

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****APPEAL FROM ORDER NO.960 OF 2019****WITH****CIVIL APPLICATION NO.1136 OF 2019**

Airport Authority of India

...Appellant

Versus

M/s Hotel Leela Ventures Ltd. And Others

...Respondents

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Mr. Ashutosh Kumbhakoni, Senior Advocate (Advocate General), a/w. Mr. Ajay Khaire, Mr. Ashish Prasad, Mr. Shailesh Poria, Mr. Rohit Sharma and Mr. C. Keswani, i/b. Economic Laws Practice, for the Appellant.

Mr. Rafique Dada, Senior Advocate, a/w. Mr. Ankoosh Mehta, Ms. Dhvani Shah, i/b. Cyril Amarchand Mangaldas & Co., for Respondent No.1.

Mr. Ravi Kadam, Senior Advocate, a/w. Dr. Birendra Saraf, Mr. Rohan Kadam, Ms. Saumyata Panwar and Ms. Kritika Sethi, i/b. Cyril Amarchand Mangaldas & Co., for Respondent Nos.3 and 4.

Mr. Vivek Menon, a/w. Mr. S.R. Tejpal and Mr. Ashok Varma, i/b. Tejpal & Co., for Respondent Nos.9 to 11.

Mr. Janak Dwarkadas, Senior Advocate, a/w. Mr. Rohit Gupta, Ms. Rishika Harish and Mr. Nikhil Rajani, i/b. M/s V. Deshpande & Co., for Respondent No.13.

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CORAM : S.C. GUPTE, J.**DATE : 18 OCTOBER 2019****(Oral Judgment) :**

. This appeal from order challenges an order passed by the Bombay Civil Civil Court at its Borivali Division in Dindoshi, Mumbai. The impugned order has been passed on a notice of motion taken out by the

Appellant (original plaintiff) seeking a temporary restraint against Respondent No.1 (original defendant no.1) from creating third party rights in respect of assets or shareholding of defendant no.1. By the impugned order, the plaintiff's notice of motion was dismissed by the trial court.

2. The plaintiff is an authority constituted under the provisions of Airports Authority of India Act, 1994 ("Act"). Whereas defendant no.1 is a company engaged in the business of hospitality, owning or operating various hotel properties in India, the other defendants are its shareholders and promoters. The plaintiff owns two pieces of land situate near Mumbai International Airport. These, respectively, admeasure 18000 sq. meters and 11000 sq. meters, and are adjacent to each other. By two separate lease deeds, the land admeasuring 18000 sq. meters was leased out by the plaintiff to defendant no.1 for the purpose of constructing a hotel. Defendant No.1 has, accordingly, constructed a hotel known as "The Leela" on this land. A part of the hotel building also extends upon the adjacent property owned by defendant no.1. On or about 7 February 1996, another lease was executed by the plaintiff in respect of the other land, namely, 11000 sq. meters of land. The purpose of this lease was to use the plot for setting up of a hotel comprising of 150 rooms. The period of lease was 30 years, i.e. from 1 April 1994 to 31 March 2014. It is an admitted position that defendant no.1 has not made any construction on this property as of this date. Entire FSI of this plot of land has, however, been used by defendant no.1 for carrying out additional construction on the existing hotel building on the plot of 18000 sq. meters, i.e. The Leela. (There is some dispute between the parties as to the exact FSI of 11000 sq. meters' plot used up for this additional construction; it is, at any rate, submitted

