

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH - BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(through physical hearing/web based video-conferencing platform)

I.A No. 545/2024
In
CP (IB) No.74/BB/2023
Under Sections 60 (5) of IBC, 2016
R/w Rule 11 of NCLT Rules, 2016

IN THE MATTER OF

Yes Bank Limited

Versus

Katerra India Private Limited

In
Embassy Commercial Projects
(Whitefield) Private Limited

Registered Office: Ground Floor,
Block 3A, Embassy Tech Village,
Outer Ring Road, Bellandur
Bangalore, Karnataka - 560103

... Applicant

And

Pankaj Srivastava
Resolution Professional
Katerra India Private Limited

Order delivered on: 20/11/2024

Coram: 1. Hon'ble Shri K. Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For Applicants : Sr Counsel, C K Nandakumar
For the Resolution Professional: Shri Dhyan Chinnappa, Sr. Counsel
Shri.R.Kiran, Shri Bibhas.V.Kittur

O R D E R

Per: Manoj Kumar Dubey, Member (Technical)

The Present Application is filed on 22/10/2024 under sub-section 5 of Section 60 of the Insolvency and Bankruptcy Code of 2016 *inter alia* praying:

- i. *Pass necessary directions to clarify that the Applicant's claim shall not be extinguished under the approved resolution plan.*
- ii. *Pending hearing and final disposal of the Application, direct the Respondent to disclose the treatment of Applicant's claim under the resolution plan.*

2) Brief Facts as submitted by the Applicant are as follows:

- i) In February 2019, Vikas Telecom Private Limited (**Developer/VTPL**) appointed Synergy Property Development Services Pvt. Ltd. (**Synergy**) [currently Colliers International (India) Property Services Limited's (**Colliers**)] as the Project Management Consultant of Parcel 3A & MLCP at Embassy Tech Village, Devarabisanahalli Village, Bangalore (**Project**) vide work order dated 6 February 2019. The Developer also awarded the contract for the Design and build package works of the Project to Katerra India Pvt Ltd as the contractor of the Project *vide* the Notice of Award/Letter of Intent/Purchase Order No. 4900016856 dated 16 May 2019 (as amended from time to time) including but not limited to the Change Order dated 23 December 2021 (collectively referred to as the **Contract**). On 23 December 2020, by way of a deed of assignment read with the Contract, (Embassy Commercial Projects (Whitefield) Private Limited) ECPWPL, the Applicant herein was appointed as a co-developer by VTPL for undertaking the development, operation and maintenance of Block 3 & Block 4 of the Embassy Tech Village including the Project with effect from 28 December 2020.
- ii) Katerra failed to meet the project deadline, leading to a change order and extended timelines for structural top-out, structural completion, and glazing completion. Despite these extensions, Katerra failed to fulfill its obligations, resulting in losses and long-delays. ECPWPL issued notices, citing non-performance, long-delays, and losses incurred due to

descope, additional costs, and additional costs. ECPWPL had to descope work, provide advances, and make direct payments to Katerra's vendors.

- iii) Katerra was admitted into insolvency in September 2023, and ECPWPL filed a claim of INR 78.16 crore for losses and expenses incurred due to Katerra's non-performance of contractual obligations. ECPWPL filed its claim in Form B as an 'operational creditor' in February 2024, but was disputed by Katerra India Pvt Ltd's claim of INR 160.46 crore. However, the RP issued a demand cum arbitration notice dated 1 March 2024 (**Arbitration Notice**) and, on 11 March 2024, informed ECPWPL that due to Katerra's claim of INR 160.46 crore (**Katerra's Claim**), ECPWPL's claim was disputed and could not be admitted. ECPWPL responded to the arbitration notice, denying liability and counterclaiming INR 78.16 crore, arising from Katerra's non-performance under the contract.
- iv) It is submitted the RP had full knowledge of ECPWPL's Claim since the date of commencement of Katerra's corporate insolvency resolution process (**CIRP**), and the existence of such a claim as on the insolvency commencement date is beyond dispute.
- v) The RP did not admit ECPWPL's Claim filed under the Code, citing Katerra's Claim of INR 160.46 crore and the issuance of the Arbitration Notice, as reflected in the RP's communication dated 11 March 2024. It is imperative to note that the arbitration proceedings were initiated at the behest of the RP raising its claims against ECPWPL, and thereafter, ECPWPL's Claim was filed in such proceedings. This clearly demonstrates the RP's acknowledgment and intent to pursue the dispute, including its claim, before an arbitral tribunal, rather than through Katerra's CIRP.
- vi) As is clearly borne from the fact narrated above, Katerra's Claim and ECPWPL's Claim are inextricably linked to each other since both such claims, emanate from the common set of factual circumstances i.e., arising from or in connection with the terms of the Contract. Therefore, it is abundantly clear that the adjudication of the Katerra's Claim as well as ECPWPL's Claim shall involve common facts, issues and evidence.

