

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Insolvency) No. 478 of 2021

IN THE MATTER OF:

Nabinagar Power Generating Company Ltd., **...Appellant**

Nabinagar Super Thermal Power Project

Versus

Ram Ratan Modi, Liquidator of DC Industrial

Plant Services Pvt. Ltd. & Anr. **...Respondents**

Present:

**For Appellant : Mr. R. Sudhinder, Ms. Ekta Bhasin, Ms. Aastha
Trivedi, Advocates.**

For Respondents : Mohd. Azeem Khan, Advocate for R-1.

O R D E R

Per: NARESH SALECHA, MEMBER (TECHNICAL)

27.03.2023: The present appeal has been filed under Section 66 of Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the impugned order dated 16.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench-I) in CA (IB) No. 1832/KB/19 in CP 45/KB/2018.

2. Appellant's claim has been rejected by the 'Respondent' primarily on the ground that the debt has not crystallised due to continued execution of the project by the Company in liquidation. The 'Appellant' being aggrieved of the decision of the liquidator/ Respondent No. 1, filed an application under provision of Section 42 of the Code, before the 'Adjudicating Authority' seeking

an order for setting aside the decision of the liquidator, however, the 'Adjudicating Authority' passed the impugned order dated 16.04.2020 rejecting the application of the 'Appellant'.

3. Aggrieved by the same, the 'Appellant' has preferred the present appeal before this 'Appellate Tribunal'.

4. Heard Counsel for the parties and also perused the record made available including cited Judgments of the Hon'ble Supreme Court of India and this 'Appellate Tribunal'.

5. As per the 'Appellant', he had awarded two contracts on 14.05.2013 to 'DC Industrial Plant Services Pvt. Ltd.' (the 'Corporate Debtor'/ 'Company in liquidation') for design, engineering, procurement/ manufacture, shop fabrication, assembly, inspection and testing manufacturer's works, type testing, packing, supply to site of all equipment/ materials and mandatory spares and transportation and installation services including Structural works, covered under Ash Handling and Ash water Recirculating System Package for Nabinagar Super Thermal Power Project (3x660 MW) as per Bidding Documents subject to the terms and conditions of the General Conditions of Contract (in short 'the GCC') and Special Conditions of Contract (in short 'the SCC').

6. It is the case of 'Appellant' that the Company in Liquidation failed to complete major part of the contracts within the prescribed completion date and sought for extension of time from time to time. The last extension was granted by the Appellant on June 15, 2021, to complete the project by

December 31, 2021, reserving its right to claim liquidated damages at a later date.

7. The 'Appellant' stated that on 30.07.2018, the 'Adjudicating Authority' admitted an Application under Section 7 of the Code and 'Corporate Insolvency Resolution Process (in short '**CIRP**') of the 'Corporate Debtor' started.

8. As per the 'Appellant', he filed his claims in 'Form- F' as 'Other Creditor' with the Resolution Professional and no additional documents/ clarifications were sought from the 'Appellant' in relation to the claims by the 'Resolution Professional' thereafter.

9. The 'Appellant' submitted that on 29.10.2018, the 'Respondent No. 1'/ 'Resolution Professional' (in short '**RP**') published an updated list of the creditors of the 'Corporate Debtor' on the website of the 'Corporate Debtor' which did not contain his name.

10. The 'Appellant' mentioned that due to failure for finding suitable Resolution Plan, the 'Adjudicating Authority' vide its order dated 19.06.2019, initiated liquidation proceedings against the 'Corporate Debtor' and appointed Mr. Ram Ratan Modi/ Respondent as the 'Liquidator' and directed him to sell the 'Corporate Debtor' as a going concern.

11. The 'Appellant' stated that he once again filed his claims under 'Form- G' as 'other creditor' on 19.07.2019 for an amount of Rs. 71,33,65,128/- as due and payable.

12. It is the case of the 'Appellant' that he had **mobilise** advance outstanding to the tune of Rs. 3,87,80,279/- and a sum of Rs. 6,39,14,305/-

towards claim against material on loan. The 'Appellant' stated that he was also entitled to recover Rs. 9,45,00,000/- towards Liquidated Damages recoverable at the rate of 5% of the entire contract value in accordance to Clause 10.1 of the 'SCC' and Rs. 6,02,47,281/- towards claim against other miscellaneous expenditure. The 'Appellant' also stated that he was further entitled to recover Rs. 1,55,24,847/- towards claim against additional structural 1416 MT steel requirement and Rs. 44,03,97,876/- was payable to him as on July 12, 2019 by the 'Company in Liquidation' towards the cost of completion of the balance work under the contract. As per the 'Appellant', the total principal claim recoverable by the 'Appellant' from the Company in Liquidation amounts to Rs. 71,33,65,128/-.

