

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1183 of 2024 &
& I.A. No. 4232, 4954 of 2024

(Arising out of the Order dated 25.04.2024 passed by the National Company Law Tribunal, New Delhi, Court – III in IA-1241/2023 in (IB) – 1083 (PB)/2018)

IN THE MATTER OF:

Gujarat Urja Vikas Nigam Limited

Through its Managing Director

Sardar Patel Vidyut Bhavan

Race Course, Vadodara – 390007

Email ID: coacom@gebmail.com

...Appellant

Versus

Mr. Udayraj Patwardhan

Resolution Professional of Adel Landmarks Private Limited

Sumedha Management Solutions Private Limited

C-703, Marathon Innova, Off Ganapatrao Kadam Marg,

Lower Parel (West),

Mumbai- 400013, Maharashtra

Email ID: ca.udayaraj@viajure.in

...Respondent

Present

For Appellant:

Ms. Ranjitha Ramachandran & Mr. Aneesh Bajaj, Advocates.

For Respondent:

Mr. Sanjay Bhatt & Ms. Apoorva Chowdhury, for RP.

J U D G E M E N T

(23.09.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by Gujarat Urja Vikas Nigam Limited, under Section 61 of the Insolvency & Bankruptcy Code, 2016 (**‘Code’**) against the Impugned Order dated 25.04.2024 passed by National Company Law Tribunal, New Delhi, Court - III (**‘Adjudicating Authority’**) in application being IA-1241/2023 in CP No. (IB) – 1083 (PB)/2018 titled as M/s Edelweiss Asset Reconstruction Company Limited vs. M/s. Adel Landmarks Private Limited, whereby the claims of the Appellant of Rs. 3,36,09,886/- was rejected.

The only Respondent is Mr. Udayraj Patwardhan, Resolution Professional of Adel Landmarks Private Limited (**‘Corporate Debtor’**).

2. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

3. The Appellant is wholly owned Government of Gujarat Undertaking who is in the business of Bulk Purchase and Bulk Sale of Power on behalf of States owned distribution licensees in State of Gujarat for maintaining the supply to the consumers in Gujarat.

4. The Appellant brought out that he entered into Power Purchase Agreement (**‘PPA’**) dated 29.05.2007 with various generating companies for purchase of power including the Corporate Debtor (previously known as Era

Infrastructure Limited) which was set up a wind power project in Gujarat and due to change in the name of the Corporate Debtor a Supplementary PPA dated 13.01.2024 was signed.

5. The Appellant submitted that subsequently there was further change in the name of the Corporate Debtor which was not notified to the Appellant.

6. The Appellant submitted that Adjudicating Authority based on an application filed by M/s Edelweiss Asset Reconstruction Company Ltd. against the Corporate Debtor being CP No. (IB) – 1083 (PB)/2018 directed the Respondent not to reject any claim on the ground of delay.

7. The Appellant stated that the PPA between the Appellant and the Corporate Debtor provides for consequences on default of Power Producer Default in terms of PPA agreement specially in clause for O&M Default as contained in Article 1.

8. The Appellant submitted that the Corporate Debtor could not supply power since March, 2015 and in terms of O & M Clause of PPA, default occurred and as such, the Appellant issued default notice dated 15.06.2019 in terms of Article 9.3.1 r/w Article 1.4 of the PPA. However, the Appellant submitted that he did not receive any response from the Corporate Debtor and the Corporate Debtor did not recommence power generation.

Consequently, the Appellant issued a termination notice dated 25.11.2019 and sought compensation of Rs. 3.36 Crores in terms of Article 9.3.1 of PPA

which was payable within the stipulated time period of 30 days from the date of Notice dated 25.11.2019.

9. The Appellant stated that he did not receive any response from the Corporate Debtor to the termination notice dated 25.11.2019, therefore, the Appellant filed a petition bearing Petition No. 1880/2020 before the Gujarat Electricity Regulatory Commission on 04.07.2020 for recovery of the amount payable to the Appellant towards termination of the PPA dated 29.05.2007.

