

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No.301

IA/711(AHM)2021 in CP(IB) 342 of 2020

Order under Section 60(5) IBC

IN THE MATTER OF:

Hitesh Goel RP For Bhadreshwar Vidhyut Pvt Ltd
V/s

.....Applicant

Nirav Anupam Tarkas RP of Steelco Gujarat Ltd

.....Respondent

Order delivered on 18/12/2023

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order. The order is pronounced in open Court, vide separate sheet.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)

**NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT NO.2**

IA No. 711/NCLT/AHM/2021
in
CP(IB) No.342/NCLT/AHM/2020

(Application under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules and read with Regulation 7 of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016.

In the matter of:

Hitesh Goel, RP of
M/s. Bhadreshwar Vidyut Pvt. Ltd. Applicant

Versus

CA Nirav Anupam Tarkas
RP of Steelco Gujarat Ltd. Respondent

Memo of Parties

Hitesh Goel, RP of
M/s. Bhadreshwar Vidyut Pvt. Ltd.
Through its Authorized
Representative
Mr. Ankit Gupta
Having registered office at:
New No.16, Old No.41, Ground Floor
Thomas Nagar, Little Mount
Saidapet, Chennai
Tamil Nadu-600 015 Applicant

Versus

CA. Nirav Anupam Tarkas
RP of Steelco Gujarat Ltd.
Having address at:
209-B.N. Chamber
R.C. Dutt Road
Alkapuri
Vadodara-390 007

..... Respondent /
Resolution Professional

Order pronounced on 18.12.2023

CORAM

**MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**

Appearance

For the Applicant : Mr. Mayur Jugtawat, Advocate along with
Mr. Nipun Singhvi, and Mr Vishal Dave,
Advocate

For the Respondent : Mr. Jaimin Dave, Advocate along with
Ms. Hirva Dave, Advocate.

JUDGMENT

1. This is an interlocutory application filed under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules and read with Regulation 7 of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 praying directing the Resolution Professional to accept the claim of the applicant as an Operational Creditor.

2. As per the application of State Bank of India, CIRP was initiated against the Steelco Gujarat Ltd. on 31.12.2020. Resolution Professional appointed invited claims from creditors of the Corporate Debtor by public announcement. Accordingly, applicant filed claim with all necessary documents to Resolution Professional by email dated 30.01.2021. As pointed out by Resolution Professional, he has removed defects and resubmitted its claim.

3. The applicant is engaged for the purpose of generation of electricity. He has executed power projects agreement with SGL dated 28.12.2016. Approval is obtained as per the terms and conditions of Infra State Open Access Regulations, 2011 notification with Gujarat Electricity Regulatory Commission (hereinafter referred to GRC), In terms of this agreement, power supply agreement was executed between the applicant and SGL dated 02.11.2017 with amendment dated 21.08.2018. The SGL stopped taking power from the applicant after February 2019 but the approval is valid till 31.03.2019. SGL has to bear transmission charges up to the said period. As per regulation, SGL requires to pay 66% of transmission charges for not availing Long Term Open Access for minimum 12 years. For reduction beyond permitted level, SGL have to pay compensation. The applicant submitted claim of Rs.20,75,49,380/- but his claim is accepted partially to the tune of Rs.81,01,339/- only. The said decision of Resolution Professional is malafide, arbitrary and erroneous and without reasons, hence, prayed for directing the respondent to accept entire claim of applicant and to update the list of stakeholders including it.

4. The respondent filed reply objecting the application stating that application is devoid of any merits. He has further stated that he has duly accepted and admitted the valid and legal claim of the applicant to the tune of Rs.81,01,339/-. He has mentioned reasons for rejection of partial claim as the transactions / claims filed are pertaining to the transactions which are claimed after commencement of insolvency commencement date and no debit notes found before ICD. The applicant raised claim for the first time filing supplementary invoices dated 16.01.2021 after the initiation of CIRP. There was no debit note or invoices of said claim prior to insolvency commencement date. From the ledger account of the applicant, it was found that it has never claimed such late payment surcharge, transmission charges or compensation from the Corporate Debtor. Admittedly, the Corporate Debtor has stopped consumption of electricity from February 2019. Hence, there is no actual power supply and applicant cannot raise claim pertaining to it. The Corporate Debtor has never agreed to make payment towards late payment surcharge, compensation etc. There was no communication between the parties regarding charges and no valid proof is submitted by the applicant and its claim is unjustifiable and non-genuine, hence, prayed for dismissal of the application with cost.
5. In the rejoinder, applicant submitted that Resolution Professional is only require to collate the clam and need not sit or adjudicatory of the claim. Agreement is still alive and neither of the parties has terminated the contract. Before commencement of CIRP, the applicant has made several

transactions with the Corporate Debtor. Transmission charges are statutory dues as per the Gujarat Electricity Regulatory Commission Regulation, 2011, hence, the same is required to be reimbursed by the Corporate Debtor. The total amount is claimed as per the agreement between the parties. The duty of the Resolution Professional is to verify the claims only.

6. Learned Counsel for the applicant submitted that as per rejoinder filed, the Corporate Debtor has to reimburse the amount raised are only up to CIRP period and yet their agreement is not terminated.
7. As against this, Learned Counsel for the respondent submitted that CIRP was initiated on 31.01.2020. Rejected claims were to generate from 16.01.2021, they were not reflected in books of accounts.
8. Perused the written submissions filed by the applicant.
9. The respondent has relied upon following judgement:
 - i. ***Narendra Singh Panwar Vs. Pashchimanchal Vidyut Vitran Nigams Ltd.*** [2023] 146 taxmann.com 337 (Allahabad) wherein it is held that conflict arises between one Parliamentarian law and other Parliamentarian law, subsequent parliamentarian law has overriding effect on earlier Parliamentarian law. IBC being a subsequent Act of Parliament, Electricity Act, 2003 cannot override any provisions of IBC.

