

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

Company Appeal (AT) (Insolvency) No. 119 of 2022

IN THE MATTER OF:

**Damodar Valley Corporation,
Having its registered office at
The DVC Towers,VIP Road,
Kolkatta-700054. West Bengal** **...Appellant**

Versus

**Kharkia Steels Pvt. Ltd.
Having its registered office at
3A, Hare Street, Kolkata-700001
West Bengal** **... Corporate Debtor/
Respondent No.1**

**Mr. Uday Narayan Mitra
LSI Resolution Private Limited,
SP Mukherjee Road,
Sagar Trade Cube, Second Floor,
Kolkata-700026.
West Bengal** **... Resolution Professional/
Respondent No. 2**

Present

**For Appellant:- Mr. Maninder Acharya, Sr. Advocate with
Ms. Madhumitta Bhattacharjee, Mr. Viplav
Acharya, Ms. Srija Choudhury, and Mr. Sai
Shashank, Advocates**

**For Respondent:- Mr. Shashwat Anand, Mr. Dhruv Vig, Mr.
Shashwat Parihar, Mr. Adya Singh,
Advocates for R.1
Mr. Utsav Mukherjee, Ms. Megha Tyagi and
Ms. Deepti Babel, Advocates for R-2 (RP)**

J U D G M E N T
(Date: 15.03.2022)
(VIRTUAL MODE)

[Per.: Dr. Alok Srivastava, Member (Technical)]

The present appeal bearing CA(AT)(Insolvency) No. 119 of 2022 filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (hereafter called 'IBC') arises out of the order dated 25.11.2021 (hereafter called 'Impugned Order') passed by the Adjudicating Authority (NCLT, Kolkata Bench) in I.A.(IB) No. 119/KB/2021 in CP (IB) No.1440/KB/2018.

2. On an application to be filed by the Successful Resolution Applicant Kharkia Steels Pvt. Ltd. for a new connection on temporary basis the Adjudicating Authority has directed by the Impugned Order that the successful resolution applicant shall deposit the requisite security deposit amount for the new connection to DVC, whereafter DVC shall process the application within ten days and provide the new connection for electricity supply to the successful resolution applicant. The Appellant/DVC is aggrieved by this order in that while his appeal CA (AT)(Ins) 1111 of 2019 is pending consideration before the NCLAT, wherein he has assailed the approval of the resolution plan, the Adjudicating Authority has provided a final relied in the form of direction for providing new connection to the successful resolution applicant.

3. The facts of the case, as stated and argued by the Appellant/DVC, are that the Appellant/DVC entered into a Power Purchase Agreement with Corporate Debtor Kharkia Steels Pvt. Ltd. (Respondent No. 1) on 28.7.2009. Due to large quantum of unpaid dues, a notice of disconnection of power supply was sent by the DVC vide letter dated 12.8.2015 to the *Company Appeal (AT) (Insolvency) No. 119 of 2022*

corporate debtor. Thereafter in September 2019, Dena Bank, a Financial Creditor filed an application under section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (in short 'CIRP') of the Corporate Debtor, which was admitted vide order dated 26.9.2019 of the Adjudicating Authority. Upon completion of the CIRP, the Resolution Plan proposed by 'Amritvani Exim Private Limited' was approved by the Committee of Creditors and subsequently approved by the Adjudicating Authority vide order dated 21.9.2020. The Successful Resolution Applicant applied for reconnection of power supply to the premises of the Corporate Debtor vide letter dated 12.10.2020. On an application, filed by the Successful Resolution Applicant, bearing No. I.A. No. 119/KB/2022 in CP (IB) 1441/2018, the Impugned Order was passed and aggrieved by the Impugned Order, the Appellant has filed this appeal.

4. We heard the arguments advanced by the learned senior counsels for both the parties and perused the record.

5. The Learned Senior Counsel for Appellant has argued that the Appellant has preferred an appeal bearing number CA (AT(Ins) No. 1111 of 2019 assailing the impugned order dated 21.9.2020 by which the Adjudicating Authority has approved the resolution plan of the corporate debtor. In the meanwhile, during the pendency of this appeal the successful resolution applicant filed an interlocutory application bearing number I.A.(IB) No. 119/KB/2021 in CP (IB) No.1440/KB/2018 for giving direction to the DVDC/Appellant to provide new electricity connection in accordance with the provisions in the approved resolution. She has contended that by allowing the IA No. 119/KB/2021 the Adjudicating Authority has given final and substantive relief to the successful resolution applicant through an interim order when the appeal assailing the resolution plan approval was pending, which is not proper. She *Company Appeal (AT) (Insolvency) No. 119 of 2022*

has argued that the legality of the approval of the resolution plan should have been decided first before granting any relief in this matter to the successful resolution applicant.

6. The Learned Senior Counsel for Appellant has also argued that payment of past dues and reconnection of electricity supply after depositing security deposit are covered under the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations made under the Electricity Act, and thus the Adjudicating Authority has exceeded its jurisdiction by approving a resolution plan which, inter alia, takes away the right of the Appellant available under the Electricity Act and WBERC Regulations. She has referred to clauses 4.1.4, 4.6.3 and 4.6.4 which relate to disconnection of power supply, deemed termination and reconnection in same premises respectively to claim that the payment of past dues and reconnection of the power supply in the same premises are covered under the WBERC Regulations and this right of DVC cannot be taken away through the approved resolution plan.

7. In this regard the Learned Sr. Counsel for Appellant has also referred to the judgments of Hon'ble Supreme Court in the matters of **M/s. Embassy Property Developments Private Ltd. Vs. State of Karnataka and Ors. (2019 SCC OnLine SC 1542)** and **Gujarat Urja Vikas Nigam Limited Versus Amit Gupta & Ors [2021 SCC OnLine SC 194]** to claim that the contract relating to Power Purchase Agreement ought to be adjudicated under the Electricity Act and related WBERC Regulation and the jurisdiction of NCLT is barred from considering such disputes.

8. In reply, the Learned Senior Counsel for Respondents No.

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1 and 3 has argued that DVC is an operational creditor which has been treated in accordance with provisions of IBC regarding its past dues which relate to the period prior to initiation of CIRP. He has also pointed out that the liquidation value of the corporate debtor is about Rs. 6.52 crore and looking to the liquidation value, the share of operational creditors has been decided in accordance with section 30(2)(b) of the IBC. He has referred to the judgment of Hon'ble Supreme Court in the matter of the **Pratap Technocrats (P) Ltd. versus Reliance Infratel Ltd. (Monitoring Committee) [2021 10 SCC 623]** to claim that the resolution plan as approved by the CoC complies with the requisite provisions of IBC and it has no legal infirmity, and this observation of Hon'ble Supreme Court is as follows:

“40..... Whether the interest of all stakeholders, including the Operational Creditors, has been adequately balanced has to be determined within the four corners of the statutory provisions of IBC. It must be borne in mind that the jurisdiction of the Adjudicating Authority is circumscribed by the terms of the provisions conferring the jurisdiction.”

9. Moreover, there is no equity-based jurisdiction with NCLT under the provisions of IBC which allows for the dues of DVC as an operational creditor to be treated differently from other operational creditors. He has further argued that under section 30(2)(b)(i) and (ii), the provision regarding treatment of claims of operational creditors has been laid down and Explanation 1 clearly states that if the provision of section 30(2)(b) is followed then it is supposed to meet the requirement of equity and viability. He has also referred to the principle laid down by the three-judge bench of the Hon'ble Supreme Court in the matter of **Committee of Creditors of Essar Steel (supra)** which has *Company Appeal (AT) (Insolvency) No. 119 of 2022*

held in paragraph 73 as follows:-

“ 73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or some-class of creditors is with the Committee of Creditors. But, the decision of such committee must reflect the fact that it has taken into account maximizing the value of the assets of the Corporate Debtor and the fact that it has adequately balanced the interests of all stake holders including Operational Creditors.....

Thus, while Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that a Corporate Debtor needs to keep going as a going concern during the Insolvency Resolution Process; that it needs to maximize the value of its assets; and that the interests of all stakeholders, including operational creditors has been taken care of.”

10. Regarding payment of past dues, the Learned Senior Counsel for Respondent has cited the judgment of Hon'ble Supreme Court in the matter of **India Resurgence ARC Private Limited vs. Amit Metaliks Ltd. & Another (2021 SCC Online SC 409)** to emphasize that the business decision taken in exercise of the commercial wisdom of Committee of Creditors cannot be interfered with unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. He has also referred to para 20 of the **India Resurgence judgment (supra)** to argue that asking for past dues and security is inapt and ill conceived. Thus, the Learned Senior Counsel for Respondents has argued that since the Resolution *Company Appeal (AT) (Insolvency) No. 119 of 2022*

Plan has been finalized and approved by the Adjudicating Authority and does not suffer from any legal infirmity, the relief granted by the Adjudicating Authority in directing the DVC to provide new connection to SRA is in accordance with the approved resolution plan.

11. The main issue in this appeal is whether the relief granted by the Adjudicating Authority directing the DVC to provide new connection to the SRA after payment of the security deposit could have given by the Adjudicating Authority while the main appeal bearing CA (AT)(Ins) No. 1111 of 2019 was pending and whether the jurisdiction under IBC is not proper in granting such a relief?

12. The legal validity of the resolution plan as approved by the Adjudicating Authority which was assailed in CA (AT)(Ins) 1111 of 2019 has been considered and decided by this tribunal and the approval of resolution plan has been upheld therein.

13. The approved resolution plan that DVC's liabilities have been treated under section VI – 'Extinguishment of Claims/Entitlements' of the approved Resolution Plan, which is as follows:-

"8. Treatment of DVC liabilities.

The DVC liabilities set out in the Information Memorandum together with all other liabilities of the Corporate Debtor towards DVC until the Effective Date (whether or not recognized or set out in the Information Memorandum), are collectively the "DVC liabilities". DVC liability is a "claim" and "debt" as defined under the IBC, and would consequently qualify as "operational debt"(as defined under the IBC) and therefore, the full amount of such DVC liabilities shall be deemed to be owed and due

as of the Effective Date, the liquidation value of which is assumed NIL and therefore, no amount is payable in relation thereto. However, the Resolution Applicant has proposed a payment towards settlement of DVC liabilities as set out in clause No. 6.6 of section 2 of part (B) (Financial Proposal) of this plan. Such DVC liabilities shall immediately after the Effective Date, irrevocably and unconditionally stand fully and finally settled at the settlement price offered by Resolution Applicant under this Plan, with there being no further claims whatsoever by DVC and all rights to invoke or enforce the same shall be waived. This will assist the RA in immediate start of production of goods.

- a. All pending dues of DVC (whether claimed or not whether contingent or crystalized, whether disputed or not and which include principal, arrears, interest on arrears, delayed payment, charges, penalty, etc. till the Effective Date and charges, if any demanded for resumption of power) shall stand extinguished by virtue of the order of NCLT approving this plan and the Corporate Debtor shall not be liable to pay any amount against such demand save and except to the extent of the amount stated in section 6.6.5.*
- b. Immediately after the Effective Date, DVC should acknowledge that its dues from the CD is restricted to the settlement amount proposed under section 6.6.5 of section II of part B (financial plan) of this regulation plan and shall issue a certificate to the CD to that effect.*
- c. DVC should not raise any further demand on account of dues prior to the Effective Date.*
- d. DVC should restore the power connection immediately after the Effective Date and shall not withhold/disconnect the Power supply on the ground of pending old dues prior to the Effective Date.*
- e. DVC should withdraw all legal cases filed, if any, immediately after the Effective Date.*

f. DVC to commit supply of power to the plant of CD immediately after the Effective Date.

g. DVC should ensure availability of continuous Power to the Plant at the same rate at which it is supplying power to adjoining units.”

14. We note that the liabilities of DVC that relate to past dues prior to the Effective Date have been extinguished under the approved Resolution Plan and DVC is prohibited from raising any further demand on this account. The clause (d) in Para 6 Section VI of the Resolution Plan directs DVC to restore the power connection immediately after the Effective Date and not withhold/disconnect power supply on the ground of pending old dues whose claim has been submitted to Resolution Professional during CIRP and which have been taken care of in the resolution plan and clause (f) directs DVC to commit supply of power to the plant of CD immediately after the Effective Date. The other condition that is approved as part of resolution plan relates to withdrawal of all legal cases, if any, immediately after the Effective Date. Clause (d) stipulates that DVC should restore the electricity connection to SRA at the tariff rates it is supplying power to adjoining units. In this context the Impugned Order directs SRA to apply for fresh connection with payment of security deposit that may be admissible under WBERC Regulations and DVC shall have to grant temporary connection within 10 days of its order after payment of security deposit.

15. As the issue regarding legality of the resolution plan is being dealt with in CA (AT)(Ins) No. 111 of 2019 we are limiting our consideration in this appeal to the propriety of order directing DVC to grant new temporary connection to DVC after

payment of security deposit.

16. We note that the Successful Resolution Plan has to be implemented in a certain time frame as contained therein. The pending appeal CA (AT)(*Ins) No. 1111 of 2019 has now been disposed upholding the legality of the approval of resolution plan. Therefore the resolution has to be implemented in letter and spirit. In Section VI – ‘Extinguishment of Claims/Entitlements’ of the approved Resolution Plan, which contains the details of how DVC Liabilities have been treated, clause (g) in ***Treatment of DVC liabilities.*** wherein direction is given to DVC to ensure availability of continuous power to the plant at the same rate at which it is supplied power to the adjoining units, needs slight modification since the conditions that are applicable for supplying power to the corporate debtor under a new agreement shall be at the tariff rate and conditions that would prevail at the time of signing of the agreement for a fresh connection by DVC with the Successful Resolution Applicant.

17. We are of the view that the commitment to supply power to the corporate debtor should be in accordance with the WBERC Regulations made under the Electricity Act. Clause (g) above, which directs DVC to ensure availability of continuous power to the plant at the same rate at which it is supplied power to the adjoining units, will have to be modified since the conditions that are applicable for supplying power to the corporate debtor under a new agreement shall be at the tariff rate and conditions that would prevail at the time of signing of the agreement for a fresh connection by DVC with the Successful Resolution Applicant under WBERC Regulations.

18. The import of various judgments cited by the Ld. Senior *Company Appeal (AT) (Insolvency) No. 119 of 2022*

Counsels of Appellant and Respondents vis-à-vis the approval of the resolution plan is included in the judgment in CA (AT)(Ins) No. 1111 of 2020 and insofar as the issue in this appeal is concerned, we do not consider discussion of these judgments relevant in this appeal.

19. Therefore the Impugned Order which directs a new temporary connection to be provided to the SRA within ten days of application after payment of requisite security deposit cannot be faulted, since this direction is in accordance with the provisions contained in the Successful Resolution Plan and it is now decided in CA (AT) (Ins) No. 1111 of 2020 that the successful resolution plan suffers from no illegality. We thus are clearly of the view that there is no legal obstruction in its implementation. We therefore hold the direction to be proper and legal with slight modifications as following:

- (i) The successful resolution applicant has to apply for fresh connection, payment of security deposit and any other charges that may be admissible under WBERC Regulations will have to be paid by the successful resolution applicant, and
- (ii) The supply of electricity to the corporate debtor should be in accordance with the WBERC Regulations made under the Electricity Act.

20. We are thus of the view that the direction given by the Adjudicating Authority to DVC to provide temporary connection to the SRA is in accordance with a legally approved resolution plan and therefore suffers from no illegality. DVC should give electricity connection to successful resolution applicant with slight modifications in conditions as contained in the preceding paragraphs of this order. The appeal is disposed of accordingly.
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21. There is no order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

15th March, 2022

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