

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1.CAPP-7-2017 (O&M)

Vardhman Polytex Limited

....Appellant

Versus

Maschinen Umwelttechnik Transportanlagen Gesellschaft GmbH

..Respondent

2.CAPP-8-2017 (O&M)

Vardhman Polytex Limited

....Appellant

Versus

Maschinen Umwelttechnik Transportanlagen Gesellschaft GmbH

Date of decision: 04.07.2022

Reserved on :20.04.2022

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Praveen Gupta, Advocate for the appellants

Mr. Gaurav Chopra, Sr. Advocate with
Mr. Prateek Gupta and
Mr. Rahul Soi, Advocates for the respondents

ANIL KSHETARPAL, J

1. By this order, two Company Appeals i.e CAPP-7-2017 and CAPP-8-2017 shall stand disposed of.

2. In order to clearly understand the facts of the case alongwith the different abbreviations used, it will be appropriate to first take a note of the information pertaining to various Companies/Corporate entities/ firms/ promoter setup by the two Groups.

3. In the present case, two Groups are involved namely the Oswal Group of Punjab and Hahnl Group, Austria. In collaboration with these two Groups, Oswal FM Hemmerle Textile Company (hereinafter referred to as 'OFMHT') was incorporated. M/s Vardhman Polytec Ltd. (Oswal Group) (hereinafter referred to as 'the VPL') was having share holding of 81.88% in the OFMHT. Maschinin Unwlttechnik Transportanlagen Gesellschaft GmbhH (hereinafter referred to as 'MUT') is the Company incorporated in Austria. FM Hammerle Textile Company (in short FMH) is a limited liability firm which is 100% subsidiary of MUT. Under the collaboration, the technical know-how and the use of Trademark and trade name was transferred to OFMHT through IRIS. MUT had licensed its technical know how while authorizing IRIS to provide technical information and marketing assistance to OFMHT. Pursuant thereto, IRIS and VPL entered into a joint venture. A technical collaboration and marketing assistance agreement (TCMA) was also entered into between the Companies. As per the agreement, the equity shares of OFMHT equivalent to 33,60,000 Euro were to be allotted in two installments to IRIS. On the one side, OFMHT started its production, whereas FMH went into bankruptcy in Austria. Mr Ashok Oswal set up two Austrian Companies namely FM Hemmerle NFG, GmbH (for short FMH Nfg) and FM Hemmerle Verwattings GmbH (for short 'FMHV'). Both these Companies set up by Mr Ashok Oswal purchased the assets and intellectual property of FMH Company. The plant and machinery of FMH was lying in the land of Hahnl Group, which entered into a lease

agreement with the Companies floated by Mr Ashok Oswal. Subsequently, IRIS, on 5th December, 2018, entered into an assignment and assumption agreement with FMG Nfg with the consent of OFMHT, wherein it (IRIS) assigned all its rights, title and interest in the technical service agreement dated 1st March, 2006 to FMG Nfg. A mutual release agreement was also entered on 5th December, 2008 between IRIS, JHV, MUT and Josef Hahnl on the one side and OFMHT, FMH Nfg, FMHV and VPL on the other side. Now, FMH Nfg went into bankruptcy and Josef Hahnl purchased FMH Nfg..

4. As many as four Company petitions came to be filed before CLB. In CP 12 of 2010 (OFMHT versus MUT, IRIS Josef Hahnl), a declaration was sought that allotment of 1,90,15,920 shares to IRIS, which were, subsequently, transferred to MUT, is void ab initio. The prayers made in CP No. 12 of 2010 is as under:-

“Prayer made in CP - 12 / 2010 filed by the Oswal Group under Section 111A of the Companies Act was:

(i) for cancelling 1,19,15,920 (18.11%) shares allotted to IRIS and the subsequent transfer of the shares to MUT, is void ab - initio for non - payment of consideration;

(ii) allow cancellation of 1,19,15,920 shares held by MUT in view of non - payment of consideration of the shares initially allotted to and held by IRIS;

(iii) direct / allow for necessary correction / rectification of register of members.”

