

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 110 of 2020**

(Arising out of Impugned Order dated passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata in CA (IB) No. 1271/KB/2019 in CP (IB) No. 596/KB/2017.)

**In the matter of**

**Damodar Valley Corporation** **... Appellant**  
**Through its Authorized Representative**  
**Having its registered office at**  
**the DVC Towers, VIP Road,**  
**Kolkata – 700054. (West Bengal)**

**Versus**

- 1. Cosmic Ferro Alloys Limited** **...Respondent No. 1**  
**Through its Managing Director** **(Resolution Professional)**  
**registered office at**  
**Trishul Apartments, Ground Floor,**  
**Nit Nos. G-A & G-D, premises No. 35,**  
**Rowland Road, Kolkata-700020.**  
**West Bengal.**
  
- 2. Mr. Anish Ranjan Nanavaty** **Respondent No. 2**  
**Having Registration No.**  
**IBBI/IPA-002/IP-N00272/2017-18/10830**  
**of Delloitte Touche Tohmatsu India LLP,**  
**India Bulls Finance Centre, Tower 3,**  
**27<sup>th</sup> Floor, Senapati Bapat Marg,**  
**Elphinstone Road, Mumbai-400013.**

**Present**

**For Appellant:** **Ms. Maninder Acharya, Sr. Advocate**  
**with Ms. Madhumita Bhattacharjee,**  
**Advocate**

**For Respondent:** **Mr. Ramji Srinivasan, Sr. Advocate with**  
**Mr. Dhiren Sharma, Mr. Naresh Balodia,**

**Mr. Divakar Kumar and AT Patra,  
Advocates for R-1,  
Mr. Vaijayant Paliwal and Ms. Charu  
Bansal, Advocates for R-2.**

**Judgment**  
(Date: 01.10.2021)

**{Per: Dr. Alok Srivastava, Member (T)}**

1. This appeal has been filed under Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called IBC) by the Appellant, who is aggrieved by the order dated 20.11.2019 of the Adjudicating Authority (National Company Law Tribunal, Kolkata) (hereinafter called the Impugned Order) in CA (IB) No. 1271/KB/2019 in CP (IB) No. 596/KB/2017.

2. The brief factual matrix of the case, as stated and argued by the Appellant, is that on an application filed by Citibank N.A. against the Corporate Debtor Cosmic Ferro Alloys Limited (CFAL in short) under Section 7 of IBC, an admission order was passed by the Adjudicating Authority on 16.1.2018, thereby setting the Corporate Insolvency Resolution Process (CIRP) in motion. The Appellant Damodar Valley Corporation (DVC in short), which is the Operational Creditor, used to supply power to the Corporate

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Debtor, and it is alleged by the Appellant that the Corporate Debtor was in huge arrears in payment of electricity dues and delay payment charges. Consequently, a disconnection notice was given by DVC to the Corporate Debtor on 1.1.2018 and its power supply was disconnected on 17.1.2018. It is also claimed by the Operational Creditor DVC that when the electricity supply was disconnected it was not aware of the initiation of Corporate Insolvency Resolution Process (CIRP in short) of the Corporate Debtor.

3. It is further stated by the Appellant that a letter dated 18.1.2018 was given by the Corporate Debtor CFAL to Operational Creditor DVC for reconnection with promise to pay arrears of electricity dues in instalments. In the meanwhile, a Resolution Plan, as approved and recommended by the Committee of Creditors, was approved vide order dated 11.10.2018 by the Adjudicating Authority.

