

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1271 of 2019

(Arising out of Order dated 14th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA(IB) No. 1184/KB/2019, CA(IB) No.1300/KB/2019 & CA(IB)No. 1286/KB/2019 in CP (IB) No. 1439/KB/2018)

IN THE MATTER OF:

**GRIDCO Limited
Janpath, Bhubaneswar,
Odisha- 751022**

....Appellant

Versus

**1. Surya Kanta Satapathy,
Insolvency Interim Resolution Professional
Of M/s. Alex Green Energy Pvt. Ltd.
4, Lake Gardens, Near Yuvak Sangha,
Kolkata-700045**

**2. Shri Hemant Khaitan,
67-A, Ballygunge Circular Road,
Flat 2-C, Kolkata- 700019**

**3. Alex Green Energy Pvt. Ltd.
226/1, A.J.C. Bose Road,
3rd Floor, Suite #3D,
Kolkata- 700020**

4. Fortis Chemicals Private Limited

.....Respondents

Present:

For Appellant: Mr. Raj Kumar Mehta and Ms. Himanshi Andley, Advocates.

For Respondents: Mr. Krishnendu Datta, Senior Advocate with Ms. Meher Tandon and Mr. Jeevan Ballav Panda, Advocates for R-4.

**Mr. Abhijeet Sinha and Mr. Sudeep Vijayan,
Advocates for R-1.**

J U D G M E N T**BANSI LAL BHAT, J.**

CA (IB) No. 1184/KB/2019 in CP (IB) No. 1439/KB/2018 filed by the Resolution Professional seeking certain directions against Respondent- 'GRIDCO Limited' (Appellant herein) came to be disposed off, alongwith determination of two more CAs in terms of order dated 14th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata by virtue whereof the application of Resolution Professional for not giving effect to the termination of the 'Power Purchase Agreement' (PPA) by GRIDCO came to be disposed off holding that the termination of PPA was in violation of Moratorium declared by the Adjudicating Authority in the case and the finding culminated in passing of a direction to GRIDCO to restore the PPA dated 26th May, 2012 as if there was no termination of PPA. The instant appeal has been preferred by GRIDCO assailing the impugned order to the extent of disposal of CA (IB) No. 1184/KB/2019.

2. For proper grasp of the controversy involved in this appeal, brief reference to the factual matrix is indispensable.

3. GRIDCO- a state owned Company of Odisha has been carrying on business of bulk supply of electricity after purchasing power from various sources and supplying the same to the Distribution Utilities for

onward use of the consumers. It also purchases Solar Power from various generators in fulfilment of its Renewable Purchase Obligation. GRIDCO entered into a PPA with 'Alex Green Energy Private Limited'- ('Corporate Debtor') for purchase of Solar Power. PPA was for a period of 25 years and power was to be supplied to GRIDCO at a fixed tariff at the rate of Rs.7 per KWH in terms of Clause 7 of the PPA. Admittedly, PPA did not provide for the alteration of said rate. Corporate Debtor stopped supply of power to GRIDCO in June 2018. On 31st July, 2018, the Corporate Debtor sent a letter informing the GRIDCO that it was envisaging to transfer the plant to some other Company. Since power supply was not restored by the Corporate Debtor, GRIDCO terminated PPA vide Notice dated 8th July, 2019. Corporate Insolvency Resolution Process was initiated against the Corporate Debtor by the Adjudicating Authority in terms of the order dated 18th February, 2019 with consequential orders in the nature of slapping of Moratorium on the assets of the 'Corporate Debtor'. Subsequently, GRIDCO terminated the PPA on 8th July, 2019. The termination of PPA was challenged before the Adjudicating Authority who, in terms of the impugned order held that the termination was in violation of Section 14(1) of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short). It accordingly, directed restoration of PPA. 'Fortis Chemicals Private Limited' emerged as the 'Successful Resolution Applicant' in the Corporate Insolvency Resolution Process initiated against the Corporate Debtor and it has been arrayed as Respondent No.4 in the instant appeal.

