

**In the National Company Law Tribunal
Single Bench, Chennai**

CP/554/(IB)/CB/2017

Under Section 9 of the IBC, 2016

In the matter of

Arkay Energy (Rameswaram) Limited

V/s

Tamilnadu Generation & Distribution Company Limited (TANGEDCO)

Order delivered on: 13.09.2017

For the Petitioner/OC: M.S.Krishnan, Sr. Advocate
Anirudh Krishnan, Advocate
P.R. Vanadana, Advocate
Keerthikiran Murali, Advocate
A. Sella Visalakshi, Advocate

For the Respondent/CD: C. Manishankhar, AAG
Abdul Saleem, Standing Counsel
S. Dhanpal, PCS

Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)

ORDER

1. Under Adjudication is a Company Petition filed by Arkay Energy (Rameswaram) Limited (hereinafter called as, 'Petitioner/Operational Creditor') under section 9 of the Insolvency & Bankruptcy Code 2016 (for brevity, 'IB Code 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 (for brevity, 'IB Rules 2016') praying this Adjudicating authority (in short, 'AA') to initiate

Corporate Insolvency Resolution Process against Tamilnadu Generation & Distribution Company Limited (hereinafter called as, '**Respondent/Corporate Debtor**') on the grounds of respondent's inability to pay debt of Rs. 251,29,31,781/-.

2. Before I proceed with the matter, it would be appropriate to make a note of background facts for the purpose of determination of this petition.
3. The Petitioner/OC is a Public Limited Company incorporated under the Companies Act, 1956 having registered office at New no. 20. Old no. 129, Chamiers Road, Nandanam, Chennai- 600035 and engaged in the business of power generation.
4. The Respondent/CD is Government Company incorporated under the Companies Act, 1956 having registered office at 144, Anna Salai, Chennai- 600002 and engaged in the business of power generation and distribution in the state of Tamilnadu.
5. Shri M.S.Krishnan, the learned senior counsel appearing on behalf of the petitioner/OC submitted that the Petitioner is a Special Purpose Vehicle (SPV) owning power generating stations at Valuthur village, Valantharavai in Ramnad district and is primarily dealing with TANGEDCO as all the electricity generated by the petitioner is pumped into the Grid controlled by TANGEDCO. It is

submitted that TANGEDCO had called for the tender no. 6 of 2014 and tender no. 7 of 2015 dated 19.08.2014 and 21.09.2015 respectively, calling for the supply of electricity at fixed rates and the petitioner was one of the successful tenderers.

6. The learned senior counsel for the petitioner further submitted that pursuant to the said tenders, the petitioner started supplying electricity to the respondent but payments were not forthcoming on time from TANGEDCO for the electricity supplied as per the agreed contracts. It is submitted that the petitioner is also entitled to interest on delayed payments as per clauses of the said tenders and the same has been accepted by the Chairman of TANGEDCO before the Hon'ble Madras High Court through his counter affidavit in Contempt petition no. 808 and 809 of 2017 in WMP 29560 of 2016 in WP no. 34238 of 2016 and WP no. 35547 of 2016, which is produced below:

“17. I submit that TANGEDCO always after clearing the Principal amounts and pays the interest on the late payments....”

7. It is submitted that the petitioner, having awaited for a long period of time for their legitimate dues and despite the respondent acknowledging its dues to the petitioner, issued a Demand Notice dated 04.07.2017 under section 8(1) of the IB Code 2016 r/w Rule

5 of the IB Rule 2016 calling upon the respondent to make the payment of Rs. 243,36,00,000/- within a period of 10 days.

8. It is further submitted that the Respondent/CD duly received the said Demand Notice on 05.07.2017, however, the Respondent neither brought to the notice of the Petitioner any existence of a dispute nor repayment of unpaid operational debt by sending an attested copy of relevant records within a period of 10 days as stipulated under section 8(2) (a) & (b) of the IB Code 2016. The learned senior counsel contends that non-reply or no notice to the said Demand Notice within stipulated time frame is a clear case of admission of liability and it is deemed that there is no dispute, hence, the instant petition is bound to be admitted under section 9(5)(i) of the IB Code 2016. In support of his contention, the learned counsel relied on the Hon'ble NCLAT judgement passed in *Kirusa Software Private Limited V. Mobilox Innovations Private limited, Company Appeal (AT) (Insolvency) 6 of 2016* and a catena of judgements passed by various NCLT Benches wherein it was held that a petition shall be admitted if all the requirements of Section 9 (5) (i) are fulfilled.

