

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : February 07, 2017*
Judgment Delivered on : February 09, 2017

+ **CO.APP.17/2016 & CM Nos.35077/2016,**
4338-39/2017, 4929/2017 & 4931/2017

ASSOTECH LTD. Appellant

Represented by: Mr.Atul Nanda, Sr.Advocate
instructed by Mr.Keshav Mohan,
Mr.Rajat Farar and Mr.Piyush
Choudhary, Advocates

versus

MANMOHAN SINGH BHALLA & ANR Respondents

Represented by: Ms.Neelam Rathore, Advocate with
Mr.Maninder Singh, Advocate
for R-1
Mr.Punit K.Bhalla, Advocate for
ICICI Bank
Mr.Sanjeev Sindhwani, Sr.Advocate
instructed by Mr.Sanjay Dher,
Advocate for applicant
Mr.Rajiv Bahl, Advocate for Official
Liquidator

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

CM No.35077/2016

Allowed subject to just exceptions.

CM No.4338-39/2017

Allowed subject to just exceptions.

Co.A.17/2016 & CM No.4929/2017 & 4931/2017

1. Orders dated February 08, 2016, February 26, 2016, March 23, 2016, April 21, 2016, May 05, 2016 and August 08, 2016 passed by the learned Company Judge are impugned in the instant appeal.
2. Taking cognizance of five company petitions seeking winding up of the appellant, the learned Company Judge noted that cheques issued by the company totaling more than ₹4 crores given to the five petitioners had been dishonoured. An FIR had been registered for offences of cheating and misappropriation against the Managing Director of the company by the Economic Offences Wing of the Delhi Police. The first Company Petition No.357/2015 was admitted. The Official Liquidator attached to the court was appointed as the Provisional Liquidator. The Directors of the company were directed to file the statement of affairs within 21 days.
3. CA No.748/2016 was filed by the appellant in which prayer made was to keep in abeyance the order dated February 08, 2016 with further prayer that the Official Liquidator be directed to de-seal the office premises of the appellant. It was pleaded in the application that the appellant had finalized a deal for sale of one its immovable property to generate funds to meet immediate requirements of the creditors. The said application was listed before the learned Company Judge on February 26, 2016 and notice thereof was issued to the petitioner returnable for March 23, 2016. Another Company Application No.1043/2016 came to be filed and along with the previous applications was listed before the learned Company Judge on March 23, 2016. The learned Judge noted that as per the application on

November 02, 2016 a written agreement was entered into between the petitioner of CP No.357/2015 and the appellant company. The learned Company Judge noted that there were a large number of creditors of the appellant and thus a piecemeal approach qua a few creditors would not be the appropriate course of action to be permitted by the Court to be adopted by the appellant. The learned Company Judge recorded in the order : *‘Having regard to the above, it is quite clear that the applicant/respondent may have to formulate a scheme of compromise/arrangement with the creditors, which will not only involve the claim of the non-applicant/petitioner in the accompanying company petition but in other petitions as well that are also listed on the board today as item Nos.1,2,3,5 and 6, being : CP NOs.357/2015, 362/2015, 363/2015, 433/2015, 434/205, respectively’*. Thereafter statement made by learned senior counsel for the appellant was recorded to the following effect *‘Having regard to the above, the matter is stood over till 21.4.2016. Mr.Sikri says that he will take requisite steps in that behalf, which would include filing of an application for compromise/arrangement with the creditors, and an application, whereby, notice could be issued to the concerned secured creditors qua the immovable properties (including the aforementioned property), which the respondent/applicant seeks permission to sell in order to pay off the creditors’*. The matter was re-notified for April 21, 2016. The order dated April 21, 2016 simply re-notified the proceedings to July 20, 2016. It appears certain applications seeking interim relief were filed and were listed before the learned Company Judge on May 05, 2016. Proceedings thereafter reached the date August 08, 2016. The order passed on said date records that the petitioner of CP No.357/2015 prayed for the petition filed by him,

seeking winding up of the appellant, to be disposed of in terms of a settlement. The settlement concerns a flat. The learned Company Judge has recorded that the Provisional Liquidator had already been appointed and the properties of the appellant company were vested in the Official Liquidator. The learned Company Judge recorded that the Official Liquidator would ensure that all property of the company are taken possession of. Concerning the settlement in terms whereof CP No.357/2015 was desired to be disposed of by the petitioner thereof and the appellant company the learned Judge declined to accept the request.

