IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on: 22.11.2018
Order Pronounced on: 21/12/2018

C O R A M

The Honourable Mr.Justice S.Manikumar
a n d
The Honourable Mr.Justice Subramonium Prasad

Civil Revision Petition Nos.3278, 4028, 4029 and 4065 of 2017
and CMP.15300,18825,18826,19065/2017

C.R.P.No.3278 of 2017

Infonet Asia Private Limited
rep. By its Director
74 Swamy Naicken Street
Cintadripet
Chennai 600 002. ...Petitioner

Vs

Autocap India Private Limited
82 Mohammedi House
Old Agra road
Mohammadbhai Esufali Compound
Renuka Nagar
Nashik
Maharashtra-422 001
...Respondent

Prayer in C.R.P.No.3278 of 2017: Petition filed under Article 227 of the Constitution of India against the order dated 28/8/2017 in C.P/536/(IB)/CB/2017 on the file of the Hon'ble National Company Law Tribunal, Chennai.

C.R.P.(PD) Nos.4028 of 2017 and 4029 of 2017

Sri Maruthi Electrical Enterprises
rep. By the Partner
Mr.E.Chandran
No.287 Second Main Road
Nehru Nagar, Kottivakkam
Chennai 600 096. ... Petitioner in
C.R.P.No.4028 of 2017

M/s. Satheeshlim Engineering Industries
rep. By Mr.M.Sachitathanandhan
No.1/174 Kamarajar Street
Thuraipakkam
Chennai 600 097. ... Petitioner in C.R.P.No.4029 of 2017

Vs

1. M/s. Jain Housing and Construction Limited
rep. By its M.D.Sandeep Kumar Mehta
High Gate, 8th and 9th Floor
No.82 D.G.S.Dhinakaran Salai
M.R.C.Nagar
Chennai 600 008.

2. Mr.Sandeep Kumar Mehta
Managing Partner
M/s. Jain Housing and Construction Limited
High Gate, 8th and 9th Floor
No.82 D.G.S.Dhinakaran Salai
M.R.C.Nagar
Chennai 600 008. ... Respondents in C.R.P.Nos.4028 and 4029 of 2017

Prayer in C.R.P.No.4028 of 2017: Petition filed under Article 227 of the Constitution of India against the order dated 11/7/2017 in T.C.P/307/(IB)/2017 on the file of the Hon'ble National Company Law Tribunal, Chennai. Bench

Prayer in C.R.P.No.4029 of 2017: Petition filed under Article 227 of the Constitution of India against the order dated 24/7/2017 in T.C.P/306/(IB)/2017 on the file of the Hon'ble National Company Law Tribunal, Chennai.Bench

C.R.P.(PD) No.4065 of 2017

M/s. A.K.M.G.Alloys Private Limited
rep. By its Managing Director
Mr.G.V.Ganesh Prabhu
Having its Registered office at
No.72 West car Street
Dindigul 624 001. ... Petitioner

Vs

Ogun Steel Rolling Mills Private Limited
Registered Office at III Floor
Excellence Building
No.104 Race Course
Coimbatore 641 018.

...Respondent

Prayer in C.R.P.No.4065 of 2017: Petition filed under Article 227 of the Constitution of India against the order dated 26/7/2017 in T.C.P.No.408 (IB) 2017 on the file of the Hon'ble National Company Law Tribunal, Chennai.Bench

For petitioner ... Mr.Naveen Kumar Murthi
(in C.R.P.No.3278 of 2017)

... Mr.M.Aravind Subramaniam
(C.R.P.Nos.4028, 4029 and 4065 of 2017)

For respondents ...

C O M M O N   O R D E R
(Order of the Court was made by Subramonium Prasad,J)

Instant Civil Revision Petitions are directed against an order, dated 28/8/2017, 11/7/2017, 24/7/2017 and 26/7/2017, passed by the National Company Law Tribunal, Chennai, in CP/536/(IB)/CB/2017, TCP/307/IB/2017, TCP/306/IB/2017 and TCP/408/(IB)/2017, respectively. Since all the Revision Petitions raise a common question regarding the maintainability of the Revision Petitions under Article 227 of Constitution of India, in the light of an Appellate remedy available to the petitioners under Section 61 of the Insolvency and Bankruptcy Code, 2016, all the Revision Petitions were heard together with the consent of the parties and a common order is being passed in all the Revision Petitions.