10. The Appellant submitted that at that stage, the Appellant came to know that the Corporate Insolvency Resolution Process (**‘CIRP’**) against the Corporate Debtor has been initiated which he did not come to know earlier since change in the name of the Corporate Debtor from Era Landmarks Ltd. to Adel Landmarks Limited was not intimated to the Appellant and similarly proceedings of CIRP was not notified to the Appellant. The Appellant stated that after knowing about the CIRP proceedings against the Corporate Debtor, the Appellant withdrew Petition No. 1880/2020 filed before Gujarat Electricity Regulatory Commission on 04.07.2020 with liberty.

11. The Appellant stated that he filed his claims in Form B with the Respondent on 01.07.2021 which was accepted by the Respondent but vide letter dated 13.01.2022. The Respondent replied to the Appellant intimating regarding initiation of CIRP vide Adjudicating Authority’s order dated 05.12.2018 with moratorium under Section 14 of the Code. The Appellant

stated that as per Respondent's reply, termination of PPA during on going CIRP was not permissible due to imposition of moratorium under Section 14 of the Code and also referred to Section 238 of the Code which provides for an overriding effect of the Code over any other laws including the Electricity Act, 2003 in case of any conflict. The Respondent further advised that claim raised by the Appellant in Form B is for termination compensation, which cannot be verified as the termination itself is impermissible during the CIRP on account of moratorium.

12. The Appellant submitted that it was also advised by the Respondent that Resolution Plan in respect of the Corporate Debtor has been received and requested the Appellant to revoke/ recall the termination notice and honor the PPA.

13. The Appellant brought out that vide his letter dated 25.02.2022 to the Respondent, the Appellant justified the termination of PPA as valid due to default of the Corporate Debtor in terms of PPA.

14. It is the case of the Appellant that Section 14 of the Code, does not in any manner prevent termination of the PPA as termination of the PPA is not a proceedings within the scope and meaning of Section 14 of the Code and the Appellant was well within his legal rights to terminate the PPA.

15. The Appellant submitted that there has been continuous non supply of power since March, 2015, therefore, the Appellant cannot be compelled to revoke/recall termination notice.

16. It is the case of the Appellant that due to the termination of PPA, the consequences of termination of PPA i.e., compensation in terms of the PPA was legal and natural and the Appellant was entitled to compensation of Rs. 3,36,09,886/-.

17. The Appellant submitted that the stand taken by the Respondent regarding delay in filing claims is incorrect as he was entitled to file his claims at any time before approval of the Resolution Plan and in the present case the Resolution Plan was approved by the CoC on 06.12.2022, hence his claim should have been accepted.

18. The Appellant assailed the conduct of the Respondent who vide letter dated 26.09.2022 rejected the claim of the Appellant on the hyper technical ground that the claim was not due on the date of initiation of CIRP.

19. The Appellant submitted that since he did not receive any suitable and positive reply from the Respondent, he filed an Interlocutory Application bearing IA No. 1241 of 2022 before the Adjudicating Authority on 02.12.2022 for seeking directions to the Respondent to reconsider the claims of the Appellant of Rs. 3,36,09,886/- which was dismissed by the Adjudicating Authority vide Impugned Order dated 25.04.2024 and held that the Appellant

had no claim as on the date of the commencement of the CIRP and further proceeded on the basis that the Resolution Plan has been approved by the CoC and the Adjudicating Authority cannot entertain the application of the Appellant.

20. The Appellant submitted that the Impugned order is incorrect as his claims were filed much before the approval of the Resolution Plan by the CoC or by the Adjudicating Authority therefore it should have been considered and further the Adjudicating Authority ignored its own order passed on 06.06.2019 directing the Respondent to consider all the claims without rejecting on account of delay.

