

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
SPECIAL BENCH (video Conference)

CORAM: HON'BLE SHRI K. ANANTHA PADMANABHA SWAMY - MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 03.09.2020 AT 11.00 A.M. THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA No.496/2020 in CP(IB) No.184/7/HDB/2019
NAME OF THE COMPANY	Meenakshi Energy Ltd
NAME OF THE PETITIONER(S)	State Bank of India
NAME OF THE RESPONDENTS(S)	Meenakshi Energy Ltd
UNDER SECTION	7 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-Mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-Mail & Telephone No.	Signature

ORDER

IA No.496/2020

1. Matter listed for pronouncement of Orders in IA No.496/2020 in CP (IB) No.184/7/HDB/2019 through Video Conference in view of Notice of the Headquarters dated 17.04.2020 read with Notice dated 03.05.2020.
2. Mr. Kumar Mihir, counsel for the Applicant and Mr. Rajesh, counsel for the Respondent/RP appeared through video conference.
3. Orders pronounced vide separate order. IA No.496/2020 in CP(IB)No.184/7/HDB/2019 is disposed of.


MEMBER JUDICIAL

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

IA No.496 of 2020
In CP (IB) No.184/7/HDB/2019
Under section 60(5) of the IB Code, 2016.

In the matter of :-

M/s. Meenakshi Energy Private Limited

Between:

M/s. Shree Cement Limited,
SB – 187, Bapu Nagar,
Opp. Rajasthan University,
JLN Marg, Jaipur – 302015.

...Applicant

And

M/s. Meenakshi Energy Private Limited
Having its Regd. Office at:
405, Saptagiri Towers,
1-10-75/1/1 to 6, Begumpet,
Secunderabad, Hyderabad,
Telangana – 500 016.

Represented by its Resolution Professional
Mr. Ravi Shankar Devarakonda
D 602, Prestige St Johns Wood Apartments,
No.80, Tavarekere Main Road,
Bangalore - 560029.

...Respondent/
Resolution Professional

Date of Order: 03.09.2020.

Parties/Counsel Present:

For the Applicant : Mr. Kumar Mihir, counsel.
For the Respondent/RP : Mr. A.Sanjay Kishore, Mr. T.G.Rajesh
Kumar and Mr. K. Mohan Kumar,
counsels.

Per: K. Anantha Padmanabha Swamy, Member Judicial.

ORDER

1. The present application bearing IA No. 496/2020 is filed seeking following prayers:-



- a. Cancel the contract/letter of intent if any granted by the Resolution Professional to any party for supply of/alternative Power source for supply of 200 MW power to Bangladesh Power Development Board (BPDB) through PTC from 2nd July 2020 till 31st October 2020.
 - b. Open the bids received by the Resolution Professional till 2.00 pm on 09.06.2020 in terms of the tender issued vide RFP dated 08.06.2020 and disclose the same to this Ld. Adjudicating Authority and the other bidders including Applicant herein;
 - c. Direct the Resolution Professional to award the contract for supply of 200 MW power to Bangladesh Power Development Board (BPDB) through PTC to the lowest bidder.
 - d. Pass any such other further Orders in favor of the Applicant as this Hon'ble Tribunal deems appropriate.
2. Brief facts of the case as stated by the Applicant are as under:-
- a. That this Adjudicating Authority vide its order dated 07.11.2019 admitted the Petition U/s.7 of the I&B Code, 2016 filed by State Bank of India and initiated the CIRP of the Corporate Debtor. Mr. Ravi Shanker Devarakonda was appointed as IRP and subsequently, in the 1st CoC meeting he was confirmed as RP.
 - b. That the Corporate Debtor had entered into a back to back 200 MW long term Power Purchase Agreement with Bangladesh Power Development Board (BPDB) through PTC India Limited for cross border supply of power. However, due to its financial condition and

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other ancillary reasons, the Corporate Debtor is not in a position to supply power under the Power Purchase Agreement from its own generating station. Further, clause 7.1(iii) of the PPA permits the Corporate Debtor to meet its supply obligations through an alternate generating source in the event, it is unable to supply power from its own generating station. Therefore, in terms of the mandate of the Code, the Resolution Professional was mandated to take such steps in order to ensure the going concern status of the Corporate Debtor and for maximisation of value of the Corporate Debtor's assets.

