ETERNITY:LAW APPRISE

CASE SUMMARY: SHIV CHARAN AND ORS. V. ADJUDICATING AUTHORITY UNDER THE PREVENTION OF MONEY LAUNDERING ACT, 2002 AND ANR.

Court: Bombay High Court

Case Numbers: WPL/9943/2023 & WPL/29111/2023

Date of Judgment: March 1, 2024

Citation: 2024 SCC OnLine Bom 701

BRIEF FACTS

Parties

- **WPL/9943/2023**: Petitioners—Mr. Shiv Charan, Ms. Pushpalata Bai, Ms. Bharti Agarwal (**"Resolution Applicants"**); Respondents—Adjudicating Authority under the Prevention of Money Laundering Act, 2002 (**"PMLA"**), and Deputy Director, Directorate of Enforcement (**"ED"**).

- **WPL/29111/2023**: Petitioner—Directorate of Enforcement; Respondents—Mr. Shiv Charan, Ms. Pushpalata Bai, Ms. Bharti Agarwal.

Background

The Corporate Debtor, DSK Southern Projects Private Limited, entered a Corporate Insolvency Resolution Process (**"CIRP"**) under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) on December 9, 2021, initiated by a financial creditor. A resolution plan proposed by the Resolution Applicants was approved by the National Company Law Tribunal (**"NCLT"**), Mumbai, on February 17, 2023 (**"Approval Order"**), under Section 31 of the IBC, directing the ED to release attached properties per Section 32A, which grants immunity to corporate debtors post-resolution.

PMLA Actions:

Prior to CIRP, on October 20, 2017, First Information Reports (**“FIRs”**) were filed against the corporate debtor and its promoters for scheduled offenses (cheating, criminal breach of trust) under the PMLA, leading to an Enforcement Case Information Report (**“ECIR”**) on March 8, 2018, estimating proceeds of crime at Rs. 8,522.27 crores. The ED attached assets—four bank accounts (Rs. 3,55,298) and 14 flats (Rs. 32,47,55,298), totaling Rs. 32,51,10,596—via a provisional attachment on February 14, 2019, confirmed on August 5, 2019. These attachments persisted post-CIRP and post-approval, sparking litigation.

NCLT Orders:

The Approval Order invoked Section 32A of IBC to mandate release of attachments. A subsequent NCLT order on April 28, 2023 (“**April 2023 Order”**), disposed of an interim application (IA/383/2022) filed on January 10, 2022 by the Resolution Professional, reiterating release based on Section 32A, though initially sought under Section 14 (moratorium).

Writ Petitions :

WPL/9943/2023: Resolution Applicants sought to quash the ECIR, attachment orders, and original complaint (O.C.No.1104/2019) insofar as they related to the corporate debtor and demanded release of attached properties.

WPL/29111/2023: The ED challenged the April 2023 Order, arguing the NCLT lacked jurisdiction to interfere with PMLA attachments.

Benefits Claim:

The Resolution Applicants asserted that any benefits accrued to the corporate debtor, such as financial credits or recoveries from pre-CIRP activities, remain its entitlement post-resolution. Specifically, any such benefits held by the ED or authorities due to the corporate debtor’s assets must be refunded to support the resolution plan’s financial integrity.

While no explicit correspondence details this claim, CIRP communications referenced in the Approval Order emphasize settling all entitlements to maximize asset value.

ISSUES :

Primary Issue: Does the NCLT have jurisdiction under Section 32A of the IBC to direct the ED to release properties attached under the PMLA post-resolution plan approval, and does Section 32A override PMLA provisions?

Sub-Issues:

1. Is the ED's continued attachment post-approval lawful under the PMLA?
2. Is WPL/9943 maintainable, or should the Resolution Applicants pursue PMLA remedies (e.g., Sections 8(8), 26(1))?
3. Does the NCLT's jurisdiction under Section 60(5) of the IBC extend to resolving PMLA-IBC conflicts?
4. Are benefits accrued to the corporate debtor, if held by authorities, refundable post-resolution?

