(2023) 04 NCLT CK 0035

In the National Company Law Tribunal

Case No : CA No. 1055/19, IA No. 214/2021, IA No. 1226/2022 In CP (IB) No.174/Chd/Chd/2018

Small Industries Development Bank of India (SIDBI) Vs M/s. International Mega Food Park Limited ?

Date of Decision : 19-04-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 20(2)(b), 60(5)
National Company LawTribunal Rules, 2016 — Rule 11

Citation : (2023) 04 NCLT CK 0035

Hon'ble Judges : Harnam Singh Thakur, Member (J);Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Manish Jain, Divya Sharma, Siddhant Jain, Dr. Rajansh Thukral, Siddharth Thukral

Final Decision : Disposed Of

Judgement

Harnam Singh Thakur, Member (Judicial)

CA No. 1055/2019

1. The present application is being filed by Schreiber Dynamix Dairies Private Limited (herein referred to as the "Applicant") against Mr. Sumit Kumar Gupta, the Resolution Professional of International Mega Food Park Limited (herein referred to as Resolution Professional or Respondent) under Section 60(5) of Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 11 of NCLT Rules, 2016.

2. It is prayed by the applicant to declare that the Respondent is liable to supply the electricity to the Applicant @ Rs. 6.75/- per unit in terms of the Lease Deed and to direct the respondent to refund the amount of Rs. 1,22,98,152/-deposited with him in terms of the said Letter dated August 1, 2019.

3. The brief facts of the case, as stated in the application, are that the applicant is the lessee of the corporate debtor and is engaged in the business of

manufacturing juices and dairy products. The Corporate Debtor is operating a Mega Food Park under the Mega-Food Park Scheme of the Government of India. The Corporate Debtor offered plots on a leasehold basis and promised infrastructure support such as water supply, power supply, effluent treatment etc. The Corporate Debtor and the applicant have executed a Letter of Intent (LOI), and in pursuance of the same, a lease deed dated 06.11.2015 (subsequently registered on 09.03.2016) has been entered into by the parties. The copies of the LOI and lease deed dated 09.03.2016 is attached as Annexure-A2 and A-4, respectively, of the application. It is averred that Under the Lease Deed, the Corporate Debtor also agreed to provide to the Applicant with certain utilities required for running the Applicant's manufacturing facility, such as electricity, steam, refrigeration, cold storage, water, effluent treatment and compressed air. Afterwards, a Utility Services and Common Facilities Agreement dated February 8, 2016 (Annexure A5) was also executed to supply the utilities.

4. It is further submitted that as per the lease deed, the corporate debtor has agreed to supply electricity @ Rs. 6.75/- per unit, irrespective of the source. Thereafter, an application under Section 7 of the Code was admitted against the corporate debtor on 28.02.2019, and a public announcement dated 01.03.2019 was made inviting claims from the creditors. CoC was constituted by IRP, and Rp was confirmed. After the CIRP, on April 2, 2019, the Corporate Debtor raised an electricity bill on the Applicant at a rate of Rs. 6.75 per unit as per the terms of the Lease Deed. However, on April 3, 2019, another electricity bill for a differential amount of Rs. 3.25 per unit was raised for the month of March 2019. Moreover, on April 3, 2019, the Applicant received an email requesting the Applicant to accept a power bill of Rs. 10/- per unit for the month of March 2019 onwards. The Copies of Email Correspondences are attached as Annexure A-13 of the application. It is further submitted that in the meeting of the Committee of Creditors held On May 13, 2019, the Applicant was prevented from voting on the pretext that it is a related party of the Corporate Debtor and the Applicant was requested to pay electricity charges at a rate higher than what was agreed under the Lease Deed. It is mentioned that the Applicant never agreed to pay higher electricity charges; in spite of that, the Resolution Professional sent an email on May 24, 2019, and on June 4, 2019, once again, demanding higher electricity charges. The Applicant provided a detailed response to the Resolution Professional on June 17, 2019, reiterating that it was under no obligation to pay higher electricity charges than what was agreed between the Applicant and the Corporate Debtor as per the terms of the Lease Deed. The applicant has filed CA No.464/2019 with prayer the resolution to not disconnect the electricity, and during the pendency of the said application, the Applicant and Respondent agreed to enter into a temporary arrangement qua the issue involved, wherein the applicant has agreed to pay the differential electricity charges during the CIRP Period only as a one time concession which was mentioned in the letter dated 01.08.2019 (Annexure A-17 of the application). CA No.464/2019 was withdrawn by order dated 03.09.2019 (Annexure A-18 of the application) with

the liberty to file a fresh application. The copy of the order dated 03.09.2019. It is alleged that it is only after the Respondent took over the Corporate Debtor that the Respondent started raising false claims of a higher rate payable under the Lease Deed, and he has no right to claim a higher rate for the supply of electricity under the Lease Deed than the agreed by and between the Applicant and Corporate Debtor.