by the plaintiff that the entire plot of 11000 sq.meters is rendered incapable of development as of date, since its development potential has been fully exhausted.) Insofar as the plot of 11000 sq. meters is concerned, the relevant provision in the lease deed of 7 February 1996 (clause-2) required defendant no.1 to pay lease rent to the plaintiff at the rate of Rs.200 per annum per sq. meter, subject to a 10 per cent compound escalation per annum. On the same date as the lease agreement, i.e. 7 February 1996, a separate supplemental agreement was executed between the parties, under which defendant no.1 agreed to pay to the plaintiff a minimum guaranteed amount ('MGA') as specified in a schedule appended to the agreement, being Schedule 'A' thereto. It is the plaintiff's case that defendant no.1 failed to pay the rentals as well as the MGA, as agreed, with effect from 1 April 2008, though it continued and even today continues to use the demised premises for running the hotel business. (There is a dispute between the parties as to the date upto which the lease rent and MGA have been paid by defendant no.1. Whereas, it is the case of the plaintiff that lease rentals as well as MGA were paid only upto 31 March 2008, it is the case of defendant no.1 that they have paid rentals upto March 2017 and are not liable to pay any MGA.)

3. In these facts, the plaintiff proceeded to invoke the arbitration agreement contained in the first lease deed, i.e. the lease in respect of 18000 sq. meters of land. The reference resulted into passing of an award of 17 May 2008 in favour of the plaintiff. The sole arbitrator hearing the reference held that the plaintiff was entitled to recover from defendant no.1 rentals as well as MGA for a period upto 31 March 2008. The arbitrator awarded Rs.37.80 crores towards MGA and Rs.4.53 crores on

account of rentals for the period between 1 April 2005 to 31 March 2008. It is common ground that this award has not only become final, but the awarded amount has even been duly paid by defendant no.1 to the plaintiff. Defendant no.1 thereafter sought a fresh arbitration under the same lease deed claiming *inter alia* that the contract had stood frustrated by reason of impossibility of performance in a commercial sense on account of events which transpired during the second half of 2008. It was also the case of defendant no.1 that the projected turnover of the hotel and the resultant MGA set out in the supplemental agreement were unattainable and arbitrary and, accordingly, no MGA was legally payable.

4. By an award passed on 29 August 2012 in this second arbitration, the arbitrator held the agreement to pay MGA to have been rendered impossible of performance from June 2008 and, accordingly, MGA, in terms of Schedule 'A' to the supplemental agreement, was not payable with effect from 1 June 2008. So far as the quantum of MGA payable upto 1 June 2008 is concerned, the arbitrator held that in the absence of any specific arbitration agreement between the parties to that effect, he could not express any opinion on the subject. The arbitrator held that the parties were, however, at liberty to enter into an appropriate arbitration agreement or make a fresh arbitration reference for seeking fixation of the amount payable towards this MGA. This award was challenged by the plaintiff before Delhi High Court. A learned Single Judge of that court, by his judgment and order dated 6 June 2016, was pleased to allow the arbitration petition. The learned Judge held the award to be patently illegal. The learned Judge held that the liability of defendant no.1 to pay MGA to the plaintiff was absolute and unconditional, and defendant

no.1 was not entitled to claim impossibility as an excuse for non-payment. An appeal preferred by defendant no.1 from the order of the learned Single Judge was dismissed by a Division Bench of that court on 7 November 2016. The Division Bench reiterated that the award was perverse and liable to be set aside. A Special Leave Petition filed against this order was dismissed by the Supreme Court on 5 February 2018; and a review petition from that order was also dismissed on 12 June 2018. In the meantime, the plaintiff, by its communication dated 27 September 2016, terminated the lease agreement and commenced proceedings for eviction under Chapter V-A of the Act. The proceedings include the plaintiff's application for recovery of arrears of rental and MGA as of 31 January 2019, said to be over Rs.807 crores, as also for eviction of defendant no.1 from the suit property. In the backdrop of these facts, the plaintiff filed the present suit before the City Civil Court, Mumbai, claiming *inter alia* that on 29 January 2019, the plaintiff had learnt that defendant no.1 was in the process of dissipating its assets by creating third party rights over them with a view to defeat the plaintiff's rights. The source of knowledge was said to be a newspaper report of that date, reporting *inter alia* that defendant no.1 was in the process of restructuring its assets and liabilities. The plaintiff sought a declaration in its suit that the acts of the defendants in attempting to dispose of, alienate or create third party rights in, the assets of defendant no.1, except the Mumbai property (which formed the subject matter of the lease deed and the supplemental agreement referred to above), either by restructuring them or otherwise in any manner whatsoever, were fraudulent and done with an object of defeating the plaintiff's rights. As a consequential relief, the plaintiff sought a perpetual injunction restraining defendant no.1 from doing so till such time as vacant and peaceful