21. It is further the case of the Appellant that in view of the Adjudicating Authority's order dated 06.06.2019 the Respondent has taken the ground that the claim has been rejected since it was filed after initiation of CIRP and not on the ground of delay as observed in the Impugned Order. The Appellant reiterated that he filed his claims on 01.07.2021 and the claims were not rejected by the Resolution Professional on the ground of delay as evident from Respondent letters dated 13.01.2022 and 26.09.2022 and therefore, the Adjudicating Authority observations regarding alleged 849 days in delay of submission of his claims is erroneous.

22. It is the case of the Appellant that even if the Code does not deal with the claims of the creditors after CIRP date, the such claims cannot be deemed to

have been discharged under Resolution Plan and ought to have been determined based on the claims filed by the creditors.

23. It is submitted that the Hon'ble Supreme Court in **GUVNI, v. Amit Gupta and Others** [(2021) 7 SCC 2019], in context of termination of PPA had specifically held that in case the termination is for default related to supply of power i.e., not related to insolvency proceedings, NCLT would have no jurisdiction and recognized that this would not affect the termination rights of the terminating party based on other events of default in the contract. The Appellant stated that this judgment was followed in case of **Tata Consultancy Services Limited v. Vishal Ghishulal Jain** (2022) 2 SCC 583, where the Hon'ble Supreme Court of India specifically held that Section 14 does not apply. This judgment related to supply of services by Corporate Debtor to Tata Consultancy Services, wherein the termination of the agreement was due to deficiency of service by the Corporate Debtor and the present case relates to supply of electricity by Corporate Debtor to the Appellant, wherein the termination of PPA is due to non supply of power by Corporate Debtor and therefore the judgment is applicable to the present case.

24. The Appellant justified his action of filing claims which is apparently late but filed before the approval of the Resolution Plan and submitted that this was due to the fact that initiation of CIRP was not brought to his notice and there was no intention of delay on part of the Appellant.

25. Concluding his arguments, the Appellant requested this Appellate Tribunal to set aside the Impugned Order.

26. Per contra, the Respondent denied all the averments made by the Appellant treating these as misleading and malicious.

27. The Respondent brought out the background of the case and the background of the CIRP proceedings and submitted that the CIRP was initiated vide the Adjudicating Authority order dated 05.12.2018 and the moratorium under Section 14 was declared.

28. The Respondent submitted that in terms of explanation to sub-section (d) of Section 14 of the Code, the Appellant was barred from termination of any right of the Corporate Debtor under the PPA during CIRP except in the case of default in payment by the Corporate Debtor which is admittedly is not a case herein.

29. The Respondent submitted that the termination of PPA was done by the Appellant for non supply of electricity under PPA and not due to non payment of dues or due to financial default by the Corporate Debtor. As such, action taken by the Appellant is illegal and perverse.

30. The Respondent stated that alleged termination of PPA vide termination notice dated 25.11.2019 during CIRP is clear violation of the law and therefore the Appellant is not entitled to any claims.

31. The Respondent submitted that Ministry of Power vide its letter dated 08.03.2019 advised all the DISCOMS not to cancel PPA of the projects which are referred to the NCLT and are being acquired by another entity.

32. The Respondent also submitted that the alleged compensation claims of the Appellant amounting to Rs. 3.36 Crores has arisen on account of such alleged termination of the PPA during CIRP of the Corporate Debtor which is not permissible as per provision of the Code r/w Regulation 13 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (**CIRP Regulations**).

33. The Respondent submitted that the claim filed by the Appellant in Form B is in the nature of recovery proceedings and not pertaining to any operational debt, therefore, the Appellant is not entitled for any claims.

34. The Respondent submitted that it is undisputed fact that the termination notice dated 25.11.2019 was issued to the Corporate Debtor during CIRP proceedings and as such in terms of the Regulation 13 of the CIRP Regulations, the Respondent is entitled to verify only the claims as on CIRP date and not thereafter. The Respondent stated that it was justified on his part to advise the Appellant that the claim cannot be verified since alleged claims have been filed after initiation of the CIRP.

