IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.11.2022

CORAM:

THE HONOURABLE **MS.JUSTICE V.M.VELUMANI**
and
THE HONOURABLE **MR.JUSTICE SUNDER MOHAN**

W.P.No.24262 of 2022
and W.M.P.Nos.23251 and 23252 of 2022

M/s.Shri Karshini Alloys Private Limited,
G-36, 1st Floor, G Block, Connaught Place,
Connaught Circus
New Delhi – 100 001
Represented by its authorized signatory
Mr Drabesh Jha

...Petitioner

Vs.

1.Mr.Ramakrishnan Sadasivan,
Liquidator of M/s. Surana Industries Limited,
Old No.22, New No. 28, Menod Street,
Purasawalkam, Chennai – 600 007.

2.The Registrar,
National Company Law Tribunal
Corporate Bhawan, II Floor,
Beach Road, George Town,
Chennai – 600 001.

... Respondents

Prayer: This Writ Petition is filed Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus in the form of an order or direction to call for the records of the impugned order dated 29.06.2022 passed in I.A.(IBC)/512 (CHE)/ 2022 in TCP/95/IB/2017 on the file of 2nd Respondent, and further actions of the 1st respondent in respect of the assets of the Corporate Debtor by bringing it to sale prejudicial to the interest of the petitioner and quash the said impugned order and the subsequent actions of the 1st Respondent and grant extension of time to the petitioner to make the balance payment and conclude the sale in favour of the Petitioner as per the order dated 22.03.2022 in I.A.No.997 of 2021 or in the alternative Direct the 1st respondent to refund the entire amount paid by the Petitioner together with interest as may be fixed by this Hon'ble Court within a time limit.

For Petitioner : Mr.Omprakash
Senior Counsel
for M/s.Abilta Banu

For R1 : Mr.T.K.Bhaskar
assisted by
Mr.Mayan H.Jain

For R2 : Mr.Prasad Vijayakumar

O R D E R

(O R D E R of the Court was delivered by SUNDER MOHAN,J.)

The petitioner has prayed for a Writ of Certiorarified Mandamus for quashing the order dated 29.06.2022 in I.A.No. (IBC)/512 (CHE)/2022 in TCP/95/IB/2017 passed by the second respondent herein and to grant extension of time to the petitioner to make the balance payment and conclude the same in favour of the petitioner as per the order dated 22.03.2022 or in the alternative direct the first respondent to recall the entire amount paid by the petitioner with interest as may be fixed by this Hon'ble Court.

2.The brief facts as stated in the affidavit in support of the Writ Petition leading to the filing of the above Writ Petition are as follows:

(a) the petitioner came to know that the 1st respondent was taking steps to sell a going concern belonging to M/s.Surana Industries, which is a company under liquidation under the provision of Insolvency Bankruptcy Code, 2016. The petitioner came to know that 1st respondent had attempted to sell the concern several times and ultimately decided to sell the assets at scrap value for

Rs.50,00,00,000/- (Rupees Fifty Crores only). It was at that time, according to the petitioner he made an offer for purchasing the going concern belonging to M/s.Surana Industries Limited for Rs.105.21 Crores. In the proposal, the petitioner offered to pay 10% of the total consideration as a commitment advance. The petitioner offered to deposit the balance sale consideration within 15 days from the date of the approval of sale by the competent authority namely the NCLT. As per the said proposal, the petitioner deposited 10% of sale consideration along with the offer letter on 02.09.2021. The first respondent placed the proposal before the Stakeholders and the same was approved by the Stakeholders in their meeting held on 15.09.2021.

(b) The first respondent filed an application before the Adjudicating Authority, on 22.09.2021 seeking confirmation for sale of assets under Section 60(5) of the Insolvency and Bankruptcy Code 2016 r/w Regulation 32(e) r/w Regulation 33(2)(d) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016.

(c)The NCLT, Adjudicating Authority, heard the application and passed final order on 22.03.2022 granting the permission to sell the going concern to the petitioner. The order granting permission stipulated that the petitioner shall pay the balance sale consideration within a period of 15 days from the date of receipt of the order. According to the petitioner, the order was uploaded on 30.03.2022. The petitioner had to pay the balance sale consideration on or before15.04.2022.

(d)The petitioner had made the proposal in September 2021. By the time order was passed in March 2022, market scenario changed due to Russia and Ukraine War and hence, the petitioner faced financial difficulties and could not make the balance payment.

(e)The petitioner approached the Stakeholders and requested them for extension of time. The Stakeholders in their meeting held on 13.04.2022 recorded that necessary approval has to be obtained from the adjudicating authority for the extension of time and the payments to be made by the petitioner on 15.04.2022 shall attract interest at the rate of 12 % per annum.

