

VISH WIND INFRASTRUCTURE LLP V. MR. SHAILEN SHAH

Vish Wind Infrastructure LLP
Through Mr. Naveen Thakur
Authorised Representative
1102(2), 11th Floor, Fortune Terrace
New Link Road, Andheri (West)
Mumbai-400053.

... Appellant

Vs

Mr. Shailen Shah,
Resolution Professional of
Wind World (India) Ltd.
2nd Floor, Lodha Excelus,
Apollo Mills Compound,
N M Joshi Marg, Mahalaxmi,
Mumbai, Maharashtra-400011.

... Respondent

Case No: Company Appeal (AT) (Insolvency) No.241 of 2023

Date of Judgement: 9th November, 2023

Judges:

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

For Appellant: Mr. Abhijeet Sinha, Ms. Varsha Banerjee,
Ms. Mahima Ahuja, Advocates.

For Respondent: Mr. Sumant Batra, Ms. Ruchi Goyal, Ms. Diya Dutta, Advocates for RP.

Facts

Vish Wind Infrastructure LLP (Appellant) had entered into an agreement with Wind World (India) Ltd. (Corporate Debtor) for supply of Wind Turbine Generators (WTGs). The Appellant had made advance payment of Rs. 132.70 crores to the Corporate Debtor for supply of 26 WTGs. Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor on 20.02.2018 by NCLT order. The Appellant filed its claim of Rs. 132.70 crores as advance payment to the Corporate Debtor. The claim was admitted by the Resolution Professional (RP). The RP was running the Corporate Debtor as a going concern. On 13.06.2022, the Appellant requested the RP to supply 26 WTGs lying with the Corporate Debtor against the advance paid. The RP by letter dated 17.06.2022 rejected the request stating that the Appellant owes Rs. 74.94 crores to the Corporate Debtor and CIRP has been initiated. Also, the request does not maximise assets of Corporate Debtor. The Appellant filed IA No. 525 of 2022 before NCLT seeking direction to the RP to supply 26 WTGs as per the agreement against advance paid. RP filed reply refuting the Appellant's claim. NCLT by impugned order rejected the IA filed by the Appellant.

NCLT's Elaborate Opinions

RP under Section 25(1) is duty bound to protect the assets including continued business operations of Corporate Debtor. The entire advance amount of Rs. 132.70 crores was claimed by the Appellant and admitted by the RP. It has to be considered in CIRP. Although agreement was executed on 03.03.2010 for supply of WTGs upto 2014-15, the same cannot be enforced after 7 years by filing IA in CIRP. RP claimed that Appellant owes Rs. 75 crores to Corporate Debtor and proceedings have been initiated. The 26 WTGs lying with Corporate Debtor have to be dealt as per wisdom of RP under the Code. Appellant has no right to claim 26 WTGs lying with Corporate Debtor to be

handed over. Decision of RP refusing to handover 26 WTGs is as per scheme of Code and does not breach Appellant's rights. RP running Corporate Debtor as going concern, decision not to supply WTGs to Appellant is as per RP's wisdom.

Arguments by Appellant

There was a contract for supply of WTGs against advance payment. RP must adhere to agreement terms and supply 26 WTGs lying with Corporate Debtor. Amount can be adjusted against advance paid already. RP must run Corporate Debtor as going concern, business cannot be stopped due to CIRP. Admission of claim in CIRP does not avoid contract implementation. RP must implement prior contracts entered by Corporate Debtor. NCLT erred in rejecting the application. Proceedings under Code are to continue operations of Corporate Debtor as going concern. There can be set off of admitted claims in CIRP.

Arguments by RP

Appellant is a related party to Corporate Debtor. Entire claim of Appellant has been admitted in CIRP. 26 WTGs lying at Yermala are not the ones under supply contract. Supply agreement was upto 2014-15, cannot be enforced now. Earlier application of Appellant for set off has been rejected. Present application is to create hurdles in CIRP, seek preferential treatment, prohibited under Code. RP running Corporate Debtor as going concern, decision not to supply WTGs as per RP's wisdom. NCLT rightly rejected the application.

Relevant Sections

Section 7 of IBC – Initiation of CIRP ; Section 25 of IBC – Duties of RP

Referred Laws

Insolvency and Bankruptcy Code, 2016; Companies Act, 2013

Conclusion

The NCLAT upheld the NCLT order and dismissed the appeal filed by the Appellant Vish Wind Infrastructure LLP. It held that

the RP was justified in refusing the supply of 26 WTGs to the Appellant as per his wisdom to run the Corporate Debtor as a going concern during CIRP. The RP's decision did not violate any provisions of the IBC or breach the Appellant's rights.

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Full Text of Judgment:

1. This Appeal has been filed against the order dated 24.01.2023 passed by the National Company Law Tribunal, Ahmedabad Division Bench, Court-1, by which order IA No.525 of 2022 filed by the Appellant was rejected.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

(i) The Appellant entered into an Agreement with Wind world India Limited (Earlier known as Enercon (India) Limited) for supply of material. The Agreement between the parties were for supply of Wind Turbine Generators ("WTG"). In pursuance of the Agreement, Wind Turbine Generators were supplied by the Corporate Debtor for which payments were made by the Appellant.

