

Damodar Valley Corporation vs Karthik Alloys Limited on 14 March, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 13 of 2021

IN THE MATTER OF:

Damodar Valley Corporation
Having registered office at
The DVC Towers, VIP Road,
Kolkata-700054. (West Bengal).
Versus
Karthik Alloys Limited,

....Appellant

....Respondent No. 1

Having registered office at L-6, L-7, Cuncolim Industrial Estate, Salcete, Goa-403703.

Having its office at P-1, Hyde Lane, Suite No. 7B, 7th Floor, Kolkata-700073.

West Bengal.

Present:

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

For Respondents: Mr. Vishesh K. Srivastava, Mr. Mayur Khandeparkar, Ranit Basu, Mr. Nikhil Wage, Maitri Malde, Rhea Verma, Advocates for R-1&R-2 Judgment (Date: 14.03.2022) (Virtual Mode) {Per: Dr. Alok Srivastava, Member (Technical)} Company Appeal (AT) (Insolvency) No. 13 of 2021 This appeal, filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (hereafter called 'IBC'), has been preferred by the Appellant against the order dated 8.12.2020 (hereinafter called the 'impugned order') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai) in IA No. 1203/2020 in the Company Petition bearing number CP(IB) 2119/MB/C-IV/2019.

2. The Appellant is aggrieved by the impugned order, which has, inter-alia, directed restoration of power connection to the Corporate Debtor for getting a better resolution plan and ordered for reconnection of power supply of the Durgapur factory of Corporate Debtor within 15 days on deposit of current electricity dues from the date of initiation of CIRP without payment of past dues and any security deposit from the Corporate Debtor as it is only reconnection of disconnected connection.

3. It is stated in the Appeal that the Appellant and Respondent No. 1/Karthik Alloys Limited entered into a Power Supply Agreement dated 1.1.1997 to provide power supply to Respondent No. 1/Corporate Debtor for a contract demand of 10,000 KVA. The Corporate Debtor failed to make payments due for power supply and the accumulated dues became a large amount, whereupon the Company Appeal (AT) (Insolvency) No. 13 of 2021 Appellant/DVC sent a notice dated 19.6.2019 for payment of dues amounting to Rs. 3,02,14,047 within 15 days from the date of the issue of the notice failing which the power supply line would be disconnected without any further notice to the Corporate Debtor (notice dated 19.6.2019 is attached at page 58 of the Appeal paperbook). Again, another notice dated 26.6.2019 (attached at page 59 of Appeal paperbook) was sent the Appellant to the Corporate Debtor for payment of Rs. 1,09,00,000 within 15 days from the date of issuance of the notice failing which the power supply line would be disconnected without any further reference to the Corporate Debtor. In response to the notices sent by DVC the power supply to corporate debtor's Durgapur factory was disconnected on 14.9.2019.

4. A Company Petition bearing CP(IB) No. 2119/MB-IV/2019 under section 9 of the IBC, filed by the Operational Creditor Vedanth.com Worldwide Limited, was admitted vide order dated 17.12.2019 of the Adjudicating Authority thereby initiating CIRP against the Corporate Debtor/Karthik Alloys Ltd. Later the Interim Resolution Professional (IRP) requested DVC to restore power supply to the Durgapur unit of the Corporate Debtor vide letter dated 12.2.2020 (attached at pp. 84-89 of the Appeal paperbook) stating that as power supply was a basic requirement for running the Company Appeal (AT) (Insolvency) No. 13 of 2021 factory of the Corporate Debtor, it was a part of essential goods and services covered under regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 (in short 'CIRP Regulations'), and therefore it should be reconnected/restored. In reply to this letter of the IRP, DVC vide letter dated 24.2.2020 (attached at pp. 90-91 of the Appeal paperbook) replied that regulation 32 of the CIRP Regulations do not apply in the present case and hence it cannot reconnect the electricity supply and requested the IRP to withdraw its letter dated 12.2.2020.

