

(2019) 07 GUJ CK 0009

In the Gujarat High Court

Case No : R/Special Civil Application No. 11501 Of 2019

Lanco Solar (Gujarat) Pvt. Ltd

APPELLANT

Vs

Gujarat Urja Vikas Nigam Ltd

RESPONDENT

Date of Decision : 29-07-2019

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 7, 52, 53

Constitution Of India, 1950 — Article 10, 12

Insolvency And Bankruptcy Board Of India (Voluntary Liquidation Process, Regulations, 2017 — Regulation 16

Citation : (2019) 07 GUJ CK 0009

Hon'ble Judges : Alpesh Y. Kogje, J

Bench : Single Bench

Advocate : M.R. Bhatt, Sakyasingha Chaudhary, Ashta Sharma, Mujal Bhatt, Kamal Trivedi, S. Shah, Dhaval Dave, Grishma Ahuja, Sushil Jethmalan, Shardul Amarchand Mangaldas

Final Decision : Disposed Off

Judgement

Alpesh Y. Kogje, J

1. Rule returnable on 14.10.2019.

2 . The present petition is filed with the main prayer to quash and set aside the decision communicated by the respondent No. 1-Gujarat Urja Vikas

Nigam Limited (for short ""GUVNL"") dated 29.05.2019 to adjust the amount of Rs. 4,91,08,080/-payable by the respondent No. 1-GUVNL against the

invoice dated 14.05.2019 raised by the petitioner-Lanco Solar (Gujarat) Private Limited (for short ""LSGPL"") for sale of energy for the month of April,

2019. It is also prayed that the respondent No. 1-GUVNL be restrained from deducting/adjusting any amount due and payable as per the contract

under the Power Purchase Agreement (for short ""PPA"") dated 29.04.2010

against the dues of respondent No. 3-Gujarat Energy Transmission Corporation Limited (for short ""GETCO"") against respondent No. 2-Lanco Infratech Limited (for short ""LIL""). Pending the petition, two prayers are made for restraining the respondents from making any adjustment/deduction of any due and payable by respondent No. 1-GUVNL under PPA dated 29.04.2010 to the petitioner-LSGPL against the dues of respondent No. 3-GETCO which are to be recovered from respondent No. 2-LIL though nature of prayer pending the petition is for forthwith release of Rs. 4,91,08,080/- against the invoices raised by the petitioner-LSGPL dated 14.05.2019.

3. Several contentions and cross contentions were raised which require consideration and hence, the rule is issued and matter is proceeded for interim relief.

4 . The facts in brief are that the respondent No. 2-LIL on 29.04.2010, had entered into PPA with the respondent No. 1-GUVNL for supplying 15

MW of power to GUVN from the proposed Solar Photovoltaic Grid Interactive Power Plant to be set up by the respondent No. 2-LIL at village Surel,

District: Surendranagar. The another PPA was executed in the same manner for another site at village Chandiyana and Santalpur, District: Patan.

Another contract entered into between the respondent No. 3-GETCO and respondent No. 2-LIL was for the purpose of erection and commission of

Mundra-Zerda power supply line of 400 KV (94.532 Kms.) and another contract between the respondent No. 3-GETCO and respondent No. 2-LIL

was for the erection and commission of Mundra-Zerda power supply of 400KV (79.928 Kms.). In the year 2016, the respondent No. 2-LIL addressed

a letter to respondent No. 1-GUVNL, informing about reorganizing the group and accordingly, transferred the solar power plant at Chandiyana and

Charanka by way of slump sale to its whole owned subsidiary (for short ""WOS"") i.e. petitioner-LSGPL. Accordingly, on 08.03.2017, two supplemental

PPAs which were tripartite executed between the respondent No. 2-LIL, petitioner-LSGPL and respondent No. 1-GUVNL. The rights and

obligations of the parties under the PPA dated 29.04.2010 were transferred to the WOS petitioner-LSGPL of respondent No. 2-LIL however, the

ownership was to continue with the Lanco group.

4.1. Parallely, in the contract between the respondent No. 3-GETCO and the respondent No. 2-LIL pertaining to the Mundra-Zerda power supply

line. The respondent No. 2-LIL and its member of joint venture abandoned the contract causing immense loss to the respondent No. 3-GETCO. The

damages quantified by respondent No. 3-GETCO is to the tune of Rs. 32.11 Crores against the respondent No. 2-LIL.

