

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.08.2017
DELIVERED ON : 30.08.2017

Coram

The Honourable Mr. Justice RAJIV SHAKDHER
and
The Honourable Mr. Justice ABDUL QUDDHOSE

Original Side Appeal No.192 of 2012

Canara Bank
Overseas Branch
46, Azad Street
Khadarpet
Tirupur 641 601.

... Appellant

Vs.

K.B.Sassidharan

... Respondent

Prayer : Appeal filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent, against the order dated 31.01.2012, in C.A.No.784 of 2011 in C.P.No.261 of 2007, on the file of this Court.

Prayer in C.A.No.784 of 2011:

This Company Application praying this court to direct the respondent herein to receive a sum of Rs, 99,27,350/- as per the sanctioned scheme of arrangement and further direct the respondent to deliver all title deeds of Ms. Pappilon Exports Limited, retained by the respondent to the applicant/Sponsor, on the said payment.

Prayer in C.A.No.261/2007:

This company Petition praying this court that the scheme of arrangement between pappilon Exports Limited, and its secured and Unsecured creditors be sanctioned by this court so as to be binding on all of the secured and unsecured creditors of pappilon Exports Limited and on the said company.

For Appellant : Mr.T.K.Seshadri, Senior Counsel
for Mr.T.K.Bhaskar

For Respondent : Mr.R.Murari, Senior Counsel
for Mr.Thriyambak

J U D G E M E N T

RAJIV SHAKDHER, J.

PREFATORY FACTS

1. This is an appeal, directed against the judgement and order, dated 31.01.2012. The impugned judgment and order, came to be passed, upon an application, being C.A.No.784 of 2011, preferred by one Mr.K.B.Sassidharan (in short, 'KBS').

1.1. The prayer, made in application No.784 of 2011, filed by KBS was for issuance of a direction to the appellant bank to receive a sum of Rs.99,27,350/-, as per the scheme, sanctioned by the Company Court and for a further direction for being delivered title deeds of immovable properties owned by M/s.Pappilon Exports Limited (in short, 'PEL'). In effect, KBS sought delivery of title deeds in the capacity of a sponsor of the Sanctioned Scheme on payment of the aforementioned amount.

2. The appellant bank, as would be obvious, has resisted the prayer, inter alia, on the ground that the scheme in so far as it pertains to itself had worked itself out, to put it more accurately fizzled out, and therefore, was no longer applicable to it.

2.1. In other words, the appellant bank took the stand that KBS had failed to make payments to it as directed in the Sanctioned Scheme and therefore, it was no longer bound to accept the payment offered to it.

2.2. In sum, the appellant bank, wishes to receive payments in terms of recovery certificate obtained in proceedings initiated out against the Liquidator of PEL and others before the Debts Recovery Tribunal, Coimbatore (in short 'DRT').

3. A perusal of the impugned judgement and order shows that the learned Company Judge in large measure agreed with the plea advanced by KBS and directed the appellant bank to accept the balance payment, after adjusting a sum of Rs.34,00,000/-, against the crystallized liability amounting to Rs.1,05,00,000/-, (as reflected in the Sanctioned Scheme), along with interest at the rate of 24% p.a.

3.1. Pertinently, in passing this direction, the learned Company Judge, inter alia, enhanced the rate of interest to 24% p.a. from 15% p.a., which was the rate of interest provided originally in the Sanctioned Scheme.

3.2. Furthermore, as to the period from which interest would kick-in, the following was observed by the learned Company Judge:

"..... after the crucial date i.e. from 01.11.2010 onwards after including two months."

3.3. KBS was directed to make payment in terms of the impugned judgment and order within a period of 30 days from the date of receipt of a copy of the said order. Correspondingly, the appellant bank was directed to release the title deeds to KBS within a period of 15 days thereafter.

4. Being aggrieved, the appellant bank has preferred the instant appeal.

5. In order to adjudicate upon the appeal, in our view, the following broad facts are required to be noticed :

5.1. PEL, which was, at the relevant point in time, in the business of manufacturing and exporting garments had availed of loan facilities from the appellant bank. Since, it defaulted in repaying the borrowed amounts, the appellant bank initiated recovery proceedings before the DRT-I, Chennai. The recovery proceedings was numbered as O.A.No.250 of 1998. The said petition was, thereafter, transferred to DRT-II, Chennai and, consequently, re-numbered as O.A.No.78 of 2001. The record shows that the proceedings were transferred, once again, and this time around to DRT, Coimbatore and, thereafter, re-numbered as : T.A.No.1034 of 2002.

5.2. In the interregnum, a winding up petition was filed by one of the creditors of PEL, namely, Maharashtra State Financial Corporation (in short 'MSFC'). The winding up petition was numbered as : C.P.No.357 of 1997. By order dated 16.03.2000, PEL was ordered to be wound up. The Official Liquidator attached to this Court was appointed as its Liquidator. Consequently, the Liquidator took control and possession of the assets of PEL.

5.3. The appellant bank, which, in the meanwhile, was continuing with its recovery proceedings persuaded DRT, Coimbatore to issue a recovery certificate both against PEL and KBS. The recovery certificate so issued is dated 27.11.2007. The recovery certificate was issued for a sum of Rs.5,03,91,584.11/-, along with interest at the rate of 9% p.a., payable from 12.09.1997, till its realisation. The recovery certificate made PEL and KBS jointly and severally liable for the amounts reflected therein. Furthermore, the recovery certificate gave liberty to the appellant bank to sell the scheduled properties and adjust the amount against the recovery certificate, in case, PEL/KBS failed to pay the amounts reflected therein.