- vii) In these circumstances, both ECPWPL's Claim and Kattera's Claim must either be resolved in the arbitration proceedings. It is submitted that Kattera's Claim can only be determined after determination of ECPWPL's Claim in the same arbitral proceedings and hence, both Kattera's Claim and ECPWPL's Claim ought to be heard together by the arbitral tribunal. **[Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd. Company Appeal (AT) (Insolvency) No. 285 of 2018 @ Para 3]**
- viii) In addition, it is submitted that any attempt to extinguish ECPWPL's Claim through the resolution plan would be unjust and detrimental as it would, while keeping RP's claim alive, nullify ECPWPL's rights and deprive it from asserting its claim and formulate necessary defences in the arbitration proceedings after the CIRP of the Kattera is complete. **[Shapoorji Pallonji & Co. (P) Ltd. v. Kobra West Power Co. Ltd., 2023 SCC OnLine NCLAT 968 @ Paras 14&20]**. Further, if ECPWPL's Claim is extinguished, then it would prevent ECPWPL from not only asserting ECPWPL's Claim independently of Kattera's Claim (which are also not legally tenable) but also from claiming a set off against Kattera's Claim to the extent, if both Kattera and ECPWPL's Claim are allowed by an arbitral tribunal.
- ix) It is settled law that no claim which is disputed and has not been admitted on account of such dispute, can be extinguished (under a resolution plan) without it being adjudicated upon by a competent forum, which in the present case is the arbitral tribunal, to be constituted pursuant to the correspondence exchanged between the parties. **[NTPC v. Rajiv Chakraborty, (2021) 10 SCC 480 @ Para 6]**.
- x) It is further submitted that the Code imposes various duties on a resolution professional appointed in terms of the Code including but not limited to the duty to collate all claims submitted by creditors and act in a fair and transparent manner. Further, as is evident, the RP has on the one hand instituted arbitration and on the other is seeking to step into the shoes of the arbitrator to decide ECPWPL's claims by stating these claims are not in terms of the Contract, which is impermissible under law.

- xi) Further, it is settled that the resolution professional has no authority to accept or disallow a claim. In this regard, it is submitted that the extinguishment of ECPWPL's Claim under the resolution plan pursuant to RP's non-admission effectively demonstrates that the RP has sought to substitute its views in place of the arbitral tribunal, which is the competent forum to decide ECPWPL's Claim. **[NTPC v. Rajiv Chakraborty, (2021) 10 SCC 480 @ Para 6].**
 - xii) In view of the aforesaid, it is submitted that the non-consideration/ no information on treatment of the ECPWPL's Claim and the extinguishment of the same by way of a resolution plan, if any, is legally untenable.
- 3) The Counsel for respondent have filed objections vide Diary No 5227 dated 06/09/2024 and Written Submission vide Diary No: 597 dated 22/10/2024 and contended as here under:
- a) At the outset the prayers made by the Applicant in the application under answer needs to be considered with utmost care. A prima facie perusal of the same, would make it succinctly clear that the said prayers are not at all maintainable and the same is ultra vires the basic tenets of the Insolvency and Bankruptcy Code, 2016, its objects and the purpose of its enactment. A bare perusal of the said prayers would make it clear that the such prayers are not maintainable under law.
 - b) It is submitted that the said prayers are not maintainable since the same the said prayers are against the bedrock of the principles of Insolvency and Bankruptcy Code and also the CLEAN SLATE PRINCIPLE.
 - c) It is submitted that Successful Resolution Applicant cannot suddenly be faced with undecided claims after the resolution plan is submitted by him and has been accepted by the committee of creditors. In the present case the claims made by the Applicant herein are not admitted by the Resolution Professional and hence the Applicant herein is not entitled to any prayers that they have sought for.
 - d) It is pertinent to note that the applicant in the present application has not

