



2023:DHC:8006-DB



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Judgment reserved on: 17.08.2023**Judgment pronounced on: 31.10.2023*

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W.P.(C) 3167/2020**RISHI GANGA POWER CORPORATION LTD. Petitioner****Through: Mr Tarun Jain and Ms Dharitry
Phookan, Advs.****versus****ASSISTANT COMMISSIONER OF INCOME TAX Respondent****Through: Mr Shubhendu Bhattacharya, Adv.
for Mr Kunal Sharma, Sr. Standing
Counsel.****CORAM:****HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE GIRISH KATHPALIA****[Physical Court hearing/ Hybrid hearing (as per request)]****RAJIV SHAKDHER, J.:****Prefatory facts:**

1. The central issue for consideration in the instant writ action is whether the impugned assessment orders and notices issued by the respondents [hereafter collectively referred to as "revenue"] are sustainable in law.

1.1 The petitioner, i.e., Rishi Ganga Power Corporation Ltd. [hereafter referred to as "RGPCCL"] has, *via* the instant writ petition, assailed two sets of orders and notices. The first set concerns the order dated 21.11.2019 and the demand notice dated 22.11.2019. The order dated 21.11.2019 was passed by the revenue for failure on the part of RGPCCL to respond to the notices issued under Section 142(1) of the Income Tax Act, 1961 [in short, "1961 Act"]. This order was passed under Section 272A(1)(d) of the 1961 Act. *Via*



the said order, RGPCL has been mulcted with a penalty of Rs.10,000/-. The demand notice dated 22.11.2019 seeks to recover the said amount.

1.2 The second set comprises the impugned order and demand notice bearing the same date, i.e., 06.12.2019. The assessment order dated 06.12.2019 has been framed under Section 143(3) of the 1961 Act and concerns Assessment Year (AY) 2017-18. *Via* the said assessment order, RGPCL's income was assessed at Rs.28,93,60,000/-against a loss declared by it amounting to Rs.3,13,43,192/. The aforesaid assessed income resulted from an addition of an equivalent amount under Section 68 of the 1961 Act *vis-à-vis* unexplained credits. The Assessing Officer (AO), *via* the same assessment order, also initiated penalty proceedings against RGPCL under Section 271AAC of the 1961 Act.

1.3 Accordingly, a demand amounting to Rs.12,05,47,497/- was raised *via* notice dated 06.12.2019. RGPCL was granted 30 days to defray the tax demand.

1.4 For convenience, the penalty order passed on 21.11.2019, the demand notice dated 22.11.2019, and the assessment order as also the consequent demand notice dated 06.12.2019, will be collectively referred to as "impugned orders and notices", unless the context requires otherwise.

Backdrop:

2. The issue culled out hereinabove as regards the legal tenability of the impugned notices and orders, would require us to set forth the backdrop in which the instant writ action came to be instituted in this court.

3. As mentioned above, on 11.12.2017, RGPCL filed its Return of Income (ROI) for AY 2017-18. Pursuant to assessment proceedings being carried out, an assessment order was passed on 06.12.2019. The result was



that RGPCL's loss return morphed into a return, which required it to pay tax, as indicated in paragraph 1.3 above.

4. In the interregnum, a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 [hereafter referred to as "2016 Code"] was filed with the National Company Law Tribunal, Chandigarh Bench [NCLT] by Punjab National Bank; a financial creditor of RGPCL. This petition was admitted by the NCLT on 25.01.2018. While admitting the petition, NCLT, *inter alia*, issued directions for the appointment of an Interim Resolution Professional [IRP]. The said order also indicated that the moratorium had kicked in under Section 14 of the 2016 Code.

5. Consequently, as a next step envisaged under the 2016 Code read with the regulations framed thereunder, a public announcement dated 31.01.2018 was published in various newspapers on 02.02.2018 and 03.02.2018.

6. The record discloses that Resolutions Plans were filed by three entities, going by the name Kundan Care Products Ltd. [in short, "KCPL"]; Ajanta Energy Pvt. Ltd. [in short, "AEPL"] and Agam Pulp and Papers Pvt. Ltd. [in short, "APPL"].

