

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 190 of 2020

[Arising out of Order dated 09th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Appeal (IB) No. 625/KB/2019 and 615/KB/2019 in Main Company Petition (IB) No.176/KB/2018]

IN THE MATTER OF:

Tuf Metallurgical Private Limited

Registered Office:

TUF House, LSC No.3

Shreshtha Vihar, Post Box No.9237

East Delhi, Delhi – 110092

CIN: U33201DL1999PTC098724

Through its General Manager – HR & Legal and

Authorised Representative –

Sanjeev Singh Chauhan

**...Appellant/
Stakeholder**

Versus

1. Impex Metal& Ferro Alloys Limited

(Under Liquidation)

Registered Office:

35, CR Avenue, Kolkata – 700012

CIN: U27101WB1991PLC051901

Registered Email: info@impexmetal.in

...Respondent No.1

2. Samir Kumar Bhattacharyya

(Liquidator)

Address:

Sagar Trade Cube, 5th Floor

104, SP Mukherjee Road,

Kolkata – 700026

Registered Email:

skb.resolution@gmail.com

liquidator.impex@gmail.com

...Respondent No.2

3. Subodh Kumar Agrawal

(Erstwhile Resolution Professional)

Address:

301, Victory House, 1,

Ganesh Chandra Avenue

Kolkata – 700013

Registered Email: subodhka@gmail.com

...Respondent No.3

With
Company Appeal (AT) (Insolvency) No. 191 of 2020

IN THE MATTER OF:

Million Link (China) Investment Limited
Registered Office:
Room No.3508, 35/F, Bank of America Tower
12, Harcourt Road, Hong Kong

Branch office in India:
Shop No.7, 3rd Floor, NWA Club Road
West Punjabi Bagh, New Delhi – 110026
Through its General Manager – India and Authorized
Representative –Neha Gambhir

**...Appellant/
Stakeholder**

Versus

- 1. Impex Metal & Ferro Alloys Limited**
(Under Liquidation)

Registered Office:
35, CR Avenue, Kolkata – 700012
CIN: U27101WB1991PLC051901
Registered Email: info@impexmetal.in

...Respondent No.1

- 2. Samir Kumar Bhattacharyya**
(Liquidator)
Sagar Trade Cube, 5th Floor
104, SP Mukherjee Road,
Kolkata – 700026
Registered Email:
skb.resolution@gmail.com
liquidator.impex@gmail.com

...Respondent No.2

- 3. Subodh Kumar Agrawal**
(Erstwhile Resolution Professional)
Address:
301, Victory House, 1,
Ganesh Chandra Avenue
Kolkata – 700013
Registered Email: subodhka@gmail.com

...Respondent No.3

Present:

For Appellant : Mr Vaibhav Mahajan, Advocate.
For Respondent : Mr Abhay Anand Jena, Mr Omnarayan Rai &
Mr Rahul Auddy, For R-1 & R-2.

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These two Appeals emanate from the common Order dated 09th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Appeal (IB) No. 625/KB/2019 and 615/KB/2019 in Company Petition (IB) No.176/KB/2018, whereby the Adjudicating Authority has summarily disposed of the Applications filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') by issuing a common one-line order "**Liquidator to consider its claim as per Rules**". Being aggrieved by the said Order, the Appellants have filed the two separate Appeals mentioned above. Their original status in the company petition represents the Parties in this Appeal for the sake of convenience.

2. These brief facts of the case are as follows:

The Appellant in CA (AT) (Ins.) No. 191 of 2020 Million Link (China) Investment Limited filed an Application seeking directions against the Liquidator/Corporate Debtor to refund an amount of Rs.2,40,35,301/- immediately- (Rupees Two Crores Forty Lacs Thirty-Five Thousand Three Hundred and One Only) paid as advance by the Appellant for purchase of Ferro Silicon Manganese from Corporate Debtor during CIRP period as the Corporate Debtor failed to supply the said goods on account of a breakdown in its manufacturing abilities or in the alternative to treat the said refund/claim of the Appellant as CIRP costs for disbursement under Section 52 read with Section 52 I&B Code.

3. The Appellant had also filed their claims above in Form 'G' claiming it part of CIRP costs before the Learned Liquidator (Section 38 of I&B Code, 2016). But the Liquidator failed to communicate its decision of acceptance or rejection of the Appellant's claim as CIRP costs, which violates Section 40(2) of I&B Code, 2016 read with Regulation 30 of Liquidation Process Regulation. Thus, the Appellants applied to the Adjudicating Authority under Sec 60(5) of the Code, which got numbered as Company Appeal (IB) No. 625/KB/2019 and Company Appeal (IB) No. 615/KB/2019.

4. It is contended by the Appellants that the Adjudicating Authority erroneously and without Application of judicial mind disposed of the Application above by directing 'Liquidator to consider the claims of the Appellant as per law' in a mechanical fashion.

5. Brief facts of the case of Appellant in Company Appeal (IB) No. 625/KB/2019 are as under:

- i) The Company Petition (IB) No.176/KB/2018, filed by State Bank of India under Section 7 of the Code was admitted by the Adjudicating Authority by Order dated 09th March 2018. The IRP was appointed, who was subsequently confirmed as RP. The IRP/RP remains in charge of the Corporate Debtor affairs until Liquidator's appointment by Order dated 12th February 2019.
- ii) The Appellants Million Link (China) Investment Limited (from now on referred to as "Million Link") contends that it is an

International Trading Company and was doing regular business with the Corporate Debtor from the time before the commencement of CIRP. It had placed an order to purchase 1000 MT of Ferro Silicon Manganese from Youthstar Vanijya Private Limited (a company based in Kolkata) at the rate of US\$ 1040/MT vide Purchase Contract No. MLC20180824 dated 24 August 2018.

- iii) The Million Link paid full consideration for 100 MT against the Order of 1000 MT of Ferro Silicon Manganese, amounting to the US \$104,000/- in advance, to Youthstar Vanijya Private Limited. In and around the month of December 2018/January 2019, Youthstar Vanijya (P) Limited supplied and shipped 100 MT of Ferro Silicon Manganese to Million Link.
- iv) In September 2018, Authorised Representative of the Corporate Debtor and the Resolution Professional approach to Million Link insisted on keeping the business relations intact and purchasing the goods manufactured by the corporate debtors manufacturing plant. Corporate debtor further represented that its business is being run as a going concern and as such there are effective attempts and steps being made to revive the business and as such corporate debtor will be able to undertake and complete all the business transactions that it agrees to undertake with million Link within the timeline agreed.

