Calcutta High Court
Maheshwary Ispat Limited vs Tata Capital Financial Services ... on 17 April, 2015
Author: Banerjee
Form No. J.(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :

The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Shiva Kant Prasad

A.C.O. No. 25 of 2015
A.P.O. No. 457 of 2012
C.P. 560 of 2011

Maheshwary Ispat Limited

-Vs.-

Tata Capital Financial Services Limited

For the Appellants : Mr. Swatarup Banerjee, Advocate,
Mr. Sourav Sengupta, Advocate

For the Respondents : Mr. Tilak Bose, Senior Advocate,
Ms. Manju Bhutoria, Advocate
Mr. Souvik Chowdhury, Advocate

Heard On : April 6, 2015

Judgment On : April 17, 2015
ASHIM KUMAR BANERJEE, J.

BACKDROP:

Tata Capital Finance Limited filed a winding up petition against Maheswari Ispat Limited, the applicant above named, inter-alia praying for its winding up on the ground, Maheswari failed to repay the financial assistance to the extent of Rs.5 crore approximately. Maheswari partly secured the claim through pledge of a fixed deposit receipt for 75 lacs that the Tata encashed with the permission of Maheswari and recovered a sum of Rs.92.54 lacs. Taking into account such encashment and irregular repayments, a sum of Rs.2,27,57,975 became due and payable as would

appear from the confirmation of accounts that Maheswari signed on July 14, 2011. The parties agreed, the borrower would pay interest at the rate of 15.5% per annum. Adding interest, a sum of Rs.4,12,98,703.81 became due and payable at the time of filing of the winding up petition. Tata also initiated proceedings under the Arbitration and Conciliation Act 1996 on the strength of the arbitration clause incorporated in the matrix contract. Maheswari contested the winding up proceeding that ultimately resulted in its admission. Being aggrieved, Maheswari preferred an appeal before the Division Bench. The Division Bench rejected the contention of Maheswari assailing the Order of admission, however, disposed of the appeal re-scheduling the repayment programme that would be as follows:

i) Maheshwari would pay the dues of Tata as quantified and adjudicated by His Lordship by the order and judgment impugned by monthly installment of Rs.10 lacs per month for one year commencing from April 10, 2013 and thereafter on the 10th day of the succeeding month.

ii) For the next financial year (April to March) Maheshwari would pay Rs.12.5 lakhs per month on the date fixed as above.

iii) In the third financial year Maheshwari would pay Rs.15 lakhs per month until the entire dues are cleared off.

iv) Upon payment of the aforesaid sums for three years in case any dues are still outstanding, that would be paid in four equal monthly installments payable on the date fixed as above.

v) The payment of interest at the contractual rate would be at the yearly rest and be paid on the reducing claim. However, the frozen amount as on the date of the foregoing order would be taken as a principal sum and would be cleared off first and the subsequent interest component would be paid thereafter.

vi) So long the installments are paid off the winding up petition would remain permanently stayed. In default of payment of anyone installment this order would stand recalled and the parties would be at liberty to proceed before the learned Company Judge.

vii) Other creditors who already indicated their support as per the advertisement, would be at liberty to proceed with their independent proceedings as referred to above and this order would not preclude them to do so.

THE PRESENT LIS:

Maheswari approached us by filing an application, inter-alia, praying for modification of the order of disposal. In effect, it was nothing but an application praying for mercy, inter-alia, asking for re-scheduling the payment terms. They would contend, they already paid a sum of Rs.1.95 crores leaving a balance sum of Rs.2,17,98,703. They wanted to clear it off in a phased manner, they wanted to pay Rs.5 lacs per month in six months and thereafter increasing the same with half-yearly interval of Rs.2.5 lacs and then Rs.10 lacs each for ten months, Rs.20 lacs and Rs.22,98,703

respectively in next two months. The respondent contested the application and filed affidavit that we heard on the above mentioned dates.

CONTENTIONS:

Mr. Satarup Banerjee learned Counsel appearing for the applicant would contend, Maheswari was in financial difficulty. They did not have any intention to defraud the creditors, in fact, they were clearing the dues of other creditors as well by making payment of monthly installment. The present application was made only to gain some respite. This Court, in its discretion, should suitably modify the schedule so as to help Maheswari to clear off the dues. Per contra, Mr. Tilak Bose learned Senior Counsel would submit, once the appeal stood disposed of, the Division Bench would lose its competence and became functus officio hence, the present application would not be maintainable. To support his contention he would rely upon four decisions:

1. Chandra Nath & another Vs. Sahadabia Kumarin reported in 52 Calcutta Weekly Notes Page-440.

2. Piyaratana Unnanse and another Vs. Wahareke Sonuttara Unnanse and others reported in 54 Calcutta Weekly Notes Page-

568.