5.4. The record shows that even before the recovery

certificate was issued, in and about 2004, a proposal for One Time Settlement (in short, 'OTS') of outstanding dues was given to PEL/KBS, by the appellant bank, which required payment of Rs.1,05,00,000/-, albeit, within a period of three months, from the date of the proposal. It appears that the proposal did not fructify. This aspect is reflected, though obliquely, in KBS's letter dated 10.06.2005, written to the appellant bank. A perusal of the letter shows that KBS envisaged that he had given his consent in proceedings pending before the DRT, its finalisation would take time, as the Liquidator had been appointed vis-a-vis PEL. KBS envisaged that the closure of the OTS proposals would take another six months. Therefore, KBS, vide this very communication, sought release of "3rd party property" upon deposit of Rs.18,00,000/- to Rs.20,00,000/- (without any interest) which, according to him, was the market value of the property. This offer was also made subject to the approval by DRT.

5.5. Thereafter, for nearly one and half years, there was no concrete movement in the matter.

5.6. KBS, it appears was contemplating moving this Court with a scheme of arrangement vis-a-vis creditors of PEL. It also appears that KBS was in discussion with the appellant bank and upon reaching a consensus, shot off a letter dated 22.12.2006, to the appellant bank. The contents of the letter being crucial, the same are extracted here:

"Dear Sir,

This has reference to the discussion we had with General Manager on 13th November 2006 at Canara Bank, Circle Office, and Coimbatore.

We confirm having agreed to settle the outstanding amount for Rs.130.00 lakhs within 2 years from the Effective Date as per the Scheme of Arrangement Under Section 391 and 394 of the Companies Act, 1956 with 15% simple interest. We have already finalized the scheme and will be submitting to High Court Chennai during second week of January, 2007. We also agreed that the properties will be released as and when we make the payment as under:
FACTORY LAND AND BUILDING:RS.80.00 LAKHS
2.51 ACRES OF LAND : RS.25.00 LAKHS
LAND OF K.B.SASIDHARAN : RS.25.00 LAKHS

Please be informed that in the Scheme being submitted to the High Court the compromise amount will be Rs.105.00 lakhs as Rs.25.00 lakhs will be settled separately by disposing the land of K.B.Sasidharan. This is being done to negotiate with other Creditors."

(emphasis is ours)

5.7. Evidently, the appellant bank, substantially, affirmed what was stated in KBS's letter dated 22.12.2006, by its communication dated 29.03.2007. In its communication, the appellant stated the following:

"Dear Sir,

Sub: OVERDUE LIABILITIES OF M/S.PAPILIN EXPORTS LTD WITH US - COMPROMISE PROPOSAL - REG.

With reference to the subject, the following is permitted;

--Payment of rs.130 lacs in full and final settlement of the account payable within 2 years of communicating acceptance of the offer along with 15% interest on the compromise amount on reducing balance.

--Payment of all pending legal and other expenses if any M/S.Pappilon exports Ltd.

RELEASE OF THE FOLLOWING SECURITIES PERMITTED AS PER BELOW:

a. Factory land and building on receipt of Rs.80 lacs.

b. 2.51 acres of land in the name of the company on receipt of Rs.25.00 lacs.

c. Land at Pitchampalayam in the name of Sri.K.B.Sasidharan on receipt of Rs.25.00 lacs.

On receipt of the entire compromise amount, further legal proceedings shall be withdrawn.

The above offer shall stand withdrawn if you fail to pay the compromise amount as stipulated above and the Bank reserves the right to proceed legally for recovery of the entire due."

सत्यमेव जयते (emphasis is ours)

5.8. What is important to note is that KBS accepted the aforesaid proposal of the appellant bank by making the following endorsement on its communication dated 29.03.2007 :

"Accepted subject to High Court Chennai clearance. The date of acceptance as per Court order i.e. cut off date to be fixed by the Court.

Sd/-

(K.B.Sassidharan)

29.03.2007"

(emphasis is ours)

5.9. As would be evident from the events referred to above, the OTS proposal which required payment of Rs.1,30,00,000/- within the period of two years of its acceptance alongwith interest at the rate of 15%, calculated on diminishing balance occurred prior to passing of DRT's judgement dated 27.11.2007 and resultant recovery certificate dated December, 2008, in favour of the appellant bank.

6. In the meanwhile, the learned Company Judge sanctioned a scheme of arrangement sponsored by KBS, vide order dated 28.04.2008 (in short "Scheme"), passed in C.P.No.261 of 2007. As per the said order, KBS was inter alia required to file certified copies of the said order with the ROC, Coimbatore within a period of 30 days from the date of the order.

6.1. Furthermore, the order also gave liberty to the parties to the scheme or any other person interested to apply to the Court for any direction that may be necessary for carrying out its purport.

6.2. Exactly, after two months of the scheme, having been sanctioned, on 28.04.2008, KBS wrote to the appellant bank vide letter dated 28.06.2008. Via this letter, KBS deposited with the appellant bank a cheque in sum of Rs.25,00,000/-, bearing No.624419, and dated 30.06.2008.

6.3. It is common ground between the parties that the cheque was accepted and encashed and consequent thereto, KBS's personal property, which was a land located in Pitchampalayam, was released. (Besides this, as per the averments made in the rejoinder filed by KBS, before the learned Single Judge, even the charge qua Tirupur property has been released by the appellant bank).

6.4. Thereafter, on 12.01.2009, the learned Company Judge closed C.P.No.261 of 2007, in which, the aforementioned scheme was filed by KBS, albeit, after satisfying himself, that KBS had substantially discharged the conditions stipulated in the Sanctioned Scheme, via order dated 28.04.2008. In its order dated 12.01.2009, the Court noted that all creditors had been paid amounts as per the scheme except MSFC.

