

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

* * * *

CIVIL REVISION PETITION NOS.4881,
4884, 4885 AND 4886 OF 2018

C.R.P.Nos.4881 and 4884 of 2018:

M/s. Golden Jubilee Hotels Limited ... Petitioner
Vs.
M/s EIH Ltd. and another ... Respondents

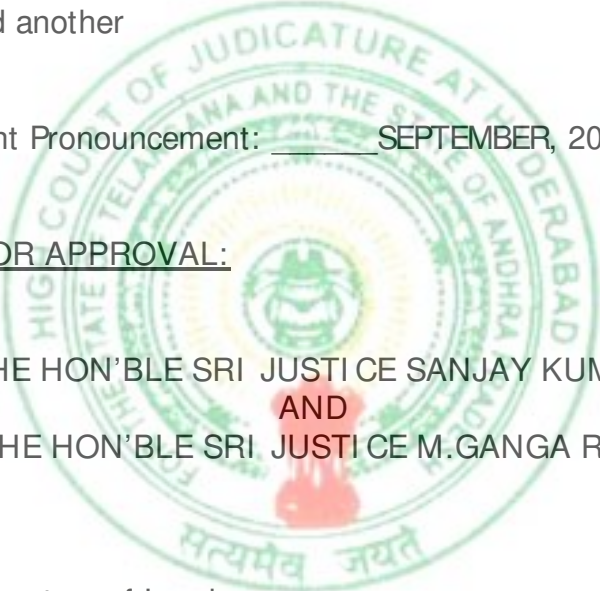
C.R.P.Nos.4885 and 4886 of 2018:

L.N.Sharma ... Petitioner
Vs.
M/s EIH Ltd. and another ... Respondents

Date of Judgment Pronouncement: SEPTEMBER, 2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO

- 
1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

M. GANGA RAO, J

* THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO

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< Gist:

> Head Note:

! Counsel for petitioners : Sri R.Raghunandan and
in all CRPs. Sri Vikram Poosarla

^ Counsel for respondent No.1 : Sri S.Niranjana Reddy and
in all CRPs. Sri K.V.Rusheek Reddy

^ Counsel for respondent No.2 : -- (Formal party)
in all CRPs.

? CASES REFERRED:

1. (2003) 5 SCC 315
2. (2018) 1 SCC 407

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO

CIVIL REVISION PETITION NOS.4881,
4884, 4885 AND 4886 OF 2018

COMMON ORDER
(*Per Hon'ble Sri Justice Sanjay Kumar*)

M/s. ElH Limited, Kolkata, instituted C.O.S.No.67 of 2017 on the file of the learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, against M/s. Golden Jubilee Hotels Private Limited, Hyderabad, and L.N.Sharma, its Director & Chief Executive Officer (CEO), for recovery of a sum of Rs.7,10,37,510/- along with *pendente lite* and future interest. This suit was filed under Order 37 Rules 1 and 2 CPC.

The trial Court set L.N.Sharma, the second defendant, *ex parte* on 14.11.2017. On 29.12.2017, M/s. Golden Jubilee Hotels Private Limited, Hyderabad, the first defendant, was also set *ex parte*. I.A.No.79 of 2018 was filed by L.N.Sharma, the second defendant, under Order 9 Rule 7 CPC to set aside the order dated 14.11.2017, whereby he was set *ex parte*. I.A.No.82 of 2018 was filed by the first defendant company under Order 9 Rule 7 CPC to set aside the order dated 29.12.2017, whereby it was set *ex parte*. In the first instance, these I.A.s were allowed by the trial Court on 05.03.2018 with the condition that both the defendants should file their written statements by 12.03.2018.