2. Facts in C.R.P.No.3278 of 2017 are as follows:-

a. The Revision Petitioner approached the respondent, to supply Facility Security Solution Products. Supply terms were finalised and verbal requests for supply of Facility Security Solution Products were made by the Revision Petition. The products were supplied by the respondent, under various invoices, under a running account. Supply of the material is duly acknowledged, by the petitioner, but the amounts have not been paid. Hence, notice, under Section 9 of the Insolvency and Bankruptcy Code, for recovery of Rs.30,99,237/-, with interest, at the rate of 10%, was issued to the Revision

Petitioner.

b. Since the amount was not paid despite notice, a petition, under the Insolvency and Bankruptcy Code, 2016, was filed by the respondent against the petitioner, for initiation of the Corporate Insolvency Resolution Process, under the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Chennai. The National Company Law Tribunal, Chennai, passed an order, dated 2/8/2017, and the operative portion of the order, reads as under:-

> "9. I declare the moratorium which shall have effect from the date of this order till the completion of Corporate Insolvency resolution process for the purposes referred to in Section 14 of the I & B Code, 2016. I order to prohibit 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 (54 of 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.
>
> 10. The supply of essential goods or services of the corporate debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-Section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.
>
> 11. It is pertinent to mention herein that the petitioner has not proposed the name of an IRP and prayed before the Adjudicating Authority to make a reference to the Insolvency and Bankruptcy Board of India (IBBI) for recommending the name of an IRP. Therefore, the Registry is directed to make a reference to IBBI

for recommending the name of an IRP.

c. Aggrieved against the abovesaid order, M/s. Infonet Asia Private Limited, has filed C.R.P.No.3278 of 2017.

d. When the matter came up for hearing, on 6/9/2017, this Court issued notice to the respondent, returnable in two weeks and further, directed the petitioner, to deposit a sum of Rs.3,00,000/- (Rupees Three lakhs only), on the payment of which, this Court, stayed the operation of the order, dated 28/8/2017, passed in CP/536/(IB)/CB/2017.

3. Facts in C.R.P.No.4028 of 2017 are as follows:-

a. First respondent Company, in C.R.P.(PD) No.4028 of 2017 had proposed, to construct a multistoried residential apartments, in the name of JIN Naksatra and Jain Palm & Meadows, for which Electrification was executed by the petitioner herein. Work orders were issued. Petitioner herein submitted a bill of Rs.8,97,665/-, which was not honoured.

b. A petition for winding up has been filed under the Companies Act, 1956, against the petitioner. On the advent of the Insolvency and Bankruptcy Code, winding up petition got transferred, to the National Company Law Tribunal, Chennai. A memo, dated 11/7/2017, was filed by the operation creditor. By an order, dated 7/6/2017, petitioner herein was directed to serve a copy of the petition, along with the documents relied upon to the respondent. On 21/6/2017, time was extended till 11/7/2017. Documents were not served, as provided, under Section 9 (3) (b) & (c) of Insolvency and Bankruptcy Code, 2016. Since the petitioner did not comply with the directions of the National Company Law Tribunal, the National Law Tribunal vide order, dated 11/7/2017, rejected the petition as under:-

> "Mr.R.T.Arivukumar, counsel for petitioner present. As seen from the orders dated 7/6/2017 and 21/6/2017 of this Bench, direction was given in both the orders to the petitioner to make compliance with the provisions of Section 9 (3) (b) (c) of I & B Code, 2016. However, after a lapse of more than one month, the petitioner has not complied with the said provisions of the Code. Therefore, in the light of the principles that has been laid down by the NCLAT in JK Jute Mills Co. Ltd Vs. Surendra Trading Co. in Company Appeal (AT) No.09 of 2017, dated 1st May 2017, the petition is rejected. The Registry is directed to send a copy of this order to the Operational Creditor and Corporate Debtor."

c. Being aggrieved, Sri Maruthi Electrical Enterprises has filed Civil Revision Petition No.4028 of 2017.

4. Facts in C.R.P.No.4029 of 2017 are as follows:-

a. Satheeshlim Engineering Industries/petitioner herein filed a petition, under Section 433 (e) (f) of the Indian Companies Act, 1956, against the respondent for winding up the respondent. The respondent was proposed to construct a residential complex, viz., Jain Spring Meadow. Petitioner herein was given the work of Electrification of Residential Complex, in Block Nos.1 to 5. A Bill of Rs.76,47,516/-, was given by the petitioner, to the respondents. Since the Company failed to make payments, a petition for winding up was filed by the petitioner against the respondents before this Court.

b. On 7/6/2017, after the winding of proceedings were transferred to the National Company Law Tribunal, National Company Law Tribunal, directed the petitioner to serve a copy of the petition, along with the documents relied upon to the respondent, within two days and also directed the respondent, to file counter, within seven days, thereafter. Counsel for the petitioner was further directed to file an affidavit and bank statement, as per Section 9 (3) (b) & (c) of Insolvency and Bankruptcy Code, 2016. On 21/6/2017 and 11/7/2017, extension of time was granted to the petitioner to serve copy of the affidavit and other documents to the other side and also to comply the statutory requirements.

c. Since no document has been filed, vide, order, dated 24/7/2017, the National Company Law Tribunal, Chennai, passed an order, and the same reads as under:-

> "Counsel for the petitioner present and submitted that he has not filed the affidavit and bank statement under Section 9 (3) (b) & (c) and other required statutory formalities to be complied as per IB Code, 2016. In view of the Notification, dated 29/6/2017 issued by the Ministry of Corporate Affairs, the matter stands abated."

d. Being aggrieved, M/s. Satheeshlim Engineering Industries, has filed instant C.R.P.No.4029 of 2017.

