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BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD

IA 328/2017 in C.P. (I.B) No. 53/19/NCLT/AHM/2017

Coram: Hon'ble Mr. BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 27.11.2017**

Name of the Company: ABG shipyard Ltd.
(Through IRP Sundaresh Bhat)
V/s.
ICICI Bank Ltd. & Ors.

Section of the Companies Act: Section 19 of the Insolvency and Bankruptcy
Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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1.

2.

ORDER

None present for Applicant. Learned Advocate Ms. Lilu Bhaya present for Respondent no. 2.

Order in IA 328/2017 pronounced in open Court. Vide separate sheets.


BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Dated this the 27th day of November, 2017.

**BEFORE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH**

IA No. 328 of 2017

In

C.P. (IB) No. 53/NCLT/AHM/2017

In the Matter of:

Shri Sundaresh Bhat
Resolution Professional
Appointed for M/s. ABG
Shipyard Limited,
Having Office at
The Ruby – Level 9,
NW Wing, Senapati Bapat
Marg, Dadar (West),
Mumbai-400028
Maharashtra

: Applicant.

In the Matter Between:

ICICI Bank Limited
Having Office at
Near Chakli Circle,
Old Padra Road,
Vadodara-390007
Gujarat.

: Petitioner.
Financial Creditor.

Versus

1. M/s. ABG Shipyard Limited
Registered Office at
Near Magdalla Port,
Dumas Road,
Surat-395007, Gujarat.
2. Dakshin Gujarat Vij
Company Limited
Having office at
1st Floor, Opp E-Space,
New VIP Road,

Bhagwan Mahavir College
Char Rasta, Vesu, Bharthana,
Surat, Gujarat.

: Respondents.

Order delivered on 27th November, 2017.

Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J)

Appearance:

Shri Sundaresh Bhat, Resolution Professional, present in person.

Mr. Maulik Nanavati with Ms. Nikita Mehta, on behalf of Nanavati & Co., learned Advocates for Respondent No.1.

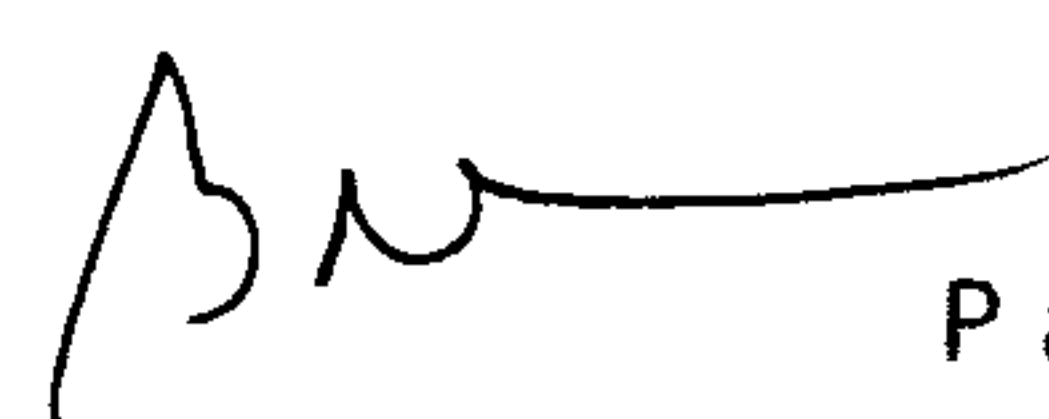
Ms. Lilu Bhaya, learned Advocate for Respondent No.2.

ORDER

1. Applicant, Resolution Professional, filed this Application seeking an order to set aside the notice dated 28.9.2017 issued by Dakshin Gujarat Vij Company Limited, [hereinafter referred to as "the Electricity Company"] and restrain the Electricity Company from disconnecting electric supply to M/s. ABG Shipyard Limited [hereinafter referred to as "Corporate Debtor"] till the completion of Corporate Insolvency Resolution Process ["CIRP" for short].