13. The 'Appellant' assailed the conduct of the 'Liquidator' who rejected the legitimate claims of the 'Appellant', vide email dated 04.09.2019 on the ground that the project is still continuing, and the 'Corporate Debtor' is continuing as a going concern, and therefore it would not be possible to crystallize the claim of the 'Appellant' at this stage.

14. The 'Appellant' filed an application against the Liquidator's order before the 'Adjudicating Authority'. The 'Adjudicating Authority' dismissed the said application vide the 'impugned order' dated April 16, 2021.

15. The 'Appellant' stated that simultaneously, the 'Respondent' was taking steps for sale of the 'Corporate Debtor' as a going concern by issuing notices inviting expression of interest and subsequently conducting E- Auction as well. It is the case of 'Appellant' that the 'Respondents' even in the present appeal has not disclosed whether in the memorandum or information to the

bidder, while mentioning the subsisting contracts of the 'Corporate Debtor' with the 'Appellant', the liabilities arising out of the same contract have been disclosed or not.

16. The 'Appellant' summarised his case to be fully determinable in respect of many items as mentioned earlier and remaining based on facts/invoices/contract, therefore, the 'Adjudicating Authority' erred in the 'impugned order'. The 'Appellant' requested to set aside the 'impugned order' and to allow his appeal.

17. Per-contra, the 'Respondents' submitted that the claims of the 'Appellant' were pre-mature and not admissible since the project execution is continuing and ongoing on a daily basis. The Respondents submitted that the 'Appellant' filed its proof of claim under 'Form-G' as "other creditor" on 19.07.2020, for a sum of Rs. 71,33,65,128, which was rejected by the 'Respondents' because the claim of the 'Appellant' was on the basis of estimated loss and contingent in nature and was not adjudicated by any competent authority.

18. It is case of the 'Respondents' that against the claims of the 'Appellant' which have has been denied and contested, the receivables dues to the 'Corporate Debtor' from the 'Appellant' are to the extent of Rs. 52.46 Crore on account of accrued retention money and return of invoked Bank Guarantee of Rs. 33. 90 Crore.

19. The 'Respondents' also submitted that this 'Appeal' is liable to be rejected on the sole ground that the 'Appellant' violated the principle of 'No loss from the breach, no damages', which means that if the 'Appellant' has not

faced loss or if there is actually loss of the 'Appellant' as per the claim, then the 'Appellant' has to approach an adjudicator as per the 'GCC'.

20. It is also the allegation of the 'Respondents' that the 'Appellant' did not release the entire funds for completion of package till date as per approved execution schedule after the date of commencement of Contract i.e. 23.03.2013. As per the 'Respondents', the unavailability of funds from the 'Appellant' with respect to the contractual requirement, was the main reason of delay in completing the projects.

21. The 'Respondent No.1' emphasised that due to the non-availability of funds, despite best efforts put forth by the Liquidator, no progress could be made for the execution of remaining supply and installation works. Thereafter, the 'Respondent' vide several email, requested the 'Appellant' for extension of Contractual Commissioning and the 'Appellant' on the request of the 'Liquidator' extended the timeline till 31.12.2021.

22. It is also case of the 'Respondents' that as per the 'GCC', the 'Appellant' did not approach any adjudicator to adjudicate the amount of damage. Therefore, this claim of the 'Appellant' is not maintainable at all. Further, the contract process is continuous in nature, which has not been terminated by the Appellant. Therefore, it was impossible for the Respondent to reach on a conclusive amount of damage in a running process.

23. The 'Respondents' admitted that it was not possible for him, as a *quasi-judicial* authority, to make the 'best estimate' of the amount of the claim as per Regulation 25 of the Liquidation Regulations, when the claim is based on contingent or estimated liabilities and the information of the claim of the

‘Appellant’ is not available with the liquidator. Moreover, in the opinion of the Liquidator, the best estimate can only be made for contingent claims towards Letters of Credit, Bank Guarantees, Standby Letters of Credit issued on behalf of the ‘Corporate Debtor’.