- c. Accordingly, in terms of the provisions of the PPA, the Resolution Professional, on behalf of the Corporate Debtor, decided to invite bids from interested parties/prospective bidders for supply of power to BPDB through PTC from an alternate generation source i.e., from an Operational Generating station where fuel source is either imported coal or imported gas.
- d. That in view of the above, the Resolution Professional issued a request for proposal (RFP) dated 08.06.2020 for supply of 200 MW power to Bangladesh Power Development Board (BPDB) through PTC from an alternate generation source under short term open access for the period commencing on 02.07.2020 till 31.10.2020 subject to approval from BPDB and the Designated Authority (i.e., Central Electricity Authority). In the RFP, it was mandated that such alternate generating station/ source must have mandated that such alternated generating station/ source must have surplus capacity to the

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tune of 200 MW and the bid was to be submitted by 2:00 PM of 09.06.2020.

- e. That in terms of the aforesaid RFP dated 08.06.2020, the Applicant herein submitted its bid against the above tender through email at around 1:47 PM of 09.06.2020.
- f. That the Applicant received an email at 4:45 PM of 09.06.2020 from the Resolution Professional of the Corporate Debtor informing the Applicant about the withdrawal of RFP and cancellation of bidding process due to technical issues.
- g. That the Applicant thereafter sent an email dated 09.06.2020 to the Resolution Professional sought the exact reasons for cancellation of tender and the details of the bid received against the above tender citing code of conduct of RP as provided in Insolvency and Bankruptcy Board of India (Insolvency Professionals Regulations) 2016.
- h. That the Applicant has apprehension that the Resolution Professional may award the contract to supply power to BPDB through PTC under its contract to some third party *dehors* the tender process in a completely arbitrary and unilateral manner. If the Resolution Professional awards the contract to some third party, this will completely be an arbitrary conduct on the part of the Resolution Professional which not only will cause loss to the Corporate Debtor, as well as to the Applicant herein.



- i. That the decision to cancel the bidding process causing huge loss to the Corporate Debtor and any step to procure the electricity from the third party without going through the bidding process clearly creates an apprehension regarding the conduct of the Resolution Professional being guided by ulterior motives and external considerations. In view of the same, the Applicant herein has also filed a complaint dated 11.06.2020 against the Resolution Professional before the Insolvency and Bankruptcy Board of India.
- j. That the power supply to the BPDB by the Corporate Debtor has to start from 02.07.2020 and there are apprehension that as the contract being awarded to a third party thereby vitiating the entire tender process, the Applicant herein has no other option/remedy, but to invoke the adjudicatory jurisdiction of this Adjudicating Authority to protect the interest of the Corporate Debtor as well as the Applicant herein.

Reiterating above, counsel for the Applicant prayed to allow the instant application as prayed for.

3. Counsel for the Respondent filed counter and written submissions *inter-alia* stating as under:-
 - a. That the Corporate Debtor is a generating Company. On 29.10.2018 the Corporate Debtor has entered into a Power Purchase Agreement with PTC for generating and sale of electricity by the Corporate Debtor to PTC. PTC in turn on 09.10.2018 has entered into a Power Purchase Agreement with Bangladesh Power Development Board

("BPDB PPA") i.e., with the Government of Bangladesh for onward sale of the power generated and sold under the PTC PPA (PTC PPA and BPDB PPA are collectively referred to as "PPAs"). As such the entire transaction is a back to back arrangement for power supply. Given the back to back nature of the transaction, terms and conditions of the BPDB PPA have been incorporated in the PTC PPA. Further, since the electricity is generated in India (by Corporate Debtor) and ultimately sold to the Government of Bangladesh (by PTC), the entire transaction is sovereign in nature.

- b. That on 07.11.2019, this Adjudicating Authority has passed the Order of initiating Corporate Insolvency Resolution Process against the Corporate Debtor and appointed Mr. Ravi Shankar Deverakonda as the IRP for the Corporate Debtor. IRP was subsequently as the RP of the Corporate Debtor in the 1st COC meeting.
- c. At the time of initiation of Corporate Insolvency Resolution Process, the power plant of the Corporate Debtor was not operational due to the financial constraints faced by the Corporate Debtor. As such the Corporate Debtor was unable to operationalise the PPAs (for generating and supplying electricity to PTC/BPDB). On taking over the operations and management of the Corporate Debtor, RP came to realise that the Corporate Debtor had to forthwith operationalise the PPAs failing which it would be liable to bear penalties. Clause 7.1 (iii) of the BPDB PPAs, permits the Corporate Debtor to supply power from an alternate generating source in the event it is unable to

supply power on its own. Relevant portion of clause 7.1(iii) of the PPA is extracted hereunder for ease of reference:

“....
iii) *Provided that if the Company is unable to provide supply of power to BPDB up to the Contracted Capacity from the power station except due to a FM event or due to BPDB Event of Default, the Company shall be allowed to supply power up to Contracted Capacity from an alternative generation source to meet its obligations under this agreement.....”*

- d. Therefore, in order to operationalise the PPAs and for value maximisation of its assets in accordance with the Code, RP, with the consent and approval of the majority of the COC dated 31.12.2019, in exercise of the Corporate Debtor's rights under Clause 7.1(iii) of the PPAs and with the mandatory prior approval of BPDB, Resolution Professional entered into negotiations with PTC and other alternate generating companies for supply of power to BPDB from an alternate source.
- e. That pursuant to such negotiations, PTC and RP identified Sembcorp Energy India Limited (“SEIL”) as the alternate generating source for supply of power to BPDB from SEIL. In terms of the Agreements executed between the parties for such alternate supply, the period of alternate supply was till 30.06.2020. Given that the transaction is sovereign in nature, PTC sought and received the prior approval of the Central Electricity Authority, Ministry of Power, Government of India (“MoP”) and BPDB for supply of power from SEIL till 30.06.2020.



- f. That on 06.05.2020, RP issued a letter to PTC requesting it to seek BPDB's approval for supply of power supply from an alternate generating source for the period from 01.07.2020 to 31.10.2020. That in the interest of time, on 03.06.2020, RP also simultaneously requested SEIL to provide a competitive quote for supply of power during the said extended period.
- g. Despite repeated reminders, SEIL failed to submit its offer on time. Given the fact that alternate supply had to re-commence from 02.07.2020 and SEIL had failed to submit its offer for alternate supply for the period from July 2020 till October 2020, RP was constrained to initiate a competitive bidding for alternate supply to BPDB inviting offers from other suitable and interested power generators. Accordingly, on 08.06.2020, RP uploaded the RFP on MEL's website inviting bids for alternate supply latest by 09.06.2020.
- h. That however on 09.06.2020 at 1:18 PM, PTC vide its letter informed RP that on 29.05.2020 BPDB has granted its approval for extension of alternate supply for the period from 02.07.2020 till 31.10.2020 through the present alternate generating source i.e., SEIL. Accordingly, PTC requested RP to forthwith cancel/ withdraw/ annul the bid.
- i. That in view of the fact that BPDB's Approval for extension of alternate supply was from the then existing alternate supplier i.e., SEIL, on 09.06.2020 and given that PTC had requested RP to

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- withdraw the bid in light of BPDB's Approval, RP was constrained to withdraw the RFP and cancel the bid process.
- j. That on 09.06.2020 at 1:47 PM, the Applicant submitted its bid in accordance with the RFP. However, vide email dated 09.06.2020, RP informed the Applicant that the RFP stood withdrawn, and the bid process was cancelled due to technical reasons.
- k. That the Applicant responded to RP's mail asking for the exact reasons for withdrawal of the bid, seeking details of other bids received pursuant to the RFP. Thereafter, despite being informed of the cancellation of the bid process, the Applicant submitted a revised bid vide its email dated 11.06.2020.
- l. That being aggrieved by the withdrawal/cancellation of bid, on 11.06.2020 the Applicant filed a complaint against RP before the IBBI alleging impropriety and violation of the Code. On 01.07.2020, RP filed his reply to the Applicant's Complaint.
- m. Further to BPDB's approval, on 14.06.2020, RP issued the letter of intent to SEIL for alternate supply from 01.07.2020 to 31.10.2020. On 30.06.2020, the Central Electricity Authority, Ministry of Power accorded its approval for supply to BPDB from SEIL and on 02.07.2020, in terms of the approvals granted by BPDB on 29.05.2020, MoP on 30.06.2020 and in terms of Clause 7.1 (iii) of the PPAs and the Letter of Intent dated 14.06.2020, SEIL has commenced supply of power to BPDB on behalf of the Corporate Debtor.



- n. That SEIL was already supplying power to BPDB as the alternate supplier and such alternate supply was approved till 30.06.2020 (by MoP and BPDB). RP had floated the bid on 08.06.2020 since SEIL was not responding to RP's request for a new proposal of alternate supply for the period 02.07.2020 to 31.10.2020.
- o. That the clause 4 of the RFP clearly states that the final outcome of the bid is subject to the approval of BPDB.
- p. That on 29.05.2020, BPDB issued its Approval, which was conditioned on alternate supply taking place from the "present alternate source" i.e., SEIL, no other generator would have qualified to supply power to BPDB on behalf of the Corporate Debtor. Going ahead with the bid would have been in clear breach of BPDB's Approval dated 29.05.2020.
- q. In such circumstances, RP had no choice but to withdraw/cancel the entire bidding process as it was a failed exercise. Neither RP nor the COC had any option other than going ahead with SEIL as the alternate supplier to BPDB for the period from 02.07.2020 to 31.10.2020.
- r. It is a settled principle that where there is a right, there is remedy (ubi jus ibi remedium). Per contra, where there is no right, there is no remedy. The RFP in no way creates any rights in favour of the Applicant entitling it to challenge the RP's decision before this Adjudicating Authority. Further, the Applicant cannot claim to be a person aggrieved by RP's action/ decision especially when admittedly