2. The facts, that give rise to the filing of this Interlocutory Application, are as follows;

2.1. This Adjudicating Authority, by order dated 1st August, 2017 made in CP (IB) No.53 of 2017 admitted the Petition filed by ICICI Bank Ltd (Financial Creditor) in initiating CIRP in respect of the Corporate Debtor. This Adjudicating Authority appointed Mr. Sundaresh Bhat as 'Interim Resolution Professional ("IRP" for short)



and thereafter the Committee of Creditors resolved to continue the IRP as 'Resolution Professional'.

2.2. It is the version of the Resolution Professional that he has received a disconnection notice bearing Reference No. Acctt/Rev/HT Disconn.Notice, dated 28.9.2017 from the Respondent no. 2 Electricity Company for non-payment of electric bill for the month of September 2017 wherein it is stated that the electric supply shall be disconnected if the outstanding amounts are not paid. It is the version of the Applicant Resolution Professional that as per Section 14(2) of the Insolvency and Bankruptcy Code, 2016 ["the Code" for short] the supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period. It is further stated that this Adjudicating Authority by order dated 1.8.2017 passed an order of moratorium under Section 13 of the Code till the completion of CIRP. It is also stated that "essential goods or services" is defined under Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 [hereinafter referred to as "the Regulations"]. It is also stated that Section 238 of the Code gives overriding effect to the provisions of the Code. It is also stated that if any Creditor violates the provisions of Section 14 the Creditor is punishable as laid down in Section 74(2) of the Code. It is further stated that if the Electricity Company disconnected the electricity supply to the Surat Unit of the Corporate Debtor 200 employees working in that unit would lose their livelihood.

3. On this Application, Notice was given to the Respondent. The Electricity Company appeared through Counsel and filed its Reply, wherein it is stated as follows;

3.1. The Electricity Company issued a Bill for consumption of electricity for the month of September 2017 amounting to Rs. 6,62,254.11 ps. for H.T. Connection No. 10208 and another bill

amounting to Rs. 87,251.25 ps., for the H.T. Connection No. 10226 for consumption of electricity for the month of September 2017 on 18.9.2017. It is stated that Applicant has to pay the same within 10 days of the date of the bill but the Applicant failed to pay the same. Therefore, the Electricity Company issued notice dated 28.9.2017 under Section 56 of the Electricity Act, 2003 to make payment within 15 days from the date of issue of notice wherein it is stated that if the Applicant failed to make payment of the bill for consumption of electricity charges the connections are liable to be disconnected without further notice as per Section 56 of the Electricity Act, 2003.

3.2. It is further stated in the Reply that on 17.10.2017 the Electricity Company issued a Bill for consumption charges for the month of October 2017 for HT Connection No. 10208 for Rs. 5,67,038.92 ps., and for HT Connection No. 10226 for Rs. 88,008.29 ps. According to the Electricity Company the Applicant is liable to pay the said bill also.

3.3. It is the plea of the Electricity Company that the provisions of the Electricity Act, Rules and Regulations framed thereunder are having overriding effect over the provisions of the IB Code. It is further stated that Section 43 of the Electricity Act creates an obligation on a Distribution / Licensee to supply electricity, whereas Section 45 of the said Act gives power to recover the charges for supply of electricity. Section 56 of the Electricity Act gives power to the licensee to disconnect the power supply in case of failure of payment of electricity consumption charges. There is also a contract between the Electricity Company and the Corporate Debtor to pay the electricity consumption charges as determined by the Electricity Company and therefore there is also a contract which is enforceable. It is further stated that in case the Applicant did not pay the consumption charges there is likelihood of Electricity Company also becoming sick and it is not the object of the IB Code. It is further contended that the Hon'ble Supreme Court, in case of *M/s. India Maize & Chemicals Ltd. Vs. State of U.P. & Ors.*, reported in 1997 (9)

