IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 9/4/2019

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Civil Revision Petition No.1356 of 2019
a n d
C.M.P.No.8832 of 2019

Sri Lakshmi Hotel Pvt Ltd
rep. By is Managing Director
Mr.V.S.Palanivel
having its Registered Office at
No.3A/27 Alexandria Road
Cantonment
Trichy 620 001. ...Petitioner

Vs

Sriram City Union Finance Ltd
rep. By its Authorised Signatory
Mr.A.Ramanujam
having Regional Office at
No.123 Angappa Naicken Street
Parrys
Chennai. ...Respondent

Petition filed under Article 227 of the Constitution of India against the order dated 28/2/2019 passed in C.P.No.1140/(1B)/CB/2018 on the file of the National Company Law Tribunal, Chennai.

For petitioner ... Mr.G.T.Subramanian

O R D E R
(Order of the Court was made by Subramonium Prasad, J)

Instant Civil Revision Petition is filed against the order, dated 28/2/2019, passed in C.P.No.1140/(1B)/CB/2018, on the file of the National Company Law Tribunal, Special Bench, Chennai.

2. Petitioner entered into a loan agreement with the respondent, on 3/4/2006 and 3/7/2006, wherein, a sum of Rs.1,50,00,000/- and 7,25,000/-, were disbursed to the

respondent, and to be repaid, together with interest, in twelve and six months time, respectively. Since the amount was not paid, as agreed in the agreement, Arbitration Proceeding before the Arbitral Tribunal was initiated. Vide, order, dated 27/12/2014, Tribunal, passed an award, directing the petitioner, to pay a sum of Rs.2,21,08,244/-, together with interest, at the rate of 24% p.a., from 26/3/2009, till the date of realisation and costs.

3. Petitioner, filed a petition in O.P.No.137 of 2015, under Section 34 of the Arbitration & Conciliation Act, 1996, challenging the award. A learned Single Judge of this Court, while adverting to the correctness of award, in the order, confirmed the award, but at the end of the order, it is typed as,

> "That the award dated 27/12/2014 made in Arbitration Case No.1 of 2009 on the file of the second respondent be and is hereby set aside.
>
> 2. That the O.P.No.137 of 2015 be and is hereby dismissed.
>
> 3. That there shall be no costs of this petition."

4. The entire order, dated 16/11/2017, reads as under:-

> "This Original petition having been heard on 4/7/2007 in the presence of Mr.G.T.Subramanian, Advocate for the petitioners herein and Mr.Satish Parasaran Senior Counsel for M/s. Mr.R.Parthasarathy, Advocates for the first respondent herein and upon reading the petition filed herein and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of the said advocates for the parties hereto and this Court having observed that a perusal of the award reveals that all factual aspects of the matter as raised by the parties have been adverted to and adjudicated upon by the Arbitrator prior to arriving at the conclusion that the borrowers are liable to pay the outstanding dues to the company along with the contracted rate of interest at 24% from the date of claim till the date of realisation and the sole dispute raised by the borrowers and canvassed before this Court is with regard to the rate of interest, being usurious and the allegations of fraud on the

part of the company have been noted and adjudicated, upon by the Arbitrator and this Court do not propose to re-visit the same, and the thrust of the appeal is solely on the rate of interest that has been found by the Arbitrator to be the agreed contracted rate warranting no interference at this juncture, and the view taken is based o an appreciation of the relevant facts and the terms of the agreements between the parties and in the view of the Court is liable to be confirmed as regard the levy of interest for the period from date of claim till date of award, being 27/12/2014 and the grounds of challenge under Section 34 (2) are narrow in scope and do not permit a re-appreciation of evidence, and the proper course of action for the petitioner, if it was really aggrieved by the order of the Tribunal, rejecting the interim application, was to have challenged the same, and this, was however not done and the facts have thus attained finality. It is ordered as follows:-

That the award dated 27/12/2014 made in Arbitration Case No.1 of 2009 on the file of the second respondent be and is hereby set aside.

2. That the O.P.No.137 of 2015 be and is hereby dismissed.

3. That there shall be no costs of this petition."

5. Perusal of the entire order would show that there is a typographical error inasmuch as the learned Single Judge, after giving reasons as to why the award has to be upheld and the operative portion probably by mistake typed as "award is set aside". O.P.No.137 of 2015, is dismissed.

