

## **NCLAT holds that taking benefit of supply of electricity during CIRP carries with it an obligation to pay for such supply.**

In its decision in *Shailesh Verma, Resolution Professional of Lavasa Corporation Limited vs. Maharashtra State Electricity Distribution Company Limited*, a 3 (three) member bench of the Hon'ble National Company Law Appellate Tribunal ("NCLAT") has held that continuation of electricity supply to a corporate debtor during the subsistence of the corporate insolvency resolution process ("CIRP") is subject to payment for such supply.

### **Brief Facts**

1. Lavasa Corporation Limited ("**Corporate Debtor**") entered into a distribution franchisee agreement ("**DFA**") with Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**") under which, the MSEDCL was to supply electricity to the Corporate Debtor. In October 2019, the DFA expired and MSEDCL expressed its intention not to renew the DFA.
2. Pursuant to an application filed by an operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), on August 30, 2018 the CIRP of the Corporate Debtor was initiated by the NCLT, Mumbai ("**NCLT**").
3. After taking charge of the Corporate Debtor, the Resolution Professional ("**RP**") requested MSEDCL to continue with the supply of electricity to the Corporate Debtor. MSEDCL rejected the request made by the RP and expressed its intention not to renew the DFA.
4. Considering the stand taken by MSEDCL, the RP was constrained to prefer an application before the NCLT *inter alia* seeking the indulgence of the NCLT in directing MSEDCL to continue supply of electricity during the subsistence of the CIRP. In response to the application so preferred, MSEDCL submitted that electricity was indeed supplied during the CIRP however, payments towards such supply remained outstanding.
5. On the issue, the NCLT held as follows;
 

*"In view of the above, this Bench is of the considered view that the Applicant is directed to pay the outstanding dues to the Respondent during the CIRP period within 90 days from the date of pronouncement of the order and also the Respondent to supply uninterrupted connection of electricity to the Corporate Debtor to keep the Corporate Debtor as a going concern and not to takeover the Distribution Franchisee Agreement."*
6. Being aggrieved by the limited ruling by the NCLT that the RP was to ensure payment of the outstanding electricity dues to MSEDCL the RP preferred an appeal before the NCLAT.

## Issue

The limited question for consideration before the NCLAT was whether the NCLAT was right in directing in issuing a direction to the RP to make payment of outstanding electricity dues to MSEDCL during the pendency of the CIRP.

## Analysis

1. The NCLAT analyzed the scope and purport of Section 14 of the Code and held thus:
  - (a) Supply of essential goods or services to a corporate debtor cannot be terminated / suspended / interrupted at a time when the moratorium is in force [Section 14(2) of the Code]; and
  - (b) In a case where a resolution professional considers supply of good or services as critical to protect and preserve the value of the corporate debtor and to maintain its status as a going concern, then such supply of goods or services cannot be terminated / suspended / interrupted except when the corporate debtor has not paid for such dues during the moratorium period [Section 14(2-A) of the Code].
2. Reliance was also placed on the statement of objects and reasons behind the amendment to Section 14 of the Code to demonstrate that the object for amending Section 14 of the Code was “*in order to fill the critical gaps in the corporate insolvency framework*”. Section 14(2) of the Code, as originally enacted merely provided for supply of essential goods or services to the Corporate Debtor not being terminated during the moratorium period. The introduction of Section 14(2-A) brought in a qualification that if a resolution professional is of the view that a particular supply of goods or services is critical to protect and preserve the value of the corporate debtor, then such supply of goods or services cannot be terminated / suspended / interrupted except in the case of non-payment towards such supply.
3. It was not open for the RP to contend that MSEDCL was obliged to continue supplying electricity even if the payments towards such electricity dues have not been made. Given that the RP has concluded that the supply of electricity is “critical to protect and preserve the value of the corporate debtor and maintain its going concern status”, Section 14(2-A) of the Code is attracted.
4. The NCLAT also held that in the event of non-payment of outstanding dues towards supply of essential goods or services considered as critical, it is always open for the supplier to terminate / suspend supply of such goods or services.

## JSA Comment

From the ruling of the NCLAT, the position that emerges is that that a benefit cannot be enjoyed by the corporate debtor *de hors* the payment obligations. This ruling could open up further avenues for banks/financial institutions to provide “*rescue financing*” to corporate debtors during the pendency of the CIRP. A corporate debtor who is undergoing CIRP is required to make payments towards essential goods or supplies. Being financially distressed, a corporate debtor requires access to external finance towards working capital requirements. In a situation where a resolution professional identifies a particular supply to be considered critical (for which payments are required to be made), interim finance can be availed by the resolution professional. This approach would be beneficial for all stakeholders concerned, as (a) the supplier of such goods or services would be paid; (b) going concern status of the corporate debtor would be maintained in absence of any imminent threat of termination / suspension of the supply; and (c) the bank / financial institution providing the interim finance would be paid in full and in priority, as such interim finance would form part of CIRP costs.

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