

7<sup>th</sup> September, 2021

## CAN NCLT DECIDE ON QUESTION OF CLAIMS UNDER THE IBC? THE DYNEPRO CASE

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1. The dispute in question is between Dynepro Pvt. Ltd. and V. Nagarajan. V. Nagarajan was appointed as the Resolution Professional of the Corporate Debtor (Cethar Ltd.) after the company entered Corporate Insolvency Resolution Process (CIRP). (*Dynepro Private Limited vs. V. Nagarajan*).
2. The claim of Dynepro in the present dispute is that it engaged the Corporate Debtor in a work through a job order. Under such job order, Dynepro had forwarded certain materials to the Corporate Debtor that were to be used for the completion of such work. The materials originally belonged to G.B. Engineering, a client of Dynepro.
3. In the CIRP proceedings against the Corporate Debtor, Dynepro made an application (*CA/65/IB/2018 in CP/511/IB/2017*) before the National Company Law Tribunal, Chennai Bench (NCLT) under Sections 23 and 25 of the Insolvency and Bankruptcy Code, 2016 (IBC) praying for a direction on the Resolution Professional to release such materials from the possession of the Corporate Debtor.
4. The Resolution Professional contended that all of Dynepro's Promoters and Managing Directors are related parties and were also the Managing Directors of the Corporate Debtor for a specific period of time and are now seeking to take advantage of their knowledge about the operations of the Corporate Debtor and are also acting beyond the terms of the non-compete clause that they are bound by. It was the counter allegation of the Resolution Professional that Dynepro is merely trying to defraud the Corporate Debtor.
5. Dynepro presented facts and documents to prove that the materials in question actually belong to G.B. Engineering. Since the materials had only been forwarded in relation to a specific job order which is not in continuance anymore, the Resolution Professional on behalf of the Corporate Debtor is bound to return such materials to Dynepro and the rightful owners.
6. NCLT considered the arguments and passed an order dated 24<sup>th</sup> April, 2018 wherein it held that the prayers of the applicant could not be granted because the facts and documents did not match the assertions made by the applicant. The NCLT found that there were contradictions in the issues of job order the documents seemed to be forged since the signatory of a particular document was not associated with the Corporate Debtor on the date when such document was signed.
7. An appeal [*Company Appeal (AT) (Insolvency) no. 229 of 2018*] was preferred by Dynepro before the National Company Law Appellate Tribunal, New Delhi (NCLAT) against the order of NCLT.
8. The issue that the NCLAT answered was whether the Adjudicating Authority under the IBC is permitted to decide the claims and counter claims between the parties.
9. It relied on *Binani Industries Limited vs. Bank of Baroda [Company Appeal (AT) (Insolvency) No. 82 of 2018]* which held that the CIRP process is not a money claim or a suit proceeding where the Adjudicating Authority may decide on a question of fact or settle claims between parties in respect of a matters that may be in dispute.
10. NCLAT also relied on Section 18 of the IBC which lists the Duties of the Interim Resolution Professional. It observed that the Explanation there under states that the "assets" within the meaning of Section 18(1) shall not include assets owned by a third party in possession of the corporate debtor held under contractual arrangements including bailment.
11. Further the court observed that the material in question in the present case was a part of multiple inter-claims as other parties had also made claims over the ownership of such material.
12. Section 60(5) was also relied on to interpret the jurisdiction of NCLT.
13. On a construction of the provisions discussed above and on consideration of the relevant facts, the NCLAT dismissed the appeal by an order dated 30<sup>th</sup> January, 2019. NCLAT held that:
  - Disputes relating to claim over certain materials could not be viewed to fit within the scope of Section 60(5)

and hence could not be decided by the adjudicating authority.

- Only after the completion of the CIRP process and the moratorium period coming to an end, when a decision in regard to such materials is finally taken, the parties may file a suit claiming that such decision holding that the material belonged to the Corporate Debtor is wrong and the same may be challenged in such suit and claim against the same may be made.
- The adjudicating authority has no jurisdiction over the claims or counter claims made between the parties in the present case and therefore, NCLT was right in not passing any orders in the application by Dynepro, praying for a direction on the Resolution Professional in relation to the materials.

