

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH**

**Company Application CA(IB) No. 110/KB/2018
In Company Petition CP(IB) No. 596/KB/2017**

IN THE MATTER OF:

Citi Bank NA

..Applicant/Financial Creditor

-Versus-

Cosmic Ferro Alloys Ltd.

**.. Respondent/corporate
Debtor**

Coram: Mr. Jinan K. R., Member(Judicial)

For the Applicant:

Date of pronouncement of the Order: 16-02-2018

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Per Jinan K. R.

ORDER

1. This is an Application under Section 14(2) of the Insolvency and Bankruptcy Code, 2016, filed by the Insolvency Resolution Professional in the matter of Citi Bank NA Vs. Cosmic Ferro Alloys Limited, being Company Petition No. CP(IB) No.596/KB/2017, which had been filed by Citi Bank NA before this Tribunal under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with rules and regulations framed thereunder, against the Corporate Debtor, Cosmic Ferro Alloys Limited on October 30, 2017.
2. Vide Order dated 16-01-2018, this adjudicating authority admitted the Company Petition and appointed the present Applicant as the Insolvency Resolution Professional with directions to take all necessary action(s) under the provisions of the I&B Code.
3. It is alleged in the application that the upon being appointed as the Insolvency Resolution Professional, the applicant, in the process of taking complete custody of the management and the assets of the Corporate Debtor, met the erstwhile management of the Corporate Debtor and was made aware of the issue being faced by one of the major production plant of the Corporate Debtor.

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4. It is further alleged that the Damodar Valley Corporation (in short "DVC") is the sole distributor of power and electricity to the major production plant of the Corporate Debtor situated at Barjora, District Bankura, West Bengal, ("Barjora Plant"). On 17-01-2018, a day after the insolvency commencement date i.e. 16-01-2018, the power supply by DVC to the Barjora Plant was disconnected on account of outstanding dues prior to insolvency commencement date and hence, the entire operations of the Corporate Debtor at the Barjora Plant had come to a standstill.

5. In terms of the spirit of the Code and its expressed provisions, the Applicant, realising the gravity of the situation, requested DVC in writing by way of hand service as well as e-mail on 25-01-2018 to reconnect the power supply to the Barjora Plant of the Corporate Debtor and receiving no reply from the DVC on the said issue again sent a letter dated 28-01-2018 by e-mail and hand delivered on 29-01-2018.

6. Further, having received no reply from the DVC, the Applicant met the officials of DVC at their Office on 01-02-2018 and explained the urgency in the matter.

7. The Applicant was asked to submit a memo in this regard and the same was given by the Applicant on 02-02-2018 by e-mail as well as by hand service, stating that upon restoration of power by the DVC, DVC is

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requested to extend time for payment to 105 days from the billing date to make payment of the electricity charges as billed instead of the standard 32 days, as provided in the terms of the bill for making payments towards the charges that would accrue upon restoration of power supply by DVC.

8. In view of the above, the Applicant submitted that reconnection of the electricity supply with immediate effect is of utmost necessity since all the operations of the Barjora Plant are totally dependent on the continuous electricity supply by DVC, which is the sole electricity supplier to the Barjora plant and it is not feasible to make alternative arrangement during the corporate insolvency resolution process.

9. The DVC entered appearance and filed its objection in the form of an affidavit. It raised the following contentions :

10. The DVC has raised preliminary objection regarding maintainability of the aforesaid application as it is misconceived, suffers from suppression of material facts and submission of distorted facts.

11. Further, it has been stated by DVC that the Electricity Act, 2003 and the West Bengal Electricity Regulatory Commission is the competent authority to adjudicate over the disputes like the one raised by the applicant.

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12. It has been further stated that the advertisement dated 20-01-2018 was published in the newspapers beyond the statutory period of 3 days from the date of such appointment of the Insolvency Resolution Professional, being 16-01-2018, as clearly provided under Section 15 of the Insolvency and Bankruptcy Code, 2016, read with Chapter III, Regulation 6 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and as such, the said public announcement was bad in law.

13. It has been stated that DVC is presently suffering from severe financial crisis due to huge amounts of dues outstanding on account of electricity consumption from various consumers. The main functions of DVC under the DVC Act, 1948 is promotion of operation of scheme for generation, transmission and distribution of electrical energy.

14. An agreement was entered into between the Corporate Debtor and DVC for supply of electricity to the factory premises of the Corporate Debtor at Barjora on 20-01-2005 and consequently, a supplementary agreement was executed on 22-06-2007.

15. The Corporate Debtor was a defaulter in the payment of electricity bills from May, 2010 and DVC had repeatedly requested the Corporate Debtor to make payment of its outstanding dues. However, the Corporate

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Debtor neglected and/or failed to make any payment to clear the outstanding dues.

16. Finding no other alternative, DVC was forced to issue a disconnection notice on 01-01-2018 for non-payment of current dues amount to Rs. 8,38,20,190/-. The Corporate Debtor did not pay any heed to the notice and made no payment to DVC. DVC was forced to disconnect electricity supply to the factory premises of the Corporate Debtor on 17-01-2018.

