

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
10.10.2022 AT 10:30 AM THROUGH VIDEO CONFERENCE

IA (IBC) 515/2022 in CP (IB) No. 529/7/HDB/2018
U/s 7 of IBC, 2016

IN THE MATTER OF:

Punjab National Bank

... Financial Creditor

Vs

Lanco Vidarbha Thermal Power Ltd

... Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)**

ORDER

IA (IBC) 515/2022

Orders passed and recorded vide separate sheets. In the result, the application is allowed.

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - I**

IA No.515 of 2022
in
CP(IB) No. 529/7/HDB/2018
[U/s. 42 of the I&B Code, 2016]

**In the matter of Punjab National Bank vs. Lanco Vidarbha Thermal Power
Limited**

In the matter of:

Maharashtra State Electricity Distribution Company Ltd.

... Applicant

Vs.

Vijay Kumar Garg
Liquidator
Lanco Vidarbha Thermal Power Limited

... Respondent

Date of Order: 10.10.2022

Coram:

Hon'ble Dr. Venkata Rama Krishna Badarinath Nandula, Member (Judicial)
Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)

Parties / Counsels Present:

For the Petitioner : Udit Kishan & Associates, Mr. Amir Bhavani,
Advocates

For the Respondent : Mr. P. Ravi Charan, Mr. L. Venkateswara Rao,
Ms. Niharika Agarwal and Grancy John, Advocates

[PER : BENCH]

ORDER

I. This is an application filed on behalf of the Applicant, M/s.Maharashtra State Electricity Distribution Company Limited under Section 42 of the Insolvency and Bankruptcy Code, 2016 seeking to –

1. Set aside the Impugned Order dated 28.04.2022 passed by the Respondent;
2. Order and/or direct the Respondent to admit the Applicant’s claim amounting to Rs.752.28 crores in its entirety as a ‘Contingent Claim’;
3. Order and/or direct the Respondent that, pending the hearing and final disposal of this application, and or all proceeds of sale of assets of the Corporate Debtor be kept in an escrow account.

II. The gist of the Applicant’s brief is -

1. The Applicant is a Maharashtra Government Company and a deemed distribution licensee in the State of Maharashtra under Section 131 r/w 14 of the Electricity Act, 2003 (“EA 2003”).

2. The Applicant had accepted the offer of the Corporate Debtor for supply of electricity of 680 MWs on the terms and conditions contained in the RFP documents and executed Power Purchase Agreement on 25.09.2008 (PPA) and Corporate Debtor was obligated to fulfil the conditions provided in Article 3 of the PPA well within the time so as to meet the Scheduled Commercial Operation Date (SCOD), which is fixed as 04.09.2012. As per the PPA, the Corporate Debtor failed to provide Fuel Supply Agreement (FSA), Environmental Clearance (EC) for the Project in time and also failed to submit the additional bank guarantee. Owing to these violations, the Applicant was constrained to invoke and encash Bank Guarantee of Rs.51 crores and issued a letter dated 09.10.2013 demanding liquidated damages from the Corporate Debtor. In turn, as an afterthought the Corporate Debtor issued a termination notice dated 20.09.2014, which was rejected by the Applicant, vide letter dated 20.10.2014 calling upon the Corporate Debtor to perform its obligations under the PPA. Subsequently, the Corporate Debtor and the Applicant had filed Case No.136/2015 and 85/2016 before the Hon'ble Maharashtra Electricity Regulatory Commission (MERC), which were decided by a Common Order dated 02.05.2018, that held against the present Applicant. A copy of the Common Order dated 02.05.2018 is filed as Annexure A-3 of the Application.

3. Aggrieved by the Common Order, the Appellant preferred a Statutory Appeal No. 161/2018 under Section 111 of the EA 2003, before the Hon'ble Appellate Tribunal for Electricity (APTEL) to impugn and set aside the said Common Order, in which APTEL passed an Interim Order dated 26.07.2018 in IA No.758 of 2018 filed by the Applicant herein restraining the Corporate Debtor from taking any coercive action against the Applicant until further orders. Copies of the Interim Order dated 26.07.2018 passed by the APTEL in IA No.758 of 2018 and Appeal No.161 of 2018 are filed as Annexure-A4 of the application.
4. Subsequently on 03.10.2019, the Adjudicating Authority admitted the Company Petition No. CP(IB) 529/7/HDB/2018 and appointed the Respondent herein as Interim Resolution Professional. The Respondent after assuming charge as IRP filed an IA 228/2020 before the APTEL for the vacation of the Interim Order dated 26.07.2018, which was dismissed by the APTEL, vide order dated 30.03.2021, inter alia, with the following observation:

