

(2023) 01 CAL CK 0055
In the Calcutta High Court
Case No : W.P.A. No. 12683 Of 2022

Rashidhan Sales Private Limited And Another	APPELLANT
Vs	
Damodar Valley Corporation And Others	RESPONDENT

Date of Decision : 17-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 19(1)(g), 21, 226, 300A
Insolvency and Bankruptcy Code, 2016 — Section 33(4), 36(3)(d), 53, 53(1), 60(5), 60(5)(c)
Code of Civil Procedure, 1908 — Section 10
Electricity Act, 2003 — Section 2(15), 2(62), 50, 56, 56(1), 181(1), 181(2)(x), 181(2)(zp)

Citation : (2023) 01 CAL CK 0055

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Siddhartha Mitra, Trisha Mukherjee, Domingo Gomes, Joydip Kar, Deepak Agarwal, Prasun Mukherjee, Pratik Dhar, Sharmistha Ghosh, Amit Ghosh, Saurav Chaudhuri

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. One Shri Badrinarayan Alloys & Steels Limited (hereinafter referred to as "the borrower") was enjoying electricity at its premises from the respondent no. 1, the Damodar Valley Corporation (for short, "the DVC"). The DVC issued a disconnection notice on August 28, 2018 on the allegation of non-payment of electricity and disconnected the electricity supply of the borrower sometime in the month of September, 2018.

2. On December 5, 2018 a Corporate Insolvency Resolution Proceeding (CIRP) was initiated against the borrower at the behest of the Bank of Baroda. The National Company Law Tribunal (NCLT), by its order dated September 6, 2019, recorded that the resolution process had failed and appointed a liquidator under Section 33 (4) of the Insolvency and Bankruptcy Code, 2016 (in brief, "the IBC").

On November 21, 2019 the resolution professional moved an application for a direction on the DVC to reconnect electricity supply for the corporate debtor, which was turned down by the NCLT.

3. On December 10, 2020 an order was passed directing the entire land of the borrower's property to be sold. Accordingly, the liquidator published an e-auction notice for sale of certain assets, including the land, of the corporate debtor as identified by the liquidator. A corrigendum was issued subsequently, amending Clause 6 of the terms and conditions of the e-sale notice, excluding any liability of the auction purchaser for the electricity dues.

4. The present petitioner no. 1 purchased the property in the e-auction sale, a letter of intent was issued to the purchaser, who accepted the same. The certificate of sale was duly issued on July 8, 2021.

5. Meanwhile, on June 29, 2021 the petitioner/auction-purchaser made an application to the DVC for a new electricity connection. On July 19, 2021, the DVC wrote back to the petitioner claiming outstanding dues left by the erstwhile owner (borrower) as a pre-condition for giving such new electricity connection in the name of the petitioner.

6. In the month of August, 2021 the writ petitioner applied before the NCLT under Section 60 (5) of the IBC. The NCLT dismissed the said application on February 16, 2022, holding that the same was not maintainable as electricity was disconnected prior to the CIRP and therefore the disconnection was not in relation to insolvency. The NCLT also observed that the said decision is, in any event, amenable to the writ jurisdiction under Article 226 of the Constitution of India.

7. The petitioner filed an appeal against the said order before the NCLAT (appellate tribunal) on March 14, 2022, which is now pending. Thereafter on June 27, 2022 the present writ petition was filed, challenging the decision of the DVC (respondent no. 1) dated July 19, 2021.

8. The learned Senior Advocate appearing for the petitioners argues that the scopes of challenge in the writ petition and the NCLAT appeal are different. The former challenges the arbitrary action of the respondent no. 1/DVC while the action of the liquidator is the subject-matter of challenge before the NCLT and the NCLAT. In the latter, the distribution of the liquidation estate under Section 53 of the IBC is disputed. The writ petition challenges not only the decision of the DVC but also the vires of Regulation 4.6.4 of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013 (hereinafter referred to as "the Supply Code"), for which the appeal is not an alternative efficacious remedy. The NCLT, while rejecting the petitioners' application, had stressed on the point that the company is not a going concern and disconnection of electricity does not make any difference in its status in order to fetch more sale price.

9. The learned Senior Advocate for the petitioner further argues that the DVC's reliance on Regulation 4.6.4 of the Supply Code is arbitrary and unreasonable in the facts of the case, where the petitioner has acquired the premises and the factory as a going concern through a liquidation sale under the IBC.

10. It is argued that the IBC is a self-contained code enacted after the enactment of the Supply Code of 2013. The IBC contemplates a mechanism for recovery of dues, including electricity dues of the respondent no. 1 as a claim made from the liquidation estate, from which there can be no deviation.

11. Even in cases of deemed termination of supply, it is contended, recovery of outstanding dues is under Regulation 3.4.2.

