IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 23.01.2019

Coram
The Hon'ble Mr.Justice M.M.Sundresh
and
The Hon'ble Justice Krishnan Ramasamy

O.S.A.No.87 of 2015
and
M.P.Nos.1 and 2 of 2015
C.M.P.Nos. 6430, 6431 and 16501 of 2018

1. S.P. Bhooma
2. V.Goumi

Appellants

Vs.

1. Indian Bank
rep. by its Chief Manager
Head Office No.31,
Rajaji Salai, Chennai - 600 001.
Branch Office No.7,
West Tank Street,
Tiruvanmiyur Chennai - 600 041.

2. The Official Assignee,
High Court, Madras.
(R-2 impleaded as per order dated
04.10.2017, made in O.S.A.No.87 of 2015.

...Respondents

Original Side Appeal filed under Order XXXIX Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent to set aside the judgment and decree dated 24.03.2015, made in Insolvency Petition No.46 of 2010, on the file of the Original Side of this Court.

For Appellants : Mr.R.Thiagarajan

For Respondent-1 : Mr.A.L.Somayaji
Senior Counsel for
Mr.T.Sundar Rajan

For Respondent-2: M/s.C. B. Meena Official Assignee
&
Mr.M.Vasantha Kumar
Deputy Official Assignee

JUDGEMENT

(Order of the Court was delivered by Krishnan Ramasamy,J.,)

This Original Side Appeal has been preferred challenging the order passed by the learned Single Judge, in I.P.No.46 of 2010, dated 24.03.2015.

2. The brief facts of the case, which led to the filing of the present Original Side Appeal are as follows:-

i) The Company, named 'M/s. Ind Solders and Alloys Pvt. Ltd.' availed loan facility from the respondent/Bank, for which, first appellant stood as guarantor, by executing a guarantee agreement, dated 12.03.2008. It is alleged that the said Company committed breach of trust and liable to pay a sum of Rs.15,68,88,928.99. Hence, the respondent/Bank initiated proceedings under Section 13 (4) of the SARFAESI Act and took possession of the secured assets mortgaged by the Company and insofar as the first appellant's assets are concerned, 'A' schedule property was taken possession. However, in order to cover the unsecured balance loan amount, the respondent/Bank took steps to trace out the other personal properties belonging to the first appellant. However, it is alleged that the first appellant, in order to delay and defeat the rights of the respondent/Bank to keep the property away them and settled 'B' schedule property in favour of the second appellant, who is none other than her daughter. Since the first appellant/debtor would not be able to pay the debts, (which the Company owes to the respondent/Bank) without the aid of the property covered under the 'B' schedule property, the respondent/Bank filed an Insolvency Petition to declare the first appellant/debtor as an insolvent with a consequential direction to appoint an Official Assignee with a direction to administer the estate of the first appellant/debtor. By the order, impugned herein, the said Insolvency Petition has been allowed. Challenging the same, the present Original Side Appeal by the first appellant/debtor and the second appellant, in whose favour, the 'B' schedule property has been settled.

3. Today, when the Appeal is taken up for hearing, Mr.R.Thiagarajan, the learned counsel appearing for the appellants submitted that challenging the SARFAESI proceedings initiated by the respondent/Bank, which resulted in issuance of demand/possession notice dated 22.08.2009 and the sale notice, dated 28.08.2009, both the Company and the first appellant filed an appeal in S.A.No.96 of 2009 (later, re-numbered as S.A.No.108 of 2011) before the DRT, which was allowed, vide order, dated 30.07.2012. Aggrieved by the said order, the respondent/Bank filed an Appeal before the DRT, in R.A.No.116 of 2012. It would not be out of place to mention here that during the pendency of

this Original Side Appeal, the said Appeal filed by the respondent/Bank came to be allowed. Simultaneously, the respondent/Bank also initiated recovery proceedings before the DRT, by filing O.A.No.210 of 2009 (later, re-numbered as O.A.No.57 of 2012, seeking recovery of Rs.15,68,88,928.99, wherein, the first appellant made a counter claim. In the meantime, the respondent/Bank filed Insolvency Petition alleging that the first appellant has committed an act of insolvency, which was allowed by the impugned order and as against which, the present Appeal is filed.