“Having heard the Learned Counsel for the Applicant (Resolution Professional for the Second Respondent in the main appeal), we do not find any justification for granting the order pressed for. The interim stay was granted on satisfaction that a prima facie case has been made out for the impugned decision of the Regulatory Commission to be put on hold. It is not a case where the Appellant is to recovery any money from the second

*Respondent, the Company facing insolvency proceedings. The decision of the Regulatory Commission is under challenge by the statutory appeal pending before us. In these circumstances, it cannot be presently said that the money in question is an asset to which the second Respondent is unexceptionally entitled to. **The balance of convenience lies in favour of continuity of the interim stay that was granted earlier. The Application is, thus, dismissed**". [Emphasis supplied].*

5. On 30.06.2021, the Adjudicating Authority passed the Liquidation Order and appointed the existing RP, Mr. Vijay Kumar Garg as Liquidator of the Corporate Debtor.
6. After assuming charge as Liquidator, the Respondent issued a Public Notice dated 05.07.2021 calling upon the creditors of the Corporate Debtor to submit their respective claims with proof on or before 30.07.2021. In turn, the Applicant filed its claim as an Operational Creditor for an amount of Rs.752.28 crores inclusive of interest, which is rejected by the Liquidator, vide letter dated 08.09.2021 by mere reliance on the Common Order dated 02.05.2018 passed by MERC, a copy of the same is filed as Annexure A-3 at page nos.31 to 159 of the application, and in disregard of the legal effect of the Appeal No.161 of 2018 filed before APTEL and Orders passed therein.

Copies of the claim and calculation of Liquidated Damages claimed by the Applicant are filed as Annexure-7 & Annexure-8 of the application respectively.

7. Aggrieved by the Respondent's letter dated 08.09.2021, the Applicant had filed an IA No.571/2021 seeking to impugn and set aside the order and the Adjudicating Authority vide order dated 07.02.2022 remanded the matter back to the Respondent for fresh consideration, wherein it was mentioned as –

“5.4 Therefore, it is clear that the Liquidator has dismissed the claim merely on the basis of the fact that Maharashtra Electricity Regulatory Commission had upheld the termination of Power Purchase Agreement and rejected the claim for liquidated damages notwithstanding the fact that an Appeal against the said order is pending. Therefore, the order of the Liquidator suffers from non-application of mind hence the order is not sustainable. It would be proper for the Liquidator to consider the same on merits of the petition rather than dismissal of the petition on the grounds stated above.

*6. We, therefore, hereby set aside the order of the Liquidator dated 08.09.2021 and remand the matter back to the Liquidator for fresh consideration of the same on merits without being influenced by the findings in the order under appeal of Maharashtra Electricity Regulatory Commission by giving reasonable opportunity to both parties.
[Emphasis supplied]*

8. Despite the above directions of the Adjudicating Authority, the Liquidator passed an Impugned Order dated 28.04.2022 rejecting the claim of the Applicant again by taking into consideration the merits of the findings in the Common Order dated 02.05.2018 of the Hon'ble MERC, which reads as follows:

“54. The observations made by MERC on delay in procurement of EC as well as FSA hold ground as on date. It would not be proper for the undersigned to sit in judgement over

an order passed by a judicial/quasi-judicial authority, which is MERC in the present case”.
[emphasis supplied]

9. The Impugned Order dated 28.04.2022 not only contravenes the letter and spirit of the Adjudicating Authority’s remand order dated 07.02.2022 but also disregards the applicable and relevant law and facts. The respondent has disregarded the provisions of Sections 3(6), 5(20), 5(21) and 38 to 41 of Insolvency & Bankruptcy Code and Regulations 16,17,23,25,28 and 30 of the IBBI (Liquidation Process) Regulations, 2016.
10. The Respondent’s Impugned Order again rejecting the claim of the Applicant is erroneous and in the teeth of this Hon’ble Tribunal’s remand order and as such ought to and should be set aside. The Respondent was only required to consider admission of the Applicant’s claim pending the appellate proceedings before APTEL, which if concluded in Applicant’s favour at a later stage, then could be effectuated under the provisions of Section 53 of the Code.
11. It is averred that Impugned Order is passed by Respondent on pre-conceived and pre-determined notices, which are misconceived in law and fact. The impugned order is not only influenced by the MERC’s Common Order but even otherwise, wherever the purported independent analysis of Applicant’s claim is made by the Respondent, even there is the reflection / reproduction of the

arguments of the Corporate Debtor as advanced before MERC. Therefore, the impugned order ought to be set aside and the Applicant's claim deserves to be admitted as a contingent claim pending outcome of the appellate proceedings before APTEL, which would eventually determine the payment obligation.

