

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 232 of 2019

(Arising out of Order dated 25th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, in CP/552 & 553/IB/CB/2017)

IN THE MATTER OF:

Asset Reconstruction Company (India) Ltd. ...Appellant

Vs.

R. Venkatakrisnan & Anr. ...Respondents

Present: For Appellant: - Mr. Dinkar Singh, Mr. Anshul Rawat and Mr. Aashish Jain, Advocates.

**For Respondents: - Mr. Pallav Shishodia, Senior Advocate with Mr. Abraham Mathews and Mr. Nisha Rajen Shonker, Advocates.
Mr. C.A. Sinha and Ms. Sonali Khanna, Advocates.**

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IN THE MATTER OF:

R. Venkatakrisnan ...Appellant

Vs.

Kerala State Electricity Board & Anr. ...Respondents

Present: For Appellant: - Mr. C.A. Sinha and Ms. Sonali Khanna, Advocates.

**For Respondents: - Mr. Dinkar Singh, Mr. Anshul Rawat, Mr. Aashish Jain, Advocates.
Mr. Pallav Shishodia, Senior Advocate with Mr. Abraham Mathews and Mr. Nisha Rajan Shonker, Advocates for R-1.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In both the appeals, as common order dated 25th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, is under challenge, they were heard together and are being disposed of by this common judgment.

2. Two 'Corporate Insolvency Resolution Processes' were initiated one against 'M/s. Paragon Steels (P) Ltd.' and another against 'M/s. SMM Steel Re-rolling Mills Private Limited', for which Common 'Resolution Professional' was appointed and matters were heard together.

3. 'M/s. Paragon Steels (P) Ltd.' has two units namely- (i) LCN 19/3051 (Unit-1); (ii) LCN 19/4028 (Unit-2). On the other hand, 'M/s. SMM Steel Re-Rolling Mills Private Limited' has one unit namely- LCN 18/3255. 'M/s. Kerala State Electricity Board' was supplying electricity to all the aforesaid three units, which were disconnected owing to non-payment of dues during the 'Corporate Insolvency Resolution Process'.

4. In the said common proceeding(s), on 26th October, 2018, the Adjudicating Authority after hearing the parties and on the concessions

given by both the parties, directed the 'Resolution Professional' to deposit an amount of Rs.3.25 Crores, which is equivalent to the dues payable to 'M/s. Kerala State Electricity Board' for the months falling within 'Corporate Insolvency Resolution Process' period in Escrow Account without prejudice to the rights and contentions of either side, likewise directed 'M/s. Kerala State Electricity Board' to forthwith restore power.

5. Pursuant to the said order, the 'Resolution Professional' deposited the amount of Rs.3.25 Crores in the Escrow Account. The 'Resolution Professional' informed that the entire Rs. 3.25 Crores need not be paid because the payments made by him (on behalf of the 'Corporate Debtor') during 'Corporate Insolvency Resolution Process' period towards the dues payable for the period before admission shall be adjusted towards payments payable during the period of 'Corporate Insolvency Resolution Process'. Since 'M/s. Kerala State Electricity Board' being the 'Operational Creditor', the payments inadvertently paid for the earlier period should be treated as claims required to be paid to 'M/s. Kerala State Electricity Board'.

6. The 'Resolution Professional' submitted that this issue has already been given treatment in the 'Resolution Plan' by adjusting arrear payments made towards preadmission bills against the bills raised during 'Corporate Insolvency Resolution Process'.

7. The Adjudicating Authority by impugned order dated 25th February, 2019 having noticed that the Electricity Board is not claiming any amount as 'Operational Creditor' observed since the payments already been made not to be considered as claim payable by the 'Corporate Debtor', therefore, there could not be any restructuring as to the money already duly paid by the 'Corporate Debtor'.

8. It was also observed by the Adjudicating Authority that since the money already deposited in the Escrow Account being towards the bills raised during 'Corporate Insolvency Resolution Process' period, it shall be released to 'M/s. Kerala State Electricity Board'. Release of money lying in Escrow Account cannot be linked to the arrears already paid by the 'Corporate Debtor', adjustments or set-off is applicable only when mutual obligations subsisting, here no debt is payable by 'M/s. Kerala State Electricity Board' to the 'Corporate Debtor'. The Adjudicating Authority further observed that since the Escrow Account has come into existence by the order passed by this Bench, once any money has come to Escrow Account towards the bills on the condition power would be supplied on deposit of bills in the Escrow Account, the 'Resolution professional' is not at liberty to give treatment in the 'Resolution Plan' towards the money paid against the preadmission dues. The application was disposed of.

9. The Appellants- 'Asset Reconstruction Company (India) Limited' and Mr. R. Venkatakrishnan- ('Resolution Professional') preferred the appeals against the said order.

