BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.(MD) No.23334 of 2017

and

W.M.P.(MD) Nos.19625, 19626, 19627 of 2017 & 7464 of 2018

M/s.Sri Krishnakanth Textiles Pvt. Ltd.
Rep.by its Managing Director
N.Krishnakanth @ Balasubramanian
SF No.978/2E, Sirumalai Road
Dindigul - 624 003 ... Petitioner

vs.

1.The Registrar
The National Company Law Tribunal
Corporate Bavan, 3rd Floor
29, Rajaji Salai
Chennai-600 001

2.M/s.Vishnu Sudha Textiles
The Managing Director
32-E, K.R.P.P.Road
Pallipalayam
Erode - 638 006

3.S.Muthuraju
Insolvency Professional
No.3, Sundaram Brothers Lay Out
Opp. to All India Radio
Trichy Road, Ramanathapuram
Coimbatore - 641 045 ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorarified mandamus calling for the records of the Respondents resulting in the 1st Respondent's impugned exparte order dated 02.11.2017 passed against the petitioner in C.P.No.600/(1B)/2017 and Quash the same and forbearing the 3rd Respondent the Liquidator from in any way interfering with the day to day affairs of the Petitioner's Mill namely "M/s.Krishnakanth Textiles (P) Ltd., situated at SF No.152/1, Annai Vilas, Gandhi Nagar, Opp. to Government I.T.I., Natham Road, Dindigul District".

For Petitioner : Mr.V.R.Venkatesan
For Respondents : No appearance for R1
Mr.A.K.Mylsamy
for Mr.S.Vinoth for R2
Mr.S.Venkatesh for R3

ORDER

The petitioner herein is engaged in the business of Manufacturing and Selling of Polyester Yarn, Cotton Yarn etc. The second respondent is a Proprietary Concern engaged in Trading of Polyester Staple Fibre PC Yarn, Polyester Yarn, Cotton Yarn etc. The petitioner had approached the second respondent for supply of the above said materials and an agreement was entered into between them in that behalf. Thereafter, it appears that the second respondent had supplied Polyester Fibre Products to the petitioner and there appears to be a default in making payment by the petitioner to the second respondent in regard to the supply made to them.

2. In the above circumstances, the second respondent, being a Corporate Creditor, approached the first respondent - Tribunal seeking to initiate action for recovery of amount due to them from the petitioner. Since there was no fruitful response forthcoming from the petitioner in regard to the settlement of their liability, the second respondent had initiated proceedings, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short, "IB Code, 2016") read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, "IB Rules, 2016"), before the first respondent, for recovery of the amount due to them. The Adjudicating Authority, namely, first respondent appeared to have issued notices to the petitioner on number of occasions. As there was no response forthcoming from the petitioner herein, the Adjudicating Authority passed an order, dated 02.11.2017, allowing the application filed by the second respondent herein. The order, dated 02.11.2017, passed by the first respondent - Tribunal is self-explanatory and therefore, the same is extracted hereunder as found in Paragraph Nos.7 to 13:

> "7. *Before proceeding the matter, it is necessary to mention herein that the Respondent was set ex-parte vide order dated 02.11.2017 due to non-appearance on several occasions. The Respondent neither gave a reply to the Demand Notice dated 02.08.2017 nor filed any counter nor caused appearance before this Adjudicating Authority in spite of several notices. The petitioner has also placed on record proof of sending notices and deliveries. The Petitioner has complied with all the requirements as stipulated under the provisions of the I&B Code, 2016*

for the purpose of initiating Corporate Insolvency Resolution Process.

8. *After hearing submissions of the counsel for the petitioner and having perused the record, this Adjudicating authority is satisfied that the petitioner has clearly made out his case by establishing that the Corporate Debtor has defaulted the payment dues on various occasion to the petitioner. Also, the petitioner has proved by placing overwhelming evidence viz. Invoices, Demand Notice, financial transactions and Bank statements that default has occurred which the Corporate Debtor was responsible to pay. I am of the opinion that the petitioner has established clearly that the amount in default committed by the corporate debtor is genuine and is supported by the documentary evidence placed before this Adjudicating authority. In the circumstances, having satisfied with the submissions put forth by the learned counsel for the petitioner, I am inclined to admit the instant petition.*

9. *Therefore, the instant petition is admitted and I order the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within 180 days, reckoning from the day this order is passed.*

10. *I appoint Shri S.Muthu Raju as Interim Resolution Professional (IRP) proposed by the Operational Creditor. There is no disciplinary proceedings pending against the IRP and his name is reflected in IBBI website. The IRP is directed to take charge of the Respondent / Corporate Debtor's Management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I&B Code, 2016 within three-days from the date of the copy of this order is received, and call for submissions of claim in the manner as prescribed.*

11. *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 other 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.