5. The Appellant has further stated that it has filed its claim amounting to Rs.27,78,95,386 (Rupees Twenty Seven Crores, Seventy Eight Lakhs, Ninety Five Thousand, Three Hundred Eighty Six Only) vide letter dated 16.1.2020 in the prescribed form under regulation 7 of the CIRP Regulations, 2016, which was accepted by the Interim Resolution Professional (in short IRP). He has also stated that the IRP had moved an interlocutory application in the company petition CP(IB) 2119/MB/C-IV/2019 before the Adjudicating Authority seeking directions to the Appellant to restore electricity connection at the Durgapur plant of the Corporate Debtor. In reply to this interlocutory application, the Appellant had questioned the 'going concern' status of the Corporate Debtor and urged that Company Appeal (AT) (Insolvency) No. 13 of 2021 rehabilitation of the Corporate Debtor should not be at the cost of another commercial entity -the Appellant -which is contrary to the real intent of the IBC.

6. We heard the arguments advanced by the Learned Senior Counsel of the Appellant and the Learned Counsel of the Respondent No.2/IRP.

7. The Learned Senior Counsel for Appellant has argued that since electricity connection had already been disconnected at Durgapur plant of the Corporate Debtor prior to initiation of the CIRP, its reconnection is not covered under the provision of section 14(2) of the IBC in the present case as section 14(2) only prohibits termination or suspension or interruption of supply of essential goods or services to the Corporate Debtor during moratorium period. He has further referred to the definition of 'essential supplies' as provided in regulation 32 of the CIRP Regulations, 2016 to claim that essential goods and services referred to in section 14(2) shall mean electricity, water, telecommunication services and information technology services only to the extent they are not a direct input to the output produced or supplied by the Corporate Debtor and from the illustration given with regulation 32 it is clear that water supplied to a Corporate Debtor will be essential supplies Company Appeal (AT) (Insolvency) No. 13 of 2021 for drinking and sanitation purposes and not for generation of hydro electricity. He has also argued that the scope of section 14(2) is limited to prohibiting termination or suspension or interruption during the period of moratorium only, and therefore the Adjudicating Authority has passed the Impugned Order without considering the actual intent of the provision under section 14(2).

8. The Learned Senior Counsel for Appellant has argued that the Durgapur plant of the Corporate Debtor is not a 'going concern' and hence the scope of section 14(2) of IBC read with regulation 32 of CIRP Regulations is limited to continuation of electricity supply for day-to-day functioning of the premises and not as an input in the manufacturing or production of output. She has contended that in a situation where the electricity supply is required for running the unit as a going concern, the Adjudicating Authority has no scope to expand the purview of section 14(2).

9. The Learned Senior Counsel for Appellant has also claimed that the disconnection of electricity was done on 14.9.2019, which is more than three months before the order dated 17.12.2019 was passed by the Adjudicating Authority, by which CIRP was initiated against the Corporate Debtor and moratorium imposed, and therefore recourse to section 14(2) cannot be taken for reconnection Company Appeal (AT) (Insolvency) No. 13 of 2021 of power supply. She has further claimed that the issue of reconnection of power supply to the Corporate Debtor would be solely under the scope and ambit of the Electricity Act and the West Bengal Electricity Regulatory Commission Regulations (in short 'WBERC Regulations') and related tariff orders and in such a situation, as per Regulation 6.2 of WBERC Regulations, the licensee DVC shall reconnect the supply of electricity to a consumer to whom supply has been disconnected in terms of regulation 4.1.1. She has also argued that the Adjudicating Authority has granted substantive relief of restoring electricity supply to the Corporate Debtor through an interim relief, without even verifying the fact whether the Corporate Debtor is a going concern.

