

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON: 05.02.2018

ORDER PRONOUNCED ON:15.02.2018

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CORAM:

Application No.327 of 2018
in CS No.65 of 2011

Falcon Tyres Limited,
K.R.S. Road, Metagalli, Mysore, Karnataka,
Pin Code 570 016, Rep by 'Insolvency Resolution Professional',
Anand Ramachandra Bhatt, [registration
No.IBBI/IPA-001/IP-P00467/2017-2018/10810]
No.81,8th Main, 8th Main Kumara Park West,
Serpentine Road, Bangalore 560 020
appointed by the Hon'ble National Company Law Tribunal ['NCLT']
Bengaluru Bench, in CP (IB) No.01/BB/17 dated 30/08/2017
... Applicant

1. Geodis Overseas Private Limited (India)
Rep by its director, Industrial Project South India,
2B & C, Ega Trade Centre, 318 Poonamallee High Road,
Kilpauk, Chennai 600 010 [Now at Dowlath Tower, 12th Floor
Nos.59, 61 and 63, Taylors Road, Kilpauk, Chennai 600 010.
2. Falcon Tyres Limited,
Rep by its Authorized Signatory, R.Venkatesh
K.R.S.Road, Metagali, Mysore, Karnataka, Pin Code 570 016.
3. Maersk India Private Ltd CFS Division,
Rep by its Director, Prince, 25/26,
Prince Towers, 1st floor, Nungambakkam,
Chennai 600 034, Tamil Nadu
4. Mr.C.Manickam, District Judge (Retd.)
22, 1st floor, Raj Enclave, Lakshmi Nagar, 6th Street,

Jalladianpet, Medavakkam, Chennai 600 100
[appointed as the 'Commissioner' pursuant to the Hon'ble Madras High Court's order dated 08/02/2017 in A.No.341 of 2017 in A.No.5304 of 2015 in A.No.4318 of 2011 in CS.No.65 of 2011]

Application is filed under Order XIV Rule VIII of O.S.Rules read with Section 151 of the Code of Civil Procedure, praying to take on record the order dated 30/08/2017 in CP (IB) No.01/BB/17 passed by the Hon'ble National Company Law Tribunal, Bengaluru Bench, and consequently, stay all further proceedings in and pursuant to C.S.No.65 of 2011 on the file of this Court pending culmination of the insolvency resolution proceedings pursuant to the order dated 30/08/2017 in CP (IB) No.01/BB/17 of the National Company Law Tribunal, Bengaluru Bench.

For Applicant : Mr.K.F.Manavalan

For 1st Respondent: Mr.APS.Ahluwalia, Asst. by
Mr.Jhender Mehta & Mr.Kaushik

ORDER

This application has been filed by the plaintiff in CS No.65 of 2011 represented by the Insolvency Resolution Professional, Sri. Anand Ramachandra Bhatt, who has been appointed as such by the National Company Law Tribunal, Bengaluru Bench, in CP(IB) No.01/BB/17 dated 30.08.2017, seeking to record the factum of appointment and to stay all further proceedings in CS No.65 of 2011, pursuant to the earlier orders of this Court, on the ground that the proceedings cannot go on in view of the

bar created, under Section 14 read with Section 238 of the Insolvency and Bankruptcy Code 2016.

2. This case has a chequered history. The original suit in CS No.65 of 2011 was filed by M/s. Falcon Tyres Limited, a Limited Company seeking the following reliefs:

- a) grant mandatory injunction directing the defendants to clear the 87 units covered by 9 invoices under 9 EPCG licences as per schedule to be released from CFS immediately upon payment of custom duty by the Plaintiff;
- b) for a mandatory injunction directing the First Defendant to pay all the detention charges and demurrage till the date of release to the 2nd defendant and other statutory bodies so that the 87 containers can be released from CFS.
- c) Permanent injunction restraining the first defendant herein by itself, or its assigns or any person claiming through or under it, claiming any lien, charge, security on the 87 units as per schedule for the amounts outstanding;
- d) A permanent injunction restraining the second defendant from disposing or auctioning the cargo covered by the 9 invoices under the nine licenses as per schedule and

e) for costs.