4. The learned counsel further submitted that, since, subsequent to the filing of this Appeal, the alleged act of insolvency was set right by the first appellant by cancelling the settlement deed executed in favour of the second appellant, vide document No.3912 of 2009, dated 14.09.2017, the order passed by the learned Single Judge in the Insolvency Petition is not sustainable. Further, he submitted that alleged act of insolvency does not come into play as long as the liability of the first appellant is determined and the same cannot be decided till claims and counter claims pending before the DRT are adjudicated and the liability of the parties, (viz., borrower, guarantor, creditor) is determined and debt is crystallized.

5. Therefore, the learned counsel suggested that pending adjudication of the proceedings before the DRT, a sum of Rs.52,10,000/- which was realized from and out of the sale proceeds of the properties (both movables and immovables) of the first appellant and lying in an 'No Lien Account' opened by the respondent/Bank, as per the orders of this Court, shall be permitted to be withdrawn by the respondent/Bank towards their outstanding dues. Further, the learned counsel assures that till the claims of the respondent/Bank is adjudicated, the appellants will not alienate/encumber the subject property and to that effect, the first appellant has filed an undertaking before this Court, dated 04.12.2017. Thus, he submitted that the present Appeal may be disposed of recording such undertaking of the first appellant.

6. Mr.A.L.Somayaji, learned Senior Counsel for Mr.T.Sundar Rajan, the learned counsel appearing for the first respondent is agreeable for such course being adopted.

7. In view of such submissions made by the learned Senior Counsel for the appellants and the learned Senior Counsel for the first respondent and the undertaking filed by the first appellant and the assurance provided by the learned counsel appearing on behalf of the appellants, we are of the view that the present Appeal could be disposed of by recording such undertaking. But, before doing so, since it is pointed out by

the learned counsel for the appellants that subsequent to the filing of the present Appeal, the alleged act of insolvency was set right by the first appellant by cancelling the settlement deed executed in favour of the second appellant, by means of executing a cancellation deed, dated 14.09.2017, we deem fit that it would be appropriate to set aside the impugned order passed by the learned Single Judge in the Insolvency Petition, as cause of action for initiation of such proceeding does not subsist, for, the very settlement deed itself has been cancelled. De hors the same, as rightly pointed out by the learned counsel for the appellants, before deciding the aspect of inability of the first appellant in settling the dues, the liability of the first appellant has to be decided and the same cannot be done, unless and until, the proceedings before the DRT attain finality and the liability of the respondent/Bank, borrower/Company and the first appellant/guarantor is determined.

8. For the reasons stated hereiabove, we set aside the impugned order passed by the learned Single Judge in I.P.No.46 of 2010, dated 24.03.2015 and allow this Original Side Appeal with the following directions:-

i) The first respondent/Bank is permitted to withdraw the sum of Rs.52,10,000/- (Rupees Fifty Two Lakhs and Ten Thousand only) which is lying in an 'No Lien Account' opened by them.

ii) The appellants, particularly, the first appellant (guarantor) is restrained from alienating/encumbering/creating any third party right over the property referred to in the cancellation deed until the settlement of claim of the respondent/Bank.

iii) However, there shall be no order as to costs.

Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

sd

To

1. Indian Bank
rep. By its Chief Manager
Head Office No.31,
Rajaji Salai, Chennai - 600 001.
Branch Office No.7,
West Tank Street,
Tiruvanmiyur Chennai - 600 041.

2. The Official Assignee,
High Court, Madras.

3. The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to Mr.T.Sundar Rajan, Advocate, S.R.No. 5261

O.S.A.No.87 of 2015

AD(CO)
GN(11/03/2019)