24. The ‘Respondents’ submitted that the ‘Karanveer Singh Yadav Enterprise Pvt. Ltd.’ ("**KSYEPL**") was declared as a "Successful Bidder" under the E-Auction process of the ‘Corporate Debtor’ held on 11.02.2021 with bid amount of Rs. 30,00,00,000, which was deposited on 02.11.2021.

25. The ‘Liquidator’ stated that he issued the sale certificate to the Successful Bidder and handed over the ‘Corporate Debtor’ vide the issuance of Sale Certificate dated 30.12.2021, as a going concern, on "As is where is basis", "As is what is basis", "Whatever there is basis" and "No recourse" basis and moreover the distribution has been made by the Liquidator among the Stakeholders of the ‘Corporate Debtor’ under the provisions of section 53 of the ‘Code’ read with Regulation 42 of the Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016.

26. The ‘Respondents’ also stated that after the completion of the Liquidation Process, the Liquidator filed an Application as per Regulation 45 of the Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 along with the Final Report and the compliance certificate in ‘Form - H’ to the ‘Adjudicating Authority’ for closure of the liquidation process of the ‘Corporate Debtor’ where the ‘Corporate Debtor’ is sold as a going concern and the ‘Adjudicating Authority’ vide order dated 19.04.2022 allowed the Application under Regulation 45 of the Insolvency And

Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 and passed the order of closure of the 'Liquidation Process' and also held that the 'Liquidator' stand discharged from his responsibility.

27. The 'Respondents' concluded that at this stage there is no option but to reject the appeal as the 'impugned order' is well reasoned and urged this 'Appellate Tribunal' to dismiss the appeal devoid of any merit.

28. It is the case of the 'Appellant' that his claim has not been suitably appreciated, examined and not provided for in the liquidation plan. The 'Appellant' vehemently opposed the plea of the Respondents that the claim being continuing contract basis could not be determined at that stage. The 'Appellant' indicated that advance outstanding of Rs. 3,87,80,279/- and Miscellaneous expenditure of Rs. 6,02,47,281/- along with expenditure incurred on construction of additional structure amounting to Rs. 1,55,24,847/- and material issued on loan amounting to Rs. 6,39,14,305/- are specific claims which does not require to be determined. The 'Appellant' further submitted that the liquidation damage amount of Rs. 9.45 Crore is also according to agreed upon contract provisions. Similarly, cost of completion of balance work of Rs. 44.03 Crore is also backed by contract.

29. In this regard, a table is produced hereinbelow illustrating the break-up of the 'Appellant's' claim head-wise:

S No.	Claim Against	Amount (Rs.)
1.	Advance outstanding (Rs. 2,26,21,314/- towards gap funding advance and Rs. 1,61,58,965/- towards outstanding against initial advance)	3,87,80,279

2.	<i>Liquidated damages recoverable at the rate of 5% of the entire contract value</i>	9,45,00,000
3.	<i>Miscellaneous expenditure</i>	6,02,47,281
4.	<i>Additional structural 1416 MT</i>	1,55,24,847
5.	<i>Estimated Cost of completion of balance work</i>	44,03,97,876
6.	<i>Material (Structural Steel) issued on loan</i>	639,14305
	<i>Total</i>	71,33,65,128

30. We observe that, the ‘Liquidator’ as well as the ‘Adjudicating Authority’ rejected the claim on the ground that there is no crystallisation of the debt and also that any claim in damages would require proper adjudication. We note from the submissions of the ‘Appellant’ herein, that he could not initiate Court proceeding against the Company in liquidation owing to the Moratorium under Section 33 (5) of the ‘Code’ during Liquidation, hence the ‘Appellant’ had no other option but to file for Liquidated Damages under its Claim. This ‘Appellate Tribunal’ also notes that the ‘Adjudicating Authority’ did not consider even specific and determined claims such as advance outstanding, material/ miscellaneous expenditure etc, which could have been straight away verified. The ‘Adjudicating Authority’ rejected all the Claims without considering the ones that could have been proved. The ‘Adjudicating Authority’ ought to have examined the claims of the ‘Appellant’ and allow the ones that could be verified and consider the others on the basis of Regulation 25 of the Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016.

