

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH**

**PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY – MEMBER JUDICIAL**

**PRESENT: HON'BLE SHRI BINOD KUMAR SINAH – MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 19.03.2020 AT 10.30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA NO. 1128/2019 in CP(IB) NO. 492/7/HDB/2019
NAME OF THE COMPANY	KSK Mahanadi Power Company Ltd
NAME OF THE PETITIONER(S)	Power Finance Corporation
NAME OF THE RESPONDENT(S)	KSK Mahanadi Power Company Ltd
UNDER SECTION	7 OF IBC

**Counsel for Petitioner(s):**

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

**Counsel for Respondent(s):**

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

**ORDER**

IA No.1128/2019

Order pronounced in open court. IA disposed of vide separate order.

  
**MEMBER TECHNICAL**

  
**MEMBER JUDICIAL**

AS



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH, HYDERABAD**

**IA No.1128/2019**

In CP (IB) No.492/7/HDB/2019

Under section 60(5) of the IB Code, 2016.

In the matter of:

**KSK Mahanadi Power Company Ltd.**

**SEPCO Electric Power Construction Corporation**

No.10567, Jingshi Road, Jinan, Shandong,  
People's Republic of China

....Applicant

Vs

**Mr.Mahender Khandelwal**

Interim Resolution Professional of  
M/s.KSK Mahanadi Power Company Ltd.

Having office at:

Pricewaterhouse Coopers Pvt LTd  
Plot #Y-14, Block EP, Sector V,  
Salt Lake, Kolkata-700091.

...Respondent No.1

**M/s KSK Mahanadi Power Company Ltd.**

Through its Interim Resolution Professional

Registered office at

8-2-293/82/A/431/A

Road No.22, Jubilee Hills,  
Hyderabad – 500033, India.

....Respondent No.2/  
Corporate Debtor

**The Companies of Creditors (CoC)**

of M/s.KSK Mahanadi Power Company Ltd.

represented by the Lead Lender,

Power finance Corporation.

...Respondent No.3

**Date of Order : 19.03.2020**

**Coram: K. Anantha Padmanabha Swamy, Member Judicial  
Dr. Binod Kumar Sinha, Member Technical**





Parties/ Counsels Present:-

For the Applicant : Mr. S.Niranjan Reddy, Senior counsel along with Mr. P.Mohith Reddy and Mr. Abhinav Raghuvanshi, Counsels.

For the Respondents : Mr. R. Raghunandan Rao, Senior counsel along with Mr. Allwin Godwin, Counsel.

Per: K. Anantha Padmanabha Swamy Member Judicial

**ORDER**

1. Under consideration is a Interlocutory Application bearing IA No. 1128 of 2019 in CP (IB) No.492/07/HDB/2019 filed by M/s. SEPCO Electric Power Construction Corporation (Applicant) under section 60(5) of the Insolvency and Bankruptcy Code, 2016, Read with Rule 11 of NCLT Rules, 2016 inter-alia, seeking the following prayers in view of the decision taken by the Resolution Professional (RP) dated 21.11.2019, whereby Resolution Professional rejected Applicant's claim against the Financial debt owed by the Corporate Debtor (M/s. KSK Mahanadi Power Company Ltd).

- 1.1 Declaring the Applicant as a Financial Creditor of the Corporate Debtor under the Code;
- 1.2 Directing the Resolution Professional (R1) admit the claim of the Applicant and to include the Applicant in the list of Financial Creditors of the Corporate Debtor;
- 1.3 That pending hearing and final disposal of the present Application, the Corporate Insolvency Resolution Process of the Corporate Debtor be stayed;







- 1.4 That pending the hearing and final disposal of the present Application, the R1 be restrained from holding any meeting of the Committee of the Creditors;
- 1.5 That pending the hearing and final disposal of the present Application, the R1 be restrained from processing and accepting any resolution plan;
2. The brief facts, as alleged by the Applicant are as follows:
  - 2.1. That the petition bearing CP (IB) No.492/7/HDB/2019 was admitted for CIRP vide this Adjudicating Authority's order dated 03.10.2019 and Mr. Mahender Khandelwal having IP Regn. No.IBBI/IPA-001/IP-P00033/2016-17/10086) was appointed as the Interim Resolution Professional (IRP). Subsequently, vide order dated 07.11.2019 in the said CP, he was appointed as Resolution Professional (RP) of the Corporate Debtor herein.
  - 2.2. The Applicant herein i.e., M/s. SEPCO Electric Power Construction Corporation is the EPC contractor of the Corporate Debtor herein for supply, service and construction of Corporate Debtor's 3600 MW power project at Nariara, Janjgir District, Chattisgarh. The Applicant had executed six contracts for the entire work and supplies of the project and accordingly raised invoices which were acknowledged and admitted by the Corporate Debtor (R2).
  - 2.3. That the Applicant, being the EPC contractor of the Corporate Debtor carried out substantive works and supplies for the project and raised invoices which were admitted and acknowledged by the Corporate Debtor. Due to financial difficulties, the Corporate Debtor failed to make payment of admitted invoices within 21 days and they remained



unpaid from the year 2012 onwards despite several periodical reminders and multiple default notices.

