

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

I.A (IBC) No. 708/KB/2021

In
C.P. (IB) No. 596/KB/2017

In the Matter of:

*An application Under section 60(5) Insolvency and Bankruptcy Code, 2016
and Rule 11 of the National Company Law Tribunal Rules, 2016.*

And

In the Matter of:

CITI BANK NA

....Financial Creditor

-Versus-

COSMIC FERRO ALLOYS LIMITED

.... Corporate Debtor

And

In the Matter of:

COSMIC FERRO ALLOYS LIMITED

... Applicant

-Versus-

DAMODAR VALLEY CORPORATIO& OTHERS.

....Respondents

Date of Hearing : 10/06/2022

Date of pronouncing the order : 14 /07/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsel appeared physically/through video conference :

For erstwhile RP

:

Mr. Siddhartha Datta, Adv.

Mr. Sakabda Roy, Adv.

Mr. Deepanjan Dutta Roy, Adv.

For Cosmic Ferro Alloys Ltd. : Mr. Ratnanko Banerji, Sr.Adv.
Mr. Dharendra Nath Sharma,Adv.
Mr. Naresh Balodia, Adv.
Ms. Shrishti Barman, Adv.

For Damodar Vally Corpn. : Mr. Jaydip Kar, Sr Adv
Mr. Shaunak Mitra, Adv.
Mr. Prasun Mukherjee,Adv.
Mr. Deepak Agarwal, Adv.

For Commercial Tax, West Bengal : Mr. Subhajit Roy, Adv.

For Respondents in IA/1436/2019 : Mr. Anuj Singh, Adv.
Mr. Barnik Ghosh, Adv.

ORDER

PER: Harish Chander Suri, Member (Technical):

1. This Court convened through video conferencing.
2. The Interlocutory Application No. 708 of 2021 has been filed by the Applicant Under *Section 60(5) Insolvency and Bankruptcy Code, 2016*, read with Rule 11 of the NCLT Rules, 2016 for seeking enforcement of the Resolution Plan as approved by this Adjudicating Authority on October 11, 2018, as the Respondent Damodar Valley Corporation (for short DVC) is not complying with the same and this is causing prejudice to the applicant.
3. It is submitted by the applicant /Corporate Debtor that Respondent No.1 DVC is engaged, inter alia, in the generation and transmission of industrial power which is supplied in bulk at a competitive rate to the industries including the applicant and Respondent No.2 to 4 are the senior most management of the team of DVC and Respondent No. 5 to 8 are the Senior Executive of DVC having control or charge over the issues involved between the applicant and DVC.
4. It is submitted that this Adjudicating Authority had admitted a section 7 application filed by Citi Bank NA, the Financial Creditor, initiating CIRP of the Corporate Debtor in which the Resolution plan was approved by this

Adjudicating Authority. It is further submitted that after the resolution plan was approved, the new management of the applicant was formed with the newly constituted Board of Directors to run, manage and continue the affairs of the applicant and its business. The applicant has been a consumer of Respondent No.1 in respect of the Barjora Factory of the applicant and has been drawing electricity for Barjora Factory.

5. Respondent No.1 had submitted its claim as an Operational Creditor before the Resolution Professional in Form-B under section 7 of the IBBI(Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

6. The Resolution Plan was approved by this Adjudicating Authority on 11th October, 2018 and it has become final and binding upon the applicant, its employees, members, creditors including the Central Government, State Government or any Local Authority, Operational Creditors including Respondent No.1 in terms of section 31 of the Code.

7. It is submitted that the new management of the applicant had taken over the applicant/Corporate Debtor as a sick unit and are trying to revive the same and have put in a lot of their own money having expectation of future potential in business and recovery of realizable Assets. The total claim submitted by respondent no. 1 was for a sum of **Rs.64.4456** crores in terms of Form-B under Regulation 7 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. However, in terms of the Resolution Plan, the total settled amount which was payable by the applicant to Respondent was Rs.24.67Crores which would settle old dues of Respondent No.1.The payment of the dues of Respondent No.1 was scheduled to be made as under:-

A) Within 30 days	: Rs. 4.93 crores
B) Within 31.03.2020	: Rs. 4.93 crores
C) Between 31.03.2020 & 31.03.2021	: Rs. 4.93 crores
D) Between 31.03.2021 & 31.03.2021	: Rs. 4.94 Crores

E) Between 31.03.2022 & 31.03.2022 : Rs. 4.94 Crores.

