

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11982 OF 2023

Naresh Sundarlal Jain
18E, A Wing, Winter Green,
Rivali Park, Borivali East,
Mumbai

..... Petitioner

Vs.

1. Udaipur Entertainment World
Pvt.Ltd.
A 24, Mamta CHS, Near Jian Temple,
RSC 26, Borivali West,
Mumbai 400 092,
Maharashtra.

2. Directorate of Enforcement,
Jaipur Zone, Ambedkar Circle,
Jaipur, Rajasthan

..... Respondents

Mr.Yogesh Naidu i/b Mr.Ishan Srivastava for the Petitioner
Dr.Sujay Kantawala i/b Mr.Jain for the Respondent no.1
Mr.Shreeram Shirsat a/w Mr.S.V.Mane and Ms.Adithi Rao for the
Respondent no.2

CORAM: SUNIL B. SHUKRE, J. &
FIRDOSH P. POONIWALLA, J.
DATED : 27th SEPTEMBER 2023

ORAL JUDGMENT (PER : SUNIL B. SHUKRE, J.) :

1. Rule. Rule made returnable forthwith. With the consent of the
parties taken up for final disposal.

2. Heard the learned Counsel for the Petitioner and the learned Counsel for the Respondent no.1 and also the learned Counsel for the Respondent no.2, both of whom appearing by service of notice.

3. The learned Counsel for the Respondent no.1 has taken a strong objection to the maintainability of this petition on the ground that the statutory remedy of appeal available to a person like the Petitioner has not been availed of within the limitation period provided therefor, and as such, the order of National Company Law Tribunal (for short “NCLT”) vacating the attachment order passed by adjudicating authority under the provisions of Prevention of Money Laundering Act, 2002 (PMLA), has now attained finality.

4. The learned Counsel for the Petitioner submits that even though there is available to Petitioner such statutory remedy of Appeal before National Company Law Appellate Tribunal (for short “NCLAT”) and that the Petitioner did not avail of it within limitation, there is a justification for the Petitioner not taking recourse to the remedy of statutory appeal in the present case. He submits that Petitioner was not a party before the NCLT proceedings which resulted in approval of the resolution plan of the Corporate Debtor i.e. Respondent no.1, while vacating in the process the order of attachment of the flats constructed by Respondent no.1 in Royal-

Raj Vilas Project, Shobhagpura Circle, Udaipur Rajasthan and that was the reason why the Petitioner had not learnt about the passing of the order, portion of which is causing prejudice to the Petitioner, and that is why he is before this court now.

5. The learned Counsel for the Petitioner further submits that today, interest of the Petitioner, who has invested huge money by lending it to Respondent no.1 in the project at Udaipur has been jeopardized, as order of attachment has been vacated and there is no protection granted to the Petitioner despite the fact that he stands in the same category as the home buyers who are recognized as unsecured creditors, under the Insolvency and Bankruptcy Code, 2016 (IBC), thereby pushing him to the bottom of the list of creditors of Respondent no.1, as per water fall mechanism. He submits that the statutory remedy of appeal provided in Section 61 of IBC has, for these reasons, been rendered illusory for the Petitioner. The learned Counsel for the Petitioner submits that it is necessary that the Petitioner, standing at par with the other unsecured creditors including the home buyers, is duly protected and therefore, he prays for confirmation of the attachment order so that his interest under the PMLA as a victim would be protected.

6. According to the learned Counsel for the Respondent no.1, all these

submissions are misleading and do not hold any water. He submits that even though the Petitioner was not a party to the resolution proceedings before NCLT, Mumbai, the Petitioner did have the knowledge about passing of the NCLT order, which is evident from the copy of the order placed on record by the Petitioner himself, which is marked as Exhibit 'E' at page 424, which order shows that the other ex-director of Respondent no.1, just like the Petitioner, had made an attempt to file an Appeal against NCLT order and had sought condonation of delay by filing an Application, which was rejected by NCLAT, New Delhi. He further submits that if passing of the NCLT order was within the knowledge of the Petitioner, it cannot be said that the right of statutory appeal available to the Petitioner has been rendered illusory in the present case. He further submits that lending of money for the development of project is one thing and making of agreement / allotment in favour of the flat purchasers of the home buyers is another thing and it is this difference between these two categories of persons which would set apart a person like the Petitioner from that of the home buyers who, in law could be treated as secured creditors in terms of section 3(30) of the IBC. He submits that in order that a creditor is treated as secured creditor there must be a creation of security interest in favour of the creditor and in the present case, the security interest was created in favour of home buyers by virtue of the