While so, the Bank of Baroda initiated a corporate insolvency resolution process against the first defendant company, *vide* CP(IB) No.248/7/HDB/2017 on the file of the National Company Law Tribunal, Hyderabad Bench, Hyderabad (*hereinafter*, 'the Tribunal'), under Section 7 of the Insolvency and Bankruptcy Code, 2016 (*for brevity*, 'the Code of 2016'). The Tribunal passed Order dated 27.02.2018 therein

admitting the case and appointing Subodh Kumar Agrawal as the Interim Resolution Professional under Section 16 of the Code of 2016. The Tribunal further declared a moratorium by prohibiting various actions, including the institution of suits or continuation of pending suits or proceedings against the corporate-debtor, the first defendant company, in any Court of law, Tribunal, Arbitration Panel or other authority. Thereupon, the plaintiff company filed Memo dated 05.03.2018 informing the trial Court that the Tribunal had ordered commencement of corporate insolvency resolution process against the first defendant company and prayed that notice of the suit proceedings be served upon the Interim Resolution Professional appointed by the Tribunal. The defendants, on the other hand, filed Memo dated 12.03.2018 adverting to the fact that the trial Court had allowed the set-aside petitions earlier with the condition that they should file written statements by that date and stating that the Tribunal had passed an order on 27.02.2018 declaring a moratorium while appointing an Interim Resolution Professional. They accordingly prayed for adjournment of the suit proceedings till the insolvency proceedings were completed.

By order dated 14.03.2018, the trial Court merely recorded the Memo filed by the defendants, holding that the filing of written statements would assist the Interim Resolution Professional to resolve the dispute and that the defendants were using delaying tactics. Their contention that in view of the order of the Tribunal, the trial Court ought not to insist upon their filing written statements was rejected. Further, as the defendants had not filed their written statements by 12.03.2018 in terms of the earlier orders dated 05.03.2018, I.A.Nos.82 of 2018 and 79 of 2018, filed by the first defendant company and the second defendant respectively, were also dismissed by the trial Court *vide* separate orders of the same date.

Aggrieved by these orders, the first defendant company and the second defendant are before this Court. C.R.P.No.4881 of 2018 was filed by the first defendant company aggrieved by the dismissal of I.A.No.82 of 2018 filed by it in the suit and C.R.P.No.4884 of 2018 was filed by it against the order passed by the trial Court upon the Memo filed by the defendants. C.R.P.No.4885 of 2018 was filed by the second defendant aggrieved by the order passed on the Memo filed by the defendants while C.R.P.No.4886 of 2018 filed by him relates to the dismissal of his I.A.No.79 of 2018.

Heard Sri R.Raghunandan, learned senior counsel representing Sri Vikram Poosarla, learned counsel for the petitioners-defendants, and Sri S.Niranjan Reddy, learned senior counsel representing Sri K.V.Rusheek Reddy, learned counsel for the respondent-plaintiff company.

At the outset, it may be noted that C.O.S.No.67 of 2017 is a summary suit filed under the provisions of Order 37 CPC. It is well settled that a summary suit under Order 37 CPC is distinct from an ordinary suit. The summary procedure prescribed under Order 37 CPC is aimed at preventing unreasonable obstruction by a defendant who has no real defence. Rule 1 of Order 37 CPC details the Courts and classes of suits to which the summary procedure prescribed in this Order would apply. Suits based on bills of exchange, hundies and promissory notes find mention in Order 37 Rule 1(2)(a) CPC. Suits in which the plaintiff seeks only to recover a debt or liquidated demand in money from the defendant on the strength of a written contract or an enactment, or where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, other than a penalty or on a guarantee, or where the claim is in respect of a debt or liquidated demand only, are set out in sub-rule (2)(b) of this Rule. Order 37 Rule 2 CPC speaks of the institution of summary suits and sub-rule (1) details the requirements

to be fulfilled by a plaint presented in a summary suit. The summons in a summary suit is to be issued in Form No.4 in Appendix B as per sub-rule (2) of this Rule. Order 37 Rule 2(3) CPC is of import and is extracted hereunder:

‘(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.’

The aforestated sub-rule makes it clear that the defendant shall not defend the summary suit unless he enters appearance and the consequence of his failing to do so would be the deemed admission on his part leading to the entitlement of the plaintiff to a decree for the sum mentioned in the summons together with interest and costs. Order 37 Rule 3 CPC sets out the procedure for appearance of the defendant in a summary suit. In terms of sub-rule (1) therein, the plaintiff is required to serve along with the summons a copy of the plaint and the annexures thereto and the defendant may, at any time within ten days of such service, enter appearance either in person or through pleader and in either case, he shall file in the Court his address for service of notices. Sub-rule (4) of this Rule provides that in the event the defendant enters appearance, the plaintiff shall serve on him a summons for judgment in Form No.4-A in Appendix B which shall be returnable in not less than ten days from the date of service, supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. Sub-rule (5) postulates that the defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise, disclose such facts as may