8. It is submitted that in terms of the Resolution Plan as approved by the Adjudicating Authority by its order dated 11.10.2018, the Applicant had made an initial payment of the first instalment of Rs. 4.93 crores within stipulated time of 30 days as directed by the order dated 11.10.2018. However, the subsequent tranche/instalment which was to be paid on or before 31.03.2020 could not be paid in view of the pandemic Covid-19 which had seriously affected the entire business life of the people of this country. The next instalment payable before 31.03.2021 could not be paid also since the electricity connection to the Bajoria Plan has been disconnected as on 14.08.2020 by Respondent No.1 for non-payment of dues whereby the revenue of the Applicant came to stand still.

9. It is submitted that the Central Government had announced national lockdown and all industrial and manufacturing activities and other businesses all over India were closed for several months. Thereafter, the applicant took all necessary measures to pay the balance outstanding dues of Respondent no.1 but due to some unavoidable circumstances, the applicant was unable to make payment of the two instalment as per the payment schedule. The applicant made several requests to Respondent No.1 not to raise any claim or demand for payment of any amount on account of old dues over and above the same which had already been settled and finalized under the Resolution Plan being Rs.24.67 crores but despite that Respondent No.1 continued to insist upon its purported demand of an exorbitant sum of Rs.104.92 Crores and relating to the period before the sanction of the Resolution Plan even though Respondent No.1 was fully aware that such amount is not payable in terms of the resolution plan and the same is binding upon Respondent No.1 and other respondents. It is submitted that there are mistakes in the bill generated by Respondent No.1 as on 01.01.2021, which requires rectification.

10. It is submitted that Respondent No.1 proceeded to recently issue a purported wrongful demand upon the Applicant under the cover of the

letter/email dated 03/07/2021 making an exorbitant alleged claim of a sum of Rs.56,66,84,128/-on account of alleged electricity dues which is contrary to the Resolution Plan as approved by this Adjudicating Authority. It is clearly evident that such purported wrongful demand has been raised in total contravention of the Order passed by this Adjudicating Authority approving the Resolution Plan, wherein the claim was given to the Resolution Applicant and accordingly the total dues of the Respondent No.1 was settled at Rs. 24.67 crores.

11. It is submitted that after receipt of the purported claim under cover of Respondent No.1's letter dated 03.07.2021, the Applicant had given a reply by its email dated 12.07.2021 enclosing therewith a letter dated 03.07.2021 dealing with the purported contentions and allegations made by the Applicant, copy whereof is annexed as Letter-R and the Respondents have been requested to consider the case of **Ghanshyam Mishra and Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd.** is annexed as Letter-S. wherein the Apex Court has held that-

“ Once a resolution plan is duly approved by the NCLT under Section 31(1), the claims provided in the resolution plan shall stand frozen and will be binding on all stakeholders involved, including the corporate debtor and its employees, members, creditors, the Central Government, any State Government or any local authority.

On the date of approval of the resolution plan by the NCLT, all claims which are not part of the resolution plan shall stand extinguished and no person shall be entitled to initiate or continue any proceedings in respect of such claims.

The 2019 amendment to Section 31 of the IBC was declaratory and clarificatory in nature and thus, would have retrospective application.”

12. It is submitted that by Advocate's letter dated 26.07.2021 (Copy annexed as Letter T), the applicant placed before Respondent No.1 to continue

to insist upon payment of the purported claim on the basis of the Respondent No.1's letter dated 03.07.2021 read with Bill Generated as on 01.01.2021 but sent to the Applicant as attachment to the email dated 03.07.2021 is illegal and void and also contrary to the approved Resolution Plan which is binding on Respondent No.1 in terms of Section 31 read with section 74(3) of the IBC, 2016.