35. The Respondent denied the applicability of the cases cited by the Appellant passed by the Hon'ble Supreme Court of India in the matter of

Gujarat Urja Vikas Nigam Limited vs. Amit Gupta & Ors. [(2021) 7 SCC 2019] and **Tata Consultancy Services Limited vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited dated 23.11.2017 in Civil Appeal No. 3045 of 2020** as these are on different facts. The said judgements dealt with the power of the Adjudicating Authority under Section 60(5) of the Code and had nothing to do in so far as admission of claim under the Code is concerned.

36. The Respondent submitted that pari-materia regulations, this Appellate Tribunal has given clear ruling on this on the issue in the case of **DBS Bank India Limited vs. Kuldeep Verma, Liquidator of Eastern Gases [(2023) SCC Online NCLAT 62]** and laid down the correct position of law for consideration and verification of claims and this supported action of the Respondent.

37. The Respondent also submitted that in terms of Regulation 12 of the CIRP Regulations, the Appellant was required to file the claims on or before 05.03.2019, however, the Adjudicating Authority gave direction to the Respondent vide an order dated 06.06.2019, wherein it was directed that the Resolution Professional not to reject any claim on account of delay and therefore the Respondent considered and dealt with all the claims filed till submissions of the Resolution Plan for approval of CoC under Section 30(3) of the Code and the Appellant filed his alleged claims of Rs. 3,36,09,886/- in Form

B only on 01.07.2021. Thus, there was inordinate delay of 849 days of the last date of submission of the claim.

38. The Respondent denied the allegation of the Appellant that the Appellant was not intimated regarding CIRP and submitted that the Respondent made the public announcement which was published in the newspapers, however, the Appellant choose not to take any diligent steps and did not file any claims within the stipulated time period.

39. The Respondent submitted that the CoC of the Corporate Debtor in 27th Meeting of the CoC held on 15.09.2022, vide e-voting, approved the Resolution Plan submitted by Art Constructions Private Limited with 82.66% votes and the application for approval of the Resolution Plan bearing IA 1817 of 2023 has already been filed by the Resolution Professional which is pending adjudication before the Adjudicating Authority and as such no claim can be entertained as otherwise the time bound proceeding under the Code can never reach finality.

40. The Respondent submitted that this Appellate Tribunal in the case of ***Deputy Commissioner, UTGST, Daman versus Rajeev Dhingra [(2023) SCC Online NCLAT 621]*** dated 14.09.2023 held that if the claims of creditors are accepted at a belated stage after the stipulated time after a resolution plan is approved by the CoC, then the possibility of resolution plan failing to materialize becomes very high and tantamount to defeat the objectives of Code.

41. Concluded his pleadings, the Respondent submitted that the Appeal devoid of any merits and requested this Appellate Tribunal to dismiss the appeal.

42. Since, we have already noted the facts of the case, during submission of the Appellant and Respondent, we will not reiterate again.

43. Following issues emerges in the present appeal :-

- (i) Whether, the Appellant was entitled to terminate the PPA after initiation of the CIRP date.
- (ii) Whether, the Appellant was entitled to file his claims of Rs. 3,36,09,886/- as compensation due to event of default by the Corporate Debtor in terms of Article 9 of the PPA.
- (iii) Whether, the Appellant is entitled to file any claims arising out of his action of termination of PPA after the initiation of the CIRP and the moratorium.
- (iv) Whether, there was inordinate delay of 849 days on the part of the Appellant to file the claims and if so, whether the claims could have been considered.
- (v) Whether despite the delay of 849 days in the case and if the Resolution Plan is not approved by the Adjudicating Authority, the Appellant is entitled for consideration of his claims.

Since, all these issues are inter-related, inter-connected and inter-dependent, we shall deal with these issues in conjoint manner in subsequent discussions.

44. We note that the relevant date is the date of CIRP which is 05.12.2018 when the Adjudicating Authority passed the order for initiation of the CIRP against the Corporate Debtor and moratorium was placed under Section 14 of the Code.