4. The Successful Resolution Applicant, which had stepped in the role of the Corporate Debtor, requested for increase in the contract demand from 10 MVA to 20 MVA vide letter dated 15.1.2019 and, inter alia, asking for reconnection of electricity

supply with waiver of security deposit. In response, vide letter dated 16.4.2019, DVC sought security deposit of Rs.6.43 crores for increasing the contract demand. Again, through letter dated 22.4.2019, the Corporate Debtor requested for revision of contract demand from 10 MVA to 16 MVA through the existing 33 KV power line. It also requested that its power supply be given through 132 KV line at the earliest. Again, through letter dated 23.5.2019, the Corporate Debtor sought increase of contract demand from 10 MVA to 45 MVA over next five years without any security deposit and installation of 132 KV powerline to supply power to its manufacturing unit without taking any security deposit over the next five years. It also agreed to clear outstanding dues of Rs.18.8 crores to DVC, which is the share of the Operational Creditor DVC in the approved Resolution Plan. Vide letter dated 6.8.2019, the Appellant again asked for security deposit, and since no security deposit was forthcoming from the Corporate Debtor, DVC disconnected electricity supply to the Corporate Debtor after giving notice of disconnection on 30.8.2019. DVC has also submitted that electricity supply to the Corporate Debtor is governed by Power Purchase Agreement dated 20.1.2005 entered into between the Corporate Debtor and the Operational Creditor, and the Supplementary Agreement dated 22.6.2007, and both the parties have to abide by the terms and conditions contained therein.

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5. We heard the arguments of the Ld. Counsels of Appellant and Respondent No. 1. The Ld. Counsel of Appellant has claimed that it has reconnected the power supply at the previous level of contract demand without taking any security deposit. He has argued that since the Corporate Debtor is seeking an increase in contract demand from 10 MVA to 45 MVA and also supply from 132 KV powerline from the current 33 KV powerline, it is entitled to ask for security deposit as stipulated in the notification no. 52/WBERC dated 2.4.2013 of the West Bengal Electricity Regulatory Commission (WBERC) and the Power Purchase Agreement and the Supplementary Agreement (supra). The Learned Counsel for Appellant has also stated that the Resolution Plan does not contain any explicit provision regarding waiver of security deposit over the next five years. It only includes a request for waiver of security deposit for next five years regarding which the Adjudicating Authority should pass specific order, which was not given by the Adjudicating Authority while approving the resolution plan. Therefore, in the absence of a specific and explicit order there is no case for waiving off security deposit over the next five years for increased contract demand and electricity supply through a new 132 KV powerline.

6. The Learned Counsel for Appellant has further argued that DVC is a Distribution Company ('discom' in short), which is an entity run on commercial principles and any waiver, that is accorded to the Successful Resolution Applicant which is not explicitly provided in the approved Resolution Plan, will cause loss to the Appellant affecting its overall functioning. The Learned Counsel has also stated that Appellant has reconnected the electricity supply after the approval of the Resolution Plan, wherein an amount of Rs.24.67 crores was sanctioned as share of the Operational Creditor DVC *qua* its total demand of Rs. 64.45 crores, and therefore it has already lost a large part of its claim in the resolution of the Corporate Debtor CFAL. He has further stated that the Successful Resolution Applicant is in default of full payment of the share of DVC in the resolution amount. In addition, the Successful Resolution Applicant is also not paying the current electricity bill as per consumption, and as on 13.9.2021, the total dues (which includes the share of the Appellant after resolution of the Corporate Debtor) is Rs. 26.68 crores. He has also claimed that the dues of electricity supplied during the CIRP should also be paid to the DVC as part of CIRP costs. The Learned Counsel for Appellant has argued that the Successful Resolution Applicant has not come with clean hands before this Hon'ble Tribunal and hence its claim of waiver of security deposit should not even be

considered.

7. The Learned Counsel for Respondent No. 1CFAL has stated that the Resolution Plan, as approved by the Adjudicating Authority, stipulates that all power dues which includes principal, arrears, interest arrears and any delayed payment charges or penalty etc. as well as charges, if any, demanded for resumption of power supply over and above the amount to be paid under this Resolution Plan to the Appellant shall be waived. The Learned Counsel for Respondent No.1 has also claimed that the demand of bank guarantee/cash as security deposit for providing supply of power from 132 KVA power connection is to be waived for the next five years from the approval date of the Resolution Plan and no disconnection of power due to settlement of past dues will be done as this is provided in the approved Resolution Plan. He has claimed that the approved Resolution Plan which includes a request for specific order by NCLT, has approved this request once the Adjudicating Authority approved the Resolution Plan. The Learned Counsel for Respondent No. 1 has, therefore, argued that DVC should not demand any security deposit for increase of the contract demand to 45 MVA from 10 MVA and supply of electricity through 132 KV powerline as that would cause financial distress to the Corporate Debtor which is in the process of being revived after Company Appeal (AT) (Insolvency) No. 110 of 2020

its successful resolution.

