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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CO.APP. 22/2018

**SHREE SHYAM PULP&BOARD MILLS LTD.
(IN LIQUIDATION)**

..... Appellant

Through: Ms. Geeta Luthra, Sr. Advocate
with Mr.Ashutosh Dubey, Mr. Pranav
Vashishtha and Mr.Anshul Duggal,
Advocates.

Versus

**TATA CAPITAL FINANCIAL SERVICES LTD
& ORS.**

..... Respondents

Through: Mr.Varun Kumar, Mr.Dheeraj
Pratap Deo, Mr.Vishal Vijayvargiya and
Ms.Dushreya P.S. Rudy, Advocates for R-1.
Ms.Ruchi Sindhwani, Sr. Standing Counsel
with Ms.Megha Bharara, Advocate for
Official Liquidator.

Mr.Rajesh Rattan, Advocate for R-3/UCO
Bank.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

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03.12.2018

Dr. S. Muralidhar, J.:

CM No. 50627/2018 (for exemption)

1. Allowed, subject to all just exceptions.

CO.APP. 22/2018 & CM Nos. 43234/2018 & 50611/2018

2. This is an appeal by M/s Shree Shyam Pulp & Board Mills Ltd. against the order dated 13th September, 2018 passed by the Company Court in CA No.741-742/2018 in CP No.81/2014.

3. The main grievance of the Appellant is that the Company Judge has allowed the prayer of the Respondent No.3 (UCO Bank) and transferred the proceedings pending in the Company Court to the National Company Law Tribunal (NCLT) under Section 434 of the Companies Act, 1956 ('Act').

4. The background facts are that a winding up petition being CP No.81/2014 was filed by Tata Capital and Financial Services Ltd. (Respondent No.1) in the Company Court for recovery of monies owed to it by the Appellant. In the said petition, orders were being passed from time to time. In the order dated 7th August, 2015, it was noted by the learned Company Judge that according to the Respondent No.1, it had provided financial services by way of term loan of Rs.5 crores to the Appellant which was to be repaid in 48 monthly installments along with interest which was agreed to be 4% less than the long term lending rate, which at the material time, worked out to be 13% per annum.

5. The Appellant paid certain installments initially and then defaulted. The Appellant issued post dated cheques but subsequently requested Respondent No.1 not to present those cheques in view of the Appellant's financial constraints. Thereafter, a notice was issued by Respondent No.1, which was

not responded to by the Appellant. This was followed by Respondent No.1 filing a winding up petition against the Appellant in the Company Court.

6. The Company Court by order dated 7th August 2015 appointed the Official Liquidator (OL) (Respondent No.2 herein) as the Provisional Liquidator to take charge of the books of accounts and other assets of the Appellant. However, the said order dated 7th August, 2015 was kept in abeyance by order dated 11th August, 2015 when the Appellant submitted that a valuable piece of land had been mortgaged with Respondent No.1 for securing the loan and that some time should be provided to find a suitable buyer. It was submitted that the said property would be sold with the consent of Respondent No.1 and the money so realized would be deposited in the Court to be paid to Respondent No.1.

7. The Company Court thereafter directed that the buyer should appear before the Court with a concrete offer failing which the order dated 7th August, 2015 would be implemented. The interim order was continued on 15th January, 2016 and again on 19th January, 2017.

8. On 12th April 2017, the Company Court was informed by the Appellant that despite repeated efforts, they had been unable to find any buyer. Granting Respondent No.1 time to file their rejoinder, the petition was adjourned to 31st July, 2017. The interim order passed on 31st January, 2014 restraining the Appellant from alienating any of its immovable assets was made absolute during the pendency of the petition.

9. On 26th September, 2017, the Appellant pointed out to the Company Judge that a piece of land in possession of Respondent No.1, was taken over by it in SARFAESI proceedings. Counsel for the Appellant sought some more time to find a buyer for said piece of land. The Company Court then adjourned the matter to 18th December, 2017.

10. Again on 23rd January 2018, the Appellant was given time by the Company Court to bring a prospective buyer. A consent order was thereafter passed on 16th February, 2018 by the Company Court whereby the Appellant agreed to pay the Respondent No.1 Rs.1 crore on or before 2nd March, 2018 and the balance of Rs.1.10 crores on or before 28th March, 2018, failing which the earlier order dated 7th August, 2015 would stand automatically revived. Upon second installment being paid within the agreed upon timelines, the Respondent No.1 was to release the original title deeds to the concerned mortgager.

