

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

IA. No. 662/2021

In

Company Petition No. (IB)-297(ND)/2018

Order under Section 60(5) of Insolvency & Bankruptcy Code, 2016

IN THE MATTER OF:

Smash Entertainment Private Limited ... Operational Creditor

vs

Pramod Kumar Sharma, ... Respondent No. 1
Resolution Professional for
International Recreation and Amusement Ltd.

Dakshin Haryana Bijli Vitran Nigam ... Respondent No. 2

Vs

And IN THE MATTER OF:

Col. Sanjeev Dalal (Retd.) ... Applicant/Petitioner

Vs

M/s. International Recreation and Amusement Ltd. ... Respondent

Dictated on 15.02.2021

Judgment delivered on 22.02.2021

CORAM:

SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant : Ms. Mrinalini Sen, Ms. Kritika Gupta, Tanmay Yadav, Advs.

For the RP : Mr. Abhishek Anand, Mr. Mohak Sharma, Advs.

: Mohd Nazim Khan, PCS for RP along with
Mr. Pramod Kumar Sharma in Person

Per: B.S.V. PRAKASH KUMAR, ACTG. PRESIDENT

Heard and dictated in the open court on 15.02.2021

IA-662/2021

It is IA-662/2021 filed by one Smash Entertainment Pvt. Ltd. referring to itself as licensee of the corporate debtor seeking directions against the RP (R1) of the Corporate Debtor, namely M/s International Recreation and Amusement Ltd. and Dakshin Haryana Bijli Vitran Nigam (R2) to resume the electricity connection of Appu Ghar, Sector-29, Next to Huda City Centre Metro Station, Gurgaon, Haryana-122009 and to provide separate meter for "SMASH Sky Karting" and "Unforked Bar & Restaurant" at Appu Ghar, Sector-29, Next to Huda City Centre Metro Station, Gurgaon, Haryana-122009 so that electricity bill could be directly paid by the applicant to R2.

2. On perusal of this application, it appears that this applicant is a company engaged in the business of gaming and sports entertainment with the name of Oyster Beach Water Park in 10 acres of land at Sector-29, Next to Huda City Centre Metro Station, Gurgaon, Haryana-122009. This licensee has been operating its units as "SMASH Sky Karting" and "Unforked Bar & Restaurant" by entering into a licence agreement with the corporate debtor on 21.06.2016 and ever since it has been running the business aforementioned.

3. Now the grievance of this applicant is that Dakshin Haryana Bijli Vitran Nigam- R2 disconnected electricity connection for Appu Ghar in March, 2020. The applicant has stated that in terms of the licence agreement, the corporate debtor was to raise the bill for consumption of electricity on the applicant as per reading of the meter and the applicant was to give equivalent amount to the corporate debtor which in turn was required to pay and clear the dues of R2. It has been stated owing to lockdown and by virtue of the restrictions imposed during the lockdown,



especially entertainment and gaming sector activities were being completely locked down, the applicant/licensee was therefore not aware of electricity dues commencing from March, 2020.

4. The applicant has stated it is impossible to operate these two businesses I.e. SMASH Sky Karting and Unforked Bar & Restaurant from the licensed premises without electricity therefore, the applicant says it was brought to the attention of the RP on 15.12.2020 about this electricity issue, upon which the RP/R1 assured the applicant that remedial steps would be taken by him to restore the electricity connection for Appu Ghar and the license premises. As no response came from the RP, the applicant addressed a letter to the RP to take remedial steps to ensure restoration of power connection. Apart from this, the applicant has also addressed a letter dated 29.01.2021 to R2 to resume the electricity connection of Appu Ghar expeditiously; however no response being received, the applicant has filed this application.

5. In addition to this factual aspect, the applicant counsel has argued that, as per Section 14(2) of the Insolvency & Bankruptcy Code, supply of essential goods and services, such as power supply, to the corporate debtor shall not be terminated or suspended or interrupted during the moratorium period, therefore R2 shall forthwith resume power connection to the applicant company.

