

OD-9

CS/1/2016

IA No. GA/3/2022

GA/4/2022

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

C. SURENDRA TRADING & INVESTMENT PVT. LTD.

Vs.

ADITI E-OILS PVT LTD. & ANR.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On : 16.11.2022

Order On : 24.11.2022

Appearance:

Mr. D. Nand Misra, Adv.
Mr. Prashant Kumar Singh, Adv.
...For the plaintiff.

Mr. Rachit Lakhmani, Adv.
Mr. Vikash Singh, Adv.
Ms. Arunima Mukhopadhyay, Adv.
Mr. Rathindra Nath Bandhopadhyay, Adv.
...For the defendants.

ORDER**GA 3 of 2022**

The plaintiff has filed the instant application for amendment in the plaint by deleting the name of the defendant no. 1 by substituting the name of the Liquidator of the defendant no. 1 in the cause title as well as in the plaint. The Counsel for the plaintiff submits that during the pendency of the suit, one of the creditor of the defendant no. 1 had initiated a proceeding before the National Company Law Tribunal against the defendant no. 1 and the National Company Law Tribunal has initially appointed one Surendra Kumar Agarwal as Liquidator and the said Liquidator of the defendant no. 1 and the said Liquidator had issued public announcement on 15.01.2021 calling upon the stockholders to file their claims along with supporting documentary evidence. Subsequently, Sri Surendra Kumar Agarwal was substituted by a new Liquidator namely, Krishna Kumar Chhaparia, on the basis of the announcement of the Liquidator, the plaintiff has also raised claim but initially the Liquidator had rejected the claim of the plaintiff and being aggrieved with the said order of the Liquidator, the plaintiff had preferred an appeal and accordingly the National Company Law Appellate Tribunal had allowed the appeal of the plaintiff and accordingly the defendant no. 1 has filed his claim before the Liquidator.

Now, the plaintiff submits that as the Liquidator has been appointed by the NCLT and as such by deleting the name of the defendant no. 1, the name of the Liquidator is to be substituted in place of defendant no. 1.

Perused the application, order passed by the NCLT and other documents. Admittedly, a Liquidator has been appointed in place of the defendant no. 1, and the defendant no. 1 had also filed his claim before the Liquidator and thus this Court finds that the prayer made by the plaintiff is required to be allowed. In view of the above prayers (a) to (e) of the Master's summon are allowed.

GA 3 is disposed of.

GA 4 of 2022

Mr. Krishna Kumar Chhaparia, Liquidator of the defendant no.1 appointed by the National Company Law Tribunal has filed the instant application praying for dismissal of the suit and release of Bank Guarantees submitted by the defendant no. 1 before the Registrar of this Court in terms of the order passed by this Court in Company Petition No. 745 of 2013, dt. 11th September, 2015.

The plaintiff company had initially filed an application for winding up against the defendant no.1 company being Company Petition No. 745 of 2013 before this Court on account of default in payment of dues. The said company petition was disposed of by this Court on 11th September, 2015 by passing the following order :

“This opportunity is given to the company upon their furnishing a bank guarantee securing the entire claim of the petitioning creditor till 20th November 2013, for Rs. 37,49,329/-. The company will furnish a bank guarantee for Rs. 10 lakhs in favour of the Registrar, Original Side, by 30th September, 2015. It will furnish bank guarantees of Rs. 5 lakhs each by the end of every quarter, the first quarter ending on 31st December 2015 in a similar manner to the Registrar, Original Side. The last bank guarantee may be of the sum of Rs. 3 lakhs. The company will be furnished upon intimation to the petitioning creditor.

The petitioning creditor will have to file a suit by 23rd November, 2015. If the suit is not filed by the petitioning creditor, the bank guarantee will be discharged and returned to the company. If there is default in furnishing any of the bank guarantees, the winding up application may be activated by application before this Court for immediate admission. Upon the bank guarantees being furnished, the petitioning creditor will have to prove its above claim in the suit to be filed by them.”

In compliance of the Order dt. 11th September, 2015, the defendant company had furnished bank guarantee of Rs. 43,00,000/- by way of fixed deposit of State Bank Of India with auto renewal before the Registrar Original Side of this Court and the plaintiff has filed the instant suit praying for a decree amounting to Rs. 31,74,916/- along with interest.

During the pendency of the suit, one of the financial creditor of the defendant company namely, JM Finance Assets Reconstruction Company Ltd. had filed an insolvency petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the defendant before the National Company Law Tribunal being CP (IB) 1178 (KB) 2018. On admission of the Company Petition corporate insolvency resolution process was commenced against the defendant company but was not successful and accordingly the Tribunal had appointed one Shri Surendra Kumar Agarwal as the Liquidator in

respect of the defendant company. The Liquidator had circulated a public announcement dt. 15th January, 2021 calling upon all the stock holders of the defendant company to submit their respective claims.