13. It is submitted that by the aforesaid Advocate's letter dated 26.07.2021, the Respondents have been called upon not to seek any amount over and above the Settled Old Dues of Rs. 24.67 Crores and revise the bill generated by Respondent No.1 on 01.01.2021 (sent by Respondent No.1 to the Applicant as an attachment to Respondent No.1's email dated 03.07.2021) giving effect to the Resolution Plan and also correcting the amount receivable as per the calculations given above and adjust the current payable dues from the amount receivable by the Applicant and send the same to the Applicant immediately and the Respondents have been requested to act strictly in compliance of the directions contained in the Resolution Plan as approved by this Adjudicating Authority by its order dated 11.10.2018 which is binding upon Respondents and to restore/reconnect the Electricity supply to Barjora Factory of the Applicant immediately and informed that the illegal disconnection and the act of non-reconnection by the Respondents has put the Applicant in great jeopardy and is causing severe damage to the Applicant which tend to make the Applicant more sick and that if the same is not done then the Applicant shall be constrained to move before the NCLT under section 74(3) of IBC without any further reference to Respondent No.1. Further, after the meeting of the representatives of both sides was held on July 26, 2021, the applicant had put on record its proposal in the form of the representation by its letter dated July, 27, 2021 calling upon the respondent/DVC inter alia to strictly act in terms of the resolution plan as approved dated October 11, 2018. A copy of the said recent letter dated July 27, 2021 issued by the applicant to the Respondent is annexed as Letter U to the application.

14. The applicant has prayed that the Respondents be directed to act in terms of the resolution plan as approved and affirmed by this Adjudicating Authority vide its order dated 11th October, 2018 and not to demand any amount beyond Rs. 24.67 Crores whatever has already been paid for the period before the date of approval of the resolution plan.

15. It is further prayed that the Respondents be directed to give effect to the Resolution Plan in its books of accounts and in its systems and thereafter generate a fresh bill after adjusting the amount paid by the applicant and also the amount receivable by the Applicant in view of the Hon'ble Supreme Court's order dated 03/12/2018 in CA-4881/2010 read with WBERC Tariff order dated 19th June , 2020 and send such revised bill to the Applicant and to give reconnection to the Applicant within such time as be directed by this Adjudicating Authority and also to provide for 132 KVA power to the Applicant and increase of power demand from 10 MVA to 45 MVA, both with a waiver of security deposit for 5 years from the date of approval of the Resolution Plan

16. The Respondents in its affidavit filed through its Dy. Chief Engineer has submitted that by filing the instant application, the applicant is not only seeking exemption from discharging the dues to DVC under the resolution plan but also seeking exemption from making payment of the electricity dues which have fallen due subsequent to the resolution plan .

17. It is submitted that under the resolution plan the claim of DVC was pegged at Rs.24.67 crore. It is submitted that the DVC had submitted its claim before the RP in two parts, (i) pre CIRP claim to the extent of Rs. 64.44 crore and (ii) the claim during CIRP amounting to Rs.5.87 crore. The said total claim of DVC was taken into consideration in pegging and allowing the claim of Rs.24.67 crore.

18. It is submitted that under the Resolution Plan, the successful resolution applicant was directed to pay the said amount of Rs.24.67 in the following manner, which are as under:-

i.	Upfront payment within thirty days	Rs. 4.93 Crore
ii.	Payment before 31 st March,2020 but Before 31 st March, 2021	Rs. 4.93 crore
iii.	Payment after 31 st March, 2020 but Before 31 st March ,2021	Rs. 4.93 crore
iv.	Payment after 31 st March 2021 but Before 31 st March,2021	Rs. 4.94 crore
v.	Payment after 31 st March 2022 but Before 31 st March 2023	Rs. 4.94 Crore

19. It is further submitted by the respondent that in violation of the Resolution Plan, the successful resolution applicant failed to pay the initial payment of Rs.4.93 crore within the period of thirty days. Within the said period, i.e. 9th November, 2018, only a sum of Rs.2.25 crore was paid. The balance payment was made subsequently by 11th December, 2018.

20. It submitted that moreover, post approval of the resolution plan, there is a default in making payment of the electricity bills on and from the month of February 2020 till August 2020 amounting to Rs.15,94,21,974/-. Therefore, the dues pertaining to the resolution plan is to the extent of Rs.5,94,98,303/- calculated up to 31.03.2021, a copy of chart indicating the details of Rs. 5,94,98,303/- is annexed to the applicant as "R1". The dues on account of electricity bills between February 2020 to August 2020 come to Rs.15,94,21,974/-. Total principal dues, as on 30th September 2021 therefore, is to the extent of Rs.21,89,20,277/-. In fact no payment has also been received during the period of 1st April, 2021 to 30th September 2021 under the resolution plan. As regards the current dues, the applicant is liable to pay Delayed Payment Surcharge [in short, 'DPS'] as per the prescribed rate under clause no. 4.14 of West Bengal Regulatory Commission (Terms and Conditions of Tariff) Regulation, 2011 and subsequent amendments. Such DPS calculated on the current dues till 30th September 2021 comes to Rs. 4,78,72,712/-. So far as the dues other than the resolution plan is concerned,

the same come to Rs.20,72,94,686/- as shown in the chart annexed hereto and marked with the letter “R2”.