6. Respondent has filed an application, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), for initiation of Corporate Insolvency Resolution Process, on the ground that a default had occurred. Section 4 of the Insolvency and Bankruptcy Code, 2016 deals with an application to be filed by a financial creditor and the same is extracted:-

Application by financial creditor -

(1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process

against a corporate debtor under Section 7 of the Code i Form 1, accompanied with documents and records requied therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2). Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

(3). The applicant shall dispatch forthwith, a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.

(4). In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

7. Application by the financial creditor(s) to initiate corporate insolvency resolution process under the code, as per section 7 of the Code, 2016, read with rule 4 of the rules, 2016, should be made as per Form 1, which is reproduced.

Application by Financial Creditor(s) to initiate Corporate Insolvency Resolution Process under the Code

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Date

To

The National Company Law Tribunal

(Address)

From,

[Names and addresses of the registered offices of the financial Creditors]

In the matter of [name of the corporate debtor]

Subject: Application to initiate corporate insolvency resolution process in the matter of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

[Names of the financial creditor(s)], hereby submit this application to initiate a corporate insolvency resolution process in the matter of [name of corporate debtor]. The details for the purpose of this application are set out below:

PART I

Particulars of Applicant (please provide for each financial creditor making the application)

1. NAME OF FINANCIAL CREDITOR

2. DATE OF INCORPROATION OF FINANCIAL CREDITOR

3. IDENTIFICATION NUMBER OF FINANCIAL CREDITOR

4. ADDRESS OF THE REGISTERED OFFICE OF THE FINANCIAL CREDITOR

5. NAME AND ADDRESS OF THE PERSON AUTHORISED TO SUBMIT APPLICATION ON ITS BEHALF

(ENCLOSE AUTHORISATION)

6. NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF

(ENCLOSE AUTHORISATION)

PART II

Particulars of the Corporate Debtor

1. NAME OF THE CORPORATE DEBTOR
2. IDENTIFICATION NUMBER OF CORPORATE DEBTOR
3. DATE OF INCORPORATION OF CORPORATE DEBTOR

4. NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)

5. ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR

PART III

Particulars of the proposed Interim Resolution Professional

1. NAME, ADDRESS, EMAIL, ADDRESS AND THE REGISTRATION NUMBER OF THE PROPSOED INTERIM RESOLUTION PROFESSIONAL

PART IV

Particulars of Financial Debt

1. TOTAL AMOUNT OF DEBT GRANTED DATE (S) OF DISBURSEMENT

2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)

PART V

Particulars of Financial Debt (Documents, Records and Evidence of Default)

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.

ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHAARGE ISSUED

BY THE REGISTRAR OF COMPANIES (IF THE CORPROATE DEBTOR IS A COMPANY)

2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY.

(ATTACH A COPY OF THE ORDER)

3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY

(ATTACH A COPY OF SUCH RECORD)

4. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSIO ACT, 1925 (10 OF 1925) (ATTACH A COPY)

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION I ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT.

I hereby certify that, to the best of my knowledge, [name of proposed insolvency professional] is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

[Name of the financial creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely

--Signature of person authorised to act on behalf of the financial creditor

--Name in block letters

--Position with or in relation to the financial creditor

Address of person signing

Instructions

Please attach the following to this application:

Annex I Copies of all documents referred to in this application

Annex II Written communication by the proposed interim resolution professional as set out in Form 2.

Annex III Proof that the specified application fee has been paid

Annex IV Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants.

8. Record of proceedings of the National Company Law Tribunal, on 25/10/2018, reads as under:-

> "When this Bench has asked as to why this petition should not be dismissed as not maintainable, the petitioner counsel has sought time to get instructions from the party for reporting withdrawal, at his request, list this matter on 29/1/2018."

9. On 29/10/2018, National Company Law Tribunal, passed the following order:-

"The Financial Creditor counsel is directed to file chronology of events on the next date of hearing.

List this matter on 2/11/2018.

10. On 2/11/2018, following order was passed by the National Company Law Tribunal.

"Heard submissions. Orders reserved."

11. Operative portion of the impugned order, dated 28/2/2019, reads thus:-

> "7. The Corporate Debtor having named the Interim Resolution Professional with his consent, there being no disciplinary proceedings against the same, this Bench hereby admits this petition filed under Section 7 of the Code, declaring moratorium with consequential directions as mentioned below:-
>
> I. Therefore, this Bench hereby prohibits,
>
> (i). that the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration, panel or other authority.
>
> (ii). transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
>
> (iii). any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including an action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

(iv). that the recovery of any property by an owner or lesser where such property is occupied by or in the possession of the corporate debtor.

