

(2024) 04 PAT CK 0083

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 14376 Of 2023, 2597 Of 2024

Patna Highway Projects Ltd

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 24-04-2024

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Insolvency and Bankruptcy Code, 2016 — Section 3(30), 3(31), 13, 14, 15, 30(4), 31, 53, 53(1)(b), 53(1)(d), 53(1)(e), 60(6)

Bihar Central Goods and Services Tax Act, 2017 — Section 31, 31(1), 82

Citation : (2024) 04 PAT CK 0083

Hon'ble Judges : K. Vinod Chandran, CJ; Harish Kumar, J

Bench : Division Bench

Advocate : Gopal Jain, Rijul, Siddhartha Prasad, Palak Vashishta, Ashwani Malhotra, Mehul Parti, Surtang Sinha, Swetang Sinha, Sunit Kumar, Om Prakash Kumar, Shristi Raman, Kumar Alok, Vikash Kumar

Final Decision : Allowed

Judgement

1. The petitioner; a Company registered under the Companies Act, 1956 is now subjected to a Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'). In the two writ petitions, the petitioner challenge the demand raised under the Bihar Goods and Services Tax Act, 2017 (for brevity 'BGST Act') for the assessment years 2020-21 and 2022-23; as having been extinguished for reason of the State Tax Authorities not moving the National Company Law Tribunal (for brevity 'NCLT') for inclusion of their demand in the resolution plan, as a debt payable by the Company-a Corporate Debtor under the IBC.

2. Mr. Gopal Jain, learned Senior Counsel for the petitioner in his arguments laid thrust on the creditor driven regime as is brought out under the IBC. The Corporation Bank a Financial Creditor, as is distinguished from an Operational Creditor; which the State Government would have been if the claims were raised at the proper time, had moved the NCLT against the petitioner company styling

itself as the Corporate Debtor. An Interim Resolution Professional was appointed and M/s Silver Point Luxembourg Platform (SARL) approached the Tribunal as a Resolution Applicant (RA) with a resolution plan to revive the petitioner company in terms of the IBC. The resolution plan placed before the Committee of Creditors was agreed to by a majority of 97% following which the Tribunal approved it on 10.05.2020. The petitioner's management was handed over to the R.A., and it was later to this, that notices were issued for assessment of tax for the subject assessment years.

3. The petitioner-company, taken over by the new management did not respond to the notices and the orders were passed ex parte. The petitioner unsuccessfully challenged both the orders in a First Appeal as provided under the BGST Act. The State Taxes Department insisted for payment of 20% of the balance amounts due, in addition to the 10% paid at the time of First Appeal, so as to keep in abeyance the demand, till the Appellate Tribunal is constituted under the BGST Act. It is at this point of time the petitioners approached this Court pointing out the CIRP having commenced and the State Taxes Department having not sought for inclusion of the debts in the resolution plan; by which the tax due stands extinguished.

4. Learned Senior Counsel for the petitioner took us through the various provisions of the Act specifically pointing out Annexure-P/2 by which the NCLT found it appropriate to commence the CIRP, on the Financial Creditor who approached the NCLT having established a case for triggering the process, which order is dated 03.01.2020. Annexure-P/3 order dated 10.05.2022, approved the certificate of the R.P., that the resolution plan placed before the NCLT was approved by the Committee of Creditors in its meeting dated 12.03.2021 with 97.95% votes cast in favour of the resolution plan. On such order being passed by the NCLT under Section 31 of the IBC Code, the CIRP kicks into operation and it is binding on the Corporate Debtor and its employees, members & creditors, including the Central Government and the 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 arise.

5. Reference is made to the decision of the Hon'ble Supreme Court in Ghanshyam Mishra & Sons Private Ltd., Vs. Edelweiss Asset Reconstruction Company Ltd.; (2021) 9 SCC 657, which specifically noticed the amendment brought to the IBC in the year 2019 by which the resolution plan was made binding on the Central Government, State Government and local authorities to whom a debt is owed under any law; which includes the tax authorities. It has been held by a three Judge Bench that the claims provided in the resolution plan would stand frozen and would be binding on the Corporate Debtor, its employees, members, creditors including Central Government and the State Government or any local authority and as on the date of approval of the resolution plan all claims which are not part of the resolution plan shall stand extinguished. It was categorically held that none would be entitled to initiate or continue any

proceeding in respect of a claim, which is not a part of the resolution plan. The State Government had not approached the NCLT despite the initiation of the proceedings; which was notified by public notice and also in the website of the Registrar of Companies. The State Government having not taken recourse to the remedy available, for including such debts in the resolution plan, is now estopped from taking recovery proceedings.