12. Regulation 4.6.4 of the Supply Code ought not to be exercised as a blanket provision but where it is necessary to do so. Regulations 3.4.2 and 4.6.4 cannot be read in isolation to one another but must be read harmoniously, so as not to fall foul of the objectives of the IBC.

13. The learned Senior Advocate submits that the petitioner no. 1, being an auction purchaser under the IBC, cannot be unfairly classified as 'any consumer' as contemplated in Regulation 4.6.4 on the basis of the fact that the petitioner has purchased the 'same premises' for which the erstwhile company in liquidation was in default. Such an application would be discriminatory, unreasonable and opposed to the equal protection afforded to the petitioner under Article 14 of the Constitution.

14. It is argued that Regulation 4.6.4 must be read down to hold that it is not applicable to an auction purchaser under the IBC as such a purchaser does not have any nexus with the erstwhile deemed terminated consumer's default.

15. The learned Senior Advocate for the petitioner cites Commissioner of Sales Tax, Madhya Pradesh, Indore and Others vs. Radhakrishnan and Others [(1979) 2 SCC 249] in support of the proposition that Courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional invalidity. These principles have given rise to the rule of reading down the sections if it becomes necessary to uphold the validity of the sections.

16. Reliance is next placed by the petitioners on Cellular Operators Association of India vs. TRAI [(2016) 7 SCC 703], where the Supreme Court observed that it is well-settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right.

17. The petitioners contend that no intelligible or discernible principle of reasonableness is made out in the respondent's letter dated July 19 2021 or its reliance on Regulation 4.6.4; rather the same is an attempt by the respondents to coerce payment of money from the petitioner despite the respondent no. 1 having already exercised its right of recovery under Section 53 of the IBC. The respondent no. 1, thus, cannot exercise subjective discretion to refuse a fresh

connection which would amount to unintelligible classification and discrimination under Article 14 of the Constitution.

18. Learned senior counsel next relies on *Isha Marbles vs. Bihar SEB* [(1995) 2 SCC 648], followed in *Shree Balasaria Construction (P) Ltd. vs. CESC Ltd.* 1995 SCC OnLine Cal 106] and *Ahmedabad Electricity Co. Ltd. vs. Gujarat Inns (P) Ltd.* [(2004) 3 SCC 587], in which the Supreme Court held that in case of a fresh connection though the premises are the same, the auction-purchasers cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply to the premises in the absence of there being a statutory provision in that regard.

19. The petitioner no. 1, it is alleged, purchased the premises primarily for taking over the functioning of the factory situated on it, which has been shut down for long, causing serious industrial unrest due to unemployment of large workforce in the backward districts of Howrah. The petitioner no. 1 had, for such purpose, obtained necessary licenses, permits, environmental clearances, consent to establish and to operate and GST documentation for operating the plant.

20. The learned Senior Advocate argues that the actions of the respondents are without authority of law and have deprived the petitioners from utilizing its immovable property and have thus breached the Constitutional right to property of the petitioners.

21. Thus, it is submitted that the respondent no. 1 be directed to grant fresh electricity connection to the factory site at Tulsiberia Road, Kulgachia, Howrah acquired by the petitioner no. 1 as an auction purchaser under e-auction dated May 18, 2021.

22. The learned Senior Advocate appearing for the DVC contends that the sale of the assets of the borrower to the writ petitioner was not as a going concern but on "as is where is", "as is what is", "whatever there is" and "without recourse" basis. The sale notice itself clarified that the liquidator does not take or assume any responsibility for any shortfall or defect or shortcoming in the movable/immovable assets of the company. Learned counsel relies on the e-sale notice dated May 13, 2021, the letter of intent dated May 19, 2021 and the certificate of sale dated July 8, 2021 in support of the contention that the assets of the borrower were never sold as a going concern.

23. It is submitted that the sale certificate contains a schedule of assets which shows sale of land, plant and machinery without any obligation to run the company and that no liability of the employees had also been passed on to the petitioner/auction-purchaser.

24. The NCLT, as per the DVC, dismissed the application on the grounds that the disconnection is not related to the resolution process; hence the tribunal lacks inherent jurisdiction, that the property was sold on 'as is where is' basis and not as a going concern, the liquidator knew that there were outstanding dues of Rs.

38,71,39,648/- of the DVC but kept the purchaser in the dark. At least upon the amendment of Clause 6 of the terms and conditions of the sale notice, it should have occurred to the purchaser as to why it has been removed and the purchaser should have made all enquiries from the liquidator.

25. The learned Senior Advocate for the DVC contends that the writ petitioner has filed an appeal before the NCLAT against the above order of the NCLT dated February 16, 2021, which is now pending. During pendency of the appeal, however, the present writ petition has been affirmed and filed on or about June 27, 2022, raising issues which are directly and substantially in issue in the previously-instituted NCLAT proceedings. Hence, the petitioner is moving two parallel forums seeking substantially the same and/or similar relief. Except the vires point, all else in the pleadings and prayers of the two proceedings are substantially the same. Thus, the second proceeding, that is, the present writ petition ought to be stayed under Section 10 of the Code of Civil Procedure.

