bank & Anr. 2018 1 SCC, at Page 407, Spl. Pg. 438, wherein, at Paragraphs 28 & 30, it is observed as under:

> *28. `` ….. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority…..''.*
>
> *30. ……. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date…..''*

22. The Learned Counsel for the Appellant, refers to the Judgment of the Hon'ble Supreme Court dated 09.08.2019, in Pioneer Urban Land and Infrastructure Limited v. Union of India (vide Writ Petition (Civil) No. 43 of 2019, wherein, at Paragraph 60, it is observed as under:

> *60. ``Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment….''*

23. The Learned Counsel for the Appellant, relies on;

(a) Judgments of this `Tribunal', dated 14.08.2018 (vide Comp. App (AT) (INS.) No. 304 of 2017, in the matter of Export Import Bank of India v. Resolution Professional, JEKPL Private Limited;

(b) Edelweiss Asset Reconstruction Company Limited v. V. Mahesh & Ors., (vide Comp. App (AT) (INS.) No. 226 of 2021 dated 13.12.2021), for the proposition, that a `Claim', can be made, whether or not, it is reduced to `award' / `judgment', and further that the `Existence of Dispute' or `Maturity of Claim', is not a `relevant factor', to be considered for `admission' / `collation' of `Claims'.

24. The Learned Counsel for the Appellant, points out the decision of the Hon'ble Supreme Court in Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC, Page 17 at Spl. Pgs. 89 to 91, wherein, at Paragraphs 88 & 89, it is observed as under:

88. `It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

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 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 sector regulator.''

89. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows:

``10. Substantiation of claims.—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

xxxx xxxx xxxx

12. Submission of proof of claims.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. Verification of claims.—(1) The interim resolution professional or the resolution professional, as the case may be,

shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be –

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. Determination of amount of claim.—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.''

It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a ``determination'' under Regulation 35-A, he is only to apply to the adjudicating authority for appropriate relief based on the determination made as follows:

35-A. Preferential and other transactions.—(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under Sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under Sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the adjudicating authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.''

25. The Learned Counsel for the Appellant, adverts to the `Order', dated 30.06.2017, in CP (IB) No. 156 (PB) / 2017 of the National Company Law Tribunal, Principal Bench, New Delhi, reported in (2017) SCC Online NCLT 185 and the `Order', dated 19.01.2021 of the National Company Law Tribunal, in CP (IB) No. 33 /7 / HDB 2020, reported in 2021, SCC Online NCLT for the contention that Section 7 Petitions of the `Code', were admitted, despite the pendency of `Arbitration'.

26. The Learned Counsel for the Appellant, refers to the decision in Tamil Nadu Generation and Distribution Corporation Limited v. Savan

Godiawala, Liquidator – Lanco Infratech Limited, 2020 SCC Online NCLT 7674, wherein, at Paragraph 22, it is observed as under:

> *22. ``In the reply the Liquidator stated that there must be a decree of civil court or an award passed by the Arbitrator determining the damages. It is the case of the Liquidator that a party which claims damages for non-performance of contract shall, at the first instance, get the damages determined either by civil court or by Arbitrator. Till then, it is a mere right to sue for damages. In this connection the Liquidator relied on decision of the Hon'ble Apex Court in the matter of Union of India v. Raman Iron Foundry, (1974) 2 SCC 231 : AIR 1974 SC 1265. It is true that damages for breach of contract is not a debt unless determined by civil court or Arbitrator. In this case, there is no decree in favour of the applicant determining the damages by civil court or award by Arbitrator determining damages. So this issue cannot be resolved by the Liquidator. The applicant has not so far obtained decree or award against the Corporate Debtor, with regard to damages suffered on account of failure to perform the contract.''*

27. The Learned Counsel for the Appellant, seeks in aid of the decision in Bank of India v. Shrenuj and Company Ltd., (2019) SCC Online NCLT 3264, to fortify his plea that ``*a Claim for damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree / order of a `Court' / `Adjudicating Authority'. ''*

Assessment:

28. Before the `Adjudicating Authority' / `Tribunal', the `Appellant / Petitioner', had filed IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 /

AMR / 2021 (under Section 60 (5) of the I & B Code, 2016, r/w. Rule 11 of NCLT Rules, 2016, seeking for passing of an `Order';

> ``*(a) in directing, the Resolution Professional (of the Corporate Debtor), to admit the amount claimed by the Applicant, i.e., an amount of INR 33,98,16,438.35 (Rupees Thirty-Three Crores Ninety-Eight Lacs Sixteen Thousand Four Hundred Thirty Eighty and Thirty-Five paise only) being the total outstanding amount payable till November 17, 2021, the date of commencement of the CIRP, or such other amount as this Hon'ble Tribunal finds just and fair.*
>
> *(b) in directing, the Resolution Professional to revise and update the list of creditors and admit the Applicant to the CoC, with voting rights proportionate to its claims as determined under Regulations 16 of the CIRP Regulations, 2016;*
>
> *(c) Pending grant of prayers (a) and (b) above, to stay further proceedings of the CoC and restrain it from holding any meeting.''*

29. It transpires that on 17.11.2021, the `Adjudicating Authority' / `Tribunal', had initiated the `Corporate Insolvency Resolution Process', against the `Respondent / Corporate Debtor', appointed an `Interim Resolution Professional' and declared `Moratorium, as per Section 14 of the I & B Code, 2016.