4. A perusal of the prolix appeal spanning 41 pages, would evince that challenge to the order dated February 08, 2016 is premised on the fact that merely because a cheque issued by the appellant company has been dishonoured would not ipso facto make liable the appellant company to be wound up and that the learned Company Judge gravely erred in admitting CP No.357/2015 and appointing Official Liquidator attached to the Delhi High Court as the Provisional Liquidator.

5. It is pleaded by the appellant that it has settled its dues with 80% of the creditors and with all family members and associates of the petitioners of the five company petitions which were listed before the learned Company Judge when CP No.357/2015 was admitted. Appellant pleads that once it had settled the dispute with the petitioners of the five company petitions, and all of them had agreed for the company petitions to be disposed of in terms of the settlement, the learned Company Judge ought not to have adjourned the matter, calling upon the Official Liquidator to proceed ahead to take charge of the properties of the company. It is pleaded that the balance sheet of the appellant company shows enough surplus reserve to meet the

liabilities. The appellant company had been earning profits and declaring dividends. It is pleaded that there are thousands of employees directly and indirectly employed by the appellant, which has sold thousands of flats/apartments to buyers and that the appellant is on the verge of finishing several thousand flats.

6. From the averments made in the appeal, and we pick on the expression used by the appellant itself : "*there are thousands of flats nearing construction*" would mean that the appellant company has to satisfy its commitments to a large number of investors and the number is in thousands.

7. The directors of the appellant company had filed a statement of affairs before the Provisional Liquidator on May 23, 2016. As per the said statement of affairs, the appellant has cash in hand in sum of ₹38,62,836/-. This money has not been deposited with the Official Liquidator. Trade debtors, without names or addresses, have been indicated as liable to pay to the appellant company ₹47,40,55,436/-. Loans and advances recoverable by the appellant company have been shown to be ₹211,48,64,886/-. Names or addresses of the parties to whom the loans and advances have been paid have not been provided. Immediately not recoverable loans and advances by the appellant company, without any particulars, have been shown in sum of ₹149,88,92,970/-. Value of plant and machinery has been shown as ₹4,66,44,407/- without indicating the details or the location thereof. Fixtures and furniture have been valued at ₹42,23,185/- without indicating where they are lying. Investments and marketable securities estimated to be realized have been quantified at ₹84,18,16,575/- without providing the address of the party with whom the investments have been made and from whom the securities are recoverable. Value of the vehicles statedly owned

by the appellant is shown at ₹47,91,107/-. No particulars of the vehicles have been disclosed. FDRs in sum of ₹2,18,97,051/-, without indicating with whom the deposit(s) has been made have been disclosed. Estimated value of realizable assets including work in progress have been shown in sum of ₹191,76,68,180/-. Liability towards secured creditors has been disclosed at ₹137,07,13,602/-.

8. In our opinion, the appellant cannot challenge the order dated February 08, 2016 by filing the instant appeal much beyond limitation without seeking delay to be condoned in challenging the said order. That apart, the further orders passed in the company petition and the Company Applications filed by the appellant before the learned Company Judge show that the appellant did not dispute the debt due to the five company petitioners, evidenced by the fact that the appellant proceeded to negotiate and enter into settlement with the five company petitioners. Similarly the appellant started entering into settlements with a few other petitioners of company petitions which were filed, but not all.

9. The record of the instant appeal would show, and we highlight that it is the case of the appellant itself, that it had entered into settlement agreement with 14 other petitioners who had filed company petitions seeking winding up of the appellant. It is the case of the appellant that it is actively negotiating to settle the disputes with 8 other petitioners who have likewise filed the company petitions. We find that the appellant filed an affidavit on July 19, 2016 bringing to the notice of the learned Company Judge the endeavours made to settle the claims of the creditors.

10. The conduct of the appellant before the learned Company Judge is clearly indicative of the appellant acquiescing in the order admitting the

winding up petition and proceeding to settle the disputes with a number of creditors. This itself establishes that the appellant company is heavily in debt.

11. Learned Senior Counsel for the appellant urge that merely because the appellant is in debt would be no ground to wind up the appellant if it otherwise is a viable company. We have serious doubts on that. From the statement of affairs filed, the manner of giving the information is prima-facie suggestive of diversion of funds.