- v) Based on the aforesaid representations and considering the fact that the corporate debtor might benefit from the business so received, Million Link agreed to purchase the remaining quantity of 900 MT of Ferro Silicon Manganese from Corporate Debtor and therefore vide addendum dated 11th September 2018 to Purchase Contract No. MLC20180824 dated 24th August 2018, Corporate Debtor was substituted as the seller in place of Youthstar Vanijya (P) Ltd for sale of balance quantity of 900 MT out of the total quantity of 1000 MT at the same price. Therefore, the addendum's effect is that the Youthstar Vanijya (P) would sell a quantity of hundred metric ton and the Corporate Debtor would sell a quantity of 900 MT to Million Link as per the terms and conditions of the said Contract.
- vi) In October-November 2018, the Corporate Debtor supplied and shipped only 162 MT of Ferro Silicon Manganese against the agreed quantity of 900 MT to "Million Link" as agreed to vide Purchase Contract dated 24th August 2018. The Corporate Debtor issued a pro forma invoice dated 24th September 2018 to Million Link. The total sale price for 900 MT of Ferro Silicon Manganese pertaining to a particular specification and size was fixed at USD 9,36,000 at the rate of US \$ 1040 per metric ton. As per the payment terms decided by the Corporate Debtor in the said pro forma invoice an amount of US \$ 507,314.13 was payable by Million Link in advance to the Corporate Debtor and

the balance on the loading of the container by Corporate Debtor at its plant.

- vii) The Corporate Debtor had closed its plant and was no longer able to supply the remaining quantity of Ferro Silicon Manganese out of the total Order of 900 MT. Since the Corporate Debtor was not supplying the goods above against the advance/money spent by the Appellant to the Corporate Debtor during CIRP and the contract was executed to keep the Corporate Debtor a going concern. Therefore, the Appellant filed its claim before the Liquidator as part of the CIRP cost. The Corporate Debtor will refund the total advance to Appellant "Million Link" amounted to USD 338,834.13 equivalent to Rs.2,40,35,301/- as per the exchange rate Rs70.9353 of RBI dated 12th February 2019.
- viii) The Appellant contends that these dues have arisen during RP's tenure in the CIRP period; therefore, the same has to be treated as CIRP cost.
- ix) As per Regulation 30 of CIRP Regulation, the Liquidator has to verify the claims submitted within 30 days and further under Section 40 the Liquidator has to communicate its acceptance or rejection of such claim within 7 days of such decision. However, the Liquidator has failed to adjudicate upon the claims of the Appellant despite several requests by the Appellant.

- x) The RP has furnished Form-III (a cost sheet submitted by RP after demitting his office) as prescribed under Circular No. IBBI/IP/013/2018 dated 12th June 2018, without disclosing the costs incurred by him to run the Corporate Debtor as a going concern, especially the dues above of the Appellant is in itself against the mandate of the said Circular. After that, the Appellant filed the aforesaid Application in CA (IB) No.625/KB/2019 seeking direction against the Liquidator to refund the advance payments made for the purchase of goods by Appellant during CIRP or in the alternative to classify and admit the claims submitted by Appellants as Corporate Insolvency Resolution Process Cost (in short CIRP cost). But the Liquidator refuses to treat the aforesaid claim as CIRP cost and clarify its position to treat the same as a pre-CIRP claim for disbursement.

6. In Company Appeal (AT) (Ins.) No. 190 of 2020 has been filed by Tuf Metallurgical Private Limited against the Liquidator of the Corporate Debtor on being aggrieved by the interim order passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata passed in CA (IB) No.615/KB/2019 in Company Petition No.176/KB/2018 under Section 60(5) of the Code.

7. Brief facts of this Company Application is that the Appellant filed an Application before the Liquidator of the Corporate Debtor for issuing a direction to refund an amount of Rs.4,50,54,512/- (Rupees Four Crore Fifty

Lacs Fifty Four Thousand Five Hundred Twelve Only) paid in advance by the Appellant for purchase of Ferro Silicon Manganese from the Corporate Debtor during CIRP period as the Corporate Debtor failed to supply the said goods on account of breakdown in its manufacturing abilities and a further amount of Rs.43,56,897/- payable as damages by Corporate Debtor on account of his default to pay for the raw materials (Manganese Ore) supplied by Appellant during CIRP period; or in the alternative to treat the said total refund/claim amounting to Rs.4,94,11,409/- (Rupees Four Crore Ninety Four Lacs Eleven Thousand Four Hundred Nine Only) of the Appellant as CIRP costs for the purpose of disbursement under Section 52 read with Section 53 of I&B Code, 2016. The Appellant has also submitted the aforesaid claim as part of CIRP costs before the Learned Adjudicator as per Section 38 of I&B Code in Form 'G'. However, the Liquidator failed to communicate his decision of acceptance of the rejection of Appellant's claim as CIRP costs as per Section 40(2) of I&B Code, 2016. Therefore, the Appellant approached the Adjudicating Authority by way of CA (IB) No.615/KB/2019. The Adjudicating Authority vide order dated 13th June 2019 stayed the disbursement of sale proceeds to be realised from the Liquidation proceeds during the aforesaid Application's pendency.

8. Learned Liquidator in his Reply to the aforesaid Application, refused to treat the aforesaid claim/refund of the Appellant as CIRP costs and clarified his position to treat the claim qua refund of advance for Ferro Silicon Manganese as the pre-CIRP claim for the purposes of disbursement and outrightly dismissed the second claim qua damages on account of non-payment of the raw material supplied by the Appellant to the Corporate

Debtor during CIRP in toto. The Adjudicating Authority vide order dated 09th December 2019 disposed of the Company Application by issuing a direction to the Liquidator to consider the claims of the Appellant as per law. The Appellant filed the instant Appeal against the impugned order dated 09th December 2019 seeking adjudication of the dispute with respect to the treatment of Appellant's claim as CIRP costs as the same has a significant bearing for the Appellant, even more so, as the Appellant has strong reason to believe that the Liquidation proceeds may not be enough to cover any claim other than CIRP costs causing severe prejudice to the Appellant, who has paid advance amount to purchase goods from Corporate Debtor undergoing CIRP in good faith.

9. The Liquidator/Respondent No.2 has filed its Reply, wherein it is stated that the Adjudicating Authority has directed him to consider the claim of the Appellant as per rules. Under the Impugned Order Appellants lodged its claim afresh on 03rd January 2020. The claim was under consideration of Respondent No.2, and it was taking some time since several factual clarification was required. Still, the Appellant has filed the present Appeal before this Appellate Tribunal.

10. The Liquidator contends that the respondent No.3 has handed over a list of unpaid CIRP cost and expenses to the respondent No.2 at the end of CIRP period and the list does not feature the name of Appellants herein. It is bound by the list provided by the RP. He cannot declare any claim as CIRP cost when he was not involved in the said transaction.

11. Liquidator further states that if an advance has been paid by the purchaser, under no circumstances does the same fall under any of the clauses of Section 5(13) of the Code. It is contended that the alleged advance cannot be treated as interim finance because there is no CoC ratification to that effect. The expenses incurred and approved by the RP such as the purchase of raw materials, workers engaged, electricity purchase etc. will come within this ambit are covered in phrase 'expenses incurred by the RP', but the advance given by purchaser cannot under any circumstances be treated as an expense incurred by a Resolution Professional. Hence the advance will be treated as an 'unsecured financial loan', and the Appellant is required to lodge its claim with the Liquidator, which may be considered as the claim for an unsecured financial loan. No expense unless it comes within the ambit of Section 5(13) of the Code can be treated as CIRP cost.