II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. That the order of moratorium shall have effect from 28/2/2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 of IBC or passes an order for liquidation of corporate debtor under Section 33 of IBC, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of OBC.

VI. That this Bench hereby appoints Mr.P.Sriram, having Registration Number [IBBI/IPA-002/IP-N000292/2017-19/10895] as Interim Resolution Professional to carry out the functions as mentioned under IBC. Fee payable to IRP/RP shall be in compliance with the IBBI Regulations/Circulars/Directions issued in this regad.

Accordingly, this petition is admitted.

9. The Registry is hereby directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or whatsapp."

12. It is this order which has been challenged in the instant Civil Revision petition.

13. Heard Mr.G.T.Subramanian, learned counsel for the petitioner.

14. Learned counsel for the petitioner would state that the application was not maintainable, because the operative portion of the order, dated 16/11/2017, passed by the learned Single Judge in O.P.No.137 of 2015 shows that the award itself has been set aside. He would further submit that in view of the above, petition before the National Company Law Tribunal was not maintainable and resultantly the process under the Insolvency and Bankruptcy Code, 2016, by the financial creditor ought not to have been initiated.

15. At the outset, we indicated to the learned counsel for the petitioner that under the Insolvency and Bankruptcy Code, 2016, there is a appeal remedy. However, learned counsel for the petitioner submitted that order impugned in this revision, requires to be set aside, in exercise of supervisory jurisdiction, under Article 227 of the Constitution of India, and thus we are called upon to test correctness and legality.

16. We are unable to appreciate the contention of the petitioner for the reason that an award has been passed, on 27/12/2014, for a sum of Rs.2,21,08,244/-, together with interest, at the rate of 24% p.a., from 26/3/2009, till the date of realisation and costs. A perusal of the order of the learned Single Judge, in O.P.No.137 of 2015 on the application, filed by the petitioner, under Section 34 of the Arbitration and Conciliation Act, 1996, would show that the learned Single Judge had in fact, rejected all the contentions of the petitioner, challenging the award. Reading of the entire award quoted supra would show that the operative portion of the order, stating that "Award is set aside" is only a typographical error because the learned Single Judge has also dismissed O.P.No.137 of 2015 by the same order.

17. Perusal of Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, does not warrant that decreetal portion of the order should be produced. Form No.A extracted supra only indicates that order which has been relied upon should be produced.

18. Undisputed facts are that there is an award, in favour of the first respondent, for a sum of Rs..2,21,08,244/-, together with interest, at the rate of 24% p.a., from 26/3/2009, till the date of realisation and costs.

(ii). Entire order of the learned Single Judge would show that all the contentions raised by the petitioner, in the application, under Section 34 of the Arbitration Act, have been negatived.

19. The contention of the learned counsel is that on 25/10/2018, the learned National Company Law Tribunal had come to a conclusion that the application as framed is not maintainable and therefore, the National Company Law Tribunal, ought not to have proceeded with the application filed under Section 7 of the Code, 2016, and all further proceedings before the National Company Law Tribunal are bad, cannot be accepted. The case came up twice after 25/10/2018. On 25/10/2018, the National Company Law Tribunal directed the learned counsel for the Financial Creditor to file the chronology of events. Further, on 2/11/2018, arguments were heard and orders were reserved. The impugned order does not reveal that the points now raised by the petitioner in this civil revision petition, regarding the inconsistency with the order dated 16/11/2017, passed by this Court in O.P.No.137 of 2015, were reiterated and argued. Probably this point was given up. Neither the order, dated 25/10/2018 nor the order, dated 2/11/2018, reflect that the petitioner has made any submissions regarding maintainability of the petition before the National Company Law Tribunal. The petitioner therefore, now cannot be permitted to raise this issue.

20. There is no infirmity in the impugned order, by which the application of the respondent has been accepted and Insolvency Resolution Professional has been appointed. This Court, under Article 227 of the Constitution of India exercises a supervisory jurisdiction. There is no material irregularity in the order passed by the National Company Law Tribunal.

21. Though this petition could have been dismissed, on the ground that alternate remedy by way of an appeal before the National Company Law Appellate Tribunal is available to the petitioner, and the petitioner could approach the National Company Law Appellate Tribunal, under Section 61 of the Insolvency and Bankruptcy Code, this Court, deems it

appropriate to dismiss the Civil Revision Petition, on merits itself. No costs. Consequently, the connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The National Company Law Tribunal, Chennai.

Civil Revision Petition No.1356 of 2019

NRL(CO)
SP(28/05/2019)