3. Central Bank of India & Ors. Vs. Ashoke Kumar Bose reported in 1983 Volume-I Calcutta Law Journal Page-406.

4. Badri Prasad Vs. Bhartiya State Bank and others reported in 76 Company Cases Page-247.

On merits, Mr. Bose would contend, the conduct of Maheswari was deplorable. They initially made payments for few months and then started defaulting. Ultimately they stopped paying since November, 2013 when Tata had to move the learned Company Judge for appointment of Provisional Liquidator, then Maheswari paid a sum of Rs.30 lacs to clear off the arrears as on that date. Moreover, they were not regular in conducting their day to day affairs. The statutory returns were also not filed that the learned Company Judge noticed vide Order dated November 22, 2013, November 25, 2013 and November 28, 2013. The appeal against the Order of the learned Company Judge stood dismissed by the Division Bench vide Order dated December 24, 2013. He would draw our attention to the Orders referred to above, annexed to affidavit-in-opposition. He would also draw our attention to the chart showing irregular payments being made by Maheswari, appearing at page-25 of his affidavit. He would pray for dismissal of the application. OUR VIEW:

Ordinarily we would have disposed of the application of the like nature upon re-scheduling the payment that would meet the substantial justice. However, because of the vociferous objection raised by Tata, the high mighty multi-national, questioning the competence of the Court in entertaining the present application, we felt it necessary to reserve our judgment so that we could deal with all the contentions that Tata raised before us including the question of law.

Before we go into merits, we wish to discuss the law on the subject that Tata would draw our attention to.

i) 52 Calcutta Weekly Notes Page-440 (Chandra Nath & another Vs. Sahadabia Kumarin):

The Hon'ble Chief Justice, while deciding a civil revision application for this Court observed, a decree for rent which was under execution could be paid in installment only with the consent of the decree holder. However, the Order passed would not be available for revision. The appeal would be the only remedy.

The facts would depict, the learned munsif passed a decree for ejectment and arrears of rent. In execution, the judgment debtor applied for installment that the learned munsif acceded to. This Court observed, it was not permissible without the consent of the decree holder in view of the provisions of Order XX Rule 11(2) of the Code of Civil Procedure however, this Court dismissed the revisional application observing, an appeal would lie.

ii) 54 Calcutta Weekly Notes Page-568 (Piyaratana Unnanse and another Vs. Wahareke Sonuttara Unnanse and others):

The Prevy Council decided an appeal against a decree of the Supreme Court of Ceylon. While deciding the appeal. the Prevy Council was of the view, the Court which passed the Order was functus officio and could not set aside the Order however, wrong it may appear to be, this could be done only on appeal. The Prevy Council also noticed the exception within a narrow campus. When there was any clerical error or accidental omission in the decree, the Court which passed the decree would still be entitled to correct the same.

iii) Volume-I Calcutta Law Journal Page-406 (Central Bank of India & Ors. Vs. Ashoke Kumar Bose) The Court decreed a mortgaged suit ex-parte and omitted to allow interest under Order XXXIV Rule 11. The decree holder prayed for amendment under Section 151 and/or Section 152. The Division Bench observed, the Court was not competent, the only remedy would lie in appeal.

ii) 76 Company Cases Page-247 (Badri Prasad Vs. Bhartiya State Bank and others):

The Single Bench of Allahabad High Court, while dealing with an application for revision, interpreted the provision under Order XX Rule 11(2) of the Code of Civil Procedure and observed, merely because the decree holder did not file any objection to the application, the revisionist would not get any right claiming payments of decreetal amount in installments. In the said case, the money decree did not provide any installment. The learned Judge observed, the judgment debtor was not entitled to pray for modification of said decree in view of the provisions of Order XX Rule 11(2) of the Code of Civil Procedure.

Order XX Rule 11(2) would not permit a Court to alter the decree after it was passed in absence of consent of the decree holder or the judgment debtor as the case may be. In the case of Manmohan (supra) the learned munsif attempted to do so that the Court rightly negated. Similarly, in the case

of Piyara Tana (supra), the District Judge, while passing the decree, omitted to give the appellant right to certain land that the District Judge wanted to correct. The judgment debtor objected. The Prevy Council held, the learned District Judge was not entitled to.