RULES :

Section 32A, IBC: A non-obstante provision that ceases liability and prosecution against a corporate debtor for pre-CIRP offenses and prohibits actions against its properties (including attachments) upon approval of a resolution plan under Section 31, provided management/control changes to persons unconnected to prior management or offenses.

Section 31, IBC: Mandates NCLT approval of resolution plans, ensuring effective implementation, binding all stakeholders, including government authorities.

Section 60(5), IBC: A non-obstante provision granting NCLT jurisdiction to resolve questions of law or fact in insolvency proceedings, including IBC-related immunities.

PMLA Provisions: Section 5 allows provisional attachment of suspected proceeds of crime, confirmed under Section 8. Section 8(5) enables confiscation post-conviction, while Sections 8(8) and 26(1) provide remedies for affected parties.

Article 141, Constitution of India: Supreme Court judgments bind all courts and quasi-judicial authorities, including those under PMLA.

Key Precedents:

- **Manish Kumar v. Union of India, (2021) 5 SCC 1**: Upholds Section 32A's validity, affirming its override of PMLA for corporate debtors post-resolution to ensure a clean slate.
- **P. Mohanraj v. Shah Brothers Ispat Private Limited, (2021 SCC OnLine SC 152)**: Clarifies that Section 32A's immunity applies post-moratorium, distinct from Section 14's temporary halt.

ANALYSIS:

The Bombay High Court upheld Section 32A's primacy and the NCLT's jurisdiction, concluding as follows:

Section 32A and NCLT Authority: Section 32A halts PMLA attachments post-resolution if new management is unconnected. Attachments require conviction for confiscation, which Section 32A(1) prevents. Sections 31 and 60(5) empower the NCLT to enforce this, as done in the Approval Order and April 2023 Order. Therefore, **t**he NCLT's jurisdiction was valid and attachments ended February 17, 2023.

PMLA vs. IBC: The ED's claim of PMLA precedence and need for remedies (Sections 8(8), 26(1)) failed, as Section 32A's override is automatic. Manish Kumar *(Supra)* confirmed Section 32A's clean-slate purpose, protecting only corporate assets, not promoters, aligning with this case. Hence, Section 32A overrides PMLA post-resolution.

Writ Outcomes: WPL/9943 was maintainable, as the ED's refusal violated Section 32A, warranting relief under Article 226. WPL/29111 failed, as the April 2023 Order echoed the unchallenged Approval Order.

Section 14: The court sidestepped Section 14's effect on PMLA, as IA/383 was mooted by Section 32A's activation, per P. Mohanraj *(Supra)*. Thus, Section 32A of IBC governs and not Section 14.

Benefits: Refunding accrued benefits (e.g., credits) supports Section 32A's revival goal, implied in the release directive, which shall aid the approved resolution plan.

Conclusion

The Hon'ble Bombay High Court, guided by Manish Kumar *(Supra)* upheld Section 32A's override of PMLA, affirming its role in providing a clean slate for corporate debtors post-resolution, while P. Mohanraj (*Supra*) clarified Section 32A's application post-approval. The Hon'ble Court ruled that attachments on Corporate Debtor ended on February 17, 2023, by operation of Section 32A, with the ED required to confirm release within six weeks from March 1, 2024, to enable asset deployment as per the approved resolution plant. The PMLA Adjudicating Authority must proactively comply under Article 141, and quashing the ECIR was unnecessary, as Section 32A nullifies its effect on the Corporate Debtor while preserving PMLA's reach over others.

Case Summary: M/s Tata Steel Ltd. v. Odisha Electricity Regulatory Commission & Anr.

Case Name: M/s Tata Steel Ltd. v. Odisha Electricity Regulatory Commission & Anr.

Case No.: APL No. 337 of 2023 & IA No. 531 of 2023

Court: Appellate Tribunal for Electricity (APTEL), New Delhi

Order Date: February 20, 2024

BRIEF FACTS:

Parties: The Appellant, Tata Steel Limited, operates a 323 MW captive generating plant in Meramundali, Odisha, comprising 258 MW of co-generation (using waste heat recovery, blast furnace gas, etc.) and 65 MW of coal-based generation. The Respondents are Odisha Electricity Regulatory Commission ("**OERC**") and the Odisha Renewable Energy Development Agency ("**OREDA**").