26. The learned Senior Advocate for the DVC, by placing reliance on the language of Section 60(5)(c) of the IBC and the judgments of Gujarat Urja Vikas Nigam Limited vs. Amit Gupta [(2021) 7 SCC 209] and Tata Consultancy Services Limited vs. SK Wheels (P) Limited [Resolution Professional], reported at (2022) 2 SCC 583, submits that when termination of a contract takes place solely on the ground of insolvency, the NCLT will have jurisdiction but the said Tribunal would not have jurisdiction if the termination is on a ground independent of insolvency. This is the ground on which the DVC succeeded before the NCLT and the petitioner's application was dismissed.

27. However, the writ petitioner, despite having preferred a challenge before the NCLAT against the order of the NCLT, thus proceeding on the premise that it has jurisdiction, has invoked the jurisdiction of this court under Article 226 of the Constitution of India and seeks to initiate parallel proceedings on the self-same cause of action in two different forums, thereby indulging in forum shopping. Hence, the later proceedings, that is, the present writ petition should be stayed.

28. The DVC next relies on the principle of caveat emptor and contends that the first notice of sale published by the liquidator on May 13, 2021 indicated that the sale was on 'as is where is' basis and also pointed out that there is no production or operation that is taking place at the factory. The sale notice also clearly indicated that the purchaser has to pay the dues of electricity and other statutory dues. However, this was amended by the liquidator by a corrigendum, where "electricity charges" have been deleted, without any further clarification.

29. The liquidator, despite having full knowledge that he had attempted to get electricity reconnection which was not allowed by the NCLT vide order dated November 21, 2019 on the ground that it would not fetch more sale price as it is not a going concern, had no authority to issue any corrigendum waiving the electricity dues. Upon such amendment and in the teeth of the 'as is where is' basis clause, the petitioner had duty to enquire as to the reason for the

amendment.

30. Section 36(3)(d) of the IBC, it is contended, includes 'contractual right' within 'liquidation estates'. However, since disconnection was effected long prior to the company having gone into liquidation, the contract with regard to supply of electricity had terminated and was not a part of the liquidation estate. As such, the liquidator had no jurisdiction to waive any electricity dues. Moreover, Section 53 of the IBC would apply where proceeds of sale of liquidation assets will include the price paid for liquidation estate. If the liquidation estate does not contain the agreement as a part of it, the liquidator cannot lay his hand on such a contract.

31. The liquidator did not resort to Regulation 32 (e) and (f) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and there was no recommendation of the Committee of Creditors in that regard. Hence, the liquidator cannot claim to have sold the assets as a going concern, since such exercise would be beyond his jurisdiction.

32. Therefore, merely because DVC's claim of money in terms of Section 53 of the IBC was not allowed, as the said section did not apply in the facts and circumstances of the case, the right of the DVC to claim outstanding dues, protected under Regulation 4.6.4 of the concerned Regulations, does not get waived.

33. The sale notice, it is argued, clearly stipulated that the petitioner shall be fully responsible for satisfying the requirements of the IBC and related Regulations ... "as well as all the laws in force that are or may be applicable to the applicant or the sale process".

34. With regard to the petitioners' challenge to the vires of Regulation 4.6.4, the DVC contends that the vires of a delegated legislation can be challenged only on the grounds of legislative competence and/or violation of Article 14 of the Constitution of India. The Regulator's legislative competence has not been challenged by the petitioners. Hence, the only issue is whether the Regulation is violative of Articles 14, 19 (1) (g), 21 and 300A of the Constitution of India.

35. The Regulation, it is submitted, has been made in public interest and as part of public policy, which is mainly to ensure that the licensees realize their dues. Failure to do so impacts society as the operating loss of the licensees has a cascading effect on the revision of tariff by the Regulator, who has to adjust such loss by passing it off to other non-defaulting consumers.

36. There is a reasonable classification between defaulting and non-defaulting consumers. The subordinate legislation extends to the latter, so that they are not burdened with the dues of defaulters. Therefore, it is argued, there is no violation of Article 14 or Article 19 (1) (g) or other provisions of the Constitution. In this regard, learned senior counsel places reliance on the following judgments of the Supreme Court:

- i) (1984) 4 SCC 27 [Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh Bhupeshkumar Sheth and others];
- ii) (2017) 9 SCC 1 [Shayara Bano Vs. Union of India and others]; and
- iii) (2017) 10 SCC 800 [Independent Thought Vs. Union of India and another].

