



IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT – VI

Item No.2

I.A/1291/2022 IN IB-81/PB/2019

IN THE MATTER OF:

ORIENTAL BANK OF COMMERCE

...FINANCIAL CREDITOR

VERSUS

DEV DENSO POWER LTD.

...CORPORATE DEBTOR

Order under Section 35(1)(b)&(n), Section 36(3)(a)&(d), IBC,2016

Order delivered on: 26.09.2023

CORAM:

SHRI. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

ORDER

Order pronounced in open Court vide separate sheets.

I.A/1291/2022 in IB-81/PB/2019 stands dismissed.

SD/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT VI, NEW DELHI**

I.A/1291/2022 IN IB-81/PB/2019

*Application under Section 35(1)(b) & (n), Section 36(3)(a) &(d),
IBC,2016.*

IN THE MATTER OF:

ORIENTAL BANK OF COMMERCE

...FINANCIAL CREDITOR

VERSUS

DEV DENSO POWER LTD.

...CORPORATE DEBTOR

AND IN THE MATTER OF:

POOJA BAHRY

LIQUIDATOR OF DEV DENSO POWER LTD.

OFFICE AT: 59/27 PRABHAT ROAD,

NEW ROHTAK ROAD, NEW DELHI – 110005

...APPLICANT

VERSUS



1. Uttar Pradesh Rajkiya Nirman Nigam Limited

Having Its Registered Address at: Vishweshwaraiya

Bhawanvibhuti Khand Gomti Nagar

Lucknow, Uttar Pradesh - 226001

...RESPONDENT NO. 1

2. Uttar Pradesh Power Transmission Corporation Limited

Having Its Registered Address at: Shakti Bhawan,

14-A Ashok Marg Lucknow, Uttar Pradesh — 226001

...RESPONDENT NO. 2

Coram:

Shri. Bachu Venkat Balaram Das, Member (Judicial)

Shri. Rahul Bhatnagar, Member (Technical)

Counsel for the Applicant: Mr. Abhishek Anand

Counsel for the Respondents: Md. Altaf Mansoor, Mr. Rajesh
Pathak

Order Pronounced on: 26.09.2023



ORDER

PER-RAHUL BHATNAGAR, MEMBER (TECHNICAL)

1. The present Application has been filed by the Applicant under Section 35(1)(b) & (n), Section 36(3)(a) &(d) of the IBC, 2016 praying for the following reliefs:

(a) Allow the present Application; and

(b) Direct the Respondent No. 1 to deposit an amount of Rs. 1,72,58,099.60/-in the Liquidation Account of the Corporate Debtor, as reflected in the balance sheet of the Corporate Debtor being an asset of the Corporate Debtor; or

(c) In the alternative, direct the Respondent No. 1 to forthwith deposit the following amounts, being the admitted project-wise dues to the Corporate Debtor being an asset of the Corporate Debtor and thus is required to be formed part of the Liquidation Estate in terms of Section 36 of the Code:

i. Rs. 89,12,000/- plus Interest @ 18% p.a. from 30.11.2018 due as payment against work done for substation at Dharampur; and



- ii. *Rs. 15,90,865/- plus Interest @ 18% p.a. from 23.05.2017 due as payment against work done for substation at Khurja; and*
- iii. *Rs. 59,17,000/- plus Interest @ 18% p.a. from 24.04.2018 due as payment against work done for substation at Panwari.*

which is required to be formed part of the Liquidation Estate in terms of Section 36 of the Code and such recovery is being made under Regulation 39 of the IBBI (Liquidation Process Regulations) 2016 for maximization of the value of assets of the Corporate Debtor; or

(d) Pass such other order as this Adjudicating Authority may deem fit and proper in the facts and circumstances of the instant case.

2. The brief facts as averred by the Applicant for filing the present Application are as follows:

- i. That Between 2010 and 2011 the Respondent No. 1 entered into various works Agreements/LOIs with the Corporate Debtor for



which outstanding amounts remain due and payable by the Respondent No. 1 to the Corporate Debtor.

