

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION No.7329 OF 2018

ORDER :

This Writ Petition is filed seeking writ of mandamus declaring the action of the 1st respondent in issuing letter No.DBRNo.BP.6012/21.04.048/2017-18 dated 28.08.20017 and letter dated 27.12.2017 and consequent action of the 2nd respondent in filing CP No.79/HBD/2018 before the National Company Law Tribunal (NCLT) Hyderabad Bench as illegal and arbitrary and consequently to set aside the letters of the 1st respondent and direct the 2nd respondent to withdraw the CP No. 79/HBD/2018 before the National Company Law Tribunal, Hyderabad Bench.

2. Brief facts which are necessary for disposal of the Writ Petition are as follows:

The Jerrella block of mines in Visakhapatnam District was found to have huge reserves of bauxite, which is the raw material for the manufacture of aluminium. An MOU dated 14.02.2007 was entered into between the Government of Andhra Pradesh and Government of RAS AL KHAIMAH. On the basis of the said MOU, the petitioner company was incorporated as joint venture between the Penna Cement Group and the RAS AL KHAIMAH Investment Authority, which is the investment arm of the Government of RAS AL

KHAIMAH. The object of petitioner company was to establish and operate a 1.5 Million Ton alumina refinery with 225 MW Cogeneration power plant at Makaravapalem Mandal, Visakhapatnam District, Andhra Pradesh. As the basis for establishment of alumina refinery was the supply of bauxite from the Jerrella block of mines, the Andhra Pradesh Mining Development Corporation (APMDC) entered into a bauxite supply agreement with the petitioner company for supply of bauxite under agreement dated 30.1.2008. The government of AP also issued GO Nos.222 (Industries and Commerce (M.III) Department dated 13.08.2008 and also G.O.Ms.No.289 (Industries and commerce (M.III) Department, dated 30.10.2008 for supply of bauxite to the alumina plant. Basing on the aforesaid agreements and assurances, the petitioner company approached a consortium of banks with the 2nd respondent as the lead creditor of the said consortium and obtained financial assistance from the said consortium. However, the APMDC which was to supply bauxite under the aforesaid GOs issued by the Government and also under the supply agreement, was unable to supply bauxite, which has resulted in the entire project being identified as a stalled project by the Project Monitoring Group. Due to the efforts of the project monitoring group and the petitioner company, the Ministry of Environment and Forests sanctioned the forest clearance in August, 2016 as the lack of the said

clearance was hindering the mining operations. By the letter dated 13.04.2016, the APMDC had informed the petitioner company that the two GOs bearing Nos.229 and 289 issued by the government of Andhra Pradesh were cancelled and in effect stating that supply of bauxite by APMDC would not be taking place. Due to the above facts, the petitioner company was unable to generate income or profits to pay the dues of the various banks in the consortium, which has resulted in the Reserve Bank of India (RBI) classifying the loans given to the petitioner as sub-standard under AQR guidelines of December, 2015, which was effective from March, 2014. Thereafter, the promoters of the petitioner company tried to find various alternative source of bauxite for supply to alumina refinery. As a part of these efforts, promoters had also invited other investors who would be willing to invest in the project so as to clear the dues of consortium, but in vain. The 1st respondent addressed letter dated 28.8.2017 to the 2nd respondent giving a list of 20 companies and directed the 2nd respondent to initiate insolvency proceedings under the provisions of IB Code against 20 companies, wherein a viable resolution plan had not been formulated and where implementation had not commenced before 13.12.2017. On such letter, the 2nd respondent convened a meeting of the consortium of banks on 08.09.2017 and sought resolution of accounts. In the minutes of the meeting, it was recorded that

