*** THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**
AND
THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

+ W.P.No.15090 OF 2020

% Date: 29-08-2022

Southern Power Distribution Company of AP Limited
and another

... Petitioners

v.

$ National Company Law Tribunal and others

... Respondents

! Counsel for the Petitioners : Mr. P. Sriram, Advocate General for the State of Andhra Pradesh for Mr. B. Harinath Rao

^ Counsel for respondent Nos.2 and 3 : Mr. S. Ravi, Senior Counsel

< GIST:

> HEAD NOTE:

? CASES REFERRED:

1. (1997) 3 SCC 261
2. (1998) 8 SCC 1
3. 2020(13) SCC 308
4. (2008) 12 SCC 675
5. (2020) 19 SCC 681

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

Writ Petition No.15090 of 2020

ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. P. Sriram, learned Advocate General for the State of Andhra Pradesh representing Mr. B. Harinath Rao, learned counsel for the petitioners, and Mr. S. Ravi, learned Senior Counsel appearing for respondent Nos.2 and 3.

2. This writ petition, under Article 226 of the Constitution of India, has been filed assailing the legality and validity of the order dated 27.11.2019 passed by the National Company Law Tribunal, Hyderabad Bench i.e., respondent No.1 (briefly, 'the Tribunal' hereinafter) directing the petitioners to pay Rs.23,91,37,582/- to respondent Nos.2 and 3.

3. At the outset, we may advert to the order dated 27.11.2019 which has been impugned in the present proceeding. It may be mentioned that the corporate insolvency resolution process was initiated against the

corporate debtor i.e., respondent No.3 vide order dated 23.05.2019 passed by the Adjudicating Authority. Respondent No.2 was appointed as an Interim Resolution Professional, which was subsequently confirmed on 08.06.2019 by the Adjudicating Authority. Respondent No.2, being the Resolution Professional, filed an Interlocutory Application in CP(IB).No.678/7/HDB/2018 i.e., the petition whereby corporate insolvency resolution process was initiated under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (briefly, 'IBC' hereinafter) seeking certain directions against the petitioners herein. The Interlocutory Application was registered as I.A.No.740 of 2019. Reliefs prayed for by the Resolution Professional in the said Interlocutory Application were as follows:-

> "i. To direct the Respondents to immediately release the pending payments with respect to bills dated 11 July 2019 at the rate of Rs.3.29/KwH amounting to Rs.23,91,37,582/- pending adjudication of the revised rate of Rs.3.93/KwH by APERC;
>
> ii. To direct the Respondents to release payments against all future invoices which are raised in accordance with the provisions of the PPA without delay and in a timely manner;

iii. Pass any such orders as may be deemed fit and proper by this Tribunal."

4. The respondents in the Interlocutory Application were the two writ petitioners herein. It was contended before the Tribunal that the writ petitioners did not pay the dues to the corporate debtor for admitted supply of electricity. It was stated that in order to supply electricity generated at its power plant, the corporate debtor had entered into Power Purchase Agreement (briefly, 'PPA' hereinafter) dated 31.03.1997 with Andhra Pradesh State Electricity Board, the predecessors of the writ petitioners. Upon expiry of the original PPA, another PPA dated 28.04.2017 was entered into between the corporate debtor and the writ petitioners. This PPA is pending final approval before the Andhra Pradesh Electricity Regulatory Commission (briefly, 'Regulatory Commission' hereinafter). Writ petitioners had agreed to procure power on the same terms and conditions as set out in the original PPA and as per tariff determined by the Regulatory Commission during pendency of PPA before the Regulatory Commission. In terms of Clause 5.12 of the PPA, corporate debtor submitted monthly tariff

bills and supplementary bills to the writ petitioners upon regular supply of electricity. Till May, 2019, writ petitioners were regular in making payments. From 04.07.2019, in terms of Bill No.231 dated 11.07.2019, an amount of Rs.23,91,37,582/- was outstanding against the supply of electricity. It is in the above backdrop that the Interlocutory Application came to be filed before the Tribunal.

