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Neutral Citation No. - 2024:AHC:194238-DB

Court No. 40

WRIT TAX No. - 408 of 2021

M/S NS PAPERS LIMITED AND ANOTHER

v.

UNION OF INDIA THROUGH SECRETARY AND OTHERS

For the Petitioners :- Ms. Arti Agarwal with Ms. Mahima Jaiswal and Mr. Rishabh Jain, Advocate

For the Respondents:- Mr. Gaurav Mahajan, Advocate

Hon'ble Shekhar B. Saraf.J.
Hon'ble Vipin Chandra Dixit, J.

(Dictated in open Court by Shekhar B. Saraf, J.)

1. Heard Ms. Arti Agarwal with Ms. Mahima Jaiswal and Mr. Rishabh Jain, learned counsel appearing on behalf of the petitioners and Mr. Gaurav Mahajan, learned counsel appearing on behalf of the respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner has challenged the Assessment Order dated April 28, 2021 passed under Section 144 read with Section 144B of the Income Tax Act, 1961 (hereinafter after referred to as ‘the Act’) for the assessment year 2018-19.

3. Ms. Arti Agarwal, learned counsel appearing on behalf of the petitioner has submitted that the petitioner no.1 was the erstwhile company that went through insolvency proceedings. She submits that the resolution plan was approved on February 24, 2021 wherein the Income Tax Department had also put forward its claim before the resolution professional. Subsequent to the resolution plan being approved, the assessment order has been passed for the particular assessment year.

4. Learned counsel appearing on behalf of the petitioner further reiterates that by letter dated March 8, 2021 this information had been communicated to the Income Tax Department. She, accordingly, submits that the entire proceedings that has been initiated and the impugned order that has been passed are without any basis in law and are specifically contrary to Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code').

5. Learned counsel appearing on behalf of the petitioner relies upon the judgements of the Supreme Court in the case of **Committee of Creditors of Essar vs. Satish Kumar Gupta** reported in **(2020) 8 SCC 531** and in the case of **Ghanshyam Mishra and Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.** reported in **2021 (4) TMI 613** to buttress her argument that once a resolution application has come into picture, the successful applicant cannot suddenly be faced with undecided claims. The relevant paragraph in **Satish Kumar Gupta (Supra)** is delineated below :-

> *"67. For the same reason, the impugned NCLAT judgment 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 this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who 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 out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.*
>
> *(Emphasis by me)*

6. She further submits that since as per the Resolution plan, all pending proceedings are extinguished, now the Resolution Applicant cannot be burdened with this assessment order which is not part of the Resolution Plan. The provisions of IBC ensures that the successful resolution applicant starts running the business of the corporate debtor as a fresh innings after the approval of resolution plan. However, in the present case respondent No.2 passed an impugned order after approval of the resolution plan and made addition. The Resolution Applicant cannot be saddled with any unforseen liability and impugned order is bad as it amounted to fastening liability on the Resolution applicant beyond what has been agreed in the Resolution Plan.

7. Furthermore, B.R. Gavai, J. authoring the Supreme Court three Bench judgement in **Ghanshyam Mishra (Supra)** has recently highlighted the principles at paragraph nos.86 to 95 that are extracted below:-

> *"86. As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is*

permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

87. *We have no hesitation to say that the words "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature noticing that on account of obvious omission certain tax authorities were not abiding by the mandate of the I&B Code and continuing with the proceedings, has brought out the 2019 Amendment so as to cure the said mischief. We therefore hold that the 2019 Amendment is declaratory and clarificatory in nature and therefore retrospective in operation.*

88. *There is another reason which persuades us to take the said view. Clause (10) of Section 3 of the I&B Code defines "creditor" thus:*

> *"creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"*

89. *Subsections (20) and (21) of Section 5 of the I&B Code define "operational creditor" and "operational debt" respectively as such:*

> *"operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*
>
> *"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"*

90. *"Creditor" therefore has been defined to mean "any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder".*

> *"Operational creditor" has been defined to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.*
>
> *"Operational debt" has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for*

the time being in force and payable to the Central Government, any State Government or any local authority.

91. *It is a cardinal principle of law that a statute has to be read as a whole. Harmonious construction of clause (10) of Section 3 of the I&B Code read with clauses (20) and (21) of Section 5 thereof would reveal that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of "operational debt". The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of "operational creditor" as defined under clause (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of "creditor" as defined under clause (10) of Section 3 of the I&B Code. As such, even without the 2019 Amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term "creditor" and in any case, by the term "other stakeholders" as provided in sub-section (1) of Section 31 of the I&B Code.*

92. *The Division Bench of the Rajasthan High Court in Ultra Tech Nathdwara Cement Ltd. v. Union of India[Ultra Tech Nathdwara Cement Ltd. v. Union of India, 2020 SCC OnLine Raj 1097] , by judgment and order dated 7-4-2020 has taken a view that the demand notices issued by the Central Goods and Service Tax Department, for a period prior to the date on which NCLT has granted its approval to the resolution plan, are not permissible in law. While doing so, the Rajasthan High Court has relied on the judgment of this Court in Essar Steel (India) Ltd. (CoC) [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] .*

93. *The Calcutta High Court in Akshay Jhunjhunwala v. Union of India [Akshay Jhunjhunwala v. Union of India, 2018 SCC OnLine Cal 142] has also taken a view that the claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. We are in agreement with the views taken by these courts.*

94. *Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold that the 2019 Amendment is declaratory and clarificatory in nature. We also hold that even if the 2019 Amendment was not effected, still in light of the view taken by us, the Central Government, any State Government or any local authority would be*

bound by the resolution plan, once it is approved by the adjudicating authority (i.e. NCLT).

