**IN THE HIGH COURT AT CALCUTTA**
**CIVIL APPELLATE JURISDICTION**
**APPELLATE SIDE**

PRESENT:

**HON'BLE JUSTICE SUBRATA TALUKDAR**
**AND**
**HON'BLE JUSTICE JAY SENGUPTA**

**MAT 626 of 2021**
**With**
**CAN 1 of 2021**

**Hiranmaye Energy Limited & Anr.**
**Versus**
**West Bengal Electricity Regulatory Commission & Ors.**

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|---|---|
| For the Appellants | : Mr. S.N. Mookherjee<br>Mr. Ratnanko Banerjee<br>Mr. Saunak Mitra<br>Mr. Amitava Mitra<br>Ms. Sayani Bhattacharyya |
| For the Respondents 3 & 4 | : Mr. Sudipto Sarkar<br>Ms. Aishani Das<br>Mr. D.K. Sarkar<br>Mr. Saurav Panda<br>Ms. Suhani Dwivedi<br>Mr. Zeeshan Khan<br>Mr. Deepanjan Dutta Roy<br>Ms. Trisha Mukherjee |
| For the WBSEDCL | : Ms. Debjani Mitra |
| For the State | : Mr. Anirban Roy<br>Mr. Raja Saha |
| Heard on | : 17/08/2021 |
| Judgment on | : 07/10/2021 |

**Subrata Talukdar, J.:**

The narrow question which arises for consideration in this appeal is simply this:

Whether the Corporate Creditors, *i.e.*, the Respondents No. 3 and 4 to this appeal (for short referred to only as *R3* and *R4*), are required to wait any further for the appellant No. 1/ the Company (for short hereinafter referred to as the Appellant Company) to resolve the Review process initiated by the Appellant Company seeking Review by the West Bengal Electricity Regulatory Commission (for short hereinafter referred to only as the Commission), of the Tariff Order of the Commission dated the 31st of May 2021?

If the answer to the aforesaid question is in the negative, both *R3* and *R4* are within their rights to proceed with the application filed by *R4* under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short hereinafter referred to only as the IBC) before the National Company Law Tribunal, Kolkata (*NCLT, Kolkata*). If the answer to the question is in the affirmative, then this Court, in exercise of its appellate jurisdiction under Article 226 of the Constitution of India, can issue directions consistent with an efficacious effort at resolution of the disputes, failing which the proceedings under the IBC shall continue.

Before tackling the above referred question, it will be standard protocol to refer to the essential aspects of the dispute.

First, the Appellant No.1/ the Company is a thermal power generating enterprise which is in charge of operating two 150 MW. coal based thermal power plants at Haldia in the State of West Bengal.

The proposed third power generating unit of the Appellant No.1/ the Company is not the subject matter of this dispute.

In 2015, the Appellant No.1/ the Company obtained investments by way of loans from *R3* and *R4* for all the three units. The first two units, *i.e.* Unit I and Unit II, are already in commercial operation. The power is supplied to the West Bengal State Electricity Distribution Limited (*WBSEDCL*) on the basis of the tariff fixed by the Commission. Power Purchase Agreement (*PPA*) was entered into by and between the Appellant No.1/ the Company and the *WBSEDCL,* first on 28th of December, 2010 and thereafter Supplementary Agreements were signed by the parties on 6th of April, 2018 and 3rd of July, 2020. The provisional tariff arrangement by and between the Appellant No.1/the Company and *WBSEDCL* has been in operation pending a formal Tariff Order by the Commission. The provisional Tariff Order has been approved by the Commission.

The Appellant No.1/ the Company, owing to financial stress, approached *R3* and *R4* in April 2019 for restructuring their loans. The restructuring proposal was sanctioned by *R3* and *R4* respectively in September, 2020 and in January, 2021. The restructuring proposal was sanctioned under the Prudential Framework for Resolution of Stressed Assets as Notified by the Reserve Bank of India (for short referred to as *the said RBI Framework of 2019*) in terms of Circular dated 7th of June 2019.