9. It is further submitted that the Petitioner, having been left with no other options, approached this Adjudicating Authority claiming to be an Operational Creditor under the provisions of the IB Code 2016 and prayed to initiate Corporate Insolvency Resolution Process against the Respondent/CD for their unpaid debt to the tune of Rs. 251,29,31,781/- as on date on the basis of calculation as tabulated below:-

S.no	Month	Amount (Rs.)
1	October 2015	35,86,77,000
2	November 2015	3,00,90,500
3	December 2015	1,94,97,500
4	January 2016	8,30,97,500
5	February 2016	3,23,70,500
6	March 2016	19,12,08,150
7	April 2016	18,70,66,150
8	May 2016	9,18,79,382
A	Total Principal Amount	99,38,86,682
B	Compensation Amount for less than 85% off take	22,72,50,049
C	Interest Amount from June 11 to May 16 (As on 30.06.2017)	129,17,95,050
A+B+C	Total Amount Receivable	251,29,31,781

10. Shri C. Manishankhar, the learned Additional Advocate General (AAG) appearing on behalf of the Respondent Company vehemently opposed the contentions put forth by the counsel for the

Petitioner and submitted that the instant petition filed by the Petitioner is false, vexatious and also not maintainable. He submitted that the petitioner is not entitled to invoke the jurisdiction of this tribunal as he does not come under the category of 'Operational Creditor' as defined under section 5(21) of the IB Code 2016.

11. With regard to the above contention, the learned senior counsel for the petitioner submitted that the petitioner, being supplier of power to the respondent, has supplied "goods" and thus provided services. He has placed reliance on two judgements passed by the Hon'ble supreme Court in *Commissioner of Sales Tax, Madhya Pradesh, Indore V. Madhya Pradesh electricity Board, Jabalpur, 1969 1 SCC 200* and *State of AP V. NTPC, AIR 2002 SC 1895* wherein it was held that Electricity falls under "goods".

12. The learned AAG further submitted that M/s. TANGEDCO being a statutory body enacted under the Electricity Act, 2003 and is an instrumentality of the state under Article 12 of the Constitution of India. Moreover, M/s. TANGEDCO exists purely for the service of the state and primarily not formed for any profit making motive, therefore the functions of TANGEDCO cannot be equated with the function of any other commercial undertaking and any order as to

winding up of TANGEDCO is not only prohibited but would also lead to total chaos in the management and supply of power throughout the state, which would not be in the interest of public.

13. The learned counsel for the petitioner strongly opposed to the above contentions made by the learned AAG and submitted that even a government company can be wound up on the grounds of inability to pay debt and made a reference to the maxim “*expressio unius est exclusion alterius*” stating that where legislature has consciously carved out expectations, no other exceptions can be read in other than what is expressly specified.. He also placed a landmark judgement passed by the Hon’ble Supreme Court in ***Indira Nehru Gandhi Vs. Raj Narain AIR 1975 SC 299*** wherein it was opined that an expressly laid down mode of doing something necessarily prohibits the doing of that thing in any other manner.

14. The learned AAG further submitted that the Electricity Act 2003 being a special enactment would override all other laws in force as enumerated under section 174 of the Electricity Act 2003 and Section 184 of the Electricity Act 2003 gives the exceptions to the application wherein the IBC is not listed as exempted. He further submitted that section 86 (1)(f) and 158 of the Electricity Act 2003 provides mechanism for dispute resolution and also for referring

the matter for Arbitration. Hence, it is a clear case of abuse of process and the petitioner is prohibited from invoking the jurisdiction of this Adjudicating Authority and Tamil Nadu Electricity Regulatory Commission (TNERC) is the proper forum for redressal of grievances of the petitioner, if any.

