

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No 301
IA/660(AHM)2022
in
CP(IB) 232 of 2018

Order under Section Sec 60(5) IBC, 2016 & Rule 11 of NCLT Rules, 2016

IN THE MATTER OF:

Sundresh Bhat RP of JBF Petrochemical Limited
V/s
Manglore Refinery and Petrochemicals Limited

.....Applicant

.....Respondent

Order delivered on ..09/03/2023

Coram:

Dr. Madan B Gosavi, Hon'ble Member(J)
Ajai Das Mehrotra, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

SD/-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

SD/-

DR. MADAN B GOSAVI
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-2**

IA 660 of 2022

IN

CP(IB) No. 232/NCLT/AHM/2018

[An application under section 60(5) (C) of the Insolvency and Bankruptcy Code, 2016]

In the matter between:

Sundaresh Bhat

Resolution Professional of
JBF Petrochemicals Limited
The Ruby, Level-9, North-West Wing,
29, Senapati Bapat Marg,
Dadar west, Mumbai- 400028

....Applicant

Versus

**Mangalore Refinery and
Petrochemicals Limited**

(earlier known as ONGC Mangalore
Petrochemicals Limited)
Kuthethoor P.O. via Katipalla,
Mangaluru- 575030
Karnataka.

....Respondent

IN THE MATTER OF:

CP(IB) No. 232 of 2018

[An application under section 7 of the Insolvency and Bankruptcy Code, 2016]

IDBI Bank Ltd.,

....Financial Creditor

Versus

JBF Petrochemicals Ltd.

....Corporate Debtor

Order reserved on: 28/02/2023

Order pronounced on: 09/03/2023

Coram: DR. MADAN B. GOSAVI, MEMBER (JUDICIAL)

AJAI DAS MEHROTRA, MEMBER (TECHNICAL)

Appearance:

For the Applicant : Mr. Rashesh Sanjanwala, Sr. Advocate & Mr. Saurabh Soparkar, Sr. Advocate a/w. Mr. Monaal Davawala, Advocate

For the Respondent : Mr. Navin Pahwa, Sr. Advocate s/w. Mr. Rohan Lavkumar, Advocate & Ms. Anushree Soni, Advocate

For the SRA(GAIL) : Mr. Kamal Trivedi, Sr. Advocate General a/w. Mr. Akshat Khare, Mr. Viraj Bairagi, Mr. Samiron Chakroborty, Ms. Kritika Angirish, Advocates

For the CoC: Mr. Tushar Mehta, Sr. Advocate Solicitor General of India a/w Ms. Saloni Kapadia Advocate

For the Income Tax: Advocate Ms. Pankti Shah on behalf of Advocate Ms. Maithli Mehta

ORDER

[PER: BENCH]

1. This application under Section 60(5) (C) of the Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) and Rule 11 of the National Company Law Tribunal Rules, 2016 is filed by Sundaresh Bhat, Resolution Professional of JBF Petrochemicals Limited (hereinafter referred to as the “Corporate Debtor”) being aggrieved by the purported termination by the Respondent of the Off-Take Agreement dated April 12, 2016 entered into between the ONGC Mangalore Petrochemicals Limited (presently known as Mangalore

Refinery and Petrochemicals Limited) and the Corporate Debtor with following prayers :

- (A) *Declare that the Termination Notice is wrongful, bad in law, void ab initio and non est,*
- (B) *Declare that the Agreement is valid and subsisting;*
- (C) *Direct the Respondent to supply Px to the Corporate Debtor as and when the Plant is ready and commissioned by the Applicant during the CIRP of the Corporate Debtor as per the terms of the Agreement;*
- (D) *Pending the hearing and final disposal of the captioned Application, restrain and injunct Respondent from acting upon and taking any steps pursuant to the Termination Notice;*
- (E) *Restrain Respondent from terminating the Agreement until the completion of the CIRP of the Corporate Debtor is concluded before this Hon'ble Tribunal.*
- (F) *Pass any other relief that this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.*

2. The facts of this case briefly are:

- (i) On 07.11.2012, the Respondent had invited bids from prospective bidders for purchase of Paraxylene (“**Px**”). The Corporate Debtor accepted the offer. On 14.02.2015, the Respondent issued notification on award in favour of the Corporate Debtor to sell and supply the Paraxylene (“**Px**”) to the Corporate Debtor. On 12.04.2016 the Agreement to supply Px is executed between the Corporate Debtor and the Respondent.

