THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing platform)

IA No.412/2021, 413/2021, 427/2021 & 31/2020
In
CP (IB) No.174/Chd/CHD/2018
(admitted)

<u>In the matter of:</u>

Small Industries Development Bank of India (SIDBI)
….Petitioner-Financial Creditor

Versus

International Mega Food Park Limited ….Respondent-Corporate Debtor

And in the matter of:-

<u>IA No.412/2021</u> **Under Section 60(5) of the IBC, 2016**

Mr. Sumat Gupta, Resolution Professional
of M/s International Mega Food Park Limited
Registered office at
C/O, 2581/3, B-1, Near Zoom Hotel Building
Industrial Area-A, Transport Nagar,
Ludhiana-141003 …Applicant

Vs

1. Punjab State Power Corporation Limited
   Registered Office at
   PSEB, Head Officer, The Mall Patiala,
   Punjab-147001

2. Chief Engineer, PSPCL
   Registered office at
   T-8, Thermal Design Complex,
   Patiala, Punjab-147001 ….Respondents

And in the matter of:-

<u>IA No.413/2021</u> **Under Section 60(5) of the IBC, 2016**

Mr. Sumat Gupta, Resolution Professional
of M/s International Mega Food Park Limited
Registered office at
C/O, 2581/3, B-1, Near Zoom Hotel Building
Industrial Area-A, Transport Nagar,
Ludhiana-141003 …Applicant

Vs.

1. Punjab State Power Corporation Limited
   Registered Office at
   PSEB, Head Officer, The Mall Patiala,
   Punjab-147001

2 Dy Chief Executive and Assistant Executive Engineer
Registered office at
CE/ Electrical, T-4, Thermal Design Complex
Patiala, Punjab-147001

3. Assistant Executive Engineer, (DS) Sub-Division
   PSPCL, Arniwala, Fazilka, Punjab ….Respondents

And in the matter of:-

<u>IA No.427/2021</u> **Under Section 60(5) of the IBC, 2016**

1. Punjab State Power Corporation Limited,
   Registered Office at
   PSEB, Head Officer, The Mall Patiala,
   Punjab-147001
2. Punjab State Power Corporation Limited, Sub-Division
   Arniwala, Fazilka, Punjab

…Applicants

Vs.

Mr. Sumat Gupta, Resolution Professional
of M/s International Mega Food Park Limited
Registered office at
C/O, 2581/3, B-1, Near Zoom Hotel Building
Industrial Area-A, Transport Nagar,
Ludhiana-141003

….Respondent

And in the matter of:-

<u>IA No.31/2020</u> **Under Section 60(5) of the IBC, 2016**

Mr. Sumat Gupta, Resolution Professional
of M/s International Mega Food Park Limited
Registered office at
C/O, 2581/3, B-1, Near Zoom Hotel Building
Industrial Area-A, Transport Nagar,
Ludhiana-141003 …Applicant

Vs.

1. Punjab State Power Corporation Limited,
   Registered Office at
   PSEB, Head Officer, The Mall Patiala,
   Punjab-147001
2. Punjab State Power Corporation Limited, Sub-Division
   Arniwala, Fazilka, Punjab

….Respondents

Order delivered on: 18.10.2022

Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

Present through video-conferencing:

For the Applicant in IA No.412/2021, 413/2021, and 31/2020	:	Dr. Rajansh Thukral, Advocate Dr. Surekha Thukral, Advocate
For the Respondents IA No. 412/2021, 413/2021, and 31/2020	:	Mr. Sehajbir Singh, Advocate Ms. Poorva Saigal, Advocate
For the Applicant in IA No. 427/2021	:	Ms. Poorva Saigal, Advocate
For the Respondent in IA No.427/2021	:	Dr. Rajansh Thukral, Advocate Dr. Surekha Thukral, Advocate

Per: Subrata Kumar Dash, Member (Technical)

ORDER

IA No.412/2021 & 413/2021

IA No.412/2021 is an application filed on 06.05.2021 under Section 60(5) of the IBC, 2016. In the present application, **Mr. Sumat Gupta, Resolution Professional of M/s International Mega Food Park Limited** is the applicant, and **Punjab State Power Corporation Limited and Chief Engineer, PSPCL** are the respondents. IA No.413/2021 is an application filed on 17.06.2021 under Section 60(5) of the IBC, 2016, further relisted for hearing on 07.10.2022. In the present application, **Mr. Sumat Gupta, Resolution Professional of M/s International Mega Food Park Limited,** is the applicant, and **Chairman and Managing Director, Punjab State Power Corporation**

Limited; Dy Chief Executive and Assistant Executive Engineer are the respondents.