6.5. It may be noted at this juncture that according to the appellant bank, it had no notice of the proceedings held on 12.01.2009 and that the observation made therein with respect to creditors having been paid off, based on the affidavit filed by KBS, was inaccurate as, apart from MSFC, its dues had also not been paid as on that date. This is an aspect, which, we would be dealing with, in the latter part of our judgment. The reason

for that is that one of the aspects, which has arisen for our consideration, is, as to the time frame, within which, KBS was required to pay the appellant bank in terms of provisions made in that behalf in the Sanctioned Scheme. While, admittedly, the period for repayment was two (2) years, what is at issue, between the parties, is, when was the period required to commence ?

6.6. As noted above, this is an aspect which, we would be dealing with in the latter part of our judgement.

6.7. Moving on with the narrative, the appellant bank, wrote a letter dated 05.06.2009, to PEL, seeking from it, information with regard to what steps it had taken towards compliance of directions contained in clause 6.1 of the Sanctioned Scheme.

6.8. In response, thereto, PEL vide letter dated 10.08.2009, set out the various steps that it had taken in terms of Clause 6.1 of the Sanctioned Scheme.

6.9. The aforesaid letter was followed by another letter dated 18.11.2009, in which, PEL informed the appellant bank that it was in the process of finalizing its balance sheet. Furthermore, PEL also sought confirmation from the appellant bank as to whether it had received insurance claim in sum of Rs.2,00,000/- to enable it to incorporate the same in its balance sheet. The appellant bank was also informed that the ROC had not taken steps to withdraw the case instituted by him, before the Judicial Magistrate No.1, Tirupur.

7. Curiously, the aforementioned letter was followed by, as it appears, with two (2) letters. First, was the letter dated 30.04.2010. The second was a letter dated 12.08.2010. The letter dated 30.04.2010 is not on record. We presume that, since the same was not brought on record by either of the parties, it is not crucial to the issue at hand.

7.1. Suffice it to say, via the letter dated 12.08.2010, PEL informed the appellate bank that it would not commence production and declare the effective date as per clause 6.1. of the Sanctioned Scheme as it had not received confirmation from the ROC, with respect to withdrawal of cases against KBS and other directors.

7.2. PEL, however indicated in the said letter that, since, payments were getting delayed, it would make arrangement to settle the dues to the creditors. It was further averred that the appellant bank's dues would be settled by 30.09.2011, and that, as discussed, property documents would be released against part payment qua each property. The letter concluded by

indicating therein that PEL would pay a sum of Rs.78,94,000/- (sic, should, perhaps, read as Rs.77,94,000/-) after adjusting Rs.2,06,000/- received towards insurance claim against the balance outstanding of Rs.80,00,000/-. PEL sought confirmation of the said position from the appellant bank.

7.3. It is pertinent to note, at this juncture, that PEL had proceeded on the basis that the sum of Rs.25,00,000/-, which it had paid to the appellant bank via cheque dated 30.06.2008, stood adjusted against sum of Rs.1,05,00,000/-; crystallized as the amount payable by KBS to the appellant bank under the Sanctioned Scheme.

7.4. The record shows that PEL thereafter wrote to the appellant bank on 15.03.2011, wherein, it is stated as follows:

"Dear Sir,

This refers to the discussion, the undersigned had with your Head Office on 14th March 2011.

We confirm that the effective date is 31st July 2008 and simple interest of 15% will be calculated from 1st November 2008 and will be paid.

We shall be most grateful if you will kindly confirm enable us to arrange full settlement within 2/3 weeks of your confirmation."

7.5. The aforesaid letter was followed by another letter of PEL dated 17.05.2011, which was, like the previous communication, addressed to the appellant bank. In this letter, PEL via KBS referred to the discussion that the Manager of the appellant bank had with KBS on 16.05.2011.

7.6. PEL in this letter went on to confirm that they would arrange to deposit Rs.1,00,00,000/- by 04.06.2011. On record, there is also a letter dated 03.06.2011, which refers to the fact that a meeting was held on 02.06.2011, at the Circle Office of the appellant bank. The letter adverts to a "Mega Recovery Meet", in which, evidently statement of dues of PEL as per the scheme of arrangement was discussed. The letter, also alludes to the fact that the appellant bank's personnel, present at the meeting, had conveyed to KBS that approval would be required from its "higher authorities" and that intimation in that behalf would be given in a week's time. The letter concludes with the assertion that in view of the said circumstance, PEL would not be making an arrangement for deposit of Rs.1,00,00,000/- as was communicated vide letter dated 17.05.2011.

7.7. After nearly a gap of four months, the appellant bank vide communication dated 28.09.2011, made a, without prejudice,

OTS proposal for the second time to PEL. The OTS proposal required PEL to pay a sum of Rs.1,77,00,000/- towards full and final settlement. Out of the said sum an amount equivalent to Rs.90,00,000/- was to be paid, immediately, and the balance sum of Rs.85,00,000/- was to be paid within in a period of one month i.e.28.10.2011. In addition thereto, PEL was also required to pay the outstanding legal and other incidental expenses. Upon receipt of the said amount, the appellant bank offered to withdraw all suits, cases and claims filed by it and furthermore it indicated that it would release all securities as well. It was clarified, though, that the criminal case already filed would not get impacted by OTS, if any, arrived at between the parties.

7.8. The record shows that it is KBS's stand that prior to the appellant bank's letter dated 28.09.2011, on 11.06.2011 its officials had interacted with him and in the course of discussion called upon him to deposit monies with the appellant bank subject to the approval of the "higher authorities". It is, in this connection, that KBS had evidently deposited a sum of Rs.92,00,000/- in his son's account i.e., one, Mr.Shashank maintained with the appellant bank.

