IN THE HIGH COURT OF ANDHRA PRADESH

***

W.P.No.15743 of 2022

BETWEEN:

M/s. Tulasi Seeds Private Limited,
A Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Tulasi House, #6-4-6, Arundel Pet, Guntur – 522002, A.P., Rep. by its Authorised Signatory,
Sri Kondaveeti Nagavara Prasad.

... Petitioner

AND

$ 1. The Union of India, rep. by its Secretary, Corporate Affairs, New Delhi.

2. National Company Law Tribunal, rep. by its Member, Amaravathi Bench, APIIC Tower, 2nd floor, Mangalagiri, Guntur District, A.P.

3. Mr. Kapa Srinivasa Rao, Occ: Seed Organizer, R/o. 17-194, Bus Stand Road, Nuzvid Mandal, Krishna District, A.P. – 521201.

... RESPONDENTS

Date of Judgment pronounced on : 30.09.2022

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether The Lordship wishes to see the fair copy Of the Judgment? : Yes/No

***IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI**

***HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO**

+ W.P.No.15743 of 2022

% Dated:30.09.2022

M/s. Tulasi Seeds Private Limited,
A Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Tulasi House, #6-4-6, Arundel Pet, Guntur – 522002, A.P., Rep. by its Authorised Signatory, Sri Kondaveeti Nagavara Prasad.

... Petitioner

AND

$ 1. The Union of India, rep. by its Secretary, Corporate Affairs, New Delhi.

2. National Company Law Tribunal, rep. by its Member, Amaravathi Bench, APIIC Tower, 2nd floor, Mangalagiri, Guntur District, A.P.

3. Mr. Kapa Srinivasa Rao, Occ: Seed Organizer, R/o. 17-194, Bus Stand Road, Nuzvid Mandal, Krishna District, A.P. – 521201.

... RESPONDENTS

! Counsel for Petitioner : Sri C. Raghu, Sr. counsel appearing On behalf of Sri L. Sai Radha Krishna

^Counsel for Respondent Nos.1&2: Solicitor General

^Counsel for Respondent No.3 : Sri S.V. Rama Krishna

<GIST:

>HEAD NOTE:

? Cases referred:

1. (2021) 6 SCC 771
2. (2019) 4 SCC 17

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

W.P.No.15743 of 2022

ORDER:

The 3rd respondent had initiated a Corporate Insolvency Resolution Process against the petitioner herein, before the National Company Law Tribunal Amaravati Bench (for short 'NCLT'), by way of CP(IB)No.28/9/AMR/2020, under Section 9 of the Insolvency and Bankruptcy Code, 2016. This application was filed on the ground that the petitioner had defaulted an operational debt of Rs.8,98,12,678/-.

2. While the matter was pending before the NCLT, the petitioner and the 3rd respondent executed a Memorandum of Understanding, dated 20.07.2020, under which it was recorded that :-

a) The 3rd respondent agreed to withdraw the application filed before the NCLT immediately.
b) On withdrawal of the application, the petitioner was to pay an amount of Rs.5,00,00,000/- to the 3rd respondent as full and final settlement.
c) This amount of Rs.5,00,00,000/- was to be paid in installments of Rs.20,00,000/- each in 25 installments, within 45 days from the date of withdrawal of the application.
d) The mode of payment was to be online banking through RTGS to the account of the 3rd respondent.

3. The Memorandum of Understanding also contained a term that the above compromise was towards full and final settlement of all the

claims of the parties against each other and no further claims would remain.

4. On the basis of the above Memorandum of Understanding, the 3rd respondent filed a memo of withdrawal before the NCLT. In this memo of withdrawal it was stated that the parties had entered into a joint Memorandum of Understanding dated 20.07.2020 and the details of the understanding were set out. The Memo also stated that the 3rd respondent be permitted to withdraw the application with liberty to continue the proceedings, if the above Memorandum of Understanding failed for any reason. The NCLT passed an order on 23.07.2020 recording the amicable settlement, with the observation that the case is disposed of as withdrawn with a liberty to the petitioner to come back, in case of default by the respondent.

5. The 3rd respondent had subsequently filed I.A.(IBC).No.5 of 2021 in CP(IB).No.28/9/AMR/2020 on 27.01.2021, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016, to restore and reopen CP(IB).No.28/9/AMR/2020, on the ground that the petitioner herein had only paid an amount of Rs.2,65,00,000/- leaving a balance of Rs.2,35,00,000/- out of the amount of Rs.5,00,00,000/- and as such the petitioner herein had defaulted.