unless the petitioner comes up with an acceptable offer under One Time Settlement (OTS), the banks would be constrained to file an application before the NCLT as suggested by the 1st respondent. Thereafter, petitioner made an offer of Rs.1250 crores as OTS for closing all the accounts, which was not accepted by the consortium. Again the meeting of consortium of banks was held on 25.10.2017, wherein the initial offer of Rs.1250 crores was increased to Rs.1275 crores, which is to be paid in accordance with the schedule set out in the minutes of the consortium meeting. In the said meeting, all the members of consortium except one member amounting to 94.80% of the total outstanding to the consortium had agreed and accepted the OTS offer of the petitioner for payment of Rs.1275 crores as full and final settlement of all dues and closure of all accounts. It was also recorded that the petitioner should deposit 5% of the OTS amount along with an application for OTS and another 5% should be paid upon issuance of sanction letter apart from other terms. Basing on this, petitioner filed its sanction proposal along with payment of Rs.62.5 crores which is 5% of the OTS amount on 09.11.2017. Thereafter, a meeting of consortium was again held on 13.12.2017, on which date petitioner and some of the other members of the consortium had reported that their competent authorities had also approved the OTS proposal of the petitioner and remaining

banks also reported that they had submitted their recommendations to the respective competent authorities for approval of OTS. The consortium again met on 29.12.2017, on which date, it was recorded in the minutes that out of 17 banks which are members of the consortium, 11 banks had reported that their competent authorities had approved the OTS offer and remaining 6 banks had informed that the proposals were still pending with their respective competent authorities, whose approval would be finalised in a week's time. While things stood thus, the 1st respondent having knowledge of above facts, issued impugned letter dated 27.12.2017 stating that conditions specified in letters dated 28.08.2017 and 30.11.2017 have to be complied basing on same, the 2nd respondent filed an application before the NCLT, Hyderabad under IB Code which is numbered as CP(IB) No.79/HDB/2018 and same is pending. Aggrieved by the same, present Writ Petition is filed.

3. This Court granted interim order dated 07.03.2018 on condition of deposit of Rs.275 Crores by the petitioner.

4. The 1st respondent filed I.A.No.3 of 2018 for vacating the interim order dated 03.07.2018 in I.A.No.2018 in WP No.No.7329 of 2018 along with counter affidavit denying the averments in the affidavit filed in support of the Writ Petition stating that the relief sought by the petitioner will cause damage to public interest and have a long-term impact. The

IBC Code, was enacted by the legislation with an object to empower the 1st respondent to identify the most stressed assets of the economy and ensure their resolution in a time bound manner and that as a part of this process, the Banking Regulation Act was amended to incorporate Sections 35AA and 35AB. Section 35AA empowers the Central Government to authorize the 1st respondent to issue directions to any banking company i.e., 2nd respondent Bank in this case, to initiate insolvency resolution process in respect of company in default and that Section 35AB authorises 1st respondent to issue directions to banking companies for resolution of stressed assets. That the 1st respondent directed banks to finalise and implement a resolution plan within 13.12.2017 and that where a viable solution plan is not agreed upon within that date, the banks will be required to initiate insolvency resolution process under IB Code before 31.12.2017. The 1st respondent issued Press Release dated 22.05.2017 in furtherance of its over all objective of taking measures against the most stressed assets. It also issued another press release on 13.06.2017, whereby 12 stressed accounts were identified and banks were directed to immediately refer those cases for resolution under IBC and that as regards other NPS, which did not qualify for immediate reference, the Internal Advisory Committee (IAC) recommended that banks should finalise a resolution plan

within six months. If the resolution plan was not agreed upon within such period, the banks were directed to file insolvency proceedings under the IB Code. In terms of communication of 1st respondent dated 28.08.2017, the 2nd respondent was advised to finalise and implement resolution plan in respect of petitioner's account before 13.12.2017, failing which insolvency proceedings under the provisions of IBC shall be initiated before 31.12.2017. The 1st respondent also issued letter dated 30.11.2017 to the 2nd respondent specifying the conditions to be complied with for any resolution plan to be considered as implemented. Since the petitioner failed to implement the resolution plan on or before 13.12.2017, he is not entitled for the relief sought for in the Writ Petition and prays to dismiss the same.