7.9. The factum of deposit is reflected in PEL letter dated 12.04.2012, addressed to the appellant bank. This letter of PEL is accompanied by a letter of request addressed by KBS's son, Mr.Shashank, to the appellant bank. Via, this letter, Mr.Shashank, called upon the appellant bank to close his account and transfer the entire amount standing to his credit to "Canara Bank A/c Pappilon Exports Ltd". Evidently, thereafter, PEL paid another sum of Rs.25,00,000/- to the appellant bank via a cheque favouring "Canara Bank A/c Pappilon Exports Ltd."

8. In sum, it is the stand of KBS that pursuant to the impugned judgment and order, the entire amount has been paid to the appellant bank.

8.1. The appellant bank being aggrieved, as indicated at the outset, has filed the instant appeal.

SUBMISSIONS OF COUNSELS

9. Mr.T.K.Seshadri, learned senior counsel, who appeared in support of the appeal assailed the impugned judgment and order, broadly, on the following ground:

9.1. That KBS had failed to adhere to the terms of the scheme, and therefore, the scheme was no longer bound down the appellant bank. Consequently, no direction could have been issued on an application preferred by KBS for acceptance of the amounts under the Sanctioned Scheme.

9.2. The fact that KBS has not adhered to the scheme is

demonstrable from the fact that he had failed to pay Rs.1,30,00,000/- under the OTS arrived at with PEL pursuant to the appellant bank's offer of 29.03.2007. Since, the said OTS offer was accepted on the same day, by KBS, on behalf of PEL and himself, the period of repayment provided therein, expired on 29.03.2009 and not on 31.07.2009 as indicated in the impugned judgment and order. KBS / PEL, having not paid the moneys as agreed to, via letter dated 29.03.2009, the appellant bank could not be forced to accept the amount provided in terms of the Sanctioned Scheme.

9.3. The learned Company Judge had contrary to the Sanctioned Scheme directed adjustment of a sum of Rs.34,00,000/- which included a sum of Rs.25,00,000/- paid by KBS and another sum of Rs.9,00,000/- against the total sum of Rs.1,05,00,000/- payable under the Sanctioned Scheme by KBS. In this context, it was stated that Rs.25,00,000/- which was paid by KBS, on 30.06.2008 was paid outside the scheme, albeit, under the OTS arrived at between parties on 29.03.2007. The said sum was paid by KBS for release of his personal property located at Pitchampalayam. The Sanctioned Scheme adverted to two properties of PEL, situate at: No.2, Angeripalayam Road, Tirupur and at Manneri, Tirupur, the charge qua which was to be released upon payment being made in terms of the Sanctioned Scheme.

9.4. Likewise, the adjustment of Rs.9,00,000/- which was the sum directed to be made by the learned Company Judge was, completely, uncalled for as it was not even the case of KBS that it had paid the said sum of Rs.9,00,000/-.

9.5. The learned Company Judge in directing KBS to pay interest at the rate of 24% per annum had exceeded the powers conferred upon him under Section 392(2) of the Companies Act, 1956 (in short 'the 1956 Act').

9.6. The learned Company Judge had wrongly ascertained the effective date as 28.04.2008, when, KBS in its own letter dated 15.03.2011 addressed to the appellant bank had indicated that the effective date would be 31.07.2008 and that interest would be calculated and paid from 01.11.2008.

9.7. Since, KBS had breached the terms of the Sanctioned Scheme, the appellant bank was entitled in law to execute its recovery certificate, being D.R.C.No.271 of 2008 of December, 2008, which, as on 11.12.2008, allowed it to recover a sum of Rs.10,14,43,063/-.

9.8. In this behalf the following judgements were cited by Mr.Seshadri (i) R.H.Patel and others Vs. Reliance Industries Ltd, (2011) 162 Comp Cas 397 (Guj); (ii) In Re.Divya Vasundhara Financeries Pvt Ltd, (1984) 56 Comp Cas 487 (Guj) (iii) Mysore

Electro Chemical Works Ltd Vs. Income Tax Officer Circle - I, Bangalore, (1982) 52 Comp Cas 32 (iv) Union of India Vs. Asia Udyog P. Ltd and Others, (1974) 44 Comp Cas 359 (Delhi); (v) Meghal Homes P.Ltd Vs. Shree Niwas Girni K.K.Samiti and Others, (2007) 139 Comp Cas 418 (SC); (vi) S.K.Gupta and another Vs. K.P.Jain and another, (1979) 49 Comp Cas 342 (SC); (vii) J.K. (Bombay) P. Ltd Vs. New Kaiser-I-Hind SPG & WVG Co. Ltd and Others (1970) 40 Comp Cas (SC) (viii) Real Lifestyle Broadcasting Pvt. Ltd. Vs. Turner Asia Pacific Ventures Inc. & Anr. 2013 IVAD (Delhi) 19 and (ix) Spentex industries Ltd. Vs. Indo Rama Synthetics (India) Ltd. (2013) 178 Comp Cas 358 (Delhi).

10. On the other hand, Mr.R.Murari, learned senior counsel appearing on behalf of KBS took us through the correspondence exchanged between the parties to demonstrate that the appellant bank was never inclined to accept the amounts as crystallised under the scheme. The learned senior counsel was at pains to submit that the amounts payable, ultimately by KBS, were those which were agreed under the terms of the Sanctioned Scheme and therefore the sum of Rs.25,00,000/- was adjusted against the total sum of Rs.1,05,00,000/- payable to the appellant bank, as reflected in the Sanctioned Scheme.

10.1. Furthermore, Mr.R.Murari, emphasised the fact that as per the definition of the expression "effective date" given in clause 1.4 of the Sanctioned Scheme, effective date would mean the last of the dates on which sanctions, consents, approvals mentioned in clause 6.1 of the scheme were obtained. According to him, while several approvals were pending, at best, the effective date would be that date on which KBS after the receipt of the order dated 28.04.2008 (whereby the scheme was sanctioned), filed the same, with the ROC.