8. We have perused the appeal memo, reply and rejoinder submitted by Respondent No. 1 and the Appellant and considered carefully the averments made therein and the oral arguments submitted by the parties.

9. The Approved Resolution Plan contains provision regarding accrued/contingent liabilities claimed by DVC and other demands relating to security deposit at pp. 139-140 of the Appeal Paperbook Volume II, filed vide diary No. 17632 dated 8.1.2020), which is reproduced below for ready reference: –

**“Accrued/Contingent Liabilities claimed by the Damodar Valley Corporation (“DVC) for supply of power-Waiver Approval by NCLT for all Power Dues which includes Principal, Arrears, Interest Arrears, any Delayed Payment Charges or Penalty etc. till the Date of NCLT Order approving the Resolution Plan as well as Charges, if any demanded for Resumption of Power Supply over and above the Amount to be paid under this Resolution Plan. This will assist in immediate start of the Production of Goods.”**

*Waiver of all Liabilities (including Interest, Penal Interest, Penalty, Interest on Penalty, any kind of Late Fee as well as Principal Liability due) related to Electricity Charges which may arise out of Ongoing Disputes with DVC OR Specific Order to DVC to withdraw the case.*

*Bank Guarantee/Cash as Security Deposit demanded by the Damodar Valley Corporation (“DVC”) for supply of Power –*

*Waiver/Stay Approval by specific order by NCLT for Bank Guarantee/Cash as Security Deposit by DVC against regular Power Usage on basis of Contract Demand as per WBERC Regulation (Demand Notice issued in May 2018) or for any Specific reasons (e.g. providing 132 KVA Power Connection with 132 KVA Sanction Load) for next 5 years from the Approval Date of the Resolution Plan by NCLT.*

*Request is being placed for the Waiver/Stay of security deposit of Bank Guarantee/Cash for 5 years as the Corporate*

*Debtor is totally under stress and attempt is being made by the resolution applicant to revive the Corporate Debtor is best possible way under this Proposed Resolution Plan through Optimal Infusion of Debt and efficient Working Capital*

*Management. The Plan is to increase the production with*

*Optimal Working Capital infusion so as to ensure better margins and low Interest Costs. The Demand of Bank Guarantee/Cash immediately will cause stress on the Resolution Applicant/Corporate Debtor in terms of revival as it will take 5 years for the Resolution Applicant to make the Corporate Debtor a Debt Free Company with good bottom-line.*

*Request is also placed for Specific Order by NCLT that DVC should be directed to maintain the supply of electricity without any disconnection of Power due to settlement of past dues of DVC under this Resolution Plan. In the event of disconnection for the stated reasons, DVC should be directed to adhere to the Specific Order of NCLT under this Resolution Plan.*

*Specific Order for NCLT to DVC for 132 KVA Power Connection*

*– Request is placed for Specific Order by NCLT and DVC should provide the 132 KVA Power Connection which was halted due to the non-payment of Past Dues as the Sub-station for 132 KVA Power Connectivity is ready.*

*Synopsis* – *Cosmic Ferro is being able to draw 27.5 MVA from its existing 33 KVA grid line that has been provided by DVC.*

*The company has an installed capacity of 45 MVA through its*  
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*existing 5 submerged arc furnaces of 9 MVA each with production capacity (peak) of 80,000 MT pa. However due to current level of power connectivity of 33 KVA, the production capacity has been restricted to a peak level of 55000 MT pa only and this ensures higher fixed costs of production on per tonne basis.*

*WBIDC had given the permission for the power corridor in 2017 stating that the line would be given to the three consumers including the Corporate Debtor, which is now at completion stage.*

*xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx”*

10. We now peruse the order dated 11.10.2018 passed by the Adjudicating Authority in CP IB No. 596/KB/2017, which relates to the approval of the Resolution Plan, wherein the relevant approval is in paragraph no. 8:-

