

IN THE HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD

WRIT PETITION NO.34761 OF 2021

Between:

1. Mr. G.Bala Reddy S/o G.Inna Reddy, Aged 56 years, R/o:Plot No.139, Vivekanadnagar Colony, Kukatpally, Hyderabad-500 072, Telangana and 5 others. **...Petitioners**

AND

1. Securities Exchange Board of India, Rep. by its Chairman, Plot No.C4A, G-Block, BandraKurla Complex, Sandra, East Mumbai 400051, Maharashtra and another. **...Respondents**

JUDGMENT PRONOUNCED ON: 19.09.2023

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE MUMMINENI SUDHEER KUMAR

1. Whether Reporters of Local : Yes/No
newspapers may be allowed to see
the Judgment ?
2. Whether the copies of judgment : Yes/No
may be marked to Law
Reports/Journals
3. Whether Their Lordship/Ladyship : Yes/No
wish to see the fair copy of
judgment

MUMMINENI SUDHEER KUMAR, J

THE HON'BLE SRI JUSTICE MUMMINENI SUDHEER KUMAR

WRIT PETITION NO.34761 OF 2021

%Dated 19.09.2023

- # 1. Mr. G.Bala Reddy S/o G.Inna Reddy, Aged 56 years, R/o: Plot No.139, Vivekanadnagar Colony, Kukatpally, Hyderabad-500 072, Telangana and 5 others. **...Petitioners**

AND

- \$ 1. The Securities Exchange Board of India, Rep. by its Chairman, Plot No.C4A, G-Block, BandraKurla Complex, Sandra, East Mumbai 400051, Maharashtra and another. **...Respondents**

! Counsel for Petitioner(s):

1. Sri B.Chandrasen Reddy, learned Senior Counsel appearing on behalf of Sri S.Rahul Reddy, learned counsel.

^ Counsel for Respondents:

1. Sri Vedula Srinivas, learned Senior Counsel appearing for Sri C.V.Narasimham, learned counsel.

< GIST :

> HEAD NOTE :

? Cases referred:

1. (2018) 18 SCC 786
2. (2018) 1 SCC 407
3. 2017 SCC Online Del 12759
4. (1983) 3 SCC 529
5. (1988) 2 SCC 134
6. (1991) 2 SCC 495
7. (1996) 11 SCC 101
8. (1996) 2 SCC 471
9. (2005) 7 SCC 615

THE HON'BLE SRI JUSTICE MUMMINENI SUDHEER KUMAR

WRIT PETITION No.34761 OF 2021

ORDER:

This Writ Petition is filed seeking a Writ of Mandamus to declare the action of the respondents in issuing the impugned certificate bearing No.RC4291/2021 of 2021, dated 23.11.2021, directing the petitioners and one another to pay a sum of Rs.69,33,92,781/- together with further interest, all costs, charges and expenses within fifteen (15) days from the date of receipt of the said notice.

2. The impugned certificate/notice was issued by the respondents in exercise of the power conferred upon them under Section 28A of the Securities and Exchange Board of India, Act 1992 (for short 'the SEBI Act, 1992') read with Section 222 of the Income Tax Act, 1961 (for short 'the Act, 1961').

3. The brief background facts that lead to issuance of the impugned notice are as under:-

The Securities and Exchange Board of India (for short 'the SEBI') conducted an investigation into the trading in the scrip of ICSA (India) Limited (for short 'the ICSAI') for the period from 01.02.2009 to 28.02.2010 and after conducting an adjudication under Section 15I of the SEBI Act, 1992, an order, dated

15.10.2015, was passed imposing penalty of an amount of Rs.40,00,00,000/- under Section 15G and 15HA of the SEBI Act, 1992, against the petitioners herein and certain others to be paid by them jointly and severally. The said order, dated 15.10.2015, has become final by virtue of dismissal of Civil Appeal No.7981 of 2019 by an order, dated 21.10.2019, by the Hon'ble Apex Court.

4. Pursuant to the said order, dated 15.10.2015, the impugned recovery certificate/notice was issued by respondent No.2. There is no dispute about the liability of the petitioners to pay an amount covered by the impugned recovery certificate. However, the said certificate is questioned on the ground that the same cannot be enforced as the proceedings that were initiated against the petitioners herein under the provisions of the Insolvency and Bankruptcy Code, 2016 (for short 'the Code, 2016') and under the provisions of the Provincial Insolvency Act, 1920 (for short 'the Act, 1920') are pending .

5. Heard Sri B.Chandrasen Reddy, learned Senior Counsel appearing on behalf of Sri S.Rahul Reddy, learned counsel for the petitioners and Sri Vedula Srinivas, learned Senior Counsel appearing for Sri C.V.Narasimham, learned counsel for the respondents.

