NATIONAL COMPANY LAW APPEALLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 268 of 2020

(Arising out of Order dated 17th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in I.A. No. 703 of 2019 in C.P. (IB) No. 275/7/HDB/2018)

IN THE MATTER OF:

Office of the Specified Officer,
Special Economic Zone,
Warora, District: Chandrapur, Maharashtra **....Appellant**

Versus

Mr. V. Venkatachalam
Resolution Professional of
Sai Wardha Power Generation Limited **.....Respondent**

Present:

For Appellant:	**Mr. Gopal Jha and Mr. Gautam Singh, Advocates.**
For Respondents:	**Mr. Kumar Anurag Singh, Ms. Vandana Sehgal and Mr. Zain A. Khan and Mr. Anando Mukherjee, Advocates.**

J U D G M E N T

BANSI LAL BHAT, J.

A Resolution Plan submitted by 'Consortium of Sri City Private Limited' and 'KCR Enterprise LLP' (Resolution Applicants) to resolve Corporate Insolvency of 'M/s. Sai Wardha Power Generation Limited' (Corporate Debtor) approved by the Committee of Creditors with 75.91%

voting shares and submitted by the Resolution Professional of the Respondent- Corporate Debtor along with application under Section 31 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) before the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad has been approved in terms of order dated 17th October, 2019. Same has been assailed by the Specified Officer, Special Economic Zone, Warora (Appellant) through the medium of instant appeal primarily on the ground that the exemption/ concession granted by the Adjudicating Authority in the impugned order is in direct conflict of the provision of Special Economic Zone Act, 2005 ("SEZ Act, 2005"/ Act for short) as well as the Special Economic Zone Rules, 2006 ("SEZ Rules, 2006"/ Rules for short). It is contended that the amount to be paid at the time of de-bonding/ exit from SEZ is subject to the assessment to be made by the Development Commissioner under Rule 74 of the 'SEZ Rules, 2016'. It is further contended that such amount is not a crystallized debt but an amount to be assessed by the development commissioner in exercise of its jurisdiction under the 'SEZ Act, 2005' and 'SEZ Rules, 2016'. It is submitted that such assessment is to be made at the time of exit and cannot be classified as a crystallized debt. Learned counsel for the Appellant submits that the impugned order is in conflict with the law laid down by the Hon'ble Apex Court in ***"M/s. Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and Ors.'*** being Civil Appeal No. 9170 of 2019 decided on 3rd December, 2019.

2. A flash back of the factual matrix culminating in approval of the Resolution Plan is required to be briefly noticed. 'India Opportunities III Pte. Ltd. and Another' initiated Corporate Insolvency Resolution Process of the Corporate Debtor by filing an application under Section 7 of the 'I&B Code' which came to be admitted on 9th November, 2018. Mr. V Venkatachalam- Respondent herein came to be appointed as Interim Resolution Professional of the Corporate Debtor who issued the Public Announcement inviting claims from all stakeholders and constituted the Committee of Creditors thereafter. He was subsequently confirmed as Resolution Professional. He carried forward the Resolution Process. Expression of Interest were invited which evoked response from four persons. Claims of as many as 15 Financial Creditors with 14 of them holding security interest, 6 Financial Creditors (related parties), 133 Operational Creditors and one other Creditor besides claims of employees/ workmen were received, collated and admitted by the Resolution Professional. The Resolution Plan filed by 'Consortium of Sri City Private Limited' and 'KCR Enterprise LLP' (Resolution Applicants) was approved by the Committee of Creditors with voting majority of 75.91% of the Committee of Creditors. In terms of the approved plan, the Resolution Applicant proposed to infuse a total amount of Rs. 495 Crores as part of Resolution Plan being a combination of equity shares CCDs as well as working capital. The working capital of Rs.325 Crores was to be infused by Resolution Applicant to meet the immediate requirement of Corporate Debtor's operations. The plan dealt with the

interest of all stakeholders providing for upfront payment to secured and unsecured Financial Creditors, payment to Operational and other creditors and servicing of residual surviving debt, contingent claims and resolution cost. The Resolution Plan was approved by the Adjudicating Authority as approved by the Committee of Creditors after recording its satisfaction that the Resolution Plan approved by the Committee of Creditors having 75.91% of voting shares meets the requirements of Section 30(2) of the 'I&B Code'.

