
Dimension Steel And Alloys Limited And Another Vs Damodar Valley Corporation And Others

W.P.A. No. 3360 Of 2022

Court: Calcutta High Court (Appellate Side)

Date of Decision: May 4, 2022

Acts Referred:

Constitution Of India, 1950 – Article 226#Insolvency And Bankruptcy Code (IBC), 2016 – Section 238#Electricity Act, 2003 – Section 42(5), 42(6), 43, 56, 60(5), 129

Hon'ble Judges: Sabyasachi Bhattacharyya, J

Bench: Single Bench

Advocate: Joy Saha, Sanchari Chakraborty, Soumik Chakraborty, Ayan Sarkar, Ishaan Saha, Anuj Singh, Aman Agarwal

Final Decision: Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The writ petitioner has primarily prayed for immediate restoration of the petitioner's electricity supply by the Respondent no. 1, the Damodar

Valley Corporation (DVC).

2. The brief facts, shorn of unnecessary details, are:

3. The DVC, upon prior notice, disconnected the electricity supply to the factory premises of the petitioner no. 1-company on June 7, 2019.

4. On October 18, 2019, the petitioner no. 1 was admitted to a Corporate Insolvency Resolution Process (CIRP). On April 8, 2021, the Committee of

Creditors approved the Resolution Plan. The NCLT approved the same on October 8, 2021.

5. Thereafter the Resolution Professional wrote to the DVC tendering payment of Rs. 7,45,608/- as per the approved Resolution Plan and requested

reconnection of electricity, which request was reiterated by a later communication by the petitioner no. 1.

6. However, the DVC, by its letter dated November 25, 2021, demanded payment of Rs. 31,77,33,915/- as outstanding dues of electricity charges

from the petitioner no. 1.

7. The learned Senior Advocate appearing for the petitioners places reliance on Ghanshyam Mishra & Sons (P) Ltd. V. Edelweiss Asset

Reconstruction Company Ltd. [(2021) 9 SCC 657] and Committee of Creditors of Essar Steel India v. Satish Kumar Gupta [(2020) 8 SCC 531] and

submits that all the pre-existing debts of a creditor stand extinguished upon the approval of a Resolution Plan. In this context, the petitioners also rely

on the following judgments:

(i) Ruchi Soya Industries v. Union of India (Civil Appeal Nos. 447-448 of 2013)

(ii) DVC v. Kharkia Steel Pvt. Ltd. [Company Appeal (AT) Insolvency No. 119 of 2022]

(iii) DVC v. Karthik Alloys Ltd. [Company Appeal (AT) Insolvency No. 13 of 2021]

(iv) Shiv Shakti Inter Globe Exports Pvt. Ltd. V. ktc Foods Pvt. Ltd. [Company Appeal (AT) Insolvency No. 650 of 2020]

(v) Sri Vasavi Industries Limited and Another v. WBSEDCL [WPA No. 1936 of 2022]

8. The learned Senior Advocate for the petitioners secondly contends that Clause 4.6.4 of the West Bengal Regulatory Commission (Electricity Supply

Code) Regulation 2013, on the basis of which the DVC makes its claim, is contrary to the objectives and provisions of the Insolvency and Bankruptcy

Code (IBC), 2016 and is, thus, hit by Section 238 of the IBC, which gives the IBC primacy over other laws, including the Electricity Act, 2003. In

support of such submission, the petitioners cite Paschimanchal Vidyut Vitran Nigam Ltd. V. Raman Ispat Pvt. Ltd. &Ors. [2019 SCC OnLine

NCLAT 883].

9. For effective revival of the debtor company, the Resolution Plan is binding with immediate effect from its approval by the NCLT on October 8,

2021, it is argued. Moreover, Section 43 of the Electricity Act, 2003 mandates the DVC to restore supply of power, since the claims of the DVC stand

extinguished in law.

10. Moreover, it is contended by the petitioners, the DVC has accepted the amount of Rs. 7,45,608/- tendered by the petitioners and is now estopped

from claiming its pre-CIRP dues as a pre-condition for restoring electricity supply.

11. The learned Senior Advocate appearing for the petitioners contends that although an appeal against the order approving the Resolution Plan is

pending at the behest of the DVC before the NCLAT, no stay of operation of the said order of approval has been passed in the appeal. On or about

January 31, 2022, the NCLAT recorded that the present petitioners were not proposing to file any contempt application against the DVC. However, it

is submitted that the said recording cannot debar the writ court from passing any order.