5. The respondent has filed its reply vide diary No.545 dated 21.01.2020 stating that as per Clause 4.2 of the Utility Services and Common Facilities Agreement, only the electricity generated out of IMFPL Power Plant and B.G. Bank and backup on PSPCL supply has to be provided at the rate of Rs.6.75 per k/w. There is no rate mentioned in the case of purchasing power from a third party. The respondent raised a demand of Rs.1,79,61,615/- from the applicant in respect of the difference in the rate of electricity. As per the settlement dated 01.08.2019 entered between the parties, the applicant has agreed to pay the electricity charges at the rate which is supplied by PSPCL. In view of the settlement, the applicant is liable to pay the same price at which the respondent purchases electricity from PSPCL.

6. The applicant has filed a rejoinder by diary No. 2000 dated 13.03.2020 stating that the respondent cannot claim any amount than was originally agreed. The respondent has arbitrarily fixed the rate of electricity @ Rs.10 per unit, and the respondent is attempting to avoid binding, legal and commercial transactions entered between the parties under the lease deed and utility agreement. It is further stated that the letter dated 01.08.2019 cannot be constituted as a consent or admission on the part of the applicant to pay the same price at which the respondent purchased electricity from PSPCL, and it is a temporary arrangement which is based upon the present application.

7. We have heard learned counsel for the applicant and respondents and have perused the record carefully.

8. The email dated 02.04.2019 annexed as A-13 to the application states that from April 2018 to February 2019, PSPCL Build IMFPL Power at Rs. 9.60 per unit(kwh) on average, whereas the corporate debtor has been billing to the applicant and the rate of Rs. 6.75 per unit (kwh). It is further mentioned that it was decided in the meeting in September 2018 that the rate of the utilities would be reviewed and revised with effect from 01.04.2019, but after seeing the losses suffered by the respondent, it is decided that with effect from 01.03.2019 rates on powers shall be charged at Rs. 10 Per unit (kWh) at IMFPL.

9. The issue that falls for discussion in this application is whether the Resolution Professional is within his power to amend or modify the terms of the contract for the supply of electricity entered into before the commencement of CIRP.

10. In this connection, a reference is made to the provisions of Section 20(2)(b) of the IBC, which reads as under:

*20. (1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

(a) xxxx

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(Emphasis Supplied)

11. In the present case, the rates have been increased by the original supplier of electricity, i.e., PSPCL and all that the Resolution Professional has done is to pass this increased electricity tariff to the applicant. We find merit in the argument of the Resolution Professional that otherwise respondent-corporate debtor would have incurred huge financial losses thereby affecting its financial viability, had the RP not passed on to the applicant, the differentiated amount of tariffs fixed by PSPCL.

12. In view of the afore-mentioned discussions, we are of the considered view that the upward modification of the tariff made by the RP to secure the financial health of the corporate debtor is justified and is as per the provisions of the IBC 2016.

13. In the result, the applicant's prayer for fixing the tariff at the original rate of Rs. 6.75 Per Unit in terms of the lease deed is rejected, and the application, i.e. CA No.1055/2019, is dismissed.

IA No.214/2021 and 1226/2022

14. IA No.214/2021 and 1226/2022 are filed by the same applicant against the same respondents involving the same issue, and hence, both these applications are taken up together.

15. The present application is being filed by Mr Sumit Kumar Gupta, the Resolution Professional of International Mega Food Park Limited (herein referred to as Resolution Professional or applicant) against Chief Engineer, canals and others under Section 60(5) of Insolvency and Bankruptcy Code, 2016 (IBC).

16. It is prayed by the applicant in IA No.214/2021 to direct the Respondents to restore the water supply to the Corporate Debtor with immediate effect and to direct the Respondents to provide the details of notification/ order/ circular/ directions of the State Government of Punjab revising the water tariff for FY 2020-21 by 1183% over the water tariff applicable for FY 2019-20 and To direct the Respondents to provide the details of notification/ order/ circular/ directions of the State Government of Punjab revising the water tariff for FY 2020-21 by

1183% over the water tariff applicable for FY 2019-20. In IA No.1226/2022, it is prayed by the applicant to direct the Respondent to refund the amount deposited in terms of the order dated 09.04.2021 being Rs.13,91,025/- along with interest @15% from the date of deposit and to further direct the Respondent to refund Rs.3,40,937/-towards the excess charge recovered by them for the year 2021-22 along with interest @15% p.a. from the date of deposit