14. An appeal against the order of NCLAT was also preferred by Dynepro before the Supreme Court (*Civil Appeal No. 2391 of 2019*). A Division Bench by an order dated 8<sup>th</sup> March, 2019 dismissed the appeal and held that there were no reasons for interference with the order of NCLAT.
15. The decision of NCLAT brings out the essence of Section 60(5) in establishing that the NCLT cannot act as a fact-finding forum when the CIRP against a Corporate Debtor has been admitted and initiated under the provisions of IBC nor act like a money recovery court.
16. This has been contemplated in other decisions of the NCLAT and Supreme Court which held that NCLT, within the powers and jurisdiction conferred by the IBC, could only adjudicate upon issues directly related to the CIRP and reconstruction of the corporate debtor or liquidation thereof. The judgment in *Gujrat Urja Vikas Nigam Limited vs. Amit Gupta (2021 SCC OnLine SC 194)* is significant in this aspect since the Supreme Court held that NCLT may only adjudicate over disputes relating to the insolvency process and in that case, the contractual dispute arose out of and by reason of the initiation of CIRP against the corporate Debtor.

17. The decision of NCLAT is also in line with *Mobilox Innovations Private Limited vs. Kirusa Software [(2018) 1 SCC 353] Private Limited* where the Supreme Court had clearly held that IBC is not intended to be substituted as a recovery forum. This decision was also followed in *Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited [(2019) 12 SCC 696]*.
18. The decision of NCLT, Principal Bench at New Delhi in a *Composite Scheme of Arrangement between Quick calls Private Limited and Others [CA(CAA)-75(ND)/2020]*, although based on entirely different facts, laid down an important observation regarding the jurisdiction of NCLT. It held that the Tribunal is limited to deal with the powers conferred upon it by the parent statute. Since the cases may be dependent on multiple facts, the statute under which it is approached may be the guiding principle for NCLT to determine its jurisdiction.
19. The decision in the Dynepro case may thus be interpreted to *mean* that the facts and the law in question may be important in determining when and under what circumstances can the NCLT pass orders specific to the relief sought for. But in all cases, it is conclusively held that NCLT have no power to decide on the claims/counter claims on merits.

A copy of the judgment of Hon'ble NCLT is annexed hereto at **page 3 to 25**.

A copy of the judgment Hon'ble NCLAT is annexed hereto at **page 26 to 42**.

A copy of the judgment Hon'ble Supreme Court is annexed hereto at **page 43 to 44**.

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
SINGLE BENCH, CHENNAI**

**CA/65/IB/2018**  
In  
**CP/511/IB/2017**

In the matter of

**M/s. DynePro Private Limited**

*..... Applicant*

**Vs.**

**Mr. V.Nagarajan,  
Resolution Professional for CD viz., M/s. Cethar  
Limited.**

*..... Respondent*

*Order delivered on 24<sup>th</sup> of April, 2018*

CORAM:

**CH.MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)**


*For Applicant : Mr. S.R.Sundar, Counsel  
For Resolution Professional : Mr. J. Manivannan, Counsel*

**ORDER**

Per: CH MOHD SHARIEF TARIQ, MEMBER (J)


1. The Company Application No. 65 of 2018 in CP/511/IB/2017 is stated to have been filed under Sections 23 and 25 of the Insolvency and Bankruptcy Code, 2016, (**I&B Code**, for short) with the prayers as follows:-  
*m*

- a) *Direct the Resolution Professional i.e., the Respondent herein who is representing the Corporate Debtor to release the materials received by the Corporate Debtor vide Inward Inspection Certificate dated 05.05.2017 vide IR No. I/U5/R/001 to 007 to the Applicant herein;*
- b) *To restrain the Resolution Professional (i.e) the Respondent herein from acting as the Resolution Professional in respect of the Corporate Debtor (M/s. Cethar Limited) in so far as the Applicant is concerned without the leave of this Hon'ble Tribunal pending disposal of the criminal complaint lodged against him before the Inspector of Police, Law and Order, Cantonment – Tiruchirappalli under CSR No. 29/2018.*

2. It has been submitted on behalf of the Applicant Company viz. *M/s. DynePro Private Limited* that the Company is engaged in the manufacture, supply, erection and commissioning of boilers/power plants upto 150 MW and other products connected thereto. The Applicant Company is stated to have been taking orders from 3<sup>rd</sup> parties and the orders are executed 


based on the specification and requirements of the end users. In the process, the Applicant Company has engaged several other companies for doing job work which is used in the completion of boilers.