4. Learned counsel for the Appellant submitted that the Appellant was constrained to terminate the agreement with the Corporate Debtor as the Corporate Debtor failed to restore supply of power despite being asked to restore the same vide letters dated 29th November, 2018 and 19th February, 2019. It is submitted that the GRIDCO is a regulated entity under the Electricity Act, 2003 and its purchase and sale of power is regulated by the Odisha Electricity Regulatory Commission ("OERC" for short). It is submitted that the market rate of solar power in State of Odisha is around Rs.3/KWH and from outside the State it is around State Rs. 2.70/KWH. It is further submitted that the GRIDCO has signed agreements for solar capacity of 575 MW at a cost of Rs.3/KWH and below. It is further submitted that at the time of putting up the solar power plant, the Corporate Debtor had bid for the sale of power from the plant which was substantially high i.e. around Rs.10 crore/MW whereas the bid amount offered by Respondent No.4 is much lower. It is further submitted that the tariff of Rs.7 per unit was provided in the PPA in view of the investment of Rs.50 Crore for putting up the power plant and Respondent No.4 whose bid was only 11.07 Crore could not claim the benefit of same tariff of Rs.7 per unit to the prejudice of the consumers. It is submitted that the Tribunal can mould the relief to balance the interest of the Respondent No.4 and the consumers of the State. It is further submitted that the power of the Electricity Regulatory Commission to regulate price of sale and

purchase of electricity includes the power to amend the tariff under the PPA. Lastly, it is contended that since in the instant case PPA was terminated on the ground that the Corporate Debtor did not supply electricity since June 2018, the impugned order directing restoration of PPA and purchase of power in terms thereof would result in unjust enrichment of Respondent No.4 at the cost of consumers of the State of Odisha.

5. Per contra, learned counsel for the Respondent No.1- Mr. Surya Kanta Satapathy, who was the Resolution Professional for the duration of Corporate Insolvency Resolution Process of Corporate Debtor and is presently serving as the Chairman of the Monitoring Committee constituted under the Resolution Plan approved by the Adjudicating Authority, submitted that the PPA executed pursuant to a bidding process in which the Corporate Debtor has participated was for a period of 25 years and power was to be supplied to the Appellant at a fixed tariff for the entire period of 25 years at the rate of Rs.7 per KWH. He further submits that there are no provisions for negotiation of the said rate in the PPA. He further submitted that the control room and inverter room of the Corporate Debtor was damaged due to a storm on 24th May, 2018 rendering the plant non-operational and resulting in disruption of power supply to Appellant and since Corporate Debtor was unable to pay its debt to its creditors and could not restore the plant, Corporate Insolvency Resolution Process was initiated by Respondent No.2-

'Operational Creditor' against the Corporate Debtor under Section 9 of the 'I&B Code' which came to be admitted on 18th February, 2019 and the Respondent No.1 was appointed as Interim Resolution Professional with slapping of moratorium on the assets of the Corporate Debtor. It is further submitted that the factum of commencement of Corporate Insolvency Resolution Process and passing of Moratorium order was communicated to Appellant by the Resolution Professional vide letter dated 25th February, 2019 alongwith the copy of order. The Appellant moved to terminate the PPA on 8th July, 2019 i.e. after delay of almost five months from the commencement of Corporate Insolvency Resolution Process. Such termination being challenged before the Adjudicating Authority, was held to be in violation of Section 14(1) of the 'I&B Code' and the PPA was restored in terms of the impugned order dated 14th October, 2019. Subsequently Respondent No.4 submitted its Resolution Plan which was approved by the requisite majority of the Committee of Creditors on 11th November, 2019. The Adjudicating Authority approved the Resolution Plan of Respondent No.4 on 25th November, 2019. This fact was notified to the Appellant. It is submitted that since the Appellant had terminated the PPA after imposition of Moratorium, it contravened provisions of Section 14(1) of the 'I&B Code'. It is further submitted that such termination was unsustainable under the PPA also for the reason that no termination notice was issued to the defaulting party. Therefore, Appellant cannot be heard to say that it is willing to restore the PPA at revised rates. It is further argued that

on facts also the Appellant has no case as it is procuring solar power at rates which is even higher than Rs.7 per KWH. Even on ground of equity such rates cannot be permitted. The guidelines issued by OERC pertaining to procurement are not applicable retrospectively and do not apply to the PPA. Therefore, there is no unjust enrichment of Respondent No.4 as alleged.

6. Learned counsel for the Respondent No.4 submitted that in terms of Clause 3.1 of the PPA power was to be supplied to the Appellant at a fixed tariff for the entire period of 25 years at the rate of Rs.7 per KWH and that there is no provision for alteration of the said rate in the PPA. It is submitted that the Solar Power Plant operated by Corporate Debtor was damaged in a storm in June 2018 resulting in stoppage of supply of power to the Appellant. Subsequently, Corporate Insolvency Resolution Process was initiated against the Corporate Debtor on 18th February, 2019 and it was only thereafter on 8th July, 2019, the Appellant moved to terminate the PPA when Moratorium was in force. The termination was challenged before the Adjudicating Authority who, in terms of the impugned order, holding the same as being in violation of Section 14(1) of the 'I&B Code' restored the PPA. It is further submitted that the Respondent No.4 had submitted the Resolution Plan primarily on the basis of subsistence of the PPA. Negotiations were also invited by the Committee of Creditors of the Corporate Debtor only on the basic premise of a valid and subsisting PPA with the Appellant. It is