37. The DVC next argues that when electricity is totally unconnected to the insolvency proceeding, the general law relating to the Electricity Act and subordinate legislation would apply. According to the learned Senior Advocate appearing for the DVC, this has now been settled by a Division Bench of this Court in FMA 956 of 2019 (DVC & Others vs. Shree Ramdoot Rollers Private Limited), which has dealt with all earlier cases except (2020) 6 SCC 404 and has held that within the definition of 'consumer' as mentioned in the Electricity Act, the purchaser would be included in the event the premises for the time being is connected for the purpose of receiving electricity with the works of a licensee. In the present case, it is contended, the premises is connected for the purpose of receiving electricity with the work of the licensee and it can just be switched on by using a switch as would appear from paragraph 19 of the affidavit-in-opposition.

38. With regard to the judgments relied on by the petitioners in the case of Isha Marbles (supra) and others on similar proposition, it is argued by the DVC that the Division Bench took note of some of those. It is contended that in Isha Marbles (supra), the Supreme Court noted the fact that there was no law to recover such dues, which is not the situation now. The DVC submits that such view has also been reaffirmed in (2020) 6 SCC 404 (Telangana State Southern Power Distribution Co. Ltd. & Another vs. Srigidhaa Beverages) and 2021 SCC OnLine P & H 403 [Venus Real Con. LLP (Limited Liability) Vs. Dakshin Haryana Bijli Vitran Nigam Limited and others].

39. The learned Senior Advocate for the DVC submits that the sale being a slump sale and not one as a going concern, the question of any benefit being extended to the petitioner as regards electricity dues did not and could not arise. This can happen only when the company and its assets are sold as a going concern. Regulations 32 and 32A of the 2016 Liquidation Process Regulations are cited in this context.

40. Since the sale proceeds could not have included the dues of DVC, the contract not having been part of the liquidation estate, the dues of the licensee could not have been waived by the liquidator, who had no such jurisdiction in law as Section 53 of the IBC did not apply to the facts of the case.

41. In the judgment of Nanu Tradecom, the sale was as a going concern where assets and liabilities were both transferred. The said case is fully covered by Regulation 32A and 32 (e) and (f) of the 2016 Regulations and thus, it is argued, has no manner of application in the facts of the instant case. Moreover, the Division Bench judgment in Ramdoot Rollers (supra) was not brought to the

notice of the court at that stage. Hence, Nanu Tradecom has no manner of application here.

42. The learned Senior Advocate appearing for the West Bengal Electricity Regulatory Commission (for short, "WBERC") contends at the outset that insofar as the WBERC is concerned, the challenge in the writ petition is confined to the vires of Regulation 4.6.4 of the Supply Code, 2013.

43. The first argument made on behalf of the WBERC is that Regulation 4.6.4 was made in accordance with the delegated legislative power conferred on the WBERC under Section 181(1) and Section 181 (2) (x) of the Electricity Act, 2003 (for short, "the 2003 Act"). Section 50 of the 2003 Act provides the subject-matter of the Supply Code.

44. Moreover, under Section 181 (2) (zp), the Commission is also empowered to make any regulation in respect of any other matter which is to be or may be specified. Section 2 (62) defines 'specified' as specified by regulation.

45. In the writ petition, it has been admitted that the impugned regulation was also published in the Kolkata Gazette Extraordinary on August 7, 2013. Hence, there is no lack of competence on the part of the WBERC to frame such regulation.

46. The second argument of the WBERC is that Regulation 4.6.4 is not violative of Articles 14, 19(1)(g) and 300A of the Constitution of India.

47. A judgment of the Supreme Court, reported at (2020) 6 SCC 404 (Telangana State Southern Power Distribution Co. Ltd. & Another vs. Srigdhaa Beverages), is cited in such context. In the said citation, a three-Judge Bench of the Supreme Court held that the dues under the terms and conditions of supply partake the character of statutory dues. In case of a specific clause dealing with electricity dues, a transferee shall pay the outstanding dues to the supplier of electricity and a reconnection or a new connection shall not be given to any premises where there are arrears on account of dues to the supplier unless they are so declared in advance.

48. It was further held that where electricity dues are statutory in character under the Electricity Act and as per the terms and conditions of supply, the same cannot be waived in view of the provisions of the 2003 Act itself, more specifically Section 56 of the same, and cannot partake the character of dues of purely contractual nature.

49. Where, in cases of e-auction notice, the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the purchaser and the sale is on "as is where is, whatever there is and without recourse" basis, there can be no doubt that the liability to pay electricity dues exists on the purchaser.

50. The learned Senior Advocate for the WBERC contends that Regulation 4.6.4

is reasonable, which can also be found from the fact that there also exists another regulation, being Regulation 3.4.2 under the heading 'Recovery of Outstanding Dues', which is not under challenge. If the said regulation is read together with Regulation 4.6.4, which carries the heading "deemed termination of agreement", it can be clearly found that proper checks and balances have been made within the permitted sphere of reasonableness. The criteria as specified in Regulation 3.4.2 being relatable to recovery of outstanding dues, it is required to be read together with the impugned Regulation 4.6.4.