6.1 The record also reveals that KCPL had submitted its Expression of Interest [EOI] to the Resolution Professional on 14.04.2018, which transformed into a Resolution Plan dated 27.04.2018 [hereafter referred to as "RP"]. Evidently, KCPL entered an [undated] amendment to its RP, which, *inter alia*, adverted to the following:

"All present and future, claims, dues, liabilities, amounts arrears, or obligations owed or payable by the company (the petitioner) to any person prior to the NCLT approval date, whether admitted or not, due or contingent, asserted or unasserted, crystallized or uncrystallized, known or unknown, secured or unsecured, disputed or undisputed, whether or not set out in the provisional balance sheet, the balance sheets of the company or the profit



and loss account statements of the company of the list of creditors, shall in accordance with Regulation 37 of the CIRP Regulations, be deemed to be written off in full and be permanently extinguished by virtue of the order of the Adjudicating Authority approving this Resolution Plan, and the Company and the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable thereto.”

7. Apparently, a revised financial proposal was submitted by KCPL on 28.06.2018. The revised resolution plan of KCPL, which included the financial proposal, was accepted by the Committee of Creditors [COC] on 30.06.2018. By this time, the other entities, i.e., AEPL and APPL, were out of the fray.

8. Thus, after going through the usual rigours provided under the 2016 Code and the extant regulations, the RP filed by KCPL was approved by the NCLT on 13.11.2018. Among other things, the NCLT, while approving the plan, adverted to the following:

“19. The learned counsel for the RP submitted on instructions that no claim with regard to statutory dues and labour dues have been received. The learned counsel for the resolution professional submitted that as per Form H (Annexure A-3 of diary No.3415 dated 10.09.2018), all the provisions of the Code and the Regulations were complied with and that the approval of the resolution plan was made by 100% voting share of the financial creditors in the meeting of the CoC held on 30.06.2018 and therefore, the resolution plan submitted by M/s Kundan Care. Products Ltd. may be approved.”

9. Just before the approval of KCPL's RP, a notice dated 09.08.2018 issued under Section 143(2) of the 1961 Act was served on RGPCL.

9.1 This was followed by notices dated 28.09.2018 and 30.09.2018. These notices were also issued under Section 143(2) of the 1961 Act. Via these notices, RGPCL was directed to furnish evidence in support of what was



stated in its ROI.

10. The aforesaid notices were followed by a notice dated 14.03.2019 issued under Section 142(1) of the 1961 Act, whereby the authorized representatives of RGPCL were asked to appear before the concerned officer on 29.03.2019, along with a direction to furnish relevant account books and documents.

11. Since RGPCL had failed to comply with the notices issued under Section 143(2) and 142(1), a notice dated 01.05.2019 was issued under Section 274 calling upon it to show cause as to why penalty ought not to be levied under Section 272A(1)(d) of the 1961 Act. This notice required the authorized representatives of RGPCL to appear before the concerned officer on 08.05.2019.

12. The record discloses that even thereafter, notices under Sections 142(1) and 274 of the 1961 Act were issued on 22.10.2019 and 04.11.2019, respectively. The latter notice required the authorized representative of the RGPCL to present himself before the concerned officer on 08.11.2019. Evidently, a notice dated 26.11.2019 was issued to RGPCL to show cause why a best judgment assessment should not be carried out against it. Once again, the authorized representative of RGPCL was required to appear before the concerned officer, the date for which was fixed as 29.11.2019. The impugned penalty order and consequent demand notice were ultimately issued on 21.11.2019.

13. Likewise, a notice dated 03.12.2019 was issued to RGPCL to show cause why Rs.28,93,60,000/- should not be added as unexplained credit in its books of accounts. This amount was apparently received as share application money pending allotment. The AO sought to make the addition



under Section 68 and imposed tax under Section 115BBE of the 1961 Act.

