NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) (INS) NO.487/2023

(Arising out of judgement and order dated 10.01.2023 passed by National Company Law Tribunal, Mumbai Bench in IA No.32/2021 in CP(IB) 1767/MB/2017)

In the matter of:

Twentyone Sugars Limited,
Through: Mr. Anil Vaijnath Mehindrakar,
Unit 4, Peninsula Chambers,
Peninsula Corporate Park,
GK Marg,
Lower Parel, Mumbai 400013 Appellant

Vs

Maharashtra State Electricity Distribution co Ltd
Prakashgar, Plot No.G-9
Anant Kanekar Marg,
Bandra (East)
Mumbai-400051 Respondent

For Appellant: Mr Ram Chandra Madan, Mr. Aatreya Singh, Advocates.

For Respondent:Mr Tushar Mathur, Advocate.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

The present appeal has been filed by the Appellant against the order dated 10.01.2023 arising out of IA No.32/2021 in CP(IB) 1767/MB/2017.

2. The Ld. NCLT vide order dated 10.01.2023 dismissed the application for refund of payment made, under protest, towards pre-CIRP electricity dues by the Successful Resolution applicant (SRA) to the Respondent, for the restoration of the Corporate Debtor's electricity connection, in order to revive the Corporate Debtor in terms of, and in compliance with, the Resolution Plan.

3. The impugned order came to dismiss the application of the SRA relying upon judgement of Ghanashyam Mishra Vs Edelweiss Reconstruction Co Ltd which squarely applies in favour of the Appellant.

4. Before coming to the reasoning given in the impugned order let us state in brief the facts of the case:-

a) M/s Maharashtra Shetkari Sugar Ltd, Corporate Debtor, was admitted to CIRP on 30.08.2018. A moratorium was imposed. The Corporate Debtor used to run a sugar crushing unit on which a large number of employees and farmers were dependent;
b) Between 19th August, 2019 and 31st August, 2019 the COC approved the resolution plan filed by the Appellant with majority of 95.73% of the votes;
c) on 07.11.2019 the Ld. NCLT approved the Resolution Plan filed by the Appellant in MA No.*3199/2019*. The liquidation value was fixed at Rs.68 Crores though the admitted claims were of Rs.491 crores;
d) admittedly Respondent failed to file any claim. The appellant in terms of the Resolution Plan agreed to settle the disclosed claims at Rs.109.4 crores and also agreed to pay Rs. 2 crores towards the debt of the farmers;
e) 65% of the settlement amount was to be sourced through loans for the revival of the Corporate Debtor and all contingent liabilities were waived off. Further while allowing the Resolution Plan, the Ld. NCLT also passed the directions that all approvals/licenses that had been terminated would be renewed/restored at no additional cost to the appellant;
f) on 09.11.2019 the SRA took over the Corporate Debtor and realised that electricity connection have been disconnected and it wrote to the respondent for its restoration by the sugar cane crushing season of November-April had already commenced and the time was an essence if the Corporate Debtor was to be revived;
g) however, the Respondent on 15.11.2019 refused to restore the electricity without clearing pre-CIRP dues and instead proposed an OTS;
h) on 25.11.2019 the appellant agreed to make the payment of electricity dues *under protest and protection* of Ld. NCLT order since the time was an essence for the implementation of the Resolution Plan and revival of the Corporate Debtor;
i) on 22.09.2020, in IA No.1096/2020, filed for various reliefs, including refund of the amount paid to the Respondent, the appellant sought liberty to move an application for refund of amounts paid to the Respondent, which liberty was granted;

j) hence IA No.32/2021 was filed by the appellant seeking refund of Rs.2,11,42,540/- paid towards the CIRP dues which led to the passing of the impugned order rejecting such application.

5. The impugned order dated 10.01.2023 notes as under:-

"On perusal of the paper it is seen, that this Bench is not a privity to the money paid to the Maharashtra State Electricity Distributor Company Limited after passing the Resolution Plan. Moreover, the claim of the MSEDCL, if any, could have been paid by the RP under the plan.

