

CASE DETAILS**PRIMARY DETAILS**

Main Number	WP 3963/2024	SR Number	WPSR 4619/2024
Petitioner	M/s. EMCO Limited,	Respondent	The Joint Commissioner State Tax,
Petitioner Advocate	KARAN TALWAR	Respondent Advocate	Spl Standing Council for Commercial Taxes
Case Category	NON-SERVICE	District	WARANGAL
Filing Date	06/02/2024	Registration Date	14/02/2024
Listing Date	22/02/2024	Case Status	DISPOSED Click here to see the Order
Disposal Date	22-02-2024	Diposal Type	ALLOWED NO COSTS
Purpose	FOR ADMISSION	Scrutiny Officer name	AJS
Hon'ble Judges	THE HONOURABLE SRI JUSTICE P.SAM KOSHY,THE HONOURABLE SRI JUSTICE N.TUKARAMJI		

**THE HONOURABLE SRI JUSTICE P.SAM KOSHY
AND
THE HONOURABLE SRI JUSTICE N.TUKARAMJI
WRIT PETITION Nos.3962, 3963 and 3964 of 2024**

COMMON ORDER: *(per Hon'ble Sri Justice P.SAM KOSHY)*

Since all three writ petitions are in respect of the same assessee/petitioners, the issue involved also being identical in nature and the grounds of challenge also being identical, we proceed to decide the three writ petitions by this common order.

2. Heard Mr. Karan Talwar, learned counsel for the petitioners, Mr. K. Raji Reddy, learned Senior Standing Counsel for Income Tax Department appearing for respondent Nos.1 to 3 and Mr. K. Arvind Kumar, Central Government Counsel appearing for respondent No.4.

3. The challenge in all the three writ petitions is to the order issued by respondent No.1 under Section 73 of the SGST/CGST Act 2017. The challenge is primarily on the ground that the notices have now been issued, petitioner No.1 Company which has gone into liquidation and petitioner No.2 is the Company which has acquired the liquidated Company, the main contention of the learned counsel for the petitioners was that petitioner No.1 was the corporate debtor in the liquidation proceedings and as such was a going concern and petitioner No.2 was the auction purchaser and acquired the said petitioner No.1 Company on a clean slate basis with all its liabilities

that was of petitioner No.1 Company prior to the transfer date, have now been fully extinguished as per the order of the order of the National Company Law Tribunal, Mumbai Bench, Court II (for short 'the NCLT').

4. As per the NCLT's order dated 09.08.2021, the effective date of transfer was 20.06.2022. Subsequent to the petitioner No.2 having acquired the assets of the petitioner No.1 Company by way of liquidation proceedings and the order of the NCLT, the respondent authorities issued a show cause notice dated 29.09.2023 and proposed the proceedings under Section 73. The petitioner No.1 immediately gave a reply to the show cause notice specifically mentioning that petitioner No.1 was the corporate debtor which was a going concern and petitioner No.2 was the firm which has acquired petitioner No.1 by way of an auction on a clean slate basis. With all liabilities whatsoever having been extinguished, proceedings under Section 73 proposed to be initiated was not sustainable and was liable to be closed. The respondent authorities in spite of taking note of the contentions that the petitioners had raised in reply to the show cause notice, proceeded and passed three impugned orders which are under challenge in these writ petitions.

5. Learned counsel for the petitioners took the Court to the claim put forth by all the financial creditors and operational creditors and other stakeholders who were other than financial creditors and the

operational creditors and where the various departments of the Government who were the operational creditors as of February, 2023, showed that the respondents in the instant cases i.e. the tax departments under the State Government had raised a total claim of Rs.1,01,070/- and the said claim was put forth before the NCLT which was ordered to be paid by the liquidator. Apart from the aforesaid Rs.1,01,070/- raised from the department, there was no other claim raised by any of the departments which are pending before any of the authorities concerned and as such all other claims if at all those which are now been raised by the departments which are under challenge in these writ petitions all would stand automatically extinguished in terms of the order of the NCLT and it is for this reason that the instant writ petitions have been filed.

6. Learned counsel for the petitioners referred to the decision of this Court in W.P.No.23436 of 2006 decided on 23.01.2024 which arose from an approval of a resolution plan by the NCLT and prayed for applying the same principle in the instant cases also. Apart from the said judgment, he also relied upon a recent decision of the Gujarat High Court on the said subject in the case of **KRBL Limited v. State of Gujarat**¹ wherein the Gujarat High Court while allowing

¹ R/Special Civil Application No.19804 of 2022 decided on 22.09.2023

the petition, set aside the order passed by the department in the said case.

7. Learned counsel for the respondents on the other hand fairly conceded to the fact that petitioner No.1 is a liquidated Company that is a going concern and the petitioner No.2 was the acquired Company acquiring all the assets of the liquidated company by way of e-auction that was conducted and where the petitioner No.2 was the highest bidder. Learned counsel for the respondents did not dispute the fact that the entire liabilities which stood on the corporate debtor prior to the order of the NCLT including those which were claimed and those which were not claimed all stood extinguished so far the Company which had acquired the assets of the corporate debtor.

8. Having heard the contentions put forth on either side and on perusal or records, at this juncture, it would be necessary to take note of the relevant portion of the order dated 09.09.2022 passed by the NCLT which reads as under:

Prayer Clause No.	Prayer	Remark
H)	Direct that on and from the Transfer Date, all claims by any Government authority or department against the Corporate Debtor or any liabilities or obligations owed or payable by the Corporate Debtor to any Government authority or department (including but not limited to Taxes, liabilities, interest and penalties, duties, etc. on account of income-tax, tax deduction at source, tax collection at sources, goods and services tax, custom duty, value added tax, service tax, wealth-tax, cess,	Granted. Since the applicant should not be saddled with the liability prior to the issuance of sale certificate.