*“8. In view of the above, I have gone through the Resolution Plan submitted for my approval. In Part-A of the Resolution Plan, I found that the provision is made for payment of insolvency resolution process costs. It appears to be somewhat at higher side because provision of amount of Rs.*

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*12.20 crores is made to incur resolution costs, which includes fees of resolution professional amounting to Rs. 6.33 crores (page 29). However, since it is approved by the CoC and this authority has no reason to doubt wisdom of CoC, I hold that the provisions of section 30(2)(a) of I&B Code is complied with. The plan also provides that repayment of debts of operational creditor (page 33). In para 2(e) of the plan at page 63 states the modalities suggested for management of the affairs of the Corporate Debtor and it also provides mechanism for effective supervision and implementation of the plan. In view of this, I hold that the provisions of section 30(2)(b) and 20(2)(c) of I&B Code are complied with. One, Mr. Nitesh Kumar sworn an affidavit on behalf of the resolution applicant stating that the resolution applicant, Consortium of United Tradeco FZC and QVC Exports Pvt Limited does not suffer from any disqualification as stated under section 29A of the I&B Code. The plan does not contravene any provisions of law and the same is in conformity with the provisions of I&B code. Resolution Professional has produced the certificate under Regulation 39(4) of the I&B Code in Form H stating that the plan is in conformity with all legal requirements. The Resolution Plan submitted for approval of this Authority complies with all the requirements stated under section 30(2)*

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*of the I&B code. Hence, I approve this plan for Corporate Debtor and I proceed to pass the following order:*

**ORDER**

*The Resolution Plan of M/s Consortium of United Tradeco FZC and QVC Exports Pvt. Limited which is approved by the CoC with 95.86% voting percentage, is hereby approved under provisions of section 31(1) of the Insolvency & Bankruptcy Code, 2016, which will be binding on the Corporate Debtor, its employees, members, creditors, coordinators and other stakeholders involved in the Resolution Plan.*

*2. The revival plan of the company in accordance with approved Resolution Plan shall come into force with immediate effect.*

*3. The moratorium order passed under Section 14 shall cease to have effect.*

*4. The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded on its database”*

11. As is seen from the aforementioned extract of order dated 11.10.2018, the proposed Resolution Plan is approved by the Adjudicating Authority under Section 31(1) of the IBC, but there is no specific or explicit approval of the waivers requested by the Successful Resolution Applicant of various charges including Security Deposit charges.

12. The accrued/contingent liabilities claimed by DVC for supply of power till the date of the approval of the Resolution Plan by the Adjudicating Authority is waived as per Resolution Plan. We also note that the Corporate Debtors ought reconnection during the ongoing CIRP vide letter dated 18.1.2018 (page 74 of Appeal Paperbook, Volume I) and through which the Corporate Debtor also committed itself to pay the amounts due to DVC in monthly installments. This letter is signed by the Director of Cosmic Ferro Alloys Limited and not by the IRP even though it was issued after the initiation of CIRP on 16.1.2018. We also note from the written submissions of the Appellant (diary no. 29878 dated 20.9.2021) that electricity supply was reconnected to the Corporate Debtor.

13. On perusing the letters exchanged between the Appellant and Respondent No.1 between 15.1.2019 and 19.8.2019, we find that the Respondent No. 1 has been making different requests in each Company Appeal (AT) (Insolvency) No. 110 of 2020

letter regarding the quantum of increase of contract demand and waiver of security deposit. For example, in the letter dated 15.1.2019 (attached at page 643 of the Appeal Paperbook, Vol. IV). Respondent No.1 sought an increase in contract demand from 10 MVA to 20 MVA from 31.1.2019, on which through letter dated 16.4.2019 Appellant sought security deposit of Rs. 6.43 crores for enhancement of contract demand. Then again vide letter dated 22.4.2019, Respondent No. 1 sought revision of contract amount from 10 MVA to 16 MVA at 33 kilovolt power line supply and also a new connection to 132 KV powerline. Thereafter, by another letter dated 23.5.2019 Respondent No. 1 requested for increase of contract demand from 10 MVA to 45 MVA over the next five years without any security deposit and installation of 132 KV powerline without payment of any security deposit over the next five years while agreeing to clear the outstanding dues of Rs.18.8 crores as contained in the Resolution Plan. On 6.8.2019, Appellant asked Respondent No. 1 to deposit security amount and in reply, Respondent No. 1, vide letter dated 19.8.2019 wrote to Appellant to rescind its demand for security deposit, citing the approval of the Resolution Plan in its entirety in support of waiver of any security deposit over next five years.