2. IA No.412/2021 was filed by the RP before the termination on 28.05.2021 of the PPA (Power Purchase Agreement) dated 04.08.2014 to restrain the respondent-PSPCL from terminating the said agreement. As the PPA stands terminated, IA No.412/2021 renders infructuous. Subsequently, IA No.413/2021 is filed after the termination of PPA inter alia, with the following prayers:-

(a) To declare Memo no. 1356/57IIPC-412 dated 28.05.2021 as premature and null & void and to set aside (Annexure A-7) thereby reviving PPA until such time the Resolution Applicant takes over the CD and thereafter Respondents may communicate with him with respect to PPA.

(b) To declare the order dated 05.05.2021 under section 20(2)(b) of IBC passed by the applicant Resolution Professional regarding amendment of PPA (Annexure A-5) as valid and binding on the Respondents in the interest of CIRP.

(c) To issue directions to the respondents not to initiate any other action detrimental to the Corporate Debtor until the Resolution Applicant takes over the CD pursuant to the approval of the Resolution Plan already pending before this Hon'ble Bench in IA No. 616/2020

3. The brief facts stated by the applicant-Resolution Professional are hereinbelow:

3.1 It is submitted that the corporate debtor was put into CIRP upon an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 filed by SIDBI. The CIRP was admitted vide order dated 28.02.2019 in CP(IB) No. 174/Chd/Chd/2018, and Mr. Sumat Kumar Gupta was appointed as Interim Resolution Professional and later confirmed as Resolution Professional. The Resolution Plan has been filed for approval before this Adjudicating Authority vide IA No. 616/2019 dated 20.01.2020.

3.2 It is stated that the corporate debtor is a going concern and had installed a 4 mw Biomass based Power Project (Generating Facility) in the premises, and accordingly, a power purchase/sale agreement(PPA) was executed on 04.08.2014 between the corporate debtor and the respondents. The duration of the agreement, in terms of Clause 12, is 20 years from the date of the commissioning of the cogeneration project.

3.3 It is submitted that a claim with respect to pre-CIRP has been filed by PSPCL, and no amount of electricity dues for the period after the commencement of CIRP is outstanding to the respondents.

3.4 It is submitted that the respondent served the applicant a notice in terms of Memo No. 984/90/IPC-412(Vol-I) dated 18.03.2021 calling upon the applicant to resume supply of power from the cogeneration unit of the corporate debtor within 60 days of receipt of notice failing which the respondent shall retain the right to terminate the PPA under Clauses 13.03.0(ii) (a) & (b) of the PPA. The applicant replied to the respondent, informing them about the moratorium and the likely approval of the Resolution Plan through a letter dated 02.04.2021. The respondent sent another letter vide Memo No. 984/90/IPC dated 30.04.2021 stating the termination of the PPA in terms of Clause 13.3.0. Respondent No. 2 with the approval of respondent No. 1, terminated the PPA on 28.05.2021(Memo No. 1356/57/IPC-412 dated 28.05.2021) in terms of Memo No. 902 dated 20.05.2021 issued by respondent No. 3, where it had given a fresh time of 60 days from the date of receipt of the said memo. The date of service of the letter of termination is 31.05.2021.