- 2.4. That due to the above difficulties, the Corporate Debtor approached the Applicant to execute the Supplementary Agreement dated 31.03.2016 with the Applicant to the EPC Contracts. The said Supplementary Agreement provided for a schedule for release of admitted payments by the Corporate Debtor along with an interest of 5% on the admitted dues. Under the Supplementary Agreement an amount of USD 120.260 million, which was an admitted payment, was converted into a loan amount with interest of 5% PA and classified as “Deferred Payment”. Thereafter, the Applicant agreed to pay the said admitted deferred amount into various instalments – thereby converting the said amounts into financial debt payable by the Corporate Debtor. As per clause 1.4.1 of the Supplementary Agreements, the Applicant also imposed an interest of 5% p.a. especially as against the aforementioned “Deferred Payment”.
- 2.5. That pursuant to the said Agreement, the Corporate Debtor paid amount of USD 29.528 million out of the total amount of USD 120.260 million and defaulted in further payment of the remaining amount i.e., USD 90 million.
- 2.6. That Applicant herein filed a petition under section 7 of the IB Code, 2016, claiming its financial debt owed by the Corporate Debtor. At the same time, the consortium of lenders of the Corporate Debtor also filed their section 7 petition vide CP(IB)No.492/7/HDB/2019, for initiation of CIRP proceeding against the Corporate Debtor. While deciding the section 7 application of the lenders of the Corporate Debtor, this



Adjudicating Authority ordered CIRP proceeding against the Corporate Debtor and directed Applicant herein to approach the RP (Respondent No.1 herein) for its claim.

- 2.7. In view of the order of this Adjudicating Authority vide its order dated 03.10.2019, the Applicant herein, filed its claim under Form C on 16.10.2019 towards the financial debt and the RP rejected the said claim with the following observation:

*"Further to our email below, kindly note that as part of the process of verification of your claim, the Resolution Professional (RP) has consulted the RP legal counsel on the matter.*

*As per the legal opinion obtained, in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 ('Code'), the amounts claimed by you as Financial Creditor claim under Form-C are in the nature of operational debt and not financial debt.*

*We therefore request you to file an updated Form-B as Operational Creditor, taking into consideration the above points, so that we can review and verify the same."*

- 2.8. That the RP rejected the Applicant's claim as a financial debt, without assigning any reason to the same and the rejection of the claim towards the financial debt was done on the basis of some internal legal opinion, which was neither shared with Applicant nor clarification was sought by the RP before the rejection of the claim.
- 2.9. Reiterating the above averments, the counsel for the Applicant prayed to allow this Application.
3. Respondent No.1 (RP) filed counter/reply on 20.12.2019 to the Application filed by the Applicant stating that the relief sought by the Applicant is erroneous, without any merit and prayed to dismiss the present application on the following grounds:





- 3.1. That the Applicant and the Corporate Debtor entered into the Supplementary Agreement, providing for a repayment plan for the outstanding amounts under the EPC Contracts along with interest. It is wholly denied that simply by making the payment outstanding under the contracts as deferred payments along with interest, this does not change the nature of the debt from an operational debt into a financial debt. The Applicant has erred in understanding the nature of a financial debt as defined in the IBC, as opposed to an operational debt.
- 3.2. That the Supplementary Agreement in no way converts the operational debt into a financial debt. The Applicant has in fact, admitted that the amounts accrued and unpaid under the EPC contracts were operational debts and not financial debts.
- 3.3. That the Supplementary Agreement *"provided for a schedule for release of admitted payments by the Corporate Debtor to the Applicant and the consequent way forward for the completion of the balance work, which were based on the Corporate Debtor's release of payments."* This clearly shows the nature of the Supplementary Agreement as it simply restructures the obligations of both the Applicant and the Corporate Debtor under the EPC contracts and does not constitute a loan advanced by the Applicant to Corporate Debtor.
- 3.4. That the Applicant has admitted that the debt due to the Applicant was originally in the nature of an operational debt. It is submitted that the Applicant has erred in reasoning that structuring the payment of the debts due into deferred payment with interest, would convert the amounts due into financial debts. Respondents No.1 denies the





statement made by the Applicant that the deferred payments were utilised for the working capital purposes of the Corporate Debtor.