6. Reference is also made to the decision in *M/s Ruchi Soya Industries Vs. Union of India*; (2022) 20 GSTR-OL 59, wherein, referring to *Ghanshyam Mishra* (supra) the claim raised by the 2nd respondent in that case after public announcements were issued under Sections 13 and 15 of the IBC was found to be not surviving since the resolution plan did not include such dues. Therein the office of the 2nd respondent had lodged a claim before the R.P. in respect of one of the demands but had failed to lodge the claim with respect to the demand which was the subject matter of the decision. The Hon'ble Supreme Court while finding the claim to be not surviving, also directed the amounts deposited by the appellant at the time of admission of the appeals along with interest accrued thereon to be refunded to the appellant, who was also under CIRP.

7. The decision of the Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Others*; (2020) 8 SCC 531, is also relied on to argue that undecided claims after acceptance of the resolution plan cannot be allowed to pop up as hydra heads after the acceptance of the resolution plan which would result in uncertainty. The efforts of a prospective R.A. who could successfully take over the business of the Corporate Debtor and revive it would be frustrated. Reliance is placed on a Division Bench decision of the Rajasthan High Court in *Ultratech Nathdwara Cement Ltd., Vs. Union of India*; AIR ONLINE 2020 RAJ 354, which followed the above proposition. *Ajay Kumar Radheshyam Goenka Vs. Tourism Finance Corporation of India Ltd*, ; (2023) 10 SCC 545, followed *C of C of Essar Steel India Limited* (supra) to hold that the new avatar of the Corporate Debtor, under the R.A., cannot be dealing with multiple claims popping up after the approval of the resolution plan.

8. Mr. Vikash Kumar, learned Government Advocate commenced his arguments with a caveat that though the petitioner has challenged the imposition of tax on the annuity paid by the National Highway Authority of India Ltd. (NHAI) there is no argument addressed on that aspect. Insofar as the claim of extinguishment of debt the learned Counsel would point out that under Section 14 of the IBC there was a moratorium after the application of the Financial Creditor was admitted by the NCLT on 03.01.2020, till the resolution plan was approved on 10.05.2022. One of the assessment years, which is the subject matter of the litigation, i.e. 2021-22, was within the period of such moratorium and the other assessment year 2022-23 commenced while the moratorium was in force and ended only after the resolution plan was approved as per Annexure-P/3. The learned Government Advocate has specifically pointed out that under Section 31 of the BGST Act a notice was issued on 08.09.2020, which was responded to by the

assessee on 03.11.2022. An intimation dated 22.11.2022 was communicated followed up with the show cause notice dated 15.11.2022. The assessment order was passed on 04.03.2023 and an Appeal was filed on 18.04.2023 which was rejected on 12.08.2023 while the moratorium was in force. Obviously, the State Taxes Department could not have taken any proceedings during the moratorium and the assessment had to be completed within the time provided under the BGST Act.

9. It is emphasized that under Section 82 of the BGST Act there is a statutory charge created on the assets of the assessee with respect to any tax, interest, penalty or other dues payable under the Act. The statutory charge as created would give the Government the status of a secured creditor as has been held in *State Tax Officer Vs. Rainbow Papers Ltd.*, (2023) 9 SCC 545.

10. It is pointed out that *Ghanshyam Mishra* (supra) was specifically noticed in the said decision and it was held that there was no obligation on the part of the State to lodge a claim in respect of dues which are statutory dues for which recovery proceedings have also been initiated. It is pointed out that the Hon'ble Supreme Court had specifically noticed that the books of accounts of the Corporate Debtor would have reflected the liability to the State in respect of the statutory dues and hence it was obligatory on the part of the R.P. to have examined the books of accounts and included the tax dues in the information memorandum and made provision for the same in the resolution plan; failing which it would be an abdication of its mandatory duty. Then the resolution plan would not conform to the statutory requirements of the IBC and hence, it would not be binding on the State as held by the Hon'ble Supreme Court, is the compelling argument of the Government Advocate.

