

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI Company Appeal (AT) (Insolvency) No. 309 of 2021**

[Arising out of Order dated 02.02.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, in CA/(IB)/1818/KB/2019 in C.P. (IB) No. 45/KB/2018]

In the matter of:

**NTPC Limited,
Barh Super Thermal Power Project,
P.O.- Barh, Patna,
Bihar- 803 213, India**

....Appellant

Vs.

**Ram Ratan Modi, Liquidator of D C Industrial Plant
Services Pvt. Ltd.
Having its registered office at 6A, South Block,
Park Plaza, 71, Park Street,
Kolkata- 700 016**

....Respondent

For Appellant:

**Mr. Balbir Singh, Addl. Solicitor General of India,
Mr. R. Sudhinder, Ms. Ekta Bhasin, Mr. Pierre
Uppal, Advocates.**

For Respondents:

Mohd. Azeem Khan for Liquidator.

JUDGMENT

(19th July, 2021)

A.I.S. Cheema, J.

1. This Appeal has been filed by 'NTPC Limited' against impugned order dated 2nd February, 2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata (Special Bench) in CA (IB)-1818/KB/2019 in C.P. (IB) No. 45/KB/2018. By the impugned order, Appeal filed under Section 42 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) by 'NTPC Limited' was partially rejected.

2. The Appellant claims that it had awarded two contracts to the Corporate Debtor- 'DC Industrial Plant Services Pvt. Ltd.' in 2006. The Appeal gives particulars regarding how the Respondent failed to carry out the contracts and the Appellant claims that the Appellant was constrained to terminate the contract on 22nd June, 2015 and to get balance work executed through third party namely— 'M/s. MELCO'. According to the Appellant, Corporate Debtor referred the disputes relating to Ash Water Re-circulation System package for BARH super thermal power project arising from the contracts to adjudication.

3. Application under Section 7 of the 'I&B Code' was admitted against the Corporate Debtor on 30th July, 2018 and the Appellant filed proof of claim as an "other creditor" under Form 'F' on 26th October, 2018 and the Resolution Professional published list of the Creditors on 29th October, 2018. Subsequently, Liquidation order was passed on 19th June, 2019 (Page 299). The Appellant filed claim under Form 'G' to the Liquidator. The Liquidator however, sent an e-mail rejecting the claim on 04.09.2019 and the Appellant moved Adjudicating Authority by filing CA/(IB)/1818/KB/2019 in the Company Petition. The Adjudicating Authority recorded that it was partly allowing the claim to the extent mentioned in the impugned order.

4. The Learned Addl. Solicitor General of India Shri Balbir Singh referred to Form 'F' which was filed as "other creditor" during Corporate Insolvency Resolution Process (CIRP) which is at Page 89. It is stated that after such Form was submitted, the same was processed in CIRP and the Resolution Professional put up status of the claims made as on 28.10.2018. With regard to the claim of the Appellant, the chart mentioned that the total amount claim

was Rs. 1,08,68,56,196/- and the remarks referred the same note 10, which reads as under:-

“10. The Corporate Debtor had filed a counter claim on the Claimant. The Claimant had called for Arbitration which was suspended due to CIRP process.”

5. The Learned ASG referred to ‘General Conditions of Contract (GCC)’ which was entered into between the Appellant and the Corporate Debtor of which paras 6.1.1 and 6.1.2 relate to ‘Adjudicator’ for the purpose of settlement of disputes. The said paragraphs read as under:-

“6.1 Adjudicator

6.1.1. If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity of termination, or the execution of the Facilities- whether during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract- the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute, then the dispute shall be referred in writing by either party to the Adjudicator, with a copy to the other party.

6.1.2. The Adjudicator shall give its decision in writing to both parties within twenty-eight (28) days of a dispute being referred to it if the Adjudicator has done so, and no notice of intention to commence arbitration has been given by either the Employer or the Contractor within fifty-six (56) days of such reference, the decision shall become final and binding upon the Employer and the Contractor. Any decision that has become final and binding shall be implemented by the parties forthwith.”

6. It is stated that in this matter when disputes arose between the parties as per contract the matter was referred as per these General Conditions of

Contract between the parties to the Adjudicator who passed award. Copy of the Award is at Page 246 and the concluding observations read as under:-

“Observations:- *The undersign has examined the claims and the counter claims of the parties in the present dispute and has concluded that the Claims of the M/s. DCIPS are not tenable and without any justifications hence the claims outlined in **Annexure IV** of the petition amounting to Rs. 8748.00 lakhs are summarily rejected. In view of the submissions made by NTPC that the contract termination is in line with the Clause no. 42.2.3 and 42.2 of the GCC of the aforesaid contract as M/s. DCIPS has not fulfilled its obligations under the contract, committed continuous breaches and ample opportunity was provided to M/s. DCIPS to remedy the defaults, however no remedial measures were taken by M/s. DCIPS neither any firm commitment provided towards completion of package. I fully agree with the contentions of NTPC and opine that the termination is in line with the contract provisions and encashment of Bank Guarantees justified. As regards the counter claims of NTPC the adjudicator feels that the new contract awarded to M/s. MELCO may further be worked out and exact amount which is assessed at the risk and cost of M/s. DCIPS may be communicated to them in due course of time.”*

