

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA

**IA No.316/KB/2021**

**in**

**CP (IB) 391/KB/2018**

*In the matter of*

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

*In the matter of*

Jai Balaji Industries Limited ... Operational Creditor  
Versus

Shriramrathi Steels Private Limited ... Corporate Debtor

*In the matter of*

SBEG Consultants Private Limited ... Applicant  
Versus

Rakesh Kumar Agarwal & another ... Respondents

*Coram:*

Mr Rajasekhar V.K. : Member (Judicial)

Mr Harish Chander Suri : Member (Technical)

*Appearances (via videoconferencing):*

For the applicant : Mr Joy Saha, Sr Adv  
Mr Ishaan Saha, Adv  
Ms Sweta Mohanty, Adv

For the Liquidator : Mr Ratnanko Banerji, Sr Adv  
Mr Anuraag Mitra, Adv  
Ms Pritha Basu, Adv  
Ms Aryaa Chatterjee, Adv  
Mr Rakesh Agarwal, Liquidator

For Damodar Valley Corporation : Mr Anirban Ray, Adv  
Mr Barnana Sen, Adv  
Mr Sayak Ranjan Ganguly, Adv

**Date of hearing: 09.04.2021**

**Date of pronouncement: 07.05.2021**

**ORDER**

*Per: Rajasekhar V.K., Member (Judicial)*

1. This is an application filed by the purchaser of the properties of the corporate debtor sold by public auction held on 24.01.2020, seeking directions upon the Respondent No.2/Damodar Valley Corporation (*hereinafter referred to as "DVC"*) to grant electricity connection to the factory premises of the corporate debtor purchased under the said auction.
2. The conspectus in which this application is required to be decided is as follows:
  - (a) *Vide* order dated 02.08.2018,<sup>1</sup> the corporate debtor was admitted to Corporate Insolvency Resolution Process (CIRP). The Committee of Creditors (CoC) sole resolution plan received was found unviable. Therefore, this Adjudicating Authority passed an order of liquidation on 10.06.2019,<sup>2</sup> and appointed the Respondent No.1 herein as the liquidator.
  - (b) The secured creditor, Indian Overseas Bank (IOB), relinquished its security interest on 09.10.2019. Thereafter, at the second meeting of the stakeholders held on 01.11.2019, it was decided that since IOB had relinquished its security right, the liquidator should proceed with the sale of property of the corporate debtor.
  - (c) The first e-auction notice dated 05.11.2019 with the reserve price fixed as ₹19 crore evoked no response. Thereafter, the reserve price was revised downwards to ₹15.20 crore. The revised bid notice was published, upon which only one bidder - SBEG Consultants Private Limited, the applicant herein, came forward, putting in a bid for ₹15.30 crore for land and building, plant, machinery and other assets located at Barjora Mauja Namobandh, Ghutgoria, Sitarampur (P.O) 722 101, Bankura District, West Bengal, as per sale notice dated 17.12.2020.<sup>3</sup>

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<sup>1</sup> Pages 22-30 of the Application.

<sup>2</sup> Pages 31-38 of the Application.

<sup>3</sup> Pages 52-53 of the Application.

SBEG was declared the successful auction purchaser on 24.01.2020.<sup>4</sup> The liquidator also realised a sum of ₹9,50,736/-,<sup>5</sup> for late payment by the bidder.

- (d) The properties were eventually sold in favour of the Applicant herein *vide* Slump Sale Agreement dated 11.06.2020.<sup>6</sup> The Applicant has specifically averred that even though the last tranche of the entire sale consideration has been paid as far back as on 24.03.2020,<sup>7</sup> the liquidator has till date not issued any sale certificate in favour of the applicant despite repeated demands, requests and representations made in this regard.<sup>8</sup>
- (e) On 01.10.2020,<sup>9</sup> the Applicant requested the Respondent No.2/DVC (*hereinafter referred to as "DVC"*) to grant electricity connection to the factory premises of the corporate debtor purchased through e-auction. The Applicant enclosed copies of various orders passed by this Adjudicating Authority, the Slump Sale Agreement, and other documents necessary for processing the application *vide* another letter dated 12.11.2020.<sup>10</sup>
- (f) DVC, *vide* letter dated 29.12.2020, replied to the Applicant, stating that a sum of ₹6,78,33,434/- was pending towards outstanding electricity dues of the corporate debtor as on that date. DVC wanted the applicant to clear the outstanding dues as a condition precedent for obtaining electricity. Additionally, DVC reserved the right to levy Delayed Payment Surcharge (DPS) as per West Bengal Electricity Regulatory Commission (WBERC) regulations at the time of realisation of payment.