3. The challenge to the approved Resolution Plan in the instant appeal filed by Special Economic Zone (Appellant) is limited to concession incorporated in Clause 3 (j) & (r) of the impugned order which deals with 'Relief and Concession in the Resolution Plan sought by the Resolution Applicant'. A cursory look at the relevant provision brings it to fore that an amount of Rs. 45 Crores was provided to be paid to Custom Department for the de-notification of Special Economic Zone ("SEZ"). The Resolution Applicant sought a direction for waiving off any additional amount required to be paid by the Corporate Debtor in the form of interest or penalty in connection with such de-notification. It is manifestly clear that the Resolution Applicant did not seek to evade liability in respect of payment of Rs.45 Crores to Custom Department for de-notification of SEZ but only sought a direction for waiving off additional amount required to be paid by the Corporate Debtor which

may be levied as an interest or penalty in connection with such de-notification.

4. Learned counsel for the Appellant submits that the impugned order dated 17th October, 2019 was passed at the back of Appellant who was not a party to proceeding before the Adjudicating Authority. It is further submitted that no notice was issued by the Adjudicating Authority prior to granting of concession which has caused prejudice to Appellant to whom the order was communicated for the first time on 23rd December, 2019. It is further submitted that the amount to be paid at the time of de-bonding/ exit from SEZ has to be assessed by the Development Commissioner at the time of exit and such amount cannot be regarded as a crystallized debt in as much as the same has to be determined on assessment at the time of de-bonding/ exit from SEZ.

5. Rebutting the contentions of the Appellant, learned counsel for the Respondent raised various pleas. Firstly, it is submitted that the Appeal is barred by limitation. In this regard, it is pointed out that though the Appellant claims to have acquired knowledge of the impugned order on 23rd December, 2019, actually and factually Appellant got knowledge of impugned order on 2nd December, 2019 when the letter and application for de-bonding by the Successful Resolution Applicant along with the impugned order of the Adjudicating Authority was received by the Appellant. Secondly, it is submitted that the Appellant cannot question the powers of the Committee of Creditors

once it submitted to the jurisdiction of the Committee of Creditors by making a claim with the Resolution Professional. Thirdly, it is argued that as regards powers of the Committee of Creditors similar claims by the Government Authorities have been dismissed by a co-ordinate Bench of this Appellate Tribunal and law laid down in ***"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors.- 2019 SCC OnLine SC 1478"*** has clearly established that the commercial wisdom of the Committee of Creditors reigns supreme in the resolution of distressed assets under the Code. Fourthly, it is submitted that the Resolution Applicant did not arrive at the figure of Rs.45 Crores for de-bonding unilaterally as the Resolution Plan clearly specified that the figure is an estimate arrived at by internal assessment at the time of submission of the Resolution Plan while the actual figure needs to be arrived at by the Competent Authorities on the written down value of the fixed assets of the Corporate Debtor on the date of application for de-bonding.

6. Heard learned counsel for the parties and also perused the written submissions filed by the Respondent. However, Appellant has not chosen to file written submissions.

7. Before leaping forward to come to grips with the merits of the case, it would be appropriate, at the outset, to deal with the issue of limitation. Section 61 of the 'I&B Code' provides for appeal against an order passed by the Adjudicating Authority under Part-II of the 'I&B

Code' covering Sections 4 to 77 of the 'I&B Code'. An aggrieved person may prefer an appeal to NCLAT within 30 days. This Appellate Tribunal has been vested with powers to allow an appeal to be filed after the expiry of 30 days if it is satisfied that there was sufficient cause for not filing the appeal within the prescribed time. However, such period shall not exceed 15 days. This provision engrafted in Section 61 (1) & (2) provides special Rules of limitation and the phraseology of Section 61 (1) in unambiguous terms provides that such right of appeal shall be available to aggrieved party notwithstanding anything to the contrary contained under the Companies Act, 2013. This leaves no room for doubt that the appeal provided for in this Section is not in any manner limited, scuttled or curtailed by the provisions of the Companies Act, 2013 and this right of appeal, as a creation of a statute, is exercisable in accordance with Special Rules of Limitation contained therein which has an overriding effect on provision contained in the Companies Act, 2013 as also in the Limitation Act, 1963. It is by now well settled that the provisions of the Limitation Act, 1963 cannot be invoked for regulating the period of limitation governing appeals preferred under Section 61 of the 'I&B Code' which ordinarily provides a period of 30 days for preferring of an appeal by an aggrieved person qua an order passed under Part-II of the 'I&B Code' which is extendable by 15 days at the discretion of this Appellate Tribunal on sufficient cause being assigned for non-filing of appeal within the statutory period of 30 days. It is also manifestly clear that the outer limit of 45 days cannot be

transgressed to enable an Appellant to maintain an appeal under this provision. If the appeal has been preferred beyond statutory period of 30 days and extended period of 15 days i.e. total 45 days, this Appellate Tribunal will have no jurisdiction to entertain such appeal.