12. Since no contravention of any condition of license has been alleged in the present case, Section 129 of the 2003 Act is not applicable, it is argued.

Moreover, neither the Grievance Redressal Officer under Section 42 (5) nor the Ombudsman under Section 42 (6) of the 2003 Act are competent to

determine the legal question as to whether or not the dues of the DVC in respect of a pre-CIRP period survives after the approval of the Resolution

Plan.

13. To stress upon the wide discretionary powers of the High Court under Article 226 of the Constitution of India, learned senior counsel places

reliance on Maharashtra Chess Association v. Union of India [(2020) 13 SCC 285].

14. On the other hand, the learned Senior Advocate appearing for the DVC relies on the pendency of the appeal before the NCLAT, against the order

of the NCLT approving the Resolution Plan, as a deterrent in the petitioners virtually seeking implementation of the said impugned order of approval.

15. The power supply agreement between the petitioner no. 1 and the DVC, it is contended, stood terminated independently of the ground of

insolvency, by operation of Clause 4.6.1. of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2007, read

with Clause 23 of the said agreement.

16. Even as per Essar Steel (supra), relied on by the petitioners, it is argued that the Supreme Court treated electricity dues as distinct and separate

from dues of other operational creditors, for which the former has primacy over the Resolution Plan.

17. The learned Senior Advocate for the DVC next relies on Gujarat Urja Vikas Nigam's Case, reported at (2021) 7 SCC 209. The Supreme

Court held there that the power purchase agreement was terminated solely on the ground of insolvency, since the event of default contemplated under

Article 9.2.1(e) was the commencement of insolvency proceedings against the corporate debtor. In the absence of the insolvency of the corporate

debtor, there would be no ground to terminate the agreement, since the termination was not on a ground independent of the insolvency.

18. Applying the same ratio, it is argued, the present claim of the petitioners for restoration of electricity supply should also be turned down.

19. As far as the decisions cited by the petitioners are concerned, the learned Senior Advocate for the DVC submits that there is no inconsistency

between those and Gujarat Urja Vikas Nigam (supra).

20. In DVC v. Karthik Alloys (supra), the DVC had disconnected supply during the moratorium period, as opposed to the present case, where such

disconnection was earlier.

21. In Sri Vasavi Industries (supra), it is contended, Gujarat Urja (supra) was not considered.

22. Lastly, learned senior counsel appearing for the DVC submits that the undertaking given by the petitioners that they will not initiate contempt

proceedings during pendency of the appeal before the NCLAT, by necessary implication, includes filing the writ petition for implementation of the

directions given by the NCLT.

23. In reply, the learned Senior Advocate for the petitioners seeks to distinguish Gujarat Urja (supra) on the ground that the ratio decidendi in the said

case and the issues involved in the present matter are different. There, the question decided was whether the inherent power of the Tribunal embodied

in Section 60(5) of the IBC can be used to oust all powers vested in regular Courts and Tribunals. However, in the present case the issue is not

whether the termination of electricity was relatable to the CIRP, but whether the claim of dues of the DVC still survives or has been extinguished and,

if so extinguished, whether DVC has a mandatory obligation to supply electricity in terms of Section 43 of the 2003 Act.

24. Upon hearing the contesting parties, this court decides as follows:

25. Gujarat Urja (supra) was on a different footing, inasmuch as the context was the termination of a power purchase agreement in exercise of the

powers of the Tribunal under Section 60(5) of the IBC, whereas, in the present case, the germane issues are, whether the pre-CIRP claims of the

DVC survives the acceptance of the approval of the Resolution Plan and what is the effect of the pendency of the appeal against the order of

approval before the NCLAT and the Āċâ,ŦĒċundertakingĀċâ,ŦĒċ, if any, made before it on behalf of the petitioners.

26. In the present case, there does not arise any question of the power purchase agreement itself being terminated. Section 238 of the IBC clearly

provides that the provisions of the said Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time

being in force or any instrument having effect by virtue of any such law.

27. A harmony can be struck between the ratio of Gujarat Urja (supra) and the proposition reiterated in Essar Steel (supra) onwards to Sri Vasavi

(supra), in the context of the facts of the present case.

28. As per Gujarat Urja (supra), the NCLT cannot oust the powers of any other statute by virtue of its inherent powers under Section 60(5) of the

IBC. Instead of having any quarrel with the said proposition, let us proceed by accepting the same.

29. In the present case, admittedly, the disconnection of the electricity supply of the petitioner no. 1 took place prior to the commencement of the

CIRP.