5. Writ petitioners filed counter affidavit in the Interlocutory Application. After denying the contentions made by the Resolution Professional, writ petitioners stated that pending approval of PPA by the Regulatory Commission, there was an understanding between the parties that the price paid for the power supplied during the interim period would be trued-up based on the terms and conditions set out in the said PPA. It was further stated that payments made to respondent No.3 were being reconciled and after payments made till the month of June, 2019, the balance amount to be released was Rs.7.45 crores only for which steps were being taken. Writ petitioners were not liable to pay the amount of

Rs.23,91,37,582/- as claimed. Additionally, it was contended that the Tribunal lacked jurisdiction to entertain the application; IBC is not intended to be a substitute for a regulatory forum; therefore the dispute should be left to the Regulatory Commission to decide.

6. After considering the rival pleadings and submissions made, Tribunal passed the order dated 27.11.2019 holding as follows:-

> "4. Heard both sides and perused the record.
>
> 5. It is the case of the Applicant that the Corporate Debtor has supplied. power to the Respondents herein for which the Respondents were liable to pay an amount of Rs.28,56,56,746/-. The Respondents have raised the question of locus standi of the Applicant and have also contended that the liability of the Respondents towards the Corporate Debtor is to the extent of Rs.7.45 Crore only and not as per the claim made by the Applicant.
>
> 6. As regards the locus of the Applicant, suffice it to say that the Applicant being the RP appointed for the Corporate Debtor by this Adjudicating Authority as per the provisions of IBC, 2016 is mandated to manage the operations of the Corporate Debtor as stipulated in section 23(1) and is entitled to exercise all powers and perform duties as are vested with IRP under Chapter-11 of part II of the IBC, 2016.

According to the provisions of Section 17 of the Code, the IRP shall be vested with the management of the Corporate Debtor and shall act and execute in the name and on behalf of the Corporate Debtor all deeds, receipts and other documents, and shall also be responsible for complying with the requirements under any Law for the time being in force on behalf of the Corporate Debtor. In view of provisions of section 23(1), the RP is also vested with same powers and duties. Further, under the provisions of Section 25 of the IB Code, 2016, the RP is duty bound to preserve and protect the assets of the Corporate Debtor, including the continued business operations of the Corporate Debtor. Thus, he is eligible to file any Application on behalf of the Corporate Debtor u/s 60(5) of the IBC, for protecting and continuation of business operations of Corporate Debtor.

7. As regards the pending bills of the Corporate Debtor, the same were raised during the CIRP period on the basis of actual supply of electricity to the DISCOMS/Respondents. The objective of the IB Code, 2016 is to provide a specific law relating to reorganization and Insolvency Resolution of Corporate Persons in a time bound manner for maximization of value of assets of such persons and to promote entrepreneurship, availability of credit and balancing the interest of all the stakeholders. Therefore, we hereby direct that payments as per the mutually agreed terms, pending approval of Hon'ble APERC, shall be made by the DISCOMS/Respondents in respect of Power

> Purchase Bills raised by the Corporate Debtor on actual user basis, so as not to adversely affected the Insolvency Resolution Process of the Corporate Debtor.
>
> 8. The contention of the Respondents placing reliance on the Judgment of Hon'ble Supreme Court in the case of Mobilox (supra) is entirely misplaced, as in the instant Application is not an application filed u/s.9 of the IBC, 2016 for triggering any Insolvency Resolution Process against the Respondents, but is an application filed u/s 60(5) of the IBC, 2016 for protecting and preserving the business of the Corporate Debtor undergoing CIRP and the facts and circumstances of the present case have no similarity with the facts and circumstances of Mobilox (supra).
>
> 9. The IA No.740/2019 is accordingly disposed of. No order as to costs."

7. Thus the Tribunal held that respondent No.2 i.e., the applicant being the Resolution Professional of respondent No.3 (corporate debtor) had the mandate to manage the affairs of respondent No.3 and is entitled to exercise all powers and perform all duties as are vested with the Resolution Professional in terms of IBC. Resolution Professional is duty bound to preserve and protect the assets of respondent No.3 including the business operations of respondent No.3.

