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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.8090 of 2019

Bhushan Power and Steel Ltd. .... ***Petitioner***

-versus-

Director of Industries-Cum-Chairman, Micro and Small Enterprises Facilitation Council, Buxi Bazar, Cuttack and another .... ***Opposite Parties***

Learned advocates appeared in this case:

For petitioner : Mr. Sanjit Mohanty, Senior Advocate

For opposite parties : Mr. A. K. Sharma, Advocate (AGA) (for opposite party no.1)

Mr. S. S. Das, Senior Advocate (for opposite party no.2)

CORAM: JUSTICE ARINDAM SINHA

Dates of hearing : 21.03.2023, 03.04.2023 and 28.06.2023
Date of judgment : 20.07.2023

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1. Mr. Mohanty, learned senior advocate appears on behalf of petitioner and Mr. Das, learned senior advocate, for opposite party no.2, the two contesting parties in this writ petition. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf

of opposite party no.1. Contesting parties earlier appeared and were heard.

2. Submission made on behalf of petitioner was, impugned is award dated 20th February, 2019 made by Micro and Small Enterprises Facilitation Council (opposite party no.1) under sub-section (3) in section 18 of Micro, Small and Medium Enterprises Development Act, 2006. Opposite party no.2 was operational creditor. There was proceeding under Insolvency and Bankruptcy Code, 2016. In the period of moratorium said opposite party moved the Council. He could not have done so. Moreover, on the Authority having approved the resolution plan, payment in accordance with the scheme was made by the successful resolution applicant. Successful resolution applicant is behind petitioner. In the circumstances, said opposite party had and is deemed to have had execution, satisfaction and discharge of its claim against petitioner. This was overlooked in the award. As such, the illegality and material irregularity appear on face of impugned award since the facts stood referred therein.

3. Petitioner rendered demonstration that opposite party no.2, being supplier to petitioner-company, was operational creditor and its position considered in the resolution plan approved by the National

Company Law Tribunal (NCLT), on its judgment dated 5th September, 2019. Further demonstration was, pursuant to said judgment opposite party no.2, on his claim taken at Rs.26,79,70,808.27/- the resolution plan had provided for Rs.22,01,84,363/-. Consequently, Rs.47.70% of the accepted amount at Rs.10,50,27,941/- was paid to said opposite party. The payment was made on 24th March, 2022 evidenced by Unit Transaction Reference (UTR) no. SBIN 422083896125. Said judgment has become final on there being no challenge mounted against it. The supplier having had been paid the money in terms of the resolution plan, there was no relevance of any dispute to be referred under the Act of 2006. Hence, impugned award is required to be interfered with on judicial review as opposite party no.2 had participated in the resolution process and accepted payment thereunder. Reliance was placed on sections 31, 60(5) and 238 in the Code.

4. Further submission on behalf of petitioner was with regard to requirement under section 19 in the 2006 Act, on pre-deposit. Reliance was on judgments of the Supreme Court, firstly in **L. Chandra Kumar v. Union of India**, reported in **AIR 1997 SC 1125**, paragraphs 78 and 79 for declaration of law that judicial superintendence over decisions of all Courts and Tribunals within respective jurisdictions of the High

Courts is also part of basic structure of the Constitution and can never be ousted or excluded by operation of statute, enacted by the Parliament. Further reliance was on **Whirlpool Corporation vs. Registrar of Trade Marks**, **Mumbai**, reported in **AIR 1999 SC 22**, paragraphs 14 and 15 for submission that challenge in the writ petition squarely fell under the third contingency stated in paragraph 15, on the order or proceeding under the Act of 2006 being wholly without jurisdiction.

5. On behalf of opposite party no.2 submission was on reliance of **judgment dated 8th October, 2021** of the Supreme Court in **Civil Appeal no.6252 of 2021 (Gujarat State Disaster Management Authority V. M/s. Aska Equipments Ltd.),** paragraphs 9, 10 and 11 for contention that mandate of section 19 in the 2006 Act, regarding pre-deposit, had to be complied with for seeking setting aside of any decree, award or other order made, inter alia, by the Council.

6. Further submission on behalf of opposite party no.2 was, on the one hand there was non-acceptance by the resolution plan or confusion regarding said opposite party's claim and on the other, pursuant to expiry of 180 days from date of admission of the insolvency resolution process, there was no extension order. As such,

the moratorium ceased to exist. For purpose of quantification, opposite party no.2, at that time moved the Council under the Act of 2006. There can be no question arisen on the quantification thereafter made by the Council.

7. Today, Mr. Das draws attention to the reply filed by petitioner in the company petition before the NCLT. Paragraph 7 therefrom is reproduced below.

> *"The Answering Respondent while dealing with the Applicant's claim considered the contract of service (i.e. work order) as well as the invoices submitted, both referred to the principal amount and not to the interest amount as claimed by the Applicant.* ***Further, there is not even any court or tribunal's order awarding any interest in favour of the Applicant to justify its claim.***"

(emphasis supplied)

Mr. Das submits, this was the confusion created by petitioner, which is why his client moved the Council. The premise was that principal claim stood admitted but the interest was disputed. It needed quantification on adjudication by appropriate authority, as was alleged to be an omission. He draws attention to impugned award to demonstrate that accordingly, the Council proceeding on the basis of admission of the principal claim, had found interest to also be due to

his client. Interest of Rs.17,76,03,939.39 up to 26th July, 2017 is payable under sections 15 and 16 under the Act of 2006. The Council upon verifying the records found that claim of his client is genuine. Hence, there was award. He concedes that direction for payment in impugned award ought not to have been made. However, the quantification on having been made, was not taken into account in considering the claim of his client in the matter of approval of the resolution plan. In the circumstances, impugned award was duly made and should not to be interfered with.