agreements/allotments made in their favour, and whereas no such agreement/allotment was there in favour of the Petitioner, with the result, the Petitioner continued to remain in the category of an unsecured creditor. He further submits that now the order of NCLT has attained finality, with the Petitioner, or any other interested party not having preferred any statutory appeal before NCLAT and therefore, this petition must not be entertained under the garb of alleged prejudice caused to the Petitioner by vacating of the attachment order passed by the adjudicating authority in terms of the provisions of PMLA Act. He thus, prays for summary dismissal of the Petition.

7. Upon considering all the rival submissions of the Petitioner, relevant provisions of law and conduct of the Petitioner, we are of the view that there is no merit in the Petition and it deserves to be summarily dismissed. The reasons for reaching such a conclusion are stated in the ensuing paragraphs.

8. There is no doubt about the fact that the Petitioner was not a party to the resolution proceedings pending before the NCLT, Mumbai but we find that Petitioner was not a person who could have said to have remained in the dark all throughout about passing of the order by the NCLT. This is evident from the fact that one of the ex-directors of

Respondent no.1 had belatedly filed an appeal under section 61 of the IBC before NCLAT along with application for condonation of delay and the application for condonation of delay was dismissed by NCLAT by a speaking order passed on 14th July 2023. This order states that power vested with the Appellate Tribunal to condone the delay is only of 15 days as provided under proviso to section 61(2) of the IBC and beyond this period, no delay could be condoned by NCLAT. The NCLAT also noted the fact that delay occurred in filing of the Appeal filed by other ex-director of Respondent no.1 was of 423 and 164 days which was beyond the power of condonation of delay vested in the appellate tribunal.

9. This attempt made by one of the ex-directors of Respondent no.1 cannot be said to be not within the knowledge of Petitioner. It was indeed within his knowledge, as it is impossible to digest a fact that one Director of a Company would not know what is done by the other Director, when it comes to taking steps for protection of the interest of the Company. In the case of *Ghanashyam Mishra and Sons Private Limited Through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited Through the Director and Others*¹, the Supreme Court has observed in paragraph 154 that when one of the wings of the State Government approaches NCLAT, it is difficult to believe that other organ of the State

¹ (2021) 9 SCC 657

was not aware about the said proceedings. In our view, these observations apply to the facts and circumstances of the present case with equal force as this Petitioner and the other ex-director who had filed an Appeal before NCLAT stand in the same category as two organs of one entity i.e. Respondent no.1 here. Therefore, the contention that there was a reasonable excuse on the part of the Petitioner to not take recourse to the statutory remedy of appeal is without any merit.

10. In the present case, the order passed by NCLT, and in particular, the portion by which order of attachment of flats passed by PMLA authority has been vacated, has attained finality, as rightly submitted by the learned counsel for the Respondent no.1. This is for the reason that no appeal has been preferred against it before NCLAT within the stipulated period of time or within the extended period of time as provided under section 61 of the IBC by anybody including the Petitioners.

11. In the case of *National Spot Exchange Limited vs. Anil Kohli, Resolution Professional for Dunar Foods Limited*², the Apex Court has held that considering the statutory provisions which provide that delay beyond 15 days in preferring an Appeal, is uncondonable, the same cannot be condoned even in exercise of powers under Article 142 of the Constitution.

² (2022) 11 SCC 761

This ruling of the Supreme Court was in the context of the statutory remedy of Appeal provided under section 61 of the IBC.

12. So, now there is no way that the NCLT order which has attained finality can be interfered with by this court. We must add here that what cannot be done directly by taking recourse to the statutory remedy of appeal cannot be permitted to be done indirectly. This is what the Petitioner is trying to do by filing this petition invoking extra-ordinary jurisdiction of this court under Article 226 of the Constitution, which is not permissible. Of course, jurisdiction of this court under Article 226 is of wide amplitude but it is certainly not wider than the power of the Supreme Court under Article 142 of the Constitution. Therefore, this court would not do anything here which cannot be done even by the Supreme Court under Article 142 of the Constitution. That means this petition must be dismissed.