11. It is also pointed out that a slightly different path was taken by another co-ordinate bench of the Hon'ble Supreme Court in *Pashchimanchal Vidyut Vitran Nigam Ltd. Vs. Raman Ispat Private Ltd*; (2023) 10 SCC 60, wherein it was observed that *Rainbow Papers* (supra) did not notice the waterfall mechanism applicable in the liquidation proceedings and the primacy given to the debts due to a secured creditor who had willingly relinquished the security interest and the Government dues having been given a lower priority than even that debts due to a private entity. The different path taken in *PVVNL* (supra) resulted in a review being sought of the decision in *Rainbow Papers* (supra) which was rejected, reaffirming the decision in *Rainbow Papers* (supra) as reported in *Sanjay Kumar Agarwal Vs State Tax Officer*; (2024) 2 SCC 362.

12. At the outset, we have to observe that in both the writ petitions, the petitioner had raised contentions against the tax liability on the annuity receipt from the NHAI; which according to them is exempted. Despite the caveat raised by the Government Advocate there was no attempt by the learned Senior Counsel appearing for the petitioner to put forth contentions on this aspect. The arguments with respect to extinguishment of tax on a resolution plan being approved by the NCLT would, according to the learned Senior Counsel, settle the

issue and there is no requirement to put forth the arguments on annuity. We are hence called upon to decide only the issue of extinguishment of the claim as raised by the Taxes Department.

13. The petitioner was incorporated as a Special Purpose Vehicle to carry out the work of upgradation of Hazipur-Muzaffarpur section of the existing NH-77 within the State of Bihar on Build Operate and Transfer (BOT) (annuity-basis) under the National Highway Development Project Phase-III. The agreement executed by the petitioner with the NHA is produced as Annexure-P/1 dated 24.02.2010. It was by Annexure-P2 dated 03.01.2020 that the NCLT, New Delhi, admitted the petitioner into the CIRP in terms of the IBC. An interim resolution professional was appointed, who was later confirmed as the resolution professional. M/s Silver Point Luxemburg Platform had made the resolution plan as an R.A. and by Annexure-P/3 dated 10.05.2024, the resolution plan submitted by the R.A. through the R.P. was approved. A monitoring committee was also constituted whose tenure ended on 27.3.2023. The management of the petitioner Company now vests in the newly constituted Board of Directors which was constituted by the R.A.

14. Annexure-P/2 is dated 03.01.2020 and till the approval of the resolution plan on 10.05.2022 there was a moratorium under Section 14 of the IBC. It has to be noticed that this does not preclude the State Tax Authorities from proceeding with the assessment, which can be proceeded with, but no recovery can be effected. In any event as submitted by the learned Government Advocate, the first notice was issued only after the resolution plan was approved on 10.05.2022, which also was within time as provided under the BGST Act to carry out an assessment. The fact that the moratorium was extended for two years, one assessment year coming within the moratorium period, the other commencing within it and concluding after the resolution plan was approved, are all inconsequential to decide the question raised in the writ petitions as to the validity of the demand made and recovery proceeded with.

15. We have to also notice the contention of the Government Advocate that the State Tax authorities had offered to keep in abeyance the recovery on deposit of 20% of the amounts, till the constitution of the Tribunal to which there is a Second Appeal provided. If the claims stands extinguished then necessarily the writ petitioner is entitled to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India despite the existence of an alternative efficacious remedy as has been held in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai; (1998) 8 SCC 1 and Godrej Sara Lee Ltd Vs. Excise and Taxation Officer cum Assessing Authority; (2023) SCC Online SC 95.

16. That the resolution plan was approved on 10.05.2023 and it does not include the two claims made by the State Taxes Department against the petitioners, is not disputed. In this context, we have to specifically notice paragraph nos. 102.1, 102.2 and 102.3 of Ghanshyam Mishra (supra), which is extracted hereinbelow: -

"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."