10. The Ld. Senior Counsel has contended that the Appellant has at every stage rebutted the claim of Respondent No. 2 that it is a going concern also claiming that the contract demand of the Corporate Debtor was 9500 KVA, and after disconnection of electricity supply in September 2019 it is highly improbable that the Corporate Debtor was doing manufacturing using a diesel generator for a 9500 KVA furnace. In view of such improbability it is not possible that the Corporate Debtor would have been a going concern at the beginning of the moratorium period. He has further argued that supporting documents such as payment of GST starting from Company Appeal (AT) (Insolvency)

No. 13 of 2021 March 2019 till date should have been verified by the Adjudicating Authority before assuming that the Corporate Debtor was a going concern and consequently giving the benefit of reconnection of power supply. She has also claimed that the Appellant is losing revenue through such non-payments and is unable to serve new customers, thereby affecting industrial growth in its area of operation as defaulting entities are not paying their dues, and in the present case it stands to lose Rs.27,78,95,386/- if the plea of Resolution Professional is accepted.

11. The Learned Senior Counsel for Appellant has cited the following judgments in support of her contentions: -

(1) M/s. Embassy Property Development Private Ltd. Vs. State of Karnataka and Ors. (2019 SCC OnLine SC 1542) (2) Telangana State Southern Power Distribution Company Ltd.

&Anr. vs. M/s. Srigdhaa Beverages (2020 6 SCC 478) (3) State of U.P. vs. Ramsukhi Devi (2005 9 SCC 733) (4) Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta and Ors. (2021 SCC Online SC 194)

12. The Learned Senior Counsel for Appellant has further stated that reconnection of power supply is covered under West Bengal Company Appeal (AT) (Insolvency) No. 13 of 2021 Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 dated 7th August 2013 and has cited provisions therein regarding disconnection for non-payment (clause 4.1) and reconnection of supply (clause 6.0).

13. The Learned Counsel for Respondent No. 2/IRP has referred to clauses 21 and 23 of the Power Supply Agreement dated 1.1.1997 (attached at pp. 38-56 of Appeal paperbook) to claim that if any bill remains unpaid for a period exceeding 60 days from the date of its issue, the licensee after having given 7 days' notice in writing to the consumers of its intention to do so could discontinue the power supply till such time as the outstanding bills along with surcharge and other charges for such disconnection and reconnection are paid in full. In the instant case, he has argued that no such explicit notice was given, and hence disconnection is not in accordance with the provisions of the Power Supply Agreement. He has also argued that the notices were given to the ex-Directors of the Corporate Debtor and, therefore, it is their responsibility to liquidate the outstanding amount and not with the RP who is now managing the Corporate Debtor. He has also claimed that deemed termination of Power Supply Agreement as per Article 4.6 can happen only 180 days after the date of disconnection. In this case, no deemed termination can be said to have taken place since, and hence no Company Appeal (AT) (Insolvency) No. 13 of 2021 cause of action exists with the Appellant.

14. The Learned Counsel for Respondent No. 2 has also argued that the Appellant was part of the Committee of Creditors (CoC) but chose not to participate and put forward its point of view in CoC meetings. He has cited the judgment of this Tribunal in the matter of Uttarakhand Power Corporation Limited vs. M/s. ANG Industries Ltd. [CA (AT) (Ins) No. 298 of 2017] wherein, in its order dated 24.1.2018, the Hon'ble NCLAT has held that on the payment of current electricity charges to the Appellant/Uttarakhand Power Corporation Limited, the electricity supply should be

restored.

15. The impugned order dated 8.12.2020, in paragraphs 5 and 6 records as follows:-

"5. Accordingly, this Bench orders for reconnection of the power supply of the factory within 15 days on deposit of current electricity dues from the date of initiation of CIRP. It is also made clear that the Damodar Valley Corporation will not be insisting for its past dues before the CIRP to be deposited upfront by the Corporate Debtor for which the claim has already been submitted by Damodar Valley Corporation before the RP. RP confirms that the claim of Damodar Valley Corporation has already been admitted.