10.2. Mr.R.Murari, drew our attention to the fact that the order dated 28.04.2008 was approved only on 09.05.2008 and in fulfillment of his obligations in law, KBS filed the same with the ROC within 30 days of receipt of a certified copy, that is, on 30.05.2008. The argument, thus, was that, since the sum of Rs.1,05,00,000/- was to be paid within two years along with interest at the rate of 15% p.a., after the first quarter from the effective date of the Sanctioned Scheme, the period of two years would commence from 31.12.2008. The logic being that the first quarter of 2008, post the effective date i.e. 30.05.2008 would fall on 01.10.2008 and come to an end on 31.12.2008.

10.3. Therefore, given this situation, the learned senior counsel said that KBS had time till December, 2010 to make payment in terms of the Sanctioned Scheme. This, according to the learned senior counsel, was a submission made de hors, what

was provided in clause 6.1 of the scheme, which required all approvals, sanctions etc., being obtained prior to the declaration of the effective date.

10.4. The learned senior counsel in order to demonstrate, KBS's bona fides, laid stress on the contents of the letter dated 12.08.2010, addressed to the appellant bank.

10.5. According to the learned senior counsel, it was, in this background, that the appellant bank wanted to move away from the terms of the Sanctioned Scheme, a move which culminated with its offer of a fresh OTS proposal being made vide its communication dated 28.09.2011.

10.6. Since, the OTS proposal was contrary to the Sanctioned Scheme, according to Mr.R.Murari, KBS was compelled to approach the learned Company Judge for issuance of direction to the appellant bank to accept moneys in terms of the Sanctioned Scheme and, thereupon release title deeds of the properties in its possession.

10.7. Mr.R.Murari, went on to submit that in fact, KBS, was entitled in law, to contend, even though, it had succeeded before the learned Company Judge that he ought not to have been compelled to pay to the appellant bank interest at the rate of 24% per annum as against the rate of interest provided in the Sanctioned Scheme, which was pegged at 15% per annum.

10.8. Mr.R.Murari, contended that this submission could be made across the bar based on the principles analogous to Order XLI Rule 22 of the Code of Civil Procedure, 1908 (in short 'CPC').

10.9. In support of his submissions Mr.Murari relied upon the following judgements:(i) Ravinder Kumar Sharma Vs. State of Assam, (1999) 7 SCC 435, and (ii) Post Graduate Institute of Medical Education Vs. A.P.Wasan, (2003) 5 SCC 231.

REASONS

11. We heard the learned counsel for the parties and perused the records.

11.1. According to us, the records clearly demonstrates that prior to the scheme of arrangement, proposed by KBS being sanctioned an OTS was arrived at between the parties on 29.03.2007. This OTS required KBS to pay a sum of Rs.1,30,00,000/- within a period of two years of its acceptance along with interest at the rate of 15% per annum, albeit, on the diminishing balance basis.

11.2. The OTS proposal also provided for release of securities, though, in a calibrated manner. Securities, qua land and building were to be released on receipt of Rs.80,00,000/-. Similarly, on receipt of Rs.25,00,000/-,

security relating to 2.51 acres of land held in the name of PEL were to be released. Likewise, on receipt of another sum of Rs.25,00,000/-, security relating to land situate at Pitchampalayam, which was owned by KBS, was to be released.

11.3. The OTS proposal dated 29.03.2007, was preceded by communication dated 22.12.2006 addressed by KBS to the appellant bank, which, clearly indicated that while the inter se parties OTS amount would be crystallized at Rs.1,30,00,000/-, the amount that would get reflected in the scheme of arrangement, that was to be submitted to the Court, would only be a sum of Rs.1,05,00,000/-.

11.4. The reason KBS made this suggestion was on account of the fact that he proposed to pay Rs.25,00,000/- to the appellant bank separately towards release of his personal property located at Pitchampalayam. Clearly this arrangement was not made known to other creditors who were party to the Scheme of arrangement.

11.5. Therefore, as per the arrangement arrived at between the appellant bank and KBS, Rs.25,00,000/- was consideration received by the former for release of securities pertaining to KBS's personal property situate at Pitchampalayam. That this aspect was kept outside the sight of other creditors and therefore was not brought to the notice of the Court is quite evident upon perusal of the aforementioned inter se partes communications.

11.6. Therefore, a conjoint reading of letter dated 22.12.2006 and the OTS proposal of 29.03.2007, which was accepted by KBS, would establish two things. First, that Rs.25,00,000/- was paid by KBS towards release of his personal property. Second, that the said sum was to be adjusted against the total sum of Rs.1,30,00,000/- and not Rs.1,05,00,000/-. The said adjustment was not required to be made as it was sought to be projected by KBS towards the sum of Rs.1,05,00,000/-, which was the amount reflected in the Sanctioned Scheme.

11.7. The clause in the Sanctioned Scheme, wherein, obligations pertaining to the parties before us, stand incorporated is set out in Part-II of the scheme. For the sake of convenience, the relevant extract from the scheme is set forth hereafter:

"PART II - THE SCHEME

2.1. The Scheme shall become effective from the Effective date.

2.2. With effect from the Effective Date, the dues of PEL to their Secured Creditors as shown in TABLE-A and the dues of the Unsecured Creditors as shown in TABLE-B shall be restructured in the following manner

and in accordance with the terms and conditions of this Scheme:-

TABLE - A

(A) CANARA BANK:

The Canara Bank shall agree for a Settlement of its entire claim and dues in an amount of Rs.105.00 lacs (as against the outstanding balance of Rs.503.92 Lakhs) (hereinafter referred to as the 'Agreed settlement amount') to be paid within 2 years with simple interest at the rate 15% p.a. commencing after the first quarter from the Effective Date of the Scheme. Canara Bank has a charge on two different properties of the Company, one being the land and building of PEL situated at No.2, Angeripalayam Road, Tirupur and the other being land situated at Manneri, Tirupur. On the Scheme being sanctioned and upon sufficient payments being made to Canara Bank, the said Bank shall release its charge over one of the property of PEL at the option of the Sponsor and which may be mutually agreed to upon between the Sponsor and Canara Bank. The Canara Bank shall however continue to have a charge on the second until the balance amounts is paid in full and shall release such charge over the second property of PEL on the payment of the entire balance of the Agreed settlement amount." (emphasis is ours)

11.8. Clearly, in terms of the scheme, KBS was required to pay to the appellant bank a sum of Rs.1,05,00,000/- against the outstanding amount of Rs.5,03,92,000/- within two years, albeit, with simple interest at the rate of 15% per annum, commencing after the first quarter from the effective date of the scheme.