3.5 It is claimed by the applicant that PPA cannot be terminated in view of the fact that the corporate debtor is under a moratorium. The termination of PPA shall cause a material deviation with regard to Information Memorandum. The Resolution Professional has amended the PPA dated 04.08.2014 under Section 20(1)(b) of the Code vide letter dated 05.05.2021 by inserting Clause 13.7.0 after Clause 13.6.0 of the agreement. It is further alleged that in terms of Memo No. 902 dated 20.05.2021, a fresh period of 60 days from the date of receipt is given to the corporate debtor to resume power supply. The said letter was received on 23.05.2021, and the period of 60 days would expire on 22.07.2021. Therefore, the termination is totally illegal and unlawful as it is done just after 8 days i.e. 28.05.2021, of dispatch of the notice of termination issued by respondent No. 3. The applicant had also relied on different Clauses of the PPA Agreement

4. The reply has been filed on behalf of respondent Nos. 1, 2 and 3 vide Diary No. 00755/2 dated 11.02.2022. The brief facts stated by the respondents in their reply are as follows:

4.1 It is submitted that the primary work of the corporate debtor relates to food processing and products. The generation and sale of electricity to PSPCL under the PPA is not the primary business activity or undertaking of the corporate debtor. The corporate debtor has stopped supplying the power to PSPCL w.e.f. 31.01.2019, and the supply of power was the essence of the PPA. The non-supply of power constitutes an event of default under the terms of Article 13.3 of the PPA.

4.2 The respondent issued the preliminary default notice on 18.03.2021 for non-supply of electricity for a period of 2 years. The 60 days cure period provided in Article 13.3 of PPA expired on 17.05.2021 and accordingly, PSPCL issued the termination notice/letter to the corporate debtor/Resolution Professional on 28.05.2021, terminating the PPA dated 04.08.2014 on account of non-supply of power w.e.f. 31.01.2019.

4.3 It is further submitted that the jurisdiction for adjudicating any dispute, including termination of PPA, lies with the competent authority i.e. the Punjab State Electricity Regulatory Commission(PSERC). Reliance is placed on the decision of the Hon'ble Supreme Court Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209, where it was held as under:

> *74. Therefore, we hold that the RP can approach NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes that arise dehors the insolvency of the corporate debtor, the RP must approach the relevant competent authority.* ***<u>For instance, if the dispute in the present matter related to the non-supply of electricity, the RP would not have been entitled to invoke the jurisdiction of NCLT under IBC.</u>*** *However, since the dispute in the present case has arisen solely on the ground of the insolvency of the corporate debtor, NCLT is empowered to adjudicate this dispute under Section 60(5)(c) of IBC.*

4.4 Further, as regards the exercise of residuary powers under section 60(5) of the Code, reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Tata Consultancy Services Limited Versus Vishal Ghisulal Jain, Resolution Professional, Sk Wheels***

Private Limited (Civil Appeal No. 3045 of 2020 decided on 23.11.2021) wherein the Hon'ble Apex Court has considered the issue of the exercise of NCLT's residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties and has held that the NCLT can adjudicate only on disputes relating to insolvency of the corporate debtor.

Thus, it is averred that the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.

4.5 It is further stated that the Application filed by the Resolution Professional is not maintainable before this Adjudicating Authority since (i) the cause of action for termination of the PPA is the non-supply of power by the corporate debtor, which constitutes a material breach and not related to the initiation of insolvency proceedings; and (ii) the termination of the PPA does not render the corporate death of the corporate debtor. Rather, in this case, the generation of electricity was intended for self-consumption of the Corporate Debtor, with only the excess/surplus power being sold to PSPCL.

4.6 The moratorium under Section 14 does not cover termination of a pre-existing contract entered into by the Corporate Debtor, such as termination of the PPA by PSPCL in terms of the provisions of Article 13.1 and 13.3 of the PPA for material breach for events of default on grounds other than insolvency. It is also pointed out, as per the agreement, any novation/amendment to the PPA has to be with the written consent of both parties.

5. The applicant has filed a rejoinder vide Diary No. 00755/03 dated 02.03.2022 whereby it has reiterated the averments made in the main application and denied the submissions by the respondent.

6. We have heard the submissions made by the learned counsels for the applicant and respondents and perused the record available.