CONCLUSION

95. *In the result, we answer the questions framed by us as under:*

(i) That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

(ii) The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.

(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."

(Emphasis by me)

8. Furthermore, division bench of the Bombay High Court in the case of **Uttam Galva Metallics Ltd. and Mr. Subodh Karmakar vs. Assistant Commissioner of Income Tax, Union of India** reported in **2024 (9) TMI 371** has dealt with all the Supreme Court judgments on the point extensively including the judgments cited above and has come to the following conclusion :-

"16. It is therefore crystal clear that once a resolution plan is duly approved under Section 31 (1) of the IBC, the debts as provided for in

the resolution plan alone shall remain payable and such position shall be binding on among others, the Central Government and various authorities, including tax authorities. All dues which are not part of the resolution plan would stand extinguished and no person would be entitled to initiate or continue any proceedings in respect of any claim for any such due. No proceedings in respect of any dues relating to the period prior to the approval of the resolution plan can be continued or initiated.

17. In this clear view of the matter, there can be no manner of doubt that the Impugned Proceedings and their continuation against the Petitioner-Assessee are wholly misconceived and untenable. The Impugned Proceedings are essentially reassessment proceedings, and that too of AY 2016-17. Evidently, such proceedings pertain to the period prior to the approval of the resolution plan. The outcome of such proceedings, particularly if adverse to the Petitioner-Assessee, would clearly be in relation to tax claims for the period prior to the approval of the resolution plan. The resolution plan came to be approved on May 6, 2020. Any attempt to re-agitate the assessment for AY 2016-17, evidently and squarely, constitutes pursuit of claims for the period prior to even the initiation of the CIRP. The conduct of such proceedings would be directly in conflict with the law declared in Ghanshyam Mishra, which makes it clear that continuation of existing proceedings and initiation of new proceedings that relate to operations prior to the CIRP are totally prohibited after the approval of the resolution plan. Consequently, nothing in the Impugned Proceedings can legitimately survive."

9. Mr. Mahajan, learned counsel appearing on behalf of the respondent authorities has supported the assessment order on the ground that no proper information was given by the petitioner to the Income Tax Authorities with regard to resolution plan. Ergo, the assessment that was carried out by means of faceless assessment was correctly done as the department did not have notice of the IBC proceedings against the petitioner.

10. Learned counsel appearing on behalf of the respondent authorities further submits that all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of resolution plan shall stand extinguished and no proceedings in

respect of such dues for the period prior to the date on which the Adjudicating Authority granted its approval under Section 31 could be continued. He, however, submitted that the question as to whether or not regular assessment under the provisions of the Act can be initiated, continued with and concluded where CIRP under the Code has been initiated and moratorium under Section 14 of the Code has been imposed by the NCLT, has not expressly been raised nor answered, and therefore remains res-integra. The third question and its answer in the above judgment only relate to initiation of proceedings for recovery of dues and do not relate to the initiation of any fresh assessment proceedings. Moreover, if the final order of the Supreme Court were also perused, it would be clear that it does not cover the point of initiation, continuation and culmination of assessment proceedings, and only declares that the "respondents are not entitled to recover any claims or claim any debts owed to them from the Corporate Debtor accruing prior to the transfer date".

11. He further submits that if proceedings under the Act could be initiated, continued with and culminated during the course of CIRP and institution of Moratorium u/s 14 of the Code, the following may also kindly be considered, for these have a bearing on the fact that income tax proceedings should not get shadowed or extinguished merely by the institution of CRIP and passage of a moratorium order, unless the proceedings were clearly inconsistent with or repugnant to any provisions of the Code, which is not the case here.

12. Upon considering the facts and circumstances of the case, we are of the view that the arguments raised by the learned counsel appearing on behalf of the respondents is without any merit on two counts. Firstly, it is clear by the letter dated March 8, 2021 that the petitioner had informed the Income Tax Authorities with regard to approval of resolution plan. Secondly, the department itself had filed a claim before the Resolution

Professional, and accordingly, the argument that the department was not aware of the IBC proceedings holds no water.

13. Even assuming that the department was not informed about the proceedings, the law is very clear as expounded in the judgments cited above. The resolution applicant cannot be saddled with new claims once a resolution plan has been approved.

14. The argument that an assessment that has been kept pending for a prior period and is quantified subsequent to the approval of the Resolution Plan is an argument in sophistry. If this argument is accepted then all authorities would be in a position to keep assessment/re-assessment pending till completion of the Resolution Plan, and thereafter, culminate the same and saddle the successful Resolution Applicant with an unknown burden. Such an action cannot be countenanced as the same would be an anathema to the fundamental principles of the moratorium provided under the Code. The law cannot be read in a manner wherein the basic structure of the Code is breached by hindering the flow of the same by creation of roadblocks and dams – the underlying principle of the Code is to give a fresh start to the Resolution Applicant. Any new liability being fastened after the approval of the Resolution Plan would inherently and palpably be illegal and go beyond the Lakshman Rekha of the Code.

15. In light of the above, the impugned assessment order dated April 28, 2021 is quashed and set aside. In the event any penalty proceedings have been initiated by the department, the writ petitioner shall be at liberty to challenge the same in accordance with law.

16. Ergo, the writ petition is allowed.

11.12.2024
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(Vipin Chandra Dixit, J.) (Shekhar B. Saraf.J.)