11.9. Clause 1.4 of the scheme defines the 'effective date' as follows:

"1.4. "Effective Date" means the last of the dates on which the sanctions, consents, approvals mentioned in Clause 6.1 of this Scheme are obtained."

12. Thus, upon a perusal of the definition of effective date given above, it is evident that the ascertainment of the effective date was dependent on KBS obtaining the last of the sanctions, consents and approvals as mentioned in clause 6.1 of the Sanctioned Scheme.

12.1. Clause 6.1, made the said scheme conditional, upon, receipt of various approvals and sanctions by KBS, as delineated in Sub-clauses (a) to (e) being:

(i) Sub-clause (a) of clause 6.1, provided for approval of the scheme by a majority in number represented by $3/4^{\text{th}}$ in value of PEL's secured creditors.

(ii) Sub-clause (b) of clause 6.1, likewise, required approval of the scheme by majority in number representing $3/4$ in value of PEL's unsecured creditors.

(iii) Sub-clause (c) of clause 6.1, required the sanction of the scheme under Sections 391 and 394 of the 1956 Act, and necessary orders being obtained in that behalf.

(iv) Sub-clause (d) of clause 6.1, required KBS to get sanction, consensus or, approval of all persons and authorities which were necessary qua matters provided for or relating to the scheme, for which, such sanction, consent or approvals are required.

(v) Sub-clause (e) of clause 6.1, required certified copies of the order of the Court Sanctioned Scheme being filed with the ROC.

12.2. Clearly, approvals as required under sub-clauses (a), (b) and (c) of clause 6.1 had been obtained; more particularly, as indicated above, the order sanctioning the scheme which was passed on 28.04.2008, and approved on 09.05.2008. It is no one's case, before us, that sanctions, consents and approvals required under sub-clause (d), with regard to matters provided for or relating to the scheme, for which, sanctions consents or approvals are required, had not been obtained by KBS.

12.3 It was in this context, Mr.Murari, in our view, correctly submitted that "effective date" would be the date on which the certified copy of order dated 28.04.2008 was filed with the ROC. It is the common ground between the parties that this obligation was fulfilled on 30.05.2008, as stipulated in clause 6.1.(e) of the Sanctioned Scheme. Therefore, as per the terms of the Sanctioned Scheme the "effective date" would only be 30.05.2008 and not the date noted by the learned Company Judge in the impugned judgement and order.

12.4. The effective date, in our view, would also not be 31.07.2008, which was the date communicated by PEL via KBS to the appellant bank vide letter dated 15.03.2011. If this be the position, the necessary consequence would be that the period of two (2) years would commence after the expiry of first quarter from the effective date of the scheme.

12.5. Thus, if quarters, as per the calender year, are taken into account, then, the first quarter, after the effective date would be October - December 2008. On the other hand, if, we were to treat the term "quarter" used in the Sanctioned Scheme as a mere period of three (3) months, then, that period of three months after the effective date would expire on 31.08.2008. The period of two (2) years would, thus, commence depending on how the said provision of the Sanctioned Scheme is interpreted. The period of two (2) years would commence from 31.12.2008, if, the first quarter after the effective date is calculated as per the calender year and if not, as alluded to above, then, it would commence from 01.12.2008. Accordingly, the two years period would come to an end either on 31.12.2010 or 01.12.2010. In our view, the more natural interpretation would be one which would have the period of two (2) years commence from 31.12.2008 and end on 31.12.2010.

12.6. The record shows that while KBS wrote letters to appellant bank giving his interpretation of relevant clauses of the scheme both with regard to what would be the effective date and the amount that he was required to pay, the appellant bank for some odd reasons did not refute any of these assertions.

12.7. We come to this conclusion as nothing, by way of evidentiary material, has been placed on record by the appellant bank nor was anything been pointed out by Mr.Seshadri which would have us come to a different conclusion.

12.8. As a result, the sense we get based on the material placed on record is that the appellant bank was not happy with the agreed amount that it had to receive in terms of the Sanctioned Scheme.

12.9. On the other hand, the appellant bank seemed to indicate that it was quite happy if PEL/KBS were to arrive at a fresh settlement, albeit, outside the scheme. This approach of the appellant bank, is reflected in its OTS proposal dated 28.09.2011. By virtue of this proposal, the appellant bank offered to settle the dues of PEL upon it being paid a sum of Rs.1,77,00,000/- in the manner indicated in the aforementioned communication.

13. We have already referred to the broad terms set out in the letter dated 28.09.2011. It is this communication which set the alarm bells ringing for KBS, and consequently, propelled him to approach the learned Company Judge, by way of an application, wherein, as indicated at the outset, a direction was sought for receipt of money by the appellant bank in terms of the Sanctioned Scheme and for resultant release of the securities released to therein.

13.1. Mr.Seshadri in this behalf has submitted that since the amounts as agreed were not paid by KBS / PEL by the given date i.e., 29.03.2009, in terms of the OTS of 29.03.2007, PEL / KBS had committed breach and, thus, resulted in relieving the appellant bank of its corresponding obligation.