12. It is averred that the Respondent has overstepped his jurisdiction and overridden the jurisdiction of APTEL, in adjudication of the Applicant's claim on merits.

13. It is averred that there is no bar in admittance of claims as 'Contingent Claim', in the liquidation process of the Corporate Debtor.

14. Section 3(6) of the IBC, the term 'claim' has been defined as follows:

“(a) a right to payment whether or not such right is reduced to judgement 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 judgement fixed, matured, unmatured, disputed, undisputed, secured or unsecured”.

15. Regulation 25 of the Liquidation Regulations, 2016 clearly envisages contingent claims and provides –

“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” [Emphasis supplied]

Regulation 28 of the Liquidation Regulations, 2016, clearly provides for a person to prove for a claim whose payment was not yet due on the liquidation commencement date and is entitled to distribution in the same manner as any other stakeholder.

16. It is relied on the Circular No. IBBI/LIQ/40/2021, dated 04.03.2021 of the IBBI wherein IBBI provides for a format for filing of list of stakeholders by a Liquidator under Regulation 31(5)(d) of the Liquidation Regulations. A copy of the Circular is filed as Annexure A-9 of the application.
17. It is averred that in fact, contingent claims are allowed and have formed a separate category of claims in a plethora of CIRPs and Resolution Plans, despite the alleged absence of an explicit provision for the same. As such, the recognition and admission of such contingent claims cannot be disputed by the Respondent, merely on allegation that there is no explicit provision under the IB Code or the Liquidation Regulations, 2016.
18. It is averred that the Liquidator of the Corporate Debtor, Gontermann-Peipers India Limited had admitted the claim of the West Bengal State Electricity Distribution Company Limited, as a contingent claim, and this fact cannot be disregarded/denied by

the Respondent. A copy of the List of Stakeholders of Gontermann-Peipers India Limited is filed as Annexure-A-10 of the application.

III. The gist of the Respondent's brief is –

- i. It is denied that all the allegations and averments made in the application as being false and incorrect except those which are specifically admitted in the counter.
- ii. The Appellant had filed an IA No.571/2021 against the Respondent for rejecting the claim, vide letter dated 08.09.2021, which was disposed of directing the Respondent to reconsider the claim of the Appellant without being influenced by the findings in the Order under Appeal of Hon'ble Maharashtra Electricity Regulatory Commission (MERC) by giving reasonable opportunity to both sides, within two months from the date of receipt of order.
- iii. Due to pre-occupation, the Liquidator could not comply the Order dated 07.02.2022 and sought 30 days extension of time vide IA 451/2022 for verification and determination of the claim submitted by the Appellant, which was allowed and disposed of on 02.06.2022.

- iv. Pending adjudication of this IA, the Liquidator issued a detailed Rejection Letter on 28.04.2022 rejecting the claim of the Appellant.
- v. The Appellant has filed its claim for liquidated damages alleged to have been caused due to delay in providing power as per the Power Purchase Agreement (PPA) executed with Corporate Debtor, which was rejected by the Hon'ble MERC that is currently under the subject matter of appeal pending before the Hon'ble Appellate Tribunal for Electricity (APTEL). Appellant is claiming liquidated damages which are not yet crystallized by any court or tribunal. It is averred that it is not within the powers of the Liquidator to adjudicate such claims which require detailed evidence, fact finding and application of a judicial mind.
- vi. The Appellant has filed an Appeal No.161 of 2018 before the Hon'ble APTEL, in which the Hon'ble APTEL vide order dated 26.07.2018 directed the Corporate Debtor not to take any coercive steps.
- vii. It is averred that liquidated damages cannot form part of the claim as defined under Section 3(6) of the Code. Respondent has acted in accordance with the Code and IBBI (Liquidation Process) Regulations, 2016 and the provisions of the Code and Liquidation Regulations.

- viii. It is averred that the provisions of the Code and Liquidation Regulations do not explicitly deal with contingent claims. Therefore, in the absence of any explicit provisions, the claim of the Appellant cannot be kept in “contingent claim”.
- ix. It is denied that the claim dated 30.07.2021 filed by the Applicant on 28.04.2022 was rejected erroneously or the Respondent has disregard the applicant of relevant laws and facts or contravened the remanding order dated 07.02.2022 of this Hon’ble Tribunal.
- x. It is averred that Petition No.136/2015 and 85/2016 filed before the Hon’ble MERC and the Hon’ble MERC, vide its order dated 02.05.2018 was pleased to hold that the termination of the Power Purchase Agreement by the Corporate Debtor was valid and the Appellant was not entitled to liquidated damages. The Hon’ble MERC further directed the Appellant to return the encashed amount of the bank guarantee of Rs.51 crores to the Corporate Debtor within a month. Aggrieved by the said order, the Appellant had filed an appeal No.161/2018 before the Hon’ble APTEL and the same is pending for adjudication. Therefore, it is denied that the Corporate Debtor has no right to terminate the Power Purchase Agreement and is also not liable for refund of the Bank Guarantee amount and also denied that the Appellant is entitled to recover the liquidated damages.