3. It has been submitted that one of the customers of the Applicant Company M/s. G.B. Engineering, Trichy, had placed orders for manufacturing boilers steam drums by its order dated, 18.04.2017, and subsequently, the Order was amended on 20.04.2017. In order to execute the work, the Applicant Company obtained materials from its customer viz., M/s. G.B. Engineering, which was sent to the Corporate Debtor viz., M/s. Cethar Limited, for doing a job work at the instance of the Applicant Company. The copy of the Amended Job Order dated, 06.10.2017 sent by the Applicant Company to the Corporate Debtor has been enclosed as Annexure-B.

4. Under para 5 (c) of the Application, it has specifically been stated that the materials in question do not belong to the Corporate Debtor and it belongs to 

M/s. G.B Engineering. It has further been averred in the Application that the materials supplied by the Applicant Company is lying in the premises of the Corporate Debtor to be used for doing a job work, and the Resolution Professional has taken control of the same. But, the request of the Applicant Company for return of the materials for using it in the job work has been un-ceremonially turned down by the Resolution Professional.


5. It has been submitted that the Resolution Profession has no right to the specific materials supplied by the customer and the Indian Bank which is a lead Bank in a meeting held on 08.02.2017 has specifically stated that the consortium of Bankers cannot include specific materials supplied by the customers.

6. It has been submitted on behalf of the Applicant Company that the execution and supply of boilers to a 3<sup>rd</sup> party viz., M/s. G.B. Engineering is time bound and there is already delay in achieving the milestone of 

work and non-release of materials by the Resolution Professional would result in further delay in supplying the boiler to the 3<sup>rd</sup> parties. It has been submitted that the supply of materials by M/s. G.B. Engineering is evidenced by an *Inward Inspection Certificate dated 05.05.2017 vide IR No. 1/U5/R/001 to 007 where the vendor's name is printed as M/s. DPL / G.B Engineering*, which establishes the ownership of the materials supplied by M/s. G.B.Engineering to the Corporate Debtor.

7. It has also been placed on record that FIR has been lodged against the Resolution Professional before the Inspector of Police, Law and Order, Cantonment, Tiruchirappalli and the Police has registered the Complaint and issued CSR in the name of the Applicant Company. Another complaint was lodged by the Applicant Company against the Resolution Professional before IBBI with respect to the threatening behaviour of the Resolution Professional. Based on these grounds, a prayer has been made for giving direction to the Resolution Professional to release the

materials which are lying in the premises of the Corporate Debtor to the Applicant Company claimed to be belonging to the customer viz., *M/s. G.B.Engineering* of the Applicant.

8. The Resolution Professional has filed the reply stating therein that Mr. K. Subburaj and Mr. N.K. Pothuraj (brothers) were the **Executive Chairman** and the **Managing Director** respectively of the Corporate Debtor viz., *M/s. Cethar Limited*, till the commencement of CIRP dated 16.06.2017, and the Applicant Company was being run by the Managing Director viz., Mr. K. Subburaj until 2015 or so, and the majority shares of the Applicant Company were held by Mr. K. N. Pothuraj and there is non-compete agreement barring the Applicant from taking up any business in the lines of the business of Corporate Debtor viz., *M/s. Cethar Limited*. It has further been submitted that Mr. Subburaj and Mr. N. K. Pothuraj, after borrowing nearly Rs.1500 Crores in the name of Corporate Debtor viz. M/s. Cethar Limited, mainly from public sector banks, had siphoned off the proceeds, and thereafter, have 



now created the Applicant Company as the vehicle to take over all businesses of the Corporate Debtor to render the same completely defunct. This is being evidenced by the written communication made by Mr. K. Subburaj, being an Executive Chairman of the Corporate Debtor, to almost all the customers seeking that orders given to the Corporate Debtor be henceforth given to Applicant Company.

9. It has been averred by the Resolution Professional that *M/s.Cethar Limited's* promoters' actions are unethical which are in direct violation of the non-compete agreement, apart from being contrary to the fiduciary responsibility cast on them as Directors of the Corporate Debtor viz., M/s. Cethar Limited.

