

PATSONS CONSTRUCTION (OPERATIONAL CREDITOR) V. SHRI RAM RATAN KANOONGO

Patsons Construction (Operational Creditor)

...Appellant

Vs.

Shri Ram Ratan Kanoongo
Resolution Professional of D Thakkar Constructions
Pvt. Ltd.

...Respondent

Case No: Company Appeal (AT) (Ins.) No. 1269 of 2022

Date of Judgement: 07.11.2023

Judges:

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

For Appellant: C.S. Sachin Sinha (PCS),

Mr. Shravan Shukla, Ms. Tejaswi Kumar, Advocates.

For Respondent: Mr. Rajendra Beniwal, Mr. Rajat Kashyap,
Mr. Saksham Solanki, Ms. Shivangi Ghosh,
Ms. Richa Singh, Advocates.

Facts

Appeal filed by Patsons Construction (Operational Creditor) against order dated 25.03.2022 passed by NCLT in IA No. 515/2022 filed by Resolution Professional (RP) of D Thakkar Constructions Pvt. Ltd. (Corporate Debtor). RP sought handover of asset (Komatsu Motor Grader) in possession of Patsons and payment of usage charges. NCLT allowed handover and payment of Rs. 48 lakhs as usage charges. Patsons was given grader by company director in lieu of outstanding dues of Rs. 45.9 lakhs as per work order and account ledger. Patsons could not file claim in CIRP. Resolution Plan approved on 09.08.2021 (CoC) and 14.03.2022 (NCLT). In compliance with NCLAT's earlier order, Patsons has handed over grader to company.

Court's Opinions

Order for handover complied, so only usage charges payment is challenged. No rental agreement shown by RP regarding usage charges. Grader given in lieu of outstanding dues, reflected in Patsons' letter dated 08.06.2021. Patsons could not file claim in CIRP, so dues not reflected. No basis given by NCLT for allowing usage charges of Rs. 2 lakhs per month. Direction to pay usage charges of Rs. 48 lakhs is unsustainable and set aside. Appeal partly allowed.

Arguments by Parties

Appellant:

Grader was given in lieu of outstanding dues which company owes. Reflected in letter and account ledger. No rental or usage agreement between parties regarding charges. Could not file claim in CIRP so dues not considered. No basis for NCLT to allow usage charges.

Respondent:

Sought handover of grader in possession of Patsons. Also claimed usage charges of Rs. 2 lakhs per month.

Sections

Appeal under Section 61 of IBC; Impugned order passed under Section 14 and 18(1)(f) of IBC

Cases Cited: None

Referred Laws:

Insolvency and Bankruptcy Code 2016; Section 14, 18(1)(f) – Functions and duties of IRP; Section 61 – Appeals and Appellate Authority

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Full Text of Judgment:

1. Heard Practicing Company Secretary for the appellant and Learned Counsel appearing for the respondent.

2. This appeal has been filed against the order dated 25.03.2022 by which order Adjudicating authority has issued following directions in paragraph (v).

(a) Consider and allow the instant IA No... of 2022 under the provisions of Section 14, r.w.s. 18 (1)(f) of the code;

(b) Direct the Respondent to handover the asset of the Corporate Debtor namely Komatsu Motor Grader GD-511 (having Registration number MH 40 P 961) which is under the possession of Respondent since last 2 years;

(c) Direct the Respondent to deposit the usage charges for the above mentioned asset of Rs. 2 lakhs per month for 24 months totaling to Rs. 48 lakhs in the account of Corporate Debtor;

(d) Pass such other order(s) and/or direction(s) in the interest of justice which this Hon'ble Tribunal deems fit."

3. In this appeal when the appeal was heard this Tribunal passed an order on 19.10.2022 directing the appellant to hand over the machine within 15 days. In pursuance of our order, it is submitted on behalf of the appellant that machine has already been handed over to the Corporate Debtor.

4. The order impugned was passed in I.A. 515/2022 filed by the Resolution Professional where prayers were made with regard to handing over the machine and direction for usage charges.

5. It appears that Resolution Professional has issued a letter dated 03.06.2021 asking the appellant to hand over the machine

and also pay usage charges. The appellant by letter dated 08.06.2021 sent following reply:

" Dated 08.06.2021

To,

D. Thakkar Constructions Pvt. Ltd.

Sub: Regarding your letter dated June 3, 2021

Sir,

With respect to your letter we would like to bring to your notice that we had been in contract with D.Thakkar Construction Pvt. Ltd. Work order Ref.no. WO/SECR/CHHINDWARA-32/2015-16(copy attached herewith) and in the audited year 2017-18 we had to take Rs.3981955.00 and Rs.611908.00 in total 4593863.00 against work done (The account ledger attached herewith) which reflects in audit financial books. On 31/08/2018 we had last sent a mail of the outstanding amount with interest and loss (copy enclosed herewith). After that in face to face meeting Vishalbhai Thakkar had agreed to give Grader against our outstanding money and will soon clear the books and handover the transfer documents of Grader (as mentioned in Letter attached dated 07/02/2019 herewith) at the earliest."

6. After the aforesaid reply the application has been filed.

7. The resolution plan of the Corporate Debtor has been approved on 09.08.2021 by CoC and 14.03.2022 by the NCLT. The appellant could file its claim after the approval of plan with the Committee of Creditors, hence, the same has not been considered.

8. The present appeal is concerned with the two directions issued in paragraph (v) as quoted above. In so far as the first direction the machine has already been handed over to the Corporate Debtor, hence, that order has been complied with.

9. In so far as the direction to pay usage charges it is clear that there has been no rental agreement between the parties for any usage charges and machine was given to the operational

creditor by the director of the Corporate Debtor in lieu of the certain dues which Corporate Debtor owe to the appellant which is reflected in letter dated 08.06.2021.

10. As noted above, the appellant could not filed its claim in the corporate insolvency resolution process of the Corporate Debtor, hence, his dues do not find any reflection.

11. In the application which was filed by the Resolution Professional there was no basis for claiming Rs. 2 lakhs per month of usage charges. Adjudicating Authority by the impugned order has also not adverted as to how the amount of Rs. 2 lakhs per month can be allowed for payment of usage charges.

12. We, thus, are of the view that second direction issued by Adjudicating Authority for payment of Rs. 48 lakhs is unsustainable and is set aside. The appeal is partly allowed to the above extent.