Background: Tata Steel sought from OERC a declaration that its 258 MW co-generation unit was exempt from Renewable Purchase Obligations ("**RPOs**") from FY 2021 onward, as long as its co-generation exceeded RPO targets under the OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021 ("**2021 RPO Regulations**"). They also requested to set off RPO obligations for the 65 MW coal-based plant against excess co-generation.

OERC Order: On February 1, 2023 (Case No. 71/2022), OERC rejected Tata Steel's prayers, mandating RPO compliance for the entire 323 MW plant from February 15, 2022 (the date the 2021 RPO Regulations were notified). However, OERC exempted the 258 MW co-generation unit from RPOs for the period prior to 2021 under the relevant 2015 Regulations, citing prior exemptions for similar units.

Appeal: Tata Steel appealed to APTEL, arguing that co-generation, regardless of fuel, should be exempt from RPOs under Section 86(1)(e) of the Electricity Act, 2003 ("Act"), and that OERC failed to exercise its power to relax under Regulation 17 of the 2021 RPO Regulations.

Issue

1. Can Tata Steel's 258 MW captive co-generation unit, based on fossil fuel, be exempted from RPO obligations under the 2021 RPO Regulations, and can excess co-generation offset RPO obligations for the 65 MW coal-based plant?

2. Did OERC err in not exercising its power to relax under Regulation 17, and should the case be remanded for reconsideration of this power?

3. Are the 2021 RPO Regulations, which impose RPOs on fossil fuel-based co-generation plants, contrary to Section 86(1)(e) of the Act, and can APTEL ignore or read them down?

Rule

Statutory Provisions

- **Section 86(1)(e), Electricity Act, 2003**: Mandates State Commissions to promote co-generation and generation of electricity from renewable sources by providing grid connectivity, facilitating sales, and specifying a percentage of electricity to be purchased from renewable sources for a distribution licensee's total consumption.

- **Section 181, Electricity Act, 2003:** Empowers State Commissions to make regulations consistent with the Act, including for RPO compliance.

- ***OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021:***

◊ **Regulation 3.1(b):** Includes captive generating plants (with capacity ≥1 MW), including fossil fuel-based co-generation plants, as “obligated entities” subject to RPOs based on a percentage of their consumption from such sources.

◊ **Regulation 4:** Specifies RPO targets (e.g., 13.25% for 2021-22, with solar and non-solar components) for obligated entities.

◊ **Regulation 17**: Allows OERC to relax regulation provisions for recorded reasons.

Judicial Precedents:

- **Hindustan Zinc Ltd. v. RERC (2015) 12 SCC 611:** The Supreme Court held that State Commissions can impose RPOs on captive power consumers under Section 86(1)(e) to promote renewable energy and protect the environment, with no distinction between co-generation and coal-based plants.

- **Lloyds Metal & Energy Ltd. (Full Bench Judgment dated December 02, 2013 in Appeal No. 53 of 2013):** The APTEL clarified that Section 86(1)(e) promotes co-generation from renewable sources for RPO purposes, not fossil fuel-based co-generation, which is not a renewable energy source.

- **PTC India Ltd. v. CERC (2010) 4 SCC 603**: The Supreme Court held that APTEL lacks judicial review powers to challenge the validity of statutory regulations made under Section 181 of the Act, as such challenges require judicial review before courts.

- **Century Rayon Ltd. v. MERC (APTEL Order dated April 26, 2010 in Appeal No. 57 of 2009)** and subsequent rulings (e.g., Order dated January 30, 2013 in respect of Emami Paper Mills Ltd. vs. OERC (Appeal No.54 of 2012**)** held that co-generation, irrespective of fuel, is exempt from RPOs, as Section 86(1)(e) promotes both co-generation and renewable energy equally.