4.2. In July-2017, an application under Section 7 of the Insolvency and Bankruptcy Code (for short ""IBC"") was filed against the respondent No. 2-LIL

by IDBI Bank before the National Company Law Tribunal, Hyderabad. On 07.08.2017, the Corporate Insolvency Resolution Process (for short

CIRP"") commenced against the respondent No. 2-LIL and on 27.08.2018, the insolvency proceedings came to be closed because of the failure as a

result of which the liquidation process against the respondent No. 2-LIL commenced. Under the supplemental PPA, solar generated power supplied

by the petitioner-LSGPL continued to be supplied respondent No. 1-GUVNL for which the petitioner-LSGPL used to raise the invoices against the

supply of solar energy and respondent No. 1-GUVNL was required to make the payment accordingly. However, by the impugned communication

dated 29.05.2019, by an E-mail, respondent No. 1-GUVNL informed the petitioner-LSGPL that an amount of Rs. 4,91,08,080/- payable against the

invoice dated 14.05.2019 for supply of solar energy in the month of April, 2019 raised by the petitioner-LSGPL is adjusted towards the outstanding of

respondent No. 3-GETCO towards the respondent No. 2-LIL with regards to Mundra-Zerda power supply line contract. On 14.06.2019, the

petitioner-LSGPL addressed a letter protesting non-payment of its dues by respondent No. 1-GUVNL on the ground of pending dues of respondent

No. 3-GETCO against the respondent No. 2-LIL.

5 . Leaned senior advocate Mr. M.R. Bhatt, appearing for the petitioner-LSGPL submitted that petitioner-LSGPL and respondent No. 2-LIL though

belonging to the same group, but are different entities and that the supplemental PPA agreement dated 08.03.2017 was the agreement under which

the power was being supplied by the petitioner-LSGPL to respondent No. 1-GUVNL. The supplemental PPA was accepted both by the respondent

No. 1-GUVNL, respondent No. 2-LIL and the petitioner-LSGP and therefore, binding to all these three parties. The dues of respondent No. 3-

GETCO against the respondent No. 2-LIL was arising out of a separate agreement dated 15.04.211/02.07.2011 which were the agreements where

the respondent No. 2-LIL was only one of the party of the joint venture and therefore, there was no privity of contract between the petitioner-LSGPL

and respondent No. 3-GETCO nor there being any agreement between the respondent No. 1-GUVNL and respondent No. 3-GETCO. The dues of

respondent No. 3-GETCO against the respondent No. 2-LIL cannot be adjusted in the dues of the petitioner-LSGPL against the respondent No. 1-

GUVNL. By doing so, the respondent No. 1-GUVNL and respondent No. 2-LIL which are the State within the meaning of Article 12 of the

Constitution of India have acted in unfair and high handed manner because of which the petitioner-LSGPL is to put in grave financial condition. The

only source of revenue to the petitioner-LSGPL is the payment made by respondent No. 1-GUVNL against the supply of solar power energy under

the supplemental PPA dated 08.03.2017 and in absence of such revenue, the petitioner company would collapse and therefore, urgent directions would

be required to restrain the respondent No. 1-GUVNL from adjusting such dues.

5.1. It is submitted that the respondent No. 2-LIL which was under CIRP was within the knowledge of respondent No. 3-GETCO and that

respondent No. 3-GETCO had lodged their claim which in the process of being examined and the claim of GETCO are being examined under a

process recognized by law. The respondent No. 1-GUVNL and respondent No. 3-GETCO have found in-genuine method of bypassing the recognized

process and itself came out with a method of adjusting dues as if such dues are admitted dues and that there is privity of contract between the

respondent No. 3-GETCO and petitioner-LSGPL.

5.2. It is submitted that under Section 53 of the IBC, a mechanism is developed for the purpose of repayment of creditors. The respondent Nos. 1 and

3 cannot bypass this mechanism and properties their claim against the respondent No. 2-LIL

5.3. The petitioner-LSGPL has relied upon the judgment of the Apex Court in the case of A BL International Limited and another vs. Export Credit

Guarantee Corporation of India Limited and others, reported in (2004) 3 SCC 553 to support his argument that even where the disputed question of

facts are involved in appropriate case, writ Court has jurisdiction to entertain the Writ Petition. He relied upon the paras 8, 10, 23, 27 and 53. The

petitioner-LSGPL has also relied upon the judgment in the case of Narmada

Cement Company vs. State of Gujarat and another, reported in 1997 (1)

GLH 168 to support his contention that where the deductions are sought to be effected by the State which cannot be referred to any of the claims of

the contracts, such deductions are arbitrary and therefore, Writ Petition would be maintainable.

