

\$~9

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 26th August, 2021

+ **W.P.(C) 4999/2020 & CM APPL. 17996/2020**

CJ DARCL LOGISTICS LTD. Petitioner

Through: Mr. Anil Goel, Advocate

versus

UNION OF INDIA AND ANOTHER Respondents

Through: Mr. Anil Soni, CGSC with Mr.
Devesh Dubey, Advocates for
Respondent No.1/UOI

Mr. Vivek Sibal, Sr. Advocate with
Mr. Rahul Sharma, Advocates for
Respondent No.2

Mr. Kuldeep Verma, Liquidator HPC
Limited/Respondent No.2

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through video conferencing.
2. The Petitioner-company is a Logistics and Transportation Company which has filed the present petition against the Union of India and M/s Hindustan Paper Corporation Limited (*hereinafter, 'HPCL'*), seeking directions for payment of the dues of the company to the tune of Rs.6,11,63,015/- and Rs.23 lakhs, which was deposited as security deposit, along with interest at 18% per annum.
3. The case of the Petitioner is that it had participated in a tender for providing transport services. It was declared successful and it had rendered transport services to HPCL, which service was fully performed and the

contract was discharged. However, dues to the tune of more than Rs.6 crores were not paid by HPCL. Hence, the Petitioner wrote a letter in September, 2016 to the Union of India to intervene and sought a direction for payment of the said amount. In this letter, the Petitioner mentioned how a meeting had been held between the Petitioner and Additional Secretary, Ministry of Heavy Industries, in which HPCL assured the Petitioner that the outstanding amount would be paid quickly. On the basis of this assurance and in order to maintain a longstanding relationship with HPCL, the Petitioner agreed to their request to undertake further transportation work. Since then, though meetings have been held between the Petitioner and HPCL and the Petitioner served a demand notice on HPCL, but the outstanding amount was not paid to the Petitioner.

4. Thus, the Petitioner-company filed a petition under Section 9 of the Insolvency & Bankruptcy Code, 2016 (*hereinafter*, 'IBC') before the NCLT. Prior to the said petition being taken up, in an application filed by another operational creditor - M/s Alloys and Metals India Limited, the Corporate Insolvency Resolution Process (*hereinafter*, 'CIRP') was initiated by the NCLT against HPCL on 13th June, 2018.

5. HPCL has now gone into liquidation vide order dated 2nd May, 2019 and the liquidator was appointed by the NCLT on 14th May, 2019. Upon being appointed, the liquidator asked all the creditors to file their claims. The Petitioner-company has submitted its claim for the entire amount which was due, including the security deposit, which reads as under:

3.	TOTAL AMOUNT OF CLAIM, INCLUDING ANY INTEREST, AS AT THE LIQUIDATION	Principal: Rs. 6,11,63,015/- (Six Crore Eleven Lacs Sixty Three Thousand and Fifteen only)
----	--	--

	COMMENCEMENT DATE AND DETAILS OF NATURE OF CLAIM (WHETHER TERM LOAN, SECURED, UNSECURED)	(+) Interest @ 18% p.a. on Principal Amount as on 02.05.2019: Rs. 4,21,94,496/- (Four Crore Twenty-one Lac Ninety-Four Thousand Four Hundred and Ninety-Six) (+) Earnest Money Deposit (EMD)/Security Deposits: - Rs. 23,00,000(Twenty-Three Lac) TOTAL: RS. 10,56,57,511/- (Ten Crore Fifty-Six Lac Fifty Seven Thousand Five Hundred and Eleven).
--	---	---

6. Ld. senior counsel Mr. Vivek Sibal, appearing for the Liquidator submits that after filing of the claims, the liquidator is now in the process of liquidating the assets of HPCL, which process has not yet been completed. It is submitted that HPCL does have substantial assets, however, its debts are much higher.

7. The Petitioner has filed the present petition seeking the following relief:

“It is therefore, most respectfully prayed that by means of appropriate order/direction/writ, the Respondents may be directed jointly and severally, to pay the admitted liability of the petitioner amounting to Rs. 6,11,63,015/- (Rs. Six Crores Eleven Lacs Sixty Three Thousand Fifteen only) and refund amount of security deposit of Rs. 23,00,000/- (Rs. Twenty Three Lacs only) along with interest @ 18% per annum till the date of realization/payment, in the interest of justice.”

8. Mr. Anil Goel, ld. counsel for the Petitioner raises three submissions.

The first submission of Mr. Goel is that in so far as the amount of Rs.23 lakhs is concerned, the same is lying in trust with HPCL and in view of Section 36 of the IBC, the NCLT has no jurisdiction as regards this amount. The second submission of Mr. Goel is that following the judgment of the Division Bench of the Bombay High Court in ***Hindustan Antibiotics Limited & Anr. v. UOI & Ors. [W.P.(C) 11366/2019, decided on 6th December, 2019]***, the Petitioner-company, being a Public Sector Undertaking (*hereinafter*, 'PSU') wholly owned by the Government, cannot be liquidated and no insolvency proceedings could have been commenced against the company. The judgment in ***Hindustan Antibiotics Limited (supra)***, which records that there is a strong *prima facie* case in support of the submission that a government owned PSU cannot be liquidated, was challenged before the Supreme Court. The SLP challenging this order, being ***SLP No. 29812/2019*** titled ***Harsh S. Pinge v. Hindustan Antibiotics Limited & Ors.*** was dismissed vide order dated 7th January, 2020. The third submission of Mr. Goel is that the Government of India ought to be directed to take a specific stand as to whether it wishes to revive the company.