6. The petitioner herein opposed the said application contending that –

a) A petition, which has been withdrawn, cannot be restored and a fresh petition has to be filed.

b) Once a Memorandum of Understanding is executed without any default conditions, the 3rd respondent herein would be entitled to claim the entire amount if the petitioner commits default, if the petition is restored and that would be contrary to the terms of the Memorandum of Understanding.

c) Execution of the Memorandum of Understanding outside the Tribunal, has resulted in a fresh contract between the parties, which supersedes the earlier transactions and as such the 3rd respondent would seek to traverse beyond the conditions in the Memorandum of Understanding, if the petition is restored and such a course of action would result in Memorandum of Understanding being frustrated.

7. The National Company Law Tribunal Amaravati Bench, after considering the rival submissions and the judgments cited by the respective parties, held that the contention of the petitioner that the applicant would be entitled to claim the entire amount mentioned in the claim petition, which he cannot do, in view of the fresh Memorandum of Understanding is not cogent, and upon failure of the terms of the Memorandum of Understanding, the situation, as before the Memorandum of Understanding, would revive in toto. In that view of the matter, the NCLT had restored the main petition by order dated 28.04.2022.

Aggrieved by the said order of restoration, the petitioner has approached this Court by way of the present writ petition.

8. Sri C. Raghu, learned Senior Counsel appearing on behalf of Sri L. Sai Radha Krishna, learned counsel for the petitioner, would submit, on the question of maintainability of the writ petition, that a writ petition is maintainable against an order passed by the NCLT and relies upon a judgment of the Hon'ble Supreme Court in the case of **Radha Krishan Industries vs. State of Himachal Pradesh and Ors.**,[1] (paragraphs 24 to 28). Learned Senior Counsel would also rely upon the judgment of the Hon'ble Supreme Court dated 24.09.2021 in **Civil Appeal No.5728 of 2021 in the case of M/s. Magadh Sugar & Energy Ltd., vs. The State of Bihar and Ors.**, to contend that a writ petition would be maintainable in such circumstances.

9. Smt. S.V. Rama Krishna, learned counsel appearing for the 3rd respondent would submit that the petitioner has an effective alternative remedy under Section 61 of the Insolvency and Bankruptcy Code, 2016, which provides an appeal before the NCLAT. He would further contend that the petitioner has already filed such an appeal before the NCLAT and has now chosen to approach this Court without pursuing the alternative remedy, which has already been exercised by the petitioner.

10. Sri C. Raghu, learned Senior Counsel, does not dispute the fact that the petitioner had filed an appeal before the NCLAT. He submits

[1] (2021) 6 SCC 771

that this appeal was never intended to be pressed and had not been pressed before the NCLAT and as such, the filing of the said appeal cannot be taken to mean that the petitioner had availed of the alternative remedy available to the petitioner.

11. The Hon'ble Supreme Court in **Radha Krishan Industries vs. State of Himachal Pradesh and Ors.,** while considering the question of maintainability of a writ petition in the presence of an alternative remedy, had held as follows:

> **27.** The principles of law which emerge are that:
>
> **27.1.** The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.
>
> **27.2.** The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.
>
> **27.3.** Exceptions to the rule of alternate remedy arise where: (*a*) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (*b*) there has been a violation of the principles of natural justice; (*c*) the order or proceedings are wholly without jurisdiction; or (*d*) the vires of a legislation is challenged.
>
> **27.4.** An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.
>
> **27.5.** When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or

> liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.
>
> **27.6.** In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.
>
> **28.** These principles have been consistently upheld by this Court in *Chand Ratan* v. *Durga Prasad* [*Chand Ratan* v. *Durga Prasad*, (2003) 5 SCC 399], *Babubhai Muljibhai Patel* v. *Nandlal Khodidas Barot* [*Babubhai Muljibhai Patel* v. *Nandlal Khodidas Barot*, (1974) 2 SCC 706] and *Rajasthan SEB* v. *Union of India* [*Rajasthan SEB* v. *Union of India*, (2008) 5 SCC 632] among other decisions.