51. Hence, the WBERC submits that there is also no requirement of reading down Regulation 4.6.4 since, as far as recovery of outstanding dues is concerned, the licensee has got no other alternative but to take into account the Regulation 3.4, including Regulation 3.4.2, as the very heading of the same is "Recovery of Outstanding Dues".

52. The learned Senior Advocate for the WBERC, however, for abundant caution, next addresses the issue of conflict between the 2003 Act and the IBC, as raised by the petitioner, although if the previous arguments are upheld the said question, according to learned senior counsel, could become redundant.

53. It is submitted that the electricity law is equally a special law in the subject of electricity whereas the IBC is also a special law in its own subject.

54. In view of the Telangana State judgment, electricity dues are statutory in nature. Hence, how the same is required to be recovered can always be prescribed by the Commission, being the authority to frame regulations in that sphere. Neither Regulation 4.6.4 nor Regulation 3.4.2 are in conflict with any of the provisions of the IBC.

55. Recovery of outstanding electricity dues is an exclusive subject of the State Regulator in case of a new connection. A distinction is sought to be drawn by the learned Senior Advocate between recovery of outstanding dues and recovery of outstanding dues for getting a new connection. Whereas the 'nexus' point is in existence in Regulation 3.4.2, the same is not there in Regulation 4.6.4. However, while interpreting both, nexus would be one of the criteria as far as the recovery of outstanding dues is concerned. It is submitted that if no arbitrariness is found in the two Regulations, there is no requirement to enter into the legal issue of conflict between the two Acts.

56. The learned Senior Advocate for the WBERC lastly makes it clear that no submission has been made on behalf of the WBERC in respect of the NCLAT case, since the WBERC is neither a party in that proceedings nor has anything to do in respect of the same.

57. Thus, it is submitted that relief (b) of the writ petition, challenging the vires of Regulation 4.6.4, may not be entertained.

58. For a comprehensive adjudication of the issues at hand, the following two regulations in the Supply Code of 2013 are required to be considered in proper

perspective:

"3.4.2 The licensee shall be eligible to recover from a new and subsequent consumer(s) the dues of the previous and defaulting consumers in respect of the same premises only if a nexus between the previous and defaulting consumer(s) and the new consumer(s) in respect of the same premises is proved. The onus of proving a nexus, if claimed by a licensee, shall lie on the licensee.

4.6.4 Notwithstanding anything contained contrary elsewhere in these Regulations were deemed termination of agreement has taken place, then on the basis of application for any consumer new service connection can only be provided in the same premises if the outstanding dues against the deemed terminated consumer is cleared along with the late payment surcharge."

59. Section 56(1) of the Electricity Act, 2003 (for the sake of brevity, "the 2003 Act"), provides that upon a consumer neglecting to pay electricity charges and "without prejudice to his rights to recover such charge or other sum by suit", the licensee may cut off the supply of electricity upon notice as contemplated therein. The second limb of the said sub-section stipulates that the licensee may discontinue the supply until such charge or other sum, together with expenses incurred in cutting-off and reconnecting supply are paid, but no longer.

60. The principle implicit in the said provision is that the discontinuance shall continue only until "such charge or other sum" is paid, but no longer. The term "such" relates to the first limb of Section 56(1) which provides that the charge will be for electricity or any sum other than a charge for electricity "due from him to a licensee".

61. The use of the expression "due from him" acquires considerable importance in the present context.

62. The dues, as per the plain language of Section 56(1), should subsist at the juncture when it is claimed for the purpose of reconnecting the electricity supply.

63. An examination of the facts in the present case indicates that upon the erstwhile company/borrower having gone into liquidation, its assets, including the land and property, were sold under the provisions of the IBC, read with allied Rules and Regulations.

64. It is important to note that the present petitioner, that is, the auction purchaser did not purchase the company or its goodwill as a whole. At the time of sale, the company was decimated and its assets sold separately. Hence, in the strict connotation of the term, it cannot be said that the erstwhile company "continued" its existence.

65. The auction purchaser, a different entity altogether, now seeks to re-start afresh the business of the borrower in its independent capacity. As per the settled law, within the contemplation of the IBC, the auction purchaser is entitled to commence with a 'clean slate'.

66. The link sought to be drawn between the distribution of assets under Section 53 of the IBC and the nature of sale is not found in the statute itself. Section 53(1) provides that the proceeds from the "sale of the liquidation assets" shall be distributed in the order of priority as stipulated in Section 53, but does not distinguish between sale of going concern and sale of assets.

67. In the present case, as such, the petitioner having purchased the property by way of 'as is where is' basis, with regard to the assets, is not a relevant distinguishing factor as such.