3. It appears that several interlocutory applications were taken out in the suit for injunction restraining the 1st defendant, viz. M/s.Geodis Overseas Pvt. Ltd. (India) from encashing the Bank guarantees executed by the plaintiff. Several orders were passed from time to time by this Court. The earliest of the orders passed was on 21.04.2011 in OA No.87 of 2011 and Application No.1397 of 2011. The original application in OA.No.87 of 2011 was filed seeking an order of injunction directing the respondents/defendants to clear 87 units covered by 9 Invoices under 9 EPCG licences as per Schedule to be released from CFS immediately upon payment of customs duty by the plaintiff. Application No.1397 of 2011 was filed by the 1st defendant in the said suit seeking to vacate the interim order granted on 28.01.2011 in Original Application No.87 of 2011. A common order was passed in the said applications and this Court had issued the following directions in the said common order.

“31. Hence, the applications are disposed of with the following directions :

(i) Within a week from today, the first defendant shall file necessary documents before the Customs Department and have the machinery covered by all the nine invoices and the 87 units of

machinery, assessed to duty, including anti dumping duty, if any. The representative of the plaintiff shall also be associated with this process, so that immediately upon the assessment being completed, the plaintiff comes to know of the liability.

(ii) Within a week from the date of assessment by the Customs Department, the plaintiff shall directly pay the duty levied by the Customs Department, including the anti dumping duty as demanded by them, without prejudice to their right to establish before the Customs Department that anti dumping duty was not leviable in respect of some of the machinery and also without prejudice to their contention that it is the sole responsibility of the first defendant to pay the excess anti dumping duty. If the plaintiff succeeds in their claim before the Customs Department, they would get refund of the excess duty paid, directly from the Customs Department. If the plaintiff fails in their claim for refund, they are at liberty to seek amendment of the plaint, so as to seek recovery of the excess duty paid, if such payment was attributable to any mistake on the part of the first defendant. It will then be open to the first defendant to contest such a claim on the ground that there was no mistake on their part.

(iii) After the payment of the customs duty and anti dumping duty by the plaintiff, the first defendant shall obtain necessary certificates from the Customs Department, for production to the liner and/or to the second defendant, so that the cargo can be cleared;

(iv) *Within a week from today, the first defendant shall pay the entire detention and other charges to the liner and obtain a valid delivery order in original.*

(v) *Within a week of procuring the delivery order from the liner, the first defendant shall submit the other documents such as Bill of Entry, Examination Order and the relevant certificates from the Customs Department, to the second defendant and also pay the entire demurrage charges as claimed by the second defendant. Immediately thereafter, the first defendant shall de-stuff the containers and arrange to dispatch them to the location at which the cargo was to be delivered by the first defendant, as per their original contract.*

(vi) *Within a week from today, the second defendant shall surrender the fixed deposit receipt handed over by the plaintiff in pursuance of the orders passed on 28.1.2011, to the Registrar General. The Registrar General shall sign the necessary discharge or make necessary endorsement on the original fixed deposit receipt and hand over the same to the counsel for the first defendant, upon the counsel for the first defendant producing proof (a) that the Customs Department had cleared the cargo (b) that the liner has issued valid delivery order and (c) that the second defendant as well as J.M.Baxy and Co., and GDL had released the entire cargo of 87 units covered by 9 invoices, for transportation by road to the factory of the plaintiff;*

(vii) After getting a delivery order from the liner and after getting the cargo released from the second defendant, the first defendant shall file a memo into Court, after serving a copy upon the counsel for the plaintiff indicating the total expenses incurred by the first defendant towards detention charges and demurrage;

(viii) Within a week from the date of service of such a memo, by the first defendant upon the counsel for the plaintiff, the plaintiff shall deposit into Court, an amount equivalent to 50% of the amount indicated in the memo filed by the first defendant. If the plaintiff fails to deposit the said amount, the first defendant will have a lien over the cargo and will have a right to approach this Court for its sale by way of public auction and the realisation of the money. If the money is so deposited by the plaintiff, it would be open to the first defendant to seek payment out of the said amount, subject however to the right of the plaintiff to amend their claim in the plaint, so as to seek recovery of the said amount;