- (ii) The Corporate Debtor was admitted in CIRP on 28.01.2022. The Applicant was appointed as the IRP, and later on continued as the Resolution Professional. On admission of the Corporate Debtor in CIRP this Adjudicating Authority declared moratorium under Section 14 of the IBC, 2016.
 - (iii) The applicant states that during the moratorium Respondent vide its letter dated 14.06.2022 informed the Corporate Debtor that since the Corporate Debtor has committed default in buying Paraxylene (“**Px**”) and there has been no off –take continuously for three months, the agreement dated 12.04.2016 stands terminated.
 - (iv) It is contended by the Applicant that the Respondent cannot terminate the Agreement to supply Paraxylene (“**Px**”) during the moratorium. Hence, the letter dated 14.06.2022 under reference is “ bad in law and void” . The Agreement between the Corporate Debtor and the Respondent to supply Paraxylene (“**Px**”) is still subsisting. The Respondent is bound to supply Paraxylene (“**Px**”) as per the Agreement.
3. The notice of this application was served to the Respondent and it has filed an Affidavit –in-reply. It is contended that the Corporate Debtor has committed default in not lifting the Paraxylene (“Px”) as per the terms of the Agreement. The Agreement was eligible for

termination **much prior to initiation of CIRP** of the Corporate Debtor. There is no breach of moratorium declared by this Adjudicating Authority. The provisions of Section 60(5) (C) of IBC, 2016 cannot be pressed into service to compel the third party to perform its part of the contract which has already been eligible for termination **much prior to initiation of CIRP** due to default committed by the Corporate Debtor itself. Thus, it was contended that this Application is not maintainable. The Respondent drew attention to Clause No. 17 of the Off-Take Agreement dated 12/04/2016, which is reproduced herein below:

“17.0 TERMINATION

17.1 Without prejudice to Clause 9.0,10.0 and 6.1(a), either Party shall have the right to terminate the Agreement forthwith by written notice as a result of non-performance by the other if the defaulting party has failed to remedy such non-performance within 60 days of receiving notice of non-performance from the other party Non-performance will mean to include the following events :

*(a) **Buyer does not off-take Px continuously for three months.***

(b) Buyer does not pay for the delivered quantity for a period exceeding 30 days.

(c) Buyer does not compensate the Seller as per the “Take or Pay” conditions described in clause 9.0.

(d) Seller is not able to deliver Px in accordance with this agreement for a continuous period of three months.

(e) Seller does not compensate the Buyer as per the “Deliver or Pay” conditions described in clause 10.0.”

4. The Respondent also drew attention to various E-mails dated 14/09/2017 (page no. 38), 03/11/2017 (page no. 39), 16/11/2017 (page no. 41), 30/05/2018 (page no. 42), 23/11/2018 (page no. 43), 17/07/2022 (page no. 45) and 19/09/2020 (page no. 46), wherein emails are exchanged with the Corporate Debtor regarding plans for Off-Take of **Px**, the inability of the Corporate Debtor to Off-Take Px and evacuation and sale of Paraxylene ("**Px**") to other parties. The Respondent submitted that there was a continuous default in not purchasing the Paraxylene ("**Px**") by the Corporate Debtor, because of which by letter dated 14/06/2022 the agreement was terminated. The Respondent also pointed out that an open-ended relief has been claimed by the Corporate Debtor to supply Paraxylene ("**Px**") "**as and when the Plant is ready and commissioned**" signifying that the Corporate Debtor is still not ready to Off-take Px.
5. The Learned Senior Counsel for the Respondent also pointed out that the Resolution Plan, in point no. 1.8 (page no. 1312) states as under:

"The Resolution Plan is unconditional and the validity of the Resolution Plan shall not be affected in the event the NCLT does not grant any particular relief, concession of prayer requested under PART E of this Resolution Plan."

The Learned Senior Counsel stated that the Resolution Plan, therefore, is not dependent upon the revival of the said Off-take Agreement and is not essential to the resolution of insolvency of the Corporate Debtor.

6. We have heard Learned Senior Counsel Mr. Rashesh Sanjanwala for the Resolution Professional and Learned Senior Counsel Mr. Navin Pahwa for the Respondent at length. We perused the material and evidence available on record. Both the Learned Senior Counsels took us through correspondence exchanged between the Corporate Debtor and the Respondent to impress upon us their respective contentions that the agreement dated 12.04.2016 is still subsisting and vice versa. Both the Senior Counsels also took us through various terms and conditions set out in the agreement to advance their arguments. We may take note of these submissions at a later stage, but some facts need to be considered in first point of time.
7. Although JBF Petrochemicals Limited has been established much prior to 2012, it could not start its business activities before its admission in CIRP and even during the CIRP. It is not a going concern even as on today. The agreement dated 12.04.2016 was executed between the Corporate Debtor and Respondent for supply of Paraxylene ("**Px**") by the Respondent.