be deemed sufficient to entitle him to defend and apply for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court to be just. The first *proviso* thereunder states to the effect that leave to defend should not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up is frivolous or vexatious. The second *proviso* thereunder states to the effect that where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit should not be granted unless the amount so admitted to be due is deposited in Court by the defendant. Sub-rule (6) provides that at the hearing of such summons for judgment, in the event the defendant has not applied for leave to defend or if such application has been made and is refused, the plaintiff would be entitled to judgment forthwith, or in the event the defendant is permitted to defend as to the whole or any part of the claim, the Court may direct him to give such security within such time as may be fixed and on failure to do so within the time specified, the plaintiff would be entitled to judgment forthwith. Sub-rule (7) is also important for the purposes of this case and states to the effect that the Court may, for sufficient cause shown by the defendant, excuse the delay on his part in entering appearance or in applying for leave to defend the suit. Order 37 Rule 4 CPC empowers the Court to set aside the summary suit decree under special circumstances and, if necessary, stay or set aside the decree and also grant leave to the defendant to appear and to defend the suit, if it seems reasonable to the Court so to do, upon such terms as the Court thinks fit. Rules 5 and 6 are not relevant for the purpose of this case but Rule 7 is relevant and states to the effect that save as provided by Order 37, the

procedure in summary suits shall be the same as the procedure in suits instituted in the ordinary manner.

It is therefore clear that the procedure under Order 37 CPC, being a summary one, cannot be put on par with the procedure followed in ordinary suits in all respects. This aspect was considered by the Supreme Court in *RAJNI KUMAR V/ s. SURESH KUMAR MALHOTRA*¹, wherein the Supreme Court was dealing with an application to set aside an *ex parte* decree in a summary suit. In this context, the Supreme Court observed that while considering such an application, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 CPC. Reference was made to Order 37 Rule 7 CPC with regard to the procedure to be followed in such summary suits and Order 37 Rule 4 CPC, which permits setting aside of *ex parte* decrees in summary suits. The Supreme Court observed that in a suit filed in the ordinary manner, a defendant has the right to contest the suit as a matter of course but nonetheless, he may be declared *ex parte* if he does not appear in response to the summons or after entering appearance, before framing of issues or during or after trial. The Supreme Court pointed out that in a suit under Order 37, the procedure for appearance of the defendant is governed by the provisions of Rule 3 thereof and a defendant is not entitled to defend the suit unless he enters appearance within ten days of service of the summons, either in person or by a pleader, and files in Court the address for service of notices on him. The Supreme Court noted that in default of his entering appearance, the plaintiff becomes entitled to a decree for a sum not exceeding that mentioned in the summons together with interest at the rate specified along with costs. The Supreme Court also noted that in a case

¹ (2003) 5 SCC 315

where the defendant enters appearance, the plaintiff is required to serve on him a summons for judgment in the prescribed form and within ten days from such service, the defendant may seek leave of the Court to defend the suit and the Court may grant him leave either unconditionally or on such terms as it may deem fit. Referring to Order 37 Rule 4 CPC, the Supreme Court observed that it makes it clear that even after passing of an *ex parte* decree, the trial Court is not precluded from setting aside the same and granting leave to the defendant to appear in response to the summons and defend the suit, if the Court considers it reasonable to do so. It is in this context that the Supreme Court noted that it would not be enough for the defendant in a summary suit to merely show the special circumstances which prevented him from appearing or applying for leave to defend, but he also has to show, by affidavit or otherwise, the facts which would entitle him to leave to defend the suit. The Supreme Court concluded that in this respect, Order 37 Rule 4 is different from Order 9 Rule 13 CPC.