17. It is further alleged by the DVC that the conduct of the Corporate Debtor shows that it has never intended for DVC to know that it is undergoing the process of insolvency resolution or that any proceedings was pending against the company before this Tribunal, thereby maliciously trying to ensure that DVC be forced to supply electricity as an essential services under Section 14(2) of the Code despite there being substantial outstanding dues in the account of the Corporate Debtor. The DVC came to aware of the insolvency resolution proceedings only on 29-01-2018 when the Applicant submitted a letter of intimation to DVC and for the first time, the Applicant met the officials of the concerned department in charge of the mater on 01-02-2018, as has been admitted by the Applicant in paragraph 10 of the Application. It has been stated that unless the outstanding dues are cleared, DVC is under no statutory obligation to restore power supply. It has also been stated that DVC is not delaying the

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reconnection of electricity and DVC is ready and willing to provide electricity once its outstanding dues are cleared.

18. The applicant filed a rejoinder in the form of reply affidavit reiterating the very same allegation and state further that the disconnection of power had completely put the Barjora Plant in complete blackout since 17-01-2018 and the Applicant is in constant fear and threat of losing the assets of the Corporate Debtor which can be damaged, misplaced or stolen, due to lack of electricity supplied by DVC at Barjora Plant.

19. Heard both sides. Upon hearing the argument and on perusal of the records, the short point that arises for the determination is whether restoration of electricity supply disconnected by the DVC is to be allowed as prayed for by the applicant ?

20. This is an application filed by the Interim Resolution Professional, Mr. Anish Niranjan Nanavaty, in the above said Company Petition in which the Corporate Resolution process has been initiated at the instance of the Financial Creditor, Citi Bank, NA in respect of the Corporate Debtor, Cosmic Ferro Alloys Limited. Vide Order dated 16-01-2018, the application was admitted declaring moratorium as on the date of the admission i.e. from 16-01-2018, till the completion of Corporate Insolvency Resolution process.

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21. The Ld. Counsel appearing on the side of the IRP prays for immediate restoration of the electricity supply disconnected by the DVC, the sole distributor of power and electricity in order to restart the plant operations and in order to preserve and secure the same as going concern. According to him, immediately after the moratorium was declared by this adjudicating authority under section 14 of the I & B Code, the said DVC disconnected the electricity supply. He further submits that despite his efforts to meet the Officials of DVC on 19-01-2018 and sending letters by way of E-mail dated 25-01-2018 and hand delivery of letter of request for reconnection of the electricity supply on 28.01.2018 and sending reminder letter to DVC on 29-01-2018, DVC not at all cared to restore the electricity. He also submits that he again met the Officials of DVC in person on 01-02-2018 and highlighted the application of Section 14 of the I & B Code in respect of the demand made by the DVC from the Corporate Debtor which is under the resolution process.

22. From the very averment in the objection submitted by the DVC it is understood that despite knowing the effect of moratorium under section 14 of the Code and application of sub-section (2) of section 14 of the Code in a case of this nature DVC expressed its intention not to restore electricity supply unless the outstanding dues are cleared. The DVC contended that it has no statutory obligation to restore power supply. When the application was heard the very same stand was stressed on the side of the DVC. According to Ld. Counsel for DVC, more than Rs. 8 Crores is due from the

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corporate debtor and unless half of the amount due as outstanding is paid, the DVC cannot restore the power.

23. This is a case in which the Corporate Debtor is under Corporate Insolvency Resolution process. Being declared the moratorium, the demand made by the DVC for clearing the outstanding dues before the date of declaration of the moratorium is invalid and illegal. Any pending legal proceedings or legal actions in respect of any debt due from a Corporate Debtor to an operational Creditor like DVC in the instant case, shall be deemed to have been stayed till the Corporate Insolvency Resolution process ends. That being the legal effect of the application of section 14 of the code let me see what direction can be passed in the case in hand.

24. The contention on the side of the DVC that it is under no statutory obligation to restore power supply is illegal and unsustainable. The said contention has no legal force in view of the application of section 14 of the Code in the case in hand. Moreover sub section(2) of section 14 of the Code, provides a clear mandate that supply of essential goods or services to the corporate debtor shall not be terminated or suspended or interrupted during the moratorium period. It is good to read sub-section (2) of section 14. it reads as follows :

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Section 14(2)

*“The supply of essential goods or service to the corporate debtor as may be **specified** shall not be terminated or suspended or interrupted during moratorium period”.*

25. As per Regulation 32 of the IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 electricity is described as one of the essential services.

26. The above provisions of the Code empower this adjudicating authority to pass an order directing the DVC to restore the electricity with immediate effect.