8. It is not in dispute that Paraxylene (“Px”) is essential raw material to be used in the products of Petrochemical Industry so as to make such industry functional. However, in this case, the Corporate Debtor, being in Petrochemical Industry has never been functional at all. It is also to be noted that this Adjudicating Authority has to declare moratorium under Section 14 of the IBC, 2016 to protect and preserve the assets of the Corporate Debtor during the CIRP and also to protect the Corporate Debtor’s status as a going concern, if Corporate Debtor is a running unit.
9. Learned Senior Counsel Mr. Rashesh Sanjanwala pressed in service provision of Section 14(2A) of the IBC, 2016 and submitted that the act of Respondent to terminate the agreement during moratorium is illegal. However, we are not able to accept his submission because the provision of Section 14(2A) of IBC, 2016 is to be pressed in service to preserve the status of the Corporate Debtor as a going concern. We hereby reproduce the said provision in verbatim for ready reference :

“ (2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified”

10. In this case the Resolution plan for Corporate Debtor has been approved by the Committee of Creditors and it is pending for approval /consideration of this Adjudicating Authority. The applicant's prayer is to direct the Respondent to supply Paraxylene ("**Px**") as and when the plant is ready and commissioned.

11. Learned Senior Counsel for the Respondent read out prayer (C) of this application which is as follows :

“(C) Direct the Respondent to supply Px to the Corporate Debtor as and when the Plant is ready and commissioned by the Applicant during the CIRP of the Corporate Debtor as per the terms of the Agreement.”

He submitted that this Adjudicating Authority cannot grant such relief which is open-ended. The Resolution Professional requests this Adjudicating Authority to direct Respondent to supply Paraxylene ("**Px**") to the Corporate Debtor as and when the plant becomes functional. Such prayer cannot be granted and such application can not be entertained by this Adjudicating Authority in its residuary jurisdiction under Section 60(5) (C) of the IBC, 2016.

12. We accept the submission of the Learned Senior Counsel for the Respondent. Our residuary jurisdiction under Section 60(5) (C) of the IBC, 2016 is limited. We can not give any finding on the issue whether the agreement in between two parties is still subsisting or not. We cannot interpret terms of such an agreement relating to third-party contract.
13. Under Section 60(5) (C) of the IBC, 2016 this Adjudicating Authority has been conferred with the jurisdiction to entertain and dispose of any question of law or facts “ **arising out of or in relation to the Insolvency resolution or liquidation process of Corporate Debtor**”. Now in this case the Corporate Debtor was never a running unit. It cannot be said that by the termination of the agreement by the Respondent, the Corporate Debtor suffered any erosion of assets during the CIRP. The Hon’ble Supreme Court in the case of ***TATA Consultancy Services Ltd. Vs. SK Wheels (P) Ltd., (2022) SCC 583*** succinctly explained the scope of residuary jurisdiction under Section 60(5) (C) of the IBC, 2016 in following words :

“91. The residuary jurisdiction of NCLT under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of NCLT were to be confined to actions prohibited by Section 14 of IBC, there would have been

no requirement for the legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of the grounds of judicial intervention contemplated under IBC in matters of preserving the value of the corporate debtor and its status as a “going concern”. We hasten to add that our finding on the validity of the exercise of residuary power by NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by NCLT. However, it is pertinent to mention that NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in Satish Kumar Gupta [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443].”

14. Considering the facts of the case and law applicable relating thereto, we hold that this application is not maintainable, as the dispute in question between the Corporate Debtor and Respondent is dehors the insolvency proceeding. The default in this case, in not purchasing Paraxylene (“**Px**”) was preceding the CIRP commencement and the Respondent had exercised its contractual right to terminate the agreement, while the Corporate Debtor was never a going concern. We restrain ourselves from making any comment on the correctness, or otherwise, of the action of the Respondent in terminating the contract, but we are conscious of our limited jurisdiction in deciding and, interfering,

in matters which are essential to the insolvency of the Corporate Debtor. Since the issue is dehors the insolvency proceeding, we reject this application. The IA is disposed of accordingly.

SD/-

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

SD/-

**DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**

Vaishali