8. Adverting to the IBC, Tribunal observed that objective of it is to provide a specific law relating to reorganisation and insolvency resolution of corporate persons in a time bound manner for maximisation of the value of assets of such persons and to promote entrepreneurship etc. In the circumstances, Tribunal directed the writ petitioners that pending final approval of the Regulatory Commission, payments be made as per the mutually agreed terms in respect of power purchase bills raised by respondent No.3 on actual user basis so as not to adversely effect the insolvency resolution process of respondent No.3.

9. This order dated 27.11.2019 came to be challenged in the present writ petition. This Court, by order dated 20.11.2020, issued notice and stayed all further proceedings before the Tribunal.

10. When Mr. P. Sriram, learned Advocate General for the State of Andhra Pradesh appearing for the writ petitioners, commenced his arguments, Court observed that writ petitioners would have to first satisfy the Court about the entertainability of the writ petition having regard to the

object of IBC and the provision of appeal under Section 61 of IBC.

11. Learned Advocate General appearing for the petitioners submitted that it is trite that availability of alternative remedy is no bar for entertaining petitions under Article 226 of the Constitution of India. Judicial review, under Article 226 of the Constitution of India, being a basic feature of the Constitution of India, there cannot be ouster of writ jurisdiction. To support his above contention, he has placed reliance on **L.Chandra Kumar vs. Union of India**[1]. He has also referred to a decision of the Supreme Court in **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai**[2] in support of his contention that in an appropriate case, the High Court may exercise its extraordinary jurisdiction under Article 226 of the Constitution of India notwithstanding availability of alternative remedy. Learned Advocate General has also relied upon a decision of the Supreme Court in **Embassy Property Developments Private Limited vs. State of**

[1] (1997) 3 SCC 261
[2] (1998) 8 SCC 1

Karnataka[3] to contend that the Tribunal under IBC would not have the jurisdiction when the disputes revolve around decisions of statutory or quasi judicial authorities, such as, the decision to be taken by the Regulatory Commission.

12. In the hearing, learned Advocate General for the State of Andhra Pradesh appearing for the petitioners has further placed reliance on a decision of the Supreme Court in **State of Uttar Pradesh vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samithi**[4] to contend that once a writ petition is admitted, it cannot be dismissed on the ground of alternative remedy.

13. On the other hand, Mr. S.Ravi, learned Senior Counsel appearing for respondent Nos.2 and 3, submits that the dispute before the Tribunal was not relating to the process of fixation of tariff or revision of tariff which is within the domain of the Regulatory Commission. Being the Resolution Professional, respondent No.2 had filed the Interlocutory Application before the Tribunal complaining that dues for supply of electricity as per tariff admitted by

---

[3] 2020(13) SCC 308
[4] (2008) 12 SCC 675

the parties were not being settled thereby adversely effecting the financial status of the corporate debtor i.e., respondent No.3. Therefore, it cannot be said that the Tribunal does not have jurisdiction.

13.1. In so far the impugned order is concerned, he submits that the order impugned is an appealable one under Section 61 of IBC. However, the period of filing appeal i.e., 30 days extendable by another 15 days is long over. Now that the limitation period for filing appeal or even the extended period of limitation is over, it is not open for the petitioners to file the writ petition as a substitute for appeal. In this connection, learned Senior Counsel has relied upon the decision of the Supreme Court in **Assistant Commissioner (CT) LTU, Kakinada vs. M/s. Glaxo Smith Kline Consumer Health Care Limited**[5] to contend that when the writ petitioners choose to approach the High Court after expiry of the maximum limitation period, High Court cannot disregard the statutory period for redressal of the grievance and entertain the petition of such a party as a matter of course. He submits that remedy of appeal is a

[5] (2020) 19 SCC 681

creature of the statute. If an aggrieved party does not avail the remedy of appeal within the limitation prescribed or within the extended period of limitation, it is incomprehensible as to how a grievance can be raised by such a party that it would be a case of violation of his fundamental right if the writ petition is not entertained.

13.2. Summing up, learned Senior Counsel points out that his objection is two-fold; firstly on the point of alternative remedy and secondly filing of the writ petition after the limitation period for filing the appeal was over.