SCC 462 held that even a sick industrial company has to pay the charges for electricity consumed by it, otherwise its supply can be disconnected. Demand for payment of electricity charges cannot be considered as an execution of a decree. If the Applicant wants the electricity supply continuously then he has to pay the current bills raised by the Electricity Company. It is not stated in the IB Code the Electricity Company should supply electricity without compliance of corresponding obligation of the consumer to pay the bills for current consumption charges as per the contract and as per the Electricity Act, 2003. The Electricity Act, 2003 is a Special Act and it is a complete code. The provisions contained in Section 14(2) of the Code are therefore not applicable to this case. Regulation 32 of the Regulations is not applicable to the Distribution Licensee because the Electricity Company is not suspending or terminating or interrupting supply of electricity in case if the Applicant make payment of current bills for consumption of electricity. It is further stated that Section 174 of the Electricity Act, 2003 gives overriding effect over all other laws. It is not stated in Section 238 of the IB Code that the provisions contained under the Electricity Act, 2003, more particularly Section 56 thereof will have no effect or that the provisions of Section 238 of the IB Code will prevail over the Electricity Act, 2003 or shall have overriding effect over it.

4. Admittedly, the Corporate Debtor is undergoing Corporate Insolvency Resolution Process. Admittedly, the Electricity Company supplied electricity to the Corporate Debtor. Admittedly, the Corporate Debtor has to pay the electricity consumption charges to the Electricity Company for the months of September, 2017 and October, 2017. Admittedly, the Resolution Professional has taken over the management of the Company and he has undertaken the process of CIRP under the provisions of the IB Code and as per the Resolutions passed by the Committee of Creditors.



5. The crucial question is whether Section 14(2) of the Code gives protection to the IRP not to pay for the electricity consumption charges to the Electricity Company pending completion of the CIRP.

6. Before going into the actual controversy, it is necessary to reproduce the provisions of Section 14(2) of the Code as under;

“Moratorium

14. (1) *Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely;*

(a)..... (b).....(c)....(d)....

(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.”

It is also necessary to reproduce Regulation 32 of the Regulations as follows;

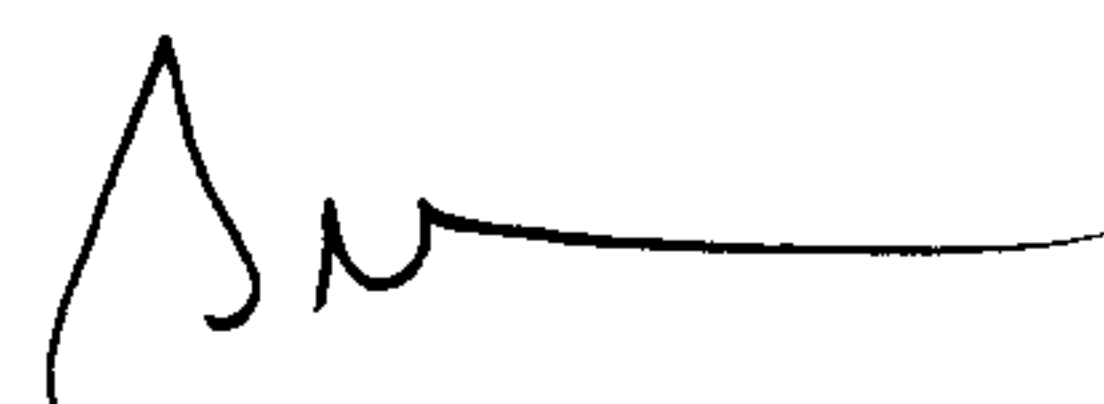
“Essential supplies

32. *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 supplies 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.”



7. In the case on hand, the 'electricity' is an essential good with reference to the Corporate Debtor. Section 14(2) clearly lays down that there shall not be termination, suspension or interruption of the supply of essential goods to the Corporate Debtor, i.e., ABG Shipyard Limited.

8. The contention of the learned Counsel for the Electricity Company is that there is nothing in Section 14(2) of the Code which says that Corporate Debtor is entitled for the supply of electricity during moratorium period even without paying electricity consumption charges.

8.1. In this context, it is necessary to see the object of Sections 13 and 14 of the IB Code. By declaring moratorium under Section 13, a protection is given to the Corporate Debtor during the Corporate Insolvency Resolution Process from recovering any kind of debt due by the Corporate Debtor even at the stage of execution in any Court of Law, Tribunal, Arbitral Panel or other authority.