possession of the lease property was handed over to the plaintiff along with FSI as of the date of handing over of the site to defendant no.1. In aid of this main relief, the plaintiff applied for interim injunction in the same terms by way of the present notice of motion. By its impugned order, the trial court dismissed the plaintiff's notice of motion, declining the injunction. That is how the plaintiff has approached this court by way of the present Appeal from Order.

5. Mr. Kumbhakoni, learned Advocate General, appearing for the Appellant, submits that restructuring of assets and liabilities proposed by defendant no.1 and its promoters is nothing but a strategy or device adopted for defrauding the plaintiff. Mr. Advocate submits that the very timing of this whole exercise gives away these mala fide intentions. It is submitted that after all attempts of defendant no.1 to wriggle out of its commitments under the lease deed and the supplemental agreement were repelled by the courts, the defendants have come up with the idea of divesting of assets of defendant no.1. Mr. Advocate submits that the course of events leading to the filing of the present suit clearly suggests that the defendants are dishonestly seeking to delay or defeat the legitimate rights of the plaintiff to recover lease rentals and MGA under the agreements between the parties. He submits that, in the premises, a temporary injunction under Order 39 Rule 1(b) of the Code of Civil Procedure, 1908 ("Code") should have been granted by the court below. Mr. Advocate submits that considering recent market trends and approach of commercial community, our courts have held that no unimpeachable claim should be defeated by long wait in courts. It is submitted that *modus operandi* of every unscrupulous litigant is to make a decree passed on such claim to be

otiose and illusory by adopting devious and clandestine means. No court, faced with such unimpeachable claim, should wait for an unscrupulous litigant to deliver his defence and enjoy the luxury of a trial, by which time the chance of recovery would be lost forever unto a deserving creditor. To protect the interests of a successful claimant, in the premises, appropriate interim orders concerning preservation of the defendant's assets should be readily passed. It is submitted that the definition of 'fraud' or 'defrauding', which is an ingredient of protective relief to be ordered under provisions such as Order 39 Rule 1(b) or order 38 Rule 5, must be viewed in the context of contemporary trade and commerce and their imperatives in a broader sense and greater latitude must be shown by courts by granting temporary injunctions under these provisions. Mr. Advocate relies on the cases of **Harieen Jairath Vs. Prabha Surana**¹, **Vareed Jacob Vs. Sosamma Geevarghese**², **Securities And Exchange Board of India Vs. Kanaiyalal Baldevbhai Patel**³, **Satluj Jal Vidyut Nigam Vs. Raj Kumar Rajinder Singh**⁴, **Chandra Estate Ltd Vs. Tej Properties**⁵ and **Shrisht Dhawan M/s Shaw Brothers**.⁶ in support of his submissions.

6. Mr. Dada, Mr. Dwarkadas and Mr. Kadam, learned Senior Counsel appearing, respectively, for defendant No.1, their promoters and the reconstruction company involved in the restructuring exercise, oppose the appeal on several grounds. Learned Counsel submit that disposal of assets, forming part of the proposed exercise, involves sale of properties of defendant no.1 with consent of its secured creditors, who anyway have a