15. With regard to the above observation, the petitioner's counsel submitted that the Electricity Act, 2003 and IB Code 2016 are separate concurrent enactments and the IB Code 2016 overrides other statutes by virtue of its Section 60(5) and section 238. If there is a dispute, the remedy lies under section 86 (1)(f) of the Electricity Act, 2003 and if there is no dispute and the Corporate Debtor is unable to pay debt, then the relief can be sought under the IB Code 2016. To substantiate his claim, he placed reliance on a recent judgement passed by the Hon'ble Supreme Court in **Innoventive Industries Limited V. ICICI Bank & Anr., 2017 SCC OnLine SC 1025** where their lordship held that the IB Code 2016 would operate to render the Maharashtra Relief Undertakings (Special Provisions) Act, 1958 void vis-à-vis action taken under the IB Code 2016 and the aforesaid Act, 1958 cannot stand in the way of the corporate insolvency resolution process in view of Section 238 of the IB Code 2016. He further placed his reliance on the apex court

judgements passed in *Harischandra Hegde V. State of Karnataka and Ors., (2004) 9 SSC 780* and *Innoventive Industries Limited V. ICICI Bank & Anr., 2017 SCC OnLine SC 1025* wherein it was held that in event of conflict between two non-obstante clauses, the later statute will prevail than former.

16. The learned AAG further submitted that the petitioner's Holding company, M/s. Ind Bharath Infra Ltd. has filed an application in M.P. No. 8 of 2016 on behalf of its subsidiary companies i.e. the petitioner before the Hon'ble Tamil Nadu electricity Regulatory Commission (in short, 'TNERC') seeking payments on the amounts allegedly due and the petitioner has suppressed this fact. It is also submitted that various writ petitions have been filed against respondent by the petitioner and its sister concern before the Hon'ble Madras High Court for recovery of payments and the said writ petitions are still pending which have been tabulated below for ready reference:-

S. No.	Case No.	Applicant	Status
1	WP. 35547/2016	Ind-Barath Thermal Power Ltd	Pending
2	WP. 34238/2016	Arkay Energy (Rameshwaram) Ltd.	Pending
3	WP. 35548/2016	Ind-Barath Powergencom Ltd.	Pending

He also submitted that apart from the writ petitions, there are numerous cases filed against the respondent wherein prohibitory orders have been issued against the respondent from making payments to the petitioner. The list of these cases are as follows:-

S. No.	Case No.	Applicant	Status
1	CS. 188/2017	M/s. GIMPEX Ltd.	Pending
2	CS. 189/2017	M/s. GIMPEX Ltd.	Pending
3	CS. 302/2017	M/s. Trimex Industries Pvt. Ltd.	Pending
4	CS. 303/2017	M/s. Trimex Industries Pvt. Ltd.	Pending
5	Appln. Nos. 4539 to 4541 of 2017	M/s. Karam Chand Thapar Ltd.	Pending
6	CS. 400/2017	M/s. Millenium Steel India Ltd.	Pending
7	CS. 401/2017	M/s. Millenium Steel India Ltd.	Pending
8	CS. 402/2017	M/s. Millenium Steel India Ltd.	Pending
9	CS. 403/2017	M/s. Millenium Steel India Ltd.	Pending

It is further submitted that another two writ petitions have been filed by the petitioner and its sister concern seeking adjustment of their current consumption bills payable to the respondent wherein interim order was passed directing adjustment of the petitioner's

bill and an undertaking has been given by TANGEDCO and undertaking given is being complied with. The details of pending writ petitions filed before the principal and Madurai Benches of the Hon'ble High Court are detailed as below:-

S. No.	Case No.	Applicant	Status
1	WP. 18675/2017	Ind-Barath Powergencom Ltd.	Pending
2	WP. 13723/2016 (Madurai Bench)	Arkay Energy (Rameshwaram) Ltd.	Pending

It is further submitted that the respondent is entitled to set-off towards the adjustment made against these bills in their claim amounts and when prohibitory orders have been passed against TANGEDCO directing it not to release payments to the petitioner, the respondent was unable to finalise the amount to be paid of the petitioner. He further submitted that the pendency of several cases enumerated above was suppressed by the petitioner, therefore, the petition is liable to be rejected at threshold for suppression of material facts with costs.

17. In relation to the above allegation relating to the suppression of material facts, the learned counsel for the petitioner submitted that the writ petitions referred above are related to matters of different nature and nowhere connected to the instant petition in question.