(f)Therefore, the petitioner filed an application in I.A.No. (IBC) / 512 (CHC) / 2022 on 25.04.2022 and prayed for extension of time to make the balance payment.

(g) The adjudicating authority passed the order on 29.06.2022, directing the petitioner to pay 50% of the balance sale consideration on or before 30.06.2022 and the remaining 50 % with interest on or before 31.07.2022.The Tribunal also stated that any deviation in the payment terms would amount to forfeiture of entire amount paid by the petitioner. The petitioner has preferred the above Writ Petition challenging the said order dated 29.06.2022.

(h)Meanwhile, the petitioner came to know that there was an Enforcement Directorate Proceedings initiated against the Corporate Debtor. The petitioner filed I.A.No.826 of 2022 seeking immunity from the possible attachment from the Enforcement Directorate of the assets of the Corporate Debtor. The application was taken up for hearing on 14.08.2022. Thereafter, the first respondent came to know that the Stakeholders had decided to forfeit the amount deposited by the petitioner in view of the order passed by the NCLT dated 29.06.2022.

(i)The petitioner withdrew I.A.No.826 of 2022 since it did not contain the details of the subsequent events and filed another application on 04.08.2022. *Inter alia*, prayed for extension of time to make the balance sale consideration. The said application was dismissed on 10.08.2022.

3.The first respondent filed a counter denying averments made in the writ petition and primarily submitted that the writ petition is not maintainable. The petitioner had suppressed the fact that the appeal was filed against the order dated 10.08.2022 wherein, the petitioner had sought extension of time to make the balance payment. The first respondent denied all the other averments and the facts stated in the writ petition and submitted that the petitioner ought to have challenged the order dated 29.06.2022 before the Appellate Tribunal.

4.The petitioner had filed a rejoinder reiterating the averments made in the petition. The petitioner further stated that the first respondent had suppressed the fact that subsequently the going concern of the corporate debtor was sold to a third party on the basis on an e-auction conducted. The first Respondent granted time till December 2022 for the auction purchaser to make the payment.

5.Mr. Omprakash, the learned Senior Counsel for the petitioner submitted that:

(a)the appellate remedy available to the petitioner was not pursued because he was pursuing other legal means by filing petition for extension of time and holding discussions with the Stakeholders for extension of time. The petitioner's remedy cannot be taken away because he was pursuing his remedies in bonafide manner. The Act provides that the appeal shall be filed within 30 days from the date of the order and in any event not beyond 15 days thereafter. It is now more than 45 days since the date of order and the petitioner, therefore, cannot file an appeal before the NCLT. The impugned order is patently illegal inasmuch as it states that the balance sale consideration had to be paid in two instalments. The Tribunal directed the petitioner to make the payment on the very next day of the order i.e., on 30.06.2022. However, the order was uploaded only on 02.07.2022. This procedural error is sufficient for this Court to entertain the Writ Petition.

5(b) The order suffers from another error in a law inasmuch as the Tribunal directed forfeiture of the entire amount in the breach of the settled principles of law.

The learned Senior Counsel relied upon the Judgement of the Hon'ble Supreme Court and this Court which are as follows:

(i) M/s.Kailash Nath Associates vs. Delhi Development Authority in C.A.No.193 0f 2015.

(ii) Fatechand vs. Balkishan Das reported in ***1964 SCR (1) 515***

(iii) Shanmugavelu vs. Authorised officer reported in (***2021) SCC Online Mad 5639***

(iv) K.Kayalvizhi vs. Branch Manager, Axis Branch reported in ***(2021) SCC Online Mad 2300.***

The Hon'ble Supreme Court and this Court have held that in terms of Sections 73 and 74 of the Contract Act, the party complaining of breach is entitled to receive the compensation only for any loss of damage caused to him. Even where the liquidated damages are fixed, the party is entitled to only reasonable compensation not exceeding the liquidated damages fixed. The first respondent has not shown the loss suffered on account of the breach committed by the petitioner and the entire amount paid by them cannot be forfeited.

5(c) The learned Senior Counsel further submitted that the Writ Petition is maintainable notwithstanding the availability of alternative remedy and relied upon the following Judgements of the Hon'ble Apex Court:

(i) ***Embassy Property Developments Private Limited vs. State of Karnataka and others*** reported in ***2019 SCC online SC 1542***.