7. In the case in hand, the issues for adjudication are as under

i) whether the contractractual dispute with PSPCL arises solely from or is related to the present Insolvency Resolution Process of the Corporate Debtor;

ii)Whether this adjudicating authority has jurisdiction over such contractual disputes;

iii) Whether the Resolution professional has the power to unilaterally alter the terms of Pre-existing contract after the initiation of the moratorium on the basis of the authority given in terms of the provisions of Section 20(2)(b) of the IBC, 2016.

Coming to issue No.1, the records in the present case indicate that the main business of the applicant is not power generation but the development of infrastructure. The following extract from the financial statement of the applicant dated 08.09.2015 for the financial year 2014-15 provides the principal business activity of the corporate debtor as under:

> "*The company has developed a multi utility Mega Food Park to meet the infrastructural needs of the food processing units in the State of Punjab with assistance from Ministry of Food Processing Industthe ries (MOFPI) which was inaugurated in December, 2014 and has deepen the companies presence in the countries Agri-Infrastructure space and serve as a foundation for its extension to the fast growing FMCG Sector.*
>
> *The company is optimistic that the Mega Food Park will emerge as one of its kind as a hub for farmers, processors and downstream users coupled with adequate financing, warehousing and other support*

functions and will have the best clients in the Food Processing Industry in Punjab in next few years."

8. The corporate debtor had initially installed a 4mw Biomass based Power Project (Generating Facility) on the premises, and accordingly, a power purchase/sale agreement (PPA) was executed between the corporate debtor and the respondents. It may be noted that the agreement also discloses the fact that the corporate debtor is a consumer (General Category) of PSPCL. The same can be inferred from the following Clauses of the PPA i.e. 2.2.1 and 4.1.0

2.0.0 ENERGY PURCHASE AND SALE

2.1.2 The Generating Company shall also generate matching MVARs corresponding to 0.99 PF lagging, so that there is no adverse effect on PSPCL's/PSTCL's system. Monthly average PF shall be computed from the ratio of KWH to KVAH injected into PSPCL's/PSTCL's system during the month.

2.1.3 In order to protect the interest of the PSPCL and the consumers in general, the Generating Company shall continue to supply the whole of the surplus generated power to the PSPCL at the rate prescribed in Article 2.1.1 above during the term of the agreement.

Further the Generating Company will not be allowed to erect radial feeders to any other Distribution Licensees/Consumers/Sister Concern from its Generating Facility

2.2.0 PURCHASE OF ENERGY BY GENERATING COMPANY
2.2.1 If the Generating Company. is also a consumer of the PSPCL, then the agreement setting out the terms and conditions for sale of power by the PSPCL to the Generating Company will be treated as distinct and separate from this Agreement for all intents and purposes i.e. all charges such as Advance Consumption Deposit, Service Connection Charges or any other charges payable by the Generating Company as a PSPCL's consumer as per relevant tariff will continue to be paid by Generating company without any reference to this Agreement. The energy supplied to the Generating Company during this period as measured on export meter of PSPCL (Import meter of Generating Company) shall be billed by the PSPCL at the tariff applicable to LS Industrial consumers (General Category) or sale rate of energy generated from the Project applicable for that period, whichever is higher.

4.0.0 PARALLEL & INTEGRATED OPERATION

4.1.0 The PSPCL shall allow the Generating Company to interconnect its Co-Generating Facility and operate it in parallel with the PSTCLPSPCL's system subject to the payment of monthly parallel operation charges or any other *charges as determined by the PSPCL from time to time and the terms and Generating provisions of this Agreement. The Generating Company shall run the C0 Facility as a part of integrated system to generate power with in parallel the grid and shall inject three phase 50 Hz (nominal) AC supply into PSTCUPSPCL's system at 66 KV. The Generating Company shall be under an obligation to comply with directions received from the PSPCLUPSTCL's Load Despatch Centre.*

9. The records also indicate that the applicant has stopped generating power since 2019 and has reduced to drawing power from the grid of PSPCL. Subsequently, vide letter dated 05.05.2021, the Resolution Professional has amended the Power Purchase Agreement dated 04.08.2014 by inserting following clause 13.7.0 after Clause 13.6.0 of the Agreement:

> "Notwithstanding anything contained in this agreement or in the implementation agreement dated 20.11.2013, the PSPCL shall not have any right to terminate this agreement if the generating company faces proceedings of Corporate Insolvency Resolution Process under the provisions of IBC until such time the Resolution Applicant takes over the management of affairs for the generating company and agrees to cure the default in terms of clause 13.3.0(ii)(b) of this agreement. For removal of doubt it is clarified that if the Resolution Applicant refuses to cure the default within 60 days of taking over the management of affairs, PSPCL may terminate the agreement at that stage."