10. Learned counsel appearing on behalf of the Appellant- Asset Reconstruction Company (India) Limited' submits that the 'Corporate Debtor' 'M/s Paragon Steels' as on 15th September, 2017 had an outstanding payment of Rs. 2,60,47,669 (Rupees Two Crores Sixty Lakhs Forty-Seven Thousand Six Hundred and Sixty-Nine only) owed to 'Kerala State Electricity Board'. As on 15th September, 2017, it had also outstanding payment of Rs. 64,78,610 (Rupees Sixty-Four Lakhs Seventy-Eight Thousand Six Hundred and Ten) to 'Kerala State Electricity Board'. The 'Corporate Debtor' was constrained to make payment to 'Kerala State Electricity Board' towards electricity supply for the period prior to 'Corporate Insolvency Resolution Process' of Rs.2,60,47,669 (Rupees Two Crores Sixty Lakhs Forty-Seven Thousand Six Hundred and Sixty-Nine only) and Rs.64,78,610 (Rupees Sixty-Four Lakhs Seventy-Eight Thousand Six Hundred and Ten) to keep the 'Corporate Debtors' as going concern and to avoid the electricity disconnection.

11. It was submitted that the 1st Respondent- Mr. R. Venkatakrishnan, vide publication on 24th September, 2017 of public announcement in Form-A in terms of Section 15 of the 'I&B Code', called upon all the creditors of the 'Corporate Debtors' to file their

respective claims on or before 08th October, 2017. However, despite due publication as prescribed under the statute, 2nd Respondent, providing electricity services to the 'Corporate Debtors', and being 'Operational Creditor' of the 'Corporate Debtor' did not come forward to file its claim as mandated for all the creditors of the 'Corporate Debtor'. The 2nd Respondent- 'Kerala State Electricity Board' disconnected electricity to the 'Corporate Debtors' in June, 2018 during the 'Corporate Insolvency Resolution Process' period and continuation of 'Moratorium' period and it was the stage that the 'Resolution Professional' filed application for restoration of the electricity to the 'Corporate Debtor'. The Adjudicating Authority, vide order dated 16th July, 2018, allowed the applications and directed 'Kerala State Electricity Board' to restore the electricity. The Adjudicating Authority also asked the Electricity Board to file its claim but, in disregard of the said direction, the Electricity Board did not submit its claim with the 'Resolution Professional'.

12. The 'Committee of Creditors' in its 14th meeting held on 28th June, 2018, approved the 'Resolution Plans' submitted by Mrs. Fathima Abdul Khadar acting in concert with Mr. AdbulKadhar ("Successful Resolution Applicant") with 100% voting in favour of the said 'Resolution Plan' in relation to both the 'Corporate Debtors'.

13. The 'Resolution Plan' categorically provides for the adjustment of dues paid by the 'Resolution Professional' to the Electricity Board ('Operation Creditor') towards its dues for dues prior to/up-to 15th

September, 2017 pertaining to the pre-‘Corporate Insolvency Resolution Process’ period. The Adjudicating Authority vide order dated 24th July, 2018 approved the plan.

14. According to the ‘Resolution Professional’, in terms of the approved ‘Resolution Plan’, it made payment to ‘Kerala State Electricity Board’ which was due from ‘M/s. Paragon Steels Private Limited’ and a sum of Rs.1,92,64,470/- was paid on 15th September, 2019 after adjusting a sum of Rs. 2,60,47,669/- which was earlier paid on 6th October, 2018 towards pre ‘Corporate Insolvency Resolution Process’ period dues.

Similarly, in terms of the approved ‘Resolution Plan’, the amount which was due to the ‘Kerala State Electricity Board’ from ‘M/s. SMM Steel Re-Rolling Mills Private Limited’, a sum of Rs 16,87,883/- was paid on 15th September, 2019 after adjusting a sum of Rs.64,78,610/- which was earlier paid on 6th October, 2018 towards pre ‘Corporate Insolvency Resolution Process’ period.

15. Thereafter, despite due payment of the outstanding electricity dues and its due intimation to the ‘Resolution Professional’ on 8th October, 2018, the Electricity Board failed to restore electric supply which had been disconnected since July, 2018, which was restored pursuant to interim order passed by the Adjudicating Authority on 26th October, 2018 subject to deposit of Rs.3.25 Crores in an Escrow Account.

16. It was submitted that the Electricity Board being a provider of electricity services to the 'Corporate Debtor', squarely falls under the definition of 'Operational Debt' as per section 5(2) of the 'I&B Code'. Thus, by virtue of the above definition the 'Resolution Professional' ought to have submitted its claims in accordance with the provisions of the 'I&B Code' applicable to the 'Operational Creditors'. By not doing so, the 'Resolution Professional' has acted arbitrarily by lowering the pool of funds available for meeting 'Corporate Insolvency Resolution Process' costs.