10. The Resolution Professional has stated in the Reply that the forged and false documents have been used by the Applicant Company to support the Application, and the Applicant Company has approached this Authority with unclean hands and the

Application is tainted by *suggestio falsi / suppressio veri*.

11. The Resolution Professional/Respondent has stated that Annexure G, at pages 20 to 28 in the Application paper book are said to be the documents of Corporate Debtor evidencing receipt of goods by the Corporate Debtor from the Applicant Company, but the said documents are set out as signed on behalf of the Corporate Debtor viz., M/s. Cethar Limited by one **Mr. S. Achuthan** shown as Engineer/QC in all the documents, all of which are dated in May, 2017 and are all set out as Corporate Debtor's documents. But, Mr. S. Achuthan had resigned from the Corporate Debtor in 2016 and was relieved on 31.10.2016 itself. Copies of the letter of Corporate Debtor dated 31.10.2016 signed through Mr. N. K. Pothuraj is evidencing relieving of Mr. S. Achuthan from services of Corporate Debtor on 31.10.2016, and the resignation letter dated, 30.10.2016 are annexed with Counter at pages 7 and 8 filed by the Resolution Professional/Respondent.

12. It has been stated by the Resolution Professional in his reply that Mr. Achuthan has since been working in the Applicant Company, and on the letterhead of the Corporate Debtor viz. *M/s. Cethar Limited*, he has prepared the documents fraudulently for the purpose of filing of the Application by the Applicant Company which is an offence under Chapter XI of IPC apart from Sections 71 and 75 of the I&B Code 2016, and this Authority is bound to direct the Registry to file complaint as per the procedure stipulated under Sections 195/340 of the Cr.P.C against the fraudsters, as there is no question of any document of Corporate Debtor viz., *M/s. Cethar Limited* being signed by Mr. S. Achuthan in May, 2017, after being relieved from services in 2016. The Resolution Professional/Respondent has also referred to the communication dated 03.01.2018 made by Sri Sharanya, i.e., Managing Director of the Applicant Company through e-mail dated 03.01.2018, wherein a reference was made to the job order which reads as follows:-

*“Reference our jobbing order Nos. JBO / HO/  
B/ C0250/0001/3, JBO / HO/ B/ C0250/  
002/3 -dated 06.10.2017”*


13. The Resolution Professional/Respondent has stated that the e-mail was sent to him on 03.01.2018 by the said Managing Director of the Applicant Company annexing the letter dated 12.01.2018 referring to the same job orders dated 06.10.2017. But, the said letter has not been enclosed with the said mail as reflects from page 11 of the typed set filed with the Application. Therefore, the above stated facts have deliberately been suppressed. Thus, instead of the said letter/documents, the Applicant in Annexure B, has referred to the job orders as follows: -

*“Amendment Jobbing Order – Reg. Ref. Our JO NO  
JBO/HO/B/C0250/001/2 date 03.10.2017, JLA  
No. JLA/M/B/C0250/00028/0 dated 10.05.2017  
and JLA No. JLA/M/B/C0250/00056/0 dated  
12.06.2017”*

As seen from the job orders mentioned above, there is no reference of the job order dated 6.10.2017 which was referred to in e-mail dated 03.01.2018.

14. The Resolution Professional has submitted that there was no reference to any Amendment of Job Order in any mails set out as Annexure-C and Annexures-D and-E. The term 'amendment' has surfaced for the first time in documents filed before this Adjudicating Authority.

15. It has further been submitted by the Resolution Professional that the Corporate Debtor's factories have no HT power for over a year, and there are no workmen for production work as well, and in such circumstances, the question of Corporate Debtor being doing any job work in May or October, 2017, does not arise.

16. The Resolution Professional has submitted that it is an admitted fact that the Managing Director of the Applicant Company is aware of materials at Corporate 


Debtor's site due to the information received from her father (Mr. K. Subburaj, suspended Executive Chairman of Corporate Debtor) and uncle (Mr. N. K. Pothuraj, suspended Managing Director of Corporate Debtor). Thus, the Managing Director of the Applicant Company with *mala fide intention* has attempted to take away the materials of the Corporate Debtor viz., *M/s. Cethar Limited*, on false pretext to defraud the creditors of the Corporate Debtor.