- xi. It is averred that the Order dated 02.05.2018 passed by the Hon'ble MERC continues to exist in law and hold good till the time Hon'ble APTEL decides the matter finally on merits.
- xii. It is averred that the Hon'ble APTEL with the consent of parties has made absolute the interim order which was operating pending adjudication of the appeal before it.
- xiii. It is averred that the Respondent followed the provisions of the Code and Liquidation Regulations while passing the Rejection Order. Therefore, the present application is liable to be dismissed and the question of Appellant's claim admitting as contingent claim does not apply.
- xiv. It is denied that it has over stepped his jurisdiction and over ridden the jurisdiction of the Hon'ble APTEL. Further denied that he has assumed and overridden the exclusive and statutory appellate powers and functions of the Hon'ble APTEL provided under EA, 2003.
- xv. It is averred that absence of any explicit provisions the claim of the Appellant cannot be kept in "Contingent Claim".

IV. The gist of the Applicant's brief in Rejoinder is –

- i. It is denied that the Liquidator has provided detailed factual reasons for rejection of the claim of the Applicant based on the documents and the hearing. On the contrary, it is averred that the Liquidator in contravention of the Order of the Hon'ble Tribunal dated 07.02.2022 has relied on the Order dated 02.05.2018 of the Hon'ble MERC while passing the Impugned Order. A copy of the Order dated 07.02.2022 is filed as Annexure A-11.
- ii. It is averred that when the matter is sub-judice before the Hon'ble APTEL, the Liquidator could not have rejected the claim of the Applicant. The Liquidator ought to and should have recorded the claim of the Applicant as a "Contingent Claim" to attain finality on the decision of the Hon'ble APTEL.
- iii. It is averred that when the statutory appellate body under the Electricity Act has acknowledged that the Applicant has a prima facie case in its favour, it is not for the Liquidator to extinguish the claim of the Applicant by rejecting the same.
- iv. It is denied that the Interim Order passed by the Hon'ble APTEL has no bearing on the main appeal. On the contrary, it is averred that the grant of an interim relief establishes that the Hon'ble APTEL is convinced of the prima facie case in favour of the

Applicant and has therefore granted protection to the Applicant till the final disposal of the appeal. However, contrary to such judicial orders, the Liquidator sought to render the appeal pending before the Hon'ble APTEL as infructuous.

- v. The Liquidator has erred by relying on the provisions of Section 3(6) of the Code to suggest that the claim of the Applicant cannot be allowed, which reads as follows:

“(a) a right to payment, whether or not such right is reduced to judgement fixed, disputed, undisputed, legal, equitable, secured or unsecured.

(b) right to remedy for breach 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]

The Applicant relied on clause (b) of the said provision.

- vi. It is denied that the Liquidator has acted in accordance with the Code. It is averred that since the claim of the Applicant is squarely covered, as such, the Liquidator clearly acted in contravention of his duties in passing the Impugned Order.
- vii. It is denied that the Applicant has no claim against the Corporate Debtor merely because the adjudication of the damages sought by the Applicant are not finalised. The definition of claim as

prescribed under the Code explicitly covers the disputed claims as well. In any event when the Applicant was prudent to approach the Hon'ble APTEL as per law for challenging the order of the Hon'ble MERC, then the Liquidator ought to and should have admitted the claim of the Applicant as a contingent claim, instead of overreaching its authority and upholding the order of Hon'ble MERC and thereby attempting to render the appeal of the Applicant as infructuous.

- V. Both the parties filed the written submissions.
- VI. In the light of the context as afore stated, the Point that emerges for consideration by this Adjudicating Authority is –

Point:

Whether the findings of the Liquidator dated 28.04.2022 while rejecting the claim of the Applicant are not in consonance with the directions passed by this Adjudicating Authority vide Order dated 07.02.2022? If so, whether the order is *sustainable*?