10. It may be noted that the respondent-PSPCL initially sent a default notice dated 20.05.2022 to the applicant-corporate debtor. The relevant para's of the above notice is extracted hereinbelow:

"3. The Project was commissioned on 12.02.2016 and term of the PPA is up to 11.02.2036. However, M/s. IMFPL has unilaterally stop supplying power to PSPCL since February 2019.

4. Such failure on the part of M/s. IMFPL to supply the energy to PSPCL constitutes an event of default under Clause 13.1.0(c) & 13.3.0 (ii) of the PPA dated 04.08.2014.

5. In view of the above, in terms of Clause 13.3.0 (ii) of the PPA, you are hereby called upon to cure the event of default and resume supply of energy to PSPCL within sixty (60) days of receipt of this notice failing which PSPLC shall retain the right to terminate the PPA dated 04.08.2014 under Clause 13.3.0 (ii) (a&b) of the PPA.

6. This notice is being issued without prejudice to all other rights available with PSPCL."

Subsequently, the respondent PSPCL has issued a Memo No. 1356/57/IPC-412 dated 28.05.2021 regarding the termination of PPA dated 04.08.2014, whereby in Para 5 of the said notice, it has been stated that default notice was issued by PSPCL on 18.03.2021 with the request to cure the event of default and resume supply of energy. Further, it has been contended by the applicant that the above-said default notice dated 20.05.2021 has not been complied with as the agreement was terminated by the PSPCL on 28.05.2021 without the completion of 60 days of the default notice.

11. In the context of the aforementioned events, a reference is now made to Clause 13.0.0 of the PP Agreement relating to the event of default and termination as follows;

"**DEFAULT AND TERMINATION"** is extracted below for the sake of clarity:

13.0.0 Events of Default and Termination

13.1.0 The occurrence of any or combination of the following events at any time during the term of this Agreement shall constitute an Event of Default by the Generating Company:-

a. *Failure to pay to the PSPCL any amount payable and due under this Agreement within ninety(90) calender days after receipt of monthly invoice, or failure on the part of the generating company to use reasonable diligence in operating, maintaining or repairing, the generating facility, such that the safety of persons and property, the PSPCL's/PSTCL's equipment or the PSPCL's service to others is adversely affected, or*
b. *Failure or refusal by the generating company to perform its material obligations under the agreement, or*
c. *Failure to use non conventional Energy sources for generation of power as per NRSE Policy 2012*
d. *Abandonment of its generating facility by the generating company or the discontinuance by the generating company of service covered under the agreement unless such discontinuance is caused by force majeure or an event of default by the PSPCL.*

13.2.0 The occurrence of any of the following at any time during the term of this Agreement shall constitute an Event of Default by the PSPCL:-

a. *Failure to pay to the generating company any amount payable and due under this agreement within nenety (90) calender days after receipt of Monthly Invoice, or*
b. *Failure to use reasonable diligence in operating, maintaining or repairing the PSPLC's interconnecting facilities, such that the safety of persons or property, the generating company's equipment or the generating company is adversely affected, or*
c. *Failure or refusal by the PSPCL to perform its material obligations under this agreement.*