(ii) On Section 7 Application of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") Corporate Insolvency Resolution Process ("CIRP") was initiated against the Corporate Debtor – Wind World (India) Ltd. by order dated 20.02.2018.

(iii) In the CIRP of the Corporate Debtor, the Appellant filed its claim of Rs.132,70,44,653/- claiming to be advance payment made to the Corporate Debtor for supply of 26 WTGs. The claim of the Appellant-Operational Creditor was admitted in toto by the Resolution Professional ("RP") and the CIRP proceeded against the Corporate Debtor.

(iv) The RP was running the Corporate Debtor as a going concern. The Appellant by letter dated 13.06.2022 made a request to the RP of the Corporate Debtor to supply WTGs in terms of the Agreement dated 03.03.2010 as against advance of Rs.132,70,44,653/-. The RP vide letter dated 17.06.2022, replied to the Appellant that request made by the Appellant cannot be accepted since the Appellant owes an amount of Rs.74,94,60,745/- along with interest and further the claim of the Appellant has already been admitted in the CIRP. It was further communicated that RP is running the Corporate Debtor as a going concern. The proposition as placed by the Appellant was rejected, since as per RP that shall not maximise the assets of the Corporate Debtor.

(v) The Appellant thereof filed an IA being IA No.525 of 2022 before the Adjudicating Authority, paying for following reliefs:

*“a. Allot the instant application;
b. Direct the Respondent to adhere to the terms of Agreement dated 03.03.2010 and supply immediately the 26 WTGs lying with the Corporate Debtor against the advance payment already made by the Applicant;
c. Pass any other order/ directions as this Hon’ble Tribunal may deem fit in the interest of justice in the facts and circumstances of the instant case.”*

The RP filed affidavit in reply to the IA, refuting the claim of the Appellant.

(vi) The Adjudicating Authority after hearing the parties, by the impugned order, rejected the IA No.525 of 2022. Aggrieved by which order, this Appeal has been filed.

3. We have heard Shri Abhijeet Sinha, learned Counsel appearing for the Appellant and shri Sumant Batra,

learned Counsel appearing for RP.

4. The learned Counsel for the Appellant challenging the order of the Adjudicating Authority submits that there was already a contract with the Corporate Debtor under which the Corporate Debtor was to supply the WTGs, for which an advance payment of Rs.132 crores were paid by the Appellant, which is lying with the Corporate Debtor. It is submitted that 26 WTGs were lying with the Corporate Debtor, which could have been supplied against the advance payment made by the Appellant and the amount could have been adjusted from the claimed amount admitted in the CIRP of the Corporate Debtor. It is submitted that the RP is under obligation to run the Corporate Debtor as a going concern and business of the Corporate Debtor cannot be stopped merely on the ground that CIRP has been initiated. Admission of the claim in the CIRP can in no manner to avoid the due implementation of the obligation arising under the contract. The RP is under obligation to implement the earlier contract entered by the Corporate Debtor. The Adjudicating Authority committed error in rejecting the application. Proceedings under the Code were to continue the business operations of the Corporate Debtor as a going concern. The Adjudicating Authority erred in coming to the conclusion that there cannot be any set off of the amount admitted in the CIRP.

5. Shri Sumant Batra, learned Counsel appearing for the RP refuting the submissions of the learned Counsel for the Appellant submits that the Appellant is a 'related party' to the Corporate Debtor and the entire claim submitted by the Appellant in the CIRP of the Corporate Debtor has been admitted and the Appellant is entitled to receive his dues in the CIRP as per provisions of the Code. The 26 WTGs, which are lying at Yermala are not the WTGs, which were in pursuance of the contract

between the parties. It is submitted that Agreement between the parties dated 03.03.2010 was to supply WTGs upto financial year 2014-15, that Agreement cannot be enforced by the Appellant by means of IA, filed in the CIRP. It is submitted that the Appellant had earlier filed an Application for set off its admitted operational claim, which Application has now been rejected. Further, the Application filed in the year 2022, after four years of the initiation of CIRP, is with the object to create hurdles in CIRP of the Appellant and the same is nothing but to get a preferential treatment, which is prohibited. It is submitted that the RP is running the Corporate Debtor as a going concern and RP in its wisdom has taken a decision, not to supply 26 WTGs to the Appellant. The Adjudicating Authority has rightly rejected the Application filed by the Appellant.

