

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERBAD**

IA No.560/2020
In CP (IB) No.420/7/HDB/2019
Under Section 60(5) of the IB Code, 2016

**In the matter of
M/s Lanco Amarkantak Power Ltd.**

Between:

M/s NRSKS Mines and Minerals Private Limited
Having its registered office at House No.4-4,
Ward No.7, ABVP, Parchur
Prakasam District, Andhra Pradesh,
Represented by its Whole time Director
Saikrishna Narra

.... Petitioner/
Applicant

And

Mr. SaurabhKumar Tikmani
Resolution Professional of –
M/s Lanco Amarkantak Power Limited
K.P.M.G. restructuring service LLP,
1st Floor, Loda Excelus, Apollo Mills Compound,
N.M. Joshi Marg, Mahalaxmi, Mumbai City,
Maharashtra – 400 011.
also at
M/s Lanco amarkantak Power Limited,
Plot No.4, Software Units Layout,
Infocity, Madhapur, Hyderabad – 81,

.... Respondent/
Resolution Professional

Date of Order: 21.09.2020.

Parties/Counsel Present:

For the Applicant : Mr. G. Sethu Ramarao
For the Respondent : Mr. S. Niranjan Reddy, senior counsel
along with Ms. Rubiana Khatoon and
Ms. Amrita, counsels.



Per: Shri. K. Anantha Padmanabha Swamy, Member Judicial.

ORDER

1. Under consideration is an Interlocutory Application bearing IA No.560/2020 in CP (IB) No.420/7/HDB/2019 filed by M/s. NRSKS Mines and Minerals Private Limited against the Resolution Professional of the Corporate Debtor i.e., M/s. Lanco Amarkantak Power Limited, under Section 60(5) of the IB Code, 2016, *inter-alia*, seeking following reliefs:-
 - a. To declare that the steps taken by the Resolution Professional for inviting fresh tenders with dubious nature without following due process of law is arbitrary, illegal and the same is not in accordance of law.
 - b. To declare that all the steps taken by the Resolution Professional in inviting fresh tenders is vitiated by law and the same is liable to be set aside in the interest of justice.
2. Brief facts leading to filing of the instant Application, as stated by the Applicant, is as under:-
 - a. That the Corporate Debtor herein was admitted for CIRP on 05.09.2019 and the Respondent herein was appointed as Interim Resolution Professional. Later, he was confirmed as Resolution Professional.
 - b. That the Corporate Debtor during the course of its ordinary business invited tenders for transportation of coal from South Eastern Coal Fields Limited, Coal mines from across the country to the site of its business operations at Unit-I and Unit-II for both Linkage Coal and e- auction coal and the Applicant herein has submitted the bid with all relevant information. The Corporate Debtor being satisfied that the Applicant Company stood as L-1 in the bidding process and has met all the requirements of tender, entered into Transportation Contract/work orders

for unit-I & II linkage coal vide order No. 4100124570, 4100124571 dated 18.02.2019 and e-auction coal work order for Unit-I and II vide order No. 4100124663, 4100124666 dated 07.03.2019 respectively on the terms set out by the Corporate Debtor including the transportation charges.

c. That the terms of the contract are governed by Indian Contract Act, 1872. The main features of the Contract and the price validity set out in all work orders is as follows:

a) Contract Validity: Contract validity shall remain for one year i.e. from 1st April 2019 till 31st March 2020 and is extended to another year i.e. from 1st April 2020 to 31st March 2021 based on your performance, unless terminated earlier in accordance with Clause 6 – General Terms & Conditions.

b) Price Validity: Above rates will be valid for 1 year i.e., from 1st April 2019 till 31st March 2020 (subject to revision of diesel component DC) with an escalation of 5% (only on Work Component, WC) in the rates for the 2nd year i.e. from 1st April 2020 to 31st March 2021.

c) Termination: Sub clauses (a) (i) to (v), (b) are general and set out for the benefit of Corporate Debtor and where as sub-clause(c) reads thus: *the parties may terminate this work order at any time during the Term of the work Order, by way of written notice, from the terminating party to the other party at least 180 days in advance of such termination.*

d. That the Resolution Professional is liable to honour the terms and conditions of contract and the Law covered by it and he shall not resort to

take any steps which frustrate the rights of the parties under contract dated 18.02.2019 and 07.03.2019, without any rhyme or reason, the Resolution Professional cannot take steps to invite fresh tenders vide Tender No. LAPL/COAL/TRANS 2020-21 dated 21.03.2020 for Unit-I & nit-II.