12. After going minutely through the PPA, it is evident that the issue relates to Energy Purchase and Sale/ Purchase of Energy By Generating Company/Parallel & Integrated Operation and there's also a provision for Dispute and Arbitration. This PPA was entered on 04.08.2014, while the CIRP was initiated on 28.02.2019. Thus this PPA was in operation much before the initiation of CIRP and is independent of the main business of the corporate debtor. As the above nature of the business of the CD indicates, but for the subsistence of the PPA, the Corporate Debtor would still remain as a 'going concern. Differently stated, by virtue of the PPA with the applicant not being the sheet-anchor of the Corporate Debtor's business and, consequently, of the CIRP, its continuation does not assume much significance for the successful completion of the CIRP. We also note that when the supply was stopped on 31.01.2020 by the PSPCL, the same was directed to continue under the order dated 03.02.2020 of this Adjudicating Authority and the status quo continued till today. In the Bill issued by the PSPCL, it is seen that the corporate debtor is shown as a consumer of electricity. It is also noted that all bills of the respondent -PSPCL have been paid during CIRP. In light of such facts, we are of the view that the PPA , which long preceded the CIRP, do not have any direct nexus with the insolvency of the corporate debtor.

13. In this context, we note that the Hon'ble Supreme Court in ***Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain, RP, SK Wheels Pvt. Ltd.(2021) ibclaw.in 167 SC*** discussed ***Gujarat Urja Vikas v. Amit Gupta & Ors****,* where it has held that

> *"In **Gujarat Urja** (supra), the contract in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). This Court observed that "….<u>NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor… The nexus with the insolvency of the corporate debtor must exist" (para 69)</u>. Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor."*

(**Emphasis Supplied)**

14. After going through the Power Purchase Agreement, we are of the view that the said agreement has nothing to do with the CIRP and the disconnection of the power supply was a direct result of the default of the provisions of PPA respectfully following the decision of the Hon'ble Supreme Court in Gujarat Urja Vikas (Supra), we reply the question No. (i) and (ii) framed in Para 7 in the negative. We, therefore, refrain from adjudicating the present dispute relating to PPA and the prayer of the applicant to declare Memo no. 1356/57IIPC-412 dated 28.05.2021 as premature and null & void and to issue directions to the respondents not to initiate any other action detrimental to the Corporate Debtor until the Resolution Applicant takes over the CD pursuant to the approval of Resolution Plan is not acceded to.

15. In the application, the RP has submitted that he has the power to amend the PPA under Section 20(2)(b) of IBC. The said provision is extracted below for the sake of clarity;

> *(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 ope,rations of the corporate debtor as a going concern.*
> *(2) For the purposes f 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;

16. Before delving into the applicability of the provision of Section 20(2)(b), it is essential to analyze the background of agreement which is sought to be amended by the RP. The said Power Purchase Agreement(PPA) was entered between the applicant and respondent on 04.08.2014 ,i.e., much before the initiation of the CIRP. As the business of the corporate debtor is completely divergent from power generation, we have already held this agreement was peripheral to the main business of the corporate debtor. This agreement, among others, had clearly defined arrangements not only for the purchase and sale of energy but also for the consequences of default and termination and made provisions for dispute resolutions and arbitrations. It will be apposite to extract the relevant clause relating to the dispute and arbitration of the agreement.

> *"16.0.0 DISPUTES AND ARBITRATION*
>
> *16.1.0. Both Parties shall comply with the provisions of this Agreement and discharge their respective obligations. In the event any Dispute arises out of or in connection with any of the terms of this Agreement between the hereto, the Parties shall attempt resolving the Dispute by mutual discussions, to be held between designated representatives of the Generating Company and the officer in-charge/ Power Purchase and Regulation Organization or any other officer authorized by him. In case the Dispute remains unresolved, it shall be resolved in accordance with the provisions of Clause 16.2.0.*
>
> *16.2.0 All Disputes between the Parties arising out of or in connection with this Agreement which the Parties are unable to resolve by mutual discussions in terms of by such procedure set out in Clause 16.1.0, shall be determined by arbitration, person or persons as the Commission may nominate in that behalf on receipt of application by either party (unless it is otherwise expressly provided in the license issued to the PSPCL or its successor entity) in terms of Parties, provisions of the Punjab. Electricity Act, 2003. The venue for arbitration shall be Patiala, Punjab.*