12. 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.

13. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016. Accordingly, the application is admitted."

3. As against the order passed by the first respondent - Tribunal, dated 02.11.2017, the present writ petition has been filed by the petitioner.

4. Although initially the learned counsel appearing for the petitioner strenuously contended that there were valid and legitimate reasons for the petitioner remaining absent during the proceedings pending before the first respondent - Tribunal and thereafter, action was initiated to have the *ex parte* order set aside, as there was no provision in the IB Code, 2016 for setting aside the *ex parte* order, he had no option except to approach this Court by invoking its extraordinary jurisdiction under Article 226 of the Constitution of India.

5. At the time, when the writ petition was entertained, an interim order *status quo* was granted protecting the interest of the petitioner pending finalization of the writ petition.

6. Subsequently, on behalf of the third respondent, a petition to vacate the interim order has been filed stating that filing of the writ petition by the petitioner lacks *bona fides* and it was intended to drag the issue and to avoid the discharge of liability. According to the third respondent, the petitioner had abused the process of law by approaching this Court and invoking its writ jurisdiction. In fact, a detailed affidavit has been filed in support of the said petition as to the steps initiated by the third respondent, after the order, dated 02.11.2017, was passed by the first respondent. The averments, as contained in the affidavit filed on behalf of the third respondent from Paragraph Nos.3 to 6, are extracted hereunder:

> *"3. I submit that pursuant to the NCLT order dated 02.11.2017. I have made public announcement in the newspapers on 12.11.2017 one in English daily "Indian Express" and another in vernacular in Tamil daily "Dhinamani" and the same has been marked as "Annexure-I".*
>
> *4. I submit that as per section 21 of IBC, I had sent notices on 04.12.2017 to all the promoters and creditors of the company calling upon them to attend the first committee of Creditors meeting to be held on 11.12.2017 and the same is filed as "Annexure-II". On 11.12.2017 aforesaid meeting as convened none appeared on behalf of the promoters and minutes of the said meeting was recorded and the same is filed as "Annexure-III". Apart from the above facts, Sri Krishnakanth did not extend co-operation under section 19 of the IBC and I am inclined to move to NCLT under section 70 of the IBC for necessary action against the directors of the company.*
>
> *5. I submit that from the above facts, it is crystal clear that the writ petitioner did not appear before the NCLT during the hearing and also did not participate in the first committee of creditors meeting. Hence, it is submitted that the writ petitioner before this Hon'ble Court has not come with clean hands and this Hon'ble Court should not indulge in favour of a person who come with false statements and mislead this Hon'ble Court.*
>
> *6. I humbly submit that the above writ petition was obviously filed with an ulterior motive to delay the corporate insolvency*

resolution process of the petitioner and thereby to cause wrongful loss to the creditors which is against the public interest. On this score alone, the above writ petition is liable to be dismissed. Further, as per the IBC the entire process should be completed within 180 days and in view of the interim order passed by this Hon'ble Court, the entire process stalled and I will not be able to discharge my duty as a Insolvency Resolution Professional and hence it is exigent upon me to move this petition before this Hon'ble Court to vacate the interim order passed in the writ petition. If this Hon'ble Court will not vacate the interim stay granted by this Hon'ble Court, I would be greatly prejudiced."

7. During the course of arguments, the learned counsel appearing for the petitioner would submit that the amount, as claimed by the second respondent, is due and payable and if reasonable time is given, the petitioner would settle the entire amount with interest at the rate of 18% per annum.

8. At this juncture, this Court directed the petitioner to file an affidavit of undertaking in order to prove their *bona fides*. Thereafter, an affidavit of undertaking, dated 07.09.2018, was filed by the petitioner and the undertaking given by the petitioner, as found in Paragraph No.2 of the undertaking affidavit, is extracted hereunder:

"2. I respectfully state that when the above matter came up before this Hon'ble Court, my counsel on my behalf prayed this Hon'ble Court to grant 1 month time to settle the subject matter of the amount involved in the above Writ Petition the national company law tribunal on the application filed by this 2nd Respondent was pleased to pass and ex party award on 02.11.2017 and through which the tribunal directed the petitioner to pay outstanding due of Rs.22,48,227/- inclusive of interest at 18 present per annum. This Hon'ble Court, on my request, was pleased to direct me to file an undertaking affidavit to that effect and the matter is posted on 07.09.2018 for filing the undertaking affidavit. By filing this undertaking affidavit, I undertake to settle the award amount of Rs.22,48,227/- inclusive of interest at 18 present per annum within a period of 1 month from today i.e., on or before 07.10.2018 without fail. In case of my failure to make payment within the agreed time of 1 month, this Hon'ble Court, may proceed the case further against me."