14. It is clear from the communications cited in the aforesaid Company Appeal (AT) (Insolvency) No. 110 of 2020

paragraph that the contract demand was at the level of 10 MVA and Respondent No. 1 sought its increase through its various letters. In addition, Respondent No. 1 also sought a change in electricity supply from a powerline of 33 KV to 132 KV. All these letters are given after the approval of the Resolution Plan. In the absence of any specific clause regarding these with the waiver of security deposit over next five years in the Adjudicating Authority's order dated 20.11.2019 (approval of the Resolution Plan). The request of the Respondent No. 1 regarding waiver of security deposit over next five years, and also seeking of security deposit for increasing the contract demand as well as supplying power through a higher voltage power supply line of 132 KV is considered proper under West Bengal Electricity Regulatory Commission Regulations Notification No. 52/WBERC dated 2.4.2013 (attached at pp. 654-658 of the Appeal PaperBook, Vol. IV).

15. The Appellant has claimed that, under the approved Resolution Plan, Respondent No. 1 was directed to pay to the Operational Creditor DVC an amount of Rs.24.67 crores as per the following schedule:-

- |       |  |                   |
|-------|--|-------------------|
| (i)   | Upfront payment within 30 days (after approval of Resolution Plan by Adjudicating Authority) | -Rs. 4.93 crores  |
| (ii)  | Payment before 31.3.2020   | - Rs. 4.93 crores |
| (iii) | Payment after 31.3.2020, but before Company Appeal (AT) (Insolvency) No. 110 of 2020         |                   |

|       |  |                         |
|-------|--|-------------------------|
|       | 31.3.2021  | - Rs. 4.93 crores       |
| (iv). | Payment after 31.3.2021, but before<br>31.3.2022 | - Rs.4.94 crores        |
| (v)   | Payment after 31.3.2022, but before<br>31.3.2023 | <u>-Rs. 4.94 crores</u> |
|       | Total:   | <u>-Rs.24.67 crores</u> |

According to the Appellant, the Respondent No. 1 has defaulted in making payment in accordance with this schedule, as only Rs. 2.25 crores was paid within 30 days of the approval of the Resolution Plan against an approved amount of Rs. 4.93 crores. His claim is that while a monitoring committee was in place, it failed to ensure payment to the Appellant in accordance with the approved Resolution Plan. For this reason, and also because the Respondent No. 1 failed to provide security deposit as required by letter dated 6.8.2019 (attached at pg. 653 of Appeal Paperbook Vol. IV), the Appellant issued disconnection notice on failure to pay the security deposit vide a letter dated 30.8.2019 and disconnection took place thereafter.

16. It is, thus, clear that Respondent No. 1 did not adhere to the payment schedule for the payment of resolution amount to Appellant DVC hence a disconnection notice was given to the vide letter dated 30.8.2019 to Respondent No. 1.

17. The Learned Counsel for Appellant has cited the following Company Appeal (AT) (Insolvency) No. 110 of 2020

judgments in support of his case:-

- (i) Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka reported in (2020) 13 SCC 608**
- (ii) Telangana State Power Distribution Co. Ltd. – Vs- Srigdha Beverages reported in [(2020) 6 SCC 404]**
- (iii) Prasad Gempex Vs. Star Agro Marine Exports Pvt. Ltd. reported in [(2019) 219 Company Case 409]**

