

(2023) 12 JH CK 0053
In the Jharkhand High Court
Case No : Writ Petition (C) No. 410 Of 2022

Amalgam Steel & Power Limited

APPELLANT

Vs

Central Coalfields Limited And Others

RESPONDENT

Date of Decision : 20-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Company (Incorporation) Rule, 2014 — Rule 29
Insolvency And Bankruptcy Code, 2016 — Section 7, 13, 15,. 31, 31(1)

Citation : (2023) 12 JH CK 0053

Hon'ble Judges : Sanjaya Kumar Mishra, CJ;Ananda Sen, J

Bench : Division Bench

Advocate : Indrajit Sinha, Amit Kumar Das

Final Decision : Dismissed

Judgement

1. In this writ petition, the petitioner has prayed to quash the part of letter as contained in Ref. CCL/HQ/C-4/FSA/2021-22/1628 dated 23.8.2021, whereby the bid security deposited by the then Adhunik Alloys & Power Limited was forfeited after cancelling the linkage. A further prayer has been made to refund the deposit of Rs.59,50,000/-.

2. Learned counsel appearing on behalf of the petitioner submitted that on the facts of this case, the respondents could not have forfeited the bid security. He further submitted that the bid security was deposited with the respondent-M/s Central Coalfields Limited (hereinafter to be referred as 'CCL') through the auction provider namely, MSTC by the Adhunik Alloys & Power Limited (hereinafter to be referred as 'AAPL') through the Resolution Professional as the said company AAPL was under the Insolvency Resolution Process. When admittedly the respondent CCL did not raise any claim with the Resolution Professional in regard to any outstanding demand which they could not have made in relation with M/s AAPL, now they could not forfeit the security nor could adjust any dues. He further submitted that since none of the dues of AAPL

payable to CCL was not a part of the resolution plan on the date of approval of such plan, no claim would survive, thus the forfeiture of security is absolutely bad. Learned counsel argued that the respondents have in fact not suffered any loss in the entire transaction as admittedly the letter of intent was not also issued in favour of M/s AAPL, thus in absence of any loss, the bid security could not have been forfeited. As per the petitioner, the change of name/control was not voluntary or unilateral action of M/s AAPL rather the same happened after conclusion of the process of resolution under IBC, thus the respondent could not have invoked the clause under the Fuel Supply Agreement and the scheme framed for that purpose to forfeit the security deposit.

3. Learned counsel appearing on behalf of the respondent-CCL submitted that as per the auction notice and the scheme, in the event of change of name/control of the successful bidder, the rights and relation to the allocated quantity of coal was permissible with the prior approval of the subsidiary coal company i.e. Central Coalfields Limited. Later the same was modified and it was made mandatory to give intimation to the coal company about the change of control/name. He submitted that admittedly in the instant case, no intimation was given to M/s CCL about the change of name/control of the Company. He further argues that due to misrepresentation made by M/s Adhunik Alloys & Power Limited (AAPL) huge amount of Rs.13.46 fell due and became recoverable from the said company under the Coal Supply Agreement but the said company M/s AAPL did not turn up for payment of such dues, thus supply of coal was discontinued and the existing Bank Guarantee of M/s AAPL towards security deposit stood revoked. The demand which was made by M/s CCL, was challenged by the said Company in writ petition being WP(L) NO. 4178 of 2016 which was ultimately withdrawn on 23.12.2021. The pendency of the proceeding under the Insolvency and Bankruptcy Code, 2016 was not initially known to the respondent. When the respondent came to know about the matter, they approached the Resolution Professional, who expressed his inability to entertain such claim. In fact, only on 24.10.2018, the respondent came to know about the said insolvency proceeding. On 27.9.2019, when the respondent enquired about the status of the proceeding, the petitioner, herein, informed that they had taken over the Company and the name and control of the Company has changed as M/s Amalgam Steel and Private Limited with effect from 16.8.2019. He also submitted that as per Clause 5.2 of the Scheme, the change of name/control of the successful bidder and/or any transfer of the specified End Use Plant along with a right in relation to allocated quantity was permissible only with prior approval of CCL. This provision was modified by CCL vide notice dated 20.4.2022 and as per the directive of CCL dated 18.3.2020, the system of seeking the prior approval was done away with. Further there was mandatory requirement of intimation of change of name/control within the stipulated period of three months vide notice dated 14.9.2020. Despite notice dated 14.9.2020, no intimation regarding change of name/control was received, thus having no option, CCL forfeited the bid security in terms of Clause 5.2.1(d) of the Scheme. He further submitted that when the notice was