1 2019 SCC OnLine Cal 2372

2 (2004) 6 Supreme Court Cases 378

3 (2017) 15 Supreme Court Cases 1

4 2018 SCC OnLine SC 1636

5 RFA (OS) 60/2008 Decided on 07.05.2012

6 (1992) 1 Supreme Court Cases 534

priority over others for satisfaction of their debts through these assets; they have a security interest in the assets. Learned Counsel submit that there is no case, proved or even pleaded, on the part of the plaintiff, that any property is being removed or disposed of with a view to defrauding creditors of defendant no.1 as a class or defeating their rights. Learned Counsel submit that defendant no.1 has been indebted to its secured creditors, as a class, in a sum of over Rs.7000 crores and these secured creditors have all acceded to the scheme of arrangement proposed by defendant no.1; they have agreed to seek satisfaction of their dues from out of sale of secured assets by taking large haircuts. It is submitted that these creditors are ready to compromise their respective debts by reducing them to about one half of the total debts. Learned Counsel submit that far from defrauding them, defendant No.1 and its promoters are seeking to discharge the creditors through this exercise of restructuring of assets and liabilities. Learned Counsel submit that no injunction, in the premises, should follow for restraining their clients from carrying out this exercise. Learned Counsel place reliance on the cases of **Ashok Kumar Lingala Vs. State of Karnataka**⁷, **Raman Tech. & Process Engg. Co. Vs. Solanki Traders**⁸ and **Union of India Vs. Rajeshwari and Co.**⁹ in support of their submissions.

7. The suit seeks a perpetual injunction restraining the defendants from creating third party rights in respect of their assets till such time as vacant and peaceful possession of the leased property is handed over by defendant no.1 to the plaintiff along with its full FSI which

7 (2012) 1 Supreme Court Cases

8 (2008) 2 Supreme Court Cases 302

9 (1986) 9 Supreme Court Cases 426

existed as of the date of handing over of the site by the plaintiff to defendant no.1. It is, in the very first place, doubtful if such a suit can ever lie. The only cases, for which protective reliefs *qua* assets of a defendant could be conceived, are cases covered under Order 38 Rule 5, Order 39 Rule 1 of the Code and Section 53 of the Transfer of Property Act. Order 38 Rule 5, being a provision for attachment before judgment, is essentially about interim protection of a creditor pending his substantive suit for recovery of a debt. Order 39 Rule 1, being expressly enacted for seeking a temporary injunction until the disposal of a suit or until further orders, is also a provision to be applied during the pendency of a substantive suit for recovery of money or property. No substantive suit for seeking reliefs under Order 38 Rule 5 or Order 39 Rule 1, as the sole final relief, can possibly lie. Section 53 of the Transfer of Property Act probably is the only provision, which entitles a creditor to institute a substantive suit to avoid any transfer of immovable property proposed by his debtor on the ground that such transfer has been made with an intent to defeat or delay the creditors. Section 53 is on the footing that any such transfer of immovable property, that is to say, a transfer made with intent to defeat or delay the creditor, is voidable at the option of any creditor so defeated or delayed. But it is important to remember that such suit has to be instituted on behalf, and for the benefit, of all creditors of the transferor. It is impermissible to institute such suit only with a view to protect any particular creditor's debt or with a view to enable such creditor to receive the value of his debt. This mandate is obviously not satisfied in the present case. If at all, the idea of the present suit is to stall the efforts of other creditors to recover their debts. Such a suit can hardly qualify as an action on behalf, or for the benefit, of all creditors. It is difficult to fathom from the narration of the

plaint or, for that matter, from the reliefs prayed for therein, which particular provision of law is resorted to by the plaintiff for filing of the present suit. One thing is sure though. None of the provisions referred to above can justify such a suit.

8. The averments in the plaint suggest that what is sought to be stopped is the exercise of reorganization of its assets and liabilities undertaken by defendant no.1 company. That is on the ground that such action is “*being done fraudulently and solely with the purpose of defeating the interest of the plaintiff*” and not for avoiding the transfer on the ground that it is being made with intent to defeat or delay the creditors of the transferor as a class. What is alleged is simply that if defendant no.1 is permitted to dissipate its assets “*without paying crystalized dues of the plaintiff, the plaintiff would suffer grave and irreparable injury*”. Based on these averments, what is prayed for is a perpetual injunction restraining defendant no.1 from transferring its property upto a certain period. That period is said to be “*till such time the vacant and peaceful possession of the leased property is handed over to the plaintiff, along with FSI as on the date of handing over of the site to defendant no.1.*” It is difficult to see how such a prayer can be made under Section 53 of the Transfer of Property Act. This being the only substantive prayer, and which cannot be termed either as a prayer under Order 38 Rule 5 or Order 39 Rule 1(b), the suit is *prima facie* not maintainable.