17. Apposite, would also be, reference to paragraph no. 14 of the decision in Ruchi Soya (supra), which is extracted hereinbelow: -

"14. Admittedly, the claim in respect of the demand which is the subject- matter of the present proceedings was not lodged by respondent No. 2 after public announcements were issued under sections 13 and 15 of the 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."

18. Lastly, we would refer to paragraph no. 107 of the decision in C of C of Essar Steel India Limited (supra), which is extracted hereinbelow:-

"107. For the same reason, the impugned NCLAT judgment [Standard 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 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 out by us hereinabove. For these reasons, NCLAT judgment must also be

set aside on this count.”

19. The decisions as relied upon by the petitioner would indubitably establish that unless the resolution plan includes the debt and the demand thereof is a part of the resolution plan, it would stand extinguished even if it is a debt due to the Central or the State Government, by virtue of a statutory charge; despite the statutory charge enabling the status of a secured creditor. As has been pointed by the learned Senior Counsel for the petitioner, the very object of the IBC is to foster entrepreneurship and ensure a creditor driven regime wherein the twin purposes of revival of a debt-ridden company is made possible, along with resolution of the various claims raised by the creditors, both secured and sundry. It is with this object in mind that even the statutory dues were pushed to the back seat as is evident from Section 53 of the IBC which comes into play in the liquidation proceedings, on failure of the resolution process. The State or the Central Government or any local authority definitely is reserved with the right to approach the Resolution Professional with their claims which the Resolution Professional is obliged to include in the resolution plan. There is also an appeal provided from the order of the NCLT to the National Company Law Appellate Tribunal which can be availed by any creditor whose claims have not been included by the resolution professional.

20. In this context we have to examine the decisions relied upon by the State juxtaposed with the facts as coming out in the two assessment years. Compelling reliance is placed on Rainbow Papers (supra) wherein, the NCLAT dismissed the appeal filed by the State Tax Officer, against an order of the NCLT, rejecting an application seeking the tax demand under the Gujarat Value Added Tax Act, 2003 to be the first charge over the property of the Corporate Debtor. Certain dates are relevant; which we would refer to briefly. The date of admission of the company petition by the NCLT, which petition was made by an operational creditor, was by order dated 12.09.2017. An R.P. was appointed on 22.09.2017 who invited claims from the creditors under Section 15 of the IBC by issuance of newspaper publications; the last date of submission of claims being 05.07.2017. The committee of creditors was constituted on 10.10.2017 which replaced the R.P. approved by the NCLT on 06.11.2017. The State Tax Officer under the VAT Act filed a claim before the resolution professional in the requisite form which was rejected by order dated 22.10.2018, against which an Appeal was taken to the NCLAT and then before the Hon’ble Supreme Court.

21. The Hon’ble Supreme Court held in the said decision that there was no obligation on the part of the State to lodge a claim before the R.P. since the dues were statutory for which recovery proceedings were also initiated. It was also held by the Hon’ble Supreme Court that books of accounts of the Corporate Debtor had to be examined by the R.P. and even if no claim is raised; verify the statutory dues and include them in the resolution plan, failing which there would be an abdication of the mandatory duty conferred on the R.P. However, the said declaration of law has to be understood as having been made on the particular

facts coming out in the case wherein in paragraph no. 34 it was the contention of the State; which was specifically noticed, that the claim was made before the R.P. prior to 20.08.2018 long before the resolution plan was approved by the COC under Section 30(4) of the IBC. The question arising in the above case was also as to whether the statutory first charge created by the VAT Act gave the Government and its dues the same status as a secured creditor and conferred on it the very same rights as conferred on a secured creditor, to enforce the security interest for realization of its dues. It was categorically held that the State is a secured creditor under the VAT Act coming within the definition under Section 3(30) of the IBC. The NCLAT order rejecting the Application/Appeal was set aside and so was the resolution plan approved by the COC for the purpose of consideration of a fresh resolution plan in the light of the observations made in the judgment.