5. Counter affidavit is also filed by the 2nd respondent denying some of the averments in the affidavit filed in support of the Writ Petition stating that the 1st respondent addressed letter dated 27.12.2017 to this respondent referring to the earlier letters advising this respondent Bank to follow the guidelines issued in the letter dated 28.08.2017 and reiterated the purpose of meeting the implementation criteria and all the conditions specified in the letter dated 30.11.2017 have to be complied with in addition to the regulation governing the specific resolution plans and also stated that any relief or specific dispensations cannot be

accepted. In pursuance to the directions of the 1st respondent, this respondent approached NCLT and filed CP No.HDB/2018 to initiate Corporate Insolvency Resolution process in respect of the petitioner under IB Code, 2016. It is stated that the Writ Petition is not maintainable as the relief claimed in the Writ Petition is virtually prohibiting a statutory organization in invoking it's rights before the Court of law, which relief cannot be granted under Article 226 of the Constitution of India, as such, sought for dismissal of the Writ Petition.

6. Reply affidavit is filed by the petitioner reiterating some of the averments in the affidavit filed in support of the Writ Petition and denied the averments in the counter affidavits filed by respondents 1 & 2 stating that the 2nd respondent filed proceedings before the NCLT only on the direction of the 1st respondent but not because there was no scheme which had been agreed upon. The resolution plan proposed by the petitioner and accepted by the lenders was an OTS of all debts and upon implementation of such a scheme, there would be no debt left post implementation of the scheme. It is stated that the minutes of the meeting dated 25.10.2017, 13.12.2017 and 29.12.2017 would clearly show that the lenders had given approval and had directed the petitioner to make payments on the basis of the said approval. It is stated that if one bank was not accepting the OTS offer, it

would not make any difference, inasmuch as the said bank would be bound by the decision of the JLF. Except insisting of alleged compliance of its requirements by the 1st respondent, being custodian of the policy, it has not explained any reason as to why the implementation of OTS scheme should be stalled either on account of such scheme being disadvantageous to the bank or to any public interest, since the petitioner had already deposited Rs.400 crores in no lien account of the 2nd respondent and is willing to comply with all the other terms of the offer accepted by the lenders.

7. Heard Sri R.Raghunandan Rao, learned Senior Counsel for the petitioner, Sri S.Niranjan Reddy, learned Senior Counsel appearing on behalf of Sri Avinash Desai, learned counsel for the 1st respondent and Sri Ambadipudi Satyanarayana, learned Standing Counsel for the 2nd respondent and Sri P.Vikram, for implead petitioners Nos. 2 to 24 in I.A.No.2 of 2018 which is allowed on 07.08.2018, as the respondents have not objected. Moreso, it is stated that they are employees of 1st petitioner company, being affected by the impugned decision.

8. Sri R.Raghunandan Rao, learned Senior Counsel for the petitioner, basing on pleadings, submits that the consortium of banks held meeting on 29.12.2017, on which date, it was recorded in the minutes of the meeting that out of 17 banks which are the members of the consortium, 11 banks had

reported that their competent authorities had approved OTS offer and remaining 6 banks had informed that the proposals were still pending with their respective competent authorities. He submits that the 2nd respondent being consortium and lead Bank, is aware of the proceedings of the JLF on 29.12.2017, wherein, petitioner was called upon to deposit Rs.62.50 crores towards the 2nd instalment, as such, non compliance of the terms and conditions of the letter issued by the 1st respondent on 28.08.2017 and 30.11.2017 does not arise at all. He submits that the resolution of accounts of the petitioner was agreed upon by the consortium of Banks on 25.10.2017 and the petitioner also deposited 1st instalment of Rs.62.50 crores along with formal offer letter on 07.11.2017 and petitioner was called upon to make payment of 2nd instalment on or before 31.12.2017, in pursuant to meeting of JLF held on 29.12.2017, as such, it cannot be said that there is no resolution of accounts of the petitioner. He submits that the resolution process by way of OTS came into effect before 13.12.2017 and that even in the impugned proceedings dated 28.08.2017 issued by 1st respondent, it was mentioned that the 2nd respondent should make every effort to comply with the resolution process and implement the viable resolution plan in a time bound manner. He submits that even when the petitioner approached NCLT, Hyderabad, the NCLT dismissed the application of the