31. It has been stated that since no acceptable ‘Resolution Plan’ was received. The ‘Adjudicating Authority’ passed the order dated June 19, 2019,

whereby it was directed that the Company was to be liquidated and Mr. Ram Ratan Modi/ Respondent was appointed as the Liquidator in this regard.

Thereafter, the 'Liquidator' proceeded to publish the public announcement dated June 21, 2019 inviting the creditors and other stakeholders of the Corporate Debtor to file their proof of claims on or before July 19, 2019.

32. This 'Appellate Tribunal' has taken into consideration that after the public announcement dated June 21, 2019, the 'Appellant' filed its proof of claim under 'Form-G' ("other claims") in terms of Regulation 20 of the Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 as an 'other creditor'. The said claim was filed before the 'Liquidator' on July 19, 2019 for Rs. 71,33,65,128/-. It is noted that the 'Liquidator'/ the 'Respondent' rejected the said claim of the 'Appellant' on the ground that such debt has not crystallised due to the continued execution of the Project by the Company in Liquidation. The 'Liquidator' cited the order of the 'Adjudicating Authority' dated July 31, 2019, wherein the liquidation of the Company as a going concern has been ordered in support of its decision to reject the claims of the 'Appellant' herein.

33. This 'Appellate Tribunal' is of considered view that the 'Liquidator' erred in not determining/ rejecting Appellant's claim of Rs. 71,33,65,128/-, full or in part as admissible as per law, on the ground the said claim is on account of delay in execution of the said two contracts, as well as there is no crystallisation of the debt claimed by the 'Appellant' and any claim of in the nature of damages, would require proper adjudication by a court of competent

jurisdiction. We observe that the 'Liquidator', unlike the 'Resolution Professional', is required to admit or reject the claim on the basis of documentary evidence submitted to him. The role of the 'Liquidator' is of *quasi-judicial* in contrast to role of the 'Resolution Professional' which is administrative.

34. This 'Appellate Tribunal' observe that the 'Liquidator' ought to have made the best estimate of the Appellant's claim as per Regulation 25 of the Liquidation Regulation, based on the information available on record before summarily rejecting the claim without even assigning proper reasoning for the same. The claim of the 'Appellant' are covered under the provisions of Section 3(6) of the 'Code', and falls under the category of "other creditor" in terms of Regulation 20 of the Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016, therefore, has a right to be included in the 'List of Stakeholders' of the Company in Liquidation as an 'other creditor'. Section 3 (6) of the 'Code' is reproduced herein below:

“6. Claim means:

- (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”*

(emphasis supplied)

35. This ‘Appellate Tribunal’ notes that in terms of Regulation No. 25 of the Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 where the amount claimed by a claimant is not precise due to any contingency or any other reason, the ‘Liquidator’ shall may best estimate of the amount of the claim based on information available with him.

36. It is an admitted fact the vide order dated 19.06.2019, the ‘Adjudicating Authority’ had directed the ‘Respondents’ to sell the ‘Corporate Debtor’ as a ‘going concern’ in terms of Regulation 32A of ‘Liquidation Regulations’. Thus, sale of ‘Corporate Debtor’ as going concern shall include transfer of both the assets and liabilities.

37. The same has also been held by this Tribunal in ***M/s. Visisth Services Ltd. vs. S.V. Ramani & Ors., CA (AT) (Ins) No. 896 of 2020***, which is reproduced as follows:

“9. It can be seen from the afore-noted discussion as well as Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 that Sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities. Paragraphs 3.2.1 and 4.2.1 of the afore-noted discussion paper amply specified that all assets and liabilities, which constitute an integral business of the Corporate Debtor Company would be transferred together and the consideration paid must be for the business of the Corporate Debtor. We conclude that Sale of a Company as a 'Going Concern' means sale of both assets and liabilities, if it is stated on 'as is where is basis.’”

(emphasis supplied)

38. This ‘Appellate Tribunal’ notes that Regulation 20, 25, 42 & 45 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 (‘Liquidation Regulations’) justify the aforesaid case. The relevant Regulations are reproduced as under :-

“20. Claims by other stakeholders.

(1) A person, claiming to be a stakeholder other than those under Regulations 17(1), 18(1), or 19(1), shall submit proof of claim to the liquidator in person, by post or by electronic means in Form G of Schedule II.