On the same analogy, it may be noted that in an ordinary suit, a defendant who is entitled as a matter of right to defend against the suit is liable to be set *ex parte* if he fails to appear in response to the summons or take necessary steps thereafter. It is in this situation that such a defendant would file an application under Order 9 Rule 7 CPC and assign good cause for his previous non-appearance or failure. Thereupon, the trial Court is empowered to set aside the order setting such defendant *ex parte* upon such terms as to costs as it directs or otherwise. However, Order 37 Rule 3 CPC does not contemplate such a situation at all in a summary suit. The failure on the part of the defendant to put in his appearance within ten days from the date of receipt of the summons in a summary suit would straightaway entitle the plaintiff therein to a decree for the sum of money mentioned in

the summons along with interest and costs. Setting the defendant in a summary suit *ex parte* therefore does not arise. Unfortunately, the trial Court seems to have completely lost sight of the procedure prescribed under Order 37 CPC and proceeded as if the procedure applicable in an ordinary suit would govern the subject suit also.

It appears that the defendants, in perpetuation of this error on the part of the trial Court, filed applications under Order 9 Rule 7 CPC praying that the orders passed earlier, setting them *ex parte*, should be set aside. Compounding its earlier folly, the trial Court failed to take note of the fact that in such a situation it had to exercise power under Order 37 Rule 3(7) CPC, if it found sufficient cause shown by them for not entering appearance, and then follow the procedure set out in Order 37 Rule 3 CPC. It may be noted that it is only after the plaintiff serves upon the appearing defendant a summons for judgment that such defendant can apply for leave to defend, disclosing the requisite facts, within ten days from the service of summons for judgment. Without following this statutory procedure, the trial Court strangely called upon the defendants to file their written statements. Such a procedure is unknown to Order 37 CPC as the trial Court ought not to have permitted the defendants to put forth their defence as a matter of course without their first seeking leave to defend against the suit.

This comedy of errors then proceeded to the next stage, i.e., the intervention in the matter by the Tribunal, *vide* its order dated 27.02.2018 passed under the provisions of the Code of 2016. It is no doubt true that even after passing of this order, the defendants in the suit went before the trial Court and invited the orders dated 05.03.2018, whereby they were granted the benefit of the earlier orders setting them *ex parte* being set aside subject to the condition that they file their written statements by

12.03.2018. This, perhaps, was their own further contribution to the progression of errors which seem to have abounded in the course of these suit proceedings. However, even if they did participate in the suit proceedings after the moratorium order dated 27.02.2018 was passed by the Tribunal, once the same was brought to the notice of the trial Court, be it by way of the Memo dated 05.03.2018 filed by the plaintiff company or the Memo dated 12.03.2018 filed by the defendants, the trial Court ought to have been mindful of the effects of such a moratorium order. This aspect was also brought to its notice by the defendants by filing a copy of the judgment of the Supreme Court in *INNOVENTIVE INDUSTRIES LIMITED V/ s. ICICI BANK*².

In *INNOVENTIVE INDUSTRIES LIMITED*², the Supreme Court dealt with various nuances of the Code of 2016. As regards the effects of a moratorium order, the Supreme Court observed that the moment initiation of corporate insolvency resolution process takes place, a moratorium is announced by the Adjudicating Authority, *vide* Sections 13 and 14 of the Code of 2016, by which institution of suits and continuation of pending suits etc. cannot be proceeded with and this situation would continue until the approval of a resolution plan under Section 31 of the Code of 2016.

It may be noted that Section 13 of the Code of 2016 mandates that the Adjudicating Authority, after admission of the application under Section 7 thereof, shall declare a moratorium for the purposes referred to in Section 14; cause a public announcement of the initiation of the corporate insolvency resolution process and call for submission of claims under Section 15; and appoint an interim resolution professional. Section 14 deals with the moratorium and sub-section (1) thereof states that upon the insolvency

² (2018) 1 SCC 407

commencement date, the Adjudicating Authority shall, by order, declare a moratorium prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor, amongst other things. Sub-section (3) however provides that the moratorium would not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a corporate debtor. Sub-section (4) makes it clear that the moratorium would have effect from the date of such order till the completion of the corporate insolvency resolution process. Section 15 deals with the procedure for making the public announcement of the corporate insolvency resolution process and Section 15(1)(c) requires such public announcement to mention the last date for submission of claims, as may be specified. The details of the interim resolution professional, who shall be vested with the management of the corporate debtor and who would be responsible for receiving claims, are required to be given in the public announcement as per Section 15(1)(d) of the Code of 2016. Section 18 of the Code of 2016 sets out the duties of the interim resolution professional and in so far as claims submitted by the creditors are concerned, Section 18(1)(b) requires him to receive and collate all such claims pursuant to the public announcement made under Sections 13 and 15 of the Code of 2016.