9. Although this Court initially had its own apprehension in regard to the genuineness of the intent of the deponent of the undertaking affidavit, but, in view of the specific undertaking given by the petitioner to this Court, the matter stood adjourned by giving time sought by the petitioner in the affidavit of undertaking.

10. When the matter was taken up for hearing after expiry of the period within which the amount was agreed to be settled with interest, the learned counsel for the petitioner casually informed the Court that appropriate order may be passed in this writ petition, since the petitioner is unable to fulfil the undertaking given before this Court.

11. Be that as it may, Mr.A.K.Mylsamy, learned counsel appearing for the second respondent had initially submitted that the writ petition itself was misconceived and not maintainable for the simple reason that under Section 61 of the IB Code, 2016, appeal remedy is provided before the Appellate Tribunal, against any orders passed by the Adjudicating Authority under Section 9 of the IB Code, 2016. The learned counsel for the second respondent would draw the attention of this Court to Section 61 of the IB Code, 2016, which reads as under:

> *"61. (1) Notwithstanding anything to the contrary contained under the Companies Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*
>
> *(2) Every appeal made 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 on the 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.

12. Once an effective alternative remedy is provided under the IB Code, 2016, by way of appeal before the Appellate Authority, the conduct of the petitioner invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India is clearly an abuse of process of law, intended to achieve oblique purpose and therefore, the writ petition has to be dismissed on this ground alone.

13. This Court is in agreement with the submissions made by the learned counsel appearing for the second respondent that the conduct of the petitioner in this regard is liable to be deprecated as the petitioner has not only bypassed the effective alternative appeal remedy provided under the Statute, but also made this Court to believe that they were willing to make payment by giving an affidavit of undertaking and not fulfilling the same, subsequently. However, by filing such an affidavit of undertaking, the petitioner has successfully dragged the proceedings one more month, without discharging their liability towards the second respondent. In the face of clear admission of liability by the petitioner towards the second respondent, this Court is unable to appreciate as to how and on what basis, the writ petition could be entertained any further, more particularly, when the alternative remedy is available by way of filing appeal before the Appellate Authority, even assuming that the petitioner has any defence to the claim of the second respondent.

14. On the other hand, in view of the clear admission of debt towards the second respondent in the affidavit of undertaking, this Court is unable to see any legitimate purpose or any ground that could be raised, even if the appeal remedy is resorted to by the petitioner herein. In any event, this Court does not wish to go further into the merits and demerits of the claim of the petitioner as against the second respondent. Since the conduct of the petitioner in filing an affidavit of undertaking and resiling from such an affidavit of undertaking after expiry of the time sought for settlement of the entire dues is not to be appreciated, this Court is of the considered view that exemplary cost ought to be imposed on the petitioner for leading this Court to believe that he was willing to settle the amount due to the second respondent, without any intent to settle the same.

15. In view of the above, the writ petition is dismissed both on merits as well as on the ground of maintainability in view of the appeal remedy available under Section 61 of the IB Act, 2016 with cost of Rs.1,00,000/- (Rupees one lakh only).

16. The cost of Rs.1,00,000/- (Rupees one lakh only) payable by the petitioner to the second respondent / third respondent shall be paid within a period of two weeks from the date of receipt of a copy of this order. In case no payment of cost is made by the petitioner within the prescribed time, it is open to the second respondent / third respondent, as the case may be, to recover the same from the petitioner in the manner know law. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS-II)

To:

1. The Registrar,
   The National Company Law Tribunal,
   Corporate Bavan, 3rd Floor,
   29, Rajaji Salai,
   Chennai-600 001.

2. Sri Krishnakanth @ Balasubramanian,
   Managing Director,
   M/s.Kishrakanth Textiles Pvt. Ltd.,
   SF No.978/2E, Sirumalai Road,
   Dindigul - 624 003.

3. The Managing Director
   M/s.Vishnu Sudha Textiles,
   Pallipalayam,
   Erode - 638 006

4. S.Muthuraju
Insolvency Professional
No.3, Sundaram Brothers Lay Out
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Trichy Road, Ramanathapuram
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+1 CC To MR.S.VENKATESH, Advocate SR. NO. 90753

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12.10.2018

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