sought directions from this Hon'ble Tribunal thereby calling upon the Resolution Professional to reconsider their claims, but on the contrary they have sought not to extinguish their claims. Such prayers would not fall in line with the essence of Insolvency and Bankruptcy Code but would run contrary to the same. Further if such prayers are allowed then a Pandora's Box would be open where, all the creditors would seek such reliefs as is sought for by the Applicant in the present application, which would make the corporate insolvency resolution process a never-ending exercise.

- e) It is submitted that all eventualities pertaining to all the creditors and stakeholders are taken care in the resolution plan submitted by the Successful Resolution Applicant. Further, considering and allowing the prayers that is short for by the Applicant in the present application would seriously prejudice the rights of the successful resolution applicant as the Insolvency and Bankruptcy Code and corporate insolvency resolution process does not contemplate matters being left inchoate. In fact, it exerts one to accept the seal of finality and quietude which stands attached to the approval of a resolution plan.
- f) It is pertinent to note here that the Applicant herein has encashed one Performance Bank Guarantee issued by Corporate Debtor and adjusted with these aforesaid claims and submitted a net claim of Rs. 78.16 Crores.
- g) Reliance is placed in the following judgements:
 - i. *Ghanashyam Mishra & Sons(P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.* – **(2021) 9 SCC 657.**
 - ii. *NTPC Ltd. (Simhadri Project) Vs. Rajiv Chakraborty* – **Civil Appeal No. 2798 of 2020.**
 - iii. *Indian Oil Corpn.Ltd.V.Arcelor Mittal Nippon Steel India Ltd.* - **2023 SCC OnLine Del 6318**
- 4) We have perused the material on record and heard the Counsels of both the sides.
- 5) It is undisputed facts that the Applicant herein had already filed its claims in Form B on 29/01/2024. Thereafter, the RP has himself issued a demand cum Arbitration Notice dated 01/03/2024, which has also not been disputed by the present Respondent. The claim and counterclaim of the parties is already a

subject matter of the Arbitration proceedings and as it has already been held in various decisions of Hon'ble Apex Court and NCLAT that determination of the tenability/validity of a contractual agreement falls in the realm of a civil dispute and therefore outside the scope and jurisdiction of this Adjudicating Authority, we do not find it necessary to address the merits of this dispute at hand.

- 6) Firstly, it the case of the Applicant that the since there are claims and counterclaims existing between the parties the same ought to be adjudicated before the Arbitration Tribunal. In this regard Reliance was placed on the judgment of Hon'ble NCLAT in the case of ***Shaapoorji Pallonji & Co (P) Ltd v. Kobra West Power Co. Ltd , 2023 SCC OnLine NCLAT 968*** vide order dated 23/02/2023 wherein the NCLAT has held that the parties even after the approval of the resolution plan are at liberty to proceed with the pending Arbitration and such proceedings are to be decided on its own merits. Hence we do not see any hindrance to Applicant of the Respondent to continue their respective claims in the Arbitration proceedings.
- 7) In addition, it is necessary to ascertain whether any liability or claim that is not included in the Resolution Plan will endure following its approval.
- 8) In this regard reliance is placed on the judgement of Hon'ble Supreme Court in the case of ***Ghanshyam Mishra & Sons Private Limited v. Edelweiss Asset Reconstruction Company Ltd (2021) 9 SCC 657*** wherein it was held that, ***"23 That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;"***

[Emphasis Supplied]

Hence, the legal principle is clear that once the Resolution Plan is approved, no claim that is not a part of the Resolution Plan can exist or continue. This was laid in view of providing a “Clean Slate” to the Resolution Applicant to revive the Corporate Debtor.