30. Before the `Interim Resolution Professional', the `Appellant / Financial Creditor / Petitioner', submitted a `Proof of Claim', to the `Interim Resolution Professional', in Form-C of the `CIRP Regulations' on 01.12.2021, and the details of the same, are as under:

Particulars	Amount (in INR)
Amount advanced on February 6, 2015	17,50,00,000/-
Interest @ 10% per annum till date of default (August 3, 2018)	6,10,82,191.78/-
Default Interest @ 18% per annum till commencement of Insolvency (November 17, 2021)	10,37,34,246.57/-
Total Claim	33,98,16,438.35/-

31. According to the Appellant, it was mentioned in the proof of `Claim', that the `entirety' of the `Debt', is covered by the `Guarantee', furnished by the `Promoters of the Corporate Debtor', and its `Related Party' (Viz. Scarpe Marketing Private Limited).

32. It is represented on behalf of the Appellant that despite the baseless `Claim' of the `Interim Resolution Professional', that `no proof', was attached in regard to the `Existence of Debt', the `Appellant / Petitioner', had resubmitted the relevant documents, and submit further `clarification' and `information', in their `Reply', to the letter of the `IRP', dated 8th December 2021, so as to facilitate the process of collation of claims, as undertaken by the `Resolution Professional'.

33. Furthermore, the `Interim Resolution Professional', by denying the `Appellant's Claim', deprived it of its place, in the `Committee of Creditors', which, it is entitled to, as a `Financial Creditor', and this has caused, an `irreparable harm', to the `Appellant'.

34. Before the `Adjudicating Authority', the `Respondent / Resolution Professional' of the `Corporate Debtor', in the `Counter' to IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, had mentioned that only after the `Respondent', came to know that there is an `Arbitration Proceedings', initiated by the `Appellant' / `Applicant', which is pending, the `Respondent / Resolution Professional', had kept the `Financial Claim' of the `Appellant', in `abeyance'.

35. Added further, the `Resolution Professional', had filed an `Arbitration Application', informing the `Arbitral Tribunal', about the `Initiation' of `Corporate Insolvency Resolution Process' and `Moratorium', under Section 14 of the I & B Code, 2016, and that the `Arbitral Tribunal', had dismissed the `Application', through an `Order', dated 14.01.2022, and continued the `Arbitration Proceedings'.

36. The clear cut stand of the Respondent is that, he took all measures to collate, verify, determine all the `Valid Claims', which were submitted for the `Payment', in the `Corporate Insolvency Resolution Process' of the `Corporate Debtor', and complied with the Provisions of the `Code', in a meticulous manner. Because of the Appellant's `Claim', is pending before the `Arbitral Tribunal', and the outcome of the said Proceedings will determine, whether the `Claim', is to be `admitted' or `rejected', and

if it is to be `admitted', what is the quantum of `Money Claimed' and `Interest'? As such, the `Respondent / Resolution Professional', was not in a position, to `admit' / `reject' the `Claim', and hence, kept in `abeyance'.

37. The other stand of the Respondent / Resolution Professional is that, because of the pending `Arbitration Proceedings', the IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021 (filed by the `Appellant / Petitioner'), became an `Infructuous' one.

38. To be noted, that the `Appellant / Petitioner', is a `Financial Creditor', who furnished its `Claim', before the `Resolution Professional', and the same was kept in `abeyance', by the said `Professional', on the basis that `Arbitration Proceedings', are pending, wherein, the `counterclaim' of the `Corporate Debtor', is pending `determination'.

39. In the instant case, the very fact that the `Appellant's Claim', cannot be admitted, till the `counterclaim' of the `Corporate Debtor', is determined, which may end in `set off' of the `Sum', payable to the `Appellant / Petitioner', the plea of the `Respondent / Resolution Professional', cannot be brushed aside and in an emergency and also when a situation arises, the `Resolution Professional', is within his

`power' and `limit', to keep the `Claims', in `abeyance', for plurality of reasons.

40. As far as the present case is concerned, this `Tribunal', on a careful consideration of the contentions advanced on behalf of the `Appellant / Petitioner', and also this `Tribunal', keeping in mind of the stand taken by the `Respondent / Resolution Professional', before the `Adjudicating Authority', vide its `Counter' to the IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, comes to a consequent conclusion that the action of the `Resolution Professional', in keeping the `Claims', in `abeyance', because of the pending `Arbitration Proceedings', in regard to the `counterclaim' of the `Corporate Debtor', only after which, the `Claim Sum' of the `Appellant', can be determined with certainty, the `Reliefs', prayed for, by the `Appellant / Petitioner', pertaining to `admission' of the `Claim', cannot be `acceded to', in the `eye of Law'. Viewed in that perspective, the `impugned order', dated 02.12.2022 in IA (IBC) No. 155 / 2022 in CP (IB) No. 58 / 9 / AMR / 2021, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Amaravati Bench), in `dismissing', the `Interlocutory Application', is free from any flaw. Accordingly, the instant `Appeal', fails.

Result:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 12 of 2023, is `Dismissed'. No costs. The IA No. 26 of 2023 (For Stay) is `Closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

12 / 06 /2023

SR / TM