
(2016) 01 BOM CK 0064
In the Bombay High Court
Case No : Company Appeal No. 2/2015

Corporate Ispat Alloys Ltd.

APPELLANT

Vs

Jayaswal Neco Industries Ltd.

RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31[6], Section 8

Citation : (2016) 4 BCR 462 : (2016) 4 MhLJ 385 : (2016) 6 RAJ 764

Hon'ble Judges : B.P. Dharmadhikari and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Balbir Singh, Senior Advocate and D.V. Chauhan, Advocate, for the Appellant; S.V. Manohar, Senior Advocate and Rahul Pande, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

B.P. Dharmadhikari, J.—1. In this appeal, the appellant/petitioner in an Application under Section 439 of the Companies Act, 1956 challenges order dated 15.10.2015, passed by the learned Company Court in Company Petition No. 11/2015. The petitioner has sought winding up of respondent Company on the ground that the respondent Company, is unable to pay its debt of Rs. 102,26,78,728/- to it. Learned Company Court has by an order dated 15.10.2015, postponed consideration of the matter to 27.01.2016, on the ground that some Arbitration proceedings are pending and the same amount is also subject matter of claim before the Arbitrator.

2. This Court has admitted the matter on 02.12.2015, and kept it on 12.01.2016, as the matter before the Company Court is scheduled to come up on 27.01.2016. Shri Balbir Singh, learned Senior Counsel appearing on behalf of the petitioner/appellant has pointed out that the arbitration proceedings are now coming up on 16.01.2016.

3. In this situation, we have heard Shri Balbir Singh, learned Senior Counsel with

Shri D.V. Chauhan, learned Counsel for the appellant/petitioner and Shri S.V. Manohar, learned Senior Counsel with Shri Rahul Pande, learned Counsel for the respondent Company.

4. Effort of Shri Manohar, learned Senior Counsel is to demonstrate that there is no urgency in the matter, and hence out of turn hearing is unwarranted. He has also urged that the Company Court has taken adequate precaution to see that interest of appellant/petitioner is not jeopardized.

5. Shri Balbir Singh learned Senior Counsel has invited our attention to certain judgments to urge that arbitration proceedings cannot operate as a bar to the proceedings for winding up, and hence, in absence of a comment on relevance or impact thereof, the Company Court could not have subjected request of winding up to arbitration proceedings. He contends that, winding up application cannot be treated as a suit for recovery. The arbitration clause appears in a family settlement between individuals, who are members of same family and are on Board of Directors of various companies. On the strength of said family settlement, the composition of companies have been altered and in accordance with the permissions given by this Court and the Calcutta High Court, merger or de-merger has taken place. This situation has attained finality. One Strip Mill is to go ultimately to respondent and hence, as per the family settlement, it is the liability of the respondent to clear its loan and to pay loan installments. After the family settlement dated 31.07.2008, Strip Mill Division of the appellant Company has merged with the respondent Company. The respondent company has commenced repayment of bankers of Strip Mill division from 30.04.2008, and stopped abruptly from 31.08.2010, with the result, the appellant/petitioner shouldered that responsibility till 31.03.2013.

6. Scheme for de-merger was finalized by the respondent on 02.03.2011, and then petitions for that purpose were filed before the Bombay High Court and Calcutta High Court in the year 2013, which came to be allowed in the year 2013 itself. From April, 2013, after de-merger having finally taken place, the respondent Company in acknowledgment of its liability, again resumed repayment of the loan. On 08.07.2014, it also accepted and confirmed the figure shown as balance outstanding [payable] to appellant by it as Rs. 102,26,78,728/-. It is in this situation, when after following due procedure the amount could not be paid, application before learned Company Judge came to be filed under Section 439 of the Companies Act.

7. Learned Senior Counsel submits that after de-merger, its legal entity has come into existence and amount payable is by one company to other company. Individual claims of family members have got no bearing on it. He also contends that individual family members cannot upset the merger and de-mergers, which have legally attained finality. He contends that in arbitration proceedings, when this amount was demanded, the respondent has come up with a case that amount is not due to any individual, but, it is payable to the appellant Company. When the appellant Company demanded that amount, stand that amount is

subject matter of arbitration proceedings has been taken.

8. In this situation, learned Senior Counsel urges that relevance of arbitration proceedings and its impact on the claim of appellant ought to have been looked into in detail. The demand made by the appellant/petitioner cannot be eclipsed by any individual claims of family members against each other and hence, arbitration proceedings do not have any impact on winding up petition. Without considering this aspect and settled law pressed into service, the Company Court could not have subjected winding up proceedings to arbitration matter only because the amount is found to be the same amount.

9. Shri Manohar, learned Senior Counsel has invited our attention to the order to urge that it does not decide the winding up petition finally and it has been only adjourned to enable the arbitrator to take a decision regarding that amount. He also states that though all arguments are reflected in the said order of Company Court, the Company Judge rightly did not record any finding on it, as it was found necessary to await for the decision of pending arbitration matter. He also places strong reliance upon arrangement made by the Company Judge in the said order to protect the interest of the appellant Company.