6. Before considering the submissions of the applicant, since Dakshin Haryana Bijli Vitran Nigam/R2's respective counsel is not present before this bench, we believe it is necessary to reproduce the electricity bill issued on 08.01.2021.



zero consumption; in September, 2020, it is zero consumption; in the month of October, 2020, consumption is 195 units; but from November, 2020 onwards, the corporate debtor perhaps started business, therefore consumption for that month has gone up to 1,63,819.5 units, when it has come to December, 2020, the corporate debtor consumed 67,601.55 units. As to the month of December, 2020 alone, this power consumption bill has come for payment of to ₹6,09,199.10. Since the corporate debtor has not even paid earlier months bills, past dues outstanding as on 01.01.2021 has come to ₹50,95,124.36, so net payable amount as on the date of this bill was generated as ₹57,043,24. Regrettably part is, this applicant as well as the corporate debtor represented by the RP stated that power was disconnected somewhere in the month of March, 2020. Since it is evident in the consumption Bill that power was not disconnected at any point of time at least until 01.01.2021.

8. When we put it to the Resolution Professional as to how he has earlier stated that power was disconnected in the month of March 2020, the Resolution Professional has not given clear answer to us as to whether disconnected or not, but only mentioned that his statement is based on the statement made in the application. We believe it is not fair on the part of the RP appointed by this Bench to make such statement. After all the RP is an officer appointed by this bench, hence he is accountable to place facts before this Bench irrespective of the outcome.

9. The bill further discloses that a payment of ₹5,00,000 was made on 05.05.2020. Therefore, by seeing the consumption charges and payment in May 2020, it is evident that the applicant/the corporate debtor consumed electricity more than one lakh units in the month of November, 2020 and more than 50,000 units in the month of December, 2020 leading to accumulation of the Bill to ₹57,00,000, if this bill is not paid to the Government Department,



which is generating electricity by spending public money over it, the Government has to bear all this loss, because the power generation is normally by coal, then the government has to buy coal then convert it into energy, it all happens with public money. Here, it cannot be the case that business did not happen in the month of November and in the month of December, 2020, but when it has come to make payment, Insolvency has come in the way for making payment. And it is also not true that the applicant was not aware of things happened in between March 2020 and December 2020, because there was part payment in the month of May 2020 and in the month of November and December, the applicant consumed power and did business.

10. The last straw in the documents filed by the applicant to prove that power has been disconnected and seeking resumption of the power connection to this Appu Ghar is, two letters, one - an undated letter to the RP as a response to an alleged telephonic conversation stating that the RP is aware that in the month of March 2020, R2 disconnected power supply to Appu Ghar for the month of November 2020 and December 2020 amounting ₹57,87,682 as per the Bill (above depicted) issued on 8.1.2021, because of which, the applicant suffered huge losses, therefore the RP shall initiate action under IBC against R2, failing which the applicant would proceed against R2 before NCLT bringing statutory violations under IBC seeking appropriate remedy.

11. Two - a letter dated 29.01.2021 alleged to have been hand delivered to a Government Department (PSU) informing that R2 has disconnected power supply owing to nonpayment of electricity charges for the months of November and December of 2019 amounting to nonpayment of ₹57,87,682, which is in violation of Section 14 (2) of IBC, therefore if power connection is not resumed within 24 months, it would initiate proceedings before NCLT, contempt proceedings and criminal proceedings against R2.



12. Upon reading these two letters putting juxtapose to each other, it is found in the first letter, it is an undated letter. According to the applicant, it shall be presumed that the applicant knows the power was disconnected in the month of March 2020 for non payment of the Bills for the months November 2020 and December 2020, the amount is ₹57,87,682, though there is no proof that the RP promised to take action for disconnection of the power supply, it is to be assumed that the applicant is under the impression that the RP would take action against R2. Would it be possible to anybody to disconnect power supply in the month of March 2020 for nonpayment of Bill dated 08.01.2021? But as per this applicant, it has happened.

13. When it has come to the letter alleged to have written to R2, it starts with heading "By Hand Delivery". Can it be imagined that when a notice is sent to a Government Department, it would be hand delivered? It is doubtful as to any such letter is ever sent to R2, secondly it says power is disconnected in the month of March 2020, here the contrasting statement in this letter from the letter written to the RP is, the letter to the RP says the Bill is for the months of November and December 2020, when it has come to the letter addressed to R2, the Bill has become for the months of November and December 2019. Unfortunate part is, this applicant itself filed the Bill which is self reflecting that it is for non payment power consumption for the months from July 2020 to December 2020, it is also evident that in the month of November 2020 enormous power was consumed, likewise in the month of December 2020 the power costing over and above ₹6,00,000 was consumed. It is not the case of the applicant that power bill has come to them though it has not consumed power. For lying also there shall be a limit, but not to the extent of saying something against the documents party itself relied upon.