- e. That the contract is not frustrated under clause 6 of Sub Clause (a) I to V and (b) of termination, as such the Resolution Professional is liable to issue advance notice of 180 days for terminating the present contract which is in force till 31.03.2021 by giving reasons to terminate the Contract/work orders. In the present case on hand no such reasons were given by the Resolution Professional as to why the Respondent has called fresh tenders to transportation of Coal.
- f. That no waiver is given to the RP to terminate the contract which is in force without following the terms and conditions of contract and the law covered by it. The Resolution Professional knowing the condition that an advance notice of 180 days is to be given and has to follow due process of law by giving the reasons for terminating the contract and to avoid the procedure contemplated under the contract and Indian Contract Act, 1872 for termination and to overcome the same calculatingly the Resolution Professional called for fresh tenders with ill-will impliedly to terminate the Contract without coming on record, thus, it is clear that the Resolution Professional is not discharging his duties in the best interest of Corporate Debtor.
- g. The Resolution Professional may come up with a plea that he has not taken any steps to terminate the contract which is in force till 31.03.2021, however, on perusal of the tender form and steps taken by the Resolution

Professional inviting fresh bids confirms that he is moving towards the terminating of Contract/work orders issued for Unit I & II dated 18.02.2019 and 07.03.2019 respectively which is arbitrary, illegally without following due process of law.

- h. To terminate the above stated existing contracts/work orders dated 18.02.2019 and 07.03.2019, the Resolution Professional must respect the clauses of the same and strictly comply with the provisions of Contract Act, 1872. In the present case on hand the Resolution Professional has not followed due process of law, no Notice was issued to the Applicant before inviting the tenders for transportation of coal and same shows that the Resolution Professional has travelled beyond the scope of law as such calling fresh tenders for Transportation of Coal by the Resolution Professional is arbitrary, illegal and not in accordance of Law.

3. Counsel for the Respondent/Resolution Professional filed its counter, inter-alia, stating as under:-

- i. That the Corporate Debtor sources fuel for operational Units I & II from South Eastern Coal Field Limited (SECL) (linkage coal), in addition to procurement through open market and e-auction. To this end, the Corporate Debtor enters into work orders/contracts on a yearly basis for transportation and handling of coal with transporters/contractors after following a strict tender process. It was a regular practice of the Corporate Debtor to float tenders in the market to get the best possible price.
- ii. That on 30.01.2019, the Corporate Debtor floated a tender vide Tender No. LAPL/COAL/TRANS/2019-2020/01 for transportation of coal at a rate contract basis during the financial year 2019-2020 from various coal

fields of SECL located across the country to its power plant in Chhattisgarh for both linkage coal and e-auction coal.

- iii. That following the issuance of the tender, the Corporate Debtor received several competitive bids from prospective transporters/contractors. Based on the review and analysis of the bids received by the Corporate Debtor, the management of the Corporate Debtor appointed three transporters /contractors viz. Indermani Minerals (India) Private Limited, Kandoi Transport Limited and the Applicant hereinabove, for transportation and handling of coal at near identical key terms and conditions.
- iv. Thereafter on 18.02.2019, the Corporate Debtor executed two work orders/contract each (for Units I and II separately) with the three selected contractors for the transportation of coal (linkage road) to the plant of the Corporate Debtor. Subsequently, on 07.03.2019, the Corporate Debtor executed two work orders/contracts each (for Units I and II separately) with the three selected contractors for the transportation of e-auction coal through road mode to the plant of the Corporate Debtor. The key terms and conditions of these work orders/contracts were almost identical.
- v. That all the work orders/contracts executed by the Corporate Debtor with the three contractors had an identical contract validity clause. Simply put, it was decided between the parties that the work orders/ contracts would be valid for a period of one year (i.e., from 1 April 2019 to 31 March 2020) and thereafter, extendable by another one year period (i.e. from 1 April 2020 to 31 March 2021) at the discretion of the Corporate Debtor and based on the performance of the contractor. The relevant clause for the present purposes has been reproduced herein below:



"4. Validity: [...]

Contract Validity – Contract validity shall remain for one year i.e. from 1st April 2019 till 31st March 2020 and is extendable to another year i.e. 1st April 2020 to 31st March 2021 based on your performance, unless terminated earlier in accordance with Clause 6 of General Terms & Conditions. [...]