11. On 5th March, 2018, a cheque dated 15th March, 2018 for Rs.2.10 crores was issued by one Ozogreen Infra Projects Pvt. Ltd. and was handed over to the counsel for the Respondent No.1 with the senior counsel for the Appellant assuring that the cheque would be honoured when presented. On 4th April, 2018, the Company Court noted in its order that the cheque had been returned as dishonoured. The Director of the company which issued the cheque, who was present in person on that date, informed the Company Court that the payment would be made within 10 days. The matter was then adjourned to 27th April, 2018.

12. C.A.No.597/2018 was then filed by the Respondent No.1 on 15th May, 2018 for reviving the earlier order dated 7th August, 2015 appointing the OL as PL. The Court after noting the fact that no payment, in terms of the consent order between the parties, had been made, revived the order dated 7th August, 2015.

13. On 29th June, 2018, the UCO Bank (Respondent No.3) filed C.A.No.741/2018 in which it was stated that it came to know of the pendency of the company petition during the course of proceedings of the Insolvency and Bankruptcy petition filed by it before the NCLT. It was pointed out that the Appellant was enjoying certain credit facilities from different banks and UCO Bank was the leader of the Consortium of Banks as the lead bank. It had sanctioned credit facilities to the tune of Rs.71.41 crores to the Appellant. After the default in payment of dues, UCO bank and other member Banks of the consortium formed a Joint Lender Forum (JLF) to deal with the loan accounts of the Appellant. Ultimately, these loan accounts were classified as non-performing assets leading to issuance of a demand notice under Section 13(2) of the SARFAESI Act dated 24th March, 2015 to the Appellant.

14. A demand notice was also issued upon the Appellant by other member banks on different dates and was published in newspapers on 15th July, 2015 showing the outstanding dues as Rs.771.03 crores plus interest owed by the Appellant towards the Banks. A possession notice dated 7th October, 2015 was issued under Section 13(4) of the SARFAESI Act by UCO Bank on behalf of the consortium. It, therefore, took symbolic possession of the

secured mortgaged and hypothecated assets of the Appellant and the same was published in a daily newspaper.

15. UCO Bank informed the Company Court in said application that the physical possession of the mortgaged immovable properties of the Appellant situated at District Rudrapur, Uttarakhand, with 'plant and machineries' were taken by its authorized officers on behalf of the consortium on 18th February, 2017.

16. The Appellant then filed an appeal challenging the SARFAESI Act measures before the DRT, Dehradun. This was, however, dismissed by an order dated 6th November, 2017.

17. The mortgaged properties were put to sale through e-auction on two different dates on 10th October, 2017 and 13th February, 2018 by UCO Bank, but no bids could be received. In those circumstances, UCO Bank and the joint lenders at a meeting held on 16th February, 2018 agreed to file a case before the NCLT. By a letter dated 6th March, 2018, the Appellant offered a one-time settlement (OTS) proposal to settle the dues. UCO Bank then filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the Appellant on 9th April, 2018. In the said application, show cause notice (SCN) was issued to the Appellant by NCLT on 16th April, 2018. On 23rd May, 2018, the Appellant appeared before the NCLT and placed before it the order dated 15th May

2018 of the Company Court and stated that a Provisional Liquidator had already been appointed.

18. In terms of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 issued on 6th June, 2018, a new proviso was added in Section 434 (1) (c) of the Act which read as under:

“Provided further that any party or parties to the proceedings relating to the winding up of companies pending before any court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 may file an application for transfer of such proceedings to the tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.”

19. It was pursuant to the above added proviso that UCO bank filed CA No.741/2018 in the Company Court seeking impleadment and C.A.No.742/2018 seeking transfer of the proceedings pending in the Company Court to the NCLT for the petition to be dealt with under the provisions of the Insolvency and Bankruptcy Code, 2016. The OL initially filed a counter affidavit to the said applications not opposing the prayer for transfer of the proceedings to the NCLT.

20. However, when the applications were taken up for hearing by the Company Court on 13th September 2018, the OL informed the Court that he would like to withdraw the reply filed and “file a fresh reply opposing the transfer”. However, the Company Court while taking the above plea of the OL on record, observed that there was no particular reason to adjourn the matter to enable the OL to file a new reply. It was noted that the winding up

petition was at an initial stage. It was noted that the OL had taken steps to seal the head office which was a tenanted premises and factory premises had already been taken over by the UCO Bank under the SARFAESI Act. It was noted that other than the said factory premises and the land at District Rudrapur, Uttarakhand, there was no immovable or worthwhile movable assets of the Appellant. The landlord of the sealed office premises was already seeking de-sealing.

