

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 157 in CP 01/I&BP/2016

Under section 7 of the IBC, 2016

In the matter of
ICICI Bank Ltd.

v.

Innoventive Industries Ltd.

Order delivered on: 23.08.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. Nirav Shah, Adv. i/b Little & Co.

For the Respondent: Mr. Ameya Gokhale a/w Meghna Rajadhyaksha
i/b Shardul Amarchand Mangaldas & Co.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

The Applicant is a public sector undertaking company supplying electricity to the Public of Maharashtra, since this applicant has been supplying electricity to this corporate debtor, it has filed this Miscellaneous Application stating that for this corporate debtor failed to pay to the electricity supplied to the Industry run by the Corporate Debtor, the Applicant has already issued notices u/s 56(1) of the Electricity Act 2003 on 20.01.2017, 17.02.2017 & 26.03.2017 to this consumer in respect two connections maintained by this debtor giving 15 days' time for making payment of the dues payable to the Applicant.

2. In spite of serving such notices upon this Corporate Debtor, Corporate Debtor has failed to make payments as demanded by the Applicant herein except a part payment of ₹48,07,402 towards dues that arose from January 2017 till August 2017. Applicant's Counsel submits that as on 18.01.2017, the total outstanding arrears of electricity bill payable by the Corporate Debtor for High Tension Consumer

No. 184279045210 is ₹1,25,83,970 and High Tension Consumer No. 184819033250 is ₹1,55,43,090 total aggregating to ₹2,81,21,060. Since the Corporate Debtor made payment of ₹48,07,402 on 18.08.2017, the total outstanding arrears payable by the Corporate Debtor as on date has aggregated to ₹2,38,00,650.

3. The Applicant's Counsel states that distribution companies have to purchase power from generation companies, if dues are stuck like this, it will be difficult for distribution companies and government to provide essential services to the public. He further submits that the power supply to this company is not for catering essential services, it is indeed supplied to cater manufacturing purpose which is not covered under Regulation 32 of CRP Regulations, therefore, these dues are not covered under Section 14(2) of the IB Code henceforth, the Counsel prays this Bench to clarify that supply of electricity to this company for manufacturing purpose is not essential service.

4. To which the Corporate Debtor company replied stating that since moratorium is presently in force, no suit/legal proceeding can lie against the Debtor Company including any execution of any judgment, decree, order in any Court of Law, Tribunal/authority. Therefore, the Counsel prays that the demand for payment of electricity bills is barred by moratorium passed under Section 14 of the Insolvency and Bankruptcy Code.

5. The Debtor Counsel submits that electricity is essential service as stated under a regulation 32 of IBC of India, therefore, if at all supply is disconnected, it will be in violation of the Admission Order dated 17.01.2017. The Counsel further submits that supplying of electricity cannot be considered as direct input as the Corporate Debtor is involved in production of tubes and motor vehicle components, not something like generating hydel energy.

6. Since this essential service is included in IRP costs under Regulation 31 of IBBI (CIRP) Regulations, this Applicant is entitled to make its claim under the head

of IRP costs ahead of all other costs covered under the aforesaid Regulation. Therefore, the Counsel submits this service is to be treated as essential service not as an input to the output produced or supplied by the Corporate Debtor.

The Corporate Debtor Counsel further submits that this company is operating as going concern on EBITDA loss since before commencement of the IRP and continuing to do so. The Corporate Debtor closing cash balance as on 26.07.2017 is ₹1.9 crores, of which payments amounting to ₹1.77 crores towards statutory dues and other creditors have to be released by 31.07.2017. It has been unable to pay salaries and wages for two months, sundry creditors and statutory dues. The Counsel further submits that the company already made payment of ₹1,68,77,148 to the Applicant towards electricity dues from the date of Admission Order. For this company has already been suffering from cash crunch, the delay in payment cannot be taken into consideration for discontinuing supply of power to the Company.

7. Apart from these, the Counsel further submits that this company has to receive Industrial Promotion Subsidy in the form of VAT refunds for the last 3 years amounting to an average of ₹25 crores per year. Since the refund is expected to come in the month of August, 2017, it will pay entire dues to the applicant.

8. In view of the above reasons, the Counsel appearing on behalf of the Company prays this Bench to consider supplying of electricity as essential service and provide direction to the Applicant herein not to disconnect in pursuance of the notice given under Section (1) of the Electricity Act 2003.

9. In view of the submission made from both sides now the point left to this Bench to consider is – *as to whether supply of electricity for manufacturing activities of the company is an essential service or not as mentioned under Regulation 32 of the IBBI (CIRP) Regulations 2016.*

10. For the benefit of understanding of this Regulation, let us read it, which is as follows:

"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."

11. By reading this Regulation, it appears that electricity, water and telecommunication services and Information Technology service are to be considered as essential as long as these services are not a requirement to the output produced or supplied by the Corporate Debtor. Under this regulation, an illustration also been given saying that water is to be considered as essential service as long as it is used for drinking purpose and sanitization purpose but not for generating electricity. Whenever any illustration is given, it will be given to have an understanding about the provision of law. If supply of water for drinking and sanitization purpose is an essential service, the supply of electricity is also deemed to be limited for lighting purpose and other domestic purposes, which are in modern days considered as essential service. If the same electricity is used as input for manufacturing purpose making huge bill of lakhs of rupees to get output from that industry, then to our understanding, supply of electricity is used as input for manufacturing purpose to get output from the factory and it obviously to make profits. Essential service is a service for survival of human kind, but not for making business and earn profits without making payment to the services used. When company is using it for making profit, then the company owes to make payment to the services/goods utilized in manufacturing purpose.

Since it is not the defense of the debtor company that this electricity is used for lighting purpose, and admittedly using for running manufacturing business, those service will not fall within the ambit of Section 14 (2) of moratorium. Every month, since this company has been consuming electricity for almost one crore of

rupees, such supply will not be treated as supply for meeting essential requirements of the company.

12. Therefore, this Bench hereby clarifies that the electricity supplying to the debtor company will not fall within essential supplies classified in Regulation 32 of IBBI (CIRP) Regulations, therefore, section 14 (2) of Insolvency and Bankruptcy Code shall not be invoked to prohibit the supplier from terminating or suspending services, accordingly, this MA 157/2017 is hereby disposed of.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)