27. One another contention stressed on the side of the DVC is that the Electricity Act,2003 and the West Bengal Electricity Regulatory Commission is the competent authority to adjudicate over the disputes like one raised in the instant application and therefore this adjudicating authority has no power to issue direction as prayed for. The above said contention also has no legal force because of section 238 of the Code to override other laws. It is good to read Section 238 of the Code.

28. Section 238 of the Code reads as under:

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Section 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."

29. Section 238 of the Code no doubt, override other laws and hence the code takes precedence over the Electricity Act,2003 and the West Bengal Electricity Regulatory Commission. Therefore, the above said objection is not at all sustainable under law.

30. Here, in the instant case, the Ld. Interim Resolution Professional is statutorily bound to see that the Corporate Debtor is a going concern. As per Section 20(1) of the Code, an Interim Resolution Professional shall make every endeavour to protect the operations of the Corporate Debtor as a going concern. The averment in the application shows that the Ld. IRP in the instant application tried his level best to see that electricity supply disconnected, is restored by the DVC. According to the Ld. Counsel for the IRP, upon disconnection of the electricity, the plant operation was stopped and there is no other alternative other than restoring the electricity for running the operation of the plant. He further submits that the plant in which the electricity supply was disconnected provides livelihood for more than 300 families and therefore, the electricity is required to be restored so

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as to enable these workers to continue earning their livelihood in the course of the resolution process.

31. Despite his earnest effort the DVC not at all inclined to restore the electricity connection. At this juncture, the Ld. Counsel appearing on the side of the IRP brought to my notice an Order of Hon'ble NCLAT, New Delhi in the matter of Uttarakhand Power Corporation Limited Vs. ANG Industries Limited(Company Appeal(AT)(Insolvency) No. 298 of 2017 for strengthening his argument that the DVC is legally bound to restore the electricity supply without demanding any portion of the past debt due till the date of disconnection and that it can file a claim before the IRP and that the DVC never submitted any claim to the applicant despite publication was issued.

32. In the above referred order, Uttarakhand Power Corporation Limited, similar to DVC in the instant case, preferred an appeal against the NCLAT, New Delhi Bench Order directing it to restore the electricity connection, which was disconnected by the Appellant in the said case.

33. In the above said case, electricity supply of the Corporate Debtor was disconnected on 25-08-2017 and the application for Insolvency Resolution process as against the Corporate Debtor was admitted on 31-08-2017. thereby moratorium commenced from 31-08-2017.

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34. Since the electricity supply was disconnected, an application was filed by the IRP in that case for restoration of the electricity which was allowed by the adjudicating authority by an Order dated 09-10-2017 and thereafter, the electricity was restored on 12-10-2017 but the Corporate Debtor failed to pay the outstanding dues subsequent to the restoration of the electricity.

35. The Hon'ble NCLAT, New Delhi, in the said case, held that *"Uttarakhand Power Corporation Ltd. Cannot recover any amount due for the period prior to 31-08-2017 though it will be open to the appellant to submit the claim before the Resolution Professional. In so far as the current charges are concerned, we hold that the appellant is entitled to the electricity supply charges from the date of restoration of electricity i.e. from 12-10-2017 and the Resolution Professional is required to pay the amount on behalf of the Corporate Debtor on month to month basis"* and directed the Corporate Debtor in the said case, M/s., ANG Industries Limited/Insolvency Resolution Professional to pay the current electricity charges by way of instalments.

36. Here in the instant application the fact is different. Power supply was disconnected while moratorium in force and it was not restored and hence no arrears due as on the date of commencement of moratorium. The Ld. Counsel for the IRP submits that since the plant is stopped resumption of production can only start after 15 days and hence it cannot raise sufficient fund for payment of the current bill and a period of 105 days if allowed to

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pay the current bill to be issued after restoration of power it can pay without any default. According to the Ld. Counsel for DVC, not more than 15 days can be allowed in case direction is issued for restoration of power. The standard billing period is 32 days according to Ld. Counsel for the IRP.

37. The above said discussions leads to a conclusion that disconnection of the electricity by the DVC , while the moratorium is in force, is quite illegal and against the provisos of the Code. None of the contentions taken by the DVC are found sustainable under law. Considering the peculiar nature and circumstances of the case in hand and considering that the disconnection is illegal and despite personal effort made by the Ld. IRP the DVC was reluctant to restore the Power supply, this CA deserve to be allowed upon the following directions :

- i) DVC is directed to restore the electricity supply with immediate effect and provide continuous electricity supply at the Barjora Plant of the Corporate Debtor;
- ii) DVC is further directed to issue bills on month to month basis upon restoring the electricity supply by granting 60 days' time to pay the billed amount;
- iii) In case the Corporate Debtor fails in paying the bill amount, as directed above, it is left open to DVC to issue appropriate

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disconnection notice in accordance with the rules and law applicable but DVC, cannot disconnect without issuing prior notice to the Corporate Debtor.

38. The CA(IB) No.110/KB/2018 is disposed of in terms of above.

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(Jinan K.R.)
Member(Judicial)

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