(ii) ***Radha Krishna Industries vs. State of Himachal Pradesh and others*** reported in ***2021 SCC Online SC 334.***

(iii) Magadh Sugar and Energy Limited vs. State of Bihar and others reported in ***2021 SCC Online SC 801.***

(iv) Rajasthan Electricity Board vs. Union of India and others reported in ***2008 SCC Online SC 805***

(v) Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd and others reported in ***2002 SCC Online 1259.***

(vi)Whirlpool Corporation vs. Registrar of Trademarks reported in ***(1998) 8 SCC 1.***

The learned Senior Counsel therefore submitted that this Court can entertain the Writ Petition in view of the patent illegality in the order notwithstanding the fact that the appellant had not filed an appeal as per the Insolvency and Bankruptcy Code, 2016.

6. Mr.T.K.Baskar, the learned counsel for the first respondent submitted that:

(a) the Division Bench of this Court by the Order in C.R.P.(PD) No.525 of 2022 and C.M.P.No.2785 of 2022 in ***L&T Infra Investments Partners vs. Ebenezar Inbaraj and others*** held that a Civil Revision Petition filed under Article 227 of constitution of India or a Writ Petition under Article 226 is not maintainable against an order passed by the NCLT when an appeal remedy is provided under Act.

(b) The Petitioner had sufficient time to challenge the order passed by the Tribunal. The reasons shown by the petitioner for not filing an appeal within the statutory time limit under the Act cannot be accepted. The petitioner had filed another application in I.A..(IBC)/ 512 (CHE) /2022 in TCP / 95 / 1B/ 2017 for extension of time for paying the balance sale consideration and the said application was also dismissed on 10.08.2022. Even thereafter, the petitioner had four days time to prefer an appeal against the order dated 29.06.2022. The petitioner having failed to avail all the opportunities to file an appeal cannot pray for invoking this Court's power under Article 226 of the Constitution.

(c) The nature of prayer sought for by the petitioner involves deciding disputed question of facts and this Court would not ordinarily entertain a Writ Petition in such circumstances.

(d) This Court would exercise the power under Article 226 of the Constitution of India notwithstanding the availability of the alternative remedy only when the order passed by the authority was bad on account of lack of Jurisdiction. This Court and the Hon'ble Supreme Court always made the distinction between the order that lacked jurisdiction and an order passed due to wrongful exercise of jurisdiction. In this case, the petitioner has alleged wrongful exercise of jurisdiction though the first respondent does not admit it.

(e)The petitioner's case that the advance amount paid by the petitioner cannot be forfeited in terms of the Sections 73 and 74 of Indian Contract Act and the Judgements relied upon by the learned Senior Counsel may not be applicable to the facts of the instant case. In this case, the forfeiture has been done by the Tribunal and the forfeiture is not in terms of a private contract between two individuals. Hence, the decisions relied upon by the learned Senior Counsel cannot be used for the purpose of challenging an order which directed forfeiture.

(f) In any event, the petitioner had challenged the subsequent order passed by the Tribunal refusing to grant extension of time. The Writ Petition deserves to be dismissed the ground that an appeal is pending against the consequential order in I.A.No (IBC)/ 512 (CHE) /2022 in TCP / 95 / 1B/ 2017.

(g) The learned counsel also relied upon the Judgements in W.P.(C) No.1431/2020 (P) (***Sulochana Gupta vs RBG Enterprises Private Limited reported) (ii) C.R.P.(PD).No.1480 of 2022 & C.M.P.No.7596 of 2022 (G.Rathinavelu vs. Indian Overseas) (iii) W.P.(C) 10645/2021 & C.M.Appl.32831/2021 (Sunil Tandon vs. Union of India & Another)*** in support of his submissions that the Writ Petition is not maintainable against the order of the NCLT.

7.We have heard the learned Senior Counsel for the petitioner and learned counsel for the respondents and perused the pleadings on record.

8.We find that the Act provides for an appeal before the National Company Law Appellate Tribunal against an order passed by the NCLT. The Act provides thirty days time to file an appeal and extension of 15 days at the most beyond the period of thirty days for preferring an appeal. There is no dispute with regard to the proposition of law that this Court under Article 226 can entertain a Writ Petition notwithstanding the availability of the alternative remedy in extraordinary situations, where the order is passed without any jurisdiction or where there has been a violation of the principles of natural justice. The further rule is that where there is a remedy or procedure for enforcing the right or liability resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. The principle in this regard have been laid down in the Judgment of Hon'ble Apex Court ***in Radhakrishnan Industries vs State of Himachal Pradesh*** reported in ***2021 SCC Online Sc 334.*** The relevant portions are extracted hereunder:

27.The principles of law which emerge are that:

27.1. *The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.*

27.2. *The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.*

27.3. *Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.*

27.4. *An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.*

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

***28.** These principles have been consistently upheld by this Court in Chand Ratan v. Durga Prasad [Chand Ratan v. Durga Prasad, (2003) 5 SCC 399] , Babubhai Muljibhai Patel v. Nandlal Khodidas Barot [Babubhai Muljibhai Patel v. Nandlal Khodidas Barot, (1974) 2 SCC 706] and Rajasthan SEB v. Union of India [Rajasthan SEB v. Union of*

India, (2008) 5 SCC 632] among other decisions.