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<sup>4</sup> Page 62 of the Application (*date of meeting is, however, wrongly stated to be 24.01.2019 instead of 24.01.2020 in the minutes of the 4<sup>th</sup> meeting of the Stakeholders Consultation Committee*).

<sup>5</sup> Incorrectly mentioned as ₹9,50,763/- in para 11 of the order dated 12.01.2021, being the order for dissolution of the corporate debtor passed by this Adjudicating Authority.

<sup>6</sup> Pages 72-83 of the Application.

<sup>7</sup> Table in para 13 at page 10 of the Application.

<sup>8</sup> Para 14 at page 10 of the Application.

<sup>9</sup> Page 69 of the Application.

<sup>10</sup> Page 70 of the Application.

3. Mr Joy Saha, learned Sr Counsel appearing for the Applicants, submitted that the demand of DVC is completely contrary to the scheme of the Code and the regulations. The entire claim of DVC is manifestly between April 2009 and June 2016, whichever way one looks at it. The table in para 13 at page 10 of the Application reproduces the claim of DVC as follows: -

June 2015 to June 2016	₹2,81,32,370
Arrear dues (new bill – old bill) 2009-13	₹72,63,571.00
April, 2009 to April, 2010	₹1,07,91,700.00
*DPS as on 15.12.2020	₹2,16,45,793.00
<b>Total</b>	<b>₹6,78,33,434.00</b>

\*Additional DPS as per WBERC regulations at the time of realisation

4. The company petition under section 9 of the IBC came to be admitted only on 02.08.2018. Therefore, the entire claim of DVC is pre-admission claim.
5. Mr Joy Saha also pointed out that in the order of dissolution of the corporate debtor passed on 12.01.2021,<sup>11</sup> it has been recorded as follows:-

*“A claim amounting to Rs.3,88,66,131/- (Rupees Three Crore Eighty Eight lacs Sixty Six thousand one hundred thirty one only) was received by the applicant from Damodar Valley Corporation out of which Rs.3,41,55,329/- (Rupees Three Crore Forty One Lakh Fifty five thousand three hundred twenty nine only) was admitted.”*

This being the position, DVC cannot now claim a sum of ₹6,78,33,434/- from the Applicant. If DVC was dissatisfied with the adjudication of the liquidator admitting a sum of ₹3,41,55,329/- out of the total claim of ₹3,88,66,131/-, then it had the right to prefer an appeal under section 42 of the IBC before this Adjudicating Authority. That has not been done, and the claim now stands crystallised at ₹3,41,55,329/-.

<sup>11</sup> Page 41A of the Application

6. During the course of hearing on 07.04.2021, we had requested Mr Anirban Ray, learned counsel for DVC, to see if some interim arrangement may be possible till the application is finally decided. Mr Ray sought time to seek instructions in the matter. Therefore, the matter was posted to 09.04.2021. On 09.04.2021, Mr Anirban Ray stated on instructions that it will not be possible to consider providing reconnection unless the applicant deposits the requisite security and also clears the previous outstanding dues. Therefore, we deemed it fit to consider the matter further for considering some interim reliefs. Thereafter, the matter was argued on the question of grant of interim reliefs.
7. Mr Joy Saha further submitted that DVC stands as an operational creditor to the corporate debtor and must take its place in accordance with the waterfall mechanism provided by section 53 of the Code. DVC cannot bypass this mechanism and ask for satisfaction of its entire claim from the successful auction purchaser of the property.
8. Mr Joy Saha thereafter submitted that regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, provides that electricity is an essential service. Hence it could not have been disconnected in the first place.
9. Mr Joy Saha submitted that *de hors* the Code, an auction purchaser has no liability to pay arrears of previous consumers. In support of his proposition, Mr Joy Saha relied on *Isha Marbles v Bihar State Electricity Board & another*.<sup>12</sup> In para 21 thereof, it was held that “Neither under the scheme of the Electricity Act nor the Electricity (Supply) Act, 1948 (hereinafter referred to as the “Supply Act”) is there any concept of the premises of the consumer being liable for the electricity dues *dehors* the consumer, whose premises it is.” Going further, in para 61 thereof, it was further held that “What we have discussed above appears to be the law gatherable from the various provisions which we have detailed

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<sup>12</sup> (1995) 2 SCC 648, paras 21 and 61

*out above. It is impossible to impose on the purchasers a liability which was not incurred by them.”*