17. Another important fact has been brought on record by the Resolution Professional that the raw-material inventory of the Corporate Debtor is shown as Rs.125 Crores. However, on physical inventory, it revealed less than 20% of the same, which is evidencing that the materials have been siphoned off from the premises of the Corporate Debtor under such false documents. Now, one more such document has been created by the Applicant Company for siphoning off the materials of the Corporate Debtor.

18. The Resolution Professional has also denied the other allegations levelled against him, by the Applicant. It has been stated in the reply that owing to the serious frauds played by the family of the Applicant's promoters' in the Corporate Debtor's affairs and inspections by the Resolution Professional/Respondent, infuriated them to file false criminal complaint, and a complaint to IBBI, against him (RP).

19. The Applicant Company has filed Rejoinder to the Reply filed by the Resolution Professional and denied the allegations of fraud levelled by the Resolution Profession. The Applicant Company has submitted in the Rejoinder that the materials in question do not belong to the Corporate Debtor and the same are belong to the customer viz., M/s. G.B. Engineering of the Applicant Company. *The Applicant Company has referred to the purchase Order No. GBE/PUR/17-18/RM/1564, dated 10.04.2017 to establish that the materials such as plate/carbon steel were purchased from M/s. Shah Brothers Ispat Pvt. Ltd., and billed in*


the name of M/s. G. B. Engineering and the materials such as C.S. Seamless Pipe were procured from M/s. Manhar Trading Co. vide P. O. No. GEBE/PUR/17-18/3332/TUBE, dated 15.06.2017 by M/s. G.B. Engineering. These documents have been filed in the Rejoinder as Annexures -1 and 2. It has further been averred in the Rejoinder that the payments for the materials purchased from the above vendor were transferred on 21.04.2017 and 28.06.2017.

20. The Applicant Company has submitted in the Rejoinder that the Corporate Debtor was permitted by Indian Bank to do job work on 16.03.2017 and the same is evidencing that the materials belonging to M/s. G. B. Engineering, which were given to the Corporate Debtor by the Applicant Company to do job work and at the time of handing over the job work to the Corporate Debtor viz., M/s. Cethar Limited, Staff/Manpower was also given to the Corporate Debtor as the Corporate Debtor was lacking manpower resources. 



21. It has been asserted in the Rejoinder that Mr. S. Achuthan, an authorised quality control representative of M/s. G. B. Engineering, and a representative of Lloyds Registrar of Shipping (a multinational company, renowned globally) have signed the Inward Inspection Report filed as document with the Application that establishes the fact that the materials belonging to M/s. G. B. Engineering were kept in the premises of the Corporate Debtor to complete the job work given by the Applicant Company.

22. It has further been averred in the Rejoinder that the Applicant Company has placed an order with the Corporate Debtor for job work on 18.04.2017 which was subsequently amended on 20.04.2017 and the same has further been amended on 06.10.2017, which as per the submission of the Applicant confirms all e-mail correspondence that the last updated/amended job order was dated 06.10.2017.

23. The Applicant Company has claimed in the Rejoinder that manufacturing took place in Unit 5 of 

the Respondent Company (Corporate Debtor), which had HT power till 16.10.2017 and besides HT power, it has diesel generator set for backup power which can be used for manufacturing activities.

24. The Applicant Company has also reiterated the facts that a criminal complaint has been filed against the Resolution Professional, and prayed this Adjudicating Authority to punish the Resolution Professional under Section 70 (2) of the I&B Code, 2016 for professional misconduct.


25. In the light of the pleadings recorded above, the question for consideration is as to whether the Applicant Company has delivered any materials to the Corporate Debtor for completion of the job order? On the issue under reference this Adjudicating Authority makes analysis as follows;-

i). Sri Sharanya, i.e., Managing Director of the Applicant Company through e-mail dated, 03.01.2018 has made a reference to the job order as follows;

*“Reference our jobbing order Nos. JBO / HO/ B/ C0250/0001/3, JBO / HO/ B/ C0250/ 002/3 -dated 06.10.2017”*


But, the letter referred in e-mail dated 03.01.2018 has not been placed on record and when asked for proof by the Resolution Professional, the Managing Director of the Applicant Company has referred to purported amended job orders as follows;-

*“Amendment Jobbing Order – Reg. Ref. Our JO NO JBO/HO/B/C0250/001/2 date 03.10.2017, JLA No. JLA/M/B/C0250/00028/0 dated 10.05.2017 and JLA No. JLA/M/B/C0250/00056/0 dated 12.06.2017”.*