21. It is submitted that due to non-payment of the current dues of electricity, DVC has disconnected the power supply of the applicant with effect from 14th August 2020, upon notice. A copy of the disconnection notice is annexed hereto and marked with the letter “R3”. It would appear from the calculation chart annexed hereto and marked with the letter “R2” that in the month of March 2020, the applicant’s bill amount for consumption month of February, March, April, May, June, July and August 2020 is Rs.2,81,30,743/-, Rs. 2,63,37,665/-, Rs. 39,71,573/-, Rs. 3,26,63,702/-, Rs.4,06,56,757/-, Rs. 4,14,90,954/-, Rs. 1,43,01,323/- respectively. It would appear from the said chart that substantial consumption of electricity was recorded in these months, which demonstrates that the applicant was functioning in its full capacity except in the month of April 2020. Despite the same, it has chosen not to pay the electricity consumption bill.

22. It is submitted that although DVC has not preferred any appeal against the order dated 11th October 2018 approving the resolution plan, DVC has preferred an appeal against the subsequent order of this Adjudicating Authority dated 20th November 2019 by which DVC was asked to reconnect electricity supply and continue the same without insisting on payment of deposits, arrear security deposit, as has been stated in the approved plan. The said appeal is pending. Notwithstanding pendency of the appeal DVC had reconnected the supply of electricity but the same had to be subsequently disconnected for the reasons stated above.

23. It is submitted that the controversy has arisen as DVC has issued a revised bill pursuant to the orders of the West Bengal Electricity Regulatory Commission dated 19th March 2020 and 19th June 2020 respectively. By its order dated 19th March 2020, the West Bengal Electricity Regulatory Commission has issued the Tariff Order for the period 2009 to 2013 and by the subsequent order dated 19th June 2020, the Commission has issued a

Tariff Order for 2006 to 2009. Accordingly, DVC had issued a revised bill for the purpose of its record, whereby the claim of DVC for the aforesaid tariff periods, namely 2006 to 2009 and 2009 to 2013 stood reduced to Rs.56.67 crore approximately. According to the applicant, though they are not liable to pay the dues of DVC in terms of the said bill, they are seeking adjustment of the refund.

24. It is further submitted that a bare perusal of the bill would show that there was short payment by the Corporate Debtor up to April 2010 to the extent of Rs.15.88 crore and there was further shortfall in payment post May 2010 to the extent of Rs.78.78 crore which includes Dues of Rs.15.94 Cr. for the period from consumption month of February 2020 to August 2020. During the period up to April 2010, DVC used to fix its own tariff and the consumer defaulted in payment of the power supply bills raised as per provisional tariff order issued by Central Electricity Regulatory Commission on 23.06.2011. Hon'ble Calcutta High Court declared that (clause 4) of Regulation 5 of 2009 Tariff Regulation related to determination of provisional tariff order is ultra vires on 07.12.2012. The appellant paid energy bills in terms of tariff order dated 06.08.2009 in place of provisional tariff order dated 23.06.2011 for the period from May 10 to August 13. The Hon'ble Supreme Court set aside the order dated 07.12.2012 of Hon'ble Calcutta High Court vide order dated 18.12.2017. DVC came under the regime of the West Bengal Electricity Regulatory Commission with effect from April 2006. By reason of pendency of determination of tariff by the West Bengal Electricity Regulatory Commission, for the year 2006-2009 and 2009-2013 the provisional tariff/tariff of DVC was being charged. The West Bengal Electricity Regulatory Commission has now fixed the tariff and in the process, there has been some deduction in the net rate for the periods 2006 to 2009 and 2009 to 2013. Since the Corporate Debtor did not make full payment for the aforesaid periods and in fact there was short payment, on adjustment, net amount of Rs.56.67 crore is receivable by DVC.