9. Leaving that aside, however, even if one were to assume that such a suit is indeed maintainable, and that is what the trial court has concluded *prima facie*, there are other insurmountable difficulties in the

way of the plaintiff seeking such a relief under any of the applicable provisions noted above, namely, either Order 38 Rule 5 or Order 39 Rule 1(b) or Section 53 of the Property Act.

10. So far as Section 53 is concerned, it is already noted that the relief sought is not on behalf of the body of creditors, but for the suing creditor alone. In fact, if such relief were to be granted to the plaintiff, who is affected the most is the body of the other creditors of defendant No.1 as a whole and more particularly, its secured creditors as a class. As the Supreme Court has said in **Union of India vs. Rajeshwari and Co.** (supra), the preference by a debtor of one creditor over the others is not *ipso facto* deemed fraudulent. The following observations of Supreme Court in that case are very much apposite in the present case:

7. [Section 53](#) of the Transfer of Property Act provides that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. A long line of cases has held that the preference by a debtor of one creditor over the others is not *ipso facto* deemed fraudulent, and reference may be made to *Musahar Sahu v. Hakim Lal*, A.I.R. 1915 PC 115, where the Judicial Committee of the Privy Council quoted *Palles C.B.*, who said in *In re Moroney* [1887] L.R. 21 Ir. 27, 62:

"The right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. Now it follows from this that security given by a debtor to one creditor upon a portion of or upon all his property (although the

effect of it, or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor) is not a fraud within the statute; because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

8. The Judicial Committee explained that

the transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton v. Pollock*. [1876] 2 Ch. D. 104, 108. So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor-there being in the case no question of bankruptcy.

This proposition of law was re-affirmed by the Judicial Committee subsequently in *MA PWA MAY v. S.R.M.M.A Chettyar Firm*, (1928-29) 56 Indian Appeals 379.

9. It seems clear that it is open to a debtor to prefer one or more creditors over the others in the payment of his debts, and so long as he retains no benefit in the property the mere circumstance that some creditors stand paid while others remain unpaid does not attract the provisions of Section 53 of the Transfer of Property Act. It is not disputed that the debts satisfied by payment of the sale proceeds are genuine. A faint attempt was made to show that some of the debts discharged were owed to persons who were also Directors of the Company. There is no finding by the High Court in support of that contention. It was also urged that the consideration which passed for the sale of the assets was inadequate and that the assets had been undervalued. Here again there is no finding to support the submission. The questions raised are questions of fact, and this Court will not permit such questions to be raised unless there is material evidence which has been ignored by the High Court or the finding reached by the Court is perverse.

11. Order 38 Rule 5, which provides for interim protection to a plaintiff, requires satisfaction of the court, by affidavit or otherwise, that the proposed disposal or removal of his property by the defendant is "with intent to obstruct or delay the execution of any decree that may be passed

against him.” As we have noted above, there is no substantive suit pending before the trial court for any decree for money or property. The expression “*any decree that may be passed*” used in Order 38 Rule 5 implies any decree that may be passed in the very suit where attachment before judgment under that provision is sought. The plaintiff’s action for a money decree (together with a decree for recovery of property) is pending before the Competent Authority under Chapter VA of the Act. As the Supreme Court has held in the case of **Ashok Kumar Lingala vs. State of Karnantaka** (supra), the power to make an interim order is exercised by an authority who has to make the final order; the exercise of such power implies that the authority seized of the proceedings, in which such order is made, would eventually pass a final order, the interim order merely serving as a step in aid of such final order. The law does not permit making of an interim order by one authority or court pending adjudication of a dispute by another. No interim order could be made, in the premises, by the trial court in the present case pending adjudication of the eviction and compensation case by the Competent Authority under Chapter VA of the Act.