The above mentioned job orders have got no link with the job order referred to in the e-mail dated 03.01.2018 as the numbers are totally different and there is no explanation as to who has amended the job orders. This creates serious doubt in the mind of this Adjudicating Authority that as to what was the requirement of amending job orders four times, which otherwise appears to be an unilateral exercise by the 

Applicant Company, with regard to which nothing has been placed on record to show that at any point of time, any request or consent for amending the job orders was made/given by the Corporate Debtor or the Resolution Professional during the CIRP that commenced on 16.06.2017. This clearly shows that there are major contradictions as far as the issue of job order is concerned.

ii) The Applicant would submit that the supply of materials by M/s. G.B. Engineering is evidenced by an *Inward Inspection Certificate dated 05.05.2017 vide IR No. 1/U5/R/001 to 007 where the vendor's name is printed as M/s. DPL / G.B Engineering*, which establishes the ownership of the materials supplied by M/s. G.B. Engineering to the Corporate Debtor, but the said documents are set out as signed on behalf of the Corporate Debtor viz., M/s. Cethar Limited by one **Mr. S. Achuthan** shown as Engineer/QC in all the documents, all of which are dated in May, 2017 and are all set out as Corporate Debtor's documents. But,

Mr. S. Achuthan had resigned from the Corporate Debtor in 2016 and was relieved on 31.10.2016 itself. But, nothing has been placed on record to clarify as to how Mr. S. Achuthan, simultaneously has been working for the Applicant viz., DynePro P. Ltd., and is an authorised quality control representative of M/s. G. B. Engineering and also the representative of Lloyds Registrar of Shipping. Most importantly, who has given him (Mr. S. Achuthan) the authority on behalf of Corporate Debtor viz., M/s. Cethar Limited, to sign Inward Inspection Report that has been filed as supporting document with the Application? In other words, Mr. S. Achuthan seems to be an omnipresent for the Applicant viz., DynePro P. Ltd, M/s. G. B. Engineering, Lloyds Registrar of Shipping, and Corporate Debtor viz., M/s. Cethar Limited, which creates legitimate suspicion in the mind of this Authority about the genuineness of the documents signed by Mr. S. Achuthan, who has resigned from the service of the Corporate Debtor long before the signing of the documents, as has been mentioned in the 


preceding paragraphs. This is being strengthened by the submission of the Resolution Professional that Mr. S. Achuthan has since been working in the Applicant Company, and on letterhead of the Corporate Debtor viz. *M/s. Cethar Limited*, he had prepared the documents fraudulently for the purpose of filing of the Application by the Applicant Company.

iii) The Applicant would contend that manufacturing took place in Unit 5 of the Respondent Company (Corporate Debtor), which had HT power till 16.10.2017 and besides HT power, it has diesel generator set for backup power which can be used for manufacturing activities. This appears to be a startling disclosure being made by the Applicant that any of the Units of the Corporate Debtor viz., *M/s. Cethar Limited*, has been carrying on manufacturing, whereas the Resolution Professional, who has the control over the assets of the Corporate Debtor during the CIR Process, that commenced on 16.06.2017, has specifically stated that the Corporate Debtor's factories have no HT power 

for over a year and there are no workmen for production as well, and the fact relating to lack of manpower resources in the Corporate Debtor viz., M/s. Cethar Limited, has also been admitted by the Applicant in Para 6 of the Rejoinder. In such circumstances, the question of Corporate Debtor doing any job work in May or October, 2017, does not arise.

iv) It is on record that *Mr. K. Subburaj*, being an Executive Chairman of the Corporate Debtor, has written to all the customers that orders given to the Corporate Debtor be henceforth given to the Applicant Company. Under such circumstances, there was no requirement for the Applicant Company to place any order to the Corporate Debtor. Moreover, the inventory of the Corporate Debtor showed the materials worth Rs.125 Crores. But, on physical inventory, it revealed less than 20% of the same, that gives credence to the arguments of the Resolution Professional that the materials have been siphoned off from the premises of the Corporate Debtor, of which the responsibility

devolves on Mr.K. Subbraj and Mr. K. N. Pothuraj, the suspended officials of the Corporate Debtor, who were in the management of the Corporate Debtor. Moreover, it appears that the Managing Director of the Applicant Company as a matter of strategy at the behest of her father and uncle filed an FIR and a complaint to the IBBI against the Resolution Professional to pressurise him to depart with the materials of the Corporate Debtor. In the circumstances, the Applicant has not come with clean hands before this Authority.