14. On looking at this position, when we have asked the RP counsel as to whether corporate debtor has any other business other than this business this applicant running, the RP counsel has categorically mentioned the corporate debtor has not been doing any other business other than the business licensee running. Indeed on reading the application, it is evident that in the past, the RP gave license termination notice for license fee has not been paid.

15. By seeing the conduct of this applicant, from one side this applicant has not been paying license fee, from other side this applicant has been unabatedly consuming electricity in large scale and making money out of it, despite making money, now this applicant has come out with this application to avoid payment of the Bill.

16. On having noticed fraudulent conduct, we can't restrain ourselves from observing that in the name of insolvency process; some people are draining the public money and making illicit gain under the garb of this Code so as to avoid payments to government authorities. If it is a tax payment, it is understandable to some extent, but as to payment for power supplied for doing business during the CIRP, it is evaded under the umbrella of IBC. If this goes unabated, wealth of the public and public institutions will dry up within no time. For power generation, natural resources to be pooled, industry has to work, for all this, money is required, where from the Government meets all this expenditure? The Governments generate money in the form of tax from the public buying anything in the market, every person of the country invariably paying either direct or indirect tax. Pity is the public money collected as tax is draining in this way. In the name of survival of the corporate sector, these kind of people left, right, centre wipe down the money of the country into their pockets by misusing the resources meant for the use of the public.



17. Over and above, this applicant has no locus to file this application, in case any application is to be filed, it is the corporate debtor to file, not this applicant. This applicant is not under CIR Process, it is the corporate debtor that is under CIR Process therefore, this applicant has no locus to file this application about this issue, because if any benefit is to go under Section 14 of the Code, it has to go to the Corporate Debtor, but not to a person other than the corporate debtor.

18. When it comes to legal proposition, the legislature, realizing the chance of misuse of Section 14(2) of the Code, has promptly brought in subsection 2A to Section 14 of the Code through an Amendment dated 28.12.2019, stating that wherever the corporate debtor failed to pay the dues arising from supply of essential services during the moratorium period, the rigors of subsection-2 of Section 14 are not applicable. Prior to this amendment, the position was, once they are essential goods or services falling under Regulation 32 of CIRP Regulations, such services shall not be terminated or suspended or interrupted during moratorium period unless such services or goods become part of direct input to the output produced or supplied by the corporate debtor.

19. Now the supplier of essential services or goods has two defenses, one - if dues are not paid for the supplies provided during moratorium period, the rigors of moratorium not applicable, two - if it is proved any of the four items mentioned in the Regulation 32 of CIRP Regulations is used as an input for doing business and to earn money, such usage will not fall within the category of essential supplies or goods. If case falls under either of the two, Moratorium restrictions are not applicable, in this case, the issue falls under both the elements mentioned above.



20. Regulation 32 of CIRP Regulations is as follows:

32. *Essential supplies.*

*“The essential goods and services referred to in section 14(2) shall mean- (1) electricity; (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.”

21. It is clear that the supply of electricity to this applicant company will not fall within the ambit of essential supplies because by using this large scale electricity for non-domestic use, this applicant company has been generating money, if power is not there, this company cannot do its business. Since the supply of power to the applicant company is directly related to generating money, such supply will not fall within the ambit of essential supplies. Here, supply of power as an input to have an outcome amounts to investment for generating money, therefore supply of electricity to this applicant company will not amount to essential supplies as envisaged under Regulation 32.

22. An application like this does not warrant this bench to summon the public sector undertaking officers to be present before this Bench to defend this kind of application which will further drain the public exchequer of the respective state.

23. In view thereof, this application shall be dismissed as misconceived, since this applicant is not a corporate debtor, the application is not only frivolous but also an attempt to knock away the public resources by taking shelter under IBC, therefore we



hereby impose ₹50,000/- costs against this applicant to pay the same to Pay and Accounts Officer, Ministry of Corporate Affairs.

24. Accordingly, **IA-662/2021** is hereby dismissed as misconceived.

Sd/-

(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT

Sd/-

(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)

Ritu Sharma
15.02.2021