14. Submissions made have been duly considered.

15. There is no dispute to the proposition that having regard to the jurisdiction exercised by the High Court under Article 226 of the Constitution of India, availability of alternative remedy is not really a bar to exercise such jurisdiction. Nonetheless as the jurisprudence has evolved over the years, Constitutional Courts have imposed upon themselves self-restraint in not exercising such jurisdiction barring in certain exceptional circumstances, such as, violation of principles of natural justice, when the *vires* of a Statute is challenged, etc. However, the same is not the

position in the present case. The order impugned in the writ proceeding cannot be said to be within the four corners of the exceptions carved out by the Courts including in **Whirlpool Corporation** (2 supra).

16. In so far **Embassy Property Developments Pvt. Ltd** (3 supra) is concerned, the questions which arose for consideration before the Supreme Court were as follows:-

> "i) Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of a statutory remedy of appeal to the National Company Law Appellate Tribunal? and if so, under what circumstances; and
> ii) Whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016?"

17. The background facts leading to formulation of the above two questions were that corporate debtor held a mining lease granted by the Government of Karnataka. Though a notice for premature termination of lease was issued on the allegation of violation of statutory provisions, no order of termination was passed till the date of initiation

of the corporate insolvency resolution process. Interim Resolution Professional filed a writ petition before the Karnataka High Court seeking a declaration that the mining lease should be deemed to be valid till expiry of its original period.

18. During the pendency of the writ petition, Government of Karnataka passed an order rejecting the proposal for deemed extension. In view of such order, Interim Resolution Professional withdrew the writ petition with liberty to file a fresh writ petition. But instead of filing a fresh writ petition, Resolution Professional moved an Interlocutory Application before the National Company Law Tribunal, Chennai (briefly, 'the NCLT' hereinafter) for setting aside the order of the Government of Karnataka and seeking a declaration that the lease should be deemed to be valid up to the original date. This was allowed by the NCLT directing the Government of Karnataka to execute supplemental lease deed in favour of the corporate debtor for the remaining period. This time Government of Karnataka filed a writ petition before the Karnataka High Court. Thereafter, the matter was remanded back to the

NCLT after setting aside the order of the NCLT. The NCLT passed order dated 03.05.2019 setting aside the rejection order of the Government and directing the Government of Karnataka to execute supplemental lease deeds. This led to filing of a fresh writ petition by the Government of Karnataka before the High Court of Karnataka. High Court granted stay of operation of the directions contained in the order of the NCLT. Against such interim stay granted by the High Court, Special Leave Petitions were moved by the Resolution Applicant, Resolution Professional and the Committee of Creditors. On being allowed, the Civil Appeals were registered whereafter the two questions came to be considered by the Supreme Court.

19. Admittedly, facts in **Embassy Property Developments Pvt. Ltd** (3 supra) and the facts of the present case are completely different. However, to complete the narrative, it may be stated that in the aforesaid decision Supreme Court held that the NCLT did not have the jurisdiction to entertain an application against the Government of Karnataka for a direction to execute supplemental lease deeds for extension of the mining lease

because such a jurisdiction was not vested in the NCLT. In so far the second question is concerned, it was held that the NCLT has the jurisdiction to enquire into questions of fraud, but the NCLT would not have the jurisdiction to adjudicate disputes/decisions arising under specific statutes rendered by statutory or quasi judicial authority.

20. Regarding the decision in **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samithi** (4 supra), it is true that when a writ petition is admitted by issuing *rule nisi* and is pending for a considerable period for adjudication, it would not be judicious to dismiss the writ petition on the ground of alternative remedy. But in the present case, as we have seen, the writ petition has not been admitted; only notice was issued that too on 20.11.2020 with interim stay. Therefore, the aforesaid decision is not applicable to the facts of the present case.

21. The fact that the writ petitioners did not file appeal within the period of limitation or within the extended period of limitation cannot be a ground to entertain the writ petition under Article 226 of the Constitution of India. That being the position, we are not inclined to entertain the

writ petition. However, writ petitioners would be at liberty to work out their remedies in terms of IBC.

22. The writ petition is accordingly dismissed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

C.V.BHASKAR REDDY, J

29.08.2022
JSU
Note: LR copy be marked.
(By order)
JSU