submitted that the Resolution Plan was approved by a majority of more than 95% of the Committee of Creditors on 11th November, 2019 and the same was approved by the Adjudicating Authority on 25th November, 2019. It is further submitted that approval of Resolution Plan of Respondent No.4 by the Adjudicating Authority was challenged in CA (AT) (Insolvency) No. 11 of 2020 and CA (AT) (Insolvency) No. 75 of 2020 (***Kundan Care Products Limited vs. Mr. Surya Kanta Satapathy & Ors.***). These appeals were dismissed by this Appellate Tribunal on 30th January, 2020 upholding the approval of Resolution Plan submitted by the Respondent No.4. It is further submitted that this order passed in appeal has not been challenged by the Appellant and the same having attained finality is binding in *rem* on all stakeholders including the Appellant. It is further submitted that the instant appeal is limited to question of termination of PPA and the Appellant cannot be permitted to expand its scope. Referring to the tariff filings reproduced hereinbelow, it is submitted that the Appellant is procuring power at rates greater than Rs.7/- per KWH which even extend to Rs.12.72/- KWH, that the Appellant has accounted for the supply of power by Respondent No.4 at Rs. 7/- per KWH in their submissions to the OREC for both F.Y. 2019-20 & 2020-21 which shows that the Appellant is also proceeding on the basis of the PPA as valid and subsisting even as on date and that in terms of the PPA, the Corporate Debtor includes its successors and permitted assigns.

Tariff filings referred to hereinabove are as under:

“Proposed Procurement & Cost of Solar Power During FY-2019-20

Solar RE Sources	Energy Proposed for FY 2019-20(MU)	OERC Approved Rates for FY 2018-19 (P/U)	Proposed rates for FY 2019-20 (P/U)	Estimated Total cost for FY 2019-20 (Rs.Cr.)
20 MW through NVVN Under ‘New Projects Scheme’ under JNNSM, ph-1	34	1272	1065	36.21
10 MW through NTPC from 5 MW Solar PV projects at Dadri & Faridabad	17	1039	8.50 MU @1294 P/U 8.50 MU @935 P/U	18.95
5MW from M/S Alex Green Energy Ltd. Through OREDA State Scheme	8	700	700	5.6
25 MW from ACME Odisha Solar Power Pvt. Ltd.	42	728	728	30.576

Accordingly, the estimated procurement of 686 MU of solar power during FY 2019-20 will be made at around Rs. 365.80 Crore at an average proposed rate of 533.24 P/U.

Proposed procurement & cost of solar power during FY 2020-21

Solar RE Sources	Energy Proposed for FY 2020-21 (MU)	OERC Approved Rates for FY 2019-20 (P/U)	Proposed rates for FY 2020-21 (P/U)	Estimated Total cost for FY 2020-21 (Rs. Cr.)
20 MW through NVVN Under ‘New Projects Scheme’ under JNNSM, ph-1	34	1272	1065	36.21
10 MW through NTPC from 5 MW Solar PV projects at Dadri & Faridabad	17	1039	8.50 MU @1294 P/U 8.50 MU @935 P/U	18.95
5MW from M/S Alex Green Energy Ltd. Through OREDA State Scheme	8	700	700	5.60
25 MW from ACME Odisha Solar Power Pvt. Ltd.	42	728	728	30.576

Accordingly, the estimated procurement of 1019 MU of solar power FY 2020-21 will be made at around Rs. 456.76 Crore at an Average Proposed Rate of 448.24 P/U.”

7. Consequently, it is submitted that the Appellant cannot be allowed to unilaterally alter the terms of the PPA to the serious prejudice and detriment of Respondent No.4 after being the 'Successful Resolution Applicant'.

8. The issues for consideration are whether the termination of PPA is in violation of Section 14(1) of the 'I&B Code' justifying the same being set aside in terms of the impugned order and if not, whether the Appellant could have validly terminated the same unilaterally. It is also to be considered as to what is the effect of approval of the Resolution Plan on such termination of the PPA. It would be appropriate to bring on record that during the course of hearing in this appeal, the Appellant- GRIDCO offered to avail power from the Respondent No.4 if Respondent No.4 agrees to supply the power at the market rate but such offer of Appellant in regard to revised tariff has been rejected by Respondent No.4.