12. We have heard the arguments of the Learned Counsel for the parties and perused the records.

13. Based on the pleadings following questions of law arise in this Appeal:

- Whether advance paid to the RP for purchase of goods from Corporate Debtor during CIRP to keep the Corporate Debtor as a going concern, in case of breach of contract, on account of a breakdown in the corporate debtor manufacturing ability, can be treated as CIRP cost?

- Whether the advance amount paid by the Appellant to the RP for purchase of goods from Corporate Debtor during CIRP to keep the corporate debtor as a going concern ought to be treated as CIRP cost by the Liquidator for the purposes of disbursement under Section 52, read with Section 53 of I&B Code, 2016?
- Whether the advance amount paid by the Appellant to the RP for purchase of goods from Corporate Debtor during CIRP ought to be refunded by the RP on account of delivery failure?

14. The moot question that arises for our consideration is whether the advance paid to Corporate Debtor for the supply of goods during CIRP, on failure to supply part goods, during CIRP can be treated as CIRP costs.

15. Corporate Insolvency Resolution Process was initiated on 09th March 2018. After perusal of the record, it is apparent that the Appellant transferred USD 507300.69 in the account of Corporate Debtor Impex Metal and Ferro Alloys Limited on 28th September 2018. The copy of the said transfer memo along with the proforma invoice is annexed with the Appeal paper book is as under for ready reference:

~~ANNEXURE P/A~~

28

68

SKP

Impex Metal & Ferro Alloys Ltd.

027101WB1991PLC051901

Ref. No. : IMFA/PI/18-19/006

Date : 24.09.2018

PROFORMA INVOICE

MILLION LINK (CHINA) INVESTMENT LTD.
ROOM 3508, 35/F., BANK OF AMERICA TOWER,
12 HARCOURT ROAD, HONGKONG

| <u>FERRO SILICO MANGANESE</u> | <u>QUANTITY</u> | <u>RATE(USD)</u> | <u>VALUE(USD)</u> |
|--|-----------------|------------------|-------------------|
| Mn : 65% Min, Si : 16% Min, C : 2% Max, P : 0.25% Max, S : 0.03% Max Size : 10-50/ 10-60/ 10-80/10-100 mm (90% Min) | 900 MT | 1040.00/MT | 936000.00 |

ADVANCE AMOUNT USD 507314.13
BALANCE TO RECEIVE USD 428685.87

TERMS & CONDITIONS :

- Packing : In 1 mt Bags
- Bank details : State Bank of India
Industrial Finance Branch
Kolkata
A/c No. 37593815470
Swift Code: SBININBB139
- Payment: Advance along with P/O and balance Amount on the date of container loading, before the loaded containers released from our plant
- Country of Origin of Goods: Indian
- Port of Loading: Kolkata Port, India
- Quantity (net weight): 900.000 MT
- HS code : 72023000

FOR IMPEX METAL & FERRO ALLOYS LTD

AUTHORISED SIGNATORY



For Cash &

ANNEXURE P-5

69

20

Please choose portrait mode for the best printing result

You are here: Cash Management > Enquiry > Remittance Enquiry

Outward Remittance Enquiry

| | |
|---|--|
| Debit Account | 019-595-92-11603-9 |
| Beneficiary Name and Address | IMPEX METAL AND FERRO ALLOYS LTD, 3 5, CHITTARANJAN AVENUE, 4TH FLOOR, KO LKATA 700012 |
| Beneficiary Account | 37593815470 |
| Product Type | Telegraphic Transfer (Confirmed) |
| Application Channel | Via Electronic Channel |
| Bank Reference | 12180928CBS23001 |
| Payment Value Date | 2018/09/28 |
| Remit Amount | USD 507,300.69 |
| Payment Purpose | PAYMENT FOR GOODS |
| Remitting Date | 2018/09/28 |
| Beneficiary Bank Name | STATE BANK OF INDIA KOLKATA (CALCUTTA) (INDUSTRIAL FINANCE BRANCH) |
| Correspondent Bank | DEUTSCHE BANK TRUST COMPANY AMERICA S NEW YORK, NY |
| Remittance Debit Account | 019-595-92-11603-9 |
| Debit Amount | USD 507,314.13 |
| Handling Charges and Correspondent Bank Charges (Details) | |
| Total Charges | USD 13.44 |
| Remittance Commission | USD 13.44 |
| Correspondent Bank Charges | to be borne by the beneficiary |
| Details of Payment | BEING PAYMENT OF PROFORMA INVOICE NO IMFA/PI/18-19/006 PAYMENT FOR GOODS |

Printed on: 2019/02/27 14:36
COPYRIGHT © BANK OF CHINA (HONG KONG) LIMITED. ALL RIGHTS RESERVED.

For copy

16. It is mentioned explicitly that the advance amount of USD 507314.13, was towards "Payment for Goods" against Proforma Invoice IMFA/PI/18-19/006. After adjusting the bill of the goods supplied, balance advance amount USD 333834 remains with the corporate debtor, which is claimed as CIRP cost.

17. The proforma invoice depicts that it was generated for the supply of 900 MT of Ferro Silicon Manganese @ 1040 USD per MT, valued USD 9,36,000/-. It is also stated in the proforma invoice that advance payment is released along with the purchase order and balance amount payable at the time, the loaded container is released from the plant. Appellant has also annexed the copy of commercial invoice dated 15th October 2018 which is relating to the supply of 162 MT of **Industrial Raw Materials** for Steel Rolling Mills, i.e. Ferro Silicon Manganese @ 1040 MT amounting to the US \$168480. Therefore, it is apparent that after deduction of the value of goods supplied by the Corporate Debtor amounting to USD 338834.13, from the advance amount paid for goods left with the Corporate Debtor was USD 3,33,834 which is being claimed as CIRP cost by the Appellant.

18. Appellant has further annexed the copy of Form 'G' filed under Regulation 20 of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016, dated 14th March 2019. Photocopy of the relevant portion of the Form 'G' as is under:

82

10

[TO BE TREATED AS CIRP COST]
Section 5(13)(c) of the IBC, 2016 r/w Circular No. IBBI/IP/013/2018 dated 12.06.2018

FORM G

PROOF OF CLAIM BY ANY OTHER STAKEHOLDER

[Under Regulation 20 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 r/w Section 5(13)(c) of the IBC, 2016 r/w Circular No. IBBI/IP/013/2018 dated 12.06.2018]

14th March 2019

To,

The Liquidator:

SAMIR KUMAR BHATTACHARYA

(Reg. No: IBBI/IPA-002/IP-N00273/2017-2018/10831)

Address as set out in Public Announcement:

LSI Resolution (P) Ltd
Sagar Trade Cube, 5th Floor
104, S.P. Mukherjee Road
Kolkata - 700026.