(ix) To facilitate the parties to understand the obligations imposed upon each one of them, it is clarified that I have made the plaintiff liable to pay the entire anti dumping duty in the first instance and proceed against the first defendant for recovery of the same by seeking amendment of the plaint, in case they are not able to get refund of the same from the Customs Department. Similarly, I have made the first defendant liable to make payment of the entire amount of detention charges and demurrage in the first instance so that the cargo is cleared and made available for

transportation to Mysore. But, I have made the plaintiff to deposit 50% of these charges, after the clearance of the cargo, so that the loss on this account is shared by both parties in equal proportions for the present, with liberty to the plaintiff to amend the pleadings and with liberty to the first defendant to make a counter claim for the remaining half. No costs.”

4. It is not in dispute that pursuant to the said order, the defendant in the suit parted with the sum of Rs.6,10,85,913.96 towards accumulated demurrage and detention charges as per the directions of this Court made in the order dated 21.04.2011. It is also not in dispute that the plaintiff in the suit, which was directed to pay 50% of the said amount, amounting to Rs.3,05,42,956.98 had not come forward to pay the said sum despite demands made by the defendant. In view of the nonpayment, the first defendant in the suit filed application No.4318 of 2011 in this Court to attach the cargo lying in the factory premises of the plaintiff, bring the same to the custody of the Court and to sell the same for realization of the dues as per the order dated 21.04.2011.

5. This application was essentially one for enforcement of the lien created in favour of the defendant by this Court in Paragraph 31.(viii) of the order dated 21.04.2011. This Court, after hearing the parties, passed the following order on 04.07.2012:

“16. In the result, this application is ordered by directing the plaintiff to deposit Rs.3,05,42,956.98 within one week from the date of receipt of this order, failing which the cargo lying at the factory premise of the plaintiff at K.R.S.Road, Metagali, Mysore, Karnataka shall stand attached and be brought to the custody of this Court to be brought for public auction and the amount due to the plaintiff under the order, dated 21.04.2011, shall be realized from and out of the amount realized through public auction and the balance sum, after defraying the expenses for attachment and for bringing the same into the custody of the court and for conducting the public auction shall be deposited to the credit of the suit. This petition is accordingly ordered.”

6. An appeal filed against the order dated 04.07.2012 in OSA No.296 of 2011 was also dismissed as withdrawn on 24.09.2012. In the mean time, this Court by an order dated 13.08.2012, directed the plaintiff/1st respondent, viz. Falcon Tyres Limited to deposit a sum Rs.3,05,42,956.98 to the credit of the suit in CS No.65 of 2011 within one week from the date of receipt of the copy of the order and also further directed that in default of depositing the amount within time as mentioned in Clause (1) supra, the cargo lying at the factory premises of the plaintiff/1st respondent at Mysore, shall stand attached and the amount due to the 1st defendant, under the order dated 21.04.2011 will be realized by sale of the property attached

through public auction.

7. While things stood thus, Central Bank of India, claiming to be a secured creditor filed two applications in the nature of claim petitions in Application Nos.1192 and 1193 of 2013 seeking to raise the attachment order passed by this Court on 13.08.2012. Those applications were dismissed by this Court holding that the claim of the Bank is unnecessarily and designedly delayed. The said order of dismissal has become final. The plaintiff, viz. Falcon Tyres Ltd., filed OA No.821 of 2015 and A No.5304 of 2015 seeking an interim injunction restraining the 1st defendant in the suit M/s.Geodis Overseas Pvt. Ltd., from dismantling or removing the machineries and for modification of the order dated 13.08.2012, by including the words "such machinery as may be necessary for fetching the sum of Rs.3.5 Crores", which was directed to be deposited by this Court. These applications were disposed of this Court on 04.09.2015, based on the agreement of parties as follows:

4. After serious arguments, the parties agreed for extension of time as follows:

The applicant/plaintiff is directed to deposit the sum, as above mentioned, in three instalments and the first instalment of Rs.1,00,00,000/- shall be deposited on or before 30.11.2015. The second instalment of Rs.1,00,00,000/- shall be deposited on or before 01.02.2016 and third instalment of

Rs.1,05,42,956/- on or before 31.03.2016. On the failure of the applicant/plaintiff to comply with the payment of instalments, as stated above, 17 items, as mentioned in the list of machineries submitted by the applicant/plaintiff, shall be brought for sale and after defraying the expenses for attachment and for bringing the same into the custody of the Court and for conducting the public auction the balance sum shall be deposited to the credit of the suit C.S.No.65/2011 and the amount due to the first defendant shall be realised from and out of such amount in terms of the earlier orders. If there is any short fall, it shall be deposited by the applicant/plaintiff, failing which, the earlier order for bringing other properties for sale shall prevail.

