HON'BLE THE ACTING CHIEF JUSTICE SRI RAMESH RANGANATHAN
AND
HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

WRIT PETITION No. 39848 of 2017

ORDER: (per HACJ)

The extra-ordinary jurisdiction of this Court, under Article 226 of the Constitution of India, has been invoked by the petitioner seeking a writ of mandamus to declare the order passed by the National Company Law Appellate Tribunal (NCLAT) in C.A (AT) (Insolvency) No.167 of 2017, dated 20.11.2017, against the order passed by the National Company Law Tribunal (NCLT), Hyderabad, in CP (IB) No.100/9/HDB/2017 dated 29.08.2017, as illegal, arbitrary and unconstitutional.

By its order dated 29.08.2017, the NCLT admitted the application filed by the 2nd respondent, and appointed an Insolvency Resolution Professional, besides declaring a moratorium prohibiting institution of suits etc., as specified in Clauses (c) (i) to (iv) thereunder, which was to last till the completion of the Corporate Insolvency Resolution Process, or till passing an order for Liquidation for Corporate Debtor under Section 33, whichever was earlier.

Aggrieved thereby, the petitioner preferred an appeal to the NCLAT which, after referring to the judgment of Supreme Court in **Mobilox Innovations Pvt. Ltd v. Kirusa Software Pvt. Ltd**[1] and by its order in C.A. (AT) (Insolvency) No.167 of 2017 held that, under Section

[1] (2017) SCC Online SC 1154

36 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act" for short), an Arbitral Award was executable as a decree; it could be enforced only after the time, for filing the application under Section 34, has expired, and/or if no application is made, or such application having been made has been rejected; for the purposes of the 1996 Act, an Arbitral Award reaches finality after expiry of the enforcement time, or if the application under Section 34 is filed and rejected; however, for the purposes of the I&B Code, no reliance could be placed on Section 34 of the 1996 Act, as the I&B Code, being a Complete Code, would prevail over all other Acts including the 1996 Act; under Section 238, the provision of the I&B Code, with regards finality of an Arbitral Award for initiation of 'Corporate Insolvency Resolution Process', would prevail over the provisions of the 1996 Act; on a conjoint reading of Section 9 of the I&B Code, and the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, more particularly Clause (3) of Part-V of Form-5 thereof which requires particulars of an order of a Court, Tribunal or Arbitral Panel Adjudicating on the default, if any, to be referred to in the application, it was clear that, while pendency of a Suit or an Arbitral Proceeding must be termed as 'existence of a dispute', an order of the Court, Tribunal or Arbitral Panel, adjudicating on the default, should be treated as a "record of Operational Debt"; and in view of the provisions of law, and the mandate of the I&B Code, no person can take advantage of the pendency of a case under Section 34 of the 1996

Act to stall the Corporate Insolvency Resolution Process under Section 9 of the I&B Code.

A few days before the petitioners invoked the jurisdiction of this Court, by way of the present writ petition on 23.11.2017, the Arbitral Award, which formed the basis for the NCLT to appoint a Corporate Insolvency Resolution Professional, was stayed by the Civil Court on 20.11.2017, i.e on the very same day on which the NCLAT passed the order impugned in this Writ Petition.

Sri S.Ravi, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the Supreme Court, in **Mobilix Innovations** (1 supra), held that if there exists a dispute which is not a patently feeble legal argument or an assertion of fact unsupported by evidence, and as long as a dispute truly exists on facts and is not spurious, hypothetical or illusory, the Adjudicating Authority should reject the application; the very fact that a petition has been filed under Section 34 of the 1996 Act, and the Civil Court has granted stay, shows that there exists a genuine dispute, and the defence taken by the petitioner is not spurious, hypothetical or illusory; accepting the contention, urged on behalf of the 2nd respondent, that the Arbitral Award can form the basis for an application to be made by an Operational Creditor under Section 9 of the I&B Code, for appointment of an Insolvency Resolution Professional, would render Sections 34 and 37 of the 1996 Act redundant; and in which event, even if an Award is *ex facie* perverse, a corporate debtor would have to suffer an order of appointment of an Insolvency Resolution Professional resulting in its directors being ousted from the Management of the Company.

Sri S. Ravi, Learned Senior Counsel, would further submit that, among the consequences which may result on the appointment of an Insolvency Resolution Professional, that too one nominated at the instance of an Operational Creditor, is that the Insolvency Resolution Professional may not even question the Award based on which the jurisdiction of the NCLT has been invoked; as the Board of Directors of such a Company would, on an Insolvency Resolution Professional being appointed, be disabled from questioning the validity of the Award, that would result in a patently perverse Award attaining finality, without its even being subjected to challenge in proceedings under Sections 34 and 37 of the 1996 Act; the petitioners have Demand Drafts readily available with them for a sum of Rs.1.72 Crores, drawn in favour of the 2nd respondent, which he was willing to handover to Sri C. Subba Rao, learned counsel for the 2nd respondent, across the bar today; the total liability, even in terms of the Award which has since been stayed by the Civil Court, is around Rs.15 Crores; and apart from these Demand Drafts, of around Rs.1.72 Crores, the remaining amount of Rs.13.3 Crores, due in terms of the Arbitral award, would be secured by depositing the title deeds, (relating to the immovable property at Banjara Hills, Hyderabad belonging to Smt. K. Jyoti, wife of the Managing Director of the petitioner-Company and one of its shareholders), before the NCLT.