12. In the present case, there is an effective alternative remedy of appeal before the NCLAT. On account of this availability, paragraph 27.3 of the judgment in **Radha Krishan Industries vs. State of Himachal Pradesh and Ors.,** would have to be considered. The Hon'ble Supreme Court, in Paragraph 27.3, had held that a challenge to the jurisdiction of the authority passing the impugned order can be considered by the court, even in the presence of an alternative remedy. In the present case, the jurisdiction of the National Company law tribunal, to recall it's earlier orders is under challenge. Accordingly, this writ petition is maintainable.

13. The contention of the writ petitioner is that, the NCLT does not have power under Section 60(5) of the Insolvency and Bankruptcy Code or under Rule 11 of the NCLT Rules, to retore a petition which has been withdrawn.

14. Sri S.V. Rama Krishna, learned counsel appearing for the unofficial respondent, would submit that the application filed by the unofficial respondent was for withdrawal of the petition, with an opportunity to continue the proceedings, if the MOU failed for any reason, and the Tribunal while allowing the withdrawal had granted liberty to the unofficial respondent to come back in case of default by the writ petitioner. In the circumstances, he would submit that the restoration of the petition is in line with the terms of the application for withdrawal and the order permitting withdrawal. The NCLT has the inherent power to restore the applications which had been withdrawn earlier.

15. Section 60(5) of the Insolvency and Bankruptcy Code reads as follows:

> "60 (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—
> (a) any application or proceeding by or against the corporate debtor or corporate person;
> (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

> (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

16. Rule 11 of the NCLT Rules reads as follows:

> "11. Inherent Powers.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

17. Under the provisions of the Insolvency and Bankruptcy Code, the insolvency resolution process, of a company, commences when the petition by a creditor, under Sections 7 to 9 is admitted. Subsequently, any application by the corporate debtor to withdraw the proceedings, on the ground that the claim of the corporate debtor is settled, is permissible after the committee of creditors, constituted under the resolution process, is consolidated. The provisions of the Code also stipulate that the committee of creditors is to be constituted within 30 days from the date of admission / appointment of an interim resolution professional.

18. A question arose before the Hon'ble Supreme Court in **Swiss Ribbons (P) Ltd., and Anr., vs. Union of India and Ors**.,[2] as to what is to be done if a settlement is arrived at even before the committee of creditors is constituted. The Hon'ble Supreme Court answered this question by holding that where the committee of creditors is not yet

[2] (2019) 4 SCC 17

constituted, a party can approach the NCLT directly and the Tribunal, in exercise of its powers under Rule 11 of the NCLT Rules, may allow or disallow such an application for withdrawal or settlement.

19. In view of the above observations of the Hon'ble Supreme Court, in paragraph 82 of the said judgment, the NCLT has the inherent power, to direct withdrawal of the creditors petition, before the committee of creditors is constituted. The recognition of such a power, by the Hon'ble Supreme Court, in a situation, which is not covered or contemplated under the Statute or the Rules made thereunder, clearly shows that the inherent powers of the NCLT cannot be interpreted restrictively and a wider and larger approach need to be taken while interpreting Rule 11 of the NCLT Rules. Such an expansive interpretation of Rule 11 would clearly mean that the Tribunal, which has the inherent power to permit withdrawal of a petition, would also have the inherent power to restore such a petition.

20. There could be a dispute or challenge to the grounds on which such a power of restoration can be exercised. There cannot be a dispute on the inherent power of the NCLT to direct restoration of an application which had been permitted by the Tribunal to be withdrawn earlier.

21. Apart from this, Section 60(5) c) of the Insolvency and Bankruptcy Code also empowers the NCLT to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person as well as any claim made by or against the corporate debtor. This

provision is in the nature of a residuary power (ESSAR STEEL (2020) 8 SCC 531). The Hon'ble Supreme court, while considering the contours of this provision, in **Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta**[3], at page 270, had held as follows;