Regd. Email: skb.resolution@gmail.com

Email for Communication: liquidator.impex@gmail.com

From,

MILLION LINK (CHINA) INVESTMENT LIMITED

Address:

Room No. 350B, 35/F
Bank of America Tower
12, Harcourt Road, Hong Kong.

Email: nehavig@millionlink.com &
vaithavmahajan.adv@gmail.com

SUBJECT: SUBMISSION OF PROOF OF CLAIM IN RESPECT OF THE LIQUIDATION OF IMPEX METAL & FERRO ALLOYS LIMITED UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

Sir,

Million Link (China) Investment Limited ('Million Link') hereby submits this proof of claim in respect of the liquidation in the case of Impex Metal & Ferro Alloys Limited ('IMFAL'). The details for the same are set out below:

For Call

| PARTICULARS | |
|---|--|
| 1. NAME OF OTHER STAKEHOLDER <small>(If an incorporated body provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)</small> | MILLION LINK (CHINA) INVESTMENT LIMITED Copy of Incorporation Certificate is annexed herewith and marked as Annexure I. |

82 33

4

[TO BE TREATED AS CIRP COST]

Section 5(13)(e) of the IBCL, 2016 & Circular No. IBB/DP/013/2018 dated 12.06.2018

| 2. | ADDRESS AND EMAIL OF THE OTHER STAKEHOLDER FOR CORRESPONDENCE. | <p style="text-align: center;">Address:</p> <p style="text-align: center;">Room No. 350B, 35/F Bank of America Tower 12, Harcourt Road, Hong Kong.</p> <p style="text-align: center;">Email:</p> <p style="text-align: center;">nchavig@millionlink.com & vaibhavmahajan.adv@gmail.com</p> | | | | | | | | | | | | | | | | | | | | | | | | | |
|--|---|---|--|-----------------|----------|-----------------|-------------|-----------------------|--|--------------------|--|---|--|--|--|--|--|--------------|--|-----------------|--|-----------------------|--|--------------------|--|---|--|
| 3. | TOTAL AMOUNT OF CLAIM, INCLUDING ANY INTEREST AS AT LIQUIDATION COMMENCEMENT AND DETAILS OF NATURE OF CLAIM | <p style="text-align: center;">REFUND OF ADVANCE PAID BY MILLION LINK TO IMFAL FOR PURCHASE OF GOODS (DURING CIRP)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%;">Principal Claim</th> <th style="width: 50%;">Interest</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">USD \$338834.13</td> <td style="text-align: center;">Not Claimed</td> </tr> <tr> <td colspan="2" style="text-align: center;"><i>Equivalent To:</i></td> </tr> <tr> <td colspan="2" style="text-align: center;">INR ₹2,40,35,301/-</td> </tr> <tr> <td colspan="2" style="text-align: center;">(Rupees Two Crores Forty Lakhs Thirty Five Thousand Three Hundred and One Only)</td> </tr> <tr> <td colspan="2" style="text-align: center;">Note: As on 12.02.2019 (Liquidation Commencement Date) Exchange Rate/Reference Rate as prescribed by FBIL under RBI was USD \$1 = INR ₹70.9353.</td> </tr> <tr> <td colspan="2" style="text-align: center;"><i>See Regulation 26, IBBI (Liquidation Process) Regulations, 2016 Exchange Rate</i></td> </tr> <tr> <td colspan="2" style="text-align: center;">TOTAL</td> </tr> <tr> <td colspan="2" style="text-align: center;">USD \$338834.13</td> </tr> <tr> <td colspan="2" style="text-align: center;"><i>Equivalent To:</i></td> </tr> <tr> <td colspan="2" style="text-align: center;">INR ₹2,40,35,301/-</td> </tr> <tr> <td colspan="2" style="text-align: center;">(Rupees Two Crores Forty Lakhs Thirty Five Thousand Three Hundred and One Only)</td> </tr> </tbody> </table> | | Principal Claim | Interest | USD \$338834.13 | Not Claimed | <i>Equivalent To:</i> | | INR ₹2,40,35,301/- | | (Rupees Two Crores Forty Lakhs Thirty Five Thousand Three Hundred and One Only) | | Note: As on 12.02.2019 (Liquidation Commencement Date) Exchange Rate/Reference Rate as prescribed by FBIL under RBI was USD \$1 = INR ₹70.9353. | | <i>See Regulation 26, IBBI (Liquidation Process) Regulations, 2016 Exchange Rate</i> | | TOTAL | | USD \$338834.13 | | <i>Equivalent To:</i> | | INR ₹2,40,35,301/- | | (Rupees Two Crores Forty Lakhs Thirty Five Thousand Three Hundred and One Only) | |
| Principal Claim | Interest | | | | | | | | | | | | | | | | | | | | | | | | | | |
| USD \$338834.13 | Not Claimed | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <i>Equivalent To:</i> | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| INR ₹2,40,35,301/- | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| (Rupees Two Crores Forty Lakhs Thirty Five Thousand Three Hundred and One Only) | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Note: As on 12.02.2019 (Liquidation Commencement Date) Exchange Rate/Reference Rate as prescribed by FBIL under RBI was USD \$1 = INR ₹70.9353. | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <i>See Regulation 26, IBBI (Liquidation Process) Regulations, 2016 Exchange Rate</i> | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| TOTAL | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| USD \$338834.13 | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <i>Equivalent To:</i> | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| INR ₹2,40,35,301/- | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| (Rupees Two Crores Forty Lakhs Thirty Five Thousand Three Hundred and One Only) | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 4. | DETAILS OF DOCUMENTS BY REFERENCE TO WHICH THE CLAIM CAN BE SUBSTANTIATED | <p>True Copy of Purchase Contract No. MLC20180324 dated 24.08.2018 with Youthstar Vanija (P) Ltd (Seller) for 1000MT of Ferro Silicon Manganese @ USD \$1040/MT along with Addendum dated 21.09.2018, wherein, IMFAL was substituted in place of earlier seller for a</p> | | | | | | | | | | | | | | | | | | | | | | | | | |

True Copy


84 34

8

[TO BE TREATED AS CIRP COST]