26. Thus, it becomes evident from the analysis made hereinabove that no transaction could have been entered into with Corporate Debtor viz., M/s. Cethar Limited, in October, 2017 except with the approval of Resolution Professional as the CIR Process has been in progress since 16.06.2017. The document (i.e. job order) dated 06.10.2017 is untenable, as a new claim has been added, as though it is an amendment to May, 2017 order, when no such May, 2017 Order was ever referred to in the earlier communications made by the 



Applicant. Similarly, the purported Inward Inspection Certificate dated 05.05.2017 relied upon by the Applicant, and stated to have been signed on behalf of the Corporate Debtor by Mr. S. Achuthan, the erstwhile employee of the Corporate Debtor, is without legal authority from the Corporate Debtor, and therefore, is inadmissible against the Corporate Debtor. Hence, the claim of the Applicant is baseless, and therefore, stands rejected. Accordingly, the CA/65/IB/2018 filed in CP/511/IB/2017 stands dismissed. However, there is no order as to costs.

27. The order is pronounced in the open court.

  
**CH. MOHD SHARIEF TARIQ**  
MEMBER (JUDICIAL)

P. ATHISTAMANI

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

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

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

**IN THE MATTER OF:**

**M/s Dynepro Private Limited**

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

**...Appellant**

**Vs**

**Mr. V. Nagarajan**

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

**...Respondent**

**Present:**

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

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

**With**

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

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

**IN THE MATTER OF:**

**M/s IU International Holdings PTE Ltd.**

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

**...Appellant**

**Vs**

**Mr. V. Nagarajan**

Resolution Professional

In respect of M/s Cethar Limited

With office at New No. 29, Kavara Street,

West Mambalam – 600 033.

(Near AMR Kalyana Mandapam)

**...Respondent**

**Present:**

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

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

## **J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

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

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

*Company Appeal (AT) (Insolvency) No. 229 of 2018 and 262 of 2018*

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

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

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

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

*Company Appeal (AT) (Insolvency) No. 229 of 2018 and 262 of 2018*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

**“18. Duties of interim resolution professional. –**

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

*Company Appeal (AT) (Insolvency) No. 229 of 2018 and 262 of 2018*

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

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

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

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

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

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

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

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

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

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

*xxx*

*xxx*

*xxx*

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

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

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

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

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

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

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



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

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

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

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

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**NEW DELHI**

**30<sup>th</sup> January, 2019**

**AM**

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
CIVIL APPEAL NO. 2391 OF 2019

M/S DYNEPRO PRIVATE LIMITED

Appellant(s)

VERSUS

V. NAGARAJAN

Respondent(s)

O R D E R

Heard the learned Senior Counsel appearing for the appellant.

We do not find any reason to interfere with the impugned order dated 30.01.2019 passed by the National Company Law Appellate Tribunal, New Delhi.

Accordingly, the appeal is dismissed.

Pending application stands disposed of.

However, liberty is granted to take appropriate proceedings in accordance with law.

..... J.  
(ROHINTON FALI NARIMAN)

..... J.  
(VINEET SARAN)

New Delhi;  
March 08, 2019.

ITEM NO.32

COURT NO.5

SECTION XVII

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS

Civil Appeal No(s). 2391/2019

M/S DYNEPRO PRIVATE LIMITED

Appellant(s)

VERSUS

V NAGARAJAN

Respondent(s)

(FOR ADMISSION and IA No.36817/2019-STAY APPLICATION )

Date : 08-03-2019 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN  
HON'BLE MR. JUSTICE VINEET SARAN

For Appellant(s) Mr. Dhruv Mehta, Sr. Adv.  
Mr. G. Umapathy Adv.  
Mr. Venkata Subramanian, Adv.  
Mr. Rakesh K. Sharma, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following  
O R D E R

The appeal is dismissed in terms of the signed order.

(R. NATARAJAN)  
COURT MASTER (SH)

(RENU DIWAN)  
ASSISTANT REGISTRAR

(Signed order is placed on the file)