8.2. The words "other authority" used in Section 14(1)(a) of the Code necessarily include the electricity authorities, may be the licensee or the distributor. Therefore, the moratorium order passed by this Adjudicating Authority gives protection from all other authorities including the electricity authorities.

8.3. Section 14(2) of the Code says that there must be continuous supply of essential goods during the moratorium period. The intention of the Legislature in introducing sub-section (2) of section 14 is to see that the Corporate Debtor function as 'a going concern'. It is also the duty of the Resolution Professional to see that the Corporate Debtor function as a going concern. Section 20 of the Code says that Interim Resolution Professional shall make every

endeavour to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern. Section 23(2) of the Code says, the Resolution Professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional in Chapter II of the Code. Therefore, what is provided in Section 20 sub-section (1) in respect of IRP applies to Resolution Professionals also in view of Section 23(2) of the Code.

8.4. The other object of Section 14(2) is that there shall not be any impediment to the Resolution Professional in keeping the Corporate Debtor as a going concern in respect of essential goods or services. If there is any interruption of supply in goods or services, it may not be possible for the Resolution Professional to manage the operations of the Corporate Debtor as 'a going concern'.

8.5. It is not in dispute that, M/s. ABG Shipyard Limited is a going concern. It appears that Resolution Professional is making every endeavour to manage the operations of the Corporate Debtor as 'a going concern'. In case if the Electricity Company is allowed to disconnect the electricity supply to M/s. ABG Shipyard Limited, Surat Unit, then there is no scope of managing the affairs of the Corporate Debtor as a going concern and it may also affect the Resolution Plan, if any, that is going to be filed and/or approved by the Committee of Creditors. On the ground of non-payment of electricity consumption charges, if electricity supply is interrupted, the business of the Corporate Debtor will come to a standstill. Likewise, if the authorities of a Municipal Corporation stop the water supply for drinking water purposes to the Corporate Debtor on the ground that water consumption charges are not paid, then also the Corporate Debtor shall not continue as a going concern. These aspects, if permitted, would make the purpose of Section 14(2) of the Code defeated in respect of essential goods and services. In the instant case, the Electricity Company by virtue of Section 45 of the

Electricity Act, 2003, is claiming the charges due to it for the electricity supplied to it. The Electricity Company, exercising the powers under Section 56 of the Electricity Act, issued a notice of disconnection in case if the Applicant fails to pay the electricity consumption charges.

8.6. Therefore, Section 56 of the Electricity Act, 2003 is repugnant to Section 14(2) of the Code.

9. The Electricity Act, 2003 and the Insolvency and Bankruptcy Code, 2016, are the legislations made by the Parliament in respect of items in List-3 Concurrent List. Serial No.9 of the List-3 is Bankruptcy and Insolvency. Serial No. 38 of List-3 is Electricity. Both the subjects are in Concurrent List. In respect of both the above said subjects, Parliament has passed the Electricity Act, 2003 and the Insolvency and Bankruptcy Code, 2016. "The Insolvency and Bankruptcy Code, 2016" is later in point of time than the Electricity Act, 2003. It is settled law, that when there is two enactments passed by the Parliament, and if there is any provision in such Acts which is repugnant to another, the provisions contained in the Act, which is later in point of time, shall prevail. On this aspect, the Hon'ble Supreme Court of India, in the matter of **KSL And Industries Limited Vs. Arihant Threads Limited And Others**, reported in (2015) 1 Supreme Court Cases 166, has held in Paras No. 41 and 48 as follows;

"41. *Indeed, the question as to which Act shall prevail must be considered with respect to the purpose of the two enactments; which of the two Acts is the general or special; which is later. It must also be considered whether they can be harmoniously construed.*"