45. The Appellant allegation regarding non intimation to him regarding CIRP proceedings is not convincing as the public announcement was made by the Respondent which is meant for the knowledge of all creditors. The Appellant is the wholly owned PSU of Government of Gujarat and cannot take plea that he did not come to know of CIRP proceedings, since he was not specifically intimated.

46. We also note that it is an undisputed fact that there has been delay of 849 days by the Appellant in filing the claims before the Respondent which should have been filed on or before the 05.03.2019 in terms of Regulation 12 of CIRP Regulations.

47. From the pleadings before us, we note that the CoC in 27th Meeting 15.09.2022 had approved the Resolution Plan of Art Constructions Private Limited with 82.66% after considering the feasibility and viability of the Corporate Debtor which has already been put up to the Adjudicating Authority bearing IA 1817 of 2023, which is pending adjudication.

48. We note that although there is a clear stipulation of time period for filing claims, however, the Adjudicating Authority vide order dated 06.06.2019 directed the Respondent not to reject any claims on account of delay and find that the claim was not rejected by the Respondent only on delay. The contention of the Appellant in this respect are not correct.

49. We will take into consideration some of important Clause of PPA, which reads as under :-

"O & M Default" shall mean any default on the part of the Power Producer for a continuous period of ninety (90) days to (i) operate and/or (ii) maintain (in accordance with Prudent Utility Practices), the Project at all times.

...

1.4 If the Power Producer commits a Construction Default or an O & M Default other than due to Force Majeure Events, GUVNL shall give notice of 90 days in writing to the Power Producer, calling upon the Power Producer to remedy such default and if the Power Producer fails to take steps to remedy such default within the aforesaid period the Agreement shall be terminated.

"9.2.1 Power Producer's Default: The occurrence of any of the following events at any time during the Term of this Agreement shall constitute an Event of Default by Power Producer:

a. O&M Default on part of Power Producer.

b. Failure or refusal by Power Producer to perform any of its material obligations under this Agreement.

c.

9.3 Termination

9.3.1 Termination for Power Producer's Default: set out in sub-clause 9.2.1 above, GUVNL may deliver a Default Notice to the Power Producer in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice, and calling upon the Power producer to remedy the same.

At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the default notice has been remedied, GUVNL may deliver a Termination Notice to the Power Producer. GUVNL may terminate this Agreement by delivering such a Termination Notice to the Power Producer and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and GUVNL shall stand discharged of all its obligations. The Power Producer shall have liability to make payment within 30 days from the date of termination notice towards compensation to GUVNL an amount equivalent to transmission charges of GETCO and wheeling charges of highest of any of the DISCOMS (i.e. DGVCL, MGVCL, UGVCL, PGVCL) applicable in the relevant year for the contracted capacity and cross subsidy surcharge which is highest of any one of the DISCOMs (i.e. DGVCL, MGVCL, UGVCL, PGVCL) applicable in the

relevant year on the quantum of power at normative PLF as considered by GERC while determining the tariff for Wind Farms.

Where a Default Notice has been issued with respect to an Event of Default, which requires the co-operation of both GUVNI Producer to remedy, GUVNL shall render all reasonable co-operation to enable the Event of Default to be remedied without any legal obligations.

In case of default by the power producer, GUVNL will select any of the option mentioned above for compensation towards termination of the agreement and inform to power producer with default notice.”

(Emphasis Supplied)

50. The main reason for that rejection of the claim by the Respondent is that the Appellant terminated PPA vide termination notice dated 25.11.2019 which was during operation of the moratorium, therefore, the Appellant was barred from taking any action by Section 14 of the Code.

51. We note that once the moratorium is placed, several restrictions automatically get imposed and which can be read from the Section itself. Section 14 of the Code. The Section 14(1) clearly stipulates that any proceedings against the Corporate Debtor will be prohibited. Similarly, Section 14(1)(b) describes that any encumbrance or alienation of legal rights or benefit interest of the Corporate Debtors are also restricted and prohibited.