The restructuring plan having failed to take off, the same was visited at a meeting of the Consortium of Lenders and the appellant Company (for short hereinafter referred to as the said Consortium Meeting) on 17th of February, 2021. It was, *inter alia,* agreed at the said Consortium Meeting that the settlement of the tariff or, the Tariff Order of the Commission, is crucial to the restructuring. The said Consortium Meeting, among its decisions, required the Lenders to approach the Commission for an early settlement of the tariff *qua* the Appellant No.1/ the Company.

By the Tariff Order dated the 31st of May, 2021, the Commission was pleased to fix the tariff for the years 2018-2019 and 2019-2020. The Appellant No. 1/ the Company having noticed arithmetical omissions which amount to *errors apparent on the face of the record*, has applied for a Review of the Tariff Order before the Commission under the Electricity Act, 2003 (the 2003 Act) read with Regulation 3.3 of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulation, 2013 (the *2013 Regulations*). The Review has been filed on 11th of June 2021 and is pending adjudication by the Commission.

It is the grievance of the Appellant No. 1/ the Company that without waiting for a final outcome in the Review, *R3* and *R4* have directly proceeded, behind the back of the Appellant No.1/ the Company, before the *NCLT* invoking the provisions of the IBC.

Mr. Mookherjee, Learned Senior Counsel appearing for the Appellant No.1/ the Company, submits that such unilateral invocation of the IBC in the teeth of the restructuring proposal being worked out with *R3 and R4* is amenable to be corrected in exercise of the Writ Jurisdiction of this Court. It is pointed out that the nature of business of the Appellant No. 1/ the Company pertaining to supply of electricity to common consumers through an agency of State namely, the West Bengal State Electricity Distribution Company Limited (*WBSEDCL*), carries with it a public law element read with the nature of the restructuring exercise under the aegis of the said *RBI Framework of 2019*. In such a scenario, the Court sitting in Writ Jurisdiction is qualified to decide on the propriety of the unilateral action under the IBC undertaken by *R3* and *R4*.

Mr. Mookherjee argues that the action under the IBC has been taken by *R3* and *R4* without putting the Appellant No.1/ the Company to substantial notice of the cancellation of the restructuring proposal as arrived at in the said Consortium Meeting of 17th of February, 2021. The initiation of IBC proceedings has resulted in an abrupt closure of the right of Review which the Appellant No.1/ the Company is entitled to claim before the Commission under the 2003 Act. Such action on the part of *R3* and *R4* in the background of the consensus decision arrived at between the Lenders and the Appellant No.1/the Company to the effect that an appropriate settlement of the tariff is crucial to the restructuring of the stressed assets of the latter, the whiplash invocation of IBC is unreasonable and inequitable. Such action, which has the effect of denying the Company an opportunity to come out of the red, is also at the highest, an affront to its right to do business guaranteed by Article 19 of the Constitution of India.

It is submitted that the *NCLT* is limited by jurisdiction to examine the arbitrariness in the action of *R3* and *R4* arising out of the suddenness of such action, its defiance of the consensus arrived at the said Consortium Meeting and, against the essence of the *RBI Framework of 2019*. The *NCLT* is limited by jurisdiction to examine the inherent unfairness of such action, affecting the constitutional protection of the right to do business with reasonable certainty. It is thus argued that the Hon'ble Single Bench ought to have examined the issues on merits and, having not done so, has abdicated jurisdiction.

*Per contra,* Mr. Sarkar, Learned Senior Counsel appearing for *R3* and *R4,* submits that the restructuring arrangement worked out between *R3* and *R4* and the Appellant No.1/ the Company carries with it a pure, undiluted fiduciary colour within the realm of private contract. It is submitted that at issue in the said Consortium Meeting was the question of restructuring of the stressed assets of the Appellant No.1/ the Company.

The settlement of the tariff or, the Tariff Order, being a pre-condition towards the restructuring arrangement arrived at in the meeting dated the 17th of February, 2021, with the pronunciation of the Tariff Order by the Commission on the 31st day of May 2021, such pre-condition stood answered. It is not within the domain of *R3* and *R4* acting as lenders to wait any further beyond the Tariff Order pronounced by the Commission. It is evident that the restructuring exercise arrived at the said Consortium Meeting dated 17th of February, 2021 has not worked out. It is not the domain of the Writ Court to explore whether, following the collapse of the restructuring exercise, *R3* and *R4* could be prodded to extend further concessions in favour of the Appellant No. 1/ the Company.