7. Thus, what appears is that the Corporate Debtor who was making counter claim of Rs.87.48 Cr., the claim was rejected. However, with regard to the claim made by the Appellant, the Adjudicator recorded that the “same may further be worked out and exact amount which is assessed at the risk and cost of ‘M/s. DCIPS’, i.e. Corporate Debtor”. Thus, the figure only remained to be worked out. Appellant has argued and it is not disputed before us that against such decision of Adjudicating Authority dated 24.03.2006 Arbitration was not invoked in 56 days as per paragraph 6.1.2. Thus, the decision became final. Now it may be relevant to refer to Form ‘G’ which was

submitted by the Appellant before the Liquidator. In Form 'G' (Appeal Page 315), the Appellant calculated its claim, as under:-

<p>3.</p>	<p>Total amount of claim, including any interest as at liquidation commencement and details of nature of claim</p>	<p>1. The claim of NTPC Limited is the difference between the expenditure incurred/ to be incurred by NTPC Limited to complete the balance work of the Ash Handling Package Stage-I awarded to Corporate Debtor vide Contract No. CS-9558-162-2-FC-COA-4662 dated March 24, 2006 and Contract No. CS-9558-162-2-FC-COA-4663 dated March 24, 2006 (hereinafter referred to as "the project") and the expenditure NTPC Limited would have incurred had the Corporate Debtor completed the Project.</p> <p>2. NTPC Limited has expended the following amount towards completion of the Project:-</p> <p>(a) Rupees 1,17,39,65,783.00/- towards additional contract for completion of the balance work of the Project awarded to Melco India Pvt. Ltd. Copies of Notification of Awards for supply and erection of 'Balance work of Ash Handling System Package for Barh Super thermal Power Project Stage- 1 (3X660 MW)' along with summary of expenses incurred for completion of balance work are annexed herewith and collectively marked with the letter 'A';</p> <p>(b) Rupees 62,78,476.00/- for cost of material for which payment has been made by NTPC to DCIPS but the same was not handed over to NTPC. A copy of the status of</p>
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		<p>reconciliation of missing items of ash handling package of Barh Stage- (3X660 MW) countersigned by NTPC Limited and the Corporate Debtor is attached herewith and marked with the letter 'B';</p> <p>(c) Rupees 4,67,49,011/- for cost of spares already procured from OEM for DCIPS supplied materials. Copies of purchase orders of spares along with a tabular summary sheet are annexed herewith and collectively marked with the letter 'C';</p> <p>(d) Rupees 2,52,20,909/- for cost of spares to be procured from OEM for DCIPS supplied materials. Copies of purchase requisitions along with other relevant documents and summary sheet is annexed herewith and collectively marked with the letter 'D';</p> <p>(e) Rupees 4,14,905/- for cost work of Hanger support and fluidising pad below ESP on risk and cost of Corporate Debtor. Copy of the service purchase order (inclusive of GST) is annexed herewith and marked with the letter 'E';</p> <p>(f) Rupees 12,52,62,708/- towards overhead cost to be incurred on the abovementioned items a to e;</p> <p>(g) Rupees 25,83,05,308.00/- towards the claim of SPML against NTPC due to delays caused by the Corporate Debtor. A letter issued by SPML dated May 27, 2015 (which includes the memorandum of claims) along with the brief written arguments filed before the Ld. Arbitral Tribunal are annexed</p>
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		<p>herewith and collectively marked with the letter 'F';</p> <p>3. The NTPC Limited would have incurred an expenditure of Rupees 55,58,66,814.00/- had the Corporate Debtor completed the Project.</p> <p>Therefore, Rupees 1,08,03,28,286/- (Rupees One Hundred Eight Crore Three Lakh Twenty Eight Thousand Two Hundred Eighty Six Only) is payable by the Corporate Debtor to NTPC Limited towards the cost of completion of the balance work under Contract No. CS-9558-162-2-FC-COA-4662 dated March 24, 2006 and Contract No. CS-9558-162-2-FC-COA-4663 dated March 24, 2006.</p> <p>Principal Claim: Rs.1,08,03,28,286/- Interest: Rs.0.00</p> <p>Total Claim: Rs.1,08,03,28,286/-</p>
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8. Counsel for parties have brought to our notice that after the Adjudicator gave Award as mentioned above, the matter was referred to the Expert Settlement Council which heard both the parties. Copy of the Report is at Page 280 of the Appeal. In Para 3, the committee referred to the counter claim of Rs.87.48 Cr. which Corporate Debtor made. In Para 4, it referred to the claim of the Appellant and then the recommendation of the Expert Committee (ESC) was recorded as under:-

“5. Recommendation of ESC:

The ESC held several rounds of discussions with the parties with a view to bridge the gap of divergence between the parties. Both the parties indicated that they were willing to review their respective claims, which considerably reduced the gap during the discussions.