Moreover, in the same case the Hon’ble Apex Court has further held as follows:

*“86.....one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. **The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims.** If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.”*

[Emphasis Supplied]

- 9) It is noted that the prayer of the Applicant to this Adjudicating Authority is to direct the Respondents that any future claim of the Applicant shall not stand extinguished after the Approval of the Resolution Plan.

- 10) We find it relevant to examine the main objective of the CIRP is the revival of the Corporate Debtor. This Objective of the IBC code is based on two paramount factors i.e the restructuring of the Corporate debtor and that such restructuring is carried out in a time bound manner. Reliance is placed on the judgment of Hon’ble Apex Court in the case of **Swiss Ribbons Pvt. Ltd. and Anr.v.Union of India and Ors (2019) ibclaw.in 03 SC, order dated 25/01/2019,**

*“11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. **The Code is first and foremost, a***

Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. **When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions.** Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.”

[Emphasis Supplied]

11) Thus the entire code is consolidated to foresee the effective implementation of the Resolution Plan by provisioning various principles that have to be satisfied to the CoC before the approval of a Resolution Plan. The burden shifts to the commercial wisdom of a COC to foresee any contingency and to satisfy the ‘feasibility and viability’ of the plan. Once the Plan has been approved by the CoC, we do not find it legally tenable to direct any such changes in the plan that will be effective only in the future and will be contingent to the adjudication of Arbitration Proceedings.

12) Moreover, it is pertinent to point out that even in the NCLAT order in the case of *Shaapoorji Pallonji & Co (P) Ltd v. Kobra West Power Co. Ltd (supra)* relied upon by the Applicant herein, the Hon’ble Appellate Tribunal has not disturbed the Resolution Plan, and only observed that the Applicants are at liberty to pursue all the contentions available to them. Moreover, the Hon’ble Supreme Court in the Appeal against the impugned order of the NCLAT, in the case of

Adani Power Ltd. v.Shapoorji Pallonji and Co Pvt. Ltd. and Ors. (2023) ibclaw.in 338 SC, vide order dated 24/03/2023, on the above mentioned observation of NCLAT, further goes on to hold as under:

“In our opinion, there is no ambiguity in the above observations and directions recorded by the NCLAT, as they reflect that the Resolution Plan, as approved, is binding on all and cannot be made subject matter of arbitration or any other proceedings. The claim of respondent no. 1 – Shapoorji Pallonji and Co. Pvt. Ltd. has been categorized by the Resolution Professional as a ‘contingent liability’. Respondent no. 1 – Shapoorji Pallonji and Co. Pvt. Ltd. may continue with the arbitration proceedings for adjudication of its claim and quantification thereof, if they so wish and choose to do so.

However, the claim even if allowed in favour of M/s Shapoorji Pallonji and Co. Pvt. Ltd. will have no bearing on the rights and obligations of the appellant – M/s. Adani Power Limited, which are in terms of the Resolution Plan. It has been held by the judgment dated 23.02.2023, that the appellant cannot be saddled with any liability except what is mentioned in the Resolution Plan.”

[Emphasis Supplied]

6. Accordingly, considering the ratio of the above judgment of the Hon’ble Apex Court including the latest judgment in the case of **Adani Power Ltd. v.Shapoorji Pallonji and Co Pvt. Ltd. and Ors (supra)**, we are of the opinion that the prayer of the Applicant that the claim should not be allowed to be extinguished is not tenable in law, hence is not acceptable. In view of the above, the instant Application bearing **I.A. No.545/2024** is not maintainable and **is hereby dismissed.**

Sd/-

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-

K. BISWAL
MEMBER (JUDICIAL)