6 . As against this, learned Advocate General with learned advocate Mr. Anal Shah, appearing for respondent Nos. 1 and 3 submitted that the

respondent No. 1-GUVNL is a alter ego of respondent No. 2-LIL. The two supplemental PPAs dated 08.03.2017 leave no scope of doubt that the

petitioner-LSGPL is alter ego to respondent No. 2-LIL and therefore, can be primarily held responsible for the dues of respondent No. 2-LIL. The

communication dated 27.08.2016 informing the respondent No. 1 about the reorganizing made it clear that the petitioner-LSGPL would be wholly

owned subsidiary of respondent No. 2-LIL and even after the slump sale, the ownership will continue to be with Lanco group.

6.1. The supplemental PPA dated 08.03.2017 was a method to defraud the dues not only of respondent No. 3-GETCO, but other creditors as well.

The circumstances for slump sale are highly doubtful particularly considering the chronology of events that in the year 2016 itself, the respondent No.

2-LIL had started to default in servicing its debts as a result of which, in July-2017, IDBI filed Bankruptcy Application under Section 7 before the

NCLT, Hyderabad. On 07.08.2017, CIRP commenced against the respondent No. 2-LIL and it was thereafter, immediately, the respondent No. 2-

LIL addressed a communication dated 27.08.2016 about the reorganizing of the group and transferred all the assets by way of slump sale. This would

clearly indicate that the purpose behind the two supplemental PPAs by creating the petitioner company was only to defraud the creditors of

respondent No. 2-LIL and therefore, the Court ought to pierce the corporate veil and conclude that the dues of respondent No. 2-LIL be treated the

dues of the petitioner-LSGPL.

6.2. It is submitted that the respondent No. 1-GUVNL is a holder company of its subsidiary respondent No. 3-GETCO and therefore, the dues of the

respondent No. 2-LIL towards the respondent No. 3-GETCO can be adjusted from the amount to be paid by respondent No. 1-GVNL to the

petitioner-LSGPL.

6.3. Learned Advocate General has also made submissions on the issue of maintainability of the petition in view of the alternative remedy which is provided under the agreement itself. He referred to Article 10 of the agreement dated 29.04.2010 which was adopted wholly by the petitioner-

LSGPL. It is submitted that the GETCO has suffered loss of Rs. 32 Crores in the agreement with the respondent No. 2-LIL and even on date, goods

and materials worth Rs. 14,96,77,353/- which are handed over to the respondent No. 2-LIL and its joint venture are still lying in their custody which

also the respondent No. 3-GETCO is entitled to recover from the respondent No. 2-LIL. It is lastly submitted that the present petition in fact is suit in

disguise, wherein the prayer is for permanently injuncting respondent No. 3-GETCO from recovering anything from the respondent No. 2 it is

submitted that the respondent No. 2 has not called before the Court and contest or oppose the present proceedings.

6.4. The learned Advocate General relied upon the judgment in the case of Joshi Technologies International INC vs. Union of India and others,

reported in (2015) 7 SCC 728, where even the case of ABL International (Supra) was considered and that though there is no absolute bar to maintain

writ petition in contractual matters, it is the discretion of the High Court and under certain circumstances can refuse to exercise the discretion. It is

submitted that the Supreme Court thereafter went on to narrate the circumstance under which clearly the Court would not exercise such discretion

and where there are serious disputed questions of facts which are complex in nature and would require oral evidence for their determination then the

Court would not exercise the discretion as in the present case. The very judgment also lays down that money claimed per-se particularly arising out of

contractual obligations are normally not be entertained.

6.5. Learned Advocate General has relied upon the judgment in the case of Vodafone International Holdings v/s. Union of India and another,

reported in (2012) 6 SCC 613 and in the case of State of Rajasthan and others vs. Gotan Lime Stone Khanij Udyog Private Limited and Another,

reported in (2016) 4 SCC 469, wherein the circumstances in which the principle of lifting corporate veil is explained. Relying upon this, it is submitted

in the present case also, where attempt is to defraud the dues of the creditors which is evidenced by the slump sale at time when the respondent No.

2-LIL apprehended action of its assessment would necessitate the lifting of corporate veil.