16.3.0 The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act provisions of the 1996 as amended from time to time.

16.4.0 Notwithstanding the existence of any question, disputes and difference referred to arbitration the Parties hereto shall continue to perform their respective obligation under this Agreement and the payment of any bill preferred shall not be with held by the PSPCL for any reason whatsoever including the pendency of the arbitration.” ***XXXXXX***

17. Thus, the proposed amendment by the RP is aimed at destabilising the long-existing arrangement between the corporate debtor and the respondent PSPCL. The question here is whether the Code gives unfettered powers to the IRP/RP to alter the agreements entered into by the corporate debtor prior to CIRP or whether such powers should be subject to rational considerations. It is also seen that in the present case the RP has not put up this issue of amendment of the agreement for the consideration and approval before the COC as admitted by the learned counsel for the RP during the proceedings on 07.10.2022. In the PPA, the RP had the option to find a way out by taking recourse to the Dispute and Arbitration Clause of the PPA. Such action by the RP has the potential to destabilize the business environment and adversely affect the continuation of the corporate debtor as a going concern. In view of the seriousness of the matter, we hold that the RP should have referred the matter to the COC for its discussion and approval before modifying the contract. We draw support from the decision of the Hon’ble NCLAT in ***Parag Sheth Interim RP of Digjam Ltd. vs. Sunil Kumar Agarwal RP for Digjam Ltd. and Ors. (13.08.2021 - NCLAT) : MANU/NL/0338/2021*** it is held as under:

“We are of the view that Section 20 (2)(b) of the IBC authorizes the IRP to enter into such contracts which were entered into before the commencement of CIRP. In this case there was a new contract of insurance after the commencement of CIRP. The Appellant was aware with this

situation that he cannot take such decision, therefore, he has circulated the quotations amongst the Members of CoC alongwith comparison of their premium amount. Thus, we are of the view that the aforesaid provision does not authorize the IRP to renew the insurance policy without approval of CoC at higher premium rate."

(emphasis supplied)

18. In view of the above discussion, we answer question No. 3 framed in Para 7 in the negative and reject the prayer of the RP to declare the order dated 05.05.2021 under section 20(2)(b) of IBC passed by the applicant Resolution Professional regarding amendment of PPA (Annexure A-5) as valid and binding on the Respondents in the interest of CIRP.

19. In the result, IA No. 412/2020 rendersh infructuous and IA No. 413/2021 is dismissed and both are disposed of accordingly.

IA No.427/2021

The present application is filed under Section 60(5) of the IBC, 2016 by Punjab State Power Corporation Limited (PSPCL) against Resolution Professional seeking modification of order dated 03.02.2020 passed by this Adjudicating Authority in IA. No. 31/2020, vide which directions have been issued to the applicant i.e. PSPCL to restore the power supply of the corporate debtor and to continue giving the power supply till further orders. Further, the present application was relisted for hearing on 07.10.2022.

2) The brief facts stated by the applicant in the present application are hereinbelow:

2.1 In the present case, the corporate debtor i.e. International Mega Food Park Limited, entered into a Power Purchase Agreement (PPA) dated 04.08.2014 with the applicant-PSPCL. The premise of the said PPA was that the corporate debtor would generate electricity by use of non-conventional energy sources and the applicant would purchase the generated energy that would be made available at the interconnection point at the Generating Company's facility. This is envisaged as a two-way system whereby the power generated by the Generating Company is transferred to PSPCL, and the Generating Company can draw power from the Corporation to start its co-generation plant.

2.2 It is stated by the applicant that the agreement states that if the Generating Company i.e. Corporate Debtor was to use the electricity generated by the Corporation for any purpose, it had to purchase the same by entering into a separate agreement, pay all relevant charges, become a Large Supply Industrial (LS) consumer of the Power Corporation and pay for such use. Thus it is stated that the agreement clearly differentiates the Power Purchase Agreement and use of electricity in the ordinary course of business, for which the signatory to the agreement would have to become a consumer of the Power Corporation and för becoming a consumer enters into a separate agreement.

2.3 The applicant further submits that the corporate debtor completely stopped generating electricity in February 2019 but continued to draw electricity generated by the Corporation from the interconnection point and started using the power generated by the corporation from the interconnection point for the everyday running of the Mega Food Park, without actually becoming a consumer of the Corporation.