Section 5(1)(c) of the IBC, 2016 & w/ Circular No. TBBI/TP/013/2018 dated 12.06.2018

| | |
|---|---|
| | <p>quantity of 900 MT out of the total quantity of 1000MT.</p> <p>2. True Copy of SWIFT transaction details evidencing advance payment of USD \$ 104,000/- by Million Link to Youthstar Vanijya (P) Ltd for Purchase Contract No. MLC20180824 dated 24.08.2018</p> <p>3. True Copy of Proforma Invoice dated 24.09.2018 of IMFAL for sale of 900 MT Ferro Silico Manganese to Million Link @ USD \$1040/MT raising demand of advance payment of USD \$507314.13</p> <p>4. True Copy of SWIFT transaction details evidencing advance payment of USD \$ 507,314.13/- by Million Link to IMFAL against Proforma Invoice dated 24.09.2018</p> <p>5. True Copy of documents evidencing shipping of 100MT of Ferro Silicon Manganese by Youthstar Vanijya (P) Ltd to Million Link</p> <p>6. True Copy of documents evidencing shipping of 162MT of Ferro Silicon Manganese by IMFAL to Million Link</p> |
| <p>7. DETAILS OF HOW AND WHEN CLAIM AROSE</p> | <p>A. Million Link had placed an order to purchase 1000MT of Ferro Silicon Manganese from Youthstar Vanijya Private Limited (based in Kolkata) at the rate of USD \$ 1040/MT vide Purchase Contract Purchase Contract No. MLC20180824 dated 24.08.2018.</p> <p>B. Million Link on 17.09.2018 vide Bank of China (Hong Kong) Limited's Reference No. 12180917CBS18046 paid an advance amount of USD \$ 104,000/- for 100MT to Youthstar Vanijya Private Limited against the aforesaid Purchase Contract dated 24.08.2018.</p> <p>C. That vide Addendum No. 2 dated 11.09.2018 to Purchase Contract No. MLC20180824 dated 24.08.2018, IMFAL agreed to be substituted as the seller in place of Youthstar Vanijya Private Limited for the sale of the a quantity of 900 MT out of the total</p> |

Receipt


19. The Liquidator has filed his written submission stating that if the Liquidator's decision aggrieves the Appellant, its remedy lies in an Appeal before the Adjudicating Authority under Section 42 of the Code. This Tribunal

can only be approached in 2nd Appeal if the Appellant feels aggrieved by an order passed in the Appeal under Section 42 of the Code. By filing the present Appeal, the Appellant has jumped one forum, and in the process, the Respondent Liquidator has lost one forum which should not be permitted. It is further contended that the Appellant cannot be aggrieved at this stage since no adverse direction or adverse observation has been made by the Adjudicating Authority and the Appellants claim is still under consideration.

20. The Liquidator further submits that the respondent No. 3 has not appeared in the instant proceedings. The records pertaining to his period are not fully available with the Respondent No. 2, Liquidator. The Respondent No. 2 does not have first-hand knowledge of the transaction. Respondent No.2 obtains the details of the transaction from the Respondent No. 3 to respond to the detailed claim dated 03rd January 2020 of the Appellant. Given the matter, the instant Appeal cannot be effectively decided till such time all the records are made available to the Liquidator, or the RP appears before this Tribunal. Any order passed in this proceeding favouring the Appellant without examining the RP's record would highly prejudice the public at large since public money is at stake.

21. The Liquidator further states that **from the perusal of form G** and its annexures filed by the Appellant, the Appellant as the purchaser of finished goods, i.e. raw materials, entered into a contract with one of the directors of the suspended Board of the corporate debtor, to purchase a certain amount of Ferro Manganese during CIRP period, without any approval or authorisation of Resolution Professional. There is no document on record even

slightly showing that the transaction was even feebly ratified or authorised by the IRP/RP. Therefore the Appellants statement cannot and should not be taken to be sacrosanct.

22. It is argued, that the entire transaction was in total disregard of Section 20(2)(b) of the Code, in as much as in terms of the provision thereof only the IRP / RP can enter into a contract on behalf of the corporate debtor, who can amend and modify the contracts or transactions which were entered into before the commencement of CIRP, as the Management of the operations of the corporate debtor remains with The Resolution Professional and power of the Board of directors is suspended. Thus the contract is void ab initio and that being so the Appellant's claim cannot be considered a CIRP cost incurred during the CIRP. The Appellant cannot claim ignorance of the fact that Corporate Debtor is under CIRP as the advance payment was made by the Appellant on 28th September 2018, well after 6 months of the insolvency commencement date, i.e. 09th March 2018.

23. The learned Liquidator further states that advance paid by a purchaser does not fall under any of the clauses of Section 5(13) of the Code for the following reasons;

- a. The same is not interim finance since there is no COC ratification to that effect, and further, the Appellant has not made out a case that it is interim finance.
- b. The same cannot be construed as the Resolution Professional's cost to keep the Company a going concern in as much as there is

no document on record to show that the RP had any point of time ratified or approved, authorised such transaction. Advance if given by an intending purchaser of finished goods to a corporate debtor during CIRP without Resolution Professional and CoC's approval, it cannot be treated as an expense incurred by the Resolution Professional.

24. The Liquidator further contends that Chapter IX of IBBI Regulations, 2016 deals with the provision of CIRP cost in detail. Further, it will be revealed from the IBBI circular dated 12th June 2018 that the advance made to Corporate Debtor for purchase of goods has not been treated as an Insolvency Resolution Process cost. The extent of provision for CIRP cost is given in the said Circular.

"Statutory Provision

"Section 20 Management of operations of corporate debtor as going concern

[(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

(a) to appoint accountants, legal or other professionals as may be necessary;

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions

which were entered into before the commencement of corporate insolvency resolution process;

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:

Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern.]

Section 25: Duties of resolution professional

¹[(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:--

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) **raise interim finances subject to the approval of the committee of creditors under section 28;**

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

2[(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.]

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.]"

"Section 5

(13) "insolvency resolution process costs" means—

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board;

(14) "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;

(15) "interim finance" means any financial debt raised by the resolution professional during the insolvency resolution process period [and such other debt as may be notified];"

INSOLVENCY AND BANKRUPTCY CODE, 2016

Definitions

Section 28 - Approval of committee of creditors for certain actions

¹(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:--

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;*
- (b) create any security interest over the assets of the corporate debtor;*
- (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;*
- (d) record any change in the ownership interest of the corporate debtor;*
- (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;*
- (f) undertake any related party transaction;*
- (g) amend any constitutional documents of the corporate debtor;*
- (h) delegate its authority to any other person;*
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;*
- (j) make any change in the Management of the corporate debtor or its subsidiary;*

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors;
or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of 2[sixty-six] per cent. of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.]

1. w.e.f. 01.12.2016 vide Notification No. SO3594(E) dated 30.11.2016.

2. Substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 w.e.f. 06.06.2018 for the following:-

"seventy five"

INSOLVENCY AND BANKRUPTCY CODE, 2016

Definitions

40. Admission or rejection of claims.—(1) The Liquidator may, after *verification of claims under Section 39*, either admit or reject the claim, in whole or in part, as the case may be:

Provided that where the Liquidator rejects a claim, he shall record in writing the reasons for such rejection.

(2) *The Liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims.*

IBBI (Insolvency Resolution Process for Corporate Persons Regulations)2016

CHAPTER IX

INSOLVENCY RESOLUTION PROCESS COSTS

31. Insolvency resolution process costs.—"Insolvency resolution process costs" under Section 5(13)(e) shall mean—

(a) amounts due to suppliers of essential goods and services under Regulation 32;

⁴²[(aa) fee payable to authorised representative under ⁴³[sub-regulation (8)] of Regulation 16-A;

(ab) out of pocket expenses of authorised representative for discharge of his functions under ⁴⁴[Section 25-A];]

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d);

(c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;

(d) expenses incurred on or by the resolution professional fixed under Regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.