25. It is submitted that however, by reason of the settled law, with the approval of the resolution plan under Section 31 of IBC, 2016, the claim as provided in the resolution plan stood frozen and became binding on the Corporate Debtor, the applicant as well as DVC. On the approval of the resolution plan by this Hon'ble Tribunal, all such claims which are not part of the resolution plan stood extinguished. As such, it is submitted that DVC is not insisting on any payment apart from the payment allowed under the resolution plan and the consumption bills outstanding post resolution plan. Similarly the applicant is not entitled to initiate or continue any proceedings in respect of a claim which is not part of the resolution plan.

26. It is submitted that in any event, according to the applicant, they are trying to enforce their selective right while trying to contend that the claim insofar as DVC is concerned is frozen, but they are trying to enforce the right to adjustment which arise out of the same transaction. It is submitted with respect that the law is well settled. Once the resolution plan is approved, the respective claims and counter claims stand frozen. Any claim beyond the resolution plan stands extinguished and Section 31(10) of the IBC, 2016 does not permit initiation or continuance of proceedings in respect of a claim which is not part of the resolution plan.

27. It is submitted that the applicant is seeking adjustment of certain payments and/or amounts which are shown in the bill raised by DVC as on 1st January 2021 which are beyond the resolution plan and therefore, the law does not permit the applicant to claim any adjustment in respect of the said claim which is beyond the resolution plan. Similarly the law do not permit DVC to claim any amount beyond the resolution plan.

28. It is submitted that Section 60(5) of the IBC, 2016 does not permit filing of an application before this Adjudicating Authority relating to a claim not arising out of the resolution plan. Only those claims which arise out of or

in relation to the insolvency resolution plan can be brought under the purview of Section 60(5) of IBC, 2016.

29. It is thus submitted that the relief claimed in the instant application travels beyond the scope of Section 60(5) of IBC, 2016. It is apparent from the present application filed by the applicant that they are trying to avoid payment of legitimate dues of DVC and seeking to be unjustly enriched by making claim travelling beyond the resolution plan.

30. It is submitted that DVC is a statutory authority. The Central Government, through the Ministry of Power, has a stake in DVC. DVC is a loss-making concern so far as the business relating to power is concerned. The operating result of DVC would appear from its statement of Profit and Loss in Annual Financial Statement for last three years, which is annexed hereto and marked with the letter "R4". The accumulated loss gets aggravated when consumers consume electricity but are unable to pay by reason of various factors, namely the company becoming sick or under a resolution plan and/or when the company goes into liquidation. The total dues of the company who are either under liquidation or under resolution plan comes to Rs.435.56 crores (before liquidation/resolution plan period) out of which DVC could realize only 4.09 crores. This loss has a cascading effect on the other existing consumers. West Bengal Regulatory Commission, which fixing the tariff, takes into consideration various factors and one of the factors is the operating loss. After taking all these into consideration, a mechanism is devised to fix the tariff. It is submitted with respect that such fixation of tariff in the teeth of the loss sustained by DVC puts an undue pressure on the other consumers of electricity. In other words, the inability to pay by one consumer taxed the other consumers, who are then required to bear the additional cost. Therefore, recovery of dues of DVC is in public interest. If the dues remain unpaid, it goes against public interest. It is submitted by DVC that considering the public interest, applicant should be directed to clear the outstanding dues as mentioned above without any further delay.

31. **In the course of arguments, Ld.Counsel for the applicant** submits that out of the total amount of Rs. 24.67 crores, which was to be paid to the Respondent in 5 yearly instalments. Out of which, four instalments have already been paid and 5th instalment is due on 31st March, 2022, the DVC/Respondent No.1 did not challenge the Resolution Plan and has already accepted the entire amount. It is submitted that after the resolution plan was approved, the Hon'ble High Court had passed an order on 3rd December, 2018 confirming the tariff order published on 19th March, 2020. In terms of the said order of the Hon'ble Supreme Court, the applicant has become entitled to receive a principle refund of Rs.49.98 crores plus interest of Rs. 42.35 Crores calculated up to May, 2022 and further interest from DVC continuing to base its original claim of Rs.64.44 crores and further revising its claim to Rs.120 Crores by adding undue amounts along with interest thereon for the period prior to the approval of Resolution Plan and not accepting the amount crystallized under the resolution plan which stood Rs. 24.67 crores and is not making necessary adjustments in its systems whereby inflated bills and exorbitant demand is being made by DVC upon the applicant. The Principal sum of Rs.12.48 crores for the period 2009-2013 and Rs. 37.50 crores for the period 2006-2009 is refundable from DVC to the applicant aggregating to Rs. 49.98 crores plus interest of Rs.42.35 crores calculated upto May'2022 @ 6% per annum in view of the order passed by the Hon'ble Supreme Court in Damodar Valley Corporation Vs. Central Regulatory Commission & Ors. reported in (2020) 6SCC95 being CA-4881/2010, based on which WBERC issued the revised fresh tariff order.