> 87. Hence, the residuary jurisdiction conferred by statute may extend to matters which are not specifically enumerated under a legislation. While a residuary jurisdiction of a court confers it wide powers, its jurisdiction cannot be in contravention of the provisions of the statute concerned. In *A. Devendran* v. *State of T.N.* [*A. Devendran* v. *State of T.N.*, (1997) 11 SCC 720 : 1998 SCC (Cri) 220] , a two-Judge Bench of this Court, while determining the limitations of the residuary jurisdiction under Section 465 of the Code of Criminal Procedure, 1973 ("CrPC"), held that a residuary jurisdiction cannot be invoked when there is a patent defect of jurisdiction or an order is passed in contravention of any mandatory provision of the CrPC. Speaking through G.B. Pattanaik, J., this Court observed that a competent court is vested with the power to exercise residuary jurisdiction under Section 465 CrPC in the following terms : (SCC pp. 740-41, para 15)
>
> "*15*. We may notice also the arguments advanced by Mr Mohan, learned counsel appearing for the State, that the conviction and sentence against the appellants should not be interfered with in view of the provisions of Section 465 of the Code, inasmuch as there has been no failure of justice. We are unable to accept this contention. Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a court of competent jurisdiction in course of trial through accident or

[3] (2021) 7 SCC 209 : (2021) 4 SCC (Civ) 1 : 2021 SCC OnLine SC 194

inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. *But by no stretch of imagination the aforesaid provisions can be attracted to a situation where a court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code*. In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Session it is only the Court of Session which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does not possess any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief Judicial Magistrate can be accepted and the evidence of the approver thereafter can be considered by attracting the provisions of Section 465 of the Code. *The aforesaid provision cannot be applied to a patent defect of jurisdiction*. Then again it is not a case of reversing the sentence or order passed by a court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice. To tender pardon by a Chief Judicial Magistrate cannot be held to be a mere case of irregularity nor can it be said that there has been no failure of justice. *It*

> *is a case of total lack of jurisdiction, and consequently the follow-up action on account of such an order of a Magistrate without jurisdiction cannot be taken into consideration at all*. In this view of the matter the contention of Mr Mohan, learned counsel appearing for the State, in this regard has to be rejected."
>
> (emphasis supplied)

22. The Statute, in the present case, is silent on the issue of restoration of a petition, which has been withdrawn with the leave of the tribunal and in such cases, in view of the above observations, the Tribunal would have the residuary power to restore such petitions.

23. For all the aforesaid reasons, it must be held that the NCLT has the inherent power under the two provisions mentioned above to entertain and allow applications for restoration of powers which had earlier been withdrawn on the permission granted by the NCLT.

24. Sri C. Raghu, learned Senior Counsel appearing for the writ petitioner would also contend that the grounds on which the application has been ordered are not in accordance with the provisions of law.

25. The contention of Sri C. Raghu, learned Senior Counsel is that, the terms of the MOU clearly stipulate that there is a settlement of dues, between the writ petitioner and the unofficial respondent, capping the liability of the writ petitioner to Rs.5 crores whereas the petition filed before the NCLT was on the basis of the claim of Rs.8.9 crores. He would further submit that there is no default clause in the MOU which stipulates

that the previous dues would revive in the event of any default in the terms of MOU. He would submit that in such a situation the earlier liability of the petitioner would not survive and consequently revival of the petition would not, in any manner, enure to the benefit of the unofficial respondent.

26. The aforesaid dispute between the petitioner and the respondent as to the maintainability of the petition filed by the unofficial respondent before the NCLT on account of the subsequent MOU, capping the liability of the writ petitioner to Rs.5 crores, and whether the writ petitioner had remitted the entire amount as claimed by the unofficial respondent or whether the writ petitioner had not remitted the entire amount of Rs.5 crores as contended by the unofficial respondent, are all issues which need to be gone into by the NCLT, without being bound by its earlier observation that, the situation, as before the Memorandum of Understanding, would revive in toto.

27. It goes without saying that the NCLT would also go into the question whether the MOU would in any manner affect the pending company petition and whether the unofficial respondent can continue the company petition in the light of the MOU executed between the parties. It would not be appropriate for this Court to go into those issues at this stage. These are matters of further enquiry as to the question whether payments had been made by the writ petitioner, in full, in compliance with

the terms of MOU and the consequences if such payment has not been made or demonstrated.

28. Accordingly, this writ petition is disposed of leaving it open to the writ petitioner to raise all the aforesaid issues before the NCLT , in the hearing before the NCLT, which would take an appropriate decision on the objections raised by the writ petitioner. There shall be no order as to costs.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

R. RAGHUNANDAN RAO, J.

30th September, 2022
Js.

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

W.P.No.15743 of 2022

30th September, 2022

Js.