

# Southern Power Distribution Company Of ... vs Gavi Siddeswara Steels India Private ... on 5 January, 2023

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT)(CH)(Ins) No.258/2021 & IA No.550/2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 13.12.2019 in IA No.1079

of 2019 in CP (IB) No.673/07/HDB/2018

passed by the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench-I)

In the matter of:

Southern Power Distribution Company

of Andhra Pradesh Limited

Represented by its Chairman & Managing Director

Beside Srinivasa Kalyana Mandapam,

Tiruchanoor Road,

Tirupathi - 517 501

Andhra Pradesh

... Appellant

V

1. Gavi Siddeswara Steels (India) Pvt. Ltd.

Through Successful Resolution Applicant

Mr. Bharat Kumar of Corporate Debtor

At Sy. No.233/2, 23612,

B.N. Halli Village, Rayadurg Mandal,

Anantapur District, Andhra Pradesh

2. Punjab National Bank,

Through its Chief Manager,

Plot No.4, Sector 10,

Dwarka, New Delhi - 117705

Branch at 6-1-73, 2nd Floor,

Sayeed Plaza, ARB Branch,

Lakdi-Ka-Pul, Hyderabad - 500004

Telangana State

... Respondents

Present :

For Appellant

: Mr. Nishant Sharma, Advocate

For Respondent No.1

: A.K. Mylsamy & Associates

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ORDER

(Virtual Mode) 05.01.2023: Heard Mr. Nishant Sharma, the Learned Counsel appearing for the 'Appellant' and the Learned Counsel for the Respondent No.1 appearing on behalf of M/s. A.K.

Mylsamy & Associates in the instant Comp. Appl. (AT)(CH)(Ins) No.258/221.

2. Earlier, the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench-I) while passing the 'impugned order' in IA No.1079 of 2019 in CP (IB) No.673/07/HDB/2018 dated 13.12.2019 at 'Paragraph Nos.20 to 24' had observed the following:-

"20. It is further stated by the Applicant that the Resolution Plan takes care of the interest of Financial Creditors and a provision is made for payment of CIRP costs which shall be paid as first priority. It is stated that no payment is made to Operational Creditor, as operational creditor would not get any amount in the event of liquidation as per provision of 30 (2) (b) of IBC. Even otherwise, the Operational Creditor / APCPDCL is a Government undertaking. By virtue of amendment to Section 31 (1) Of the Code, the Resolution Plan is binding on the State Government. Therefore, even if no amount is allotted to Operational Creditor in the Resolution Plan, but by virtue of amendment, the plan is binding on the undertaking of State Government. Hence, Resolution Plan can be approved even if no allotment is made to the Operational Creditor.

21. Applicant submits that Corporate Debtor has already commissioned the industry by taking necessary approvals from the various departments. However for any future clearance, the same would be taken accordingly.

22. The Resolution Plan has been approved by the CoC in accordance with the provisions of the Code and the CIRP Regulations made thereunder. The Resolution Plan has been approved by 100% of voting share of financial creditors after considering its feasibility and viability and other requirements specified by the CIRP Regulations. It is also stated by the Resolution Professional that RESOLUTION APPLICANT would take up the repair and renovation of the plant only after getting possession of plant i.e after the entire payment of Rs.20.32 Cr. earmarked for Financial Creditors and CIRP cost is paid. The bid amount is above the Liquidation Value.

23. As per the amendment to Section 31 (1), the Resolution Plan is binding on the central Government, any State Government or any Local Authority to whom a debt in respect of the payment of due arising under any law for time being in force such as authorities to whom statutory dues are owed. The Resolution Applicant has to obtain necessary approval if any required with one year as per Section 31 (4) of the Code. I am convinced with the Resolution Plan approved by the CoC and as such the Application is question deserves consideration. Hence, I pass the following order:-

24. ORDER Thus, Resolution plan submitted by Resolution Applicant Bharat Kumar ("Resolution Applicant") which is approved by members of CoC having 100% voting share stands approved as per Section 31 (i) of the Code subject to filing an undertaking by Resolution Applicant that the Performance Security Deposit amounting to Rs.2,03,20,000/- will not be withdrawn by the Resolution Applicant till implementation of Resolution Plan and until full bid amount is paid. In other words I am satisfied with the Resolution Plan as approved by Committee of Creditors under Section 30 (4) of the Code and it meets the requirement as referred to in Section 30 (2) of IBC, 2016.

Accordingly, the Resolution Plan stands approved with above condition and the same is binding on Corporate Debtor, its employees, Members, Creditors including the Central Government, any State Government or any Local Authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, Guarantors and stakeholders involved in the Resolution Plan in terms of Section 31 (1) Of the Code.