5. In CP 40 of 2010 (VPL versus OFMHT, IRIS, Josef Hahnl, MUT and Ishwinder Maddh the removal of Josef Hahnl as Director of OFMHT was sought. In CP No. 50 of 2010 (MUT vs. OFMHT and others), the allegations were made that Oswal Group is guilty of siphoning of the funds from the OFMHT Company. The non-extension

of term of Mr Ishwinder Maddh, Alternate Director nominated by Josef Hahnl Group was also challenged. In CP No. 118 of 2018 filed by Hahnl Group, the prayer was made to investigate the accounts of OFMHT. All these 4 petitions were disposed of by a consolidated judgment dated 13th August, 2015, which was the subject matter of four appeals filed before the High Court. The CLB has dismissed CP No. 12 of 2010. In CP No. 50 of 2010, the CLB found no merit in the allegations of siphoning of funds, however, removal of Sh.Ishwinder Maddh was held invalid. In CP No. 118 of 2010, the CLB refused to order investigation in the accounts of OFMHT Company. After realizing that the Hahnl Group and Oswal Group have lost mutual trust, the CLB ordered that Oswal Group shall provide honourable exit to the Hahnl Group on fair valuation of its shares. In order to get the fair valuation of the shares of MUT belonging to Hahnl group in OFMHT, it was ordered that the value of their share holding shall be assessed while taking 31st March, 2010 as cut off date and exit shall be provided within 60 days, from the date of valuation report, prepared by M/s Ernest and Young. It was ordered that on valuation of shares, OFMH shall pay the value of the shares to MUT alongwith interest at the rate of 15% from 31.03.2010 till the date of its realization. It was also ordered that the report shall be provided to OFMHT and Hahnl Group within a period of 60 days from the date of receipt of the order. Against this order, as many as 4 appeals were preferred in this Court. CAPP No. 45 and 47 of 2015 were filed by OFMHT, which is, now, known as FM Hemmerle whereas CAPP No. 7 and 8 of 2017 were filed by VPL. It may be noted here that CAPP No.

45 and 47 of 2015 have been withdrawn on 20th April, 2022.

6. At this stage, it would be appropriate to notice that on 13th May, 2019, the following order was passed:-

“Notice of CMA No.21 of 2017 in CAPP No.45 of 2015 to counsel opposite.

Mr. Yash Pal Gupta, Advocate, informs the Court that he appears for the Resolution Professional appointed by the National Company Law Tribunal, Chandigarh (NCLT) on 27.06.2017 taking charge of the appellant - FMH Textiles Limited. He prays for and is granted time to file reply.

The Resolution Professional is directed to maintain the entire record relating to this case and its off - shoots. This would necessarily be the record handed over the Resolution Professional by the corporate debtor.

In the meanwhile, the interim arrangement made by the order dated 12.05.2017 shall continue.

The Court is informed that the requisite 270 days mandate required by the Resolution Professional to complete its task has expired and he has accordingly made a recommendation to the NCLT, Chandigarh to take appropriate proceedings towards liquidation of the company.

Learned counsel are assured that in order not to alter the rights and liabilities of the parties at this stage, the petition coming up on 16.05.2019 before the NCLT may be suitably adjourned to await decision on this appeal. Parties may make a request in this regard.

Mr. Chaudhary, learned senior counsel assisted by Mr. Yash Pal Gupta, Advocate, represents the appellant - company today. It would be appropriate to first take up this application and pass orders before proceeding further with the case coming up on 16.05.2019 in which Mr. Nanda's clients are not party.

Mr. Chaudhary submits that there should be no order of execution in pending appeal.

Reply be filed three days in advance of the date fixed.

In view of the voluminous record, parties may file short. synopsis with a comprehensive list of material dates and events from the year 2006 till date to save the time of the Court on facts and in

understanding of the issues involved for determination.

List on 09.07.2019.

A photocopy of the order be placed on the files of other connected cases.

Photocopy of this order be supplied to the respective parties under the signatures of the Bench Secretary attached to this Court.”

7. On 9th July, 2019, the following order was passed:-

“Replies are ready to be filed in the Registry. May do so by tomorrow. Advance copies have been given to the opposite side.