18. With regard to the payment of interest on late payment raised by the counsel for the petitioner, the learned AAG submitted that payment of interest can be made only when the principal amount itself is finalised. He further submitted that due to the multiple litigations caused at the instance of the petitioner and the ongoing investigation/Vigilance enquiry against the respondent, the respondent has been unable to finalize its accounts. In support to this averment, he further submitted that the Tamilnadu electricity Grid Code (**Regulation**) provides for the manner in which power is to be injected into the system of M/s. TANGEDCO. The Regulation provides that as per instructions, the private power plants should inject power on a 15 minute time block. Therefore, even if sum total of power supplied by a private power plant in a day meets the instruction issued, the same will have to be as per the 15 minutes time block. He further submitted that there is a specific Unit known as the State Load Despatch Centre (**SLDC**) which is formed as per specific provisions of Section 32 of the Electricity Act 2003 & the said Regulation and this unit issues the requirement of power and the specifications for export of load by generators like the petitioner. The power exported by generators are monitored continuously under the system and the petitioner is liable to pay

penalty on such unauthorised injections and deviated supply which is the subject matter of enquiry by the Superintending Engineer (Enforcement) working under the control of the Director General of Police/Vigilance/TANGEDCO. He finally submitted that the petitioner will have to pay the charges for unauthorised injections of power and unless the quantum of charges to be levied are finalised, the amount claimed by the petitioner cannot be said to be correct and therefore, the Petitioner is devoid of particulars necessary to decide a lis.

19. The learned counsel for the petitioner countered the submissions of the learned AAG stating that no any aforesaid enquiry is pending.
20. Heard both sides. Perused the entire record. Now, the point for consideration is whether the instant petition can be admitted or not?
21. In view of the aforesaid facts, this Adjudicating Authority arrives at the conclusion that a 'dispute' exists in respect of the claim made by the Operational creditor. The dispute has its foundation for the reason the Principal Amount itself, is disputed before the Hon'ble High Court in various pending writ petitions. Undoubtedly, the petitioner has reached this Adjudicating Authority at a premature stage because, unless the real figures with respect to the Principal Amount is determined, it would be difficult to ascertain the exact

Principal amount as well as accrued Interest. I find merit in the arguments advanced by the learned AAG on behalf of the Corporate Debtor that in view of the pendency of several writ petitions before the Hon'ble Madras High Court, the present claim is disputed.

22. Further, with regard to the jurisdiction of NCLT in this case, the learned AAG pointed out that the claim for the interest or any other claim, if disputed, could only be referred to the Hon'ble TNERC as per the provisions of Electricity Act 2003, the terms of the tender and Clause 16 of the Power Purchase Agreement (PPA) entered into between the petitioner and respondent, which provides that dispute, if any shall be referred to the TNERC for adjudication. The extract of the Clause 16 is reproduced below:-

16. Settlement of Disputes- Arbitration:

If any dispute or difference whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicable by the parties, failing which the matter shall be referred to the TNERC for adjudication of such dispute.

However, as already held above, the present claim of the petitioner is disputed. Therefore, at this juncture, it does not warrant me to discuss this issue as it is not required now for the purpose of adjudicating the matter.

23. Furthermore, as pointed out by the learned senior counsel for the petitioner that the IB Code 2016 would override the Electricity Act, 2003 in view of section 238 of the IB Code 2016 & the landmark judgement passed by the Hon'ble Supreme Court in **Innoventive Industries Limited V. ICICI Bank & Anr., 2017 SCC OnLine SC 1025**, I am of the opinion that this issue has to be tested with reference to the constitutional position on repugnancy. Moreover, the facts and issue of Innoventive Industries case is different from the present case as in Innoventive Industries case, it was held that the IB Code 2016 would override the Maharashtra Act 1956 which is a state law. But whether the IB Code 2016 would override the Electricity Act 2003, a central enactment or not, has to be tested in view of Article 254 of the Constitution of India and would differ from the facts and circumstances of each case. Also while testing this, the objects of both the enactments are to be seen and I leave this issue unanswered as at this stage, this issue does not warrant me to be adjudicated as already held above, there exists a dispute between the parties in the instant petition.

24. Therefore, in the circumstances as discussed above, I am not inclined to admit the instant petition. Accordingly, the instant petition is rejected.

25. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor immediately.



K. ANANTHA PADMANABHA SWAMY
Member (J)

SINHA