"48. *In view of the observations of this Court in the decisions referred to and relied on by the learned counsel for the parties we find that, the purpose of the two*

enactments is entirely different. As observed earlier, the purpose of one is to provide ameliorative measures for reconstruction of sick companies and the purpose of the other is to provide for speedy recovery of debts of banks and financial institutions. Both the Acts are "special" in this sense. However, with reference to the specific purpose of reconstruction of sick companies, SICA must be held to be a special law, though it may be considered to be a general law in relation to the recovery of debts. Whereas, the RDDB Act may be considered to be a special law in relation to the recovery of debts and SICA may be considered to be a general law in this regard. For this purpose we rely on the decision in *LIC v. Vijay Bahadur*. Normally the latter of the two would prevail on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a non obstante clause. In this case, however, the express intendment of Parliament in the non obstante clause of the RDDB Act does not permit us to take that view. Though the RDDB Act is the later enactment, sub-section (2) of Section 34 thereof specifically provides that the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of the other laws mentioned therein including SICA".

That was a case where there was a repugnancy between Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA); and Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act). In RDDB Act, overriding effect is given to the provisions under Section 34(1). Section 34(2) of the RDDB Act is an exception to the overriding effect wherein SICA is exempted from the overriding effect.

Section 174 of the Electricity Act, 2003 reads as follows;

"174. Act to have overriding effect.— Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."



Section 173 of the said Act reads as follows;

“173. Inconsistency in laws.—*Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989).”*

Section 173 in the Electricity Act, 2003 is an exception to Section 174 of the said Act. Section 173 says, the provisions of the Electricity Act insofar as they inconsistent with Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989 have no effect. By the date of passing of the Electricity Act, 2003 the Insolvency and Bankruptcy Code, 2016 was not there in existence. Therefore, there is no scope of introducing the IB Code in Section 173 of the Electricity Act, 2003.

10. Now coming to Section 238 of the Code, it reads as follows;

“Provisions of this Code to override other laws

238. *The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*


In view of Section 238, any other law which is inconsistent with the provisions of the IB Code shall have effect. That means, the provisions of the Electricity Act, 2003 have no effect in case they are inconsistent with the provisions of the Code. From the above discussion on facts, the interruption of electricity supply to the Corporate Debtor is certainly inconsistent with Section 14(2) of the IB Code. The authority to interrupt the power supply was derived by the Electricity Company under Section 56 of the Electricity Act. Therefore, it can only be said that there is repugnancy between

Section 56 of the Electricity Act, 2003 and Section 14(2) of Insolvency and Bankruptcy Code, 2016, insofar as it relates to Corporate Debtors that are undergoing the CIRP.

10.1. The Judgment of the Hon'ble Supreme Court referred to by the Dakshin Gujarat Vij Company Ltd., in the case of *M/s. India Maize & Chemicals Ltd. Vs. State of U.P. & Ors.*, reported in 1997 (9) SCC 462, is in relation to Sick Industrial Companies. That decision by the Hon'ble Apex Court is not applicable to the facts of the present case because the said decision does not deal with Section 238 of the IB Code.

11. The object of The Electricity Act, 2003 is *to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.*

12. The object of Insolvency and Bankruptcy Code, 2016 is *to maximise the value of assets of Corporate Debtors and to revive the Corporate Debtors who are in default in payment of debts.* The Electricity Act, 2003 deals with subject of electricity. The Insolvency and Bankruptcy Code, 2016 deals with Insolvency Resolution Process and Liquidation Process. Though the two subjects are different, still there is repugnancy between Section 56 of The Electricity Act, 2003 and Section 14(2) of the Insolvency and Bankruptcy Code, 2016. When there is a repugnancy between the



two Central Acts, the Act which is later in point of time shall prevail over the other.

13. It would, thus, appear the Electricity Act, 2003 is intended to deal with the generation, transmission, distribution, trading and use of electricity. Whereas the Insolvency and Bankruptcy Code, 2016 is enacted with an object to revive the Corporate Debtors if possible, and, if not possible, to liquidate the Corporate Debtor by declaring a period of not less than 180 days as 'moratorium' which could be extended up to another 90 days. Therefore, the object of the later enactment, namely IB Code is to give some kind of protection to the Corporate Debtors during the moratorium period which, as already said, extend to supply of essential goods. Therefore, the provisions of Section 56 of the Electricity Act, 2003 which is repugnant to Section 14(2) of the IB Code has to give way and shall not cause any interruption of supply of electricity on the ground of non-payment of electricity consumption charges during moratorium period. In my opinion, therefore, keeping in view the object and purpose underlying both the enactments viz; Electricity Act, 2003 and Insolvency and Bankruptcy Code, 2016, the provisions of Section 14(2) of the IB Code have to be construed as overriding the Section 56 of the Electricity Act, 2003. On this aspect, there is a decision of the Hon'ble Supreme Court in the matter of **Ashoka Marketing Ltd. And Another Vs. Punjab National Bank And Others**, reported in (1990) 4 Supreme Court Cases 406.