13.2. According to us, this argument of Mr.Seshadri cannot be accepted because the record shows that the appellant bank was in the know of the fact that the scheme of arrangement was in the offing, and that, the acceptance by KBS of the OTS proposal dated 29.03.2007, was subject to the approval by this Court.

13.3. It was, specifically, made clear in the endorsement made by KBS on the OTS proposal dated 29.03.2007, that the "cut off" date would be that which would be fixed by the Court; by which, we understand that the effective date and the period by which repayment had to be made would be that which would be provided in the Sanctioned Scheme.

13.4. Therefore, the submission advanced by Mr.Seshadri that because payment was not made by KBS / PEL of the agreed sum, that is, Rs.1,30,00,000/-, within a the period of two (2) years from the date of the acceptance of OTS, i.e. 29.03.2007, cannot be accepted.

13.5. Having said so, what is required to be ascertained is: as to whether KBS was in breach of the terms of the Sanctioned Scheme. As indicated above, according to us, the effective date was 30.05.2008, which was also the stand taken by Mr.Murari on behalf of KBS and as held by us, herein above, the two (2) year period would commence after the end of the first quarter from the effective date which was 31.12.2008 and, therefore the two (2) year period would come to an end on 31.12.2010. Clearly, KBS was required to make the payment of Rs.1,05,00,000/- as provided for in the Sanctioned Scheme before 31.12.2010.

13.6. KBS's letter dated 12.08.2010, seemed to indicate and, according to us, wrongly, that the sum of Rs.25,00,000/- paid by him towards release of his personal property located at Pitchampalayam was to be adjusted against the sum of Rs.1,05,00,000/- adverted to in the Sanctioned Scheme. As to why this adjustment could not have been made by KBS has already been indicated hereinabove by us. Having said so, the difficulty that we are faced with is that the records shows that the appellant bank did not write back and say what was its stand with regard to the contents of letter dated 12.08.2010.

13.7. At that point in time, KBS had at least four months available to him to pay the amount. It appears that, thereafter,

the correspondence exchanged between PEL/KBS and the appellant bank did not somehow display any sense of urgency in resolving the issue with regard to payment of the amount agreed to under the Sanctioned Scheme. There is, as indicated by us, in the course of discussion above, a reference to a 'Mega Recovery Meet' and deposit of some adhoc monies in the account of one Mr.Shashank, the son of KBS. That amounts were deposited is also reflected in the communication dated 12.04.2012, and 05.05.2012, to which, we have had made a reference above. The appellant bank, as it appears, did not move the learned Company Judge, for having KBS adhere to the terms of the Sanctioned Scheme or, in the alternative having the scheme declared failed.

13.8. Since, KBS approached the learned Company Judge, the impugned judgment and order came to be passed. Mr.Seshadri says that the application filed by KBS was not maintainable. It is also Mr.Seshadri's submission that the directions issued via the impugned judgment were beyond the powers conferred on the learned Company Judge under Section 392 of the 1956 Act.

13.9. In order to appreciate this submission, one has to advert to Section 392 of the 1965 Act. Section 392 of the 1956 Act empowers the Company Judge to supervise the carrying out of a compromise or arrangement arrived at in respect of the concerned company and making such orders or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as may be considered necessary for the proper working of the compromise or arrangement. [See Section 392(1) (a) and (b)]

14. Under sub-Section (2) of Section 392 of the 1956 Act, if the Court is satisfied that a compromise or arrangement sanctioned under Section 391 of the 1956 Act, cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company and such order if passed shall be deemed to be an order made under Section 433 of the 1956 Act.

14.1. Clearly, the Court has powers not only to give directions but also the power to modify the compromise or arrangement arrived at between company and its creditors, as may be considered necessary for the proper working of such a compromise or arrangement.

14.2. Therefore, the question which arises for consideration is: whether the learned Company Judge, given the circumstances at hand, right, in principle, in directing the appellant bank, to accept the sum as referred to in KBS's application and, issue directions with regard to modification qua the rate of interest provided in the Sanctioned Scheme.

14.3. In our view, the appellant bank is to blame itself as KBS for whatever it was worth, took a stand in his letter dated 12.08.2010 as to how the terms of the Sanctioned Scheme were to operate. The appellant bank did not rebut the stand taken by KBS in its letter of 12.08.2010. On the other hand, the appellant bank allowed the matter to drift and as indicated above by us, our sense is, it was looking to recover the amounts outside the terms of the Sanctioned Scheme, perhaps, by way of a fresh OTS. The record shows that despite the appellant bank giving an offer via its letter dated 28.09.2011, the said endeavour did not fructify.

14.4. Given these circumstance, in our view, the learned Company Judge, in principle, was right in issuing a direction to the appellant bank to accept the balance monies. The reason for the same is that based on the terms of the Sanctioned Scheme, KBS has paid dues of all its secured and unsecured creditors except to MSFC.

14.5. It appears MSFC has not accepted the monies which KBS has offered under the Sanctioned Scheme. Since, MSFC is not before us, we do not know the exact position.

14.6. Besides, MSFC, the only other entity, which has not received the entire amount under the Sanctioned Scheme, is the appellant bank. If the learned Company Judge were to reject the application of KBS, it would result in the failure of the Sanctioned Scheme. The endeavour of the Court while exercising powers under Section 392 of the 1956 Act is to work a Sanctioned Scheme and, as far as possible save the same without changing its fundamentals. Had the appellant bank responded to the letter of 12.08.2010, then perhaps, it could have been said that the learned Company Judge ought not to have issued a direction to the appellant bank to accept monies under the Sanctioned Scheme. The power of modification, which is conferred on the learned Company Judge under Section 392(1)(b) of the 1956 Act is of the widest amplitude and is geared to work the scheme of compromise / arrangement as deemed necessary by him¹. The wisdom of the learned Company Judge has to be respected. An appellate Court would be slow to interfere with the directions issued by the learned Company Judge unless they are found to be completely contrary to the terms of the Sanctioned Scheme and / or the law. The principle enunciated in the judgements cited by Mr.T.K.Seshadri, to which we have made a reference, cannot be quibbled with. It is the facts obtaining in those cases, which distinguish them from the instant matter.