6. We have considered the submissions of learned Counsel for the parties and have perused the record.

7. The CIRP against the Corporate Debtor commenced on 20.02.2018. It was after four years of commencement of CIRP that for the first time, the Appellant wrote letter dated 13.06.2022 for supply of WTGs. The letter was replied by the RP by letter dated 17.06.2022. In paragraph 3 of the letter, the reasons were communicated by the RP for not acceding the request of the Appellant. Paragraph 3 of the letter dated 17.06.2022 is as follows:

“3. With reference to paragraph 7, 8 and 9 I state that the 26 wind turbine generators (WTGs) lying in the Yermala site cannot be arbitrarily appropriated to Vish Wind as requested. In view of the facts stated in paragraph 2 above, there is no question of WWIL fulfilling obligation under the Agreement, especially in the manner proposed in the letter. Further, with

reference to your statement that by supplying the said WTGs to VishWind, WWIL would benefit from the potential income for operation and maintenance (O&M) of the said turbines from Vish Wind, while denying this in toto, I state that the current outstanding dues payable by Vish Wind towards outstanding dues under the currently subsisting agreements are to the tune of Rs.74,94,60,745 (even without considering the interest applicable @ 18% p.a.) for which WWIL has also initiated arbitration proceedings against VishWind. Thus, the proposition of supplying the said WTGs to VishWind and gaining any revenue from VishWind is denied and cannot be perceived as an action that can probably maximise the value of the assets of WWIL at all. Admittedly WWIL is managed as a going concern during the CIRP, and the RP has continued to and shall in the future act only in the interest of WWIL with a view to maximise the value of its assets. In view of this and the statements as mentioned above, I will not be in a position to consider your request under the Letter. Trust this suffices."

8. Under Section 25, sub-section (1) of the Code, the RP is under obligation to protect the assets of the Corporate Debtor, including the continued business operations of the Corporate Debtor. Section 25, sub-section (1) is as follows:

"25. Duties of resolution professional. – (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor."

9. It is admitted fact that for entire advance amount of Rs.132,70,44,653/-, which Appellant has given to the Corporate Debtor as an Operational Creditor, a claim was filed by the Appellant, which was admitted in toto by the Corporate Debtor and the said claim is to be

considered in the CIRP. It is true that the Agreement was entered on 03.03.2010 for supply of WTGs. Supplies were made by the Corporate Debtor from time to time for which payments were also received from the Operational Creditor. An advance was also made by the Appellant as noted above, against which no supply was made by the Corporate Debtor. The learned Counsel for the RP has submitted that there are huge dues payable by the Operational Creditor to the Corporate Debtor of about Rs.75 crores, which the Appellant has not paid to the Corporate Debtor, which was due for the services rendered by the Corporate Debtor during the CIRP period towards operation and maintenance of existing WTGs. The Corporate Debtor has to initiate arbitration proceedings for realization of the aforesaid dues. On one hand, the Appellant is not paying the dues and on the other, the Appellant is claiming to supply WTGs, which are lying with the Corporate Debtor. The learned Counsel for the RP has further contended that in the Application, which was filed by the Appellant, it is not even pleaded that 26 WTGs, which are lying at Yermala in Maharashtra, are the Generators, which are in compliance of the Contract between the parties. In paragraph 13 of the Application, the Appellant has made the following pleadings:

"13. It is submitted that the Corporate Debtor has available in its inventory 26 wind turbine generators lying at Yermala in Maharashtra in semi erected conditions. These wind turbine generators can be supplied to the Applicant in terms of the agreement wherein the advance payment has already been made to the Applicant. It is noteworthy that in case if these wind turbines generators are not supplied to the Applicant, it will further erode the asset value of the WTGs. However, in case the same are supplied to the Applicant, the Respondent will not be in contravention of the terms of the agreement and the obligations arising from the

same will be fulfilled. It is noteworthy that the agreement is still subsisting and neither frustrated nor effected by force majeure or any other legal impediment, preventing the due performance of the said Agreement dated 03.03.2010."

10. The case of the Appellant is that there are 26 WTGs in the inventory of the Corporate Debtor, which are lying at Yermala and the same can be supplied to the Appellant or else it will further erode the asset value of the WTGs. The assets which are in the inventory of the Corporate Debtor are the assets, which are in possession and control of the RP and has to be utilized as per the wisdom of the RP. The RP has also pointed out that as per the Agreement between the parties, the supply was to be made upto the financial year 2014-15 and after seven years from the said period, the Appellant cannot pray for specific performance of Contract in the CIRP.

11. From the facts brought on record, it is clear that the RP is claiming payment of dues of about Rs.75 crores from the Appellant, for which arbitration proceedings have been initiated. When the Corporate Debtor has not received the dues from the Appellant for which proceedings are pending, the decision taken by the RP, not to handover the 26 WTGs is as per the wisdom of RP, who is to run the Corporate Debtor as a going concern. The Operational Creditor having filed the claim, which has been already admitted for an amount of Rs.132 crores and odd, the same has to be dealt with as per the CIRP and the Appellant has no right to claim that 26 WTGs lying in the inventory of the Corporate Debtor should be handed over to the Appellant.

12. We are of the view that decision of the RP refusing to handover 26 WTGs lying with the Corporate Debtor, is a decision which RP is entitled to take as per the

scheme of the Code, which decision cannot be said to be contrary to any provisions of the Code or in breach of any right of the Appellant. The Adjudicating Authority has not committed any error in rejecting the IA filed by the Appellant. We, thus, do not find any error in the order of the Adjudicating Authority, rejecting the IA filed by the Appellant. There is no merit in the Appeal, the Appeal is dismissed.