5. Facts in C.R.P.No.4065 of 2017 are as follows:-

a. AKMG Alloys Private Limited/petitioner had filed a winding up petition, under Section 433 (e) and (f) r/w. 434 (1) (a) and 435 (1) and (b) of the Companies Act, 1956, against the respondent, contending that the respondent is a customer of the petitioner and had been purchasing steel ingots from the petitioner Company, on regular basis, since May, 2012. It is stated in the winding up petition that a sum of Rs.1,16,64,783/-, as due and payable and that the respondent Company is unable to pay its debts. The matter was transferred to the National Company Law Tribunal. By an order, dated 10/7/2017, the National Company Law Tribunal, adjourned the matter to 26/7/2017.

b. Since the learned counsel for the petitioner has not filed the affidavit and bank statement, vide, order, dated 26/7/2017, the National Company Law Tribunal, Chennai, passed the following order:-

> "Counsel representing both the parties are present. Counsel for respondent pointed out that the mandatory requirements of IB Code, 2016 has not been complied by the petitioner. Counsel for petitioner stated that he has not filed the affidavit and bank statement and other required statutory formalities to be complied, as per the provisions of the IB Code, 2016 and sought time to file the same. The plea of the counsel is rejected. In view of the Notification dated 29/6/2017 issued by the Ministry of Corporate Affairs, the matter stands abated."

c. Being aggrieved, M/s. AKMG Alloys Private Limited, has filed C.R.P.No.4065 of 2017.

Heard the counsel for parties in all the Revision Petitions.

6. In all the petitions the respondents have raised a preliminary objection regarding maintainability of the petitions filed under Article 227 of the Constitution of India. It is submitted by the respondents that an order passed by the National Company Law Tribunal can be challenged by filing an appeal before the National Company Law Appellate Tribunal under Section 61 of the Insolvency and Bankruptcy Code which read as under:-

> "61. (1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.
> (2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:
> Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.
> (3) An appeal against an order approving a resolution plan under section 31 may be filed onthe following grounds, namely:-
> (i) the approved resolution plan is in contravention of

the provisions of any law for the time being in force;
(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
(v) the resolution plan does not comply with any other criteria specified by the Board.
(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."

7. On the other hand the learned counsel for the petitioners would state that the jurisdiction of the High Court under Article 227 of the Constitution of India cannot be taken away just because an alternate remedy is available. Reliance is placed on the judgment of the Hon'ble Supreme Court of India in the case of SURYA DEV RAI Vs. RAM CHANDER RAI AND OTHERS {2003 (6) SCC 675}, wherein at paragraph Nos.38 and 39, it has been observed as under:-

"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of

natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not

corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis. (emphasis supplied).

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where 'a stitch in time would save nine'. At

the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge."

8. This Bench has considered a similar question arising under the Companies Act, 1956, proceedings arising out of an application under Section 241 and 244 of the Companies Act dealing with oppression and mis-management in CRP.No.3739 of 2016. In that case against an interim order passed by the National Company Law Tribunal, Revision Petition under Article 227 of the Constitution of India was filed in this Court. In that case, like in the present case a preliminary objection was taken regarding the maintainability of the Revision Petition because of the Appellate remedy provided under Section 421 of the Companies Act. After examining the issue in detail, this Bench by a judgment dated 20.12.2018 refused to entertain the petition under Article 227 of the Constitution of India on the ground of the availability of the Appellate remedy. In the light of the judgment delivered in CRP.No.3739 of 2016 dated 20.12.2018, in the case of The Church of South India Trust Association Vs. John Dorai, since an alternate remedy in the form of an appeal under Section 252(3) of the Companies Act, 2013, is available against any order passed by the National Company Law Tribunal to National Company Law Appellate Tribunal. These Revision Petitions are dismissed. Needless to say that this Court has not expressed any opinion on the merits of the case.

9. In the result, Civil Revision Petitions are not maintainable and the same are dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To
1.The National Company Law Tribunal Bench at Chennai.
+1cc to Mr.S.Varsha, Advocate, S.R.No.89410
+2cc to Mr.M.Aravind Subramaniam, Advocate, S.R.No.89551 &89553
+1cc to Mr.M.Aravind Subramaniam, Advocate, S.R.No.89552
(11/03/2019)

Civil Revision Petition Nos.
3278, 4028, 4029 and 4065 of 2017

VD(CO)
GSP(25/02/2019)