issued, the petitioner never resisted the invocation of the bid security amount but only stated that the forfeiture would prejudice them and the ground taken by them is that "they are starting on a clean slate". As per the respondent, the petitioner, in reply, urged and pleaded that they should be allowed to participate in the forthcoming auction of the CCL. As per the learned counsel for the respondent, the ground taken by the petitioner was that they are not liable to pay any dues, recoverable from M/s AAPL nor they should be restrained from participating in future auction on account of forfeiture of bid security. It is the stand of the CCL that considering the representation, the respondent clarifies that it is open to the petitioner to apply in the forthcoming linkage auction. The learned counsel for the respondent lastly submitted that forfeiture had already been taken effect as per the terms and clause of the scheme, thus no relief can be granted to the petitioner. He further submitted that the petitioner was not even aware about the bid security amount, which was deposited by the erst while company nor such deposit has been considered in the Resolution Plan, thus the same cannot be refunded.

4. The facts are admitted in this case. One M/s Adhunik Alloys & Power Limited (AAPL) was incorporated under the Companies Act. State Bank of India was a financial creditor of M/s AAPL. The loan taken by M/s AAPL was not re-paid thus M/s AAPL stood as a defaulter. The amount outstanding was Rs.329,92,77,414.71 as on 30.6.2017. In terms of Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as 'IBC'), the State Bank of India filed an application before the National Company Law and Tribunal (NCLT), Kolkata for initiation of Corporate Insolvency Resolution Process. The application was admitted on 23.8.2017 and a Resolution Professional was appointed. On 4. 6.2018, M/s CCL published information by way of scheme for acting as coal linkage in Sponge Iron Sub-Sector. M/s AAPL participated in the said auction through the Resolution Professional for which, bid security of 59,50,000/- was deposited with the auction provider. 35,500 MT coal was allocated to M/s AAPL but the letter of intent was not issued. A letter was issued way back on 10.11.2015 (much prior to initiation of proceeding under the IBC) to M/s AAPL by the respondent-CCL making demand of their outstanding amount. The said letter was only replied by the Resolution Professional on 24.10.2018 intimating that the proceeding under the IBC has been initiated and the Company is presently under the Corporate Insolvency Resolution Professional (CIRP) and moratorium also came into existence on 23.8.2017 vide order passed by the NCLT, Kolkata. It was informed that the plan for revival has been submitted before NCLT, which was approved by the members of the Committee of creditor and is pending for approval by the Adjudicating Authority. From the aforesaid letter, it is apparent that the Resolution Professional informed that as the respondent had not made any claim as prescribed under the IBC for the amount outstanding dues with the Company nor any claim has been received by the Resolution Professional during the Corporate Insolvency Resolution Process till the approval of the Resolution Plan by the Committee of the Creditor, thus no