- 3.5. That the email from RP to the Applicant dated 21.11.2019, communicating the failure of the claim filed by the Applicant under Form-C to pass the verification by RP is not in the nature of an order. Resolution Professional only verified the submitted claim which is not in the nature of a financial debt under the IBC and permitted the Applicant to re-file the claim as an operational creditor.
- 3.6. That R1 cannot adjudicate on any claim and that the only authority given to the Resolution professional is the collation of claim which he has duly complied with. However, the Applicant has failed to peruse the duty of the Resolution Professional to verify claims under Regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. Verification of the claims to meet the requirements as stipulated under the IBC is not a quasi-judicial function but a purely administrative function of checking whether the claims filed are in compliance with the law. The email dated 21.11.2019 clearly provides the reason for not admitting the financial claim of the Applicant, by stating that the debts owed by the Corporate Debtor to the Applicant under the Supplementary Agreement are in the nature of operational debts.
- 3.7. That the deferred payments and the interest component on the deferred payments does not change the nature of the debt due from the Corporate Debtor from operational debt into financial debt. It is also not clear as to what these deferred payments along with interest are required to be made by the Corporate Debtor as there has been no



underlying monetary disbursement from the Applicant to Corporate Debtor. It can only be inferred, that the payments are to be made as consideration for services already rendered by the Applicant to Corporate Debtor.

- 3.8. That RP does not have the authority to determine the nature of the debt, whether it is a financial debt or an operational debt. It is admitted that the R1 as the Resolution Professional of R2 i.e., the Corporate Debtor has no adjudicatory powers under the IBC. The communication by RP was not in any manner an adjudicatory order, but simply it is an intimation of the discrepancy regarding the claim made by the Applicant in Form C, calling for rectification of such discrepancy by filing the claim as an operational creditor instead of a financial creditor.
4. Further, the Applicant filed Rejoinder/written submissions to the reply filed by the R1 (RP) and the submissions are hereunder:
- 4.1. That the email of the RP constituted an order, since it has decided the nature of the debt and claim of the Applicant, which was not in the nature of request for correction of an error. The said order finally decided the nature of the claim of the Applicant and leaves it with no avenues left but to approach this Adjudicating Authority.
- 4.2. The Applicant reiterated its reliance upon the case of *Swiss Ribbons* and stated further that this was a highly complex transaction which even necessitated taking of a legal opinion by the RP. Thus, this was not akin to a grossly time-barred debt. Moreover, none of the other members of the CoC have stepped forward in the present matter to deny the fact that the said debt is financial debt in nature. Accordingly, the RP being vested with the power to collate the claims, cannot *suo*



*mottu* take it upon itself, to start classifying Financial Creditors into operational ones *de hors* its powers.

4.3. That “Deferred Payment” in the nature of financial debts were utilised for working capital requirements by the Respondent. As is clear from the perusal of the Supplementary Agreement, these payments were not linked with any further supply of goods and services and had a distinct interest rate. The sole purpose of carving out a separate category of deferred payment with a separate interest rate was for the Applicant to realise the time value of money. Moreover, like any loan, the entire amount could be called by the Applicant in case of default of any instalment. Accordingly, these deferred payments patently fall within the classification of loans by their very nature.

4.4. The Applicant had also relied upon the decision of the NCLT Mumbai in the matter of *IL & FS Financial Services Ltd Vs La Fin Financial Services Pvt Ltd [2018] SCC online NCLT 11437 (Bom) [paras 11 & 12]* for the above proposition, wherein the Tribunal held that section 5(8) of the Code was capable of a wide ambit. As a matter of fact, in the said precedent, the NCLT held that even time value of money is not necessary and if a transaction has been “raised” with an objective of economic gain or commercial effect, the same may also constitute ‘*financial debt*’. This part of the decision was upheld by the Hon’ble NCLAT in the case of *Pushpa Shah & Anr Vs IL & FS Financial Services Ltd & Anr.* and was only subsequently *set aside* by the Hon’ble Supreme Court on the point of limitation.

4.5. That the transaction in the present case constitutes financial debt due to the following reasons:



- a) The interest rate provided within Clause 1.4.1 was distinct from the contractual interest rate for delayed invoices and the Deferred Payments were not linked to providing of any goods or services.
- b) In any case, section 5(8)(f) provides for all 'transactions' having the commercial effect of a borrowing. 'Transactions' within section 3(33) of the Code covers a very wide nature of transactions.
- c) The present transaction is different from a mere delayed invoice payment for the reason that in March 2016, parties agreed to change the nature of part of the debt (i.e., the Deferred Payment) vide a new instrument of Supplementary Agreement.
- d) It is not necessary that a contract between a builder and the owner cannot be one of a loan. In this regard, the Applicant relied upon the Privy Council judgment of *Beninson & Others Vs Shiber [(1946) 59 LW 595 (PC)]* whereby, the Hon'ble Council held that the nature of the transaction has to be looked into, to determine whether the same is a loan. As a matter of fact, the Hon'ble Council also held that it was not necessary for loan that a sum of money was to be physically handed over to the borrower.