2. The moratorium order passed under Section 14 shall cease to have effect from today.

3. The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Board to be recorded on its database.

4. The Resolution Applicant shall obtain necessary approval required under any law for the time being in force within a period of one year from the date of approval of the Resolution Plan or within such period as provided for in such law."

3. According to the Learned Counsel for the 'Appellant', the 'Appellant' is the 'Distribution Licencee', constituted under the 'Companies Act' and wholly owned by the Government of Andhra Pradesh. Further the 'Appellant' was procuring 'Power' from the State and the Central generating stations apart from procuring power from private generating stations and power exchanges, to supply such power to all end consumers of the State of Andhra Pradesh within the 'jurisdiction', having control over Ananthapur, Chittoor, Kadapa, Kurnool and Nellore Districts.

4. It is represented on behalf of the 'Appellant' that the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench-I) in IA No.1079 of 2019 in CP (IB) No.673/07/HDB/2018 (filed by the 'Applicant' / 'Resolution Professional') has not examined the Clause 8.4 of the 'general terms and conditions' of supply followed by the 'Petitioner', herein, which was approved by the 'Andhra Pradesh Electricity Regulatory Commission' as the 'Applicant' only after 'Transfer' / 'Resolution' / 'Auction' or on any other 'Transaction' and, that there is no 'jurisdiction' conferred on an 'Adjudicating Authority' to 'waive' the 'Electricity Dues' recoverable from the premises.

5. Added further, the Learned Counsel for the 'Appellant' advances an argument that the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench-I) had failed to appreciate that in the 'Decision' in TSSPDCL V Srigdhaa Beverages reported in 2020 SCC Online SC 478 of the Hon'ble Supreme Court of India, wherein it was mentioned that in terms of non-waiver of 'past dues' of premises and failure to taking into account of the same at the time of passing of the 'impugned order' has resulted in a 'serious miscarriage' of 'Justice', culminating for failure of the present 'Appeal' by the 'Appellant' before this 'Tribunal'.

6. At this juncture, the Learned Counsel for the 'Appellant' fairly brings it to the 'Notice' of this 'Tribunal', that the similar issue (s) came up for consideration before this 'Tribunal' in Comp. App. (AT) (Ins) No.1078/2020 dated 13.12.2022 and wherein at Paragraph Nos.2 to 6 had observed as under :-

"2. The Appellant's case in the Appeal is that the Adjudicating Authority has not examined Clause 8.4 of General Terms and Conditions of Supply followed by the Appellant approved by Andhra Pradesh Electricity Regulatory Commission. The Adjudicating Authority has no jurisdiction to waive the electricity dues recoverable from the premises. It is submitted that the electricity dues cannot be waived in the Resolution Plan. In the Appeal reliance has been placed on the judgment of Hon'ble Supreme Court in "Telangana State Southern Power Distribution Company Ltd. & Anr. vs. M/s Srigdhaa Beverages, 2020 SCC OnLine SC 478". It is submitted that previous dues cannot be waived and Appellant is entitled to insist for payment of previous dues before restoration of electricity supply.

3. The issues which have been raised by the Appellant in this Appeal are fully covered by the judgment of this Tribunal in "Company Appeal (AT) (Ins.) No.62 of 2022, Damodar Valley Corporation vs. Dimension Steel and Alloys & Ors., decided on 23.05.2022". In the above case the approval of plan was challenged on various grounds. One of the ground raised was that Appellant was entitled to claim unpaid dues as per West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013. In the above judgment in paragraphs 14 to 17 following has been laid down:

"14. There is no question of the claim of Appellant still existing pertaining to pre-CIRP period, which claim was filed before the Resolution Professional, after the approval of the Resolution Plan.

15. The submission, which has been much pressed by learned Senior Counsel for the Appellant that there has been contravention of Statutory Regulations, as the Plan breaches the provision of Section 30, sub-section (2) (e). Section 30, subsection (2) (e) provides: "30. Submission of resolution plan. (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan - (e) does not contravene any of the provisions of the law for the time being in force."

16. We may at this stage also refer to the Statutory Regulations 4.6.1 and 4.6.4, which are to the following effect: "4.6.1 If the power supply to any consumer remains disconnected continuously for a period of one hundred and eighty day's where the disconnection has been effected in compliance with any of the provisions of the Act or Regulations, the agreement of the licensee with the consumer for supply of electricity shall be deemed to have been terminated with consequential effect on expiry of the said period of one hundred and eighty days. This will be without prejudice to such other action or the claim that may arise from the disconnection of supply or related issues therefor. On termination of the agreement, the licensee shall have the right to remove the service line and other installations through which electricity is supplied to the consumer. 4.6.4 Notwithstanding anything contained contrary elsewhere in these Regulations were deemed termination of agreement has taken place, then on the basis of application for any consumer new service connection can only be provided in the same premises if the outstanding dues against the deemed terminated consumer is cleared along with the late payment surcharge."