fresh claim can be entertained by the Resolution Professional. The resolution plan was approved by the NCLT, Kolkata Branch, Kolkata and the resolution plan of Bhagwati Power and Steel Limited was approved and on 16.8.2019. The name and control of M/s AAPL was changed to M/s Amalgam Steel and Power Limited (the petitioner herein) and the same stood incorporated pursuant to Rule 29 of the Company (Incorporation) Rule 2014. On 27.9.2019, M/s CCL wrote to the Resolution Professional enquiring about the present status of the IBC Proceeding, as the same was not known to CCL and also about the present status of the Company. In reply to the same, the petitioner, herein informed that under the provision of IBC, the Corporate debtor i.e. M/s AAPL had successfully undergone the Corporate Insolvency Resolution Process and the name of M/s AAPL has been changed to M/s Amalgam Steel and Private Limited i.e. the petitioner and the resolution is binding on all corporate debtor and its employees, members, creditors including the Central and State Government or any local authority to whom the debt in respect of payment of dues arises. The respondent thereafter issued a notice to show cause on 25.6.2021 seeking reply as to why the security bid would not be forfeited against the quantity of coal secured by M/s AAPL and the bid be cancelled in terms of Clause 5.2.1(d) of the scheme. In reply, the petitioner informed that they be allowed to participate in the fresh auction as they could not be saddled with the dues of M/s AAPL as the entire process of transfer was under the terms of IBC Code. They also informed that under the process the Resolution Professional received several claims from the creditor and the Resolution Professional also informed that no claim was received from CCL during the entire process, thus the claim of CCL cannot be entertained. As per the petitioner, considering the status, they claimed that they cannot be debarred from participating in future tender and CCL cannot claim any outstanding amount of M/s AAPL from the petitioner.

5. Be it noted that in the entire reply, the petitioner has never whispered or took any defence on the proposed action of the respondent on forfeiting the bid security. The respondent thereafter issued the impugned letter dated 23.08.2021 where why they informed the petitioner that the bid security of M/s AAPL was forfeited but it will be open to the petitioner to apply under the upcoming NRS linkage auction and as per its eligibility, which will be determined in the letter and terms and conditions of the scheme documents, meaning thereby the petitioner was allowed to participate in the future auction and they were not debarred. From the documents and the arguments of the parties and the facts mentioned above it is clear that through the Resolution Professional the erst while M/s AAPL participated in the auction and had deposited Rs.59,50,000/- as bid security, being the successful bidder. Admittedly, no letter of intent was issued, meaning thereby the contract did not fructify. It also admitted that there was huge dues, which M/s AAPL was to pay M/s CCL. It is further admitted that M/s CCL did not make any claim before the Resolution Professional at any point, nor before the date of approval of the Resolution Plan by the committee of the creditors. They raised the demand with the erst while company and also

informed about the dues to the Resolution Professional though beyond the period prescribed. This means that on the date of the approval of the Resolution Plan, there was no claim of respondent-M/s CCL before the Resolution Professional or before the any authority. In the case of Ghanshyam Mishra and Sons (P) Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd., reported in (2021) 9 SCC 657, the Supreme Court has held that once the scheme provided in the Resolution Plan has been frozen, it is binding on the corporate debtor and its employees and also binding the creditors including the Central and State Government and other authorities. It has also been held that all such claims, which are not a part of the resolution plan, on the date of approval of the resolution, shall stand extinguished and no person will be entitled to initiate or continue any proceedings of such claim, which is not part of the resolution Plan. It is necessary to quote paragraphs 102.1 to 102.3, which reads as under:

102.1. 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.

102.2. 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.

102.3. 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.

In the case of Ruchi Soya Industries Ltd. V. Union of India, reported in (2022) 6 SCC 343, the Hon'ble Supreme Court in paragraphs 11 and 12 had held as under:-

11. Admittedly, the claim in respect of the demand which is the subject-matter of the present proceedings was not lodged by Respondent 2 after public announcements were issued under Sections 13 and 15 IBC. As such, on the date on which the resolution plan was approved by the learned NCLT, all claims stood frozen, and no claim, which is not a part of the resolution plan, would survive.

12. In that view of the matter, the appeals deserve to be allowed only on this ground. It is held that the claim of the respondent, which is not part of the resolution plan, does not survive. The amount deposited by the appellant at the time of admission of the appeals along with interest accrued thereon is directed

to be refunded to the appellant.

Thus, from the aforesaid judgments it has now been settled by the Hon'ble Supreme Court that if any dues, which is not part of the Resolution Plan and has not been approved, cannot be claim of any proceeding. Thus, the respondent-CCL cannot claim any amount of due from the petitioner as the same was not covered under the Plan.