8. He relies on judgments of the Supreme Court:-

i) **Swiss Ribbons P. Ltd. vs. Union of India**, reported in **(2019) 213 Company Cases 198 (SC)**, placitums 10 and 11. He submits, extracted was the preamble in the Code of 2016. The interpretation, the moratorium was for protection of assets of the corporate debtor. Initiation of the proceeding before the Council pursuant to confusion sought to be created by petitioner regarding omission of quantification of interest was not an action directed at alienating or encumbering any asset of petitioner.

ii) **P. Mohanraj. Vs. Shah Brothers Ispat (P) Ltd**., reported in **(2021) 6 SCC 258**, paragraph 29 for same view taken by the same learned Judge, who authored **Swiss Ribbons** (supra).

9. In reply Mr. Mohanty relies on judgment of the Supreme Court in **Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited**, reported in **(2021) 9 SCC 657**, paragraphs 61 and 62 (Manupatra print). He submits, interpretation of the Supreme Court was that legislative intent of making the resolution plan binding on all stakeholders, after it gets the seal of approval from the Adjudicating Authority upon its satisfaction it was approved by the Committee of Creditors (CoC), meets the requirement as referred in sub-section (2) of section 30. After approval of the plan, no surprise claims should be flung on the successful resolution applicant. The purported adjudication and impugned award made in violation of the moratorium puts forth something that was not contemplated in the resolution plan, approved by the Adjudicating Authority.

10. With reference to section 12 in the Code of 2016 he submits that initially mandated period for completion of insolvency resolution process was 180 days. The time could be extended as provided

thereunder for period not exceeding 90 days and the extension could only be granted once. However, there was amendment to the section by Act 26 of 2019, with effect from 16th August, 2019. Two provisos were inserted by the amendment. He relies on the second proviso. It is reproduced below.

> *"Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019."*

He submits, time for completing the insolvency resolution process stood extended by amended proviso, till 90 days after 16th August, 2019. The resolution plan stood approved on 5th of September, 2019, well before expiry of the extended time by amendment. In the circumstances, the moratorium operated during pendency of the insolvency resolution process, as provided in section 14. Proviso under sub-section (4), in facts of this case, operates for the moratorium to have ended on 5th September, 2019. As such, institution of the proceeding on moving the Council was clearly barred by the moratorium and hence, the Council having entered upon the reference

to go on to pass impugned award, did so without jurisdiction. Mr. Das submits, impugned award was made much before the coming into effect of the amendment on 16th August, 2019.

11. Facts of the case emerging from pleadings and argument put forth by the contesting parties are not in dispute. Those essential for the adjudication are that there was initiated insolvency resolution process in respect of petitioner-company. Opposite party no.2 being supplier participated in the process on coming to know of it. He filed claims, both on account of principal and interest. In the resolution process, cognizance was taken only of the claim on principal. During pendency of the resolution process the supplier invoked provisions in section 60(5) of the Code. The sub-section is reproduced below.

> *"60(5). Notwithstanding anything to the contrary contained in any other law for the time being in force,* ***the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-***
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> *(a) any application or proceeding by or against the corporate debtor or corporate person;*
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> *(b)* ***any claim made by or against the corporate debtor or corporate person****, including claims by or against any of its subsidiaries situated in India; and*
>
> *(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of*

the corporate debtor or corporate person under this Code. "

(emphasis supplied)

Contesting parties did not bring to notice of Court, order made disposing of said application. However, submission was made on behalf of petitioner that approval of the resolution plan by the NCLT put paid to all objections as might have been raised during pendency of the insolvency resolution process. The omission need not detain the adjudication since, declaration of law by the Supreme Court in **Edelweiss** (supra) is clear, on binding nature of the resolution plan upon approval thereof duly made. It is undisputed that opposite party no.2 was an operational creditor, who participated in the resolution process culminating in the duly approved resolution plan. Furthermore, Court accepts contention of petitioner that the moratorium commenced and ran till 5th September, 2019, when the resolution plan stood approved. In the circumstances, the Council entered into the reference during subsistence of the moratorium.

12. Perusal of impugned award reveals record in it that on behalf of petitioner, subsistence of the moratorium was brought to notice of the Council. Impugned award thereafter is silent regarding consideration of the contention. It proceeds straightway to give finding

on admitted principal claim and genuineness of consequent claim of interest, claimed under sections 15 and 16 in the Act of 2006. The omission by the Council to deal with this contention points to non-application of mind at the first instance and an implication that it could not be dealt with. In the circumstances, the supplier's anxiety in being unable to recover on his claim for interest cannot stand in the way of impugned award being set aside on judicial review.

13. The requirement of pre-deposit is mandated by section 19 in the Act of 2006. It is a statutory requirement. Section 18, in providing for arbitration on thereby made applicable provisions in Arbitration and Conciliation Act, 1996, was resorted to by the Council, resulting in impugned award. Statutory remedy is for challenge of the award under section 34 in the Act of 1996. By operation of section 19 in the Act of 2006, the requirement for pre-deposit overrides provisions in section 36 of the 1996 Act. Having said so, challenge in successfully moving the constitutional writ Court stands on a separate footing and is maintainable in spite of availability of alternative statutory remedy. Mandate of statute cannot impede exercise of constitutional writ jurisdiction. The contention of opposite party no.2 on pre-deposit is not well founded.

14. For reasons aforesaid impugned award is set aside and quashed. Mr. Mohanty submits, his client has filed interim application for quashing the execution case launched by opposite party no.2, pursuant to impugned award, set aside herein. Petitioner has liberty to produce this order before the executing Court and accordingly pray.

15. The writ petition is disposed of.

(Arindam Sinha)
Judge

Prasant