32. Essential supplies.—The essential goods and services referred to in Section 14(2) shall mean—

(1) electricity;

(2) water;

(3) telecommunication services; and

(4) information technology services,
to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration.—Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

33. Costs of the interim resolution professional.—(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

(3) *The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.*

(4) ***The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.***

⁴⁵*[Explanation.—For the purposes of this regulation, "expenses" include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.]*

34. Resolution professional costs.—*The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.*

⁴⁶*[Explanation.—For the purposes of this regulation, "expenses" include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.]*

⁴⁷**34-A. Disclosure of Costs.**—*The interim resolution professional or the resolution professional, as the case may be, shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board.]*

25. Based on the above statutory provisions it is clear that the Resolution Professional is duty-bound under Section 20 of the Insolvency and Bankruptcy Code to make every endeavour to protect and preserve the value of the Corporate Debtor's property manage the operations of the Corporate Debtor as a going concern. Section 20 of the Code imposes a duty on the

Resolution Professional to preserve and protect the Corporate Debtor's assets, including the continued business operations of the Corporate Debtor.

26. Section 5(13) of the Code defines the term 'Insolvency Resolution Process cost'. It provides that any cost incurred by the Resolution Professional in running the Corporate Debtor business as a going concern shall be treated as Insolvency Resolution Process cost. Section 20 of the Insolvency and Bankruptcy Code deals with the Management of the Corporate Debtor's operations as a going concern. It authorises the Resolution Professional to raise interim finance, provided that no security interest shall be created over any encumbered property of the Corporate Debtor, without the prior consent of the creditor. Section 25 of the Code provides that the Resolution Professional must preserve and protect the Corporate Debtor's assets, including the continued business operations of the Corporate Debtor.

27. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons Regulations) 2016 deals with the provision regarding Insolvency Resolution Process costs. Regulation 31 provides that 'amount due to suppliers of essential goods and services under Regulation 32' shall be treated as Insolvency Resolution Process costs.

28. In the instant case, it is noticed that the Corporate Debtor raised proforma invoice during CIRP for the supply of 900 metric tons of Ferro Silicon Manganese at the rate of US\$ 1040 per metric ton. But it supplied only 162 metric tons of Ferro Silicon Manganese. It is also on record that the Corporate Debtor received an advance of US\$ 507,314 for the supply of industrial raw

material Ferro Silicon Manganese. It is also undisputed that the goods worth ₹1 US\$ 168,480 could be supplied and US\$ 338,834 remained left as advanced money with the Corporate Debtor. During Corporate Insolvency Resolution Process the Corporate Debtor was under Management and control of the Resolution Professional.

29. The Liquidator's learned counsel contends that if an advance has been paid by the purchaser, under no circumstances does the same fall under the ambit of Section 5(13) of the Code. Firstly, because there is no CoC ratification to that effect and further, the Appellant has not made out a case that it is interim finance. The same cannot be construed under Section 5(13) of the Code as a cost incurred by the Resolution Professional to keep the Company a going concern. The Appellant has tried to make out a case that the advance given by it comes within the Clause (c) of Section 5(13) of the Code, i.e., the Resolution Process Cost to keep the Corporate Debtor as a going concern. The expenses incurred or approved by the Resolution Professional, such as purchasing raw material, workers engaged, electricity purchased, etc. will come within this ambit of interim finance covered under the head CIRP cost.

30. It is argued that an advance given by the purchaser cannot under any circumstances be treated as an expense incurred by the Resolution Professional. There is no expenditure. Hence, the advance will be treated as an unsecured financial loan, and the Appellant is required to lodge its claim with the Liquidator. No expense unless it comes within the ambit of Section 5(13) of the Code can be treated as CIRP cost, and strict construction of the said section is required.

31. It is further argued that the claim lodged by the Appellant is absolutely mala fide and harassing in nature and for malafide reasons. Since the Appellant itself states that if its claim is not considered as CIRP cost, then the chances are that under Section 53 of the Code, the Appellant will not receive any amount. Thus, according to the Appellant's own admissions, they desperately tried to fit their claim as a CIRP cost. They can realise their claims as CIRP cost, or in the alternative, chances are bleak if the waterfall mechanism in Section 53 is considered.

32. **IBBI Circular IBBI/IP/013/2018 DT. 12th June 2018** is highlighted by the Liquidator. The relevant part of Circular is as under;

"6. Keeping the above in view, the IP is directed to ensure that;

(a) the fee for other expenses incurred by him are directly related to and necessary for the CIRP are reasonable;

(b) the fee other expenses incurred by him are directly related to and necessary for CIRP;

(c) the fee other expenses are determined by him on an arm's length basis, in consonance with the requirements of the integrity and independence;

(d) written contemporaneous records for incurring are agreeing to incur any fee or the expenses are maintained;

(e) supporting records of fee and other expenses incurred are maintained at least for 3 years from the completion of the CIRP;

*(f) approval of the committee of creditors for the fee or other the expense is obtained **wherever approval is required**;*

(g) all CIRP related fee and other expenses are paid through banking channel."

33. Based on the above Circular, it is clear that the Committee of Creditors' approval is required for the fee and other expenses incurred by the Resolution Professional, only where approval is required. The Insolvency and Bankruptcy Code provides the places where prior approval is required explicitly with the vote's necessary percentage. Thus, it cannot be said that any action of the Resolution Professional can only be validated if it has the Committee of Creditors' approval.

34. Regarding the argument advanced by the Liquidator about IBBI Circular dated 12th June 2018, it is pertinent to mention that the Circular provides that Insolvency Professional is to ensure that fee and other expenses incurred by him are directly related to and are reasonable and necessary for the CIRP. It is further provided that wherever approval is required, Insolvency Professional (in short 'IP') is to obtain approval of the CoC.

35. The Learned Counsel for the Liquidator argued that an advance given by a purchaser could under no circumstance be treated as covered in the phrase 'an expense incurred by the Resolution Professional'. The advance could only be treated as an unsecured financial loan, and the Appellant is required to lodge its claim before the Liquidator. It is stated that no expense unless it comes within Section 5(13) of the Code can be treated as CIRP cost.

36. In the instant case, the petition was admitted under Section 7 of the Code on 09th March 2018 after that the Management of the Corporate Debtor's affairs was with the Interim Resolution Professional.

37. Section 14 of the Code comes into operation with the Initiation of CIRP. Section 14(2)(a) provides that:

"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.]".

38. We are not convinced with the Liquidator's argument that purchaser's advance during CIRP can never be treated as an expense in the ambit of Section 5(13) of the Code.