It is in this statutory context that the opinion expressed by the trial Court in the docket order dated 14.03.2018 has to be tested.

Despite being informed that the moratorium order was passed by the Tribunal on 27.02.2018 under Section 14 of the Code of 2016 and of the law laid down in *INNOVENTIVE INDUSTRIES LIMITED*², the trial Court strangely opined that mere filing of written statements would not violate the order of the Tribunal and observed that though the Civil Court could not pass

any adverse order fastening any liability, the mere making of an appearance by the defendants and putting forth their case would not be violative of the moratorium. The trial Court further opined that it had discretion to receive the written statements and pass any procedural orders which would not be in conflict with the order of the Tribunal. A rather strange justification was then offered by the trial Court to the effect that the written statements of the defendants would assist the interim resolution professional to resolve the dispute for which the defendants were using delaying tactics. It is on the basis of this reasoning that the trial Court merely recorded the Memo filed by the defendants, thereby requiring them to comply with its earlier direction to file their written statements.

This Court is at a loss to understand as to how the trial Court could misconstrue the scope and import of Section 14(1)(a) of the Code of 2016, which categorically states that upon the order declaring moratorium being passed by the Adjudicating Authority, not only the institution of suits but even continuation of pending suits or proceedings against the corporate debtor are prohibited. Requiring the filing of a written statement would be a step in continuation of the suit proceedings and the understanding of the trial Court to the contrary belies comprehension. Further, the interim resolution professional is not required to play an adjudicatory role in terms of testing the claims of the creditors against the corporate debtor and the question of the written statements filed by the defendants assisting him in resolving the dispute does not arise. It is only at a later stage that the verification of claims would be undertaken by the liquidator under Sections 38, 39 and 40 of the Code of 2016. The trial Court was therefore in error in concluding that continuing with the suit proceedings for passing procedural orders would not be violative of the moratorium order passed under Section

14 of the Code of 2016. Continuation of the suit proceedings would encompass every step therein, which would include not only adjudicatory steps but also procedural ones. Upon the moratorium order being passed, the pending suit proceedings necessarily had to come to a complete halt. The docket order dated 14.03.2018 passed by the trial Court upon the Memo filed by the defendants is therefore unsustainable in law in so far as the first defendant company is concerned.

The second defendant in the suit is the Director & CEO of the first defendant company. The trial Court, in the docket order dated 14.03.2018, observed that as he is an individual, the Tribunal's moratorium order would not apply to him. However, the plaint averments clearly demonstrate that the suit claim was directed against the first defendant company and it is only in the capacity of being its CEO that the second defendant was impleaded. The plaint also puts it beyond doubt that the cheques on the strength of which the summary suit was filed were issued by the first defendant company. Section 14 of the Code of 2016, as it presently reads after its amendment, *vide* the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, with retrospective effect from 06.06.2018, only excludes the surety in a contract of guarantee to a corporate debtor from the ambit of a moratorium order. There is no mention of individual Directors of the corporate debtor being immune from the moratorium order. It is the normal practice to implead in a suit or proceeding not only the corporate entity but also its Managing Director or Chief Executive Officer. That, however, would not mean that the cause of action against such Managing Director or Chief Executive Officer is independent of and separate from the claim against the corporate entity itself. The case on hand is an example. The claim of the plaintiff company is essentially directed against the first defendant company

and the acts imputed to the second defendant, its Director & CEO, are inextricably linked therewith. The question of allowing the suit proceedings to go on independently against the second defendant, while giving effect to the moratorium order dated 27.02.2018 against the first defendant company alone, would not arise. The understanding of the trial Court to the contrary is therefore erroneous.

Before we conclude, one other aspect needs to be dealt with. Sri S.Niranjan Reddy, learned senior counsel, raised an objection in respect of C.R.P.Nos.4881 and 4884 of 2018 to the effect that these civil revision petitions are not maintainable as the corporate debtor, the petitioner therein, is represented by its Managing Director though an interim resolution professional was appointed by the Tribunal under the Code of 2016. Reliance in this regard is placed upon the observations of the Supreme Court in *INNOVENTIVE INDUSTRIES LIMITED*² to the effect that once a resolution professional is appointed to manage the company, the erstwhile Directors, who are no longer in management, cannot maintain an appeal on behalf of the company.