6. It is contended on behalf of the petitioners that the State Bank of India initiated proceedings under Section 95 of the Code, 2016, by filing C.P.(IB)No.319/HDB/2021 before the National Company Law Tribunal, Hyderabad Bench (for short 'the NCLT, Hyderabad') against the first petitioner and in the said petition an interim moratorium order, dated 14.07.2021, was passed appointing the Insolvency Resolution Professional under Section 99 of the Code, 2016, and an interim moratorium was also issued under Section 26 of the Code, 2016. It is the further contention that the second petitioner herein has also filed an application before the NCLT, Hyderabad, under Section 94 of the Code, 2016, in her capacity as the personal guarantor of the 5th petitioner and the same is pending for adjudication. Petitioner Nos.3 and 4 claimed to have filed petitions under Sections 7, 10 and 13 of the Act, 1920, on the file of the Court of the Additional Senior Civil Judge at Kukatpally to adjudicate them as insolvent and to grant absolute discharge from all the debts/liabilities that are due to the respondents therein. The first respondent herein was also shown as one of the respondents in the said petitions. The fifth petitioner-Company is stated to be undergoing Corporate Insolvency Resolution Process under Section 10 of

the Code, 2016, and the same is pending for admission. Insofar as the 6th petitioner is concerned, the same was stated to have been wound up as per the orders, dated 21.08.2018, passed by this Court in C.P.Nos.170 of 2012, 135 of 2013 and 181 of 2014.

7. Basing on the above set of facts, it is contended that once the interim moratorium has been issued in terms of Section 96 of the Code, 2016 (in specific Section 96 (b) (i) & (ii) of the Code), all the legal action/proceedings against the debtor are deemed to have been stayed and the creditors are required not to initiate any action/proceedings in respect of the debt. It is further contended that the respondents herein are the operational creditors and they can enforce the penalty amount due by filing a claim petition before the Resolution Professional, but not by directly enforcing the orders passed by the adjudicating authority under the provisions of the SEBI Act, 1992. It is also contended that by virtue of operation of Section 238 of the Code, 2016, the provisions of the Code, 2016, were given overriding effect on the provisions of the SEBI Act, 1992, and as such, the impugned certificate cannot be enforced. In support of the said contention, the petitioners also relied upon the judgment of the Hon'ble Supreme Court in the case of **Principal**

Commissioner of Income Tax v. Monnet Ispat and Energy Ltd. (SLP(C) No.6487/2018)¹ and the decision of the Hon'ble Apex Court in the case of **M/s. Innoventive Industries Ltd v. ICICI Bank and another**².

8. On the other hand, it is contended by Sri Vedula Srinivas, learned Senior Counsel, on behalf of the respondents that the amount that is covered by the impugned certificate/notice is the debt that is excluded in terms of sub-section (15) of Section 79 of the Code, 2016, and as such, the moratorium orders if any passed under the provisions of the Code, 2016, have no application to the amount that is sought to be recovered as penalty under Section 28A of the SEBI Act, 1992. Thus, it is contended that in term of clause (a) of sub-section (15) of Section 79 of the Code, 2016, the liability to pay fine imposed by a Court or Tribunal is included in the definition of excluded debt and as such, all the contentions raised on behalf of the petitioners are not sustainable. It is also further contended that under sub-section (3) of Section 94 of the Code, 2016, any application that can be submitted under Section 94 of the Code, 2016, can be submitted only in respect of the debts which are not excluded debts. It is also contended

¹ (2018) 18 SCC 786

² (2018) 1 SCC 407

that there are no moratorium orders that are passed in respect of petitioner Nos.2 to 6. It is also contended that the 6th petitioner was already directed to be wound up by virtue of the orders passed by this Court and as such, the person who represented the 6th petitioner has no authority to represent petitioner No.6 as the Director of the said Company and if at all the said Company intends to file any Writ Petition that can be filed by the Company represented by the liquidator alone.

09. In the light of the above rival contentions, the following points would arise for consideration.

POINTS:-

(I) Whether the provisions of the Code, 2016, will override the provisions of the SEBI Act, 1992 or not?

(II) Whether there are any moratorium orders that are passed in respect of all the petitioners herein under the provisions of the Code, 2016 and the Act, 1992. If any such orders are passed, the same would come in the way of the respondents in continuing the proceedings under Section 28A of the SEBI Act, 1992,

(III) Whether the liability to pay penalty amount covered by the impugned certificate would fall within the meaning of liability to pay fine imposed by a Court or Tribunal, as provided under clause (a) of sub-section (15) of Section 79 of the Code, 2016, or not?