14. The aforesaid show cause notice resulted in the AO framing the impugned assessment order dated 06.12.2019 under Section 143(3) of the 1961 Act. The addition proposed in the show cause notice dated 03.12.2019 was made, which resulted in the impugned demand notice dated 06.12.2019 being issued to the petitioner under Section 156 of the 1961 Act. RGPCL was, thus, called upon to pay Rs.12,05,47,497/-.

15. The record shows that on 11.02.2020, the new management, which had taken over the affairs of RGPCL, wrote to the AO, explaining the reasons for non-participation in the assessment proceedings. A request was also made for the deletion of the additions made *via* the impugned assessment order having regard to the fact that the moratorium, as ordered by the NCLT, was in place. Since there was no response from the revenue, RGPCL took recourse to the instant writ action.

16. Notice in the instant writ petition was issued on 18.05.2020. While issuing notice, an interim direction was passed to the effect that the impugned income tax demand will not be enforced against RGPCL. Furthermore, the said order also indicated that RGPCL was at liberty to file an appeal, if necessary, by moving an application for condonation of delay.

16.1 The interim order was made absolute during the pendency of the writ petition on 23.01.2023. Accordingly, the interlocutory application, i.e., CM No.11017/2020, was disposed of.

Submissions of Counsels:

17. Arguments on behalf of RGPCL were addressed by Mr Tarun Jain, Advocate, while Mr Kunal Sharma represented the revenue, learned senior standing counsel.



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18. The arguments advanced by Mr Jain can broadly be paraphrased as follows:

(i) The claims represented by the impugned orders and notices concern a period which precedes the date when the NCLT approved the RP. The impugned orders and notices concern AY 2017-18. KCPL's plan was approved by NCLT on 13.11.2018.

(ii) The revenue chose not to file a claim with the Resolution Professional, although a public announcement dated 31.01.2018 was published in various newspapers on 02.02.2018 and 03.02.2018. The revenue is an operational creditor; therefore, all proceedings that concern claims about periods before the approval of the RP are automatically extinguished. [See *Ghanashyam Mishra and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director*, (2021) 9 SCC 65; *Ruchi Soya Industries Limited and Others Vs Union of India and Others*, (2022) 6 SCC 343; *Committee of Creditors of Esser Steel India Limited through Authorised Signatory Vs. Satish Kumar Gupta and Others*, (2020) 8 SCC 531 and *Indian Overseas Bank Vs. RCM Infrastructure Ltd. and Another*, (2022) 8 SCC 516].

(iii) The RP approved by NCLT, as per the provisions of Section 31 of the 2016 Code, binds all stakeholders, which includes statutory creditors [in this case, the revenue]. [See *Ultra Tech Nathdwara Cement Ltd. Vs. Union of India, Through the Joint Secretary and Others*, 2020 SCC OnLine Raj 1097; *Murli Industries Limited, through its Dy. Ex. Director Vs. Assistant Commissioner of Income Tax and Others*, 2021 SCC OnLine Bom 6187 and *Sirpur Paper Mills Limited and Another Vs. Union of India and*



Others, 2022 SCC OnLine TS 130].

19. On the other hand, in rebuttal, Mr Sharma submitted that claims were not lodged with the Resolution Professional, pursuant to the public announcement publication dated 31.01.2018, as they had not fructified into demands on that date. In this regard, our attention was drawn to when the impugned orders and demand notices were issued, i.e., 21.11.2019 and 06.12.2019. It was, therefore, submitted that the judgment cited on behalf of RGPCL was distinguishable.

20. Insofar as the other aspects of the matter were concerned, Mr Sharma drew our attention to the counter-affidavit, which broadly captured the date and events we have adverted to in the earlier part of this judgment. However, an emphasis was made that the reply to the notices issued under Section 143(2) and 142(1) of the 1961 Act was tendered by the new management quite late in the day.