List again on 06.08.2019.

Meanwhile, the proceedings before the NCLT may continue, but final liquidation order may not be passed.

A photocopy of this order be placed on all the connected file/s.”

8. Thereafter, the case was adjourned to 14th November, 2019.

9. On 4th December, 2019, after hearing the learned counsel representing the parties at length, the Court passed the following order:-

The orders passed by the NCLT, Chandigarh Bench, Chandigarh on 30.10.2019 in CA Nos.248/2019, 587/2019 & 893/2019 in CP (IB) No.30/Chd/Pb/2017 and 21.11.2019 in CA No.1066/2019 in CP (IB) No.30/Chd/Pb/2017 have been produced before me and have been perused. Their photocopies are retained on record.

Heard at length Mr. Yashpal Gupta for the Resolution Professional and Mr. Atul Nanda, learned senior counsel representing respondent No.1.

In order to abridge the litigation, it is found just and equitable that the request of the minority shareholders lead by senior counsel Mr. Atul Nanda to call upon Earnest & Young at the expense of respondent No.1 –Maschinen Umwelttechnik Transportanlagen Gesellschaft GMBH to determine the market value of the shares held by the minority shareholders of F.M.Hammerele Textiles Ltd. as on 31.03.2010 and submit its findings to this court in a sealed cover to be opened before

the parties on the next date of hearing to elicit their responses.

The parties are directed to cooperate with Earnest & Young as and when they are required to submit information, documents etc. to assist the Valuer in the task.

The Insolvency Resolution Professional will be associated, in case he wishes or is requested by the valuer for any assistance in the process notwithstanding anything contained in the order because by the nature of his work involved in drawing the plan, he would be person closest to the facts being well acquainted with the relevant papers.

For completion of this process, time-limits fixed in the IBC will be excluded for the period the report is awaited.

List again on 21.01.2020 for submission of the share valuation report.

Meanwhile, the NCLT, Chandigarh Bench, Chandigarh is requested not to pass any effective order tomorrow on the resolution plan.”

10. It is apparent that the matter was taken to the Supreme Court wherein various interim orders were passed. On 19th March, 2021, the Special Leave Petition was disposed of with the following order:-

“It appears that much water has flowed down the bridge since Mr. Tushar the time we have been passing orders in these cases. ehta, learned Solicitor General, informs us that a Resolution professional has been appointed qua the Corporate Debtor and a new taken over. The inter se Management has disputes between respondent No.3 and Respondent No.2 are pending before the Single Judge Bench of the Punjab & Haryana High Court. We direct Respondent No.3 and Respondent No.2 to share the expenses of a Valuation Report to be furnished by M/s Ernst & Young Merchant Sanking Services LLP 50:50. Both Respondent No.3 and Respondent No.2 are directed to issue letters pursuant to this order to M/s Ernst & Young Merchant Banking Services LLP telling the valuer that they will share the valuer's fee 50:50 and formally appointing the valuer to value the property. The Valuation Report to be then placed before the Single Judge Bench of the Punjab & Haryana High

court within a period of four weeks from the request letters made by Respondent No.3 and Respondent No.2. In view of the above, nothing further remains in these Special Leave Petitions which are accordingly disposed of. Pending applications, if any, also stand disposed of.”

11. On change of roster, the matter came before this Bench for hearing on 17th March, 2022, and the following order was passed:-

“RA-CA-1-2022

Sh. Prashant Puri, Advocate, accepts notice on behalf of respondent.

Let a copy of application be handed over to respondent during the course of hearing of the appeal.

Main

Sh. U.K. Chaudhary, learned Senior counsel representing the applicant-appellant has submitted that the value of the share holding of the appellant-Company has become zero on account of a resolution plan. He submits that practically these appeals are rendered infructuous in view of the subsequent development.

Sh. Prashant Puri, Advocate, prays for an adjournment.

Adjourned to 04.04.2022.

To be heard through video conferencing.

No further request, written or oral, for an adjournment shall be entertained.

It shall be the responsibility of the respondent to come prepared for final arguments.”