10. Mr Joy Saha also relied on the decisions in *Ahmedabad Electricity Co Ltd v Gujarat Inns Pvt Ltd & others*,<sup>13</sup> *AI Champdany Industries Ltd v Official Liquidator & another*,<sup>14</sup> and *Southern Power Distribution Company of Telangana Ltd & others v Gopal Agarwal & others*,<sup>15</sup> *Dollar Industries v Assistant Commissioner, Central Excise, Customs and Service Tax, Dindigul & others*.<sup>16</sup> In all these judgments, it has been broadly held that the dues arising out of the transactions of the previous owner and his liability are not binding on third party purchasers.
11. Mr Joy Saha also urged the Bench to grant the reliefs prayed for, since it would be to the benefit of the workmen who were earlier employees of the corporate debtor and who have now become employees of the applicant. Further, it is over a year since the full sale consideration has been paid and until the electricity supply is restored, the applicant will be unable to restart the factory.
12. Mr Anirban Ray, learned counsel for the Respondent No.2, submitted that DVC as a supplier of electricity is duty bound to comply with the WBERC regulations. He placed for consideration
13. Mr Joy Saha, learned senior counsel for the applicants, submitted that in so far as DVC's reliance on the decision of the Hon'ble Supreme Court in *Telangana State Southern Power Distribution Company Limited (supra) -Vs- Srigdhaa Beverages*, reported in (2020) 6 SCC 404 is concerned, the judgment of the Hon'ble Apex Court in the matter of *Isha Marbles (supra)* was rendered by a bench comprising of three Hon'ble Judges while the

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<sup>13</sup> (2004) 3 SCC 587, paras 2 & 3

<sup>14</sup> (2009) 4 SCC 486, paras 10, 22, 23, 26 to 28

<sup>15</sup> (2018) 12 SCC 644, paras 6 and 7

<sup>16</sup> MANU/TN/5987/2020, paras 5 to 9, 20 and 21

judgment in the matter of *Telangana State (supra)* is of two Hon'ble Judges of Hon'ble Apex Court. In accordance with the principle of *stare decisis*, the judgment rendered in the matter of *Telangana State (supra)* cannot be considered to the extent that the same contradicts the case of *Isha Marbles (supra)* and other cases referred to therein which have all been pronounced prior to the decision in the matter of *Telangana State* and therefore were and continue to remain binding.

14. Mr Anirban Ray, learned counsel for DVC, submitted at the outset that the present application is not maintainable. The applicant contends that it has no relationship with the corporate debtor; at the same time, it seeks reconnection of the electricity connection given to the corporate debtor.
15. If it is a case of reconnection, then the applicant acts as successor-in-interest of the corporate debtor, and is therefore bound by the agreement executed between DVC and the corporate debtor and also by the terms and conditions under the Electricity Act, 2003 and WBERC notifications dated 02.04.2013 and 07.08.2013. If, on the other hand, the applicant is seeking a new connection, then such a move has no relation with the procedure under the IBC any more. Therefore, Mr Anirban Ray argues that whichever way one looks at it, the petition is not maintainable.
16. Mr Anirban Ray submitted that the averments do not make out any *prima facie* case for receiving electricity without clearing the dues of the corporate debtor. The terms and conditions of the auction<sup>17</sup> indicate that the e-auction would be on "*as is where is, as is what is and whatever there is*" basis. Under clause 9 thereof, the successful bidder is liable to bear all statutory and non-statutory dues in respect of the properties. The additional terms and conditions<sup>18</sup>, particularly clause 2, make it clear that any prospective bidder should make their own independent enquiry regarding encumbrances or

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<sup>17</sup> Page 48 onwards, at page 49 of the Application

<sup>18</sup> Page 54 of the Application

title of assets or claims or rights or dues affecting the assets. Hence, in the present case, the applicant was already on notice. The Slump Sale Agreement,<sup>19</sup> incorporates the terms of the letter of intent and the e-auction information process of 17.09.2019. Therefore, DVC was always under the impression that the statutory dues of the statutory debtor has been made payable by the auction purchaser.