(2) The existence of the claim of the stakeholder may be proved on the basis of –

(a) the records available in an information utility, if any, or

(b) other relevant documents which adequately establish the claim, including any or all of the following-

(i) documentary evidence of notice demanding payment of unpaid amount or bank statements of the claimant showing that the claim has not been paid and an affidavit that the documentary evidence and bank statements are true, valid and genuine;

(ii) documentary or electronic evidence of his shareholding; and

(iii) an order of a court, tribunal or other authority that has adjudicated upon the non- payment of a claim, if any.

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.

42. Distribution.

(1) Subject to the provisions of section 53, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.

(2) The liquidator shall distribute the proceeds from realization within 29[ninety days] from the receipt of the amount to the stakeholders.

(3) The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made.

45. Final report prior to dissolution.

(1) When the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated.

(2) If the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same.

(3) [The liquidator shall submit an application along with the final report and the compliance certificate in form H to the Adjudicating Authority for –

(a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or

(b) for the dissolution of the corporate debtor, in cases not covered under clause (a).]"

(emphasis supplied)

39. This 'Appellate Tribunal' notes that in the present case pursuant to selling the 'Corporate Debtor' as a 'going concern', the 'Respondents' have entered into a memorandum of understanding) dated August 11, 2021 with "KSYEPL", wherein it has been agreed that 'KSYEPL' shall complete the balance work in the project. However, the claims/liabilities of the 'Appellant' arising out of the said project have nowhere been mentioned or dealt with in the 'MoU'. In fact, as per Clause V(c) of the 'MoU', it has been agreed that, all the previous expenses, claims, tax liabilities and liabilities of all kinds including such expenses and liabilities before 'CIRP' period, during 'CIRP' period and Liquidation Period prior to handover of Operational Control shall not be of the Successful Bidder and shall not be met from the receipts of the 'Corporate Debtor' which are received after the date. The 'Operational Control' was handed over to the 'KSYEPL'. This 'Appellate Tribunal' observes that the 'Respondents' failed miserably to understand that he is required to transfer 'Assets & Liabilities', together and not 'Assets' bereft of 'Liabilities' when the 'Corporate Debtor' is being sold as a going concern i.e. the entire business, 'Assets & Liabilities' including all contracts. The 'Respondents' could not have excluded the genuine claims of the 'Appellant' while entering into the 'MoU'.

40. This 'Appellate Tribunal' observes that as a normal commercial practice, the 'sale as a going concern' can only be made by transfer of 'Assets & Liabilities' together. The 'Liquidator' should have considered the claims of the 'Appellant' as liability of the 'Corporate Debtor' arising out of the contract, being transferred to 'KSYEPL'. It is felt that in the absence of any right available with the 'Appellant' under law to pursue his claims against company

under liquidation, the 'Appellant' could not have been deprived of its claims, while forcing the 'Appellant' to accept a new entity as a contractor. In a generic manner, the expression 'Assets & Liabilities' means the assets together with liabilities. It cannot be the case of the 'Respondents' that the 'Assets' on a particular date can be transferred sans the corresponding 'Liabilities'. The claims of the 'Appellant' were prima-facia payable by the 'Corporate Debtor'.

41. Based on above detailed analysis, this 'Appellate Tribunal' has no option but to set aside the 'impugned order' dated 16.04.2021 which is in contravention of various liquidation regulations as discussed in the preceding paragraphs. The matter is remanded back and both the parties are required to appear before the 'Adjudicating Authority' on 24th April, 2023. With the above observations and directions, the instant Comp. App (AT) (Ins.) No. 478 of 2021, stands 'Disposed of'. No costs. The connected pending 'Interlocutory Applications', if any, are 'Closed'.

42. This 'Tribunal', relevantly points out that it is not expressing its opinion on the 'merits' or 'demerits' of the case, and hence, remits back the case to the 'Adjudicating Authority' ('Tribunal'), with directions to look into all factual and legal aspects and decide the 'Petition' Denovo, on 'merits', by providing, 'adequate opportunity' of 'Hearing', to the respective 'Parties', and also, by adhering to the 'Principles of Natural Justice'. It is reiterated that the 'Adjudicating Authority', shall decide on the 'merits' of the main 'Petition', in a 'Fair', 'Just', in a 'Dispassionate Manner', by passing a 'Speaking Reasoned Order' (in qualitative and quantitative terms), preferably within 'twelve weeks'

from today, of course, uninfluenced and untrammelled with any of the
`Observations', made by this `Tribunal'.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran/RR