12. On 4th April, 2022, an application seeking review of the order dated 4th December, 2019 was withdrawn on 7th April, 2022 with the following order:-

“RA-CA-1-2022 and CMA-2-2022

Learned counsel representing the applicant prays for permission to withdraw the review application.

Learned senior counsel representing the respondents has pointed out that the review applicants are guilty of concealing material facts from the Court including the order passed by the Supreme Court on 19.03.2021.

This fact is taken on record.

Be that as it may, the present applications are dismissed as withdrawn.

CAPP-45, 47 of 2015 and CAPP 7 & 8 of 2017

Learned counsel representing the appellants prays for an adjournment, which is opposed by the learned counsel representing the respondents.

It has been noticed that these appeals are pending for the last 7 years. One last opportunity is granted to the appellants to make their submissions.

List on 20.04.2022.

No further request for an adjournment, oral or written, shall be entertained.

Learned counsel representing the parties shall be at liberty to file their written synopsis alongwith gist of their arguments well before date fixed after exchanging them amongst themselves.

A photocopy of this order be placed on the files of the other connected cases.”

13. Ultimately, the case was listed for hearing on 20th April, 2022, when the learned counsel representing the appellants, in both the appeals, submitted that he does not wish to advance any oral arguments but he will file his written arguments and the appeals may be decided after perusing the same.

14. Learned counsel representing the parties have filed their respective written arguments.

15. The valuation report was submitted by Ernst & Young Merchant Banking Services LLP, Gurgaon, on 16.06.2022 with regard to the share of OFMHT as held by Hnhnl Group.

16. In substance, the learned counsel representing the appellants has submitted that in view of sanctioning of the Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP'), which provides for extinguishment of the entire paid up share capital of FMHTL (previously, OFMHT), the appeals are rendered infructuous. It is

claimed that the impugned order is impossible to be complied with as the maxim *lex non cogit ad impossibilia* which means that law does not compel a man to do something which is impossible is fairly and squarely attracted in the present case. It is claimed that the sanctioned/approved CIRP of FMHTL (previously OFMHT) is binding on all the stake holders in the Company, including its members/ shareholders. It is asserted that the entire equity and preference share capital of FMHTL, as it stood prior to the CIRP, and set out hereafter, including the shares held by its shareholders/promoters, shall extinguish as having nil value. Learned counsel relies upon the relevant portion of the resolution plan, which is extracted as under:-

“10.2 On account of the continuous losses incurred by the CD since inception, the aggregate of losses over the years has exceeded the paid up share capital of CD. The Equity and Preference shares belong to the promoters of CD.

*10.3 The estimate of valuation of assets and enterprise of CD as assessed by RA does not cover the full claim of FC - bank (SBI) - and there is therefore, no amount available for Equity and Preference Share Capital holders of CD. Also, the holders of issued share capital (equity shareholders and preference shareholders) of CD have no amount available to them liquidation of CD. **In view of the above circumstances, RA proposes to reduce the issued Equity and Preference Share Capital of the CD, as held by the Promoters of the CD (as per table A in para 10.4) to Zero, i.e., NIL value. It is therefore proposed that there will be complete extinguishment of 11,16,00,000 issued fully paid up Equity Shares of the CD and fully paid up 12,20,750 Preference Shares of CD (as per table B of para 10.4) which will have the effect of making the issued share capital of CD to Zero, i.e., NIL value.**”*

17. It is claimed that post the order dated 13th March, 2020, passed by the adjudicating authority, while approving CIRP, a new

situation has arisen where the appellant is no longer a major shareholder while MUT is not a shareholder at all. The said resolution plan, in terms of the section 31(1) of the Insolvency and Bankruptcy Code, is binding on all its shareholders. Learned counsel representing the appellant relies upon the following judgments passed by the Supreme Court:-

a) **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and others (2020) 8 SCC 531**

b) **Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited (2021) 9 SCC 657.**

18. While relying upon the definition of 'nullity' in the 'Blacks Law Dictionary' and judgment passed by the Supreme Court in **Satya Prada Ghosh vs. Mugni Ram and Company AIR 1954 SC 44**, the learned counsel contends that the doctrine of impossibility is equally applicable to the Court's order. It may be noted here that on the merits of the appeal, the learned counsel representing the appellant has chosen not to question the correctness of the order passed.