12. Order 39 Rule 1(b) of the Code, which, as we have noted above, is also essentially for claiming an interim order pending a suit, that is to say, presumably a suit for recovery of the creditor’s dues (which this suit is not), speaks of proof, by affidavit or otherwise, that “*defendant no.1 threatens or intends to remove or dispose of its properties with a view to defraud its creditors*”. Learned Advocate General is right in submitting that the words “defrauding” or the concept of “fraud” inherent in this expression encompasses a wide variety of actions on the part of the

defendants; it is not necessarily restricted to ‘fraud’ as understood by Section 17 of the Contract Act. That is so, since Section 17 concerns consent or volition of a contracting party and focuses on factors which vitiate such volition or consent. The particular group of Sections, namely, Sections 15 to 19 of the Contract Act, envisage various circumstances, in which such consent or volition can be said to be vitiated and accordingly the contract rendered voidable at the instance of the aggrieved contracting party. Fraud is one of these instances, where acts are committed by a party to contract, or with his connivance, or by his agent, with intent “*to deceive another party thereto or his agent or to induce him to enter into the contract.*” These acts are said to be (i) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or (ii) the active concealment of a fact by one having knowledge or belief of the fact; or (iii) a promise made without an intention of performing it; or (iv) any other act fitted to deceive; or (v) any act or omission which the law specially declares to be fraudulent. No doubt going by this definition, the acts complained of cannot possibly qualify as ‘fraud’. But even by the expansive meaning of the expression ‘fraud’, as we have noted below, it is difficult to say that these acts could possibly be subsumed within that expression.

13. As the Supreme Court has observed in **SEBI Vs. Kanaiyalal Baldevbhai Patel**¹⁰, ‘fraud’ is difficult to define jurisprudentially; it is very difficult to clothe it with particular ingredients; whichever way one were to so define or clothe it, human ingenuity was sure to find ways and means to bypass such definition or stuff. In the same refrain, Kerr in his celebrated

10 (2017) 15 SCC 1

treatise “Law of Fraud and Mistake”, whilst underscoring the importance of avoiding hampering of courts by seeking to define or lay down general propositions for constituting ‘fraud’, puts the matter thus :

“Fraud is infinite in variety..Courts have always declined to define it,reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud....may be said to include property all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a willful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled too.”

As Delhi High Court puts it in the case of **Chandra Estate Ltd Vs. Tej Properties**, “agreements pertaining to fraud are nothing but conspiracies; they are hatched in the darkness of secrecy and more often than not, it is the conduct of the parties and prudence to infer, from the conduct, which helps in determining where the truth lies”.

14. Mr. Advocate is right in submitting that whenever a court considers granting of any restraint on a fraudulent transfer under Section 53 of the Transfer of Property Act or, for that matter, attachment or restraint either under Order 38 or Order 39, depending on the circumstances of the case, the power of the court to grant such relief would vary; what is to be kept in mind is the *modus operandi* of an unscrupulous

litigant to make the remedy illusory by adopting clandestine means; and to that end, a broader view of the idea of 'fraud' or 'defrauding of creditors' may have to be adopted. There is certainly no quarrel with the proposition. The point of the matter is whether there is any such suggestion in the facts of the present case.