68. The expression "as is where is" basis can only signify the exact position of the property as on the date of sale. In the event the licensee had a pending claim of its dues on the property, it might have been argued that the expression "as is where is" connotes the liabilities including the electricity dues as well.

69. However, it is well-settled that electricity dues do not pass with the property as a charge thereon.

70. A comparison between Regulations 3.4.2 and 4.6.4 of the Supply Code clearly reveals the respective fields of operation of the two provisions, a part of which, though, may be arguably overlap each other.

71. Clause 3.4.2 provides for recovery of outstanding dues from a new and subsequent consumer in respect of the same premises and restricts such right specifically to situations where a nexus between the previous and defaulting consumer and the new consumer in respect of the same premises is proved. Not only that, the said Regulation provides in no uncertain terms that the onus of proving a nexus, if claimed by a licensee, shall lie on the licensee.

72. A perusal of Regulation 4.6.4, on the other hand, shows that the same operates in cases where deemed termination of agreement has taken place in terms of Regulation 4.6.1, after 180 days from disconnection. In such cases, on the basis of application of any "consumer" new service connection can only be provided if the outstanding dues are cleared along with late payment surcharge.

73. It can very well be seen even on a cursory perusal that the expressions used in Regulations 3.4.2 and 4.6.4 are, respectively, 'new and subsequent consumer' and 'any consumer'.

74. The term 'consumer' has been defined in Section 2(15) of the 2003 Act to mean any person who is supplied with electricity and includes any person whose premises are for the time being connected for the purpose of receiving electricity.

75. Hence, the use of the present tense in the said definition clearly excludes intending consumers who are yet to apply for electricity.

76. However, the use of the expression "new and subsequent consumer" in Regulation 3.4.2 can only denote an intending consumer, as opposed to the expression 'consumer' as used in Regulation 4.6.4, which has been defined in the 2003 Act as an existing consumer. Thus, the fields of operation of the two

Regulations have their subtle differences.

77. Insofar as new and subsequent (or intending) consumers are concerned, Regulation 3.4.2 is the Regulation which applies and not Regulation 4.6.4. Regulation 4.6.4 applies to a 'consumer' who is enjoying electricity. Such a person, when applying for a new or fresh service connection at the same premises, have to clear the outstanding dues in respect of the same premises.

78. In the present case, the writ petitioner purchased the property in an auction sale on 'as is where is' basis. At the juncture when the sale took place and/or prior thereto, when the default was committed by the borrower, the writ petitioner/auction purchaser has had no possible nexus whatsoever with the defaulting consumer, that is, the borrower-company. Thus, the basic pre-requisite of Regulation 3.4.2, applicable to new and subsequent consumers or intending consumers, that is, nexus, is not established at all. In any event, Regulation 3.4.2 clearly casts the onus of proof of nexus on the licensee. The outstanding dues can be claimed from the new consumer only if a nexus between the previous defaulting consumer and a new consumer in respect of the same premises is proved. In the present case, however, neither the auction purchaser had any nexus with the defaulting consumer nor did the writ petitioner enjoy any benefit of the electricity connection, in respect of which default was committed, at any point of time. An asset sale cannot include the liability per se to pay electricity dues, since electricity dues do not operate as a charge on the property itself. Hence, in the absence of nexus being established by the Licensee (DVC), there is no scope of the DVC insisting upon prior clearance of the outstanding dues and/or late payment surcharge as a pre-condition of giving a new electricity connection to the petitioner, who is entitled in law to start afresh on a clean slate.

79. It has been held time and again that upon a CIRP proceeding having concluded, no liability remains apart from the sale price.

80. The argument of the DVC, that the contract had terminated with the borrower and the liquidator had no jurisdiction, does not help the DVC in any manner. When the assets were sold, there was no electricity connection existing at the premises, nor was there any subsisting contract with the DVC. Hence, by the same logic that the liquidator is argued to have had no jurisdiction, the auction purchaser also did not have any liability within the contemplation of the expression 'as is where is'. The principle of caveat emptor cannot be applied in the case of the auction purchaser in an asset sale, because it is not possible for an auction purchaser to have a prior idea of any existing liability which, in any event, was not there. Even the sale notice admittedly did not include "electricity dues".

81. The right of discontinuance of electricity conferred on the licensee under Section 56(1) is restricted till the time when "such dues" that is the dues of electricity and other charges are paid.

82. At the juncture when the auction sale took place and/or when the new

electricity connection was sought by the writ petitioner, there were no “dues” as such, to justify the ‘discontinuance’ of electricity supply.

83. In any event, the question of ‘discontinuance’ does not arise in the present case, since the auction purchaser/petitioner has sought for a new electricity connection without having any nexus whatsoever with the default of the previous consumer.