13.1. Section 56 of the Electricity Act, 2003 applies to every citizen of India and whole of India except the State of Jammu and Kashmir. Whoever that failed to pay the electricity consumption charges, even by the highest dignitary in India has to face the interruption of electricity supply under Section 56 of the Electricity Act, 2003. But Insolvency and Bankruptcy Code gives exemption for the Corporate Debtors undergoing CIRP for a particular period,



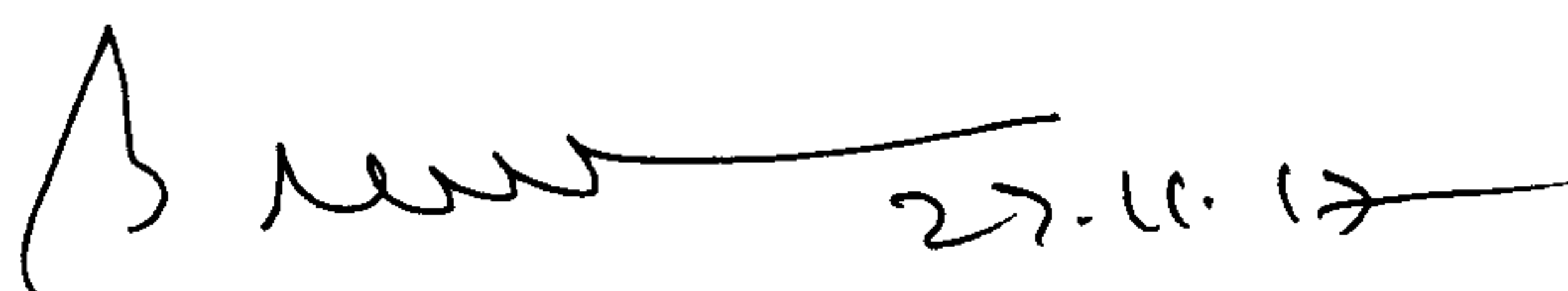
namely the 'moratorium period'. Therefore, Section 14(2) of the Code must prevail over Section 56 of the Electricity Act, 2003.

14. Therefore, the electricity authorities are not entitled to disconnect the power supply to the Corporate Debtor, M/s. ABG Shipyard Limited, invoking Section 56 of the Electricity Act, 2013. It may be said that it amounts to absolving the Applicant or the Corporate Debtor from paying the electricity consumption charges. But it is not so. The Electricity Company can claim the power consumption charges as an 'Operational Creditor' from the assets of the Corporate Debtor on par with other operational creditors based on priorities given in the Code and the Rules and Regulations. Therefore, the Corporate Debtor or the Applicant is not absolved from paying the charges. The claim of the Corporate Debtor to pay the electricity consumption charges shall be taken into account by the Resolution Professional along with other Operational Creditors following the priorities given under the Code, Rules and Regulations.

15. In view of the above discussion, there shall be a direction to the Dakshin Gujarat Vij Company Limited, Piplod Division Office, not to disconnect the power supply to M/s. ABG Shipyard Limited, Surat Unit, during the moratorium period. However, Dakshin Gujarat Vij Company Limited is entitled to make a claim for electricity consumption charges with the Resolution Professional and the Resolution Professional shall receive such claim, and process it along with other Operational Creditors following the priorities given in the Code, Rules and Regulations.

16. The Application is disposed of accordingly. No order as to costs.

Signature:



**Sri Bikki Raveendra Babu, Member (J).
Adjudicating Authority.**