9. After hearing learned counsel for the parties at length and wading through the record, we find that the Appellant is a Government concern supplying electricity in bulk after purchasing power from four different generation Companies. The role of the Appellant is that of a trading licensee. Corporate Debtor- 'M/s. Alex Green Energy Pvt. Ltd.', engaged in the business of Solar Power Generation in Patnagarh in the State of Odisha was to supply power to Appellant under the PPA which had been approved by the OREC. Admittedly, the PPA was executed

pursuant to a bidding process in which Corporate Debtor had participated. It was to last for 25 years and power was to be supplied to Appellant at the rate of Rs.7 per KWH for the entire period of 25 years. This is explicitly provided in Clause 7 of the PPA which reads as under:

“7. Power Purchase Price:

*The quoted tariff for 25 years for Solar Power Plant shall be **Rs. 7/- per kWh** as per tariff bid submitted by the selected bidder through OREDA. This tariff is inclusive of the charges and taxes to be paid by the selected bidder. (The metering shall be at the generator premises and at Grid S/s as provided in CEA metering Regulation and Odisha Grid Code). Copy of the intimation from OREDA addressed to the project proponent regarding the L1 price and acceptance thereto is appended as **Annexure-1.**”*

10. On a plain reading of Clause 7 of the PPA, it emerges that the tariff at the rate of Rs.7/- per KWH was quoted by the Corporate Debtor as per tariff bid submitted by it through ‘Odisha Renewable Energy Development Agency’ (“OREDA” for short) and same was accepted with Corporate Debtor being the L1 bidder. The bid process culminated in acceptance of quoted tariff of Corporate Debtor for 25 years for Solar Power Plant at the fixed rate of Rs.7/- per KWH and the terms and

conditions agreed upon crystallized into the PPA executed *inter se* the Corporate Debtor and Appellant. The argument that presently the tariff of solar power is much less than Rs.7/ KWH does not hold water as the tariff in PPA was decided on commercial consideration obtaining at the time the PPA was executed. Admittedly, PPA does not contain a provision for revision of tariff though it makes a provision for force majeure and default and termination. The relevant portion of Clause 14 reads as under:

“.....Neither party shall be entitled for claiming compensation for damages and loss in the event of force majeure.....”

11. This clause brings within its ambit any event of unforeseen circumstances including vagaries of Nature resulting in inability on the part of seller/ project proponent to continue to supply power in performance of its obligations under PPA. The effect of this provision is that the seller, in the event of such unforeseen event including damage caused to the plant due to a storm, lightening etc., would not be under an obligation to pay compensation to the Appellant for its inability to supply power due to disruption of power supply arising out of such unforeseen event.

12. Clause 17 dealing with default and termination of PPA is reproduced hereunder:

“17. Default & Termination:

17.1 *The PPA may be terminated either by the Project Proponent or GRIDCO only in the event of default by GRIDCO or the Project Proponent respectively*

17.2 *Default by GRIDCO will mean non-payment of electricity charges for a period of consecutive three months*

17.3 *Default by the Project Proponent shall mean non-supply of total **net electricity generated** and delivered at the Delivery Point for a period of three months for reasons exclusively attributable to the Project Proponent.*

17.4 *In case of default, the non-defaulting party shall issue a default notice to the defaulting party. If the default is not fully set right within one month from the date of the default notice, then, the non-defaulting party may get the specific performance of agreement till the time default is corrected.*

17.5 *In case of default is cured, the agreement will revive and the provisions of original agreement will come into force, automatically within a maximum period of six months”*

13. A bare perusal of provision contained in Clause 17.4 leaves no room for doubt that the affected party/ buyer viz the Appellant in the instant case, in the event of default in performance of obligation on the part of seller/ project proponent, was required to issue a default notice to the seller/ project proponent and in the event of the default not being set right i.e. power supply not being restored to Appellant, the Appellant was required to seek specific performance of agreement till the time default is corrected. Clause 17.5 provides that in case of default being cured, the agreement will revive and its provisions shall become enforceable automatically within a maximum period of six months.

14. Clauses 17.4 & 17.5 have to be read conjointly with the force majeure clause embodied in Clause 14. A juxtaposition of these provisions would leave no scope for any ambiguity in deriving the conclusion that the default and termination of PPA in consequence of a default arising out of failure on the part of project proponent/ seller for any reason beyond his control and falling within the force majeure clause would require one month notice on the part of buyer/ Appellant to set right the default and in the event of non-compliance it may seek specific performance of agreement till the default is corrected. It is also manifestly clear that in the event of default being cured within a maximum period of six months, the PPA will revive. Clause 17.1 provides that the PPA may be terminated by either of the parties only in

the event of default by the other party. This clause protects the interest of a non-defaulting party to escape the obligations under the PPA to saddle it with any liability. Any other interpretation will lead to absurdity and render the provisions unworkable.