17. Similar plea has been taken by Mr. R. Venkatkrishnan, 'Resolution Professional' in his appeal.

18. According to 2nd Respondent- 'Kerala State Electricity Board', post Commencement of 'Insolvency Resolution Process' since 15th September, 2017, the electricity dues were being paid as cost of insolvency resolution process, albeit erratically. The electricity supply was disconnected for the dues pertaining to Resolution Period and was restored in compliance with the order dated 26th October, 2018 passed by the Adjudicating Authority, whereby the amount payable was directed to be kept in an escrow account as security. On scrutiny, the story of inadvertent payment of past dues concocted after 'Resolution Plan' and/or figures given in application are imaginary. None of this and other submissions of Appellants are

borne out by the 'Resolution Plan' itself and/or the actual dues/payments from time to time.

19. It was further submitted that the supply of electricity is restored pursuant to order safeguarding the payment of dues in escrow account, without in any manner disturbing the 'Resolution Plan', the amount in escrow account is rightly released to the 'Kerala State Electricity Board'.

20. On 14th March, 2019, when the matter was taken up, counsel for the Electricity Board submitted that the electricity connection of the 'Corporate Debtor' have been restored. They were allowed to file reply affidavit with liberty to Appellant to file rejoinder. Interim order was passed directing the Respondent- Electricity Board including the 'Resolution Professional' not to withdraw any amount from the Escrow Account in which the amount has been deposited.

21. 'Moratorium' prescribed under Section 14 of the 'I&B Code'. As per sub-section (2) of Section 14, the supply of essential goods or services to the 'Corporate Debtor' as may be specified shall not be terminated or suspended or interrupted during 'Moratorium' period.

22. The essential supplies have been defined under Regulation 32 of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016', which includes electricity and read as follows:

“32. Essential supplies.— *The essential goods and services referred to in section 14(2) shall mean—*

(1) Electricity;

(2) Water;

(3) Telecommunication services; and

(4) Information technology services,

to the extent there are not a direct input to the output produced or supplied by the corporate debtor.”

23. In that view of the matter, it was not open to the Electricity Board to disconnect the electricity which is in violation of Section 14(2) of the ‘I&B Code’.

24. If any amount due for the period of the ‘Corporate Insolvency Resolution Process’ was not paid, in such case, Electricity Board should have moved before the Adjudicating Authority for payment of current dues of ‘Corporate Insolvency Resolution Process’, but it had no jurisdiction to disconnect the electricity in violation of Section 14(2) of the ‘I&B Code’.

25. The Electricity Board provides services by supplying electricity and thereby comes within the meaning of ‘Operational Creditor’ as defined under Section 5(20) read with Section 5(21) of the ‘I&B Code’.

26. Similar matter fell for consideration before this Appellant Tribunal in ***“Uttarakhand Power Corporation Ltd. v. M/s. ANG Industries Ltd.– Company Appeal (AT) (Insol.) No. 298 of 2017”*** wherein this Appellate Tribunal taking into consideration the fact that the order of ‘Moratorium’ had been passed held that ‘Uttarakhand Power Corporation Limited’ cannot recover any amount as was due for the earlier period prior to the date of initiation of ‘Corporate Insolvency Resolution Process’, though it was entitled to submit the claim before the ‘Resolution Professional’. This Appellate Tribunal further observed that the amount payable towards the current charges during the ‘Corporate Insolvency Resolution Process’ was payable to the ‘Uttarakhand Power Corporation Limited’.

27. In view of the aforesaid position of law, while we hold that it is not open to the Electricity Board to disconnect the electric supply of the ‘Corporate Debtor’ during the ‘Corporate Insolvency Resolution Process’, the ‘Resolution Professional’ should not have paid any dues of the earlier period for restoration of electricity. The ‘Resolution Professional’ should have brought the fact to the notice of the Adjudicating Authority, who should have ordered for restoration of electricity with clear direction to pay the dues of the current charges of the ‘Corporate Insolvency Resolution Process’. Such being the position, the amount, if any, wrongly paid of the earlier period to the Electricity Board, the same should be adjusted from the current charges. On such adjustment, if it is found

further amount is liable to be returned by the Electricity Board then the Electricity Board should be asked to return the amount.

28. The 'Resolution Plan' having been approved by the Adjudicating Authority on 24th July, 2018 under Section 31, it was not open to the Adjudicating Authority to pass order subsequently on 25th February, 2019 to release the amount of Rs.3.25 Crores in favour of Electricity Board.

29. For the reason aforesaid, we set aside the impugned order dated 25th February, 2019 and allow the appeals. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

NEW DELHI
23rd July, 2019
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