14.7. The learned Company Judge, in order to compensate the appellant bank, has, in fact, enhanced the rate of interest from

15% p.a to 24 % p.a. Whether the learned Company Judge ought to have carried out such a modification is a moot point. While KBS could have been aggrieved by the decision, the appellant bank, surely, cannot be seen griping about this direction. The modification in the rate of interest subsumed in a decree issued in that behalf.

14.8. KBS, fortunately for the appellant bank has not filed a cross appeal. Mr.Murari did make an attempt to persuade us that an objection qua the enhancement in the rate of interest, can be taken even by way of an oral submission. According to us, the impugned judgement having morphed into a decree, it can only be tinkered with, and, if, principles analogous to Order XLI Rule 22 of CPC are to be followed, as contended by Mr.Murari, only upon cross objections being filed. KBS has chosen not to file cross objections. The submission of Mr.Murari to the contrary cannot be accepted.

15. We may only note that in support of his submission, Mr.Murari, relied upon the judgements rendered by the Supreme Court in Ravinder Kumar Sharma V. State of Assam and others, (1999) 7 SCC 435 and Postgraduate Institute of Medical Education and Research V. A.P. Wasan, (2003) 5 SCC 321.

15.1. In our view, the learned counsel has not appreciated the correct ratio of the aforementioned judgements. Order XLI, Rule 22 of the CPC deals with two distinct situations. In the first scenario, a respondent to the appeal seeks to "support" the decree by asserting that the matters decided against him, or the finding returned against him could have been decided in his favour. In such a situation, clearly, the respondent is not required to file cross objections. The second scenario, emerges where, a respondent to the appeal seeks to impugn the decree. In such a situation, necessarily, he has to file cross objections and obtain ruling on the same.

15.2. The explanation to Order XLI, Rule 22, however, gives an option to the respondent in an appeal preferred qua him to file cross objections, even against an adverse finding, while supporting the decree. This, though, is not mandatory, as the explanation uses the expression "may".

15.3. Since, the instant case is relatable to the second scenario, (as the enhancement of rate of interest from 15% per annum to 24% per annum stands subsumed in a decree), KBS, as indicated above, was required to file cross objections.

15.4. The judgements cited by the learned counsel do not take a different view. (Also see the judgement of the Supreme

court in Chandra P.J. Temple V. Harikrishnan, AIR 1973 SC 2565).

15.5. Therefore, having regard to aforementioned aspects, we are of the view, that, as an appellate Court, we need not interfere with the decision taken by the learned Company Judge as to how best the Sanctioned Scheme ought to be worked.

15.6. However, having said so, as indicated above by us, the direction issued by the learned Company Judge with regard to adjustment of Rs.34,00,000/- against the amount crystallized in the scheme, which is a sum of Rs.1,05,00,000/- was on the facts uncalled for, being contrary to the material on record. Rs.25,00,000/- which KBS paid for release of securities pertaining to his personal property had nothing to do with the liability in the sum of Rs.1,05,00,000/- provided for in the Sanctioned Scheme.

15.7. As a matter of fact, the appellant bank as well as KBS kept this arrangement outside the sight of the other creditors as indicated above, perhaps, to gain space to negotiate better terms with other creditors. In our view, both KBS and appellant bank ought to have made candid disclosure qua this aspect of the matter prior to the Scheme being sanctioned. Unfortunately, this was not done.

15.8. Having said so, at this stage, it would be rather difficult for us to pass any direction in that behalf, as it would require the Court, in a manner of speech, to unscramble the egg.

16. We may note that during the pendency of the appeal, admittedly, KBS has paid sums in terms of the impugned judgement to the appellant bank; a fact which is reflected in the order dated 16.05.2012. The total sum paid by KBS is a sum of Rs.1,07,55,720/-, (which includes Rs.82,55,720/- + Rs.25,00,000/-).

17. Therefore, in view of the foregoing discussion, we allow the appeal, albeit, partially by modifying the finding and / or direction contained in the impugned judgement and order to the following extent:

(i) The sum of Rs.25,00,000/- which KBS paid to the appellant bank for release of his personal property situate at Pitchampalayam could not have been adjusted against the total liability of Rs.1,05,00,000/- as reflected in the Sanctioned Scheme.

(ii) Likewise, the sum of Rs.9,00,000/- could not have been adjusted against the total liability of Rs.1,05,00,000/- as it

was never paid by KBS.

18. In sum, we hold, that KBS was required to pay the entire sum of Rs.1,05,00,000/-. Since, the rate of interest has been enhanced by the learned Company Judge from 15% p.a. to 24 % p.a.; a rate that we sustained - the amount, if any, payable by KBS will be worked out, accordingly, after taking into account the amounts paid during the pendency of the scheme. The interest would, therefore, run from 31.12.2008., albeit, at the rate of 24% (simple) per annum.

19. The captioned appeal is thus, disposed of in the aforesaid terms, leaving parties to bear their own costs.

s/d-

Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

kk/gg

To

1. The Sub Assistant Registrar (Original Side),
High Court, Madras.

+1 CC to Ms.T.K. Bhaskar, Advocate sr 62897.

+1 Cc to Mr.Thriyambak J. Kannan, Advocate sr 62747.

O.S.A.No.192 of 2012

PPA(CO)
SP(08/11/2017)

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