30. The Āċâ,ŦĒċ"duesĀċâ,ŦĒċ claimed under Section 56 of the 2003 Act pertain to the juncture of such disconnection. Section 56 of the 2003 Act confers dual

rights on the licensee Āċâ,ŦĒċ" first, to recover the dues and secondly, to withhold reconnection of electricity till repayment of such dues. Thus, both the said

rights are dependent on the single touchstone Āċâ,ŦĒċ" Āċâ,ŦĒċ"duesĀċâ,ŦĒċ, which relate to electricity and other charges due from the consumer at the time of

disconnection. Admittedly, in the present case, disconnection took place prior to commencement of the CIRP; hence, the dues are pre-CIRP debts.

31. Section 56 further provides that the electricity supply may be discontinued Āċâ,ŦĒċ"until such charge or other sum, together with any expenses incurred

by him in cutting off and reconnecting the supply, are paidĀċâ,ŦĒċ but no longer. The expression Āċâ,ŦĒċ"such chargeĀċâ,ŦĒċ refers to the first part of the section

which relates the charge to the time of disconnection. Insofar as the electricity charges and disconnection charges are concerned, those obviously

refer to the juncture of disconnection. However, only the reconnection charges, by definition, are incurred at the time of restoration of connection.

32. Hence, in the present case, as per the scheme of the IBC, as interpreted in the light of the judgments cited by the petitioners, including Essar Steel

(supra), Ghanshyam Mishra (supra), Sri Vasavi (supra), etc., all pre-CIRP debts (in other words, "dues") are extinguished once and for all by

approval of the Resolution Plan, so that hydra heads of new debts do not confront the successor of the consumer-company even after the approval of

the Resolution Plan by the NCLT.

33. This is not a case of ouster of the powers of the licensee conferred by the 2003 Act. Even if such powers under Section 56 of the 2003 Act

remain intact, those become illusory in view of the dues themselves having been extinguished on the approval of the Resolution Plan, by independent

operation of the IBC. Thus, even if the DVC retains its powers to recover debts and/or withhold electricity supply till the dues are cleared, there

remain no dues to be cleared, since all pre-CIRP debts of the petitioner no.1-company, that is, the successful resolution applicant stand extinguished.

34. Thus, the DVC acted without jurisdiction and de hors the law in further withholding the electricity supply of the petitioner no.1.

35. Insofar as the pendency of the appeal before the NCLAT against the order of the NCLT approving the Resolution Plan is concerned, it is well-

settled that mere pendency of an appeal does not operate of its own as a stay. In the absence of any specific stay order being passed in the appeal,

there is no impediment to the petitioners asserting their right of immediate resumption of business in terms of the approved Resolution Plan.

36. The so-called undertaking before the NCLAT was a mere submission that no contempt proceeding shall be initiated against the DVC. It is well-

known that the contempt jurisdiction is penal in nature and is distinct and different from execution or implementation of an order. Even without

initiating any contempt proceeding, the petitioners are fully at liberty to seek implementation of the validly approved Resolution Plan until, if at all, the

same is set aside by the NCLAT.

37. That apart, the balance of convenience and inconvenience is squarely in favour of directing the DVC to restore electricity connection immediately

to ensure that the valid Resolution Plan is given effect to and, more importantly the previously going concern does not suffer a serious set-back again,

despite the approval of the corporate resolution plan, due to sitting idle for dearth of power supply. On the other hand, if the DVC restores electricity

supply, the same will not be an irreversible act, so much to the detriment of the DVC that it would suffer substantial hardship.

38. Another determinant is the acceptance of the DVC of the amount of Rs. 7,45,608/- on November 8, 2021, that is, after and in terms of the order

of approval of the Resolution Plan by the NCLT on October 8, 2021. Such acceptance of the amount can definitely be construed as waiver of the

right of the DVC, if there was any, to discontinue electricity supply.

39. Thus, in the light of the above observations, W.P.A. No.3360 of 2022 is allowed, thereby directing the Damodar Valley Corporation (Respondent

no. 1) to restore the electricity supply of the writ petitioner no. 1-company at the earliest, positively within four weeks from date, subject to payment of

the reconnection charges by the petitioner no. 1. However, such restoration of connection shall be subject to the final result of the appeal pending at

the behest of the DVC before the NCLAT which will, in turn, affect the approval of the Resolution Plan itself, which has extinguished the prior debts

of the petitioner no. 1-company as of now, unless set aside.

40. There will be no order as to costs.

41. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.