13. We get support to our observations made as above from the case of *Assistant Commissioner (CT) LTU, Kakinada and Others vs. Glaxo Smith Kline Consumer Health Care Limited*³. The Supreme Court, in this case, has held that High Court does not have any more power in exercise of its jurisdiction under Article 226 of the Constitution of India than that of the

³ (2020) 19 SCC 681

Supreme Court under Article 142. It is observed that under Article 142 plenary powers are bestowed on the Supreme but extraordinary power of the High Court under Article 226 of the Constitution of India, otherwise of wide amplitude, is not wider than the power of the Supreme Court in Article 142. If we consider the aforesaid observations of the Supreme Court made in these two cases of *National Spot Exchange Limited* (Supra) and *Assistant Commissioner (CT) LTU, Kakinada and Others* (Supra), the only conclusion that can be made by us is what we have already stated in the earlier paragraph. At the cost of repetition, we would say that it is not permissible for this court to do something in exercise of its power under Article 226 of the Constitution of India which otherwise cannot be done even by the Supreme Court in exercise of its plenary power under Article 142 of the Constitution of India. To put it differently, this court, in the name of invocation of extraordinary jurisdiction under Article 226 of the Constitution, cannot permit a party to achieve something by indirect way which he cannot secure through direct means.

14. As regards the submission that the Petitioner is a person who is highly prejudiced on account of he being treated as unsecured creditor thereby wanting interference by this court under Article 226 of the Constitution of India, we must say that even this contention is devoid of

any merit. It is an admitted fact that role of the Petitioner was no more than that of a lender of some money to Respondent no.1 and that there was neither any allotment/agreement whatsoever made in favour of the Petitioner unlike the home buyers in whose favour there were agreements/allotments made for sale of flats in their favour creating in them a security interest as defined under Section 3(31) of the IBC. We may say it here that mere lending of money without there being any security created for repayment of loan, would not create any security interest as contemplated under section 3(31) of the IBC and therefore, a person like the Petitioner can only be treated as an unsecured creditor as defined under the IBC, and we do treat him to be so. This is, however, not so in case of home buyers in whose favour there have been issued allotment letters and/or agreements made, thereby creating security interest for sale of flats to them as per Section 3(31) of the IBC, putting them unmistakably in the category of secured creditors under Section 3(30) of the IBC.

15. At this stage, the learned counsel for the Petitioner raises a contention that the proceedings before NCLT were not maintainable as NCLT at Mumbai had no territorial jurisdiction over the subject matter considering the fact that all the properties of Respondent no.1 Company

were situated in Rajasthan.

16. We find no merit in the submission as it is an admitted fact that the registered address of Respondent no.1 company is of Mumbai and therefore, NCLT Mumbai would have had the jurisdiction in the matter. Even otherwise, if any such contention was to be made, it could have been made by the Petitioner by availing of statutory remedy of appeal, which remedy now has been forfeited by him on account of his own lethargy.

17. At this stage, the learned counsel for Respondent no.1 submits that now even the Appeal pending before the PMLA Appellate Authority questioning the order of attachment of properties of Respondent no.1 has been rendered infructuous in view of the order passed by NCLT Mumbai which has attained finality. Although there is a truth in this submission, we are of the view that an order to this effect would have to be made by the said appellate authority, which we are sure, would be made by it.

18. Thus, we find that there is no merit in the petition and it deserves to be summarily dismissed.

19. The learned counsel for the Respondent no.1 and also the learned counsel for the Respondent no.2 both submit that this petition exemplifies the frivolity on the part of the Petitioner and therefore some exemplary

costs are required to be imposed while dismissing this petition. They submit that if this is not done, the other fence sitters may get encouraged and may start filing such frivolous petitions in similar matters. This request is opposed by the learned counsel for the Petitioner who submits that just because the other parties may feel encouraged to file petitions, it could not be a valid ground for imposing cost upon the Petitioner.

20. Having regard to the totality of the facts and circumstance, we are not inclined to impose any cost upon the Petitioner.

21. The petition thus, stands dismissed. No cost.

22. Rule is discharged.

(FIRDOSH P. POONIWALLA, J.)

(SUNIL B. SHUKRE, J.)