

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V**

**I.A. No. 1363 of 2023
In
C.P. No. 1236 of 2020**

Under Sections 60(5) read with
Section 14 of Insolvency &
Bankruptcy Code, 2016 And
Regulation 32 of Insolvency and
Bankruptcy Board of
India (Insolvency
Resolution Process for
Corporate Persons)
Regulations, 2016

In the matter of

**Shapoorji Pallonji Finance Private
Limited**

.... *Operational Creditor*

vs.

M/S Rajesh Construction

Company Private Limited

.... *Corporate Debtor*

I. A. No. 1363 of 2023

Mr. Abhijit Gokhale

....Applicant/
Resolution
Professional

vs.

Suzlon Global Services Limited

.....Respondent

Order Reserved on: 27.10.2023

Order Pronounced on: 06.11.2023

Quoram:

Hon'ble Ms. Reeta Kohli, Member (Judicial)

Hon'ble Ms. Madhu Sinha, Member (Technical)

Appearance in Physical Mode:

For the Applicant/Resolution Professional: Amey Hadwale

For the Respondent: Manvendra Kane

ORDER

Per: Ms. Reeta Kohli, Member (Judicial)

Brief Facts and Submission by the Applicant

1. Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor by the Hon'ble National Company Law Tribunal, Mumbai Bench vide an order dated 13.05.2021.
2. The Applicant, who is the Resolution Professional of the Corporate Debtor, has filed this Application and thereby submitted that the Corporate Debtor and the Respondent (Suzlon Global Services Limited) entered into an Operation and Maintenance Agreement (O&M Agreement) dated 21.04.2005 with effect from 01.11.2008 to 31.10.2024 with an object to operate and maintain Wind Turbine Generators, Windmills and other equipment at the Karnataka site of the Corporate Debtor.
3. The scope of this Agreement included that the following services should be provided by the Respondent to the Corporate Debtor:-
 - a. Routine maintenance services labour work,
 - b. Security services, Management services,
 - c. Technical services,
 - d. Crane services for attending breakdown repairs,

- e. Maintenance and repair work involving labour and materials.
4. The Respondent stopped providing the abovementioned services from the date of initiation of CIRP against the Corporate Debtor, i.e. 13.05.2021, allegedly for reason of non-repayment of pre CIRP dues.
 5. The Respondent failed to deploy security at the Windmills location due to which a few parts of the Windmills had been stolen and the same reason was the cause for insurers to deny insurance services to the Windmills.
 6. The Applicant vide its Emails dated 26.10.2021 and 11.10.2022 requested the Respondent for reinstatement of services and in the email dated 11.10.2021 categorically informed the Respondent that the cost incurred for providing security services will be considered as CIRP Costs under Section 5(13)(c) of the Insolvency and Bankruptcy Code (Code) and will be paid on priority as per Section 53 of the Code.
 7. The Applicant further submitted that Section 14(2) of the Code expressly provides that if the supply of essential goods or services is critical to protect and preserve the value of the Corporate Debtor and manage its operations as a going concern then the supply of such goods or services shall not be terminated, suspended or interrupted during moratorium period. In view of this Section, the Applicant prayed for reinstatement of all services covered under the O&M Agreement and also for the compensation of loss due to theft that occurred on account of failure in providing security services by the Respondent.

Submission by the Respondent

1. The respondent submitted that the present Application is not maintainable on the very ground that the O&M Agreement was put to an effective end on or about 01.08.2019, i.e., more than 21 months prior to the commencement of CIRP. The reason for termination of the

said Agreement was non-payment of O&M charges by the Corporate Debtor. The default in payment of the said charges had begun since about 2017. The Respondent had sent various follow up emails, marked as Annexures, to recover the payment but in vain.

2. The Respondent vide its email dated 24.11.2021 had intimated to the Applicant that without receiving payment of O&M fees the Agreement cannot be executed. The Respondent further mentioned in the email that it is ready to discuss the plan for payment of past dues, cost of restarting the Wind Turbine Generators and payment of future O&M fees.
3. The Applicant itself admits to not intending to restart the Wind Turbine Generators. The reason being that the cost of restarting is substantial for the Corporate Debtor in view of the fact that it is under financial distress. This admission can be established from the email of the Applicant dated 11.10.2022. It is also the case of the Respondent that security services cannot be included within the purview of “essential services” under the Code if the Wind Turbine Generators are inoperable.
4. The Respondent further submitted that the Applicant was well aware of the termination of the O&M Agreement and therefore had requested for a fresh quotation from the Respondent for providing security services on a stand-alone basis vide its email dated 02.06.2021. The same email also contains an intimation by the Applicant to the Respondent to submit its claim in Form B (for Operational Creditors) as prescribed in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
5. The Respondent vide its email dated 10.06.2021 had categorically denied providing of security services on a stand-alone basis and had asked the Applicant to engage a separate agency for the same.

Findings

1. On close perusal of the Pleadings of both the parties, and particularly in light of the email dated 09.03.2018, it can be established that total outstanding dues to the amount of Rs. 83,65,160/- is pending for payment to be made by the Corporate Debtor. This substantiates the claim of the Respondent regarding non-payment and default in O&M Charges which led to the termination of the O&M Agreement back in around August 2019 itself.
2. On further perusal of the documentary evidence submitted by the Respondent and specifically the email dated 02.06.2021 sent by the Applicant, it is very clearly established that the Applicant had, in fact, asked the Respondent to provide a quote for deploying security services at the Wind Turbine Generators of the Corporate Debtor. This also empathetically establishes the fact that the Applicant was well aware of the termination of the O&M Agreement and also of the fact that continuation of services under the said Agreement cannot therefore be claimed during subsistence of the moratorium period.
3. Furthermore, from the perusal of the email dated 11.10.2022, the admission of the Applicant denying to restart the operation of the Wind Turbine Generators on account of the Corporate Debtor being in financial distress can be clearly established and the claim of the Applicant that security services form part of essential services thus stands negated. It is also pertinent to note that this email is silent on the proposal made by the Respondent to reinstate the O&M Agreement provided there is a discussion on payment of the past dues, cost of restarting the Wind Turbine Generators and payment of future O&M fees.
4. Thus, in view of the overall Pleadings of both the parties and particularly in light of the aforementioned 3 emails, the present

Application is dismissed and the Applicant is not made entitled to any reliefs.

SD/-
MADHU SINHA
MEMBER (TECHNICAL)

SD/-
REETA KOHLI
MEMBER (JUDICIAL)