19. Per contra, the learned counsel representing the respondent, while drawing the attention of the Court to the resolution plan, submits that the VPL was held liable to pay the claim of MUT being holding Company of the corporate debtor. The attention of the Court has been drawn to the following part of the resolution plan, which has been approved:-

“The claim of MUT has not been admitted by RP, and therefore, there is no liability to be paid by CD on this account. VPL is held liable to pay, which being the holding Company of CD, is

obliged as of now and continues to remain obliged at all times.”

20. Learned counsel representing the appellant does not dispute the correctness of the CIRP which provides for a provision for VPL's liability to pay. The resolution plan has already been approved by the adjudicating authority that is the National Company Law Tribunal (NCLT). In these circumstances, it is evident that CIRP of FMHTL would have no bearing on the decision of these appeals. VPL has not challenged the sanctioned resolution plan. This matter can be examined from yet another perspective. As per the order passed by the CLB, the liability to pay the amount is with the Oswal Group. Moreover, the valuation of the OFMHT's shares is to be taken as was on 31st March, 2010. The valuation of the shares of the Company was required to be carried out by M/s Ernst and Young. It is not in dispute that the VPL was the majority shareholder of FMHTL (previously of OFMHT).

21. This Court has carefully read the judgment passed by the Supreme Court in **Committee of Creditors of Essar Steel India Limited (supra)**. In the aforesaid case, the Supreme Court decided the question noticed in para 2 of the judgment, which is extracted as under:-

“This group of appeals and writ petitions raises important questions as to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) and last, but by no means the least, the jurisdiction of the National Company Law Tribunal (hereinafter referred to as “NCLT”/”Adjudicating Authority”) and the National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT/Appellate Tribunal”) qua resolution

plans that have been approved by the Committee of Creditors. The constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (hereinafter referred to as “the Amending Act of 2019”) have also been challenged. These appeals and writ petitions are an aftermath of this Court's judgment dated 4-10-2018, reported as Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta”

22. It was held that the adjudicating authority or the appellate authority cannot interfere with the commercial wisdom of the resolution plan approved by the committee of creditors. The Court also examined the constitutional validity of the outer time limit prescribed for the completion of Corporate Insolvency Resolution Plan (CIRP) and held that in exceptional cases, the extension of time can be granted.

23. The next judgment relied upon by the learned counsel representing the appellant is in **Ghanshyam Mishra & Sons Private Limited (2021) 9 SCC 657**. In this case, the Supreme Court, after examining the provisions of Insolvency and Bankruptcy Code, 2016, held that the approved resolution plan is binding on the Central Government, State Government and the local authorities, including the tax authorities. The Supreme Court has discussed the following issues:-

“(i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by an adjudicating authority under Section 31 (1) of the Insolvency and Bankruptcy Code, 2016 (“IBC”)?

(ii) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/ declaratory or substantive in nature?

(iii) As to whether after approval of resolution plan by the adjudicating authority a creditor including the Central Government, the State Government or any

local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?”

24. It is evident that the aforesaid judgments do not apply to the facts of the present case. Here the question to be adjudicated is entirely different from the question arising in the cases relied upon by the learned counsel. In any case, the judgment passed by Supreme Court in **Ghanshyam Mishra (supra)** lays down that the approved resolution plan is binding on all the concerned parties. In fact, in view of the settled law expounded that the approved CIRP is binding on all, the argument of the learned counsel representing the appellant cannot be accepted and is proved to be counter productive.

25. From the aforesaid discussion, it is evident that the implementation of the impugned order is neither rendered impossible nor the aforesaid maxim i.e *lex non cogit ad impossibilia* is applicable on the facts of the present case. As already noticed, in the written arguments, learned counsel representing the appellant has not disclosed any reason for interference in the order passed by the CLB on 13th August, 2015.

26. With all these observations, both the appeals are dismissed.

27. All the pending miscellaneous applications, if any, are also disposed of.

04.07.2022

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE