

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 1263 OF 2022**

**IN
CP(IB) NO. 1765/MB/2018**

*Application u/s 60(5) of the Insolvency and
Bankruptcy Code, 2016.*

In the matter of:

**Maharashtra State Electricity Distribution
Company Limited**

Having its Registered Office at: Prakashgad, Plot
No. G-9, Anant Kanekar Marg, Bandra (East),
Mumbai-400 051.

...Applicant

v/s.

Mr. Shailesh Verma, Resolution Professional of
Lavasa Corporation Ltd., Having his office at:
Deloitte Touche Tomatsu India LLP, 27th Floor,
Tower 3, Indiabulls Centre, Senapati Bapat Marg,
Elphinstone West, Mumbai 400013.

.... Respondent

In the matter of

**Raj Infrastructure Development (India) Pvt Ltd.,
...Financial Creditor**

v/s.

Lavasa Corporation Ltd. ...Corporate Debtor

Order pronounced on 07.05.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in physical mode)

For the Applicant: Adv. Revati Desai.

For the Respondent: Adv. Kriti Kalyani.

ORDER

Per: Coram

1. This is an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) filed by the Applicant *inter-alia*, seeking directions to the Respondent for exclusion of Distribution Infrastructure Assets from the resolution plan and for handing over the Distribution Infrastructure Assets to the Applicant herein in terms of Clauses 18, 31(b) and 32(a) of the Distribution Franchise Agreement.

Facts of the Case (in brief):

2. The Applicant is a government undertaking and provides electricity to the hill station developed by the Corporate Debtor. The Respondent herein is the Resolution Professional of the Corporate Debtor. The Hon’ble Tribunal vide its Order dated 30th August, 2018 was pleased to admit the Corporate Debtor into the Corporate Insolvency Resolution Process (“CIRP”) and declared moratorium in terms of Section 14 of the Code.

3. The Corporate Debtor was the developer of Lavasa Township. In order to facilitate the supply of electricity across the Lavasa Township, the Corporate Debtor had entered into a Distribution Franchise Agreement ('DFA') dated 25.10.2016 with the Applicant, whereby the Applicant would supply electricity at specified injection points and the Corporate Debtor, thereafter, through a Distribution Franchise Infrastructure, would further supply the electricity to the consumers in Lavasa Township. The Corporate Debtor, as a distribution franchisee, was also required to collect 100% payment of bills from all the consumers of Lavasa Township on behalf of the Applicant.
4. The DFA expired on 24.10.2019. However, the Applicant and the Respondent, by their conduct, continued to act upon the terms of the DFA. The Applicant, vide its Notice dated 09th July, 2021 informed the Respondent of its decision, *"not to execute Distribution Franchise Agreement through MoU route with M/s. Lavasa and freeze the arrears. Take over the Distribution Franchisee of M/s. Lavasa at the earliest. Individual consumer metering, billing and collection to be handled by MSEDCL."* The aforesaid notice stated that the reason for the same was pending arrears of the Corporate Debtor. Therefore, the contractual arrangement between the Applicant and the Corporate Debtor/Respondent was terminated by the Applicant vide Notice dated 09th July, 2021. Accordingly, the Applicant informed the Respondent vide Letter dated 19th July, 2021 that MSEDCL will be taking over the operations of Distribution Franchisee of M/s. Lavasa Corporation, Pune on 27.07.2021 and requested the Respondent to handover all the Operations & Maintenance activities to SDO, Mulshi Sub-Division, MSEDCL.
5. The Respondent thereafter filed Interlocutory Application No. 1661/2021, inter alia, impugning the aforesaid notices of 09.07.2021 and 19.07.2021 issued by

the Applicant in respect of the DFA and takeover of the Distribution Infrastructure. On 21st January 2022, this Tribunal passed an order, *inter-alia*, directing the Applicant to supply uninterrupted power supply to the Corporate Debtor so as to keep the Corporate Debtor running as a going concern and not to take over the DFA. Further, the Respondent was directed to pay the outstanding dues to the Applicant during the CIRP period within 90 days from the date of pronouncement of order. Although the period of 90 days from the date of the order has expired, the Respondent has failed to make payment of outstanding dues of the Applicant and has challenged the said portion of the Order before Hon'ble NCLAT by filing Company Appeal (AT)(Ins.) No. 383/2022 and the same is pending adjudication.

6. The Resolution Professional filed an I.A. No. 52/2022 in the above-captioned Company Petition for approval of resolution plan of the Corporate Debtor by the Adjudicating Authority. However, the Bench did not approve the resolution plan u/s 31 of the Code for the reasons stated in the Order dated 09.02.2023 and directed the CoC to re-examine and re-submit the resolution plan in light of the Judgment of Hon'ble Supreme Court of India in State Tax Officer (1) v/s. Rainbow Papers Ltd (Civil Appeal No. 1661/2020), so as to allocate funds for the fulfillment/satisfaction of Government and Statutory Dues in the same proportion as provided to the Secured Financial Creditors.
7. It is the case of the Applicant that the Resolution Professional of the Corporate Debtor has failed to inform the Tribunal whether the resolution plan deals with the Distribution Infrastructure Assets and also about the treatment of Distribution Infrastructure Assets post approval of the resolution plan. The Resolution Professional of the Corporate Debtor has also failed to disclose the

amount of outstanding dues payable to the Applicant as per the resolution plan approved by the CoC. Hence this application.

8. Reply filed by Respondent/RP:

- i. The Applicant's own case before this Tribunal, NCLAT as well as in the High Court has been that this Tribunal has no jurisdiction to decide issues arising out of the DFA. Therefore, the Applicant is now estopped from taking a contrary stand in the present application. The Applicant cannot approbate and reprobate as per its convenience.
- ii. The Applicant has been well aware that the Corporate Debtor has been in default of the provisions of DFA well before the commencement of CIRP on 30th August, 2018. However, the Applicant did not take any steps for enforcement of its right under the DFA before the appropriate forum despite such defaults having been committed by the Corporate Debtor. The Applicant cannot seek enforcement of its contractual rights emanating from the DFA before this Tribunal in light of the Supreme Court judgment in Gujarat Urja Vikas Nigam Ltd v/s. Amit Gupta & Ors. (2021) Comm.Cases 432 (SC), where the Hon'ble Apex Court has held that for adjudication of disputes which arise de hors the insolvency, the parties must approach an appropriate forum. The Respondent submits that the present application is a desperate attempt by the Applicant to do indirectly, what it cannot do directly.
- iii. The resolution plan in respect of the Corporate Debtor has been approved by the CoC and I.A. No. 52/2022 has been filed seeking approval of the Tribunal u/s 31 of the Code. Therefore, the present application is nothing but an attempt to delay the approval of resolution plan.
- iv. The instant application suffers from non-joinder of proper and necessary party as the Successful Resolution Applicant ('SRA'), namely M/s.

Darwin Platform Infrastructure Ltd, has not been arraigned as a party to the current Lis. Since the reliefs sought by the Applicant will have direct impact on the SRA, the SRA is a proper as also a necessary party. Therefore, the present application deserves to be dismissed for non-joinder of necessary party.

- v. The Applicant has alleged that the Respondent has not disclosed to this Tribunal outstanding dues payable to the Applicant under the resolution plan. In this regard, the Respondent submits that all the payments to be made under the resolution plan have been duly set out in Form H and steps will be taken in accordance with provisions of the Code. The Respondent states that the Applicant is an operational creditor and had filed a claim before him on January 31, 2019. The Respondent verified the said claim and after such verification, the Respondent had admitted an amount of Rs. 4.60 crores, verified a sum of Rs. 14.68 crores as contingent and rejected an amount of Rs. 2.20 crores. The said treatment was challenged by the Applicant vide I.A. No. 113/2022.
- vi. As regards the payment of CIRP costs to the Applicant, the Respondent submits that the computation of CIRP costs submitted by the Applicant has been arrived at without any application of mind, it was not only vague but also lacked any justification whatsoever. The Respondent hereby calls upon the Applicant to submit a detailed break-up of its aforesaid calculation. The Respondent further states that the gross amounts towards distribution losses incurred by the Corporate Debtor in terms of DFA during the CIRP period are subject to netting-off against the reimbursement charges accrued during the CIRP period that are payable by the Applicant to the Corporate Debtor. However, despite repeated reminders vide Letter dated 15th January, 2021 and email dated 18th

March, 2021, the Applicant has repeatedly failed and neglected to provide this information to the Corporate Debtor.

FINDINGS

9. We have heard the learned Counsels for the Applicant and the Respondent.
10. This is an application u/s 60(5) of the Code read with Rule 11 of the N.C.L.T Rules, 2016 moved by the Applicant herein seeking, *inter-alia*, following reliefs:
 - a. To allow the present application and direct the Respondent to disclose the relevant details about the amount and treatment of outstanding dues of Respondent towards electricity supply, distribution loss and penalty has been provided by the Respondent in the resolution plan;
 - b. To direct the Respondent to disclose the treatment of distribution infrastructure assets of the Applicant under the Resolution Plan;
 - c. To direct the Respondent not to deal with the Distribution Infrastructure Assets in the Resolution Plan and that the same be handed over to the Applicant in terms of Clause 18 read with Clause 31(b) and 32(a) of the DFA;
 - d. Pending the hearing and final disposal of the present application, the Tribunal be pleased to not allow the Application for approval of Resolution Plan u/s 31 of the Code or initiation of liquidation with respect to the Corporate Debtor u/s 33 of the Code;
11. This Tribunal while adjudicating I.A. No. 1661/2021 filed by the Respondent, had passed the Order dated 21.01.2022 directing the Resolution Professional of the Corporate Debtor to pay the outstanding dues to MSEDCL during the CIRP within 90 days from the date of pronouncement of the Order and directed MSEDCL to supply uninterrupted connection of electricity to the

Corporate Debtor to keep the Corporate Debtor as a going concern. The Bench further directed MSEDCL (i.e. the Applicant herein) not to take over the Distribution Franchisee Agreement. The Order dated 21.01.2022 in I.A. No. 1661/2021 was impugned before the Hon'ble NCLAT vide Company Appeal (AT)(Insolvency) No. 383 of 2022. The Hon'ble NCLAT had dismissed the aforementioned appeal vide Order dated 02nd September, 2022 finding no fault with the Order dated 21.01.2022 passed by the Adjudicating Authority. Though the NCLAT Order dated 02.09.2022 was further impugned before the Hon'ble Supreme Court of India by the Respondent herein vide Civil Appeal No. 6820/2022, the Hon'ble Apex Court did not interfere with the aforementioned NCLAT Order.