8. The next question for consideration would be as to from which date the period of limitation is to be reckoned. NCLT Rules enjoin upon the NCLT/ Adjudicating Authority to provide free certified copy of the order to the parties to resolution process before it. There is no difficulty in computing the period of limitation in so far as the same relates to a party to such resolution process. However, other aggrieved persons who may not have been a party to the proceedings before the Adjudicating Authority will not be entitled to a free certified copy of the impugned order and in their case the period of limitation will have to be reckoned from the date of knowledge of such order having been passed by the Adjudicating Authority. In the instant case, Appellant claims that it was not a party to the proceeding before the Adjudicating Authority and it gained knowledge about the impugned order vide Respondent's letter dated 20th December, 2019 received on 23rd December, 2019 together with a copy of the impugned order. This is specifically pleaded in para 2. The appeal was admittedly filed on 4th February, 2020 i.e. after 42 days. If it be so, it would fall within the purview of extended timeline of 45 days within the ambit of Section 61 (2) proviso of the 'I&B Code' subject to assigning of a sufficient cause but the controversy does not

end here. According to respondent, the impugned order was communicated to Appellant by Respondent vide letter dated 29th November, 2019 forming Annexure R1 to the Affidavit filed by the Respondent. Same appears to have been replied on 10th December, 2019, the reply forming Annexure R2 to the Affidavit of the Respondent. In the aforesaid reply, the Appellant has acknowledged receipt of impugned order of the Adjudicating Authority, therefore, the date of knowledge of the impugned order would have to be reckoned from 29th November, 2019 i.e. the day when the impugned order was communicated by the Respondent to Appellant vide Annexure R-1 to Respondent's Affidavit. Computed from 29th November, 2019, the appeal has been preferred after 75 days. Viewed thus, it is abundantly clear that the appeal has been preferred even 30 days beyond the extended timelines of 45 days envisaged under Section 61(2) proviso of the 'I&B Code'. It is, therefore, irrelevant as to whether the cause assigned for non-filing of the appeal within statutory period of 30 days from the date of knowledge was sufficient to warrant condonation of delay/ extension for 15 days contemplated under law as the maximum outer limit. The appeal being hopelessly time barred deserves to be dismissed on the count of limitation alone.

9. Now proceeding on the assumption though not holding so, let us examine whether the Appellant has been able to carve out a case on merit for judicial intervention qua the impugned order.

10. Admittedly, 'Sai Wardha Power Generation Limited' had to undergo Corporate Insolvency Resolution Process which culminated in the approval of Resolution Plan submitted by 'Consortium of Sri City Private Limited' and 'KCR Enterprise LLP' (Resolution Applicants) by the Committee of Creditors with vote shares of about 76%. Application under Section 31 was filed by the Resolution Professional seeking approval of the Adjudicating Authority qua such Resolution Plan. According to Appellant, the Corporate Debtor was operating in an area notified as Special Economic Zone governed by different businesses and trade laws including 'SEZ Act, 2005' and 'SEZ Rules, 2006' framed thereunder designed to achieve certain objectives which include increased trade balance, employment, increased investment, job creation and effective administration. Section 51 of the 'SEZ Act, 2005' has non-obstante provision and it reads as under:

> *"**51. Act to have overriding effect.-** The provisions of this Act shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force or in any other instrument having effect by virtue of any law other than this Act."*

11. It is abundantly clear that the 'SEZ Act, 2005' has overriding effect and wherever the extant laws dealing with the matters dealt with

under the Act are inconsistent with the provisions of the Act, the provision of the Act will prevail. The Act provides for exemption from duties of Customs with provisions contained in Section 76(E), (F), (G) and (H) which are reproduced hereinbelow:

> *"**76.E. Exemption from duties of customs.** Without prejudice to the provisions of Sections 76F, 76G and 76H, any goods admitted to a special economic zone shall be exempt from duties of customs.*
>
> ***76.F. Levy of duties of customs.-** Subject to the conditions as may be specified in the rules made in this behalf:*
>
> *(a) any goods admitted to a special economic zone from the domestic tariff area shall be chargeable to export duties at such rates as are leviable on such goods when exported;*
>
> *(b) any goods removed from a special economic zone for home consumption shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Custom Tariff Act, 1975, where applicable, as leviable on such goods when imported; and*
>
> *(c) the rate of duty and tariff valuation, if any, applicable to goods admitted to, or removed from, a*

special economic zone shall be the rate and tariff valuation in force as on the date of such admission or removal, as the case may be, and where such date is not ascertainable, on the date of payment of the duty.