- ii. That vide Office Memorandum dated 09.10.2018, Respondent No. 2 intimated that with respect to the construction of the 132KV substation at Dharampur, Rs. 91.62 lakhs was due to be released to the Respondent No. 1. The said O.M. further stated that the amount of Rs. 91.62 lakhs was adjusted against the excess payment of Rs. 1086.41 lakhs which was available with the Respondent No. 1 for construction of another works project (i.e. for construction of 220KV Motiram Adda (Gorakhpur)). It was, accordingly, stated that the monies for the 132KV substation at Dharampur had been adjusted and was available with the Respondent.
- iii. That, subsequently, vide order dated 11.06.2019 this Adjudicating Authority admitted the Application filed under Section 7 of the Code by one of the Financial Creditors of the Corporate Debtor, i.e. Oriental Bank of Commerce (merged with Punjab National Bank), and initiated the Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor, and



appointed Ms. Pooja Bahry as the Interim Resolution Professional ("IRP").

- iv. That, thereafter, upon taking over the management of the affairs and the powers of the board of directors of the Corporate Debtor in terms of Section 17 of the Code, the IRP sent letters and emails dated 27.06.2019 to the Respondent No. 1 and 2 intimating of the commencement of CIRP against the Corporate Debtor and appointment of the IRP. The IRP further requested the Respondents to pay the outstanding dues payable to the Corporate Debtor for the projects at Dharampur, Khurja and Panwari for which work had been completed on 01.12.2014, 30.12.2013 and 05.03.2016 respectively (i.e. much before the initiation of CIRP against the Corporate Debtor).
- v. That the Resolution Professional ("RP") wrote an email dated 24.07.2019 to Respondent No. 2 requesting that the amount of Rs. 150.79 lakhs as specified in the letter dated 18.07.2019 be released as soon as possible so that the debt outstanding to the Corporate Debtor could be paid at the earliest, as the amount due to the Corporate Debtor from the Respondent No. 1 forms a part of the assets of the Corporate Debtor.



- vi. That as there was still no response from the Respondents, the RP was constrained to, once again, send another letter to the Respondents dated 18.12.2019, reiterating the request made in the previous letters, and further stating that despite numerous telephonic discussions with the Respondent No. 1 on the matter, the amount due to the Corporate Debtor had not been paid. It was further reiterated that vide letter dated 18.07.2019 the Respondent No. 1 had written to the Respondent No. 2 to release the amount of Rs. 150.79 lakhs to be paid to the Corporate Debtor, where after the RP had earnestly requested the Respondent No. 2 to release the dues as soon as possible, so that the debt outstanding to the Corporate Debtor could be paid at the earliest, as the amount due from Respondent No. 1 formed a part of the assets of the Corporate Debtor, however the amounts had not yet been released.
- vii. That subsequently, this Adjudicating Authority passed the order of liquidation dated 06.09.2021 against the Corporate Debtor and appointed the Applicant as the Liquidator of the Corporate Debtor.



viii. That after the appointment of the Applicant as the Liquidator, the Applicant wrote to the Respondents vide email and letter dated 16.09.2021 informing the Respondents of the initiation of Liquidation Process of the Corporate Debtor and the appointment of the Applicant as the Liquidator. The Applicant/Liquidator further stated that as on 31.03.2020 the outstanding recoverable amount payable by the Respondent No. 1, as reflected in the audited Balance Sheets of the Corporate Debtor was Rs. 1,72,58,099.60. The Respondent No. 1 was requested to pay the amount due to the Corporate Debtor as the same formed a part of the Liquidation Estate of the Corporate Debtor. It was further reiterated that during the CIRP period the Applicant (as the RP) had made numerous requests for payment of the outstanding amount to the Corporate Debtor, as well as reiterating that the Respondent No. 1 had addressed letters dated 18.07.2019 and 20.12.2019 to the Respondent No. 2 regarding release of amounts to the Corporate Debtor.