- vi. Considering that the work orders/contracts entered into with the then existing three transporters/ contractors were due to expire on 31.03.2020 and with an aim to reduce the cost of transportation of coal, the Corporate Debtor, floated fresh tender with Tender No. LAPL/COAL/TRANS/2020-21/01 dated 21.03.2020 and invited coal transporters to submit their technical and price bids for handling and transportation of coal offered under road mode by SECL for its power station during the financial year 2020-2021. This was a regular practice of the Corporate Debtor to float tenders in the market even before commencement of CIRP.
- vii. While the last date for submission of bids was initially on 27.03.2020, the Corporate Debtor was constrained to extend the last date for submission of bids several times to 31.07.2020, on account of the ongoing COVID-19 crisis and the resultant lockdown. The Corporate Debtor has received 11 bids along with the requisite earnest money deposit from the prospective bidders including Indermani Minerals (India) Private Limited and Kandoi Transport Limited. However, the bids are yet to be opened and evaluated.
- viii. That considering the tender process could not be completed within the initially stipulated time due to the Covid-19 situation, on 27.03.2020, the Corporate Debtor sent an email to the Applicant stating that it has extended the current work orders for a period of another three months

(i.e., until 30.06.2020). This mail was primarily sent to the Applicant since the work orders were valid for a period of one year only and had already expired on 31.03.2020 due to efflux of time. Similar emails were also sent by the Corporate Debtor to the other two appointed contactors i.e. Indermani Minerals (India) Private Limited and Kandoi Transport Limited on 27.03.2020 to extend their work orders/contracts until 30.06.2020.

- ix. The Applicant did not protest to the above referred email dated 27.03.2020 sent by the Corporate Debtor and tacitly accepted the three-month extension period provided by the Corporate Debtor. In fact, the Applicant continued to provide its services at the existing rates and terms and conditions for the extended period. However, the Applicant then suddenly turned around and took a contrary stand few months later when the tender process floated by the Corporate Debtor had reached a very advanced stage. That on 09.06.2020 the Corporate Debtor sent an email stating that the work orders issued to it is valid for two years and without providing much details or any justification for asserting the said position.
- x. Thereafter, the Applicant has now approached this Adjudicating Authority, seeking directions, *inter-alia*, to set aside the steps taken by the Corporate Debtor in inviting fresh tender for handling the transportation of coal. That this application has been preferred by the Applicant after a lapse of almost five months from the date when the impugned tender process was initiated i.e., on 21.03.2020 and when the tender process is nearing completion.
- xi. That the Clause 4 of the work orders/contract (which is identical in all the work orders/contract), has been reproduced below:

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“4. Validity: [...]

Price Validity: Above rates will be valid for 1 year i.e. from 1st April 2019 till 31st March 2020 (subject to the revision of Diesel Component, DC) with an escalation of 5% (only on work component, WC) in the rates from the 2nd year i.e. 1st April 2020 to 31st March 2021 as explained below:

[...]

Contract Validity – Contract validity shall remain for one year i.e. from 1st April 2019 till 31st March 2020 and is extendable to another year i.e. 1st April 2020 to 31st March 2021 based on your performance, unless terminated earlier in accordance with Clause 6 of General Terms & Conditions. [...] (emphasis supplied).

xii. That a bare perusal of the above referred clause would make it clear that the contract would be valid for a period of one year (i.e. from 1 April 2019 to 31 March 2020) and would automatically expire after lapse of the initial one year period due to efflux of time. However, the employer i.e., the Corporate Debtor has been given the discretion to extend the contract for a further period of one year i.e., from 1 April 2020 to 31 March 2021 based on the performance of the contractor, provided that the contract is not already terminated by the employer within the initial one year period in accordance with Clause 6 of the General Terms and Conditions of the contract.

xiii. That the above interpretation of Clause 4 is strictly in line with the intention of the parties, which can be gathered from the conduct of the parties themselves. In this context, reference may be made to the email of 27.03.2020 sent by the Corporate Debtor to the Applicant stating that the validity of the four work orders/contracts have been extended for an additional period of another three months i.e. until 30.06.2020, which otherwise came to an end on 31.03.2020. That the Applicant never objected to such a communication nor raised any concern, thereby tacitly showing that it agreed with the view of the Corporate Debtor that the


- work order/contracts needed to be specifically extended if the Corporate Debtor wished to avail any services there under.
- xiv. That this position can be further highlighted that the additional work done by the Applicant in the period between 01.03.2020 to 30.06.2020 was carried out at the existing rates that was agreed upon by the parties for the first year period. If the Applicant had in fact intended that the contract was to automatically get extended for the second year period, it ought to have emphasized on giving effect to the price escalation clause which was applicable for the services to be provided in the second year. However, the Applicant did not raise this issue and continued to provide its services at the rates decided for the first year thereby strongly indicating that the applicant itself also agreed that the contract had expired after the first year period i.e., on 31.03.2020.
- xv. That the steps taken by the Respondent to initiate fresh tender process was in furtherance of its duties under the provisions of the IBC and was in order to ensure that the Corporate Debtor is kept as a going concern.
- xvi. That the Applicant is seeking a direction of specific performance against the Corporate Debtor, which is otherwise barred by Law.
- xvii. That the judicial decisions in the cases of Indian Oil Corporation Limited v. Amritsar Gas Services and others, ((1991) 1 SCC 533) and Her Highness Maharani Shantidevi Vs. P. Gaikwadv Savijbhai Haribhai Pael, (AIR 2001 SC 1462) suggest that the mere existence of a termination clause may lead to the contract being 'determinable' and hence, not specifically enforceable.
- xviii. The Hon'ble Delhi High Court in the case of Rajasthan Breweries Limited v. The Stroh Brewery Company, (2000 (55) DRJ (DB) is

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relevant where the Court went on to hold that all commercial contracts are determinable contracts.