8. It is conceded at the bar that this consent order was also not complied with. Hence, the 1st defendant in the suit, viz. Geodis Overseas Pvt Ltd., filed an application in Application No.341 of 2017 with a prayer to appoint a retired District Judge or such other person as deemed fit as a Commissioner to auction the attached machinery. This Court, by an order dated 08.02.2017, appointed a retired District Judge to be the Commissioner. Thereafter, the Commissioner had sought for certain directions before this Court, directions were issued by this Court with regard to the valuation as well as the publication of notices of auction. Those aspects are not very germane to the present relief sought for in the

application which is now under consideration.

9. While things stood thus, the present application has been filed by Mr.Anand Ramachandra Bhatt stating that he has been appointed as a Insolvency Resolution Professional by NCLT at Bengaluru, on such appointment the moratorium prescribed under Section 14 of the Insolvency and Bankruptcy Code 2016, had come into force and therefore, all proceedings against the corporate debtor, viz. M/s.Falcon Tyres Ltd., will have to be suspended for a period of 180 days from the date of its appointment i.e., 30.08.2017.

10. I have heard Mr.K.F.Manavalan, learned counsel appearing for the applicant and Mr.APS.Ahluwalia, Senior Counsel assisted by Mr.Jhender Mehta & Mr.T.N.C.Kaushik, learned counsels appearing for the 1st defendant M/s.Geodis Overseas Pvt. Ltd. (India)

11. Mr.K.F.Manavalan, learned counsel appearing for the applicant would refer to Sections 13 and 14 of the Insolvency and Bankruptcy Code, 2016, and contend that once the Adjudicating Authority, viz. the National Company Law Tribunal, Bengaluru, admits an application under Section 7 or Section 9 or Section 10 of the said Code, it is obliged to declare a

Moratorium for the purposes refer to Section 14 and in view of the mandatory provisions of Section 14 all proceedings against the Corporate Debtor will stand prohibited. Section 14 of the Insolvency and Bankruptcy Code, 2016 reads as follows:

“14. Moratorium. -

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

*(a) the institution of suits or continuation of pending suits or **proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;***

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

12. Relying on Section 14 as well as Section 238, which provides that

the provisions of the Insolvency and Bankruptcy Code, 2016, will have an overriding effect on any other Law that is time being in force. Mr.K.F.Manavalan would submit that this court has no other option but to stay further proceedings.

Section 238 of the Code reads as follows:

“238. Provisions of this Code to override other laws-

The provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

13. Contending that the language of Section 14 is so wide that it encompasses within itself all kinds of proceedings including proceedings for execution of a decree or order, Mr.K.F.Manavalon would submit that the proceedings that are now before this Court are essentially proceedings for enforcement of the lien as per the order dated 21.04.2011. Mr.K.F.Manavalon would also rely upon the judgment of the Hon'ble Supreme Court reported in ***M/s.Innoventive Industries Ltd., v. ICICI Bank and Another***, wherein the Hon'ble Supreme Court had discussed the effect of Moratorium and while considering the repugnancy between the Maharashtra Relief Undertakings (Special Provisions) Act, 1958 and the

Insolvency and Bankruptcy Code 2016, the Hon'ble Supreme Court had at paragraph 55 of the said judgment observed as follows:

“55. It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further,

the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of [Article 254 \(1\)](#), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment. Also, [Section 238](#) of the Code reads as under:

Sec. 238. Provisions of this Code to override other laws.-

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under [the Code](#).”