6. Further, power supply company i.e. Damodar Valley Corporation is also directed not to insist for any security deposit from the Corporate Debtor as it is only reconnection of disconnected connection and the existing security deposit should be continued as it is."

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16. The relevant clauses of West Bengal Electricity Regulatory Commission Regulations (WBERC Regulation) are as given below:

West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 "4.0 Disconnection of supply:

4.1 Disconnection for non-payment:

4.1.1 The licensee shall issue a disconnection notice under sub-section (I) of section 56 of the Act through the bill against electricity consumption under regulation 3.2 or regulation 3.5 (for provisional payment) itself, where following issues shall be specifically mentioned:

(i) Disconnection will be effected if payment has not been made within fifteen days after the due date as provided in the bill following the regulation 3.2 where the billed amount does not include full or part of any deposit that is required for the security deposit maintenance as per Miscellaneous Regulations.

4.1.4 The Licensee may disconnect or cut off supply of electricity to any defaulting consumer who fails or neglects to pay the electricity charges and/or other charges due from the consumer as per the electricity bill and/or demand notice subject to fulfillment of the conditions of regulations 4.1.3 and 4.1.1 or 4.1.2 whichever is applicable.

Company Appeal (AT) (Insolvency) No. 13 of 2021 4.6 The deemed termination of agreement:

4.6.1 If the power supply to any consumer remains disconnected continuously for a period of one hundred and eighty days where the disconnection has been effected in compliance with any of the provisions of the Act or Regulations, the agreement of the licensee with the consumer for supply of electricity shall be deemed to have been terminated with consequential effect on expiry of the said period of one hundred and eighty days. This will be without prejudice to such other action or the claim that may arise from the disconnection of supply or related issues therefor. On termination of agreement, the licensee shall have the right to remove the service line and other installations through which electricity is supplied to the consumer."

Further the regulation relating to reconnection of power supply is as follows:-

"6.0 Reconnection of supply:

6.1 The licensee shall not reconnect the supply of electricity to a person, supply to whom has been disconnected in terms of regulation 4.2.1, if he is not a consumer. However on payment of all assessed amount as per Section 126 and Section 127 of the Act, as may be applicable, where there is no further dispute between the licensee and the person, then on receipt of an application from the person for new service connection in the said premises where disconnection took place, service connection can be provided as per terms and conditions as Company Appeal (AT) (Insolvency) No. 13 of 2021 applicable for an intending consumer as per SOP."

17. The Resolution Professional filed IA No. 1203 of 2020 in Company Petition bearing No. CP(IB) 2119/MB/C-IV/2019 praying for restoration of electricity connection to the plant of the Corporate Debtor situated at Durgapur, West Bengal. The pleadings made with regard to restoration of electricity connection in this IA are as follows:

"6. That the applicant, upon perusal of records of the corporate debtor and subsequently as informed by the suspended board of Director became aware of the following facts:

(i) That the Corporate Debtor was operating its business from its two units. The first unit situated in the state of Maharashtra which is closed and the second unit which is situated at the state of West Bengal at Durgapur which is a going concern unit of the corporate debtor.

(ii) That the applicant immediately after getting appointment as IRP has visited the factory premises situated at Durgapur of the corporate debtor and seen that the electricity connection in the factory has been disconnected by the DVC due to unpaid electricity dues amounting to Rs. 22,57,06,151.00 (Rs. Twenty Two Crores Fifty Seven Lacs Six Thousand One Hundred and Fifty One only). It was also observed that the corporate debtor is running its Durgapur unit through the generator by using diesel which is unnecessarily imposing extra cost to the corporate debtor and at the same

time creating impact in the profit of the corporate debtor."

"iii. That the applicant has immediately wrote a letter to DVC on 12.02.2020 seeking restoration of electricity connection at the factory premises of the corporate debtor. The DVC through its advocate replied to the notice sent by the IRP on 24.02.2020 alleging the nonpayment of outstanding Rs.27,78,95,386/-. The Company Appeal (AT) (Insolvency) No. 13 of 2021 copy of letter dated 12.02.2020 issued by the applicant and the copy of reply dated 24.02.2020 by the advocate of the DVC are annexed here with and marked as "Annexure B".(COLLY) iv. That the Respondent No. 1 has already filed its claim before the IRP as a operational creditor and the applicant has already considered the same."