76.G. Authorized operations.- *All goods admitted to a special economic zone shall undergo such operations including processing or manufacturing as may be specified in the rules made in this behalf.*

76.H. Goods utilized with a special economic zone.-

(1) The Central Government may make rules in this behalf to enumerate the cases in which goods to be utilized inside a special economic zone may be admitted free of duties of customs and lay down the requirements which shall be fulfilled.

(2) Goods utilized contrary to the provisions of rules made under sub section (1) shall be chargeable to duties of customs in the same manner as provided under clause (b) of Section 76F as if they have been removed for home consumption."

12. A bare look at these provisions reveals that while as a general rule goods admitted to a Special Economic Zone have been exempted from duties of Customs, duties of Customs can be levied on any goods as per

conditions specified in the Rules. Goods admitted to SEZ may undergo operations including processing or manufacturing as specified in the Rules. Central Government has been authorised to make Rules to enumerate the cases in which goods sought to be utilized in a SEZ may be admitted free of duties of Customs. Any breach thereof shall render the goods chargeable to duties of Customs as if they were removed for home consumption. A SEZ unit may opt out of SEZ with the approval of Development Commissioner subject to payment of applicable duties on the goods, raw materials and finished goods in stock etc. However, penalty may be imposed under the Foreign Trade (Development and Regulation) Act, 1992 if the unit has not achieved positive net foreign exchange. Certain conditions have been made applicable on the exit of the unit. The relevant provision is contained in Rule 74 of the Rules which reads as under:

> *"**74. Exit of Units.—** (1) The Unit may opt out of Special Economic Zone with the approval of the Development Commissioner and such exit shall be subject to payment of applicable duties on the imported or indigenous capital goods, raw materials, components, consumables, spares and finished goods in stock:*
>
> *Provided that if the unit has not achieved positive Net Foreign Exchange, the exit shall be subject to*

penalty that may be imposed under the Foreign Trade (Development and Regulation), Act, 1992.

(2) The following conditions shall apply on the exit of the Unit, namely:—

(i) Penalty imposed by the competent authority would be paid and in case an appeal against an order-imposing penalty is pending, exit shall be considered if the unit has obtained a stay order from competent authority and has furnished a Bank Guarantee for the penalty adjudicated by the appropriate authority unless the appellate authority makes a specific order exempting the Unit from this requirement;

(ii) In case the Unit has failed to fulfil the terms and conditions of the Letter of Approval and penal proceedings are to be taken up or are in process, a legal undertaking for payment of penalties, that may be imposed, shall be executed with the Development Commissioner;

(iii) The Unit shall continue to be treated a Unit till the date of final exit.

(3) In the event of a gems and jewellery unit ceasing its operation, gold and other precious metals, alloys, gem and other materials available for manufacture

> *of jewellery shall be handed over to an agency nominated by the Central Government at a price to be determined by that agency.*
>
> *(4) Development Commissioner may permit a Unit, as one time option, to exit from Special Economic Zone on payment of duty on capital goods under the prevailing Export Promotion Capital Goods Scheme under the Foreign Trade Policy subject to the Unit satisfying the eligibility criteria under that Scheme.*
>
> *(5) Depreciation norms for capital goods shall be as given in sub-rule (1) of rule 49."*

13. It is manifestly clear that the dues or penalty payable is to be calculated at the time of exit from SEZ with the approval of the Development Commissioner and subject to payment of applicable duties. This proposition of law is not disputed by the Respondent who submits that the quantification of the amount at Rs.45 Crores for being paid to the Appellant by the Corporate Debtor in lieu of de-notification from SEZ is only an estimated amount which is subject to change with exact amount payable to be arrived at the time of exit in accordance with Rule 74. Corporate Debtor, operating in SEZ, may have been enjoying various benefits including exemption from Customs duty in respect of its authorised operations which, it cannot be denied, would be at the cost of burden on public resources. However, enjoyment of

such benefits would be in exercise of a lawful right conferred under a statutory scheme which was to achieve an objective bearing nexus with promotion of national interest. However, that cannot be a legal impediment in making an exit and opting out of SEZ which has been subjected to payment of applicable duties and levy of penalty in the event of not achieving positive net foreign exchange. The mechanism provided under Rule 74 takes care of all eventualities to ensure that the provision regarding exit of unit from SEZ is not resorted to for nefarious design of appropriating chargeable duties. Power to levy penalty is an additional safeguard against tax/ duty evasion and fiscal fraud.