17. The brief facts of the case, as stated in the applications, are that the M/s International Mega Food Park Limited- Corporate Debtor is a Mega Food Park set up under the scheme of the Government of India wherein third-party industries are invited to operate within the premises of the company by using the utilities. The corporate debtor has sanctioned the bulk water supply capacity of 2.0 CS, which is communicated to Respondent No. 4 on a Financial Year basis. The CD does not have any direct consumption of water, and the entire water is consumed by the lessees operating within the mega food park. The Respondent has already submitted their claim in respect of arrears of water consumption charges for the FY 2018-19. However, the respondents disconnected the water supply of the corporate debtor on 08.06.2020. Therefore, the applicant filed IA No. 208/2020 for the restoration of the water supply and in reply to the application, they claimed an amount of Rs.1,78,59,830/- as an amount recoverable for FY 2020-21 and the same was rendered infructuous by order dated 18.07.2022. The application for renewable sanction of bulk supply for FY 2020-21 was sent. However, a letter No.1178 dated 01.07.2020 has been received by the applicant from respondent No.4 regarding the sanction of 2.0 CS water supply for FY 2020-21 at a revised rate of Rs.1,78,59,830/- which is an 1183% increase over the previous year without any notice. A representation has also been made by the applicant to the Secretary, of irrigation against the unprecedented increase in water tariff. However, no reply has been received.

18. It is further submitted that the increase of 1183% is totally arbitrary and is without complying with the principles of natural justice, and the Respondents have not provided the details of the order/ notification of the government vide which the water tariff has been escalated. Additionally, the Respondents have not taken any decision on the request submitted by the Applicant to reduce the bulk supply from 2.0 CS to 0.5 CS.

19. It is stated in IA No.1226/2022 that the supply of water was sanctioned in the year 2018-19 with 2% annual increase as per notification No.10/110/12-IW(2)/3895 dated 06.11.2012. The respondent issued a sanction letter dated 01.07.2020 in which the water tariff has been increased by 1183% on account of notification No.10/110/12-IW(2/88/1) dated 23.01.2020. The applicant has deposited an amount of Rs.27,82,050/- in terms of an order dated 09.04.2021 for the restoration of the water supply. The aforesaid notification dated 23.01.2020 has been challenged before Hon'ble Punjab and Haryana High Court in CP No.9181/2021. In the judgment dated 02.09.2022, Hon'ble Punjab and Haryana High Court quashed the said notification and the illegal demands raised

by the respondent. For the year 2021-22, the respondent has sanctioned the water supply of 0.5 CS on a deposit of twice the amount. It is submitted that in view of the order of the Hon'ble Punjab and Haryana High Court, the applicant is liable for the refund of the excess amount along with interest.

20. The respondent has filed its reply by diary No.00203/11 dated 07.05.2021 stating that the applicant has not submitted any application for renewal of water supply for the year 2020-21, and there is an outstanding amount of Rs.13,63,750/- which is recoverable from the corporate debtor. It is further submitted that vide notification dated 23.01.2020, Punjab Government has revised the dates for bulk supply of water, and it is only after the revision of dates the applicant was asked to pay Rs.1,78,59,830/- for the year 2020-21. The permission for 0.5 cusecs has been granted to the applicant for the year 2021-2022. It is also averred that a total amount of Rs.2,36,88,537/- is recoverable from the applicant on account of bulk water supply. However, the amount of Rs.27,82,050/- paid by the applicant on the directions of this Adjudicating Authority issued vide order dated 09.04.2021 will be adjusted in the said outstanding amount.

21. We have heard learned counsel for the applicant and respondents and have perused the record carefully.

22. In the course of the proceedings, the decision of the Hon'ble Punjab and Haryana High Court in CWP No. 9181/2021 dated 02.09.2022, in which the Resolution Professional was one of the petitioners, has been brought to our notice. The Hon'ble High Court has allowed the prayer of the petitioner to pay the amount of bulk supply of water at the same rates as applicable during the financial year 2019-20. The Hon'ble High Court has quashed the impugned notification dated 23.01.2020 and has, inter alia, observed as under:

"In consequence, the covenanted contractual levies, as occur in the apposite contracts, drawn amongst the concerned, cannot be undone through any unilaterally made notification. In the sequel, the validly drawn contracts amongst the concerned qua the relevant purpose, is to be assigned sanctity, and, in case the respondent concerned, wishes to increase the contractual levies, it cannot do so, except, upon its drawing a fresh contract with the petitioners-industrial units concerned, as, permitting the respondent, to in any other mode do so would cause breach to the accuracy and this document contractual terms, especially when a reading of the contractual terms, does not make any contemplation, that yet the respondent concerned, can in detraction thereof, proceed to make reliance, upon any statutory provisions, which may well authorize the levies rather beyond the contractual terms".

23. In view of the aforementioned discussion of the Hon'ble Punjab and Haryana High Court, the prayers in IA No. 214/2021 are rendered infructuous as the same has been already granted by the Hon'ble High Court and the water supply has already been reduced to 0.5 CS. The prayer in IA No. 1226/2022, for the refund

of the amounts of Rs. 13,91,025/- deposited in terms of our order dated 09.04.2021 and Rs, 3,40,937/- being paid in excess for the year 2021-22, is hereby allowed in view of the aforementioned decision of the Hon'ble High Court. The petitioner is hereby granted interest of 6% as against the prayer of interest @ 15%.

24. In view of the aforesaid discussion, IA No.214/2021 is dismissed and IA No. 1226/2022 is allowed as above and disposed of accordingly.