petitioner asking the petitioner and 2nd respondent to seek revival plan in the interest of public at large. He submits that the petitioner and the consortium bank i.e., 2nd respondent being the lead bank, understood the same and arrived at a resolution plan by way of OTS, as such, the 1st respondent cannot issue letter dated 27.12.2017 stating that since the resolution plan is not completed by 13.12.2017, the 2nd respondent should initiate proceedings before the NCLT, which is illegal and arbitrary. He submits that the consortium of banks received 1st instalment of Rs.62.50 crores on 07.11.2017 and another instalment of Rs.62.50 Crores on 30.12.2017, as required under OTS resolution plan and that by that time, the 2nd respondent is aware of the letters of the 1st respondent dated 28.08.2017 and 27.12.2017 and that they have received the amount without any objection. He submits that having received the aforesaid amounts, the 1st and 2nd respondents, cannot turn around and initiate proceedings under IB Code, which is illegal and arbitrary. He submits that even otherwise, the majority of the consortium of banks agreed for OTS before 13.12.2017 and same is implemented by way of payment of amount, as such, issuance of impugned proceedings by the 1st respondent is illegal. He submits that the 1st respondent has not appointed any credit rating agencies for acceptance, since that letter was issued for the first time on 13.11.2017. He

submits that at any rate the OTS scheme is not a part of restructuring of account, since the petitioner wants to pay the amount and settle the matter with the consortium of banks, as such, same is also not applicable and there is no empanelment of two Credit Rating Agencies by the 1st respondent. He also submits that there is also no residual debt left over after 13.12.2017 since the petitioner has agreed for payment of entire debt by way of OTS and also agreed to pay Rs.25.00 crores towards interest along with last instalment.

9. On the other hand, Sri S.Niranjan Reddy, learned Senior Counsel appearing for the 1st respondent Bank submits that the 1st respondent has power to issue directions to the 2nd respondent bank under Section 35AA and 35AB of the Banking Regulation Act, 1949, as such, the 1st respondent issued circulars dated 05.05.2017 and 22.05.2017. He submits that the resolution plan by OTS of the petitioner is not implemented by 13.12.2017 as entire amount is not paid in accordance with letter dated 28.08.2017 issued by the 1st respondent, as such, the 1st respondent addressed another letter dated 27.12.2017 reiterating the same stating that there cannot be any extension of time and specific dispensation as the so-called OTS is not in compliance, as the same goes beyond 13.12.2017. He also submits that even the OTS was not finalized on or before 13.12.2017 and

implemented and no master agreement of restructuring of account was executed. He submits that in the case of petitioner, the directions of 1st respondent are binding on the banks. He submits that the writ petition is liable to be dismissed on the following grounds: a) The resolution plan in respect of petitioner's debt was incomplete as on 13.12.2017; b) The 1st respondent's directives are reasonable and make a classification valid under Article 14 of the Constitution of India; c) Resolution under the IB Code is a democratic process; and d) Restructuring of debt is a matter of Economic policy. In support of his contention, he relied on the judgment reported in **Central Bank of India v. Ravindra and others**¹.

10. It is pertinent to note that the impugned proceedings dated 28.08.2017 issued by the 1st respondent to the 2nd respondent, wherein paragraphs 4 and 6 reads as follows:

"4. Accordingly, enclosed are two separate lists of accounts, one where the State Bank of India is the lead bank (Annex1) and, two, where the State Bank of India is a member of the Joint Lenders' Forum (JLF) (Annex2). The JLF process should already have been initiated in respect of these accounts. We advise that the State Bank of India, along with other lenders that are part of the JLF/consortium, make every effort to complete the resolution process and implement a viable resolution plan for these accounts before December 13, 2017, failing which, the JLF/consortium may initiate insolvency proceedings in respect of the accounts under the provisions of the IBC, before December 31, 2017, unless already initiated. The resolution plan, wherever feasible, may involve restructuring under any of the existing guidelines or sale of the stressed debt to an interested buyer/investor, including any other viable and legal restructuring plan.

6. It is further advised that any resolution plan finalised in respect of the said accounts outside IBC will be subject to a rating requirement i.e., in all resolution plans where the lenders continue to hold a portion of the debt, the residual debt must be rated as investment grade by two external credit rating agencies (CRAs) accredited by the Reserve Bank for bank loan ratings. In case the

¹ (2002) 1 Supreme Court Cases 367

resolution plan is not able to get the required rating, such accounts shall be required to be referred for resolution under IBC before December 31, 2017.”

It is pertinent to note that the name of the petitioner is found in the annexure I appended to the above letter dated 28.08.2017. Through the aforesaid impugned proceedings, the 1st respondent advised the 2nd respondent to make every effort to complete the resolution process, but there is no direction to the 2nd respondent, as contended by the learned counsel for the 1st respondent that amounts in pursuance to resolution plan should be paid by cut off date. In fact, the consortium of banks met several times and that almost all 11 banks out of 17 banks, have obtained approval from their competent authorities for the resolution of account of petitioner through OTS. Therefore, the contention of the learned Senior Counsel for the 1st respondent that the petitioner did not make full payment under OTS before 13.12.2017, cannot be accepted.

11. That apart, in the counter affidavit it is stated that in pursuance to the letter dated 28.08.2017 only, the 2nd respondent initiated resolution process with the consortium of Banks. A perusal of the minutes of meeting dated 08.09.2017 goes to show that the Consortium of Banks came to the conclusion that if the petitioner company is coming up for payment of Rs.1400.00 Crores of OTS payable within 12 months they can take a view on the same, which was communicated to the petitioner company, who took time for settlement of OTS. Thereafter, the Consortium of Banks met on 25.10.2017 and

after discussing the issue at length same was recorded as follows:

“All the Bankers discussed at length about resolution of the account as decision to be taken before 13.12.2017 as suggested by RBI. DGM PNB, DGM Canara Bank, DGM SBI have opined that whatever resolution is taken either through NCLT or otherwise, it is to be taken by lenders only. Therefore, it is the befitting forum to take up acceptable resolution plan so as to save on time and cost. Finding the buyers through NCLT cannot be assured of as the land is in SEZ and to be sold to the buyer engaged in same line of activity and in this event, relief/concessions extended to AAL by SEZ authorities are to be reverted back.”

The aforesaid decision goes to show that even the lenders while exploring the possibility of sale of the assets of the company/takeover of the company by third parties had expressed their view that such a situation would not arise as company had set up its refinery unit as a SEZ unit and any sale/takeover by third party would automatically result in the SEZ authorities and the Customs and Excise authorities requiring such third party to pay up all the taxes, duties on assets that were waived because of the company's unit was set up as a SEZ unit and that it is because of this difficulty, the lenders had to accept the OTS scheme instead of trying to restructure the debt or undertake any revival plan. When the petitioner company proposed to pay Rs.1275.00 Crores on 25.10.2017 as OTS amount, the matter was discussed and the Chief Manager, SBI, informed the members that the OTS offer of Rs.1275.00 Crores payable in 18 instalments is acceptable to SBI and enquired with all the member Banks

about the same. All the member banks except IOB with a majority of 94.80% of consortium banks agreed to the OTS offer of the petitioner, subject to approval by appropriate committee of individual banks. SBI and all the member Banks except IOB, UCO Bank, Bank of India, Indian Bank and United Bank of India with a majority of 82.80% of consortium agreed to the offer of the Company to pay an amount of Rs.25.00 Crores with instalment of OTS in lieu of interest payment making the total OTS amount of Rs.1,275.00 Crores. It is also agreed by all the members that interest to be charged @ SBI MCLR + 2% in the event of default/delay in repayment of instalment of OTS by the promoter/guarantor. As such, it cannot be said that the petitioner is at fault in making payments to the consortium of Banks. In the said meeting it is also recorded that when AGM, IOB suggested to form a group of higher officials of Banks, approach Chief Minister of Andhra Pradesh and to request him to help in this regard, the SBI and PNB officials informed that they had already approached APMDC in this regard, there was no positive result. All the members opined that it is not possible to get resolution within 13/12/2017 through this process and that all the member banks suggested to the petitioner company to pay 10% of OTS offer as initial deposit/up-front amount (5% along with application and 5% on issuing sanction letter) and the final instalment

also to be paid latest by 25.03.2019. Thereafter, petitioner company has complied with the same, which is not disputed in the counter affidavit of the 2nd respondent and at paragraph No.3, wherein it is categorically admitted that the petitioners and some of the consortium Banks have arrived at OTS initially for Rs.1250 crores, which was increased to Rs.1275 Crores, in pursuance of the same, petitioner has deposited Rs.62.50 crores on 09.11.2017, Rs.62.50 crores on 30.12.2017 and thereafter Rs.275.00 crores on 29.03.2018 in pursuance of the interim orders passed by this Court in this Writ Petition dated 07.03.2018.

12. It is not in dispute that the petitioner has paid an amount of Rs.400 Crores as OTS instalment, which was agreed by the 2nd respondent in its counter. In paragraph 6 of the counter of 2nd respondent, it is stated as follows:

“6.It is also submitted that this Respondent Bank has issued a letter to the petitioner dated 19.12.2017 stating that the officer of the petitioner company to pay Rs.228.00 crores to this respondent Bank (out of total OTS amount of Rs.1275.00 crores to the consortium) was accepted by the Bank with payment schedule and certain terms and conditions mentioned therein. The petitioner has accepted the same and in pursuance of the same has remitted a sum of Rs.400.00 crores with this Respondent Bank as OTS instalment amount for all consortium banks.”

13. It is pertinent to note that even when the consortium of banks met on 13.12.2017, it was reiterated that the DGM of SBI informed that the competent authority of SBI has approved the OTS offer submitted by the petitioner company with a condition that if the company fails to pay any of the

instalments as per schedule, OTS will stand cancelled and immediately application will be filed in NCLT. In the said minutes, it is stated that official from Lakshmi Vilas Bank informed that their competent authority has also recommended the OTS proposal with the same condition as of SBI to cancel OTS and file application in NCLT if any of the OTS instalment is delayed. In addition to SBI five other Banks i.e., Union Bank of India, United Bank of India, Axis Bank, Indian bank and JM Financial competent authorities have also approved the OTS proposals of the company with (44.73% of o/s) and that except Vijaya Bank and Indian Overseas Bank (together with 7.325 of o/s) all other Banks have submitted their recommendations to respective competent authorities for approval of the OTS. Thereafter, the DGM (SBI) called the officials of the petitioner company and conveyed the decision taken by the Consortium and advised to pay remaining 5% of OTS offer of up-front amount on receiving OTS approvals from a minimum 9 member Banks (more than 50% in number) and 60% of total outstanding. Again meeting of consortium was conducted on 29.12.2017 stating that the 2nd respondent received a letter from 1st respondent-RBI stating that the conditions specified in their letters dated 28.08.2017 and 30.11.2017 have to be fully complied with. SBI, Punjab National Bank, Union Bank of India, United Bank of India, Axis Bank, Indian Bank, JM

Financial, Bank of Baroda, Canara Bank, Bank of India & Lakshmi Vilas Bank have approved the OTS proposal of the company till date and remaining six banks have not yet approved the OTS proposal of the company, as such, the competent authority of SBI decided to file application with NCLT today i.e., 29.12.2017. It is also recorded in the said minutes that 11 out of 17 member banks with 74.25% of outstanding have approved the OTS proposal by 29.12.2017. It is also stated therein that all banks advised that all the possible strategies like finding investors, possibilities of SARFAESI action to find resolution of the account have failed and discussed about various other strategies in all previous JLM's at length and finally opted for OTS except IOB. The petitioner company may require additional working capital limits for running the unit in future and no Banker is ready to arrange working capital at this stage and procuring raw material from out side is also not viable after APMIDC cancelled the MOU for supply of Bauxite. It is also recorded that SBI Caps already conducted a study for finding investors and viability of using imported raw material and the outcome is negative. It is also recorded that the JM Financial ARC official also said that though OTS is not the best option, it is a better option in the prevailing conditions and as discussed in previous JLMs, resolution through NCLT is time consuming and huge expenditure is involved. All the facts

discussed in the meeting of consortium Banks goes to show that the 2nd respondent and other members of the Consortium Bank are aware of the impugned proceedings dated 28.08.2017 issued by the 1st respondent and that in pursuance of the same, has taken a decision to accept the OTS proposal of the petitioner and petitioner was asked to pay the amounts. Accordingly petitioner paid some amounts in instalments and said fact is not in dispute, as the same is categorically admitted by the 2nd respondent in its counter. In fact, impugned proceedings also states that the 1st respondent advised the 2nd respondent to make every effort to complete the resolution process and implement viable solution on or before 13.12.2017, failing which, the consortium may initiate proceedings under IB Code. In this case, the majority of the Banks i.e., 60% of the Banks have agreed the OTS proposal of the petitioner company. It is not the case of the 1st respondent or 2nd respondent that the OTS agreed was irregular or illegal, but 1st respondent stated that it is not fully implemented by paying entire amounts by 13.12.2017. What all the contention of the learned Senior Counsel for the 1st respondent is that the payment was stipulated made beyond 13.12.2017 and all the Banks have not agreed upon for the OTS proposal of the petitioner. As already observed supra, the majority of the Banks agreed for OTS proposal and payment was accordingly made. Even it is

not the case of other members of the consortium that they are not agreeable for the OTS. In fact, the 2nd respondent received the instalments paid by the petitioner company, without any protest and unconditionally. Even when this Court granted interim order on 07.03.2018, neither the 2nd respondent nor the 1st respondent objected for receiving the amount. Even when the petitioner approached NCLT, the NCLT dismissed the application of the petitioner by observing as follows:

“18.The Adjudicating Authority considering the huge public money already invested by the Banks and contribution of promoters towards the project which had a potential employment generation of more than 1000 employees directly and indirectly, instead of winding up/liquidating the company, as a Still Born Baby, the Adjudicating Authority directed all the parties to explore various possible avenues for operation/running of the company rather than to winding up/liquidate the same which may not be in the interest of Nation and only alternative. During various hearings before the Adjudicating Authority, both the parties pleaded with a closed view to liquidate the company in spite of Rs.5712 Crores already invested in the project but was not open to the idea of exploring various venues for commencing commercial production, even though the project was completed and lying idle for more than 4 years as submitted by them. Further, they have also failed to produce any documents to prove that they have taken up/pursing with the State Government/APMDC in the matter of revoking the cancellation of Bauxite supply Agreement with the State Government/APMDC. Therefore, in the interest of all stakeholders, shareholders especially public funds of banks potential/future employment generation/contribution to GDP/various possible tax revenues to Government, the Adjudicating authority prima facie was not satisfied to admit the petition filed u/s.10 of IBC.”

14. The 2nd respondent Bank along with consortium appears to have worked out the resolution plan of OTS in pursuant to impugned proceedings dated 28.08.2017 and order of NCLT dated 31.08.2017 and held series of discussions on 08.09.2017, 25.10.2017 and 13.12.2017 and all the members of the consortium including the petitioner have also understood the

same, as such, it cannot be said that the resolution by way of OTS is not in accordance with proceedings dated 28.08.2017. Even in counter affidavit of 1st respondent, it is stated that the 1st respondent directed Banks to finalize and implement resolution plan within 13.12.2017 and wherein viable resolution plan is not agreed upon within that date, then only banks are required to initiate proceedings under IB Code. But a viable resolution was agreed upon between parties and part payment was made by the petitioner in pursuant thereto before cut off date, as such, it is not correct to say that resolution plan by way of OTS is not in accordance with proceedings dated 28.08.2017.

15. It is pertinent to note that admittedly an agreement for supply of bauxite was cancelled by the Government of Andhra Pradesh and the same was given effect to by cancelling the G.O Nos.222 (Industries and Commerce (M.III) Department dated 13.08.2008 and also G.O.Ms.No.289 (Industries and commerce (M.III) Department, dated 30.10.2008.

16. In this case, it is to be seen that the petitioner has established alumina refinery and was commissioned by 30.03.2013 itself. Since the APMDC failed to supply bauxite agreement dated 30.01.2008 and G.O.Ms.Nos.222 and 289, dated 13.08.2008 and 30.10.2008 respectively, which is the raw material for running factory, the petitioner could not commence its production for earning profits and paying dues to the consortium banks as contended by the learned counsel

for the petitioner. As such, the petitioner is not at fault and it is only on the act of the Government of Andhra Pradesh as well as APMDC, petitioner defaulted in payment of monies, as such there is no wilful default on the part of the petitioner.

17. Learned Senior Counsel for the 1st respondent submits that even after resolution, the opinion of two Credit Rating Agencies have to be obtained, when there is a residual debt remaining. But as contended by learned Senior Counsel for petitioner, the petitioner company agreed to discharge the entire debt in toto in accordance with OTS and that there is no residual debt left over after 13.12.2017. In this case, the settlement arrived between the members of the consortium and petitioner for payment of entire amount and that an amount of Rs.25.00 crores was to be paid along with last instalment towards interest, which was arrived at with consent and no residual debt is remaining.

18. As already observed supra, there is no clear cut direction imposing any condition in the impugned proceedings dated 28.08.2017, but it is only in the form of an advise to consortium of Bank that it may initiate the process before and the consortium banks understood the same and acted upon and arrived at a solution by way of OTS and implemented the same by receiving amounts in pursuance to same. No doubt, the 1st respondent has power to issue directions under Sections 35A and 35AB of Banking

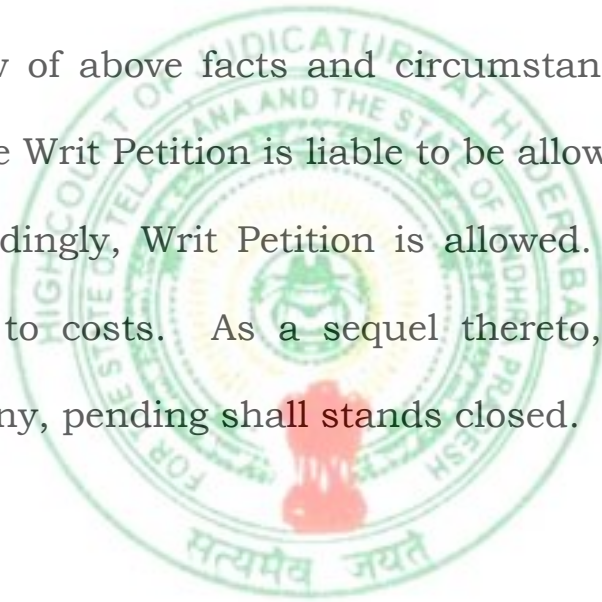
Regulation Act as contended by the learned Senior Counsel for the 1st respondent, as held by Apex Court in **Central Bank of India v. Ravindra and others (supra)**, but in the present case, the 1st respondent has advised the 2nd respondent to workout resolution process and the same was done, as such, the action of the 1st respondent in issuing the impugned proceedings, basing on which the 2nd respondent filed petition before the NCLT at Hyderabad, is arbitrary and illegal. Even if the impugned proceedings of the 1st respondent construed as a direction to make every effort to arrive at resolution by 13.12.2017, the same is complied with.

19. The 2nd respondent Bank along with consortium of Banks accepted payments made by the petitioner in pursuant to OTS resolution before 30.11.2017 and also after 30.11.2017. The 1st respondent issued letter dated 30.11.2017 after receipt of payments by the petitioner to the 2nd respondent Bank in pursuance of OTS scheme, which is resolved in pursuant to letter of the 1st respondent dated 28.08.2017. Even otherwise, in the proceedings dated 30.11.2017 & 28.08.2017, there is no specification that the entire amount should be paid by 13.12.2017, but it only states that the resolution plan should be adopted before the deadline. In this case, in pursuant to letter of the 1st respondent dated 28.08.2017, the case of the petitioner is resolved and implemented by way of part payments, as such,

it cannot be said that the resolution plan is not adopted before deadline i.e., 13.12.2017. The 2nd respondent along with consortium of Banks understood the letter of the 1st respondent dated 28.08.2017 while considering the OTS of the petitioner and received payments. Only at the instance of the 1st respondent, the 2nd respondent initiated proceedings under IB Code, as such, initiation of proceedings under IB Code by the 2nd respondent on the letter of 1st respondent dated 30.11.2017 is erroneous.

In view of above facts and circumstances, this Court holds that the Writ Petition is liable to be allowed.

Accordingly, Writ Petition is allowed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.



A.RAJASHEKER REDDY, J

12-09-2018
kvs

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION No.7329 OF 2018



kvs