It is further made clear that in terms of the order of the Hon'ble Supreme Court in its Judgment namely, Ghanshyam Mishra & Sons vs. Edelweiss Asset Reconstruction Company Limited, [Civil Appeal No.8129 of 2019], which reads as under:

(i) That once a resolution plan is duly .approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

(iii) *Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.'*

In that view of the matter, we thus find no merits in the prayer of the present Application and is of the considered view that the prayer sought in this Application sans merit. Accordingly, the Interlocutory Application bearing No. 32/2021 is disposed of.

6. Learned counsel for the Respondent supported the impugned order by referring to the earlier order dated 07.11.2019 which approved the Resolution Plan consisting of the following:-

> *30. xxxxxxxxx However, if any such business permit, license and approval as envisaged above is not granted before initiation of CIRP, then the Resolution Applicant may apply to the appropriate Authority under relevant law for granting business permit, license and approval and we are not inclined to grant any such business permit, license and approval as envisaged above.*
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> *31. The Resolution Applicant in its affidavit dated 04.11.2019 has submitted that in the course of preparing the Resolution Plan, they have inspected the plant of the Corporate Debtor along with various experts to ascertain the nature and extent of repairs that would have to be undertaken to operate the plant efficiently. After conducting a close inspection, these experts have given their respective quotations for overhauling and repairing the machineries presently situated at the plant.*
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> *32. On a concern raised by the Bench regarding absence of financial statements of the Corporate Debtor after 31.03.2016, the Resolution Professional has submitted that the fact has been disclosed to the Resolution Applicant at the initial stages of the CIRP. The Counsel for the Resolution Applicant, on instructions, has orally undertaken that Resolution Applicant has knowledge of the missing statements and that the Resolution Applicant will not make any claims based on the missing financial statements and information.*
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> *34. Any relief sought for in the Resolution Plan, where the contract/agreement/understanding/proceedings/actions/notice etc. is not specifically identified or is for future and contingent liability, is at this moment rejected.*
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> *36. We shall clarify here that any resolution applicant shall takeover the Corporate Debtor with all its assets and liabilities as per terms of the approved Resolution Plan. If any relief concerning any identified liability of the Corporate Debtor is required, then that needs to be specifically mentioned and sought for in the Resolution Plan. This bench cannot allow any general power to any resolution applicant absolving him of liability of the corporate debtor company without knowing about the liability against which such exemption is sought. In other words reliefs/exemptions from only existing liabilities which*

are specifically identified can be sought and allowed in the Resolution Plan.

7. It was thus argued by the learned counsel for the Respondent that anything not specifically asked was all rejected and that the appellant very well knew the premises had no electricity as the appellant had inspected it prior to its purchase and despite that failed to make any provision for arrears of electricity dues and further the appellant itself agreed for one of the two options to make the payment *vide* its letter dated 07.01.2020. It was argued the appellant had cleared the payment due *without any protest* and rather gave an *undertaking* not to raise any dispute later and the contractual obligations between the parties thus came to an end much prior to the initiation of the CIRP and thus this dispute would not be covered under Section *60(5)(c)* of the IBC.

8. Heard.

9. Section *60(5)(c)* of the IBC read as under:-

"60(5)(c): any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

10. Considering the facts and the submissions made we are unable to agree to the submissions made by the Respondent as the Resolution Plan related to revival of sugar crushing factory located in Distt. Parbhani, Maharashtra. Admittedly a sugar crushing factory is operational generally for six months in a year during the crushing season from *November to April* and during this

time electricity connection is crucial for the operation of its factory as without it the factory could not operate and may come to a standstill. It would be appropriate here to refer to the correspondence exchanged between the parties. A letter dated 9th November, 2019 written by the appellant to the Superintendent Engineer of the Respondent notes:

> *"Please that in view of the said Order, the Hon'ble NCLT has permitted Twenty One Sugars Limited to make application to the relevant authorities for restoring/renewing/reinstating all business permits/and/or licences and/or approval which are required for the smooth implementation of the Resolution Plan submitted by the Resolution Applicant* ***without payment and/or discharge of any liabilities of Maharashtra Shetkari Sugars Limited which has occurred and/or prior*** *to the CIRP process. In view of the above, we have to request you to reinstate the electricity connection existing at Maharashtra Shetkari Sugar Limited, Uttam Nagar, Saikheda to Sonpeth, Dist. Parbhani bearing Consumer No.536069006330 as expeditiously as possible and* ***without insistence of Twenty One Sugars Limited requiring to clear and/or discharge previous liability of Maharashtra Shetkari Sugar Limited towards electricity dues.***
> *Needless to say that as provided in the said Order passed by Hon'ble NCLT, the Resolution applicant shall bear the costs towards the consumption of electricity from the time the electricity connection is reinstated."*

11. The reply dated 15.11.2019 of the Respondent to the appellant's dated 09.11.2019 notes:

> *"Vide the above subject and reference, it is to inform you that , as the amount of Rs. 1,81,08,240/- (amount of bill of the month of July, 2019) is outstanding against Electricity bill, with M/s. Maharashtra Shetkari Sugar Limited, Shri Uttam Nagar, Saikhed- Divanagar, Sonpeth, Tal. Sonpeth, Dist. Parbhani, high voltage electricity consumer No. 536069006339, who is a permanently disconnected high voltage electricity consumer under Parbhani Circle Office, their electric supply has been disconnected permanently. Vide the application given by you, for the purpose of connection electricity, two options of One Time Settlement or Instalment package are available for the said Factory vide M.S.E.D. Co. Ltd. Circular No. 2. The circular of the same is attached herewith for your information. Accordingly as*

per the option felt proper by you, your written application will be sent to the Competent Officer Main Office, Mumbai for the purpose of approval. Before sending the Application for approval, it is necessary as per the Rules of the Company first to pay the amount of 2o/o of the total outstanding, i.e. Rs. 3,62,165/- as per rules of the Company."

12. To this on 25.11.2019 appellant wrote a letter as under:-

With reference to the above subject, it is hereby requested that, we had filed an application for providing high voltage electric supply at factory of Maharashtra Shetkari Sugar Limited As such in that regard, as per your Letter No.3809 dated 15.11.2019, we have chosen the option of instalment package and 2o/o amount 1.e. Rs.3,62,165/- (Rupees Three lac Sixty Two Thousand One Hundred Sixty Five Only) as mentioned in your letter has been paid by us along with the application under protection of order passed by Hon'ble National Company Law Tribunal through NEFT bearing U.T.R. No.MAHBH19329656617."

13. The above correspondence would rather reveal there was no option left for the appellant except to adhere to the demands raised by the Respondent lest the Respondent would not provide electricity in the coming sugar cane crushing season. Thus the payment of pre-CIRP dues by the appellant was paid *under protest and under protection of the order of the Ld. NCLT* and thus it related to the revival of the Corporate Debtor in terms of the Resolution Plan and to the Insolvency Resolution Process, hence the claim for refund of such amount is a matter which can be adjudicated under Section *60(5)(c)* of the IBC.

14. In Tata Power Western Odisha Distribution Ltd (TPWODL) & Anr Vs Jagannath Sponage Pvt Ltd, *Civil Appeal No.5556 of 2023* and further in Southern Power Distribution Company of Andhra Pradesh Ltd Vs Gavi Siddeswara Steels (India) Pvt Ltd and Another in *Civil Appeal No.5716-5717*

of 2023, the Hon'ble Supreme Court held the power distribution company cannot insist on the payment of arrears for the purpose of the restoration of the electricity connection and such a matter would fall within the ambit of Section *60(5)(c)* of the IBC.

15. Further in Yarn Sales Corporation Vs Punjab State Power Corporation Ltd Company Appeal (AT)(Ins) No.292 of 2024 this Tribunal set aside the order of dismissal of application under Section 60(5)(c) IBC, holding that a power distribution company cannot insist on payment of past dues to restore electricity.