6. Now, the question relates to forfeiture the security deposit, which was forfeited in terms of clause 5.2.1(d) of the scheme, which reads as under:-

5.2.1(d): In the event of change of ownership of the plant or change of control necessitating a change of name and the Successful bidder fails to intimate about the change of name within the stipulated time for execution of FSA as per the Scheme document, the Seller shall be entitled to cancel the bid, LOI if issued and forfeit the bid security.

7. It is an admitted case of the petitioner that the change of ownership of the plan was not intimated to the Central Coalfields Limited. The scheme documents earlier provided that the change of the name and control has to be approved by M/s CCL then only the letter of intent/ bid can be given effect to, but the requirement of approval was done away with. Thus, as per the aforesaid clause 5.2.1(d) of the scheme, it was the duty of the petitioner to inform the respondent about the change of name/control, even if the change was effected due to the proceedings initiated and concluded under the IBC.

7.

8. Further, we find that the bid security, which was forfeited was in terms of bid document. Admittedly, no contract was entered into with M/s CCL and M/s AAPL after the erst while company (M/s AAPL) became successful in the auction process. Thus, the bid security was forfeited at the pre-contract stage in terms of auction notice itself. As observed earlier, the forfeiture was a consequence of non-disclosure of the change of name/ control of the ownership, which was a default. When the consequence of default is forfeiture of bid security as per the bid document, and when there is specific clause of such consequence of such default, the forfeiture will automatically come to play on the said default. It is not necessary to prove whether there was any loss to the company or not. In this case, it is necessary to refer to National Thermal Power Corporation Limited vs. Ashok Kumar Singh and Others, reported in (2014) 4 SCC 252 in which para 10 the Hon'ble Supreme Court has held as under:

"10. In Ganga Enterprises case, this Court was examining a similar question. The argument in that case, as is the position even before us, was that withdrawal of an offer before it was accepted could not result in forfeiture of the earnest money/security money given by the bidder. Repelling that contention this Court held that while a person may have a right to withdraw his offer at any time before the acceptance is conveyed to him if the offer is itself subject to the

condition that the earnest money will be forfeited for not entering into contract or if some other act is not performed, then, even though he may have a right to withdraw his offer he will have no right to claim the refund of the earnest money. Forfeiture of the earnest money, in any such case, does not, observed this Court, infringe any statutory right under the Contract Act, 1872 for earnest/security is given and taken in such cases only to ensure that a contract comes in to existence. What is important is that this Court recognized that absence of any term stipulating forfeiture of the earnest money may lead to situations where even those who do not have the capacity or intention of entering into a contract venture into the bidding process for at times extraneous reasons. The purpose of such a clause providing for forfeiture of the earnest money clearly was to see that only genuine bids are received. This Court observed: (Ganga Enterprises Case SCC P. 416, para 9).

9. ”

Whether, there was loss of the company or not is a question of fact, which cannot be determined under application under Section 226 of the Constitution.

9. We also find from the reply to the show-cause that the petitioner only contested the claim of the respondents, which related to the dues of the previous company i.e. M/s AAPL and requested the respondents to allow them to participate in future auction. Nowhere in the said reply, they contested or challenged the act of forfeiture of security deposit.

10. Another glaring fact which emerges in course of argument of the respondents is that the petitioner was not even aware about the bid security amount, which was deposited by the erst while company nor such deposit has been considered or finds place in the Resolution Plan.

11. The argument of the learned counsel for the respondent that the appellant was not aware of the bid security deposit and nor such deposit has been considered in the Resolution Plan has not been specifically controverted by the petitioner. Thus, in our opinion that if the said amount is not included and considered in the approved Resolution Plan, the petitioner cannot claim refund of said money. The principle that the Resolution applicant starts on a clean slate will be conversely applicable in this case also.

12. In view of what has been held above, we find no merit in the writ petition in respect of challenge thrown to the forfeiture and refund of security deposit. Accordingly, this writ petition is dismissed.

13. There shall be no orders as to costs.

14. Urgent certified copies as per Rules.