32. Ld. Counsel for the applicant submitted that application filed by the successful applicant being I.A. (IB) No. 708/KB/2021 who is now running the Corporate Debtor deserves to be allowed due to the following reasons:-

- i. Under the resolution plan which is approved and is binding, only the resolution debt is frozen but the receivables and assets of Corporate Debtor are not frozen (Paras- 9 to 11 of Hon'ble NCLAT order in Company Appeal (AT) (Ins) No. 467 of 2019 (Re: JSE Steel Ltd. – vs- Ashok Kumar Gulla).

- ii. In CIRP process, the corporate debtors have been transferred as going concern means transfer of all the assets and liabilities but by the provision of laws of IBC, the liabilities are being denied to mitigate the uncertainty in running the business of corporate debtors.(Ghanshyam Mishra – vs- Elelwise).From Section 5(26) of I & B Code which defines “Resolution Plan”. It is further clear that the date of approval of Resolution Plan, Corporate Debtor is handed over to new management as going concern with definite liability and the assets, rights, claims, licenses etc. remain with the Corporate Debtor without any limitation or bar.
- iii. Corporate Debtor has been taken over by the successful resolution applicant as a going concern for which haircut is given only to the dues payable by Corporate Debtor but the other assets, rights and properties remains with the applicant /Corporate Debtor. Hence DVC cannot deny the refund to which the applicant is now entitled to in view of the reduction in the tariff for the period prior to the approval of the resolution plan dated 11.10.2018.
- iv. The applicant is claiming refund for the period prior to approval of the resolution plan i.e. before 11.10.2018 for which they are entitled in view of Hon’ble Supreme Court Order for revision in tariff rates for the period 2006-2009 and 2009-2013.
- v. In the reply affidavit filed by the DVC, it has admitted that its claim has been frozen at Rs. 24.67 crores which is binding and that the claim of the DVC for the tariff Period of 2006-09 and 2009-13 has stood reduced (para (n) at page 8 and para 8 at page 13 of the reply).
- vi. However, while accepting the reduction in the tariff rate for the aforesaid periods, DVC is now seeking to adjust the amount which is refundable to the applicant from inflated demand of Rs.120 Crores raised vide bill dated 01.01.2021 issued vide mail dated 3rd July, 2021 on the mail id of our representative. This

inflated amount of Rs.120 Crores includes original claim of Rs.64.4456 crores filed by DVC in Form-B to the resolution professional and other undue amounts claimed to be pertaining to the period prior to NCLT Order dated 11th October, 2018 and there on adding huge interest on that amount. In spite of the amount crystallized under the plan being Rs. 24.67 Crores. This is the real bone of contention.

- vii. Both DVC and the Applicant are ad-idem on the issue that the applicant is entitled to benefit of reduced tariff in view of WBERC order, but the amount which is refundable to the applicant is sought to be adjusted by the DVC from exorbitant demand of Rs.120 Crores created by DVC by adding unjustified interest and other claims which were not added to the claim originally filed by DVC in Form B, Instead of giving this adjustment /refund from the amount crystallized under the plan being Rs.24.67 crores. The admission of DVC will appear from the credit note.
- viii. The resolution plan upon being sanctioned is binding, as once CoC in its commercial wisdom has approved the plan, the same cannot be interfered with (India Resurgence ARC Pvt. Ltd. – vs- Amit Metaliks) 2021 SCC Online SC 409 (paras-13 and 17) and Ghanshyam Mishra reported in 2021 (9) SCC 657).
- ix. DVC has admitted that the applicant is entitled to refund because of reduction in tariff but the DVC is trying to set off the refund from extinguished liability which was prior to the claim of DVC being crystalized under the resolution plan in stead of adjusting from the internal resolution amount of Rs.24.67 crores.