POINT No.I:- In the light of the clear language that was used in Section 238 of the Code, 2016 and the settled legal position in this regard, no much adjudication need to be done. Section 238 of the Code, 2016, reads as under:-

“238. Provisions of this Code to override other laws.-
The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

The very same issue has fallen for consideration before the Hon’ble Apex Court in **M/s. Innoventive Industries Ltd.** (2 supra) case and following the decision of the Hon’ble Apex Court in **M/s. Innoventive Industries Ltd.** (2 supra) case, the High Court of Delhi in the case of **Principal Commissioner of Income Tax-6, New Delhi v. Monnet Ispat and Energy Ltd.**³, held as under:-

“It appears to the Court that Section 238 of the Code is categorical that the Code will apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 14(1)(a) of the Code states, *inter alia*, that on the 'insolvency commencement date' the Adjudicating Authority (AA) shall by order declare moratorium for

³ 2017 SCC Online Del 12759

prohibiting "the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority." That the Code will prevail over all other statutes inconsistent therewith has been explained in the recent decision dated 31st August, 2017 of the Supreme Court in Civil Appeal No.8337-8338/2017 (**Innovative Industries Ltd. v. ICICI Bank**)."

The said judgment of the Delhi High Court was confirmed by the Hon'ble Apex Court in **Principal Commissioner of Income Tax** (1 supra) case.

In the decision of the Delhi High Court, as confirmed by the Hon'ble Apex Court, it was held that the provisions of the Code, 2016, prevail over the provisions of the Act, 1961, after thoroughly considering the language used in Section 238 of the Code, 2016. In the light of the above settled legal position, this point is answered holding that the provisions of the Code, 2016, shall prevail over the provisions of the SEBI, Act 1992.

POINT No.II:- Even according to the case of the petitioners, there are no moratorium orders that are passed under the provisions of the Code, 2016 in respect of petitioner Nos.2 to 6. The proceedings that were initiated by petitioner Nos.2 to 5 by or against them are all stated to be pending for admission.

Insofar as petitioner No.1 is concerned, there is an order, dated 14.07.2021, passed by the NCLT, Hyderabad, imposing the interim moratorium under Section 96 of the Code, 2016.

There is no dispute about the interim moratorium through the said order. In terms of clause (b) of sub-section (1) of Section 96 of the Code, 2016, any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed and the creditors shall not initiate any legal action or proceedings in respect of any debt. Once such interim moratorium came into force, subject to the finding to be rendered by this Court on Point No.3, the said interim moratorium would definitely come in the way of the respondents in initiating and continuing the proceedings by issuing the impugned recovery certificate. Therefore, petitioner Nos.2 to 5 are not entitled to claim the benefit of Section 96 of the Code, 2016 or the benefit of Section 14 of the Code, 2016, to resist the respondents from continuing the proceedings under Section 28A of the SEBI Act, 1992.

Insofar as petitioner No.6 is concerned, even on the own saying of the petitioners, the said Company was ordered to be wound up by virtue of the orders passed by this Court, as early as on 21.08.2018. But, the petitioners for the reasons best known to them neither disclosed the stage of such liquidation proceedings nor stated as to how the Director of a Company under liquidation can represent petitioner No.6, when admittedly a liquidator was appointed for the said company. It

is settled legal position that once a Company is ordered to be wound up and a liquidator is appointed, the said Company can sue or be sued represented by its liquidator alone, but not the original Directors of the said Company. Therefore, the very filing of this Writ Petition by petitioner No.6 represented by its Director/former Director is incompetent and the same is liable to be dismissed, insofar as petitioner No.6 is concerned, on this ground alone.

POINT No.III:- The Code, 2016, consists of various parts covering Sections 1 to 255. Part 2 of the Code, 2016, deals with the Insolvency Resolution and Liquidation for Corporate Persons and it consists of seven (07) chapters. Part 3 of the Code, 2016, deals with the Insolvency Resolution and Bankruptcy for individuals and partnership firms. In this Writ Petition, petitioner Nos.1 to 4 are concerned with Part No.3 of the Code, 2016 and petitioner No.5 is concerned with Part No.2 of the Code, 2016. Petitioner Nos.3 and 4 are not the persons claiming any benefit of the provisions of the Code, 2016.

The contention raised on behalf of the respondents by placing reliance on the definition of excluded debt, as defined under sub-section (15) of the Section 79 of the Code, 2016, will come to their aid only, as against the claim made by petitioner