*On the same line he has also relied upon **NRC Limited Vs. State of Maharashtra** [2022] 143 taxmann.com 96 (Calcutta)*

ii. West Bengal State Electricity Distribution Company Ltd. Vs. Sri Vasavi Industries Ltd. [2022] 143 taxmann.com 96 (Calcutta) wherein it is held that appellant had not submitted any claims before RP – Subsequently, resolution plan submitted by successful resolution applicant was approved by NCLT. After approval of resolution plan, right of appellant to recover amount which was due prior to resolution plan had extinguished.

10. On perusing claim sheet filed by the applicant, it is observed that the reason for rejection of partial claim is mentioned at serial number 116 that *“transactions / claims filed are pertaining to transactions which are claimed after commencement of insolvency Commencement date. No debit notes found before CD”*. According to respondent, this claim of Rs.19,94,47,981/- was filed vide supplementary invoice dated 16.01.2021 wherein CIRP of corporate debtor was initiated i.e. after 31.12.2020. It is pertinent to note that this claim was not even due at the relevant time. The respondent also relied upon ledger accounts of the corporate debtor. According to him, ledger account of corporate debtor from 16.03.2017 to 16.01.2021 (produced by the applicant at page Nos. 218-224) also shows that the applicant never claimed any late payment, surcharge or compensation charges from corporate debtor by raising these supplementary invoices dated 16.01.2021. It appears that these claims were raised for the first time before the RP on 16.01.2021. No debit note or any invoice was produced before the RP.

11. On perusing the power supply agreement between OPGS Power Gujarat Private Limited and the corporate debtor/Steelco Gujarat Ltd., following covenants are seen:-

“2.9 (a) The Member Consumer will reimburse to the GENERATOR all statutory charges for any reduction in purchase and scheduling from the Contracted Capacity including any transmission and open access charges levied by a Competent Authority.

3.5 If the Member Consumer defaults in making payments by the Due Date of two consecutive Weekly Bill or Supplementary Bill raised by the Generator and/or fails to consume the Scheduled Capacity in two consecutive Billing Period, whether in part or in full, then the GENERATOR may at its sole option and discretion, with prior intimation to the Member Consumer, with immediate effect.

7.2 (b). The GENERATOR/Member Consumer may terminate this Agreement, on any one or more of the following grounds attributable to the Member Consumer / the Generator and the determination by the GENERATOR / Member Consumer of the occurrence of such grounds shall be final and binding and conclusive; that is to say the Member Consumer / Generator (as may be applicable)

(a) Fails to Schedule the Contracted Capacity partially or fully during a Billing Period except force majeure clause 9 for continuously 3 months.

(b) Defaults in paying any Weekly Bill and/or Supplementary Bill within the Due Date for payment for continues period of 2 months;

(c) Commits any wilful default whereby the Wheeling Agreement is adversely

affected/terminated;

- (d) Commits any action or due to the Member Consumer's wilful omission, the evacuation of Power from the Delivery Point to the Member Consumer's facility is hindered or is stopped;*
- (e) Commits any wilful act, deeds, things or matters which in any event have adverse Implication on the GENERATOR;*
- (f) Commits any breach of Electricity Act, the Electricity Rules, Wheeling Agreement and any regulations, guidelines, rules, notifications and orders issued by Government of India or Government of Gujarat or the GUVNL or GUVNL's Subsidiaries or GETCO or SLDC and/or by any Competent Authority, including a breach of the shareholding to consumption after contracted capacity laid down in Electricity Rules for captive consumers;*
- (g) Ceases to carry on its business;*
- (h) In the event (a) the BUYER becomes voluntarily or involuntarily the subject of any bankruptcy or insolvency or winding up proceedings and such proceedings remain uncontested for a period of thirty (30) days, or (b) any winding up or bankruptcy or insolvency order is passed against the BUYER, or (c) the BUYER goes into liquidation or dissolution or has a receiver or any similar officer appointed over all or substantially all of its assets or official liquidator is appointed to manage its affairs, pursuant to applicable law or (d) the BUYER undergoes structural change in the constitution, merger, demerger, amalgamation or arrangement or partnership or association;*
- (i) Undergoes any merger, demerger, amalgamation or arrangement or acquisition or any other means of corporate restructuring or partnership or association or change in character;*
- (j) Commits any breach of this Agreement. ”*

12. These covenants give authority to the applicant to terminate the agreement if certain conditions happened, which is also not done by the applicant. In spite of that failing to pay the amount he is claiming charges till March 2029.
13. It is clear from the application that the corporate debtor has stopped consumption of electricity from the applicant from February 2019. However, applicant raised claim till March 2029. During this period, there was no actual supply of power to the corporate debtor. The applicant is relying upon Gujarat Electricity Regulatory Commission Regulations 2011 for raising transmission charges for further period. According to applicant, even if the long term open access was not availed, the transmission charges can be claimed for 12 years. Whether the applicant can claim those charges or not would have been considered by the RP, if the claim was made before initiation of CIRP. It is, thus, settled principle of law that whenever there is conflict between the laws, the provisions of IBC will override. The judgments filed by the respondent are squarely applicable to the facts of the case.
14. Considering the facts and submissions made by the applicant, the applicant is not entitled to claim the amount of Rs.199,447,981/-. Therefore, RP cannot be directed to accept his claim.

15. Hence, we pass the following order:-

ORDER

Application is rejected and disposed off.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

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