7. Mr. Dhaval Dave, learned senior advocate for appearing for respondent No. 2-LIL has by and large adopted the arguments of learned Advocate

General and has emphasized on maintainability of the writ petition in a pure question of contractual right. He also drew attention of this Court to the

nature of reliefs prayed for in this petition and submits that the nature of prayer itself is suggesting that the petition is made for restraining the

respondent No. 1-GUVNL from exercising its contractual rights. There is no averment in the petition that the contract which is to be enforced under

the writ petition is of a statutory nature or that the breach alleged is concocted with the different law. The respondent No. 2-LIL has not come forward

and disputed the claim by respondent No. 3-GETCO against it and in absence of any dispute raised by the respondent No. 2-LIL, the petitioner-

LSGPL cannot dispute it under this petition. It is submitted that the petitioner-LSGPL and the respondent No. 2-LIL are so intricately connected with

each other and that the dues of the respondent No. 2-LIL can be treated to be dues of the petitioner-LSGPL and hence, the respondent No.1-

GUVNL was within its power to effect the adjustment.

8. Having heard the learned advocates appearing for the rival parties and perused the documents placed on record. At the outset, elaborate

submissions are made on the issue of maintainability, existence of alter ego, lifting of corporate veil and the arbitrary action of resorting to

deduction/adjustment of dues of respondent No. 1-GUVNL in the payment due to the petitioner-LSGPL from another entity. The Court therefore,

propose to take up all the elaborate submissions made at the stage of final hearing however, for considering the interim relief as prayed in the

preceding paras, following is considered.

9. The original PPA dated 29.04.2010 was entered into between the respondent No. 2-LIL and respondent No. 1-GUVNL based on which the

respondent No. 2-LIL developed the Solar Photovoltaic Grid Interactive Power Plant of 15MW capacity at village Surel, Taluka Dasada and the

entire energy is so generated for commercial purposes would be sold to the respondent No. 1-GUVNL at a tariff rate determined by the GERC.

Similarly, another PPA was entered on the same day with similar capacity at

another site at Chandiyaya and Santalpur, District: Patan. In between there was change in the site which was acceptable to both the sides from village Sural to village Charanka. The respondent No. 2-LIL as per the requirement of the project made investment of substantial amount and started power generation and supply of electricity to the respondent No. 1-GUVNL. The exercise of supplying of power generated and raising of monthly invoices by respondent No. 2-LIL to respondent No. 1-GUVNL continued between November-2011 to February-2017. However, on account of reorganizing of company namely Lanco Group, a communication dated 27.08.2016 was addressed by the respondent No. 2-LIL to respondent No. 1-GUVNL and at that time also, by way of slump sale, the solar project under the aforementioned PPA were transferred to the petitioner-LSGPL which was wholly owned subsidiary of Lanco Group. The supplemental agreements were entered into on 08.03.2017, wherein the respondent No. 1-GUVNL, respondent No. 2-LIL and the petitioner-LSGPL were signatories of such agreements. From that day onwards, as per the supplemental agreement, the petitioner-LSGPL was supplying the electricity generated to the respondent No. 1-GUVNL and was used to raise invoices in terms of the agreement and respondent No. 1-GUVNL used to duly pay against the invoices in due course and there was no dispute. It was only when two invoices were raised transferring the energy supplied to the petitioner-LSGPL during the month of April 2019 each of Rs. 2,05,00,440/- and Rs. 2,86,07,640/- respectively that the petitioner-LSGPL received impugned communication intimating the petitioner-LSGPL that as per the request made by the respondent No. 3-GETCO, the payments under the invoices raised as aforesaid have been adjusted by the respondent No. 1-GUVNL towards the outstanding dues of the respondent No. 3-GETCO against the respondent No. 2-LIL.

9.1. The original PPA is between the respondent No. 1-GUVNL and respondent No. 2-LIL. The entire rights and obligations were substituted under the two supplemental PPAs dated 08.03.2017 which were between the petitioner-LSGPL, the respondent No. 2-LIL and respondent No. 1-GUVNL. Insofar as the two original PPAs of 2010, the respondent No. 2-LIL stood substituted by the petitioner-LSGPL. This was in the year 2017 and to the knowledge of respondent No. 1-GUVNL and therefore also to the knowledge of

respondent No. 3-GETCO. The other set of agreement which pertains to erection and commission of Mudra-Zerda power supply line of 200 KV was dated 15.04.2011 and 02.07.2011. This was between the respondent No. 3-GETCO on one side and joint venture of three companies, which was headed by respondent No. 2-LIL. The default with regards to the aforesaid contract for erection and commission of Mundra-Zerda power supply line had crystallized in July-2014 and there and then itself the dues of respondent No. 3-GETCO against the respondent No. 2-LIL to the tune of Rs. 32.11 Crores under the contracts and additional Rs. 14,96,77,353/- being the value of equipments and goods of GETCO supplied to respondent No. 2-LIL had crystallized. Despite the aforesaid fact situation, the supplemental PPAs were entered into on 08.03.2017 and the respondent No. 1-GUVNL had continued to honour the invoices and make payment for the supply of power to the petitioner-LSGPL.