15. Admittedly, in the instant case, power supply from Corporate Debtor to Appellant got disrupted and completely stopped on account of damage to the plant of Corporate Debtor due to a storm on 24th May, 2018 which rendered the plant non-operational. According to Corporate Debtor, the cessation of power supply to Appellant did not arise out of any act of nonfeasance, misfeasance or malfeasance on the part of the Corporate Debtor but on account of storm damaging the plant and rendering it non-operational and such eventuality is squarely covered under the force majeure clause viz Clause 14 of the PPA. In these circumstances, termination of the PPA purportedly for failure on the part of Corporate Debtor to restore the plant and power supply almost one year after power supply had ceased and about five months after commencement of Moratorium as a sequel to the initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor communicated by the Resolution Professional to Appellant in terms of letter dated 25th February, 2019, being in violation of Section 14(1) of the 'I&B Code' would not sustain. That apart, such termination of PPA not being in conformity with procedure set out in the contractual provision as noticed hereinabove cannot be supported. Admittedly, the

Appellant did not issue the termination notice as contemplated in the contract and failed to comply with the mandate of clause 17.4 of PPA.

16. In view of the foregoing discussion, we find no hesitation in accepting the Respondents contention that the termination of PPA on the part of Appellant in the given circumstances would not sustain. In view of this finding, endeavours on the part of the Appellant to show his willingness and make overtures for reinstatement/ revival of PPA at the revised rates would be unacceptable and the argument raised on behalf of the Appellant on this score has to be repelled.

17. Now coming to the aspect of Resolution Plan of Respondent No.4 who subsequently intervened and was impleaded as party Respondent No.4 in this proceeding, be it seen that the Respondent No.4 submitted his Expression of Interest on the basic premise of the PPA being in operation and subsisting. The Resolution Plan submitted by Respondent No.4 was approved by majority of slightly over 95% of the Committee of Creditors on 11th November, 2019. Same has been approved by the Adjudicating Authority on 25th November, 2019. Admittedly, the Appellant has not challenged the approved Resolution Plan which has attained finality and is binding in *rem* on all stakeholders including the Appellant. In this regard, it is significant to notice that the order of Adjudicating Authority dated 25th November, 2019 approving the Resolution Plan of Respondent No.4 came to be challenged before this Appellate Tribunal in CA (AT) (Insolvency) No. 11

of 2020 and CA (AT) (Insolvency) No. 75 of 2020 (Kundan Care Products Limited vs. Mr. Surya Kanta Satapathy & Ors.) and both appeals were dismissed on 30th January, 2020. Thus, the approval of Resolution Plan of Respondent No.4 by the Adjudicating Authority stands upheld by this Appellate Tribunal. Admittedly, judgment rendered by this Appellate Tribunal on 30th January, 2020 in the aforesaid appeals goes un-assailed. The effect of approval of the Resolution Plan of Respondent No.4 and such approval having been upheld by this Appellate Tribunal which stands un-assailed is that the Resolution Plan of Respondent No.4 is binding on the Corporate Debtor and all other stakeholders involved in the Resolution Plan which encompasses the Appellant within its fold who had the notice of pendency of Corporate Insolvency Resolution Process culminating in approval of the Resolution Plan of Respondent No.4. This proposition of law is clearly laid down in Section 31 of the 'I&B Code' as interpreted by the Hon'ble Apex Court in **“Swiss Ribbons Pvt. Ltd. v. Union of India- Writ Petition (Civil) No. 99 of 2018”**:-

“43.It is important to bear in mind that once the resolution plan is approved by the committee of creditors and thereafter by the Adjudicating Authority, the aforesaid plan is binding on all stakeholders as follows:

“31. Approval of resolution plan.—(1) If the Adjudicating Authority is satisfied that the

resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.....”

This proposition of law was again reiterated by the Hon'ble Apex Court in **“Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta & Ors.- 2019 SCC OnLine SC 1479”**:

“86. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were.....”

18. On consideration of all relevant facts and circumstances, the position of law and bearing in mind the entire gamut of controversy as projected in appeal but limited to scope of appeal within the confines of Section 61(1) of the 'I&B Code', we are of the considered opinion that there is no merit in this appeal. No legal infirmity or factual frailty has been brought to our notice which could have rendered the impugned order erroneous. The appeal is accordingly dismissed. No cost.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V.P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI
24th July, 2020
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