It is submitted that *R3* and *R4* have faithfully discharged their obligations *qua* the restructuring exercise coterminous with the pronunciation of the Tariff Order by the Commission on 31st of May, 2021.

The prejudice claimed by the Appellant No.1/ the Company *qua* the Tariff Order, does not bind *R3* and *R4* who, as Corporate Creditors, are free to proceed to realise their debts. With the non-acceptance of the Tariff Order by the Appellant No.1/the Company, the restructuring exercise triggered by the said Consortium Meeting collapsed freeing the parties of their reciprocal obligations. *R3* and *R4* are within their rights to claim their debts by invoking the IBC.

It is submitted on the strength of *In Re: A. NaveenChandra Steels Private Limited vs. Srei Equipment Finance Limited and Others* reported in *(2021) 4 SCC 435* which, in turn relies upon *In Re*: *Swiss Ribbons Pvt. Ltd. Vs. Union of India* reported in *(2019) 4 SCC 17* that proceedings under the IBC are adequately competent to save the restructuring of the stressed assets of the Appellant No.1/ the Company. Therefore, it is incorrect on the part of Appellant No.1/ the Company to take the position that with the initiation of the IBC proceedings, the restructuring process has collapsed.

The issue between the parties is at a stage now when the non-viability of the financial arrangement between the Corporate Creditors and the Corporate Debtor subsumes, arguably if any, the public law element which can be attributed to either the *RBI Framework of 2019* or, to the nature of the business of the Appellant No.1/ the Company, *i.e.* to generate an essential service such as electricity. Admittedly, having regard to the commercial arrangement arrived at between the parties at the said Consortium Meeting dated 17th February, 2021, there is no legal flaw in *R3* and *R4* taking the next logical step under the IBC.

Having heard the parties and, anxiously considering the materials placed, this Court arrives at the following findings:-

**A)** That admittedly one of the key pre-conditions of the settlement arrived at in the said Consortium Meeting dated 17th February, 2021 was that the parties would work towards obtaining a Tariff Order from the Commission.

**B)** The parties, meaning thereby the Appellant No.1/Company as well as *R3* and *R4*, fulfilled the mandate of the said Consortium Meeting by taking respective steps towards obtaining a Tariff Order.

**C)** It was fairly settled *inter se* the parties that the Tariff Order is crucial to the financial viability of the Appellant No.1/the Company.

**D)** That from a pure commercial standpoint, the claimed non-viability of the Tariff Order as returned by the Commission on 31st of May, 2021 by the Appellant No.1/the Company, does not fetter *R3* and *R4* from instituting proceedings under the IBC, which is in the nature of an independent remedy under a special statute.

**E)** The problem connected to the alleged non-viable Tariff Order handed over by the Commission on 31st May, 2021 therefore stood solely inherited by the Appellant No.1/the Company. Parties would debate whether the consensus arrived at in the said Consortium

Meeting stops with the pronouncement of *any* Tariff Order or, included within its ambit a *viable* Tariff Order.

**F)** Even a plain look at the Review Application filed by the Appellant No.1/the Company before the Commission pointing out to the arithmetical omissions in the Tariff Order dated 31st May, 2021, *prima facie* do *not* carry the impression of a cosmetic exercise.

**G)** Although, it is completely upon the Commission to decide whether the *Grounds* taken in the Review Application point to *errors on the face of the records*, settling a Tariff is undoubtedly an arithmetical exercise. It would be therefore entirely for experts to prove, disprove and, ultimately decide, the correctness or otherwise of the fundamentals connected thereto.

**H)** The question hardly begs an answer that a *non-viable* tariff is *no* tariff at all. Equally, Corporate Creditors cannot wait *ad infinitum* for the tariff adjudicatory process to be exhausted and their debts dry up. Needless to emphasise, in all this, the Commission must get its act together since shoddy arithmetic fetches zero numbers.