Sri R.Raghunandan, learned senior counsel, would counter this argument by pointing out that though the cause title as set out in the suit necessarily had to be reproduced in C.R.P.Nos.4881 and 4884 of 2018, as they arose from the said suit proceedings, the cause titles in these revisions reflect that the petitioner-first defendant company is now represented by its authorised representative, C.V.Ramana, its Vice President. Learned senior counsel would point out that authority letter dated 12.06.2018 was issued by Subodh Kumar Agrawal, the interim resolution professional appointed by the Tribunal, and the same bears out that the said interim resolution professional authorised C.V.Ramana, Vice President-Administration of the first defendant

company, to represent it before all Courts. He would therefore assert that the aforesaid revision petitions, which have been filed on the strength of the vakalat executed by C.V.Ramana, Vice President-Administration of the first defendant company, do not fall foul of the edict of the Supreme Court in *INNOVENTIVE INDUSTRIES LIMITED*².

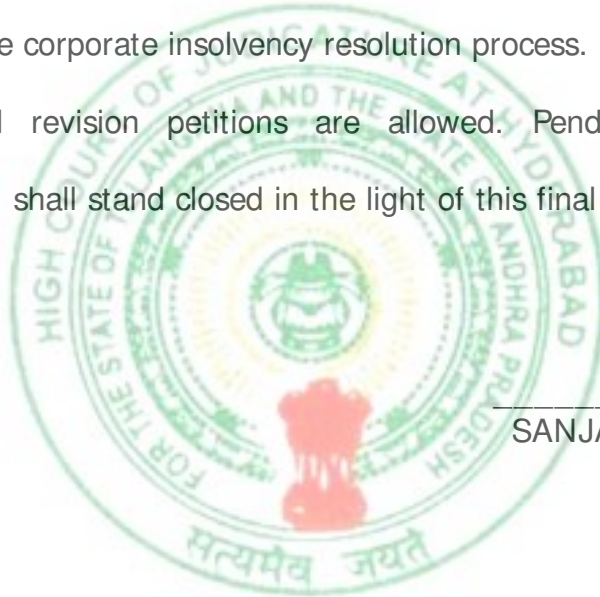
In reply, Sri S.Niranjana Reddy, learned senior counsel, would state that as per Section 25(2)(d) of the Code of 2016, it is the resolution professional who has to undertake appointment of legal or other professionals and therefore, Subodh Kumar Agrawal, the interim resolution professional, could not have delegated this statutory function to an employee of the first defendant company.

This contention however does not hold water. It may be noted that Section 25 of the Code of 2016 deals with the resolution professional appointed under Section 22 of the Code of 2016 and not an interim resolution professional appointed under Section 16 thereof. Further, the various duties of an interim resolution professional enumerated under Section 18 of the Code of 2016 clearly manifest that one individual cannot, by himself, undertake all of them. He would necessarily have to take the assistance of others. In this regard, it may be noted that Section 19 of the Code of 2016 mandates that the personnel of the corporate debtor, its promoters or any other person associated with its management shall extend all assistance and co-operation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor. In the light of this provision, the argument that the interim resolution professional cannot delegate some of his duties and functions to such personnel has to be rejected. Institution of C.R.P.Nos.4881 and 4884 of 2018 is therefore not

hit by the defect identified by the Supreme Court in INNOVENTIVE INDUSTRIES LIMITED².

On the above analysis, this Court finds that the trial Court grievously erred in dealing with the suit proceedings in the manner that it did even prior to the passing of the moratorium order by the Tribunal on 27.02.2018. The trial Court further compounded its error by seeking to continue with the suit proceedings despite the said moratorium order and in dismissing the applications filed in the suit while insisting upon filing of written statements by the defendants. The orders passed by the trial Court in this regard are accordingly set aside. The suit proceedings shall remain stayed until the conclusion of the corporate insolvency resolution process.

The civil revision petitions are allowed. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.



SANJAY KUMAR, J

M.GANGA RAO, J

27th SEPTEMBER, 2018

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