- VII. We have heard Mr.Amir Bhavani, Learned Counsel for Applicant and Mr. P. Ravi Charan, Learned Counsel for Respondent and perused the record.
- VIII. Admittedly, on 07.02.2022 this Adjudicating Authority set aside the communication of the Liquidator dated 08.09.2021 and remanded the matter back to the Liquidator for fresh consideration of the same on

merits without being influenced by the findings in the Order under Appeal passed by the Maharashtra Electricity Regulatory Commission (MERC), after giving reasonable opportunity to both the parties. It is now alleged that in utter disregard to the above Order of this Adjudicating Authority, the Liquidator has disposed of the matter, observing that,

“54. In this view, the Order dated 02.05.2018 passed by MERC continues to exist in law, and holds good till the time APTEL decides the matter finally, on its merits. The observations made by MERC on delay in procurement of EC as well as FSA hold ground as on date. It would not be proper for the undersigned to sit in judgement over an order passed by a judicial/quasi-judicial authority, which is MERC in the present case”.
[emphasis supplied]

In so far as dealing with the merits of the claim by the Liquidator is concerned, the Learned Counsel for the Applicant would submit that though the claim of the Applicant squarely falls under Section 3(6) of the Code, the Liquidator had erroneously observed that the claim of the Applicant is not a ‘contingent claim’. Ld. Counsel further submitted that the rulings relied upon by the Applicant were not considered by the Liquidator. Thus, submitting Ld. Counsel prayed the Tribunal to set aside the Order dated 28.04.2022 passed by the Liquidator.

The Learned Counsel for the Liquidator, however, would contend that the claim of the Applicant since rejected by the Maharashtra Electricity

Regulatory Commission besides that the same does not fall under Section 3(6) of the Code, the same has been rightly rejected by the Liquidator. The appeal is therefore is devoid of any merit hence liable to be dismissed.

IX. In the above backdrop, we have carefully perused the impugned communication of the Liquidator dated 28.04.2022. It is pertinent to state here that, in our Order dated 07.02.2022 whereunder we remanded the matter back to the Liquidator for fresh consideration on merits, have categorically observed that the *Liquidator shall* consider the matter afresh, *un influenced by the findings in the Order of Maharashtra Electricity Regulatory Commission* . However, a perusal of the Order dated 28.04.2022 wherein the Liquidator had stated that –

“54. In this view, the Order dated 02.05.2018 passed by MERC continues to exist in law, and holds good till the time APTEL decides the matter finally, on its merits. The observations made by MERC on delay in procurement f EC as well as FSA hold ground as on date. It would not be proper for the undersigned to sit in judgement over an order passed by a judicial/quasi-judicial authority, which is MERC in the present case”.

[emphasis supplied]

Thus, as rightly contended by the Learned Counsel for the Applicant the Liquidator has once again, despite specific direction by this Adjudicating Authority *to dispose of the matter afresh un influenced by the findings in the order of MERC*, has relied on the Order of the MERC, thus the Liquidator has breached the above direction of this Tribunal. The observation of the Liquidator that “it would not be

proper for the undersigned to sit in judgement over an order passed by a judicial/quasi-judicial authority, is not only impudent but also contemptuous in much as the Liquidator has chooses to do the act which he was prohibited from doing, by this Tribunal. When this Adjudicating Authority has directed the Liquidator to dispose of the claim of the Appellant *un influenced by the findings in the order of MERC*, dismissing the claim observing that ‘it would not be proper for the undersigned to sit in judgement over an order passed by a judicial/quasi-judicial authority, is nothing but a deliberate defiance of the Order of this Tribunal dated 07.02.2022. We therefore express our displeasure towards the Liquidator for not carrying out our Orders dated 07.02.2022.

- X. Even the findings of the Liquidator on the plea of the Applicant that its claim is ‘contingent claim’ are unacceptable as relevant provisions in IB Code are not even discussed. The IBBI Circular dated 04.03.2021 relied on by the Appellant in this regard is completely ignored by the Liquidator. The manner in which the claim was disposed of speaks volumes about how overwhelmingly the Liquidator got influenced by the findings in the order of MERC which is under Appeal, even though prohibited from being so.
- XI. We, therefore, have no hesitation to say that the Order under Appeal is in total violation of the directions of this Adjudicating Authority besides not sustainable on merits as well. We, therefore, hereby set aside the same.

XII. Therefore, IA 515/2022 in CP 529/7/HDB/2018 is accordingly allowed. The communication of the Liquidator dated 28.04.2022 is set aside and the matter is sent back to the Liquidator, *for fresh consideration un influenced by the findings in the order of MERC*, by giving due opportunity to both sides.

XIII. In the result, IA 515/2022 is allowed accordingly. No costs.

Sd/-

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

Sd/-

Dr.N.V.RAMA KRISHNA BADARINATH
MEMBER (JUDICIAL)

Syamala