3. The Respondent No. 1 has filed its reply stating as follows:



- i. That the Respondent No. 1 i.e., Uttar Pradesh Rajkiya Nirman Nigam Limited (hereinafter referred to as UPRNN for the sake of brevity) is a Government of Uttar Pradesh undertaking which executes construction works awarded by government, semi-government and government undertaking through tender participation. In all the projects awarded by Respondent No.2 to Respondent No.1 through tender, Respondent no.1 executes the work.
- ii. That Respondent no.2 awarded the work of various substations in the state of Uttar Pradesh to Respondent No.1. Upon the Applicant's willingness to work, Respondent No.1 subcontracted the work of three substations to the Applicant through Letters of Intent (LoI). The role of Respondent No.1 in the present contract was solely to provide project management services to engage the contractor, like the Applicant. The Respondent No.1 issued three LoIs for the substations at Khurja, Panwari, and Dharampur to the applicant.
- iii. That the terms and conditions regarding these three substation projects were mentioned in the LoIs and connected documents.



- iv. That with respect to the Khurja and Dharampur projects, it is stated that Respondent No.1 has made excess payments totaling Rs. 1,93,306.98/-, and the final bill has not been submitted by the Applicant to date. Additionally, an amount of Rs. 15 lakhs for unapproved variations in the Khurja project could only be paid after approval from the UP Power Transmission Corporation.
- v. That Regarding the Panwari project, there is a pending amount of Rs. 50,61,888/- after the reconciliation of accounts. The payment of this pending amount is subject to the submission of bills and tax certificates as per the terms of the LoI/Agreement.
- vi. That the LoI and connected letters themselves indicate that the present application filed by the liquidator is not maintainable in its current form. The clauses in all three LoIs state that the entire transaction shall comply with the terms and conditions of UPPTCL Form A & B. Furthermore, Clause 38 of Form A provides for arbitration in case of any dispute between the parties, the matter may be referred to arbitration for the resolution of disputes. Additionally, Clause 38A of the same



Form A of Respondent No. 2 states that any action taken or proceeding initiated on any of the terms of the agreement shall be within the jurisdiction of the High Courts of Judicature at Allahabad.

- vii. That the application filed by the liquidator seeks recovery of a certain amount from the respondent, but the applicant has failed to either refer to arbitration or make an appropriate application in accordance with the law. Therefore, the Applicant's claim through the present application is not maintainable.
- viii. That the applicant has never submitted any bill for payment, and therefore, there is no occasion to finalize the accounts. Payment of bills is subject to the terms and conditions of the LoI and agreement. Any reference to internal letters from Respondent No. 2 and Respondent No. 1 will not hold the Respondent liable, as these letters are merely approximations of accounts without any conciliation or verification.
- ix. That any outstanding amount shown in the Applicant's own balance sheet cannot be said to be admitted amount and does not entitle them to claim that amount from the Respondent. The



avermment that any amount shown to be recoverable from the other party becomes part of the liquidation estate is completely misconceived.

- x. That it is the Applicant who failed to adhere to the terms of the LoI/Contract and is attempting to shift their own failure onto the Respondent.

4. The Respondent No. 2 has filed its reply stating as follows:

- i. That no liability can be fastened on UPPTCL as it did not have any privity of contract with Dev Denso Power Ltd. and all payments have already been made to UPRNN, which was the agency under contractual liability to make payments to Dev Denso. Mere references to UPPTCL in the agreement between the corporate debtor and UPRNN does not fasten any liability on UPPTCL.
- ii. That no payments were made by UPPTCL directly to Dev Denso Power Ltd. and UPPTCL has already made all payments to UPRNN for the substations.



- iii. That the Respondent No. 2/UPPTCL has in fact paid in excess of the amount due to UPRNN and claimed by Dev Denso in the present IA.
- iv. That as the Respondent No. 2 did not have a contractual relationship with the corporate debtor, it did not make any payments directly to the corporate debtor. As per the understanding between UPRNN and UPPTCL, UPPTCL was to make payments regarding the construction work to UPRNN once UPRNN had verified the construction. Payments were to be made on the actual cost of construction. Thereafter, it was the responsibility of UPRNN to forward these payments to the contractor, who was engaged in the construction of the substation, in the instant matter the corporate debtor. In case, UPRNN has failed to forward the payment to the corporate debtor, the said default cannot be fastened on UPPTCL as UPPTCL has in good faith already forwarded the amounts to UPRNN.