12. The Resolution Professional had filed an I.A. No. 52/2022 in the above-captioned Company Petition for approval of resolution plan of the Corporate Debtor by the Adjudicating Authority. However, the Bench did not approve the resolution plan u/s 31 of the Code for the reasons stated in the Order dated 09.02.2023 and directed the CoC to re-examine and re-submit the resolution plan in light of the Judgment of Hon'ble Supreme Court of India in State Tax Officer (1) v/s. Rainbow Papers Ltd (Civil Appeal No. 1661/2020), so as to allocate funds for the fulfillment/satisfaction of Government and Statutory Dues in the same proportion as provided to the Secured Financial Creditors. Accordingly, the resolution plan was resubmitted for approval before the Tribunal vide I.A. No. 1007/2023. This Tribunal was pleased to approve the revised and re-submitted resolution plan u/s 31 of the Code vide Order dated 21.07.2023. It is also pertinent to note that while approving the resolution plan, this Tribunal had observed as follows:

“17. In relation to CIRP cost, the Resolution Plan envisages that the insolvency resolution process costs will be paid in full and in priority to any other creditors' dues. Unpaid CIRP Costs, to the tune of INR 80 Crores, shall be paid upfront, and in case the said costs are in excess of INR 80 Crores, such additional amounts shall be adjusted from payments proposed to be made to the secured financial creditors and the CIRP costs shall be paid in priority at the end of 90 days from the Effective Date. Further, in relation to Operational Creditors, the Resolution Plan proposes to make payments in compliance with Section 30(2)(b) of the Code read with Regulation 38(1)(a) of the CIRP Regulations. Save to related parties, the Resolution Plan envisages payment of INR 1 crore amongst certain sub-classes of operational creditors in proportion to their admitted claims. The Addendum dated 20.02.2023 also provides that in accordance with the order of this Tribunal dated 09.02.2023, the Resolution Applicant proposes to allocate a sum of Rs 1,96,54,421/- towards dues claimed by Government and statutory authorities. The said amount of Rs 1,96,54,421/- is 20.50% of the amounts claimed by such Government and statutory authorities and will result in the same proportion of recovery as is being made by the financial creditors. Additionally, the Resolution Plan envisages an operational creditors'-exigency fund of INR 6.73 Crores, which shall be used for any additional payment, if needed to be paid to the operational creditors, wherein an amount not more than INR 4 Crores will be paid separately to a single operational creditor over and above the apportioned amount received by such operational creditor from the above-stated resolution plan amount. This payment shall form part of the Upfront Payment. Further, an amount of INR 5.570 crores is proposed to be paid to the workmen and employees. This payment shall also form part of the Upfront Payment.”

Thus, the CIRP costs in relation to the electricity dues payable to the Applicant herein has already been taken care of in the resolution plan. As regards the claim of the Applicant, the same will now be dealt with in accordance with the approved resolution plan. The CIRP costs and claims of the Applicant have already been taken care of, and the Applicant was directed vide Order dated 21.01.2022 passed in I.A. No. 1661/2021 not to take over the Distribution Franchise Infrastructure until the conclusion of CIRP. Even otherwise, since the resolution plan concerning the Corporate Debtor has been approved by the Adjudicating Authority u/s 31 of the Code vide Order dated 21.07.2023 in I.A. No. 1007/2023, the reliefs sought by the Applicant cannot be granted because the Adjudicating Authority has no jurisdiction to modify or correct the

resolution plan once it is approved by the Adjudicating Authority u/s 31 of the Code.

13. We also observe that the Applicant herein has impugned the resolution plan approved by the Adjudicating Authority u/s 31 of the Code vide Order dated 21.07.2023 in I.A. No. 1007/2023, vide Company Appeal (AT)(Ins.) No. 1211 of 2023 before the Hon'ble NCLAT u/s 32 r.w. Section 61 of the Code. It is trite to say that appeal is nothing but continuation of original proceedings. Since the Appellant has challenged the resolution plan before the Hon'ble NCLAT, the prayers sought for in this I.A. in relation to the resolution plan approved by the CoC of the Corporate Debtor cannot be granted.
14. In view of the foregoing discussions and aforesaid findings, we are of the considered view that this application should be dismissed and hence, **we hereby dismiss I.A. No. 1263 of 2022** with no order as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)