On the other hand Sri C. Subba Rao, learned counsel appearing on behalf of the 2nd respondent, would submit that, since Section 62(1) of the I&B Code provides for an appeal to the Supreme Court against the order of NCLAT, the Writ Petition as filed is not maintainable; Section 9 of the I&B Code, read with Paragraph V(3) of Form-5, requires the claim of the Operational Creditor to be supported either by an Award of the Tribunal or a Decree of a Civil Court; the application was filed, by the 2nd respondent before the NCLT, on the basis of the Award passed by an Arbitral Panel consisting of three Judges of this High Court; both the NCLT and the NCLAT were, therefore, justified in appointing an Insolvency Resolution Professional, more so when the petitioners has admitted its liability to the 2nd respondent for a sum exceeding Rs.1.72 Crores, and has chosen to avoid payment thereof on the specious plea that they have a counter claim against the 2nd respondent; in **Innoventive Industries Ltd., v. ICICI Bank & Anr**[2], the Supreme Court held that, once an Insolvency Resolution Professional is appointed to manage the Company, the erstwhile Directors cannot maintain an appeal on behalf of the Company; at best, such an application can be filed by the Directors in their individual capacity, and not by the Company itself; and the Writ Petition, filed before this Court, is liable to be dismissed in limini.

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[2] 2017 LawSuit (SC) 880

We must express our inability to agree with the submission of Sri C. Subba Rao, Learned Counsel for the 2nd respondent, that a Writ Petition, filed questioning the validity of the order of the NCLAT, is not maintainable as the power of judicial review conferred on this Court, under Article 226 of the Constitution of India, forms part of the basic structure of the Constitution **(L. Chandra Kumar v. Union of India[3]),** and cannot be negated or circumscribed even by a Constitution Amendment under Article 368 of the Constitution, much less by legislation - plenary or subordinate. The contention that, in all circumstances, the jurisdiction of this Court cannot be invoked against the order of NCLAT does not, therefore, merit acceptance.

That does not, however, mean that this Court would entertain a Writ Petition, against the orders passed by NCLAT, for the mere asking or as a matter of course. The jurisdiction which this Court exercises, to issue a Writ of Mandamus or a Writ of Certiorari, is discretionary, and one of the grounds on which this Court would refrain from exercising its discretion, to entertain a Writ Petition, is if the petitioner has an effective and efficacious alternative statutory remedy to challenge the validity of the order of the NCLAT.

Section 62(1) of the Insolvency and Bankruptcy Code, 2016, enables any person, aggrieved by the order of the NCLAT, to file an appeal to the Supreme Court on a question of law, arising out of such an order under the Code, within 45 days from the date of receipt of such an order. Section 62(2) of the I&B Code enables the Supreme

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[3] (1997) 3 SCC 261

Court, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within 45 days, to allow an appeal to be filed within a further period not exceeding 15 days.

While exercising its discretion on whether or not a Writ Petition, filed against the order passed by the NCLAT, should be entertained, this Court must bear in mind the provisions of Section 62(1) of the I&B Code which provides for an appeal to the Supreme Court on a question of law. The contentions put forth by Sri S. Ravi, learned Senior Counsel appearing on behalf of the petitioners, and Sri C. Subba Rao, learned counsel for the 2nd respondent, would undoubtedly constitute questions of law which the Supreme Court can be requested to examine on its jurisdiction being invoked under Section 62(1) of the I&B Code. We may not be understood to have held that mere existence of a remedy of an appeal, under Section 62(1) of the I&B Code, would automatically necessitate the High Court to exercise restraint, and refrain from exercising its discretionary jurisdiction under Article 226 of the Constitution. Suffice it to make it clear that the High Court should bear in mind, the existence of a Statutory remedy of an appeal to the Supreme Court under Section 62(1) of the I&B Code, in considering whether or not to entertain a Writ Petition wherein the validity of the order of the NCLAT is under challenge.

The affidavit, filed in support of the Writ Petition, makes no mention as to why the statutory remedy of an appeal to the Supreme Court, under Section 62(1) of the Code, is not effective or efficacious.

On the other hand, the petitioner has asserted, in paragraph 13 of the writ affidavit, (evidently erroneously), that they are left with no other efficacious remedy except to approach this Court under Article 226 of the Constitution.

As it has not been disputed before us that the petitioner has the remedy of an appeal to the Supreme Court under Section 62(1) of the I&B Code, and as no reasons are stated in the Writ affidavit as to why the petitioner has chosen not to invoke the appellate jurisdiction of the Supreme Court under Section 62(1) of the I&B Code, instead of invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, we see no justification in exercising our discretion, under Article 226 of the Constitution, to entertain this Writ Petition. Suffice it to make it clear that the order now passed by us shall not disable the petitioner from availing their statutory remedy of an appeal, under Section 62(1) of the I&B Code, to the Supreme Court.

Subject to the aforesaid observations, the Writ Petition fails and is, accordingly, dismissed. No costs. Miscellaneous petitions, if any pending, shall also stand dismissed.

RAMESH RANGANATHAN, ACJ

GUDISEVA SHYAM PRASAD, J

04th December, 2017
Note: Issue C.C. in 3 days
(B/o) KSM

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