5. We have heard the submissions made by all the parties. The present Application has been filed by the Applicant seeking



direction to the Respondent No. 1 to deposit an amount of Rs. 1,72,58,099.60/-in the Liquidation Account of the Corporate Debtor, as reflected in the balance sheet of the Corporate Debtor being an asset of the Corporate Debtor. The said amount is in lieu of various works Agreements/LoIs entered between 2010 and 2011 by the Respondent No. 1 with the Corporate Debtor for which certain outstanding amounts remain due and payable by the Respondent No. 1 to the Corporate Debtor. The Respondent No. 1 in its reply has stated that the Corporate Debtor represented by the Applicant had failed to adhere to the terms of the LoI. Be that as it may be, it is evident that the amount for which the present Application has been filed is the subject matter of the LoIs executed between the Respondent No. 1 and the Corporate Debtor represented by the Applicant. It has been rightly stated by the Respondent No. 1 that the Applicant ought to have adhered to the terms and conditions laid down in the above stated LoIs executed between the parties. The Applicant on the other hand has relied on Section 35(1)(b) &(n) and Section 36(3)(a) of the IBC, 2016 and stated that the since the amount is reflecting in the balance sheet of the Corporate Debtor, the Liquidator is bound to recover the



same. The Respondent No. 1 has denied that the amount as claimed by the Liquidator is due and payable and has rather admitted that after reconciliation of accounts, it was found that excess payment of Rs. 19,88,000/- was made in respect of the project in Dharampur and an amount of Rs. 50,61,888/- is due for the project in Panwari. However, no bills were raised for the same.

6. The jurisdiction of this Adjudicating Authority in this matter is limited as the amount claimed by the Liquidator arises out of contractual agreement between the parties which is outside the purview of the jurisdiction of this Tribunal in light of the various judgements of Hon'ble Supreme Court specifically in the matter of *Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors., Civil Appeal No. 9241 of 2019* wherein it was held as follows:

67. Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing so, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute



is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

- 7.** We would like to refer to a judgment of Hon'ble NCLAT in the matter of *Shri Ramachandra D. Choudhary RP of M/s. Oasis Tradelink Ltd. Vs. Bansal Trading Company, Company Appeal (AT) (Insolvency) Nos. 810-812 & 815 of 2020* wherein the Hon'ble NCLAT while relying on the abovementioned judgment of the Hon'ble Supreme Court held as follows:

15. Keeping in view the aforementioned ratio in 'Gujarat Urja Vikas Nigam Limited' (Supra), we hold that the remedy for recovery of debts, disputed or not, cannot be determined in summary proceedings and the Code does not contemplate adjudication of any such nature. Any such steps taken under Section 60(5) of the Code before the Adjudicating Authority, would tantamount to bypassing/shortcircuiting the Judicial Proceedings. Keeping in view the submissions of the Respondents, to adjudicate whether the amount is due and payable by the 'sundry debtors' who have raised disputes, would require calling for evidence and cannot be proceeded under the Code. The Appellant is well within its



powers to take appropriate steps to file legal proceedings, if the circumstances so warrant. The Code expressly provides for the Liquidator to institute or defend any Suit, Prosecution or other Legal Proceedings, Civil or Criminal, in the name or on behalf of the 'Corporate Debtor'.

- 8.** In light of the above, it is evident that the Corporate Debtor represented by the Applicant had carried out works in lieu of Agreements/LoIs entered between 2010 and 2011 by the Respondent No. 1 with the Corporate Debtor. However, keeping in view the submissions of the Respondents, to adjudicate the amount which is due and payable by the Respondents who have raised disputes it would require calling for evidence and as such cannot be proceeded under the IB Code, 2016. The Applicant is well within its powers to take appropriate steps to file legal proceedings, if the circumstances so warrant. The Code expressly provides for the Liquidator to institute or defend any Suit, Prosecution or other Legal Proceedings, Civil or Criminal, in the name or on behalf of the Corporate Debtor. Therefore, the



Liquidator may approach an appropriate forum to recover the dues from the Respondents.

9. IA/1291/2022 stands dismissed and accordingly disposed off in terms of the above order.

Let a copy of order be served to parties.

SD/-	SD/-
(RAHUL BHATNAGAR)	(BACHU VENKAT BALARAM DAS)
MEMBER (TECHNICAL)	MEMBER(JUDICIAL)