	DGFT dues, property tax etc.), whether direct or indirect, whether admitted or not, due or contingent, asserted or un-asserted, crystallized or un-crystallized, known or unknown, secured or unsecured, disputed or undisputed, in relation to any period prior to the Transfer Date, whether admitted by the Liquidator or not in full or part, shall stand permanently extinguished and no such claim, liability etc. shall be recoverable in any form or manner whatsoever from the Corporate Debtor/Applicant or their successors or assignees and the payment of sale consideration by the Applicant is a full and final settlement towards such claims, liabilities etc.;	
J)	Direct that all inquiries, investigations, assessments, notice clauses of action, suits, claims, disputes, litigations, arbitration, or other judicial regulatory or administrative proceedings against, or in relation to or in connection with the Corporate Debtor (other than against the erstwhile promoters or former members of the management of the Corporate Debtor), pending or threatened, present or future, in relation any period prior to the Transfer Date shall not be continued and/or instituted in future against the Corporate Debtor/Applicant or their successors or assignees;	Granted. Since the applicant should not be saddled with the liability prior to the issuance of sale certificate.

9. In the light of the aforesaid order of the NCLT, it would now be relevant to take note of the decision of the Hon'ble Supreme Court in the case of **Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited**² which reads as under:

“65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by

² (2021) 9 SCC 657

the Adjudicating Authority, after it is 61 satisfied, that that the resolution plan as approved by CoC meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.

66. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who d not vote in favour of 62 the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with subsection (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of subsection (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (3) of subsection (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of the 63 assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also require to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum.

68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities, that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets 64 the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in subsection (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that the should start with fresh slate on the basis of the resolution plan approved.

69. This aspect has been aptly explained by this Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Singatory (supra).

“107. For the same reason, the impugned NCLAT judgment [Standar Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] IN holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as 65 this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.”

70. In view of this legal position, we could have very well stopped here and held, that, the observation made by NCLAT in the appeal filed by EARC to the effect, that EARC was entitled to take recourse to such remedies as are available to it in law, is impermissible in law.

71. As held by this Court in the case of Pr. Commissioner of Income Tax vs. Monnet Ispat and Energy Ltd.¹⁰, in view of provisions of Section 238 of I&B Code, the provisions thereof will have an overriding effect, in there is any inconsistency with any of the provisions of the law for the time being in force or any

instrument having effect by virtue of any such law. As such, the observations made by NCLAT to the aforesaid effect, if permitted to remain, would frustrate the very purpose for which the I&B Code is enacted.

72. However, in Civil Appeal arising out of Special Leave Petition (Civil) No.11232 of 2020, Writ Petition (Civil) No.1177 of 2020 and Civil Appeals arising out of Special Leave Petition (Civil) Nos.71477150 of 2020, the issue with regard to the statutory claims of the State Government and the Central Government in respect of the period prior to the approval of resolution plan by NCLT, will have to be considered.

73. Vide Section 7 of Act No.26 of 2019 (vide S.O.2953 (E), dated 16.8.2019 w.e.f 16.8.2019), the following words have been inserted in Section 31 of the I&B Code. “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”

74. As such, with respect to the proceedings, which arise after 16.8.2019, there will be no difficulty. After the 67 amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished.

...

79. In the Rajya Sabha debates, on 29.7.2019, when the Bill for amending I&B Code came up for discussion, there were certain issues raised by certain Members, the Hon'ble Finance Minister stated thus:

“IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC.

There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be not criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would

want all the hon. Members to recognize this message and communicate further that this Code, therefore, gives that comfort to all new bidders. So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear.

(emphasis supplied)”

10. Recently, a similar matter came up for before the Gujarat High Court in the case of **KRBL Limited** (supra) wherein the Division Bench vide its judgment dated 22.09.2023 heavily relying upon the judgment of the Hon’ble Supreme Court in the case of **Ghanashyam Mishra and Sons Private Limited** (supra) in paragraph Nos.5.18 to 6 held as under:

“5.18 Reading of the aforesaid paras would indicate that once having relinquished its interest under Section 52, the State cannot continue the insistence of maintaining the charge in the revenue records and its claim will have to stand in priority.

5.19 The argument of the State that since the asset was sold on a condition of “AS IS WHERE IS BASIS”, the charge of the State was rightly recorded is misconceived as the deed already records that the purchaser shall not be liable for payment of any outstanding dues of the government. This too was, in the opinion of the Court a clause that would relieve the petitioner of the liability to pay tax dues. In light of the decision in the case of **Ghanshayam Mishra and Sons Private Limited** (supra), the petitioner was entitled to a clean slate.

5.20 Even otherwise as per Section 100 of the Transfer of Property Act, a charge cannot be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of such charge. The State moved in to get a charge registered on 15.12.2022 much later.

6. For the aforesaid reasons, petition is allowed. The order dated 05.01.2022 is set aside.”

11. Taking into consideration the authoritative decision of the Hon'ble Supreme Court in the case of **Ghanashyam Mishra and Sons Private Limited** (supra) and also the view taken by the Gujarat High Court in the case of **KRBL Limited** (supra) and the recent decision of this Court in W.P.No.23436 of 2006, we have no hesitation in holding that the order under Section 73 (Annexure P1) issued by respondent No.1 in the three writ petitions is totally without jurisdiction and the same therefore deserves to be and are accordingly set aside/quashed.

12. In the result, the writ petitions are allowed. However, there shall be no order as to costs. Consequently, miscellaneous petitions pending if any, shall stand closed.

P.SAM KOSHY, J

N.TUKARAMJI, J

Date: 22.02.2024
GSD