Reasons and Analysis:

21. Having heard learned counsel for the parties, what is not in dispute insofar as the instant case is concerned is that some of the notices issued under Section 143(2) of the 1961 Act predated the order dated 13.11.2018 passed by the NCLT, whereby KCPL's RP was approved. These notices are dated 09.08.2018, 28.09.2018 and 30.09.2018. These notices adverted to the fact that additions concerning share application money and depreciation claimed by RGPCL were proposed to be made for AY 2017-18 [Financial Year (FY) 2016- 17]. Thus, limited scrutiny was proposed. The notices were based on the ROI filed by RGPCL. Therefore, the additions to RGPCL's income were, quite clearly, on the anvil. The argument that the proposal had not fructified into tax demand is flawed for the following reason:



21.1 A perusal of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 [hereafter referred to as "2016 Regulations"] require operational creditors to submit their claim with proof to the IRP, which are not necessarily claims that have been adjudicated. As per Regulation 7 of the 2016 Regulations, operational creditors must file their claims with proof in the prescribed form, i.e., Form B appended to the Schedule. Regulation 7, when read alongside particulars sought against Sr.No. 6 of Form B, would drive home the point that it can include claims that are disputed. The information sought, among other things, against Sr.No.6 of Form B points in this direction:

	Particulars	
xxx	xxxxxx	
6.	Details of any dispute as well as the record of pendency or order of suit or arbitration proceedings.	
xxx	xxxxxx	

22. Furthermore, the definition of claim contained in Section 3(6)(a) of the 2016 Code puts these aspects beyond doubt:

“3. **Definitions.**- In this Code, unless the context otherwise requires,-

xxx xxxxxx

(6) “claim” means-

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

xxx xxxxxx”

23. Therefore, the submission advanced on behalf of the revenue insofar as the tax demand, which is the subject matter of the impugned order and notice dated 06.12.2019, is concerned, is untenable in law. An operational creditor can lodge a claim which needs to be adjudicated.

24. As far as the impugned order dated 21.11.2019 and notice dated



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22.11.2019 are concerned, it will have to suffer the same fate as the penalty which was imposed, and the consequential demand that was created had its genesis in the failure of the previous management of RGPCL in responding to the statutory notices. These notices concerned the aspects mentioned in the first notice dated 09.08.2018, issued under Section 143(2) of the 1961 Act.

24.1 The aforementioned impugned order and notice, dated 21.11.2019, cannot have a life on its own and are inextricably linked to the fate of the impugned assessment order and notice dated 06.12.2019.

25. Thus, having regard to the fact that the revenue had not lodged its claim, despite the publication of the public announcement by the Resolution Professional inviting claims from creditors, including statutory/operational creditors such as the revenue, no provision could be made [even if it may otherwise have been possible] in the approved RP. The terms contained in the approved RP are binding on all stakeholders, including those who could have filed claims but chose not to lodge them. The revenue, having failed to lodge its claim, cannot enforce the impugned orders and notices, given the binding nature of the approved RP.

26. Section 31 of the 2016 Code, among other things, stipulates that once the RP is approved, it shall be binding on the corporate debtor and its employees, members, and creditors, which includes the Central Government, State Government, Local Authority to whom a debt in respect of payment of dues arising under any law for the time being in force and also on authorities to whom statutory dues are owed. Furthermore, the provision also stipulates that the approved plan will bind the guarantors and other stakeholders involved in forging the same. [See *Ghanashyam Mishra*



and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director, (2021) 9 SCC 65].

27. Since the revenue failed to lodge its claims, the impugned demands raised by the revenue stand automatically extinguished. [See *Ruchi Soya Industries Limited and Others Vs Union of India and Others*, (2022) 6 SCC 343 and *Sreemetaliks Limited Vs. Additional Director General and Ors.*, 2023/DHC/001118 (at para 53)]

27.1 Therefore, the submission made on behalf of the revenue that it should be allowed to enforce the impugned orders and notices is misconceived in law.

Conclusion:

28. Thus, for the foregoing reasons, we are inclined to quash the impugned notices and orders. It is directed accordingly.

29. The writ petition is disposed of in the aforesaid terms.

30. Parties will bear their respective costs.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

OCTOBER 31, 2023/aj