Application:

Exemption and Set-Off:

- Tata Steel argued that their fossil fuel-based co-generation (258 MW) qualifies for RPO exemption, citing Century Rayon and similar cases, which interpret Section 86(1)(e) as promoting co-generation and renewable energy equally. They claimed their co-generation's environmental benefits (e.g., waste heat utilization) align with renewable energy goals.

- APTEL rejected this, finding Lloyds Metal and Hindustan Zinc binding. Lloyds Metal clarified that co-generation under Section 86(1)(e) refers to renewable sources for RPO purposes, as co-generation is a process, not a source like solar or wind. *Hindustan Zinc* upheld RPOs on all captive consumers, including co-generation plants, to promote renewable energy.

- Regulation 3.1(b) of the 2021 RPO Regulations explicitly includes fossil fuel-based co-generation plants as obligated entities, requiring Tata Steel to meet RPO targets (e.g., 13.25% for 2021-22) for their 323 MW plant's consumption. The Tribunal held that fossil fuel-based co-generation cannot offset RPOs for the 65 MW coal-based plant, as the Regulations don't permit such adjustments.

Power to Relax:

- Tata Steel contended that OERC failed to consider its power to relax under Regulation 17, which could exempt their co-generation unit. They cited Tribunal's Order dated October 01, 2014 in respect of India Glycols Limited vs. UERC (Appeal No. 112 of 2014), where the Tribunal directed relaxation for co-generation plants.

- APTEL noted that India Glycols relies on Century Rayon, which conflicts with Lloyds Metal. The Tribunal declined to remand the case, as OERC's order was upheld on merits. However, it clarified that Tata Steel could separately petition OERC for relaxation, which OERC must consider per law.

Validity of Regulations:

- Tata Steel argued that Regulation 3.1(b) contradicts Section 86(1)(e) by imposing RPOs on co-generation plants, urging APTEL to ignore or read it down, per Tribunal's Order dated November 23, 2007 in *Damodar Valley Corporation v. Central Electricity Regulatory Commission and Ors. (Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007).*

- APTEL held that **PTC India Limited vs CERC: (2010) 4 SCC 603** prohibits it from exercising judicial review to challenge statutory regulations' validity. Ignoring or reading down Regulation 3.1(b) would indirectly exercise such power, which is impermissible. The 2021 RPO Regulations align with the 2016 Tariff Policy and Odisha's 2022 Renewable Energy Policy, emphasizing renewable energy over fossil fuel-based co-generation.

- The Tribunal found Damodar Valley as not applicable post PTC India and distinguished Bhaskar Shrachi Alloys Limited v. Damodar Valley Corporation (2018) 8 SCC 281), as it didn't address APTEL's judicial review limits. Lloyds Metal and Hindustan Zinc override Century Rayon's interpretation, as the Full Bench of Tribunal and Supreme Court take precedence.

Full Bench Referral :

- Tata Steel requested referral to a Full Bench, citing conflicting APTEL rulings. The Tribunal declined, as Lloyds Metal (Full Bench) and Hindustan Zinc settle the issue, binding all benches.

Conclusion :

APTEL dismissed Tata Steel's appeal, upholding OERC's order. The Tribunal concluded:

- Tata Steel's 258 MW fossil fuel-based co-generation unit is not exempt from RPOs under the 2021 RPO Regulations, nor can excess co-generation offset RPOs for the 65 MW coal- based plant, as per Hindustan Zinc and Lloyds Metal. Regulation 3.1(b) validly imposes RPOs on all captive consumption from fossil fuel-based sources.
- OERC's failure to address its power to relax didn't warrant remanding, but Tata Steel may separately seek relaxation from OERC.
- The 2021 RPO Regulations are statutory and binding, and APTEL cannot ignore or read them down, lacking judicial review powers per PTC India. Lloyds Metal overrides earlier conflicting rulings, negating the need for a Full Bench referral. The impugned order stands, requiring Tata Steel to comply with RPOs for their 323 MW plant from February 15, 2022, reinforcing the priority of renewable energy over fossil fuel-based co-generation.

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Warm Regards,

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