14. In the instant case, there is no controversy on the vital aspect of the exact amount chargeable for de-notification of the unit of Corporate Debtor being determined by the Development Commissioner at the time of exit in terms of Rule 74. This is in fact admitted position and the Appellant also has admitted that the amount of Rs.45 Crores set apart in the approved Resolution Plan for de-notification of the Corporate Debtor from SEZ is not a crystallised debt but an amount to be assessed by the Development Commissioner in exercise of its jurisdiction. Thus, it is abundantly clear that the estimated amount of Rs.45 Crores has been set apart in the approved Resolution Plan to take care of the duties chargeable and penalties imposable by the Development Commissioner while according approval to opting out of Corporate Debtor from SEZ. Admittedly, the Resolution Applicant has

applied for the de-notification of the unit of the Corporate Debtor before the Development Commissioner. The approved Resolution Plan is binding on all stakeholders including the Central Government but it would not be correct to hold that the amount of Rs.45 crores set apart is a crystallised debt and in that sense same is not subject to any variation or change. The proposed Resolution Plan allocated an amount of Rs.45 Crores for being paid to the Development Commissioner as chargeable duty/ penalty for de-notification from SEZ purely on the basis of an estimate. Such allocation was to take care of the duties chargeable/ penalties imposed being realized from the Successful Resolution Applicant when the Development Commissioner was approached for grant of approval within the ambit of Rule 74. It appears that the Corporate Debtor was not enjoying any benefit as a SEZ unit when the Resolution Plan was approved and in view of the same, the proposed Resolution Plan provided for seeking its de-notification. While dealing with reason for de-notification, it was stated in the Resolution Plan (at page 15):

> *"Since the Corporate Debtor is currently not availing any benefit as an SEZ, it seems prudent to get de-notified as the Customs Act, 1962 has a provision for the same. By paying a one-time cost to be arrived at based on the written down value of the fixed assets, such de-notification is possible. Based on the*

> *internal estimates, a sum of INR 450,000,000 (Rupees Forty Five Crores Only) shall be required to be paid to the Custom Department for the de-notification. The Resolution Applicant shall infuse this capital immediately upon finalisation of the amount required to be paid. Once de-notified, the Corporate Debtor shall be exempt from paying customs duty of INR 0.264/Kwh for the entire balance life of the plant resulting in huge saving."*

15. It appears that representation made to Development Commissioner for assessment and de-notification of the Corporate Debtor is still pending. It is submitted on behalf of Respondent that unless the said representation was decided by the development Commissioner, the Corporate Debtor will have to pay additional cost of Rs. 0.26/- per unit of power generated and transmitted thereby mounting the burden on the Corporate Debtor. It is well settled by now that the 'I&B Code' overrides other laws and under Section 31 of the 'I&B Code' a Resolution Plan approved by the Committee of Creditors and meeting the requirements under Section 30(2) has to be approved by the Adjudicating Authority. Commercial wisdom of the Committee of Creditors in regard to the business decision taken while evaluating a Resolution Plan has to prevail and unless the plan approved by the Committee of Creditors is in conflict with any provision of law and the

distribution mechanism balances the interests of all stakeholders besides taking care of maximisation of value of assets of the Corporate Debtor, judicial intervention would not be warranted. In the instant case, as we find that the amount of Rs.45 Crores has been set apart only as an estimated value of the chargeable duties/ leviable penalties being imposed by the Development Commissioner while approving the exit of Corporate Debtor from SEZ, contravention of any law is not made out. Issue regarding chargeable duties and penalties imposable by the Development Commissioner while considering exit/ opting out of Corporate Debtor from SEZ and its de-notification adjudicatable by the Competent Authority being not in controversy and the Adjudicating Authority being found to have exercised its jurisdiction in approving the Resolution Plan of the Successful Resolution Applicant within the parameters of law and contours of settled legal position, it cannot be said that the Adjudicating Authority has encroached upon the jurisdiction of the Development Commissioner under the Act and usurped his authority. The argument on this score being devoid of merit is rejected.

16. Claim of Appellant amounting to Rs.36,21,42,252/- having been rejected during the Resolution Process and the same not having been assailed by the Appellant before the Adjudicating Authority, the Appellant is not entitled to raise issue in this regard for the first time in

appeal before this Appellate Tribunal. Argument advanced on this aspect is accordingly repelled.

17. In view of the foregoing discussion, we are of the considered opinion that the Appellant has failed to carve out a case for judicial intervention in appeal on merits too. There being no legal infirmity in the impugned order and the appeal being barred by limitation, the same is dismissed. No order as to costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

NEW DELHI
13th July, 2020

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