84. The provisions of Regulations 3.4.2 and 4.6.4 have to be tested on the anvil of the parent right conferred under Section 56(1) of the 2003 Act and cannot be divorced from the scheme of the parent Act itself. Since there was no subsisting due from the auction purchaser, particularly since the contract had already terminated by operation of Regulation 4.6.1, the right to discontinue, which is inextricably linked with such due, did not survive. Along with the dues, the right of discontinuance had ceased at the juncture when the auction purchase and the application for new connection took place.

85. Hence, the licensee, that is, the DVC acted de hors the law in insisting upon clearance of the outstanding dues left by the erstwhile consumer as a pre-condition for giving a new connection to the petitioner.

86. Insofar as the vires of Regulation 4.6.4 is concerned, the said provision, if read harmoniously with Regulation 3.4.2 and with the entire scheme of the Supply Code in the context of the 2003 Act, cannot be said to be violative of the Constitution of India. The argument that it contravenes Article 14 of the Constitution is not tenable since the two regulations operate in distinct and separate fields inasmuch as they govern existing consumers and intending or new and subsequent consumers respectively.

87. An illustration would be convenient to explain the distinct spheres of operation of Section 156 and Regulations 3.4.2 and 4.6.4 respectively.

88. If an existing consumer commits default in payment of electricity charges and the contract with him automatically terminates after 180 days by operation of Regulation 4.6.1, the following four different scenarios may arise in respect of the said premises:

89. First, there may be no further application for fresh connection at the same premises, in which case the only remedy available to the licensee for such non-payment is, as indicated in Section 56 (1) of the 2003 Act, to institute a money suit against the erstwhile consumer.

90. Secondly, the erstwhile defaulting consumer himself may apply for a fresh connection at the same premises, in which case both Section 56 (1) of the 2003 Act and Regulation 4.6.4 of the Supply Code apply. As contemplated in Section 56(1), the licensee is entitled to continue disconnection (in other words, withhold new connection) till payment of the dues. Again, the applicant is the erstwhile consumer who has been enjoying electricity as a ‘consumer’ and the connection sought is a ‘new connection’ in view of the previous contract having ceased after

180 days.

91. Thirdly, some third party set up by the defaulting consumer or knowing fully well about the default and becoming a party to the evasion, applies for a fresh connection in the said third party's name at the same premises. In such case, Section 56(1) does not apply strictly, since the licensee's act no longer remains the continuance of the previous disconnection but becomes refusal of a new connection; nor does Regulation 4.6.4 apply, since the new consumer is not a 'consumer' within the definition of Section 2(15) of the 2003 Act, which is also the term used in Regulation 4.6.4. However, in such a case Regulation 3.4.2 applies squarely, since the applicant is a 'new and subsequent' consumer having nexus with the defaulting consumer, as stipulated in Clause 3.4.2.

92. In the fourth instance, an entirely innocent third person having no nexus with the defaulting consumer applies for a fresh connection after coming to acquire the 'same' premises. In that event, none of the above-discussed provisions apply, despite the premises being the same as where the default occurred. Section 56 is ruled out because the new applicant was not negligent in committing the default. Regulation 3.4.2 is also not attracted as, although the applicant is a 'new and subsequent' consumer, no nexus between the applicant and the defaulting consumer can be proved by the licensee. Regulation 4.6.4 is equally inapplicable since the connection sought would be a 'new' connection but the applicant is not a 'consumer' under Section 2(15) of the 2003 Act.

93. The petitioners have cited *Isha Marbles* (supra), which has also been followed in *Shree Balasaria* (supra) and *Ahmedabad Electricity* (supra). In the said case, the Supreme Court clearly proceeded on the premise that in the absence of there being a statutory provision in that regard, the auction-purchasers, while applying for a fresh connection, cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply to the premises. In the instant case, however, there is a specific statutory provision governing the field. Regulation 3.4.2 of the Supply Code clearly governs 'new and subsequent' consumers, although qualified by the 'nexus' rider. Thus, the ratio of the said judgments cannot be applied in the present case.

94. CST, *Madhya Pradesh* (supra) and *Cellular Operators* (supra) are not attracted to the present case as well since, in view of the interpretation as discussed above, the question of infringement of any Constitutional provision is obviated. As such, no provision is required to be declared ultra vires or to be read down.

95. We are now to consider the issue raised by the DVC that the writ petition, being filed subsequent to the NCLT and NCLAT proceeding, ought to be stayed. Such issue has to be negated as the principle of Section 10 of the Code of Civil Procedure cannot be applied here, since the matters in issue in the two proceedings are not directly and substantially the same.

96. The proceeding before the Tribunal falls within the scope of the IBC and only

in respect of liabilities arising out of the CIRP. Even when the NCLT held that the claim did not arise out of the CIRP, the same issue was under consideration. The challenge before the NCLAT also revolves around the question as to whether the claims are related to the CIRP.