52. We further note that the explanation of Section 14 clearly stipulate that notwithstanding anything contained in any other law for the time being in force, no license, permit, concessions or rights, etc., given by any other authority can not be suspended or terminated on ground of insolvency, subject to condition that there is no default in payment of current dues arising or use of continuation of license, permit, concessions or rights, etc.

53. As regard, the contention of the Appellant that even if the Code does not provide the claims not arising as on date of initiation of the CIRP, the claims do not get automatically discharged, we hold that if the Appellant has any recovery towards the Corporate Debtor, he is entitled to initiate suitable recovery proceedings, if allowed by the law and in accordance with the law, which is a different legal right then arising out of filing claims under present petition, but cannot file claims arising after CIRP date.

54. The claim of the Appellant that he has filed the claim before the approval of the Resolution Plan is not convincing which has already been settled by catena of judgement of Hon'ble Supreme Court of India in the case of ***RPS Infrastructure Limited versus Mukul Kumar and Another*** (2023) 10 Supreme Court Cases 718 decided on 11.09.2023 wherein, the Hon'ble Supreme Court in para 23 has laid down as under:-

"23. The mere fact that the Adjudicating Authority has yet not approved the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless

process. This would result in the reopening of the whole issue, particularly as there may be other similar persons who may jump onto the bandwagon....."

(Emphasis Supplied)

55. We note that this Appellant Tribunal in case of **DBS Bank India Limited (Supra)** have examined the issue before us in relation to the liquidation process (the present case is the CIRP process), whereas the ratio was given in para 18 & 20 of the judgement which reads as under :-

"18. In the present case, Liquidation Commencement Date is a date when the Adjudicating Authority passed the Order of Liquidation. Thus claim has to be with reference to the liquidation commencement date. The statute pegs the claim on a particular date for a purpose and object. When a claim is filed in Form D where interest and principal have been included up to the date of liquidation commencement date, claimants cannot be allowed to claim any further amount in addition to the amount which they have claimed in their Form D.

20. We have noticed above that statutory scheme provides submission of claim on a liquidation commencement date which is a fixed connotation. When a statute provides for liquidation commencement date as a date up to which claims can be filed and proved, no claim thereafter can be entertained by the Liquidator. The amount of interest which was retained by the Appellant claiming to be interest in addition to the claim as filed by it in Form D till the date of

realization of receipt of the sale, cannot be permitted to be retained by the Appellant and the Adjudicating Authority has rightly passed the order allowing application filed by the Liquidator to hand over the additional amount to the Liquidator. Learned Counsel for the Appellant submits that out of Rs. 1.84 Crores, amount of Rs. 20 Lakhs have already been paid.”

(Emphasis Supplied)

56. We consciously note that this judgement was w.r.t liquidation process where as present case is w.r.t. CIRP, but the issue remains the same i.e., whether the Resolution Professional or liquidator can consider claim not due or not filed on the date of commencement of such CIRP or liquidation proceedings.

57. We hold that there is a clear law that Resolution Professional can only entertain claims due and filed w.r.t. CIRP commencement date and not due to subsequent event, for which claimant might have other legal remedy.

58. In backdrop of above detailed examination of facts and judgements, we find that the Appellant could not convince us regarding his claims. We reiterated that alleged compensation claims of Rs. 3.26 Crores is due to termination of PPA after initiation of CIRP, which was filed after huge delay of 849 days. It is settled law that the Resolution Professional can collate and verify claims w.r.t. CIRP date and therefore any claims arising subsequent to CIRP date can't be entertained by Resolution Professional. We do not find fault in action of the Resolution Professional in rejecting such claims.

59. In view of above detailed observations, we find that the Adjudicating Authority has correctly passed the Impugned Order.

60. In fine the appeal devoid of any merit, fails and stands rejected. No cost. IA, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

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