- xix. The Rajasthan breweries case *Supra* has been relied upon and subsequently followed by the decision of The Hon'ble Delhi High Court in the case of Rainbow Electric Supply Co. v. North Delhi Power Limited, (2206 (87) DRJ 307). Therefore, while termination of a private commercial contract for convenience is permissible even in the absence of a contractual right to that effect, if such termination is found to be wrongful, then the remedy lies in damages.
- xx. That even if the subject work orders/contracts are assumed to be terminated wrongfully, the reliefs sought by the Applicant ought not be granted by this Adjudicating Authority as its relief lies elsewhere, if at all.
- xxi. That the tender process is currently in an advanced stage and lot of time, effort and resources have been invested in carrying out the said process so as to ensure that the Corporate Debtor is kept as a going concern. As such, any order setting aside the process may adversely affect the Corporate Debtor and will also cause irreparable harm and injury to the Corporate Debtor.

Reiterating above, counsel for the Respondent prayed to dismiss the Application.

4. Counsel for the Applicant filed its Rejoinder, reiterating the averments made in the Application, denying the allegations made in the counter and further prayed to allow the Application as prayed for.
 5. Heard both the sides and perused the record.
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6. It is a fact on record that the Applicant herein was awarded a contract/work order for transportation of coal to the Corporate Debtor vide work orders for unit-I & II linkage coal vide order No. 4100124570, 4100124571 dated 18.02.2019 and e-auction coal work order for Unit-I and II vide order No. 4100124663, 4100124666 dated 07.03.2019 respectively. Now that the Applicant herein has filed the instant Application seeking relief against the action of Resolution Professional for calling of bids and seeking quotation for award of contract of supply for the year 2020-21.
7. Relevant clauses relating to validity of the contract as per the agreement entered into between the applicant and the Corporate Debtor is as under:-

"4. Validity: [...]

Price Validity: Above rates will be valid for 1 year i.e. from 1st April 2019 till 31st March 2020 (subject to the revision of Diesel Component, DC) with an escalation of 5% (only on work component, WC) in the rates from the 2nd year i.e. 1st April 2020 to 31st March 2021 as explained below:

[...]

Contract Validity – Contract validity shall remain for one year i.e. from 1st April 2019 till 31st March 2020 and is extendable to another year i.e. 1st April 2020 to 31st March 2021 based on your performance, unless terminated earlier in accordance with Clause 6 of General Terms & Conditions.

[...].

8. From a bare reading of the above clause relating to contract validity, it is clear that the contract is not automatically determinable by passing of time of one year. A plain reading given to the clause i.e., "*extendable to another year i.e., from 01.04.2020 to 31.03.2021 based on your performance, unless terminated earlier in accordance with clause 6 of general terms and conditions*" indicates that the contract is extended by default for one more year i.e., from 01.04.2020 to 31.03.2021 subject to fulfillment of two essential conditions (1) Performance of the Applicant (2) earlier termination in accordance with clause 6 of general terms and conditions. Thus the contract shall be extended, if it is

another year i.e.

unless terminated

not terminated earlier and if the performance of the contractee is satisfactory. Thus satisfactory performance and non-termination leads to automatic extension of the contract. The term "*extendable*" should be appreciated with reference to the context in which it is used. It does not mean that a option is given to the Corporate Debtor to extend the contract, on the contrary, it means that subject to the satisfaction of two essential conditions i.e., (1) satisfactory performance and (2) non-termination, the contract shall be extendable.

9. In the instant case, the Resolution Professional has extended the tenure of the Applicant by a period of 3 months, in my opinion, obviously the Resolution Professional would not have done so, if the performance of the Applicant was not satisfactory. Therefore, it is clearly indicates that the performance of the Applicant is satisfactory. Thus both the ingredients i.e., satisfactory performance and non-termination which are essential pre-conditions for an automatic extension of the contract for a period of another one year are present here.
10. In view of the above observations, the steps proposed to be taken by the Resolution Professional such as inviting fresh tenders etc., are not warranted.
11. Accordingly, IA No. 560/2020 is disposed as allowed.



K. ANANTHA PADMANABHA SWAMY
MEMBER JUDICIAL

Rathi/Rk