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- no loss and/or prejudice has been caused to the Applicant by cancellation of the bid.
- s. That the Applicant is not a stakeholder in the Corporate Insolvency Resolution Process of the Corporate Debtor. The Applicant is a mere third party unaware of the acts and circumstances relating to the Corporate Insolvency Resolution Process of the Corporate Debtor. As such, the Applicant cannot by any stretch of imagination claim to be knowledgeable of any loss caused to the Corporate Debtor on account of RP's decision to withdraw the competitive bid.
- t. That in terms of Section 23(2) read with Section 20(1) of the Code, the RP is mandated to make every endeavour to protect and preserve the value of the property of the Corporate Debtor and manage its operations as a going concern. Further, Section 20(2)(e) mandates the RP to take all such actions as are necessary to keep the Corporate Debtor as a going concern.

Reiterating above, counsel for the Respondent prayed to dismiss the present application.

4. Counsel for Applicant filed its rejoinder reiterating the averments made in the Application, denying the allegations made in counter and further prayed to allow the Application as prayed for.
5. Heard both the sides and perused the record.
6. It is fact on record that the Corporate Debtor is a power generating Company and it has entered into a Power Purchase Agreement with PTC for generating and sale of electricity by the Corporate Debtor to PTC and

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that PTC in turn has entered into a Power Purchase Agreement with Bangladesh Power Development Board ("BPDB PPA") i.e., with the Government of Bangladesh for onward sale of the power generated and sold under the PTC PPA. Such generation and sale of power by the corporate debtor is subject to approvals by Central Electricity Authority, Ministry of Power for supply to BPDB. In terms of the Power Purchase Agreements, in case the Corporate Debtor is unable to generate and transmit power, it has to arrange for supply of power to BPDB from an alternate power generating source.

7. On perusal of record, it is seen that as the Corporate Debtor was not in a position to generate power, with the approvals of the CoC as well as concerned government authorities, supply of power to BPDB was ensured by engaging Sembcorp Energy India Limited ("SEIL") as the alternate generating source. It appears that since the agreement with SEIL was about to come to an end, the Corporate Debtor had to take up with SEIL for continued supply of power beyond 30.06.2020 i.e. from 01.07.2020 to 31.10.2020. However, since no response was forthcoming from SEIL, the Resolution Professional with the approval of CoC issued RFP inviting bid/tender for supply of power to BPDB. However, since PTC requested the RP to cancel the bid on the ground that on 29.05.2020 BPDB has granted its approval for extension of alternate supply for the period from 02.07.2020 till 31.10.2020 through the present alternate generating source i.e., SEIL, RFP was withdrawn and bidding process was cancelled citing technical reasons. On 09.06.2020 at 1:47 PM, the Applicant submitted its

- bid in accordance with the RFP. However, vide email dated 09.06.2020, RP informed the Applicant that the RFP stood withdrawn, and the bid process was cancelled due to technical reasons.
8. Though the applicant has submitted its bid within the time stipulated, cancellation of the bid has been informed by the RP on the on 09.06.2020 itself. The applicant herein is a 3rd party to the ongoing CIRP of the Corporate Debtor. This Adjudicating Authority fails to understand as to how any loss is suffered by the applicant herein who has simply evinced its interest in supplying power. Further, No any document is placed on record to show either any material loss or any monetary loss suffered by the Applicant herein. Neither the terms nor conditions of RFP issued by the respondent/RP give any right in favour of the applicant by mere submission of its bid.
9. It is further observed that any intervention by this Adjudicating Authority by granting the reliefs prayed for would not only derail the CIRP of the Corporate Debtor but would also lead to multiplicity of litigation.
10. In view of the above observations and having satisfied with the submissions made by the RP this Adjudicating Authority holds that the applicant is not entitled for any of the reliefs as prayed for in the instant IA.
11. Accordingly, IA No. 496/2020 stands closed as dismissed. No order as to costs.



K. ANANTHA PADMANABHA SWAMY
MEMBER JUDICIAL