4.6. Reiterating the above, the counsel for the Applicant prayed to allow the present application

5. Heard both the sides and perused the records.

6. It is not in dispute that the original EPC contracts entered into between the Applicant herein and Corporate Debtor are for supply of goods and services. The Supplementary Agreement entered into between the Applicant and Corporate Debtor plays key role to adjudicate upon the issue in hand. The preamble to the Supplementary Agreement reflects KMPCL



as “Purchaser” and SEPCO as “Supplier”. Further, after the preamble portion of the supplementary agreement, the said agreement reads as follows:

“ *WHEREAS:*


*Both SEPCO & KMPCL (Parties) agree upon the following clarifications, to the contracts & their amendments in vogue (emphasis supplied).*

.....”

Para 1.5 of the Supplementary Agreement reads as follows:

“*1.5 Foreign Exchange Variation (FEV)*

*..... If any default by KMPCL against making the deferred payment as per Annexure-I herewith, the FEV clause in the original contract shall be applicable (emphasis laid)”*

7. It is a settled position of Law that no agreement can be termed as a supplementary agreement if there is no principal agreement. Without the principal agreement, the supplementary agreement cannot stand on its own. In the instant case, the Supplementary Agreement is not a separate agreement but they are additions to the Original EPC contracts and their amendments in terms of the clauses contained therein. And, therefore, the Original EPC contracts, their amendments and supplementary contract are to be read together as comprehensive single document and not otherwise. It is also noted that nowhere in the Supplementary Agreement it has been specifically stated that the amounts due i.e. deferred payments are agreed to be treated as financial debt to the Applicant herein. Even the parties to the supplementary agreement are defined as ‘Purchaser’ and ‘Supplier’ meaning thereby that the agreement is for supply of goods and services and payments thereto. It is observed that the Supplementary Agreement was entered not to treat the transaction between KMPCL and SEPCO as a financial transaction. This become evident from Clause 1.6 of the agreement that reads as under:
- 



defined as 'Purchaser' and 'Supplier' meaning thereby that the agreement is for supply of goods and services and payments thereto. It is observed that the Supplementary Agreement was entered not to treat the transaction between KMPCL and SEPCO as a financial transaction. This become evident from Clause 1.6 of the agreement that reads as under:

*"1.6 Contract schedule/Project completion Schedule*

- (a) The "First Commissioning" means "First Synchronisation";*
- (b) Both parties agreed that RRT within 3 months from First Synchronisation because equipment and materials of Unit 2&5 lying idle for long which requires long period for commissioning and testing;*
- (c) The First Commissioning is subject to:*
  - SEPCO and KMPCL shall take responsibility to divert one of the generators under manufacturing at DFEM works to ensure generator for unit 2 to dispatch from the manufacture works by 30<sup>th</sup> May, 2016 and reach site by 31<sup>st</sup> August, 2016.*
  - SEPCO and KMPCL shall take responsibility to ensure Coal Mills for unit 2 to dispatch from the manufacturer works by 30<sup>th</sup> June, 2016 and reach site by 30<sup>th</sup> September, 2016 and completion of erection by 15<sup>th</sup> November, 2016.*
  - SEPCO and KMPCL shall work together to arrange sufficient numbers of visa for Chinese workers to meet site requirements.*
  - KMPCL and SEPCO should make their respective documents for custom clearance ready to ensure to deliver equipment and materials to site on time."*

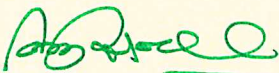
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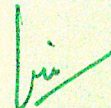


8. Thus, it is clear that the supplementary agreement is nothing but an extension of the original agreement between the Applicant herein and the Corporate Debtor. Therefore, the supplementary agreement is to be read as a part and parcel of the original agreement and in that case all clauses of the principal agreement will only exist unless explicitly modified in the supplementary agreement. Thus it clearly establishes that the said transaction between the parties are operational transactions and the debt arising out of such transactions can only be of the nature of an 'Operational Debt'. Hence, this Adjudicating Authority does not find any infirmity in the decision taken by the RP with respect to the claim submitted by the Applicant.

9. Accordingly, the instant Application bearing IA No. 1128 of 2019 in CP (IB) No.492/7/HDB/2019 is dismissed. No order as to costs.



**Dr. Binod Kumar Sinha**  
Member Technical



**K. Anantha Padmanabha Swamy**  
Member Judicial