Nos.1 and 2. As already noted above, the insolvency proceedings that were initiated in respect of petitioner No.5 are under Section 10 of the Code, 2016, in respect of which there is no such concept of excluded debt. Therefore, the contention based on the excluded debt is required to be examined only in respect of petitioner Nos.1 and 2. The amount i.e., sought to be recovered by issuing the impugned recovery certificate is termed as penalty imposed under Section 15G and 15HA of the SEBI Act, 1992. The word penalty is a word of wide significance. What is excluded in terms of sub-section (15) of Section 79 of the Code, 2016, is only the liability to pay fine imposed by a Court or Tribunal. The word fine in common parlance is construed as the one imposed after concluding the adjudication process in a criminal proceeding. Whereas, the penalty is not necessary in a criminal proceeding but the same can be the one imposed pursuant to a contractual liability or as a result of a failure to comply with a statutory provision. The Hon'ble Apex Court has considered the word penalty, its meaning and its effect in various decisions in the cases of **Shiv Dutt Rai Fateh Chand v. Union of India**⁴, **Sova Ray v. Gostha Gopal Dey**⁵, **N.K. Jain v.**

⁴ (1983) 3 SCC 529

⁵ (1988) 2 SCC 134

C.K. Shah⁶, Pratibha Processors v. Union of India⁷, Director of Enforcement v. M/s. M.C.T.M. Corporation Pvt. Ltd.,⁸ and State of U.P. v. Sukhpal Singh Bal⁹.

In the light of the decisions by the Hon'ble Apex Court, as noted hereinabove and on application of the same to the facts of the case on hand, it is to be seen whether the penalty that is imposed on the petitioners and sought to be recovered through the impugned certificate will come within the meaning of fine, as provided under clause (a) of sub-section (15) of Section 79 of the Code, 2016, or not.

10. The next question that arises for consideration is whether the order passed by the adjudicating authority under Section 15I of the SEBI Act, 1992, would fall within the meaning of the order passed by a Court or Tribunal. A perusal of Section 15I of the SEBI Act, 1992, contemplates an enquiry to be conducted by the adjudicating officer in the prescribed manner after giving an opportunity to the person concerned of being heard for the purpose of imposing any penalty. Sub-section (2) of Section 15I of the SEBI Act, 1992, further confers the power on the adjudicating officer to summon and enforce the attendance of

⁶ (1991) 2 SCC 495

⁷ (1996) 11 SCC 101

⁸ (1996) 2 SCC 471

⁹ (2005) 7 SCC 615

any person acquainted with the facts and circumstances of the case to give evidence or to produce any document and further empowers the adjudicating officer to impose a penalty on such person if he fails to appear or produce document, as required by the adjudicating officer. Thus, it is very much clear that the adjudicating officer, while discharging his duties under Section 15I of the SEBI Act, 1992, was conferred with all the powers satisfying all the facets of a judicial forum and therefore, this Court has no hesitation to hold that the adjudicating officer under Section 15I of the SEBI Act, 1992, would definitely fall within the meaning of the Tribunal/Court for the purpose of clause (a) of sub-section (15) of Section 79 of the Code, 2016.

11. Insofar as petitioner Nos.3 and 4 are concerned, except filing a petition under Sections 7, 10 and 13 of the Act, 1920, there is nothing on record to show that the Court concerned before whom the said petition is pending, have initiated any action or passed any orders on the said petitions. In the absence of any such information being placed before this Court, this Court does not find any merit insofar as petitioner Nos.3 and 4 are concerned and the Writ Petition is liable to be dismissed in respect of petitioner Nos.3 and 4.

12. Then coming to the case of petitioner No.5, admittedly there are no moratorium orders whatsoever nature passed in the application filed by petitioner No.5 under Section 10 of the Code, 2016, and as such, there is no merit in the case of the petitioner No.5 as well. As already noted above, the very filing of the Writ Petition by the former Director of petitioner No.6-Company is incompetent as petitioner No.6-Company can only sue or be sued only by its official liquidator. Therefore, the Writ Petition is liable to be dismissed insofar as petitioner No.6 is concerned.

13. Insofar as petitioner No.2 is concerned, admittedly there is no moratorium order passed under the provisions of the Code, 2016 and the petition filed by petitioner No.2 under Section 95 of the Code, 2016, is also yet to be admitted. Therefore, this Court does not find any merit in the case of petitioner No.2 as well. Therefore, the Writ Petition is liable to be dismissed insofar as petitioner No.2 is concerned.

14. In the light of the conclusions arrived at on Point Nos.I to III above, the penalty imposed and sought to be recovered from the petitioners by issuing the impugned certificate fall within the meaning of 'Fine' excluded under clause (a) of sub-section (15) of Section 79 of the Code, 2016 and as such, the interim

moratorium imposed under Section 96 has no application to the penalty sought to be recovered under the impugned certificate. Further, the interim moratorium also stated to have already come to an end.

15. In the light of the above, this Court does not find any merit in the Writ Petition and the same is, accordingly, dismissed.

As a sequel, miscellaneous petitions, pending if any in this Writ Petition, shall stand dismissed. No costs.

MUMMINENI SUDHEER KUMAR, J

Date: 19.09.2023
NDS

THE HON'BLE SRI JUSTICE MUMMINENI SUDHEER KUMAR

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Date: 19.09.2023

NDS