21. In the circumstances, by the impugned order dated 13th September 2018, the Company Court expressed the view that it would be in the interest of all the creditors that the proceedings be transferred to NCLT and an attempt was made for initiation of corporate insolvency resolution. The order dated 7th August, 2015, which was revived on 15th May 2018, appointing the OL as PL, was revoked subject to UCO Bank paying the expenses of Rs.75,000/- incurred by the OL. On receipt of said sum, the OL was to de-seal the office premises that had been sealed. The Company Petition 81 of 2014 was transferred to the NCLT.

22. The Court has heard the submissions of Ms. Geeta Luthra, learned Senior counsel appearing for the Appellant, Ms. Ruchi Sindhwani, Standing Counsel for the OL and Mr. Rajesh Rattan, Advocate for the Respondent No.3 UCO Bank.

23. Ms. Luthra took exception to the Company Court entertaining the application filed by the UCO Bank. She submitted that in terms of proviso to Section 434 (1) (c), the UCO Bank was not the party to the proceedings

relating to the winding up of the Appellant before any Court immediately before commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance and, therefore, it had no locus to maintain such an application seeking transfer of the proceedings to NCLT.

24. Ms. Luthra further submitted that the Respondent No.1 had acted unfairly in not disclosing certain material facts before the Company Court. However, she submitted that the Appellant will seek other appropriate remedies since that was not the subject matter of the order under appeal here. She pointed out that there were some other claimants whose impleadment the Appellant was seeking, viz., M/s. Magma Fincap Ltd. and Arjun Chemicals Pvt. Ltd. She pointed out that the separate winding up petitions filed by these two companies, CP Nos.2/2014 and 101/2016, were disposed of by the Company Court by separate orders dated 18th July, 2018 permitting them to file their claims before the OL. According to her, without hearing the said two companies, the learned Single Judge could not have passed the impugned order.

25. On the other hand, Mr. Rajiv Rattan, learned counsel for the Respondent No.3-UCO Bank maintained that there was no other option left with the lenders but to approach the NCLT. The fact was that despite being a secured creditor, UCO Bank was unable to recover any amount from the Appellant. He submitted that the application before the Company Court was rightly maintained by the UCO Bank and the order passed by the Company Court was in the best interests of all the creditors, both secured and unsecured.

26. Ms. Ruchi Sindhvani, learned Standing Counsel appearing for the OL, submitted that although the OL had sought leave of the Company Court to file a fresh affidavit, withdrawing its consent to transfer the proceedings to NCLT, as of now the OL was not further contesting that position. According to her, there being no other immovable or worthwhile movable assets of the Appellant which can aid recovery of the dues to the creditors, other than the immovable assets already mortgaged to UCO Bank and the other consortium banks, there could possibly be no progress in the recovery of dues from the Appellant in the proceedings in the Company Court. In the circumstances, the best hope for any recovery was if the matter went before the NCLT.

27. The above submissions have been considered. The proviso to Section 434 (1) (c) of the Act has already been reproduced hereinbefore. Although, Ms. Luthra may be technically right in contending that UCO Bank was not a party to any proceedings relating to the winding up which were pending in any Court, the fact remains that the OL was a party to the winding up proceedings. The OL had initially not opposed the prayer of UCO Bank. The OL's attempt to withdraw its consent to the transfer was negative by the Company Court. The OL has accepted the order of the Company Court in that regard.

28. The fact, therefore, remains that except for the Appellant, there is no opposition by the OL or any of the parties to the winding up proceedings to the transfer of the proceedings to the NCLT. The OL was certainly a party to the winding up proceedings and this was sufficient, in terms of the proviso to Section 434(1) (c) of the 2013 Act, for the Company Court to proceed to

exercise its discretion in the matter. With the prospect of recovery of dues being brighter in the NCLT, the two other claimants can also have no objection to the transfer of the proceedings to the NCLT.

29. The fact of the matter is that despite pendency of the winding up petition for more than four years, no money has been able to be recovered by any of the creditors. At this juncture it is necessary for this Court to clarify that it is not expressing any view on the plea of the Appellant regarding the conduct of Respondent No.1 since that is not the subject matter of the present appeal. That will have to be pursued separately by the Appellant in accordance with law.

30. In the circumstances, this Court concurs with the Company Court that it was in the best interest of all the creditors that the matter should be transferred to NCLT. Consequently, the Court finds no reason to interfere with the impugned order of the Company Court.

31. The appeal is accordingly dismissed. The pending applications are disposed of.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

DECEMBER 03, 2018

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