In Para 7 of the pleadings the following is stated:

"7. Furthermore, as per Section 14(2) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 32 of IBBI (IRPCP) Regulations, 2016 the supply of essential goods or services to the Corporate Debtor as may be specified and shall not be terminated or suspended or interrupted during moratorium period to the extent these are not a direct input to the output produced or supplied by the Corporate Debtor".

18. Later in the IA No. 1203 of 2020 the following is stated in the section on 'Reliefs Sought' in relation to reconnection of power supply:

"1. That this Hon ble Tribunal be pleased to direct to Respondent No. 1 Damodar Valley Corporation to restore the Electricity Connection to the plant of the Corporate Debtor situated at Durgapur, West Bengal."

19. It is clear from the aforesaid pleadings made by the Resolution Professional and relief sought in IA No. 1203 of 2020 that the when the electricity connection was disconnected the Durgapur unit was being run using diesel generator. The RP has sought reconnection of electricity supply on the basis of section 14(2) of IBC. Company Appeal (AT) (Insolvency) No. 13 of 2021

20. We may now notice the provisions regarding the requirement of maintaining supply of electricity supply is included in Section 14(2) and 14(2-A), which are as follows:-

"14. Moratorium. -

xxxxxxxxxxxxx (2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate

debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted 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."

21. Further, Regulation 32 in the CIRP Regulations, 2016 which relates to essential supplies is as follows:-

"32. Essential supplies. - The essential goods and services referred to in section 14(2) shall mean -

(1) Electricity;

Company Appeal (AT) (Insolvency) No. 13 of 2021 (2) Water;

(3) Telecommunication services; and (4) Information technology services, to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration. - Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes and not for generation of hydro-electricity".

22. From the above-stated provision in Section 14(2) of IBC we find that supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The essential goods and supplies have been defined and explained through an illustration in Regulation 32 of the CIRP Regulations wherein it is clarified that essential goods and services referred to in Section 14(2) shall be considered essential supplies only to the extent they are not a direct input to the output produced or supplied by the Corporate Debtor. Moreover, under Section 14(2-A) the IRP/RP can ask for continuation of the supply of such goods and services which are critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern.

23. Admittedly the disconnection of the electricity supply to the Company Appeal (AT) (Insolvency) No. 13 of 2021 Durgapur unit took place on 14.9.2019. According to clause 4.6.1 of the Power Supply Agreement, deemed termination of the agreement could happen only after 180 days from the date of disconnection. Thus deemed termination could have taken place on or after 12.3.2020 i.e. 180 days after the date of disconnection. The order for initiation of CIRP was passed on 17.12.2019 and moratorium was imposed under section 14 from the same date. Thus the deemed termination of the Power Supply Agreement to the Durgapur unit of the corporate debtor which could not take place by 17.12.2019, could not happen during the moratorium period, by virtue of protection provided under Section 14(2). The IRP has claimed reconnection of electricity supply as the same was essential supply during the moratorium period and the Power Supply Agreement had not been terminated. It is also noted that the IRP has asked for reconnection of the electricity supply so that a 'better' resolution plan can be obtained in the resolution of the CD which is the intent of the IBC.