15. For a plaintiff, such as the one we have here, to make out a case against his debtor of transfer of property with intent to defraud creditors, he would have to at least make out some secret or surreptitious act on the part of the debtor in disposing of the latter's property and further, that the real intent of such act was different from what was apparently disclosed (the real intent being to defeat or delay the creditors). None of these elements is present in the facts of the present case. Defendant No.1 is a public limited company; it is subject to rigorous regulatory frame work of various statutory authorities, including SEBI and the Stock Exchanges. The whole exercise of restructuring of assets and liabilities is being carried out in the full glare of these authorities and is scrupulously subjected to their regulatory powers. The record indicates the various steps adopted by defendant no.1 and its promoters to achieve the present reorganization. As for the act of restructuring itself, it is apparently on record, and does not admit of any doubt, that the real purpose, as also the disclosed purpose, of the whole exercise is to satisfy the debts of secured creditors from out of the assets of defendant no.1-company, which themselves form security of such creditors, and with the latter taking a substantial haircut and waiving large parts of their debts in the process. The sale of assets of defendant no.1, as proposed, is expected to wipe out all debts it owes to its secured creditors and enable it to become debt-free

so far as these creditors are concerned. In the face of these facts, it can hardly be suggested that the exercise, contemplated by defendant no.1, is with an intent to defeat or delay its creditors; it is rather with a view to achieve an expeditious and satisfactory payment of creditors as a body, at least the most important segment or class of creditors, namely, the secured creditors.

16. The only facts pointed out by the learned Advocate General in support of his case of fraudulent disposal of assets by defendant no.1 are : (i) the approach by defendant no.1 to the arbitral forum on a wholly unstable case of impossibility of the contract requiring it to pay MGA; and (ii) the timing of its restructuring exercise, that is to say, after its arbitration reference finally resulted in a failure in the court of last resort. Neither of these two circumstances makes out any case of fraudulent disposal of assets by means of the purported restructuring. Approaching an arbitral forum for redressal of any grievance, however, illegitimate or ill-perceived such grievance may be, can hardly suggest a mala fide or devious tactic. And as for the timing of the restructuring exercise, the argument based on it can at best be described as far-fetched. Besides, as pointed out below, defendant no.1 has been exploring ways of reconstruction of its debts for long.

17. At least from the year 2012, defendant no.1 has been in discussions trying to restructure its assets. In September 2012, a major portion of its debts was sought to be restructured under a Corporate Debts Restructuring (“CDR”) Scheme of Reserve Bank of India with a cut off date of January 2012. (At that time, its total debt was approximately in the

region of Rs.4100 crores.) It is also pertinent to note that the Board of Directors of defendant no.1-company had a nominee director of the plaintiff all along. When this CDR was proposed, it had the support of the nominee director of the plaintiff. The CDR, however, failed. Over time, multiple other attempts appear to have been made by defendant no.1 so as to eliminate, or at least obviate, its burden of debts. In September 2015, its hotel undertaking was sold and money realized from the sale was made over to its lenders. In August 2016, by a shareholders' resolution, defendant no.1 approved the sale of its hotel undertakings in Chennai and Delhi, though the sale did not materialize, as no offer acceptable to the lenders of defendant no.1 was received. Besides, in 2014, defendant no.1 had appointed a merchant banker to assist, and advise, it to explore potential divestment of its hotel undertakings with a view to eliminate/pay its mounting debts. Along with this merchant banker, defendant no.1 also appears to have held extensive discussions with various parties towards either purchase of its hotel undertakings or investment in them in its efforts to clear the dues owed to its secured creditors. It must, however, be noted that all this does not form part of the record of the case before the trial court, but then it is equally true that there was no such specific allegation, as we have noted above, in the plaint, which would have called for submission of these particulars on the part of defendant no.1. Defendant no.1 appears to have presented these facts in its affidavit filed before this court on the basis of what was urged at the Bar by the learned Advocate General, which submissions do not either form part of, or emanate from, the plaintiff's pleadings before the trial court.

18. In the premises, there is no infirmity to be found in the

impugned order of the trial court. The Appeal from Order has no merit, and is dismissed.

19. In view of the dismissal of the appeal, the Civil Application does not survive and is disposed of.

(S.C. GUPTE, J.)

Rajesh V.
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