In the case of Central Bank of India (supra), the Court omitted to allow interest that the Division Bench observed, could not be done without the consent of the judgment debtor unless the decree was appealed from.

In the case of Badri Prasad (supra), the Executing Court declined to grant installment despite no objection being raised by the decree holder. The learned Judge held, with the express consent of the decree holder it could be possible under Order XX Rule 11(2). If we consider all the four cases cited by Mr. Bose we would find, in two cases the Court attempted to alter the decree that would change the nature and character thereof whereas in other two cases, the power to grant of installment was in question. We, the Chartered High Court judges would derive power from the Letters Patent that would give inherent power to do substantial justice. The Code of Civil Procedure would also not stand in the way to do substantial justice and such inherent power is recognized by the Code under Section 151. However, such discretion could only be exercised within the permissible limit. Inherent jurisdiction of the Curt to make order ex debito justitiae is undoubtedly affirmed by Section 151, nevertheless, that jurisdiction cannot be exercised so as to nullify the provisions of the code.

In our considered view, the High Court, being a Court of record, is always entitled to correct its own mistake to set its record right. Similarly, this Court is not so powerless to do substantial justice by moulding the relief that would not affect the ultimate decision. The Division Bench was approached with the principal issue as to whether the appellant was entitled to upset the order of admission of winding up. We did not accept the contention of the appellant and rejected the same. However, we re-scheduled the payment that was within the power of the Company Court and the Division Bench being an extension of the Company Court under Section 483, was competent to give such direction in a petition for winding up that would meet the substantial justice as recognized by Section 443 of the Companies Act, 1956. Accordingly, the Division Bench granted installments. When the company paid installments to a substantial extent and prayed for some respite the Division Bench, in our view, would be within its right to consider such prayer and examine as to whether the applicant would deserve such treatment and the Court would not be so powerless to entertain such application. Even if we entertain such application and grant relief that would not in any way hit the provisions of Order XX Rule 11(2) of the Civil Procedure Code as it would not affect the ultimate decision. Company (Court) Rules 1959 is having a statutory force. These rules of 1959 would take care of the procedural part of the company proceedings before the Company Court. Rule 6 would inter-alia provide, while the said rule is silent, the provisions of Civil Procedure Code would apply. Rule 9 would extend inherent power to the Company Court to pass any Order to do substantial Justice in the matter. If we read these two provisions we would find, Rule 6 might make the code applicable in Company proceedings however, Rule 9 would have a dominant role and cannot be set at not by virtue of direct application of any of the provisions of the Code. In short, the principles relating to the statutory provisions of the Code might apply in Company proceeding where there was no conflict however, any of the provisions of the Code, if comes in conflict with any of the provisions of the said rules of 1959, the provision of the said rules of 1959 would be applicable and rule 9 is no

exception thereof.

With deepest regard, we have for Mr. Bose, and with all humility, may we say, his argument on the issue was totally without any basis. Neither of the decisions cited at the bar would support his contention in the present scenario. We reject the same. With this mind set, let us now deal with the case on merits. Out of Rs.4.12 crores the applicant paid Rs.2.95 crores, the balance is due. If we reject the application and the company would not be in a position to pay and clear off the installments the Order of winding up would come into effect taking away the means of livelihood of hundreds or thousands. Moreover, interest of share-holders and creditors would be in jeopardy. The respondent would carry on business of extending financial support that would have a tremendous risk. Keeping it in view, they advanced money to the applicant. The applicant already paid a substantial part of it. The Order of admission of winding up is hanging as a sword on their shoulder. Little respite, they would seek, should, in our view, be acceded to that would meet the ends of justice. We however, do not agree with the schedule that Maheswari would suggest. We would consider their prayer for re-scheduling after six months. In the mean-time, they should continue to make payment at the rate Rs.10 lacs per month. In case they do so they would be at liberty to approach the learned Company Judge for re-scheduling the installment and the learned Company Judge would be free to deal with such application in accordance of law.

We make it clear, in case of a single default during the six months this Order would stand recalled and Tata would be at liberty to approach the learned Company Judge to proceed for winding up of Maheswari, the applicant above named.

ACO 25 of 2015 is disposed of accordingly without any order as to costs.

Shiva Kant Prasad, J:

I agree.

[ASHIM KUMAR BANERJEE, J.] [SHIVA KANT PRASAD, J.]