9. In response, it is submitted by Mr. Sibal, Id. Sr. counsel, that the Petitioner-company, having already raised its claim before the Liquidator, in so far as the earnest money deposit of Rs. 23 lakhs is concerned, the same is being held in trust and would be dealt with in terms of Section 36 of the IBC. In so far as the remaining claims are concerned, the same would be processed in accordance with Section 53 of the IBC. He further submits that the security deposit having already been made a part of the claim before the Liquidator, a separate writ petition in respect of the same is not liable to be entertained.

10. On behalf of the Union of India, Mr. Anil Soni, CGSC along with Mr. Dubey, Id. counsel submits that the Union of India has already taken a policy decision in respect of the revival of the Petitioner-company, which decision has been placed before the Gauhati High Court. He further submits that in another writ petition concerning HPCL, they have received instructions that since the Petitioner-company is in liquidation, the Union of India does not intend to revive the said company.

11. Heard Id. counsels for the parties. The prayer in this petition is for a direction to the Respondents to pay the admitted liability to the Petitioner of Rs.6,11,63,015/- and Rs.23 lakhs. In effect, therefore, the Writ Court is being used as a forum for recovering dues which, according to the Petitioner, are admitted. The contract of the Petitioner-company was not with the Union of India but with the Respondent No.2-company i.e., HPCL, which has now, admittedly, gone into liquidation as per the writ petition itself. Once a company has gone into liquidation and the liquidation process is underway, the Petitioner, having filed its claim before the liquidator, cannot be given preference over other creditors, including workmen/employees who have unpaid wages etc. The Liquidator is required to follow the discipline set out in the IBC for payment of the dues of the creditors, in the priority and hierarchy contained in the IBC.

12. The Petitioner, by filing the present writ petition, is seeking an extraordinary remedy of recovery against the Union of India on the ground that HPCL is a PSU. Admittedly, the claims of the Petitioner have already been filed before the Liquidator. In so far as the security deposit is concerned, the question as to whether the said amount would have to be treated as one which is held in trust by the company is a question which

would be considered by the liquidator. If the Petitioner-company is, in any manner, aggrieved by the opinion of the liquidator, it is free to challenge the same before the appropriate forum i.e., the NCLT and avail of its remedies in accordance with law.

13. In so far as the judgment in ***Hindustan Antibiotics Limited (supra)*** is concerned, the issue being raised before that Court is whether, in principle, a PSU can ever be allowed to go into liquidation. The present writ petition is not drafted in a manner so as to raise the said challenge. The present writ petition is restricted in its scope to the recovery of the amounts due to the Petitioner. This Court is therefore not concerned with the issue as to whether a PSU, in principle, can ever be the subject of insolvency or liquidation. There are competing views on this issue which have been expressed before the Court on the basis of the judgment of the Bombay High Court in ***Hindustan Antibiotics Limited (supra)*** and the judgment of the Supreme Court in ***Hindustan Construction Company Limited & Anr. v. UOI & Ors., 2019 SCC OnLine SC 1520***. The said issue, having not been raised in the present writ petition, has not been gone into. On this issue, at the conclusion of arguments, Id Sr. Counsel for the liquidator informed the Court that today itself, a view has been taken by the Gauhati High Court dealing with a writ petition related to HPCL, on this very issue. A copy of the judgment was emailed to the Court Master. As per the said judgement in ***Hindustan Paper Corporation Limited Officers' and Supervisors' Association & Ors. v. UOI & Ors. [W.P.(C) No. 575/2020, decided on 26th August, 2021]*** the Court holds:

“37. Mr. K.N. Choudhury, learned senior counsel for the petitioners has referred to a number of judgments

including a recent judgment of the Hon'ble Apex Court in the case of Pawan Hans Limited & Ors. -Vs- Aviation Karmachari Sanghatana & Ors., reported in (2020) 13 SCC 506, where a Government Company is seen not as an ordinary Company but as something different, with more responsibility where the Courts expect such a Company to be a model employer where there is fairness in the treatment of its workers, etc. There can never be a quarrel on this proposition. These are all accepted principles now. But as we have seen from the decisions given by the Hon'ble Apex Court in the above two judgments, a Company has its separate identity after being incorporated as a Company under the Companies Act. It is not an arm of the State. It is usually performing a commercial or/and business functions. A Government Company cannot be equated with a State authority, like National Highway Authority of India (NHAI), which is performing statutory functions or like other Departments, like Postal, Telegraph or the Railways or Public Works Department. This distinction has been clearly made by the Hon'ble Apex Court in the case of Hindustan Construction Company Limited, which is binding upon this Court. Accordingly, the writ petition fails and is hereby dismissed."

14. The question as to whether a PSU ought to be revived or not is a question of policy. In the opinion of this Court, just because there are dues which are liable to be paid by the PSU it cannot be said that each and every PSU which is fully controlled by the Government would have to be revived or that the Government ought to pay the dues of the PSU. The PSU would have its own independent existence. In a writ petition which is seeking recovery of amounts, the Court cannot direct the Union of India to revive the Company. As observed above, the scope of this writ petition is limited. If the Petitioner wishes to raise this as a legal issue, it may avail of its remedies

in accordance with law.

15. Since the liquidation process is underway and some assets of the Petitioner-company are stated to have been advertised for sale, upon any amount being recovered from the sale of the assets, the Petitioner-company is free to approach the liquidator for taking a view in respect of the amounts due, including the Security deposit, in accordance with the provisions of the IBC.

16. The writ petition is disposed of in the above terms. All pending applications are also disposed of.

**PRATHIBA M. SINGH
JUDGE**

AUGUST 26, 2021

mw/T

(corrected & released on 31st August, 2021)