**I)** At the same time, the action of *R3* and *R4* in proceeding straightaway invoking the *IBC* requires to be positioned in the context of the action taken by the Appellant No.1/the Company in terms of the said Consortium Meeting. Admittedly, except chasing the tariff, the Appellant No.1/the Company has failed in key commitments such as pumping in 0.83 billion rupees in Working Capital infusion. Such a failure, on the face of the record, would justify the conduct of *R3* and *R4* to make an unilateral dash to the *NCLT*.

**J)** The question now arises whether the Writ Court can step into this issue at all. Both *R3* and *R4* are not pure private players in the commercial space. They are entities of State. Besides, the outcome of the whole venture is generation of electricity, which serves public purpose. Having noticed these facts, the Writ Court is not precluded from exercising Jurisdiction which would enure to the benefit of certainty in commercial transactions over and above that of commercial expediency.

**K)** Delivering *THE HAMLYN LECTURES, 1997 on 'Commercial Law In The Next Millenium',* Professor Roy Goode spoke as follows:

> *"But perhaps the most remarkable partnership has been that between commercial law and equity. If contract lies at the heart of commercial law, it is equity that has provided the foundation for security interests in commercial assets and for the enhancement of the required standards of behavior in the conduct of business life. In particular, the concept of fiduciary obligation has been significantly developed and refined, and there has been a marked shift from abstract rules to general standards which are fact-specific. Restitution, the reversal of unjust enrichment, has become accepted as an identified branch of law and is increasingly invoked as a remedy where there is no available claim in contract or where the benefits improperly received by the defendant exceed the amount of the plaintiff's recoverable loss. The relationship between the common law of contract and the doctrines of equity mirrors the tensions between form and substance, and between predictability and justice in the individual case, and is a recurrent theme in modern commercial law."*

**L)** Closer home, that Article 226 Courts are not denuded of jurisdiction to do complete justice, stands explained *In Re: B.C.*

*Chaturvedi vs Union Of India & Ors.*, reported in *(1995) 6 SCC 749 at Paragraph 23* which reads as follows*:*

> *"23. It deserves to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh's case, AIR 1963 SC 1909, that the High Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. of course, this power is not as wide which this Court has under Article 142. That, however, is a different matter."*

**M)** Therefore, the Tariff Order dated 31st May, 2021 being fundamental to both the Corporate Debtor and the Corporate Creditor, its failure necessitated that the parties re-visit their positions or, at least brief each other of their respective positions, prior to embarking upon exercising their respective legal options. It would be thus open to the parties to keep the Tariff Order dated 31st May, 2021 one last time on the table and, on failure to reach a commonality of perceptions, either of the parties could then proceed with their chosen legal remedies.

**N)** This Court is not at all unmindful of the primacy of the IBC proceedings. This Court is also not at all unmindful of the fact that the survival of the corporate entity, *viz.* the Appellant No.1/the Company, as *distinguished* from its Promoter Group, shall be given due and deep consideration under the IBC. At the same time this Court must record the fact that a select Audit placed before the said Consortium Meeting dated 17th February, 2021, did not suspect the Appellant No.1/the Company of any *mala fide* financial action.

In the backdrop of the above discussion, this Court directs as follows:-

**I)** The Commission to adjudicate the Review Petition of the Appellant No.1/the Company on its own merits not later than a period of six weeks from the date of communication of this order.

**II)** *R3* and *R4* to address the Tariff Order dated 31st of May, 2021 along with the extent of fulfillment of pre-conditions outlined in the said Consortium Meeting dated 17th of February, 2017 in a second Consortium Meeting with the Appellant No.1/the Company, without prejudice to their respective rights and legal options.

**III)** This Court has not ventured into the merits of the claims between the parties but, acted in exercise of prerogative, extraordinary jurisdiction on the principle that it is the duty of the Writ Courts to do complete justice between the parties.

With the above directions, the Judgement and Order impugned of the Hon'ble Single Bench dated 2nd of July 2021 stands appropriately modified.

**MAT 626 of 2021** with **CAN 1 of 2021** stand thus **disposed of**.

There will be no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

**I agree.**

**(Jay Sengupta, J.)** **(Subrata Talukdar, J.)**