2.4 It is further submitted that the electricity being utilized by the Corporate Debtor is' without actually being a consumer of the Corporation, and such use is impermissible as per the Electricity Act, 2003. The applicant has further confirmed that it does not intend to stop the supply of electricity to the corporate debtor, though the Power Purchase Agreement dated 04.08.2014 stands terminated vide order dated 28.05.2021

3) The respondent has filed its reply filed by Diary No.00877/01 dated 16.11.2021, stating the averments as hereinbelow:

3.1 It is submitted that the applicant cannot avail the remedy of modification of order dated 03.02.2020 as it will amount to review of its own order by this Adjudicating Authority.

3.2 The respondent has duly paid all the charges and levies, and there is no outstanding amount of any kind of PSPCL. The power supply available on the corporate debtor is in accordance with law and in respect of CIRP and the PPA entered into between the corporate debtor and applicant terminated wrongfully. It is further stated that the applicant should wait until the approval of the Resolution Plan and the corporate debtor is under moratorium and the PPA cannot be terminated.

3.3 The respondent has filed written submissions vide Diary No. 00877/5 dated 12.05.2022, whereby the averments made in its reply have been reiterated and references made to the judgment of Hon'ble NCLAT in Company Appeal (AT) (INS) 1504/2019 and Company Appeal (AT) (INS) 379/2020, where it has been held that power to review is not an inherent power.

4) We have heard the learned counsels for the applicant and respondent and carefully perused the records available.

5) As observed in our order for IA No 413/2021 and 412/2020, this Bench refrains from adjudicating on the impugned contract of the corporate debtor with the PSPCL for reasons recorded therein. However, we consider it a part of our duty to ensure that the corporate debtor continues its business operations smoothly during the moratorium period. To meet the business requirements of the corporate debtor, we grant a further extension till the decision on approval of Resolution Plan application on the condition that the corporate debtor applies for regular connection under PSERC Regulations, 2007 immediately after the decision on the resolution plan pending before this Adjudicating Authority.

6) In the circumstances, this application is allowed accordingly and disposed of.

2. <u>IA No.31/2020</u>

The present application is being filed by the Resolution Professional under Section 60(5) of the IBC, 2016 seeking direction against the respondents to restore the electricity connection, extend cooperation to the applicant which may be necessary for the applicant to carry out its duties and responsibilities as Interim Resolution Professional.

2) The brief facts of the present application as stated by the Resolution Professional is as below:

2.1 In the instant application, the Resolution Professional, submitted that the corporate debtor was put into CIRP vide order dated 28.02.2019 of this Adjudicating Authority and subsequently, moratorium was declared. It is further stated that after the public announcement in Form A as required under Regulation 6, IBBI(CIRP) Regulations, 2016, respondent No. 2 filed its claim with the Resolution Professional in respect of arrears of electricity for the period prior to the commencement of CIRP.

2.2 The Resolution Professional has submitted that no amount of electricity dues for the period after the commencement of CIRP till the date of this application is outstanding. It is stated that on the evening of 31.01.2020, the respondent disconnected the power supply without any information or notice. Further, it is alleged the disconnection of the power supply is on account of arrears of electricity dues for the period prior to the commencement of CIRP.

3) Pursuant to order dated 03.02.2020 of this Adjudicating Authority, the applicant vide Diary No. 1439 dated 20.02.2020 submitted an affidavit stating that the applicant has served the notice to respondent No. 1 and 2 along with the copy of the application by hand on 04.02.2020 and 07.02.2020 respectively. Additionally, the copy of the application has been duly served to respondent No. 2 by speed post, having receipt No. EP590647148IN, and the

same was duly delivered on 06.02.2020. Since the service has been done but none appeared on behalf of the respondents.

4) We have heard the submissions made by the learned counsel for the applicant and perused the records available. In view of our decision in IA No. 427/2021, the order dated 03.02.2020 of this Adjudicating Authority stands modified accordingly and the instant application i.e, IA No. 31/2020 is dismissed and disposed of.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

October 18, 2022
PB/ASH