17. There can be no quarrel with the Statutory Regulations of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013. In Regulation 4.6.4, it is contemplated that new service connection can only be provided in the same premises if the outstanding dues against the deemed terminated consumer is cleared, but the said Regulations cannot be pressed in service, when the Resolution Plan has been approved in the CIRP under the Code. The Code has been given overriding effect, on any other inconsistent law under Section 238. When any statutory provision including the provisions of West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 are overridden, the question of contravention of such provision does not arise. In event, the submission of learned Senior Counsel is accepted that all laws in force, including the Regulations in question have to be followed in the Resolution Plan and any contravention shall violate Section 30, sub-section (2) (a) & (e), the provision of Section 238 shall become redundant. From the conjoint reading of the provisions of Code, it is clear that in event any provision is not overridden by Section 238, Resolution Plan cannot contravene any existing law."

4. We may also refer to another judgment of this Tribunal in "Company Appeal (AT) (Ins.) No.961 of 2021, Eastern Power Distribution Company of Andhra Pradesh Limited. Vs. Maithan Alloys Limited & Ors., decided on 26.05.2022", where this Tribunal had occasion to consider the judgment of Hon'ble Supreme Court in "Telangana State Southern Power Distribution Company Ltd. & Anr. vs. M/s Srighdhaa Beverages" (supra).

Referring to the judgment of Hon'ble Supreme Court following was stated in Paragraph 17:

"17. It is to be noted that the Hon'ble Supreme Court in the above case was considering the Auction Sale under SARFAESI Act, 2002. No provision of IBC were under consideration of the Hon'ble Supreme Court. In the IBC proceedings, the electricity supplier is also an Operational Creditor who files claim for its operational debt as well as the charges during the CIRP period. IBC deals with the claims and require for payment of the claim of the electricity service provider under Section 53 of the Code in a liquidation proceeding. Regulation formed under Electricity Act, 2003 fastening liability on the Successful Auction Purchaser in the Liquidation Proceedings will be in conflict with the provision of the IBC. IBC having been given overriding effect under Section 238, any contrary provision in any other statute under Electricity Act, 2003 shall be overridden. Therefore, it shall not be open for the Appellant to contend that Appellant shall recover the entire preCIRP and post-CIRP dues from the Successful Auction Purchaser in pursuance of Regulation 8.4, as noticed above. The Appellant is entitled to recover its dues under the IBC proceedings."

5. We, thus, are of the view that judgment of Hon'ble Supreme Court in "Telangana State Southern Power Distribution Company Ltd. & Anr. vs. M/s Srighdhaa Beverages" (supra) does not help the Appellant in facts of the present case.

6. We do not find any good ground to interfere with the order dated 14.02.2020 passed by the Adjudicating Authority approving the Resolution Plan. There is no merit in the Appeal.

The Appeal is dismissed."

7. According to the Learned Counsel for the 'Appellant', the aforesaid 'Judgment' passed by this 'Tribunal' in 'Comp. App. (AT) (Ins) No.1078/2020' between Southern Power Distribution Company of Andhra Pradesh Ltd. V. Kalptaru Steel Rolling Mills Ltd. and 2 Others, applies to the facts of the instant Comp. App. (AT)(CH)(Ins) No.258/2021 before this 'Tribunal'. There is no distinct ground and had already held by this 'Appellate Tribunal' in 'Comp. App. (AT) (Ins) No.1078/2020' dated 13.12.2019, the instant Comp. App. (AT)(CH)(Ins) No.258/2021 is to be 'dismissed' by following the said 'Judgment'.

In as much as the point for consideration in the instant Comp. App.

(AT)(CH)(Ins) No.258/2021 are squarely covered by the 'Judgment' of this 'Tribunal' in 'Comp. App. (AT) (Ins) No.1078/2020' dated 13.12.2022, this 'Tribunal' comes to a 'consequent conclusion' that the 'subject matter' in the instant Comp. App. (AT)(CH)(Ins) No.258/2021 is covered by the 'Decision' of this 'Tribunal', as referred to 'Supra' and 'resting upon' the same, this 'Tribunal' 'dismisses' the instant Comp. App. (AT)(CH)(Ins) No.258/2021, as no interference with the 'impugned order' dated 13.12.2019 passed in IA No.1079 of 2019 in CP (IB) No.673/07/HDB/2018 by the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench-I). No Costs. The connected IA/550/2021 (For 'Exemption' from filing 'certified copy of the Order' dated 13.12.2019) is Closed.

[Justice M. Venugopal] Member (Judicial) [Shreesha Merla] Member (Technical) ghk/tm