10. From the record, it appears that the petitioner-LSGPL had entered contract with GETCO also for using its facility to transfer the power generated at its premises to the premises of the respondent No. 1-GUVNL for which the petitioner has duly made the payment against invoices/bills raised by respondent No. 3-GETCO upon the petitioner and there is no dispute in that regards.

11. From the record, it appears that the IDBI Bank has filed an application under Section 7 of the IBC before the NCLT, Hyderabad being C.P. (IB)

No. 111/7/HDB/2017 against the respondent No. 2-LIL in July-2017, alleging default in payment in November-2016. The CIRP against the respondent

No. 2-LIL commenced on 07.08.2017. It also appears that the respondent No. 3-GETCO submitted its proof of claim by operational creditor under

Regulation 16 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process, Regulations, 2017 on 18.11.2018 as operational

creditors. The perusal of the scheduled Form-B submitted by the respondent No. 3-GETCO to the liquidator which is at Annexure-P1 would reveal

that the respondent No. 2-LIL to be operational creditor of the claim of respondent No. 3-GETCO are identified as under:

(A) Claim in respect of Transmission Services (including Delayed Payment Charges up to 30.09.2018.)

(B) Claim in respect of Contractual Liability arising under Agreement for Supply &

Erection of 400KV D/C Munrda-Zerda Line No. 1 on turnkey

basis (Package-1 & 2):

1 . Risk purchase for unexecuted/balance work for Supply Portion under Work Order No. CE(Pro.)/II/400KV/M-21/2131/P1/2387 and Erection

Portion under Work Order No. CE(Pro.)/II/400KV/M-21/2131/P1/2388 and Agreements dated 19.12.2011 for Supply and Erection of 400KV D/C

Mundra-Zerda Line No. 1 (Package-1-79.28 Kms to AP34).

Net amount Recoverable (BI):

Rs. 12,94,46,000

2 . Risk purchase for unexecuted/balance work for Supply Portion under Work Order No. CE(Pro.)/II/400KV/M-Z/2131/T-2/253 and Erection

Portion under Work Order No. CE(Pro.)/II/400KV/M-Z/E/2131/T-2/254 and Agreements dated 22.11.2011 for Supply and Erection of 400KV D/C

Mundra-Zerda Line No. 1 (Package-2-94.532

Kms-AP34 to AP46).

Net amount Recoverable (BI):

Rs. 12,63,18,000

Net amount Recoverable on account of Risk Purchase (B1+2): Rs. 25,57,64,000

TOTAL CLAIM AMOUNT (A+B) =

(Rupees Twenty Five Crores Fifty Eight Lacs Eighty Seven Thousand Six Hundred Thirty One Only).

* The claim is based on estimation as actual amounts can be ascertained after the risk purchase tender process is completed and work orders are issued. Currently the process of risk purchase tender is ongoing.

12. Therefore, apparently under the contract between the respondent No. 2-LIL and respondent No. 3-GETCO, the respondent No. 3-GETCO is

already before the NCLT, Hyderabad for its claim and therefore, the adjustment which is under the impugned communication prima-faice is merely

duplication of the claim registered by the respondent No. 2-LIL as a operational creditor. Section 53 of the IBC reads as under:-

53. Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the

shall be distributed in the following order of priority and within such period and in

such manner as may be specified, namely:-

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following:--
 - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
 - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:--
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;

The above section provides for the mechanism of payment of dues to the creditors.

13 . The method adopted by the respondent No. 1-GUVNL at the instructions of respondent No. 3-GETCO prima-facie appears to bypass the

mechanism provided under the IBC. Therefore, the Court is inclined to grant interim relief till final disposal of the petition.

14. The Court has also considered the submissions of respondents to the effect that under the contract between the respondent No. 2-LIL and

respondent No. 3-GETCO, equipments and goods to the extent of Rs. 14,96,77,353/- are in custody of the respondent No. 2-LIL which is not

controverted in any manner and hence, so far as prayer clause for interim relief in term of para 52(f) is concerned, the Court is inclined to reject the

same. However, the amount of Rs. 4,91,08,080/- deducted will be subject to final

outcome of this petition.

15 . In view of the aforesaid, by way of interim relief, till final disposal of the petition, the respondent No. 1-GUVNL is restrained from

deducting/adjusting any amount arising from the contractual payments under PPA dated 29.04.2010 read with supplemental PPA dated 08.03.2017 to

the petitioner-LSGPL against the dues of the respondent No. 3-GETCO against the respondent No. 2-LIL.