In the mean time, the Tribunal had replaced Shri Surendra Kumar Agarwal and appointed the petitioner herein as liquidator of the defendant company. On 20th May, 2022, the plaintiff being one of creditor has filed his proof of claim before the Liquidator and the claim made by the plaintiff before the Liquidator is same transaction with the plaintiff has claimed in the present suit.

Initially the Liquidator has rejected the claim of the plaintiff on the ground of time barred and being aggrieved by the order of the Liquidator, the plaintiff has preferred an appeal before the Ld. Tribunal and vide order dt. 18th July, 2022, the Ld. Tribunal had condoned the delay of 466 days in filing the claim with the Liquidator and allowed the appeal filed by the plaintiff.

As the Liquidator has taken the custody of all the assets and properties of the defendant company to liquidate and distribute the proceeds amongst the creditors of the defendant company and thus the Liquidator prays for an order to dismiss the suit and to release the bank guarantees deposited by the defendant company as security in favour of the Registrar, Original Side of this Court so as to enable the Liquidator to take control of the fixed assets of the defendant company and to complete the liquidation process in respect of the defendant company in terms of the IBC.

Section 238 of the Insolvency and Bankruptcy Code 2016 reads as follows :

“238. Provisions of this Code to override other laws. – The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument have effected by virtue of any such law.”

In the case reported in (2017) SCC Online Del 12759, the Delhi High Court held that

“2. It appears to the Court that Section 238 of the Code is categorical that the Code will apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 14(1)(a) of the Code states, inter alia, that on the ‘insolvency commencement date’ the Adjudicating Authority (AA) shall by order declare moratorium for prohibiting “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.” That the Code will prevail over all other statutes inconsistent therewith has been explained in the recent decision dated 31st August, 2017 of the Supreme Court in Civil Appeal No. 8337-8338/2017 (Innoventive Industries Ltd. v. ICICI Bank).”

In the case reported in (2018) 1 SCC 407 (Innovative Industries Ltd - versus- ICICI Bank Ltd.), the Hon’ble Supreme Court held that:

“20. Under Section 4 of the Code, Part II applies to matters relating to the insolvency and liquidation of corporate debtors, where the minimum amount of default is rupees one lakh. Sections 6, 7 and 8 form part of one scheme and are very important for the decision in the present case. They read as follows:

“6. Persons who may initiate corporate insolvency resolution process.—Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The adjudicating authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the adjudicating authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the adjudicating authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the adjudicating authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The adjudicating authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

8. Insolvency resolution by operational creditor.—(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a “**demand notice**” means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.”

21. Section 12 provides for a time-limit for completion of the insolvency resolution process and reads as follows:

“12. Time-limit for completion of insolvency resolution process.—

(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the adjudicating authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the adjudicating authority is satisfied that the subject-matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.”

22. Sections 13 and 14 deal with the declaration of moratorium and public announcements and read as under:

“13. Declaration of moratorium and public announcement.—(1) The adjudicating authority, after admission of the application under Section 7 or Section 9 or Section 10, shall, by an order—

- (a) declare a moratorium for the purposes referred to in Section 14;
- (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under Section 15; and
- (c) appoint an interim resolution professional in the manner as laid down in Section 16.

(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.

14. Moratorium.—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the adjudicating authority shall by order declare moratorium for prohibiting all of the following, namely—

- (a) 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;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

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

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the adjudicating authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

23. Under Section 17, from the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor vests with interim resolution professional. Section 17(1)(a) reads as under:

“17. Management of affairs of corporate debtor by interim resolution professional.—(1) From the date of appointment of the interim resolution professional—

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a

period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.”

In the instant case, one of the financial creditors of the defendant had initiated proceeding under Section 7 of the Insolvency and Bankruptcy Code 2016 against the defendant and the Tribunal had admitted the application and appointed Liquidator. The Liquidator had made Public announcement calling upon all the stakeholders of the defendant company for submission of their respective claim, if any, and the plaintiff has lodged its claim before the Liquidator but the same was rejected on the ground of limitation but in appeal the Learned Tribunal had admitted the claim of the plaintiff and admittedly the same is to be adjudicated by the Liquidator.

As Section 238 of the Code is having the override effect in any other law for the time being in force and thus the suit cannot be proceeded further as the claim made by the plaintiff in the instant suit is similar to the claim raised before the Liquidator.

Section 61 of the Code provide for an appeal. In case the Liquidator rejects the claim of the plaintiff, the plaintiff is having remedy of an appeal.

In view of the above, this Court held that the suit filed by the plaintiff is cannot be proceeded further and thus CS No. 1 of 2016 is dismissed. The Registrar, Original Side of this Court is directed to release the Bank Guarantees submitted by the defendant no.1 in terms of the order passed by

this Court in Company Petition No. 745 of 2013 dt. 11th September, 2015 in favour of the Liquidator Shri Krishna Kumar Chhaparia.

G.A. No. 4 of 2022 is thus disposed of.

(KRISHNA RAO, J.)

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