97. As opposed thereto, the subject-matter of challenge in the present writ petition is confined to availability and enforcement of remedies provided by a different statute, that is, the Electricity Act, 2003 and the Regulations framed thereunder. Hence, the outcome of either of the proceedings would not operate as *res judicata* in respect of the other, nor does the decision of either of the forums directly affect or debar the remedy before the other.

98. Hence, the writ petitioner cannot be said to pursue the same remedy before two parallel forums and there does not arise any question of the writ petition being stayed on the principle of Section 10 of the Code of Civil Procedure.

99. The ratio of the decisions cited by the DVC on such score, that is, Gujarat Urja (*supra*) and Tata Consultancy (*supra*) are, thus, not applicable in the present case.

100. The judgments cited by the DVC on the question of non-violation of Articles 14, 19 and 300A of the Constitution are apt and there cannot be any quarrel with the propositions laid down therein. However, since there is no contravention of any Constitutional provision in the impugned Regulation, those judgments need not be discussed threadbare.

101. The Division Bench judgment of *Shree Ramdoot Rollers Case* has been cited by the DVC. In the said case, the premises for the time being was connected for the purpose of receiving electricity with the works of a licensee. In the present case, however, the DVC itself has contended that, after the expiry of 180 days, the contract to supply electricity with the erstwhile consumer (defaulter) ceased by operation of Regulation 4.6.1. Another component of the present matter which has to be factored in is that the writ petitioner acquired the property of the borrower in an auction sale of the assets. Thus, although the present endeavour of the writ petitioner is to commence the business of the borrower afresh, as per the DVC itself, the borrower company was decimated in liquidation and its assets were sold out. The company was not sold as a whole as a going concern but ceased to function with the liquidation. Thus, even if the DVC's infrastructure to provide electricity to the auction-purchaser may be the same as that used to supply electricity previously to the borrower, such ingredient per se does not attract any of the regulations of the Supply Code to justify the DVC's insistence upon prior payment of all outstanding dues allegedly left by the erstwhile consumer before giving a new connection to the writ petitioner.

102. Thus, the present case differs substantially on facts from the cited Division Bench judgment in *Shree Ramdoot Rollers*, for which the ratio laid down therein cannot be applied to the instant matter.

103. The WBERC has relied on Telangana State (*supra*), where it was held that dues under the terms and conditions of supply partake the character of statutory dues and does not remain purely contractual in character.

104. However, in the said judgment, the Supreme Court was not called upon to scrutinize the interplay between the Electricity Act, 2003 and the IBC of 2016. If the IBC were to be applicable in the present case, statutory dues would have also extinguished with the CIRP and subsequent liquidation and would not be payable by the auction-purchaser in any event.

105. Alternatively, the IBC is not applicable to the electricity dues, as the NCLT has held that the dues do not arise from the CIRP. Even then, nothing hinges on the Telangana State ratio in the facts of the present case. The question which has arisen for adjudication here is whether the writ petitioner can be held liable to pay the outstanding dues left by the erstwhile consumer for the purpose of getting a new electricity connection from the DVC. As discussed earlier, there is a specific provision in the Supply Code (Regulation 3.4.2) to entitle the licensee to claim the outstanding dues from a new or subsequent consumer if a nexus is established by the licensee between the new consumer and the erstwhile defaulter-consumer. Since no such nexus has been proved by the licensee in the present case, mere subsistence of the licensee's right to claim outstanding dues from the erring consumer cannot justify shifting of such burden on the auction-purchaser and, for all practical purposes, there is no statutory provision to claim the amount from the writ petitioner. The position, in a sense, reverts back to the Isha Marbles scenario, where there is no statutory provision to cast the burden of payment on the auction-purchaser. Since the writ petitioner does not have the liability to pay the outstanding amount, which liability is inextricably linked with the right of the DVC to withhold new connection, the present insistence of the DVC for payment of the amount by the petitioner for giving new connection is palpably illegal and *de hors* the law.

106. Hence, the impugned claim of the DVC is not tenable in the eye of law and cannot survive the scrutiny of judicial review under Article 226 of the Constitution of India.

107. Accordingly, W.P.A. No.12683 of 2022 is allowed on contest, thereby setting aside the impugned claim of outstanding dues of the DVC from the writ petitioners and directing the DVC to give new electricity service connection to the petitioners in terms of the petitioners' application, subject to compliance of all other formalities by the petitioners but without insisting upon payment of alleged outstanding dues of the borrower company from the petitioner. Since the DVC itself has argued that the infrastructure for giving such connection is already there and the same has merely to be "switched on", the DVC is directed to raise a revised quotation sans the alleged outstanding dues within a fortnight from date and to give the new connection to the petitioner within a fortnight from compliance of all formalities by the petitioner.

108. There will be no order as to costs.

109. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.