10. With the assistance of respective learned Senior Counsel we have perused the impugned order as also the records. It is apparent that the Company Court has found it appropriate not to expedite the proceedings of winding up till the arbitrator takes decision regarding claim of amount of Rs. 102,26,78,728/- in respect of which an interim award is sought for under Section 31[6] of the Arbitration and Conciliation Act.

11. This order, therefore, postpones consideration of winding up petition till the interim award of arbitrator on the said claim. Hence, indirectly, the claim in winding up petition is subjected to said consideration by the arbitrator. However, there is no finding as to why this course of action is necessary.

12. These judgments relied upon before us by Shri Singh learned Senior Counsel were also pressed into service before the Company Court. , (1999) 5 SCC 688 (Harayana Telecom Ltd. vrs. Sterlite Industries (India) Ltd.), shows that there the Punjab and Haryana High Court considered application under Section 8 of the Arbitration and Conciliation Act, 1996 moved in winding up petition. The Company Court dismissed that application. Division Bench of that High Court upheld the adjudication. The Hon"ble Apex Court has in paragraph No. 5 pointed out that the claim in a petition for winding up is not for money, while dismissing the Special Leave Petition in limine by a reasoned order. , (2011) 5 SCC 532 (Booz Allen and Hamilton Inc. vrs. SBI. Home Finance Ltd. and others), is the judgment of Hon"ble Apex Court which in paragraph No. 36 points out well recognized examples of non arbitrable disputes. Insolvency and winding up matters, is one of them. Learned Single Judge of Andhra Pradesh High Court in judgment reported at 2012 SC Online AP 83 (M/s. Integrated Broadcasting Company Pvt. Ltd. Hyderabad vrs. M/s. Nettlinx Ltd., Hyderabad), has also noted

that the Directors or Members of a Family who form a incorporated Company, do not pass on their status or their personality to that Company. It is a settled proposition that a Company incorporated under the Companies Act is a distinct legal entity entitled to hold and dispose of the property. We are not inclined to make any comments on relevance of any of these judgments on merits of dispute in this appeal.

13. The Indenture of Family Settlement dated 31.07.2008 is between individuals. Person at Sr. No. 3 Manoj Kumar Jayaswal, appears to be connected with the appellant/applicant Company, while the others therein are connected with the respondent Company. The issue of merger and demerger in so far as Strip Mill with which we are concerned in the present matter, is dealt with in its paragraph No. 7 [I]. There documents on record which show that merger and de-merger have taken place in accordance with the provisions contained in Companies Act dealing with amalgamation, re-constitution, merger etc. Again it is not necessary for us to delve more into this aspect at this stage. Prima facie it appears that the private individuals have while settlement of their disputes, re-constituted, created or given birth to certain artificial persons, and the legality or validity thereof is approved by the competent Courts in accordance with law. Such merger/de-merger having already taken place and in place, the individuals cease to have any control over them. The identity of an individual family member has no bearing on such personality of an artificial person. The disputes, if any, between individuals therefore may not be available to kill the artificial persons so born or to defeat the arrangement through which they are born. Various other persons and instrumentalities like Investors, Bankers and Financers may have altered their positions after such merger and de-merger. This situation cannot be lost sight of.

14. When prima facie an arbitration clause or a pending arbitration may not be an answer to the winding up petition, similarity of claim made by one individual family member against others and by a legal entity (artificial person), against other legal entity, therefore, may not have any bearing in the eyes of law, on each other. The Company Court has noted rival contentions and thereafter only because of conclusion that "the same amount is subject matter of claim before the Arbitrator", impugned order has been passed. Though the amount may be the same in figures, legality of demand or its nature varies. A Company cannot demand the amount due and payable to its Directors in his private and personal capacity. Similarly, a family member who happens to be the Director cannot demand money due to his Company from other company, from other family members. As attention of learned Company Court was not invited to all these niceties, and there is no finding upon it, we do not record a conclusive and binding finding in this regard.

15. We find that only because of pending arbitration proceedings between individual family members, the winding up petition could not have been made to wait till its adjudication. The defences available in winding up petition are well

known and in absence of such defences, the petition must be prosecuted further.

16. We therefore, quash and set aside the impugned order dated 15.10.2015. Parties shall address the learned Company Court afresh on all relevant aspects so as to enable it to pass suitable orders after considering it, as per law.

17. Company Appeal is thus, partly allowed and disposed of. No costs.

18. At this stage, Shri Manohar, learned Senior Counsel with Shri Rahul Pande, learned Counsel appearing on behalf of respondent seeks stay of the present judgment for a period of six weeks to enable the respondent to approach the Hon"ble Supreme Court. The request is opposed by Shri D.V. Chauhan, learned Counsel for the appellant. However, in the interest of justice, we stay the judgment for a period of six weeks. The same shall cease to operate after expiry of the period of six weeks from today.