17. On the delay aspect, Mr Anirban Ray submitted that the application for energising the connection was made on 01.10.2020. Between 01.10.2020 and March 2021, apparently there was no requirement of electricity by the applicant. Hence, interim orders should be refused purely on the ground of there being no urgency.
18. On the argument that supply of electricity was an essential service in terms of regulation 32 *ibid*, Mr Ray also submitted that commercial connection is not an essential service for a closed unit.
19. Mr Anirban Ray further submitted that the interim reliefs claimed are oblivious to the demanded amount of about six crore rupees in terms of section 56 of the Electricity Act, 2003, in terms of which where the applicant is required to pay the demanded amount under protest before he becomes eligible for energy. Even during the course of arguments, the applicant is not ready to do so, the applicant is also not ready to put in the security deposit required.
20. Mr Anirban Ray strongly relied on the judgment of the Hon'ble Supreme Court in *Telangana State Southern Power Distribution Company Limited (supra) v Srigdhaa Beverages*,<sup>20</sup> which is a judgment by a two-judge Bench. In that matter, the Hon'ble Supreme Court held that where, as in cases of the e-auction notice in question, the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the

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<sup>19</sup> Page 78 of the Application

<sup>20</sup> (2020) 6 SCC 404, dated 01.06.2020

purchaser and the sale is on “*as is where is, whatever there is, and without recourse basis,*” there can be no doubt that the liability to pay electricity dues exists on the respondent (purchaser). He submitted that when all the judgments relied on by the applicant have been referred to and dealt with in this judgment, the same cannot be *per incuriam*. The interim orders prayer for, if granted, would be a final relief. Therefore, Mr Anirban Ray prayed that interim reliefs be not granted.

21. Lastly, Mr Anirban Ray submitted that the increase in dues payable by the corporate debtor from the time the claim was lodged with the liquidator in 2018, is due to the increase in tariff fixed by the Central Electricity Regulatory Commission (CERC). Further, in view of an order passed by the WBERC on 19.06.2020 for the period from April 2006 to March 2009, there has been increase in the electricity used by the corporate debtor. These amounts are payable under orders of court. Mr Anirban Ray submitted that DVC may be permitted to bring the same on record by way of a detailed affidavit. In the circumstances, he prayed that no interim orders be passed in the present proceedings.
22. Mr Ratnanko Banerji, learned Senior Counsel for the liquidator, submitted that there are no prayers in the nature of interim reliefs claimed against the liquidator. It is a matter between the applicant and DVC, he submitted.
23. We have considered the rival submissions and perused the records.
24. The question is whether the DVC is entitled to charge the third-party purchaser for the defaults committed by the previous consumer, in terms of the WBERC Regulations. DVC has also raised the question of maintainability of the application. Further, the question whether liability of the previous consumer will fasten on every third-party purchaser when the properties have been purchased in a public auction under the aegis of the IBC, is a legal issue that will have to be gone into. This is a matter that will have to be considered after inviting reply affidavits from the

respondents. The matter is likely to take some more time before a decision can be arrived at, due to the prevailing pandemic situation, and considering that only urgent matters are begin taken up for hearing.

25. In the meantime, the successful auction purchaser cannot be made to sit idle while awaiting a decision in the matter, since successful energisation of the factory will enable it to start functioning, leading in turn to some gainful employment to the workers.
26. In keeping with this noble intent, we issue the following directions: -
  - (a) The demand of ₹6,78,33,434/- made by DVC upon the successful auction purchaser, SBEG Consultants Private Limited, the applicant herein, shall be stayed and no coercive action shall be taken by DVC in this regard without leave of this court;
  - (b) Respondent No.2/DVC shall process the application filed by SBEG Consultants Private Limited, the successful auction purchaser, as if the same was a request for a brand-new connection on temporary basis;
  - (c) DVC shall communicate the requirements for a new temporary connection to the SBEG Consultants Private Limited within a period of ten days from today;
  - (d) Upon receipt of such a communication, the applicant/SBEG Consultants Private Limited, shall make the applicable security deposit with DVC to enable the latter to process the application, within two weeks from the date on which the communication is received from DVC;
  - (e) Once the requisite formalities are completed, DVC shall install the meters and energise the connection within a further period of two weeks thereafter.

27. **We make it clear that at this stage, not making any observations as regards maintainability of the present application and the other legal issues raised, which will all be decided after reply affidavits are filed. We are making these orders only so that the factory can be restarted at the earliest, which will provide some employment to the workers in this pandemic which has already caused sufficient hardship, particularly to the workers.** These orders may not be construed in any other manner by either side.
28. The respondents shall have three weeks within which to file reply affidavits in the matter, copies of which shall be served on the counsel on record for the applicant. The applicant shall have a further period of three weeks within which to file rejoinder.
29. List IA No.316/KB/2021 for hearing after completion of pleadings, on 22.07.2021.

**Harish Chander Suri**  
**Member (Technical)**

**Rajasekhar V.K.**  
**Member (Judicial)**