

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

**I.A./177/ND/2023
IN**

Company Petition No. (IB)-2561/ND/2019

(Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

IN THE MATTER OF:

M/s. Shapoorji Pallonji & Co. Pvt. Ltd.

...Operational Creditor

Versus

**M/s. Sinnar Thermal Power Limited
(Formally known as Rattan India
Nasik Power Limited)**

...Corporate Debtor

AND IN THE MATTER OF:

**Mr. Jeevagan Narayana Swami Nadar,
Suspended Director of Sinnar Thermal Power Limited**

...Applicant

Versus

South Eastern Coalfields Limited & Ors.

...Respondents

CORAM:

SHRI P. MOHAN RAJ, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on: 29.03.2023

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

The instant application is filed on behalf of Mr. Jeevagan Narayana Swami Nadar, Suspended Director of M/s. Sinnar Thermal Power Limited ('Corporate Debtor') under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 praying for the following relief(s):-

- a) "To stay the operation of SECL's letter dated 08.12.2022 issued to Corporate Debtor terminating the Fuel Supply Agreement dated 03.09.2013 in continuation of the Hon'ble Delhi High Court's Order dated 09.12.2022; and
- b) To stay the operation of SECL's letter dated 08.12.2022 issued to Axis Bank Limited thereby encashing the Security Deposits issued by the Corporate Debtor as per the provisions of the Fuel Supply Agreement dated 03 .09.2013 in continuation of the Hon'ble Delhi High Court's Order dated 09.12.2022; and/or
- c) To pass any other Order as this Hon'ble Tribunal may deem fit in light of the facts and circumstances of the present case."

2. Briefly stated, the facts of the present case as averred by the applicant are that the Corporate Insolvency Resolution Process was initiated against M/s. Sinner Thermal Power Limited ('Corporate Debtor') vide this Adjudicating Authority's order dated 19.09.2022 and moratorium under Section 14 of the Code, 2016 was imposed. It is submitted that the CIRP admission order dated 19.09.2022 passed by this Adjudicating Authority was challenged before the Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 1185/2022 and Hon'ble NCLAT vide order dated 26.09.2022 passed the following direction:-

"In view of the above submission, we are of the view that IRP in pursuance of the impugned order may not take any steps and it shall be open for the Appellant to participate further with the Ministry of Power in continuation of the earlier minutes of meetings."

This order was subsequently clarified by Hon'ble NCLAT vide their order dated 18.01.2023 in I.A. No. 4692 of 2022 in CA (AT) Ins. No. 1185 of 2022 as under:

"We have looked into the Interim Order passed by this Tribunal on 26.09.2022. We clarify that Order dated 26.09.2022 does not stay the moratorium which had been kicked in by virtue of order of the Adjudicating Authority."

[Emphasis Supplied]

3. It is submitted that M/s. South Eastern Coalfields Limited's ('SECL'/ 'Respondent No.1') vide its letter dated 08.12.2022 had terminated the Fuel Supply Agreement dated 03.09.2013 ("FSA") entered between the SECL (Respondent No.1) and Corporate Debtor for supply of 27,16,000 tonnes of coal to the Corporate Debtor's Nasik Thermal Power Plant and further Respondent No.1 vide its letter dated 08.12.2022 to Axis Bank Limited had sought to encash the Security Deposits issued by Corporate Debtor in terms of the Fuel Supply Agreement. The Applicant upon issuance of the termination letter had filed a Writ Petition before the Hon'ble High Court and the same was listed on 09.12.2022, wherein the Hon'ble High Court vide its Order has directed that the invocation of security deposits as sought by SECL shall not be given effect to by the banks till 04.01.2023. It was further directed that if an application before this Hon'ble Tribunal is filed by 04.01.2023, then the said protection would continue till the date of first listing of the Application before this Hon'ble Tribunal.
4. From the record, this Adjudicating Authority observed that the instant application was listed before this Adjudicating Authority for the first time on 12.01.2023, and after hearing Ld. Counsel for both the Applicant as well as Respondent No.1 this Adjudicating Authority had granted interim protection qua encashment of the bank guarantees.
5. We have heard the submissions made by the Learned Counsel for both parties and perused the material available on record. From the submissions of the Applicant itself, it is undisputed that even prior to the initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor, the Corporate Debtor had failed to adhere to the terms/ conditions precedent to the FSA and failed to execute the PPA due to the several litigations involved in the matter as averred by the Applicant. The same fact stands corroborated with the contemporaneous litigation records and e-mail correspondence as placed on record by the Applicant with the present interlocutory application. It is, therefore, necessary to refer to the relevant clauses of the Fuel Supply Agreement dated 03.09.2013 and the same are reproduced hereunder:

“2.8 Condition Precedent (CP)

The rights and obligations of the Parties under this Agreement are subject to the satisfaction in full of the Conditions Precedent provided under Clause 2.8.1 and Clause 2.8.2 within the Condition Precedent Period unless the same have been waived in accordance with this Agreement.

2.8.2 Purchaser's Condition Precedent

2.8.1 *****

2.8.2 *****

2.8.2.3 [Applicable to Purchaser who has signed FSA without entering into long term PPA]

The Purchaser shall have to furnish the long term Power Purchase Agreements (PPA) either directly with Distribution Companies (DISCOMs) or through Power Trading Company (ies) (PTC) who has/have signed back to back PPA(s) (long term) with DISCOMs within the Condition Precedent (CP) period as per clause 2.8.3.

2.8.3 Satisfaction of Condition Precedent

2.8.3.1 The Conditions Precedents shall be fulfilled/ achieved within a period of twenty four (24) months from the Signature Date or such further period (up to a maximum of 180 days) as may be extended on account of Force Majeure under Clause 17 of this Agreement ("Condition Precedent Period")”

6. It is the case of the Applicant that due to delay in execution of a long term PPA owing to decade long litigation and sectoral issues related to capacity allocation amongst Independent Power Producers, Corporate Debtor had suffered significant burden in the form of interest, administrative cost and other overheads on one hand and received no revenue income on the other, because of which the Corporate Debtor was unable to operationalize its Nasik TPP, which in-tum delayed the performance of obligation under Clause 2.8.2 of the FSA. Further, it was submitted that such factors are beyond the control of the Corporate Debtor which restricted it from signing a long term PPA as per FSA. The Applicant submitted that the FSA is organic to the resolution of the Corporate Debtor and the Corporate Debtor's bargaining power for further discussions of revival is dependent on FSA being alive.

7. The relevant para of the letter dated 08.12.2022 issued by the Respondent No.1 for termination of FSA is reproduced herein below for ready reference:-

“In this connection, from the available records, it has been observed that in case of M/s Sinnar Thermal Power Limited (formerly known as Rattan India Nasik Power Limited) that:

(a) No PPA has been submitted by M/s Sinnar Thermal Power Limited (formerly known as RattanIndia Nasik Power Limited) within the Condition Precedent Period or even in the extended time period i.e. till 31.03.2022

(b) Further, the Unit 1 to 4 (Capacity under the agreement 1080 MW) (against which the aforesaid FSA has been signed) has also not been commissioned till 31.03.2022.”

8. In this regard it is pertinent to see the correspondence exchanged between the Maharashtra State Electricity Distribution Company Limited (‘MSEDCL’) and the Corporate Debtor regarding the supply of power and executing the PPA thereof, which also contains the termination letter dated 19.05.2022, issued by MSEDCL to the Corporate Debtor as extracted below: -



Maharashtra State Electricity Distribution Co. Ltd.
Power Purchase Section, 5th Floor, “Prakashgad”, Bandra (East), Mumbai -400051
Tel. : 26472131, 26474211 Website: www.mahadiscom.in

Ref: CE/PP/ 9640

Date: 19.05.2020

**Notice
Without prejudice**

To,
M/s. Sinnar Thermal Power Ltd.,
A150-151, Ground Floor K.H. No.407,
A Block Mahipalpur Extension,
New Delhi -110037.

Subject : Termination Notice for procurement of 507 MW from M/s. Sinnar Thermal Power Ltd.(STPL) under Long Term Competitive Bidding process, Case-I Stage-II.

Reference: 1. Letter from STPL, STPL/Nasik/MSEDCL/2019- 20/22 dated 26.09.2019.
2. MSEDCL letter CE/PP/CASE-1/ST-2/20362 dated 20.07.2019.
3. Letter from STPL, STPL/Nasik/MSEDCL/2019- 20/08 dated 13.06.2019.
5. Letter from STPL, STPL/Nasik/MSEDCL/2019-20/05 dated 07.05.2019.
6. MSEDCL letter CE/PP/CASE-1/ST-2/ 11248 dated 30.04.2019.
7. Letter from STPL, STPL/Nasik/MSEDCL/2019-20/03 dated 24.04.2019.
8. Letter from STPL, STPL/Nasik/MSEDCL/2018-19/366 dated 27.02.2019.
9. MSEDCL letter CE/PP/5121 dated 20.02.2019.

Sir,

In response to the MERC order dated 19.01.2019 in Case No.53 of 2012, MSEDCL vide its letter dated 20.02.2019 requested (STPL) to submit the consent for supply of power at levelised tariff of Rs. 3.28 per unit along with required documents and CPG of Rs.153 Cr as per RFP.

M/s. STPL vide letter dated 27.02.2019, has given consent for supply of power at levelised tariff of Rs. 3.28 per unit at Maharashtra STU periphery and requested for a time of 60 days for providing the CPG. M/s STPL vide its letter dated 24.04.2019 further requested 3 month's time for submission of CPG.

Vide letter dated 30.04.2019, MSEDCL issued Letter of Intent to M/s STPL and accepted request of 60 day's time for submission of Contract Performance Guarantee and also informed that, SCOD should be within three months after signing PPA.

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M/s STPL again vide its letters dated 7.05.2019 and 13.06.2019 requested for further extension of timeline for submission of CPG for three months due to NCLT issue. Accordingly, vide letter dated 20.06.2019, MSEDCL has extended timeline by further three months i.e. upto 30.09.2019.

M/s STPL vide letter dated 26.09.2019 has again asked for extension of timeline upto 30.11.2019 for submission of CPG. However, MSEDCL has not considered the said request and also the requested timeline has also lapsed. Please note that as per Clause 2.13 of RFP:

"2.13 Within thirty (30) days of issue of Letter of Intent, the Successful Bidder(s) either on his/their own behalf or on behalf of the Seller, shall provide to the Procurer, the Contract Performance Guarantee calculated on the basis of Rs. 30 lakhs/MW of the total Contracted Capacity of the Successful Bidder and as prescribed in Format 5.7. In case of the Successful Bidder being a Bidding Consortium, the Lead Member shall be responsible for ensuring the submission of the CPG on behalf of all the Consortium Members. The Contract Performance Guarantee shall be initially valid for a period of three (3) months after the Scheduled Delivery Date and thereafter shall be dealt with in accordance with the provisions of the PPA. The Contract Performance Guarantee shall be issued by any of the banks listed in Format 5.8."

Further as per Clause No. 2.13.3 of RFP :

2.13.3 Non submission of the CPG by the Successful Bidder(s) as per the provisions of Clause 2.13 may lead to the invocation of the Bid Bond, cancellation of the Letter of Intent of such Successful Bidder(s) by the Procurer, and thereafter, the provisions of Clause 2.5 (b) shall be applicable.

Hence, as per clause 2.13.3 of RFP, MSEDCL is compelled to issue notice of termination of LoI issued to you and, by way of this notice MSEDCL is hereby terminating the Letter of Intent dated 30.04.2019 issued to M/s STPL which please be noted.

This is without prejudice to our rights available under relevant laws.

Yours Faithfully,

Sd/-

Chief Engineer (Power Purchase)

9. It is evident from the correspondence between the Corporate Detor and MSEDCL, that MSEDCL had terminated the Letter of Intent (LoI) dated 30th April, 2019 due to delay in submission of Contract Performance Guarantee by the Corporate Debtor and because of the decade long litigation involved, the Corporate Debtor had failed to execute the long term Power Purchase Agreement due to which the Corporate Debtor was falling foul of its contractual obligations with SECL ('Respondent No.1') more particularly, the performance of obligation under Clause 2.8.2 of the FSA leading to the impugned termination of the FSA dated 03.09.2013. There is nothing on record of this Adjudicating Authority to indicate that the termination of the FSA agreement dated 03.09.2013 by the Respondent No1. was motivated by the insolvency of the Corporate Debtor. The course of events as submitted by the Applicant in the instant application, makes it clear that the alleged breaches noted in the termination letter dated 08.12.2022 were not a smokescreen to terminate the agreement because of the insolvency of the

Corporate Debtor, and the real reason of termination is the non-adherence of the covenants and obligations as enumerated in FSA Agreement due to non-execution of Long Term PPA by the Corporate Debtor. Therefore, we are of the considered view that this Adjudicating Authority has no jurisdiction to entertain the present contractual dispute which has arisen outside the insolvency of the Corporate Debtor.

10. Since the applicant has claimed that the impugned FSA is organic to the Corporate Debtor's running as a going concern, in our view, the applicant's contention are also to be tested with reference to the provisions of Section 14 (2A) of the Code, 2016 which empowers the IRP or RP to decide which supply of goods or service is critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern and the Code bars termination, suspension or interruption of supply of such goods or services during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.
11. Adverting to the facts of the present case, it is an admitted position that Nashik Thermal Power Project was not operationalized due to the delay in execution of PPA due to various reasons as enumerated above and the applicant is still in rounds of talk with the authorities and lenders to raise the working capital requirement for the said purpose. In the present case before us, it seems that the termination of the FSA agreement dated 03.09.2013, was motivated because of the alleged breach of the terms of the FSA agreement and non-execution of the PPA because of which the Nashik Thermal Power Plant could never begin its operation. Therefore, the nature of the termination of the FSA dated 03.09.2013 is not explicitly barred under Section 14(2A) of the Code, 2016 as it is an undisputed fact that all 4 units of the Nashik Thermal Power Plant never started operation since a very long period of time even before the initiation of CIRP on 19.09.2022 and imposition of moratorium and are therefore, not contributing in

keeping the Corporate Debtor as a going concern. Accordingly, Section 14(2A) of the Code, 2016 will not come to the rescue of the Corporate Debtor since what is prohibited therein is the termination or suspension or interruption of the supply of the goods or services to protect and preserve the value the Corporate Debtor and manage its operations as a going concern, whereas in the case before us, due to non-operationalization of the unit 1 to 4 of the Nashik Thermal Power Plant for which FSA Agreement dated 03.09.2013 is executed, no supply of coal had even started which can be said to be termed to be suspended or interrupted due to the impugned action of the Respondent No.1. At best, it can be termed as termination of rights under the FSA due to non-adherence to the conditions precedent therein. Accordingly, the supply of coal under the FSA dated 03.09.2013, termination of which is in question before this Adjudicating Authority, was never operationalized and therefore, by no means whatsoever, can be considered as critical to manage the operations of the Corporate Debtor as a going concern.

12. At this stage, it is pertinent to distinguish the termination of a contract which 'dilutes' the value of the Corporate Debtor from the termination of the contract which would lead to its corporate death. Only on a mere probability that pursuant to the ongoing discussion with the concerned Ministry and infusion of working capital by the lenders and the suspended directors, the Corporate Debtor would be able to raise working Capital and make its Nashik Thermal Power Project operational which in return will increase the Corporate Debtor's bargaining power could not be entertained by this Adjudicating Authority by prejudicing the contractual rights of the Respondent No.1.

13. The applicant has placed reliance **on Hon'ble Supreme Court's judgement in Gujarat Urja Vikas Nigam Limited v. Amit Gupta, [(2021) 7 SCC 209]** for his contention that the termination of FSA by SECL is related to insolvency of the Corporate Debtor, which is not tenable and that this Adjudicating Authority will have jurisdiction to stay or reverse such termination. However, adverting to the

facts and circumstances of the instant case, we have already held that the impugned termination was not based on the fact of insolvency itself but due to failure of the Corporate Debtor to adhere to the conditions precedent in clause 2.8 of the impugned FSA. As such, the contention of the applicant is not tenable in facts and law.

14. This Adjudicating Authority is persuaded by the **Hon'ble Supreme Court's Judgement in Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain, RP, SK Wheels Pvt. Ltd.[(2021) ibclaw.in 167 SC] wherein the Hon'ble Supreme Court observed as follow:-**

“In Gujarat Urja (supra), the contract in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). **This Court observed that “...NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor... The nexus with the insolvency of the corporate debtor must exist” (para 69). Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.**

Admittedly, this Court has clarified the law on the present subject matter in Gujarat Urja (supra) after the pronouncements of the NCLT and NCLAT. Going forward, the exercise of the NCLT's residuary powers should be governed by the above decision.”

15. In light of the facts of the present case and Judgement stated supra, the reliance placed by the Applicant on citation **Gujarat Urja Vikas Nigam Limited v. Amit Gupta, [(2021) 7 SCC 209]** is not helpful in the facts of the present case. **Accordingly, the relief (a) i.e., Stay on the operation of SECL's letter dated 08.12.2022 issued to Corporate Debtor terminating the Fuel Supply Agreement dated 03.09.2013, cannot be granted by this Adjudicating Authority.**

16. As regard to relief (b) i.e., seeking stay of the operation of SECL's letter dated 08.12.2022 issued to Axis Bank Limited for encashing the Security Deposits issued by the Corporate Debtor as per the provisions of the Fuel Supply Agreement dated 03.09.2013, we observe that it is a settled proposition of law, that Bank guarantee can be invoked even during moratorium period imposed under section 14 of the IBC in view of the amended provision under section 14 (3)(b) of the IBC by Insolvency and Bankruptcy Code, (Second Amendment) Act, 26 of 2018 as held by the **Hon'ble NCLAT in a recent Judgement dated 10.01.2023 in case IDBI Bank Ltd -vs- Indian Oil Corporation Limited [Company Appeal (AT) (Ins) No. 543 of 2021]** wherein it was held that:-

“Having regard to the ratio of the Hon'ble Apex Court in the aforementioned Judgments, and keeping in view the provisions of the Code, we are of the considered view that an irrevocable and unconditional Bank Guarantee can be invoked even during moratorium period in view of the amended provision under Section 14 (3) (b) of the Code. We are conscious of the fact that the Bank has not taken any steps with respect to the alleged fraud, if any, between IOCL and the Corporate Debtor. The findings of the Hon'ble Arbitral Tribunal have also attained finality.”

17. The invocation of the Bank Guarantee/Security Deposit by the Respondent No.1 being the outcome of the termination of the FSA Agreement dated 03.09.2013, it cannot be barred under Section 14 of the Code, 2016. Accordingly, the relief (b) sought in the present application cannot be granted.

18. In view of the aforementioned facts and circumstances, we are of the considered view that despite the prayer(s) sought in the present application, no interference by this Adjudicating Authority is called for at this stage. The interim protection granted by this Adjudicating Authority vide its order dated 12.01.2023 stands withdrawn from the date of pronouncement of this order.

19. We make it clear that any observations or findings made by this Adjudicating Authority in this order should not be construed as expressing opinion on merits of the respective contractual rights of the parties. The rights of the applicant for seeking remedy before appropriate forum or authority as per the provision of law shall not be prejudiced on the grounds of dismissal of the present application.

20. Accordingly, the present application i.e., **I.A.177/ND/2023** being devoid of merit stands **dismissed. No orders to costs.**

Sd/-

**(DR.BINOD KUMAR SINHA)
MEMBER (TECHNICAL)**

Sd/-

**(P. MOHAN RAJ)
MEMBER (JUDICIAL)**