39. In this case, Liquidator has filed its Reply stating that the Appellant had filed Form 'G' relating to its claim on 03rd January 2020, and that there is no document on record showing that the transaction was authorised or approved by the IRP/RP. It is further stated that he is in the process of obtaining details of the transaction from Respondent No.3. If the Appellant is aggrieved by his Order, he must file an Appeal under Section 42 of the Code before the Adjudicating Authority. That by filing the present Appeal, the Appellant has jumped one forum which should not be permitted.

40. It is admitted fact that the Liquidator received the claim on 03rd January 2020. Section 40(2) mandates the Liquidator to communicate its decision of admission or rejection of the claim to the Creditor and the Corporate Debtor within seven days of admission or rejection of the claim. Section 42 of the Code provides that a creditor may file an Appeal before the Adjudicating Authority against the Liquidator's decision to accept or reject the claim, within 14 days from receipt of such decision. The Liquidator cannot simply sit on the claim without deciding the same one way or the other.

41. In case of **2019 SCC OnLine NCLAT 785 M V Projects V Divya Jyoti Sponges Iron Pvt Ltd** this Tribunal has held that:

"25. In view of the aforesaid provision, if the Appellant has supplied the goods during the period of the 'Corporate Insolvency Resolution Process' to keep the Company as a going concern, it was the duty of the 'Resolution Professional' to include such cost towards 'Resolution Process Cost' for payment in favour of Appellant for non-inclusion of the same, it can be held that the 'Resolution Plan' in question is in violation of Section 30(2)(a) of the 'I&B Code'."

42. In case of **2019 SCC OnLine NCLAT 146 MSTC Limited V Adhunik Metaliks Ltd** this Tribunal has held:

"17. The Appellant - 'MSTC Limited' was doing business with the 'Adhunik Metaliks Ltd.'- ('Corporate Debtor') of facilitating the transactions of import and export of iron ore, coke, coal, etc. Before the Adjudicating Authority, the Appellant - 'MSTC Limited' contended that it had incurred expenses of Rs. 343.43 Crores for facilitating the procurement of raw materials during the 'Corporate Insolvency Resolution Process' period to keep the Company as a going concern. Out of such amount only Rs. 244.12 Crores has

been paid. The rest of the raw materials lying stored in the Company as on the date is of Rs. 99.31 Crores which were procured subsequent to Commencement Date (date of admission).

18. It was further contended that the Appellant - 'MSTC Limited' had incurred additional expenses of Rs. 14.33 Crores and thereby the said Appellant made a claim of total sum of Rs. 113.64 Crores towards the 'Resolution Process Costs' and not towards claim as an 'Operational Creditor'.

19. The 'Resolution Professional' disputed the claim and taken plea that 'MSTC Limited' is a facilitator and not a vendor or owner of raw materials, 'MSTC Limited' procure such materials from different vendors and supplies to the buyers. In the present case, 'MSTC Limited' made available iron ore, coke etc., which are the key inputs in the production process of steel industry ('Corporate Debtor'). As per facility arrangement, the Appellant - 'MSTC Limited' pays the vendor directly against the supply of raw material to the 'Corporate Debtor'. So when every raw material is lifted from the possession of the 'MSTC Limited', the 'Corporate Debtor' is required to pay the amount only in respect of the materials lifted from the possession of the 'MSTC Limited'.

20. It was submitted that 'MSTC Limited' as 'Operational Creditor' had submitted its claim for an amount of Rs. 172.15 Crores along with proof of claim on 09th January, 2018. The 'Resolution Professional' collated the claim and admitted a sum of Rs. 165.09 Crores payable as on the 'Insolvency Commencement Date'. The 'Corporate Debtor' was availing raw material procurement facility from 'MSTC Limited' from abroad.

21. Further, according to the 'Resolution Professional' a sum of Rs. 165.09 Crores as on the 'Insolvency Commencement Date' less an amount of Rs. 18.5 Crores was disbursed to 'MSTC Limited', after which their pending claim stood at Rs. 146.59 Crores. In

order to ensure continued supply of goods (raw materials) through 'MSTC Limited' an advance amount of Rs. 56.72 Crores out of the admitted claim of Rs. 146.59 Crores was made. Thereafter, amount as due was Rs. 108.36 Crores.

22. It was further submitted that 'MSTC Limited' is demanding to treat their outstanding claims of Rs. 108.36 Crores which relates to supply made prior to the 'Insolvency Commencement Date'. It was submitted that the aforesaid amount of Rs. 108.36 Crores cannot be treated as 'Resolution Process Cost'.

23. According to Appellant - 'MSTC Limited', whatever payment made by the 'Resolution Professional' has been appropriated towards the old dues. According to learned counsel, such appropriation can be made even during the moratorium period.

24. Having heard learned counsel, **we find that the Adjudicating Authority rightly held that Section 14 of the I&B Code will override any other provisions contrary to the same. Any amount due to the 'Operational Creditor' prior to the date of 'Corporate Insolvency Resolution Process' (Admission) cannot be appropriated during the moratorium period for the parties,**

25. In view of the aforesaid findings, we hold that no case has been made out by the 'MSTC Limited' to treat any amount as a 'Resolution Cost'."

43. It is important to mention that under Regulation 30 of The Insolvency and Bankruptcy Board of India (Liquidation Process Regulation, 2016) the Liquidator is duty-bound to verify the claim submitted, within 30 days from the last date of receipt of the claims. He may either admit or reject the claim, in whole or in part, as the case may be but cannot simply sit on it. We find that the Liquidator has failed to admit or reject the claim even after receiving

the claim on 03rd January 2020. Section 40 of the Insolvency and Bankruptcy Code, 2016 mandates the Liquidator to communicate his reasons for admission or rejection of claim within 7 days of such admission or rejection of claims. The liquidation process is a time-bound process. In the instant case, the Liquidator failed to adhere to his duties of accepting or rejecting the Appellant's claim as per given in schedule provided under the Code. Liquidator states that the records pertaining to the claims are not fully available with him. He has not the first-hand information of the transaction. He is in the process of obtaining the details of the transaction from the Respondent No. 3 for the purpose of responding to the detailed claim dated 03rd January 2020. Liquidator further states that the instant case remedy lies before the Adjudicating Authority under Section 42 of the Code. When the Appellant filed an application before the Adjudicating Authority for issuing a direction to the Liquidator to decide the Appellant's claim, the Adjudicating Authority passed an order for considering the claim of the Appellant as per Rules.