18. The Learned Counsel for Respondent No. 1 has submitted following citations in support of his contentions:

- (i) India Resurgence Arc Pvt. Ltd. Vs. Amit Metaliks Ltd. & Ors. MANU/SC/0367/2021 dated 13.05.2021**
- (ii) Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors. (2020) 8 SCC 531 dated 15.11.2019.**
- (iii) Ghanashyam Mishra & Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd. reported in 2021 SCC online SC 313 = MANU/SC/0273/2021.**

19. The ratio in the judgments cited by the Learned Counsel for Appellant hold that during the moratorium period, no action can be taken to dispose off or alienate the assets of corporate debtor. Company Appeal (AT) (Insolvency) No. 110 of 2020

**Telangana State Power Distribution Co. Ltd. Vs. Srividya Beverages** judgment is not under the IBC, though it seeks waiver of electricity dues in the specific context of that case, which is not applicable in the present Appeal. Any grant of waiver or otherwise should be governed by the specific provisions of the approved Resolution Plan.

20. The citations relied upon by the Learned Counsel of Respondent No. 1 primarily lay down that the commercial wisdom of the COC is not subject to judicial review at the instance of any party, whether it is dissenting creditor or shareholder. This view is also held in **Essar Steel India Ltd. Vs. Satish Kumar Gupta** and **Ghanshyam Mishra & Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd.** judgments. Therefore, the judgments cited have specific context which are different from the contextual situation in the present appeal.

21. In the light of the above, we are of very clear view that once reconnection has been provided by the Appellant at the previously held contract demand of 10 MVA through a 33 KV power supply line, any change in the contract demand or an enhanced power supply voltage of 132 KV will not be covered under the provisions of the approved Resolution Plan.

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22. Thus, insofar as the request of the successful resolution applicant regarding waiver of security deposit for 5 years for increase in the contract demand to 45 MVA and supply of power at an enhanced voltage of 132 KV is concerned, waiver of bank guarantee/cash as security deposit by DVC against regular power usage on basis of contract demand for at 132 KV for next five years from the date of approval of the Resolution Plan by the Adjudicating Authority is not given by a specific order by the Adjudicating Authority (NCLT). Similarly, providing power supply through 132 KV supply line is also not granted by a specific order of NCLT. Thus, these requests only remain as proposals which have not been accepted or approved by specific order of the Adjudicating Authority while approving the Resolution Plan. Therefore, in our view in the absence of any specific orders, the Appellant is not obliged to grant any waiver of payment of security deposit over the next five years for increase in contract demand or supply of electricity by a 132 KV supply line.

23. Moreover, we are also of the view that any statutory or legitimate dues which might be demanded from the Successful Resolution Applicant (SRA) for supply of any services should be

paid by the SRA and no waiver for any period of time for the future is not permissible.

24. It is stated in the written submissions filed by the Appellant (Diary No. 29878 dated 20.9. 2021) that the Respondent No. 1 is in default of payment of electricity bills for the period February 2020 to August 2020 amounting to Rs.15,94,21,974 (at serial number xii in the Written Submissions of the Appellant). This amount has become due and payable to Appellant after the submission and approval of the Resolution Plan by the Adjudicating Authority on 11.10. 2018. We are of the opinion that the parties should take action regarding these or any subsequent dues including security deposit in accordance with the extant and relevant regulations of WBERC. The dues of electricity supplied by DVC to the Corporate Debtor during the CIRP period, if not paid, should be paid from out of CIRP costs and the Resolution Professional should ensure it.

25. We, therefore, quash and set aside the impugned order and make it clear that any security deposit or other charges for requested increase in contract demand and enhanced supply line for electricity will have to be paid to the discom DVC in accordance with the relevant and extant laws and regulations. The payment of

dues for electricity supplied to the corporate debtor during the moratorium period, to keep the corporate debtor as a going concern, should be paid out of CIRP costs, and the payment should be ensured by the Resolution Professional. Any dues relating to electricity supplied after the moratorium has ceased will have to be paid by the corporate debtor to the discom DVC. The Adjudicating Authority could be approached in case of any difficulty. There is no order as to costs.

**(Justice Jarat Kumar Jain)**  
**Member (Judicial)**

**(Dr. Alok Srivastava)**  
**Member (Technical)**

**New Delhi**  
**1<sup>st</sup> October, 2021**

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