22. Immediately, we have to notice that in the present case there is no challenge against the resolution plan as approved by the COC followed up with the approval of the adjudicating authority; the NCLT. The State does not have a case that they have approached the R.P. within the period provided and before the resolution plan was approved by the COC and then by the NCLT. There is no recovery initiated or assessment order passed before the resolution plan is approved. There is also no appeal filed before the NCLAT by the State. The writ petitions before us are by the Corporate Debtor who is undergoing CIRP; against the demand raised and the recovery attempted to be enforced as against the dues under the BGST Act for two assessment years, which is not at all a part of the claim before the R.P. or included in the resolution plan. The decision in *Rainbow Papers Ltd* (supra) has no application in the present case.

23. *PVVNL* (supra) was with respect to a liquidation process as was specifically noticed by the Division Bench, while *Rainbow Papers* (supra) was in the context of a resolution process. In *PVVNL* (supra) the challenge was to the order of the NCLT directing the District Magistrate and Tehsildar, Muzaffarnagar to release the property attached for the electricity dues of the Corporate Debtor, payable to *PVVNL*. Therein also *PVVNL* raised the claim of statutory first charge created by way of an agreement, which was in accordance with the provisions of the Electricity Act, 2003 and the Regulations framed under it including the U.P. Electricity Supply Code, 2005. It was noticed by the learned Judges that, concurrently it was found that *PVVNL* and the charge created in its favour, fall under the definition of 'security interest' as defined under Section 3(31) of the IBC; which definition was in the widest of terms. The order of the NCLT was approved finding that, even the dues to the Central or the State Government payable into the respective consolidated funds stand on a different footing; covered only under Section 53(1)(e) of the IBC, in a liquidation proceeding. The debts owed to secured creditors who have relinquished their security interest have a better claim under Section 53(1)(b); at par and along with the dues of the workmen for the just prior 24 months period; both of which have pre-eminence from that of a secured creditor who does not give up the security

interest. Even the financial debts owed to unsecured creditors by virtue of Section 53(1)(d) of the IBC has a better claim than the dues to the Central Government and the State Government falling under Clause-(e) of Section 53(1) of the IBC.

24. It was found that though PVVNL comes under the purview of State under Article 12 of the Constitution of India, it would be for the limited purpose of Part-III of the Constitution of India and the term State Government would not in its ordinary sense encompass within its ambit, either a local or a statutory authority. In fact the claim of the PVVNL if it does not relinquish its security interest would only be at par with the dues to the Central Government and the State Government under Clause-(e) of Section 53(1) of the IBC, as a debt owed to a secured creditor, for any amount unpaid after the enforcement of the security interest; if the security interest is not relinquished. The order of the NCLT was approved in the aforesaid decision, thus releasing the attachment order based on the dues of the Electricity Supply Company, which had first charge, in favour of the Liquidator appointed for the Corporate Debtor.

25. True Sanjay Kumar Agrawal (supra) found that the reservation on the dictum in Rainbow Papers (supra), as has been expressed in PVVNL (supra) to be of no avail and refused to review the decision in Rainbow Papers. We have already held that Rainbow Papers (supra) do not apply to the facts of the present case and hence PVVNL (supra) and the reservation made therein from the earlier decision of a co-ordinate bench as also the reaffirmation of the principles in Rainbow Papers (supra) in Sanjay Kumar Agarwal (supra) is of absolutely no avail in deciding the issue raised in the present case.

26. We have found for a fact that, the tax dues for the respective assessment years were not included in the resolution plan. The State has not challenged the resolution plan by way of an Appeal or a proceeding before this Court. The resolution plan has been approved on 10.05.2022 and before that the State has not approached the R.P. or the NCLT.

27. In the above circumstances, we have to follow the consistent declaration of law made by the Hon'ble Supreme Court in Ghanshyam Mishra, CoC of Essar Steel India Limited and M/s Ruchi Soya (all supra) and the demands raised by the assessment orders, of tax due for the years 2020-21 and 2022-23 stands extinguished; subject only to the contingency of a liquidation proceeding if the resolution plan fails.

28. Both the writ petitions are allowed restraining the State from proceeding for recovery under the impugned assessment orders.

29. We notice the submission of the learned Senior Counsel for the petitioners that substantial amounts were paid on the basis of the demands raised; which would aptly remain with the State and especially when no refund has been claimed. We also make it clear that we have not considered the exemption on annuity, as raised in the writ petitions which point was not argued before us.

30. Ordered accordingly.