9.The other Judgements relied upon by the learned Senior Counsel for the petitioner also reiterate the same principle. In ***Embassy Property Developments private limited vs. State of Karnataka and others*** reported in ***2019 SCC online SC 1542***, the Hon'ble Apex Court held that where an order has been passed without any jurisdiction and the appellate court would not have any Jurisdiction to adjudicate the dispute, then a Writ Petition can be entertained under Article 226 of the Constitution of India.

10.In the instant case, we find that the petitioner had not exhausted the statutory remedy of preferring an appeal though he had several opportunities and enough time to do so. The excuse that they were negotiating with the Stakeholders for extension of time is not a ground to justify their action in not filing an appeal on time. That apart, even after the second application filed before the NCLT for extension of time was dismissed on 10.08.2022, the petitioner had four days to file the appeal. On the other hand, the petitioner chose to file Writ Petition challenging the order dated 29.06.2022 only on 05.09.2022.

11.There are several factual disputes which cannot be adjudicated under Article 226 of the Constitution of India. It is the case of the first respondent that though the sale that was proposed to be made in favour of the petitioner was a private sale, prior permission of the adjudicating authority had to be obtained as per Section 33 (2) (d) of the IBBI (Liquidation Process) Regulations, 2016. The said permission was obtained on 22.03.2022. The Adjudicating authority had granted permission only on the terms proposed by the petitioner which included the payment of balance sale consideration within 15 days from the date of the order granting permission. In the application filed for extension of time, the Tribunal granted time to make 50 % of the balance payment on or before 30.06.2022 i.e., the next day of the order and balance 50% within 31.07.2022. It is the case of the respondent that the order dated 29.06.2022 was passed in the presence of the petitioner and hence the petitioner cannot feign ignorance. In any event that direction ought to have been challenged in an appeal. The petitioner however would deny this fact. This Court cannot adjudicate that factual dispute.

12. The Tribunal further directed that any deviation of the direction to make balance payment in accordance with the order would result in forfeiture of the entire amount paid by the petitioner. Whether this order directing forfeiture can be equated to the terms of the contract between private parties which provides for forfeiture of any advance amount paid in case of breach are disputes which cannot be adjudicated by this Court under Article 226 of the Constitution of India when the petitioner has not exhausted his alternative remedy. That apart, the respondent has factually disputed the reasons stated by the petitioner for not preferring the appeal on time. Those issues also cannot be adjudicated by this Court in a Writ Petition.

13.Above all a Division Bench of this Court had after considering all the Judgments of Hon’ble Apex Court had held that a Writ Petition is not maintainable against an order passed by the NCLT when an appellate remedy is provided under the Act in ***L & T Infra Investments partners vs. Ebenezar Inbaraj and others*** in C.R.P.(PD) No.525 of 2022 and C.M.P.No.2785 of 2022 which is extracted hereunder for easy reference.

> *"On a perusal of the recent Judgments of the Apex court, it is clear that when an appeal remedy is provided under the Act, the aggrieved party should exhaust the said remedy by filing an appeal before the Appellate Forum and the Writ Petition/Civil Revision Petition filed them under Articles 226/227 of the constitution is not maintainable. When the petitioner can raise all the grounds available to them under law before the Appellate Forum, the filing of the Civil Revision Petition under Article 227 cannot be entertained.*

14.We also note that the petitioner has preferred an appeal against the subsequent order passed by the NCLT relating to the same issue and this is also another factor which deters us from entertaining this Writ Petition, leaving it open for the petitioner to raise all the contentions available to them in law in the said appeal.

15.In our view therefore, the above Writ Petition is not maintainable as the impugned order passed by the Tribunal is appealable. The petitioner has not made out a case of lack of Jurisdiction by the Tribunal. The averments in the petition are at best a case of wrongful exercise of Jurisdiction which is disputed by the respondent. That apart, there are several factual disputes raised by the petitioner and this Court cannot adjudicate such factual disputes in this Writ Petition.

16. For all the above reasons, the Writ Petition is dismissed as not maintainable. No Costs. Consequently, the Connected miscellaneous petition is closed.

(V.M.V., J) **(S.M., J)**

24.11.2022

Index : Yes / No
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and
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