However, the gulf of divergence was so wide that it could not be totally bridged. Hence, ESC recommends closure of this case.

The ESC takes this opportunity to thank Shri D Basu, MD, and Shri S K Kar ED of DCIPS and Shri J P Roy, AGM (Nodal Officer Barh) and Shri V D Verma, Manager of NTPC for their positive approach and cooperation extended during the ESC proceedings.”

9. Thus, ESC also could not bridge the gap between the parties. Referring to this, the Liquidator sent an e-mail at Page 740 and observed that since the claim amount of Appellant has been subjected to dispute by the Corporate Debtor and the books of Corporate Debtor does not show the said claim amounts as claimed by the Appellant, the claim was not admissible.

10. It is the argument of Learned ASG that it was a matter of calculation for the Liquidator to see as to what were the expenses Appellant was to bear for completion of the contract by the Corporate Debtor and what it was required to bear because the project had to be handed over to ‘M/s. MELCO’ and the difference should have been accepted as the claim of the Appellant.

11. As per Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the Liquidator was required to process the claims submitted in Form ‘G’ by the Appellant as claim by “Other Stakeholder”. Regulation 20 provides for processing of claims by other stakeholders and the Appellant was required to prove its claim *inter alia* on the basis of relevant documents which adequately establish the claim. Under Regulation 23, the Liquidator has power and duty to call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim. Regulation 25 may be reproduced which reads as under:-

“25. Determination of quantum of claim.- *Where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim based on the information available with him.”*

12. In fact, Regulation 28 even makes provisions for contingencies where debt is payable at future time and Regulation 29 provides for Mutual Credits and set-off.

The substance is that there are sufficient provisions which require the Liquidator to take steps. The substance in the arguments of Learned ASG is that when the Adjudicator had on 3rd January, 2017 (Pages 246 & 249) recorded observations (Supra), it was already held that the counter claim being made by the Corporate Debtor was rejected and that claim made by the Appellant was a matter of working out exact amount which was to be assessed at the risk and cost of the Corporate Debtor. With such documents being on record, it was inappropriate on the part of the Liquidator to inform the Appellant in the e-mail dated 4th September, 2019 that because the Corporate Debtor had disputed the amount and the same did not reflect in the record of the Corporate Debtor, the claim filed by the Appellant was not admissible. It was his duty to examine the claim as provided by Regulations and Regulation 25 to come at best estimate of the amount and give the benefit to the Appellant.

13. In para 13 of the impugned order, the Adjudicating Authority observed as under:-

“13. As far as the classification of the claim under the category of ‘Operational Creditor’ is concerned, I am of the opinion that the liquidator erred in not classifying the claim under the category of ‘other creditors’. This was not a case of Operational Debt within the meaning of Section 5(21) of the Code, since it did not arise out of supply of goods or services on the part of the Appellant. The supply of goods and services was on the part of the Corporate Debtor in favour of the Appellant, and not vice versa. Therefore, the Appellant could not have been classified as ‘Operational Creditor’ within the meaning of Section 5(20) of the Code. The Liquidator ought to have classified the Appellant as ‘Other Creditor’ in terms of Regulation 20 of the IBBI (Liquidation Process) Regulations, 2016. The Appeal is partly allowed to this extent.”

14. It appears that the Adjudicating Authority missed the fact that the Appellant had filed the claim itself claiming that the Liquidator should have accepted the claim of the Appellant as “other creditors” in terms of Regulation 20.

15. The Learned Counsel for the Liquidator submitted that the Liquidator had in terms of the impugned order treated the Appellant as ‘other creditor’ but however, the amount was not crystallised. We have already referred to the various Regulations and how the Liquidator has powers to call for documents and determine the quantum of claim. In this context, even Section 39 of the ‘I&B Code’ is relevant, which reads as under:-

“39. Verification of claims.- (1) *The liquidator shall verify the claims submitted under section 38 within such time as specified by the Board.*
(2) *The Liquidator may require any creditor or the corporate debtor or any other person to produce any other*

document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim.”

16. Considering the Section referred above and the Regulations which we have discussed and facts of this matter, we find that the Liquidator has avoided performing the duty as was required to be performed under the 'I&B Code' and the Regulations. We accept the submission of the Learned ASG that the Liquidator was required to look into the Award of Adjudicator and look into the documents and come to the 'best estimate' and give the benefit to the Appellant.

17. For the above reasons, we direct the Liquidator to take steps as mentioned in this judgment and process claim of the Appellant as 'other creditor' and arrive at best estimate of the amount of claim made by the Appellant and give the necessary benefit to the Appellant. The communication dated 4th September, 2019 (Appeal Page 740) sent by the Liquidator is quashed and set aside.

The Appeal is disposed of, accordingly.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi
Anjali