16. It is crucial to note the Respondent without having filed any claim during the CIRP or having challenged the Resolution Plan is trying to benefit from its own default. The Resolution Plan provided for the payment of the Operational Creditors at an amount which was around 7% of the admitted claim. If the Respondent had filed its claim as an operational creditor it would have received rs.10.5 lakhs but today the Respondent had received Rs.2.11 crores towards the pre-CIRP dues. In Ghanshyam Mishra Vs. Edelweiss Asset Reconstruction CO Ltd (2021) 9 SCC 657 the Hon'ble Supreme Court has held the claims of creditors stand frozen after the approval of the Resolution Plan and any claim that is not part of the resolution plan is extinguished. It has been time and again held by the Hon'ble Supreme Court that SRA cannot be saddled with claim which are not a part of the Resolution Plan and the Corporate Debtor must be permitted to start with a clean slate.

17. In Committee of Creditors for Essar Steel V Satish Kumar Gupta and Ors (2020) 8 SCC 531 the Hon'ble Supreme Court held *"A successful resolution applicant cannot suddenly be faced with "undecided" claims after*

the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully takes over the business of the Corporate Debtor."

18. Thus the Respondent cannot be permitted to benefit from its own failure to file the claim and coercing the appellant to pay pre-CIRP dues for restoring the electricity. Even if the payment was not made by the appellant under protest and so was made only because of compulsion due to the coming season then also the Respondent was barred from seeking arrears of the amount that stood extinguished by operation of law as a precondition for restoring the appellants' electricity connection.

19. In Ferro Alloys Corporation Ltd Vs. Sttae of Odisha and others (2021) ibclaw.in 82 H`C, the Court held as follows:-

> *32. In terms of Section 31 of the IBC, the ARP is binding on all creditors including Central Government and the State Government. Since all of the impugned demands raised against FACOR pertain to the period prior to the Plan Effective date i.e. 31st January, 2020, all such demands stand automatically extinguished in terms of the ARP.*
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> *33. In that view of the matter, the impugned demand raised against the Petitioner by the Opposite Parties on the strength of the decision of the Supreme Court in Common Cause (supra) are unsustainable in law and are hereby set aside. Consequently, a direction is issued to the Opposite Parties to refund the amounts paid by the Petitioner under protest for the purpose of issuance of the MDCC and renewal of the trading licence.*

20. Learned counsel for the Respondent has referred to Gujarat Urja Vikas Nigam Ltd and Other Vs Renew Wind Energy (Rajkot) Pvt Ltd and Tata Consultancy to press his case but in Gujarat Urja the dispute related to the

termination of PPA between the Corporate Debtor and the appellant in view of a clause that provided a party could terminate the agreement in case the opposite party went into bankruptcy. The Hon'ble Supreme court held only in such a case where power distribution company refused to supply electricity on consideration other than those related to the resolution process, would the remedy before the Ld. NCLT be barred. In Tata Consultancy Ltd (Supra) the power supply company terminated the agreement on certain grounds unrelated to the bankruptcy process, such as non-maintenance of the minimum level of skill set of personnel on exam and non-exam days and hence it was held such a dispute raised does not relate to the IBC and could not be adjudicated by the Ld. NCLT.

21. Hence from the aforesaid it is evident the issue is squarely covered by Tata Power (Supra) and Southern Power Distribution Company (Supra) and pertains to a dispute arising out of the non-compliance of the Respondent of para 30 of order dated 07.11.2019 whereby the NCLT had directed the restoration of all approvals and licenses. The present matter thus falls under Section 60(5)(c) of IBC since it relates to the insistence of the Respondent for payment of pre-CIRP amounts that stood extinguished by way of the Resolution Plan. Finally, the present matter is also directly related to the resolution process as the failure of the Respondent to refund the pre-CIRP amounts paid to it would negatively impact the revival of the Corporate Debtor. Accordingly the present appeal deserves to be allowed. Thus the impugned order is set aside. The application IA 32/2021 filed before the Ld. NCLT is allowed. The amount paid be refunded by the respondent within six weeks from today.

22. Pending applications are disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated: 13-11-2024

BM.