33. It is submitted that the application filed by applicant/ Cosmic Ferro Alloys Ltd. deserves to be allowed in terms of prayers (a), (b) and (c) of the application at pages-30 and 31.DVC has admitted the entitlement of the applicant to receive refund which is the right of receivables of a Corporate Debtor but however the DVC is acting against the resolution plan by seeking give such adjustment from the earlier demand of Rs. 64.44 crores [which was

prior to the resolution plan] and further claiming additional interest and claims for the period prior to the approval of Resolution plan and NOT from the amount crystallized under the resolution plan being Rs.24.67 crores.

34. **Ld. Counsel appearing for the DVC/Respondent**, however, in his argument submitted that the applicant seeking a refund from DVC has failed to appreciate that by reason of publication of tariff order for the period 2009-2013 on 19th March, 2020 and for the period 2006-2009 on 19th June, 2020 by the West Bengal Electricity Regulatory Commission (hereinafter referred to as “WBERC”) the claim of DVC which was at 64.4.crores on the date of approval of resolution plan had come down to Rs.56.6. crores (see Page 275 petition).

35. It is submitted that DVC had not raised any bill on the Applicant nor it is claiming any further amount over and above 24.67 crores allowed under the resolution plan. The bill at page 275 of the petition, is meant for internal adjustment of accounts of DVC so that at the stage of truing up of accounts by the WBERC, the actual bad debt suffered by DVC is correctly reflected after adjustment of electricity tariff.

36. It is submitted that DVC had submitted the aforesaid claimed before the Resolution Professional in two parts, namely (i) pre CRIP claim to the extent of Rs. 64.44 crore and (ii) the claim during CIRP amounting to Rs.5.87 crore.

37. It is submitted that by a Judgment and order dated 1st October, 2021, the Hon’ble National Company Law Appellate Tribunal was pleased to interfere with the order dated 20th November, 2019 and clarified 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, was directed to be paid out of CIRP costs, and the payment was directed to be

ensured by the Resolution Professional. Any dues relating to electricity supplied after the moratorium was also directed to be paid by the corporate debtor to the discom DVC.

38. It is submitted that the controversy has arisen as stated above since DVC has generated revised bills dated 26th July, 2020 and 1st January, 2021 pursuant to the subsequent orders of the West Bengal Electricity Regulatory Commission dated 19th March, 2020 and 19th June, 2020 respectively for adjusting its own accounts. By its order dated 19th March, 2020, the West Bengal Electricity Regulatory Commission has issued the Tariff Order for the period 2009 to 2013 and by the subsequent order dated 19th June, 2020, the Commission has issued a Tariff Order for 2006 to 2009. Accordingly, DVC has generated a revised bill dated 1st January, 2021 for the purpose of its record, whereby the claim of DVC for the aforesaid tariff periods, namely 2006 to 2009 and 2009 to 2013 after giving adjustment stood reduced to Rs.56.67 crore approximately instead of Rs.64.44 crores. The bills dated 26th July 2020 and 1st January, 2021 takes into consideration the refund amount and after adjustment of the same, a sum in excess of Rs.56.67 crores remained due. The adjustment of accounts by DVC was meant to reduce the balance amount of bad debt.

39. It is stated by DVC that the bill dated 26th July ,2020 merely indicates billing difference for the internal adjustment of records of DVC in respect of the present consumer and all the allegations to the contrary are denied and disputed. It is submitted that the approved resolution plan being binding on both the respondent and the Applicant being the Corporate Debtor, the Applicant is estopped from claiming any amount overlooking the corresponding liability post approval of the resolution plan. In view of the approved resolution plan DVC is unable to give effect to the tariff order dated 19th March, 2020 and 19th June, 2020 in so far as the present consumer is concerned. In the event the said tariff order was applicable, the Applicant would have been liable to pay a sum in excess of 56.7 crores as would be evident from the bill dated 1st January, 2021, as such the question of any

alleged refund to the applicant under the bill dated 1st January, 2021 does not and cannot arise.

40. It is submitted that DVC's claim now stands at of 56.67 crores from the Applicant which under the resolution plan stands reduced to Rs.24.67 crores. Therefore, DVC is entitled to claim the difference as bad and doubtful debt for accounting purpose before the Commission under 2011 Regulation.