12. This takes us to CM No.4931/2017 and CM No.4929/2017 filed on behalf of J.S.R.M. Estates Pvt. Ltd. The pleadings in the applications evinces that the appellant had agreed to sell a flat at its group housing project called Celest Towers to the applicant for which the appellant took ₹1 crore. The appellant had agreed to re-purchase the flat by paying to the applicant ₹1,23,88,972/- and for which had issued post-dated cheques. Appellant failed to give possession of the flat. Disputes arose. The applicant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 in which a settlement was arrived at requiring the appellant to pay to the applicant a sum of ₹1,34,00,022/-. Post-dated cheques to clear the agreed liability were issued. The first two cheques were dishonoured by the bankers. The settlement agreement had failed. This was much before the petition for winding up against the appellant was admitted. Since the Managing Director of the appellant had given an undertaking a contempt petition was filed in which an assurance was given that the payment would be cleared. Till date the payment has not been made.

13. There was another person who had likewise approached a learned Single Judge of this Court on the Original Side under the Arbitration and

Conciliation Act, 1996, in which proceedings the appellant paid ₹65,88,986/-.

14. We note aforesaid facts to bring home the point that a scramble appears to have commenced by the persons who had paid money to the appellant and booked flats.

15. Reports filed by the learned Official Liquidator before the learned Company Judge would evince that the learned Liquidator was unable to take possession of many flats on April 28, 2016 because he found the same to be occupied but no occupant could show a document evidencing the flat occupied, to be formally transferred by the appellant to the person in possession. This reinforces the prima-facie view taken by the learned Company Judge on February 08, 2016 that there was a grave and credible apprehension that the assets of the appellant may be imperiled.

16. Since proceedings are pending before the learned Company Judge we do not intend to return any determinative finding but suffice to state that from the aforesaid facts noted it appears those who were in charge of the affairs of the appellant have much to explain. There are traces of the funds being siphoned off.

17. That apart, the appellant cannot be permitted to satisfy the claims of a few creditors on preferential basis, for if the assets fall short it would mean a large number of unsecured creditors being left high and dry.

18. Surprisingly, in the appeal, the appellant itself has pleaded that the learned Company Judge had directed the appellant to formulate a scheme of compromise/arrangement with other creditors and if such a scheme was filed the learned Judge would consider removing the Provisional Liquidator. The appellant did not file any scheme but chose to selectively settle the disputes

with a few creditors. During arguments in appeal Sh.Atul Nanda, learned Senior Counsel for the appellant, had requested us to defer hearing of the appeal to enable appellant to file a scheme of compromise/arrangement with the other creditors. The appellant is free to do so before the learned Single Judge.

19. The facts which we have noted, which emanate from the statement of affairs filed by the directors of the appellant do not warrant any of the impugned order to be set aside in appeal. The debts owned by the appellant are much. The rosy picture painted in the balance sheet, is not so rosy. The situs of the assets of the appellant is not known. The persons who have to pay money to the appellant are unknown as of today. The persons with whom deposits have been made are unknown today.

20. As regards the interim applications filed we decline relief for the reason any direction by way of an interim order to honour the settlement which the directors of the appellant have entered into after the Provisional Liquidator was appointed would require either payments to be made or flats to be handed over to the persons with whom the appellant through its directors has entered into a settlement and this would prima-facie amount to a preferential payment to an unsecured creditor. We dismiss the appeal and CM Nos.4929/2017 and 4931/2017 for the reason compromise orders obtained by the applicants would be in the nature of a decree and the applicants are free to file applications before the learned Company Judge seeking permission to institute execution proceedings. The usual mantra.

21. The facts noted by us are for purposes of deciding the appeal and by no means would be treated as conclusive of the liability of the appellant. Observations made are a prima-facie view expressed and nothing more.

22. The appellant which is under provisional liquidation cannot be now represented by any of its ex-Directors and no settlement or undertaking by any ex-Director would bind the appellant company.

23. It would be open to the ex-Directors of the appellant company to file a comprehensive scheme of arrangement disclosing therein all the admitted creditors of the company and such particulars of the debt which the appellant admits. The proposal would indicate the manner in which the dues of the creditors are proposed to be liquidated.

24. All interim order passed in the appeal are vacated.

25. No cost.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

FEBRUARY 09, 2017
rk