44. A perusal of Section 20 of IBC makes it clear that after the CIRP is initiated, the IRP/RP is required to manage the Corporate Debtor's operations as a going concern. Section 20(2) (e) gives power to the IRP (Subsequently RP) to take all actions as are necessary to keep the Corporate Debtor as a going concern. In such a process of managing the business operations of the Corporate Debtor, if advance payments for supply of goods is received, it cannot be treated as raising an interim finance. It is an advance for payment of goods which the Corporate Debtor as a going concern may be

manufacturing. The goods are either to be supplied, or the amount should be returned. If the goods are not supplied, the purchaser cannot be made to run for his money. If this approach as in the present matter is not changed, it will become difficult to keep the Corporate Debtors as a going concern. Such amount received as an advance payment for the supply of goods during the CIRP would have to be treated as CIRP costs. A perusal of the record of Company Appeal (AT) (Ins.) No. 191 of 2020 shows purchase contract dated 24th August 2018 (Page 64) executed between the Appellant and Youth Star Vanijya Pvt. Ltd. which has an addendum (Page 67) dated 21st September 2018. The addendum may be reproduced:

67
Contract

Addendum no. 2 for contract no. MLC20180824

Date: 21/09/2018

Place: Hongkong

This is with reference to the Purchase Contract no. MLC20180824 for Ferro Silicon Manganese Qty 1000MT their are following amendments in the Contract.

- 1) For Qty 900MT Supplier has been changed to Impex Metal and Ferro Alloys Ltd, Address: 35,Chittaranjan Avenue,4th Floor, Kolkata 700012 instead of YOUTHSTAR VANIJYA PVT LTD. Address Room No 311 , 3rd floor, Shantiniketan Building 8 Carnac Street Kolkata 700017

Same has been agreed between the Buyer and the Seller.

The Seller



Impex Metal and Ferro Alloys Ltd


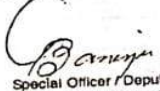


The Buyer

For and on behalf of
MILLION LINK (CHINA) INVESTMENT LIMITED
兆隆(中国)投资有限公司

Million Link (China) Investment Ltd.

This date of 21st September 2018 is subsequent to the date of admission of the Application under Section 7 of IBC on 09th March 2018. Then, there is a document relating to the supply of a part of the goods to the extent of 162.240 MT of Ferro Silicon Manganese, at Page 76 which is as under:

27

| Goods Consigned from (Exporter's Business Name, Address, Country) IMPEX METAL AND FERRO ALLOYS LTD SKP HOUSE, 132A S.F. MUKHERJEE ROAD, KOLKATA-700 026 INDIA. | | Reference No. : <u>13591</u> | | | |
|---|---|---|---|-----------------|--|
| Goods Consigned to (Consignee's Name, Address, Country) MILLION LINK (CHINA) INVESTMENT LTD. ROOM 3508, 35/F., BANK OF AMERICA TOWER, 12 HARCOURT ROAD HONG KONG | | CERTIFICATE OF ORIGIN (NON - PREFERENTIAL) (Combined declaration & certificate) Issued in India  ORIGINAL BHARAT CHAMBER OF COMMERCE 'BHARAT CHAMBERS' 9/1, Syed Amir Ali Avenue, Kolkata - 700 017, India Phone : 2282-9591, 2283-9608, Fax : 033-2282-4947 E-mail : info@bharatchamber.com, bharat.chamber@gmail.com CIN:U91110WB1926GAP005483, Website: www.bharatchamber.com GSTIN : 19AAAAB2171Q1ZH | | | |
| Means of Transport BY SEA | Port of Loading VISAKHAPATNAM, INDIA. | For official use : | | | |
| Port of Discharge ONNE, NIGERIA | Final Destination ONNE, NIGERIA | | | | |
| Item No. | Marks & No. of Packages | No. & Kind of Pkgs. | Description of Goods | Origin Criteria | Gross Weight/ Quantity |
| | N/M | 162 BAGS. | NAME OF COMMODITY INDUSTRIAL RAW MATERIALS FOR STEEL ROLLING MILL (FERRO SILICON MANGANESE) FORM M:MF20180020440 BA NO: BA-057-2018-0002533. PACKING: IN 1 MT BAGS. (06 X 20' CONTAINERS) | INDIA | 162.240 M.T. GROSS WEIGHT 162.000 M.T. NET WEIGHT. |
| Invoice No. : IMFA/EXP/004/18-19 | | Date : 15/10/2018 | | | |
| CERTIFICATION It is hereby certified, on the basis of control carried out, that the declaration by the exporter is correct.  Special Officer / Deputy Secretary / Secretary General BHARAT CHAMBER OF COMMERCE Place : Kolkata, India Date : 31/10/18 Issued by :  | | | Declaration by the exporter : The undersigned hereby declares that the above details and statements are correct; that all the goods were produced in India and that they comply with the origin requirements for exports to NIGERIA (importing country) Place : KOLKATA Date : 30/10/2018 Date : Impex Metal & Ferro Alloys Ltd.  Authorised Signatory Signature with Stamp | | |

There are rubber stamps with signature claiming to be authorised signatory of the Corporate Debtor on both the above documents. We have

already referred to the Transfer Memo and Proforma Invoice. Proforma Invoice also has the rubber stamp of the Corporate Debtor and signature purporting to be of authorised signatory which document is dated 24th September 2018. With such and other documents available on record, we are not ready to accept the Reply filed by the Liquidator as referred by us in Paragraph 39 supra, that he is in the process of obtaining details of the transactions from Respondent No. 3. It will not be permissible for the Liquidator to state that he does not have the record. He has a duty to obtain informations from IRP/RP, and the IRP/RP would be duty-bound to give requisite informations to the Liquidator and on failure, the Liquidator will file report before the Adjudicating Authority and will have to refer the matter to IBBI. We find that the Respondent No. 3/RP, although served in these Appeals, preferred not to appear and not to respond to the Appeals. Such conduct by a responsible professional recognised under the IBC cannot be accepted. It is necessary for the IRP/RP to share all the information with the Liquidator. If the IRP/RP wants to state that the transactions were not authorised, an explanation may be necessary regarding how goods were exported from the Corporate Debtor; and how money was received without demur, as the Management was with IRP/RP during CIRP period.

As in the present matter, the Liquidator failed to take a decision, one way or the other on the lame excuse that the Liquidator is in the process of obtaining details of transactions from Respondent No. 3 and now wants to claim that the Appellants have jumped forum, we feel it appropriate to give certain directions while disposing the present Appeal.

ORDER

We direct the Respondent No. 3/RP to respond to the claims made in both these Appeals and supply all the necessary details and information relating to transactions impugned in these Appeals before the Liquidator within 15 days of the passing of this Judgment. The Liquidator will consider the response and obtain informations as above and as may be further necessary and admit or reject the claims of the Appellants recording reasons in terms of Section 40 of I&B Code within 30 days from the date of this Judgment. If the claims are rejected, the Liquidator will communicate the reason to the Appellants and not act on the rejections for 14 days in terms of Section 42 of I&B Code, to enable Appellants to move before the Adjudicating Authority.

We make it clear that if the IRP/RP fails to file response and submit all the necessary information before the Liquidator within 15 days as directed above, the Liquidator will file report before the Adjudicating Authority and refer the matter to IBBI for taking suitable steps/actions in the matter. Registry to send the copy of this Judgment to the parties immediately.

With the above observations, both the Appeals stand disposed.

[Justice A.I.S. Cheema]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
03 FEBRUARY, 2021

pks