*“It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of matters contained in Section 4(i), **the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course.**”*

14. The submission of Mr.K.F.Manovalan is that once an Insolvency Resolution Professional has been appointed by NCLT and NCLT has declared the moratorium as required under Section 14(1) of the Act, the moratorium will apply an all fours and no proceeding which will be covered by Section 14 can be either initiated or continued for a period of six months from the date of the said order or within the extended period, if there is an extension.

15. Per contra, Mr.APS.Ahluwalia, learned Senior Counsel appearing for the respondent would submit that what is being done is only done pursuant to the orders of this Court and the proceeding that is now pending is not a proceeding in execution of a decree or order. Therefore, according to him the moratorium will not apply to the proceedings in this suit. He would also contend that as much as the original proceeding is not initiated against the corporate debtor the moratorium contemplated under Section 14 will not be attracted. It is his further case that once a lien has been created over the property of the corporate debtor, the Court will be entitled to enforce the lien *de hors* the moratorium.

16. I have considered the rival submissions. At the outset, it should be pointed out that this case presents a situation where this Court has to

choose between a person who has expended monies pursuant to the orders of this Court on a firm belief that he would be paid back the monies either by the plaintiff or by sale of the property of the plaintiff and a persistent defaulter which has flouted the orders as well as its own undertakings. It is almost 7 years now since the 1st order was passed on 21.04.2011 by Hon'ble Mr. Justice V.Ramasubramaniam.

17. It is rightly pointed out by Mr.APS.Ahluwalia, learned Senior Counsel appearing for the respondent/defendant in the suit that the respondent/defendant has obeyed all the orders of this Court and therefore he cannot be penalized for obeying the orders of this Court. The sum and substance of the contentions of Mr.APS.Ahluwalia, learned Senior Counsel is that having obeyed the orders under the firm belief that it would get back the money spent by it, the respondent cannot be made to wait till the conclusion of the Insolvency Resolution process. All that this Court can do in the present situation is only to sympathize with the 1st respondent/defendant. A bare perusal of the earlier orders passed by this Court would show that the plaintiff in the suit M/s.Falcon Tyres Ltd., is a consistent and willful defaulter. But, in view of Section 14 of the Code, this Court is denuded of the power to proceed against the properties of a consistent defaulter also.

18. The language of Section 14 leaves no room for doubt that the proceedings contemplated under Clauses (a) to (d) of Subsection (1) of Section 14 would include any proceeding for recovery against the corporate debtor. Even proceedings initiated by a secured creditor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest, Act 2002, have been included under Sub Clause (c) of Sub Section (1) of Section 14. Therefore, I am unable to accept the submission of the learned Senior Counsel Mr.APS.Ahluwalia, that the present proceedings cannot be termed as proceedings within the meaning of Sub Clauses a, b, c and d of Sub Section (1) of Section 14. Mr.APS.Ahluwalia, learned Senior Counsel would also contend that by virtue of the lien created under the Order dated 21.04.2011, the property becomes answerable to the claims of the 1st respondent. Therefore the 1st respondent would be in the position of the secured creditor and hence these proceedings cannot be prohibited by the order of NCLT. A lien created over the property would not divest the ownership of the corporate debtor over the said property. Even claims of secured creditors are barred under Sub Clause (c) of Sub Section (1) of Section 14. Clause (d) of Sub Section (1) of Section 14 includes even proceedings of recovery of any property in possession of a corporate debtor by its owner or lessor. Apart from the wide language of Section 14, Section

238 of the Code gives an overriding effect to the provisions of the Act for any statute or any instrument having the force of the statute.

19. The Hon'ble Supreme Court has in ***M/s.Innoventive Industries Ltd v. ICICI Bank & Anr.***, cited *supra*, pointed out that the scope of moratorium created by Section 14 of the Code. Therefore, I do not think, I have any other option but to stay all further proceedings pursuant to the earlier orders in the suit and adjourn the suit till 16th April 2018.

20. In fine, the application in Application No.327 of 2018 is allowed and all further proceedings for sale of the machinery attached by the order of this Court dated 13.08.2012 will stand stayed, till the expiry of 180 days from 30.08.2017, or till such extended period as may be granted by the Adjudicating Authority, viz. The National Company Law Tribunal, Bengaluru.

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Index : Yes/No

Internet: Yes/No

Speaking Order/Non Speaking order

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Pre Delivery Order

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