41. It is stated that as already stated above, the bill dated 1st January, 2021 was not served and/or raised upon the Applicant and is meant for adjustment of internal accounts of DVC in view of the approved resolution plan and is meant to finalize the bad and doubtful debt only as such the question of demanding or claiming the same and/or consequent violation of the approved resolution plan does not and cannot arise.

42. It is submitted that in exercise of raising the bill dated 01.01.2021 became necessary for adjustment of bad and doubtful debt relating to the corporate debtor. The resolution plan allowed Rs.24.67 crores only, leaving out the balance claim of DVC which had to be written off as bad debt. The adjustment of accounts was necessary to arrive at the actual figure of bad debt. Under West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011, Chapter 5 lays down the General principles for computing cost and return. Regulation 5.10 is to the extent as follows:-

“ 5.10.1 – The Commission may allow such amount of bad debts as actually had been written off in the latest available audited accounts of the generating companies/ licences subject to a ceiling of 05% of the annual gross sale value of power at the end of the current year. Provided that in case of restructuring or merger of entities, the Commission may relax the ceiling for once only as deemed fit and proper”.

43. Ld. Counsel for the Respondent (DVC) has relied upon in the case of **K Sashidhar vs Indian Overseas Bank & Ors, 2019 (12) SCC 150,(paragraphs 55,59 and 64)**, the Hon'ble Supreme Court held that the

discretion of NCLT circumscribed by section 31 is limited to security of resolution plan “as approved” by requisite percentage of voting share of financial creditors. Even in such enquiry the Adjudicating Authority can reject the Resolution Plan, in reference to matters specified in section 30(2) of the I & B Code. It is thus settled law that NCLT may cause an enquiry into the approved resolution plan on limited grounds referred to in section 30(2) read with Section 419(1) of the I & B Code. It cannot make any other enquiry.

44. Ld.Counsel for the Respondent (DVC) has further relied upon in the case of ***Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors reported 2020 (8)SCC 531 (Paragraphs 67,68 and 69)***, wherein the Hon’ble Supreme Court taking note of Section 60(5) of IBC and its various sub provisions held that “ any other law for the time being in force” as appearing in the said section does not include the provision of the Code itself and in any event the residual jurisdiction as contained in Section 60(5) does not in any manner impact section 30(2) of the Code nor does it whittle down the provision contained in section 31(1) of the IBC nor does it vest any discretionary or equity jurisdiction upon the adjudicatory authority outside section 30(2) of the Code.

45. It is submitted by the Ld.Counsel for the Respondent (DVC) has also relied upon in the case of ***Ghanashyam Mishra and sons Pvt Limited vs Edelweiss Asset Reconstruction Company Limited reported in 2021(9) SCC 657.***

46. The applicant in course of the hearing of the application has relied upon a judgement of **NCLAT dated 4th December, 2019 passed in Company Appeal (AT) (Insolvency) No. 467 of 2019 JSW steel Vs Ashok Kumar Gulla & Ors.**

47. We have heard the Ld. Counsel for the parties at length and have seen the application, reply and other documents placed on record. We are of the view that once the Resolution Plan has been accepted and the claim of the DVC was pegged and allowed at Rs. 24.67 Crores, thereby excluding the total

pre CIRP claim to the extent of Rs.64.44 Crores, the claim became final for all practical purposes. The Corporate Debtor cannot have benefit on both counts. On the one hand, the Corporate Debtor has saved itself by waiver of all pre CIRP dues and on the other hand, if there is any adjustment of accounts in the applicant office, the Corporate Debtor cannot claim the same as its own receivables, and claim the said amount from the applicant. The applicant has borne all the pre CIRP dues as its bad debts and if it has fortunately adjusted some amounts that came to it through some decision of the Hon'ble Supreme Court. It should have the benefit of setting off that amount against its bad debts.

48. There is no purpose to unjustly enrich the new investors who have entered the shoes of the Corporate Debtor by further exploiting and squeezing the DVC. We do not find any merit in the demand of the Corporate Debtor/applicant, the relief sought by the applicant staying the demand of the DVC beyond Rs. 24.67 Crores is thus rejected. The DVC shall however give connection to the applicant as per the relevant rules of the DVC on completion of all formalities and deposit of requisite amount by the applicant/ Corporate Debtor within one month.

49. I.A.(IB)No. 708/KB/2021 is dismissed with the aforesaid directions.

50. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on this, the 14th day of July, 2022

PJ.