24. The Learned Senior Counsel for Appellant has referred to judgment of Hon'ble Supreme Court in M/s Embassy Property Developments Private Limited versus State of Karnataka and Others (Civil Appeal No. 9170 of 2019, judgment dated 3.12.2019) wherein a dispute under the Mines and Minerals Company Appeal (AT) (Insolvency) No. 13 of 2021 (Development and Regulation) Act, 1957 and rules made there under, Hon'ble Supreme Court has held that NCLT lacks jurisdiction to issue a direction in the matter. The Learned Senior Counsel for Appellant has sought to draw a parallel between the context in the Embassy Property Development case with that in the present case and argued that the matter of reconnection pertaining to or arising out of the Electricity Act, 2005 and the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 falls in the exclusive domain of tribunals under the West Bengal Electricity Regulatory Commission Regulations, 2013, and NCLT does not have purview/jurisdiction to adjudicate or pass any directions in such disputes or matters. In the instant case there has been no termination of Power Supply Agreement whereas in the case of Embassy Property Developments judgment the mining leases had been extended by an order of NCLT, and hence the context and situation in both the cases are entirely different.

25. The Learned Counsel for Appellant has also cited the judgment of NCLAT dated 1.10.2021, in the matter of Damodar Valley Corporation versus Cosmic Ferro Alloys Limited (2020 SCC OnLine NCLAT 392) wherein this Tribunal has held that no waiver for any period of time for the future is permissible and that Company Appeal (AT) (Insolvency) No. 13 of 2021 „the parties should take action regarding these or any subsequent dues, including security deposit in accordance with the extent and relevant regulations of WBERC. The dues of electricity supplied by DVC to the Corporate Debtor during the CIRP period, if not paid, should be paid from out of CIRP costs and the Resolution Professional should ensure it. This judgment holds that for future supply of electricity, and also supply during the CIRP period, the dues should be paid by the Corporate Debtor and any dues relating to security deposit after the approval of the resolution plan by Adjudicating Authority should be considered in accordance with the extant regulations of the WBERC.

26. Another judgment cited by the Ld. Senior Counsel for Appellant is in the case of Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta and Ors. (2021 SCC Online SC 194), where it is held that the Power Purchase Agreement was organic to the resolution of the Corporate debtor, and hence it could not have been terminated. In the present case the disconnection has taken place prior to initiation of CIRP and hence this judgment is distinguished on this account.

27. We note that DVC has filed its claim of past dues of period prior to initiation of CIRP before the Resolution Professional, which will be considered by the Committee of Creditors and appropriate Company Appeal (AT) (Insolvency) No. 13 of 2021 decision regarding settlement and payment of the claim shall be done in accordance with the resolution plan to be approved by the Adjudicating Authority. In such a situation we, do not think that the payment of past dues of the pre-CIRP period have to be paid by the corporate debtor when the resolution of the corporate debtor is in process.

28. We note that the context in the matter of Telangana Southern State Power Distribution Company Limited versus Srigdhaa Beverages (2020 SCC OnLine SC 478) cited by Learned Senior Counsel for Appellant is also distinguished from that in the present case, since in the Telangana

Southern State Power case auction-purchase of the asset had taken place, whereas in the present case the corporate debtor is under insolvency resolution and the settlement of past debts of financial and operational creditors will be considered under resolution plan or liquidation, as the case may be. Hence DVC, which is an operational creditor, or any other creditor cannot claim and be given priority in payment of its pre-CIRP debt before the resolution plan is finalised and approved by the Adjudicating Authority.

29. We are, therefore, of the view that in passing the Impugned order by which directions have been given to DVC for reconnection Company Appeal (AT) (Insolvency) No. 13 of 2021 of the electricity supply to the corporate debtor during the moratorium period and also allowing waiver of security deposit, the Adjudicating Authority has not exceed its jurisdiction under the IBC. We, therefore, do not feel there is any need to interfere with the impugned order. As is provided in the IBC, the electricity dues in the CIRP period shall be paid by the corporate debtor whereas the settlement and payment of pre-CIRP dues shall be done qua the finally approved resolution plan, or in liquidation, as may be the case.

30. There shall be no order as to costs.

(Justice Ashok Bhushan) Chairperson (Dr. Alok Srivastava) Member (Technical) New Delhi 14th March, 2022 /aks/ Company Appeal (AT) (Insolvency) No. 13 of 2021