
(2024) 05 NCLT CK 0013

In the National Company Law Tribunal

Case No : Company Petition (Ib) No. 60/Chd/Hp/2024

?Gursev Singh Vs

Date of Decision : 17-05-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 9, 94, 94(1), 94(4), 94(5), 96

Citation : (2024) 05 NCLT CK 0013

Hon'ble Judges : Harnam Singh Thakur, Member (J); L.N. Gupta, Member (T)

Bench : Division Bench

Advocate : A. S. Likhari, Arpit Chawla, Pulkit Goyal

Final Decision : Dismissed

Judgement

L. N. Gupta, M (T) & Sh. Harnam Singh Thakur, M (J)

1. The present Application has been filed by Mr. Gursev Singh under Section 94 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency for initiation of Insolvency resolution process ("IR Process")) of the Petitioner, who is the Personal Guarantor to M/s. Ram Hari Motors Private Limited, Ram Hari Auto's Private Limited and Ram Hari Cars Private Limited, ("Corporate Debtor/ Principal Borrower"), for whom he extended his personal guarantee for availing loans from different Creditors.

2. The brief facts of the case are that the Applicant had earlier filed an application bearing No. 77/CH/HP/2021, which was dismissed for non-compliance on 01.02.2024. Subsequently, the Applicant herein filed an IA No. 519/2024 under Rule 48 r/w Rule 11 of the NCLT Rules, 2016 for restoration of the Application no 77/CH/HP/2021. On 28.02.2024, the Ld. Counsel for the Applicant after arguing for some time, sought to withdraw the said IA No. 519/2024 with liberty to refile the petition under 94 of the Code as per law. Accordingly, the said IA was dismissed as withdrawn with liberty aforesaid. The Applicant has now filed a fresh Petition No. 60/Chd/HP/2024, which is before us.

3. One of the Financial Creditors, i.e., IDBI Bank (hereinafter referred to as the

"Respondent/Caveator"), filed Caveat No. 8 of 2024 under Rule 25 of the NCLT Rules, 2016 wherein it is stated that Mr. Gursev Singh had earlier filed an application No. CP IB no 77/CH/HP/2021 before this adjudicating authority, in which vide order dated 06.05.2022, the Petitioner was directed to make compliance and eligibility under Section 94(4) & 94(5) of the Code. However, the Petitioner failed to comply with the orders of this Adjudicating Authority despite various opportunities given to her and therefore, vide order dated 01.02.2024, CP IB No. 77/CH/HP/2021 was dismissed for non-compliance. The Caveator has mentioned his apprehension that the Petitioner/ Personal Guarantor may approach this Adjudicating Authority by filing a fresh application under section 94 to gain the benefit of pre-moratorium and as such the Caveat Applicant is filing the present Application to assist this Adjudicating Authority. The Caveat No. 8/2024 filed by the IDBI Bank was disposed of by tagging the same with the main application under consideration vide order dated 14.03.2024 of this Adjudicating Authority.

4. The Caveator IDBI Bank has also filed Short written submissions dated 08.04.2024, wherein the following submissions are made:

4.1. By filing the earlier application on 24.09.2020 under section 94 of IBC, 2016 bearing CP(IB) No. 77/CH/HP/2021 before this Adjudicating Authority, the Petitioner/ Personal Guarantor was simply misusing the interim moratorium granted under section 96 of IBC, 2016.

4.2 In the above said petition bearing CP(IB) No. 77/CH/HP/2021, vide order dated 06.05.2022 this Adjudicating Authority had directed Applicant/ Personal Guarantor to make compliance of the provisions of section 94(4) & 94(5) of the Code. However the applicant, in order to delay any recovery action by the Bank under any other law including SARFAESI Act, 2002, had intentionally not complied with orders of this Adjudicating Authority despite various opportunities, only to prolong the misuse of interim moratorium granted. Therefore, when this matter was listed before this Adjudicating Authority on 01.02.2024, the said company petition was dismissed vide order dated 01.02.2024 for non-compliance.

4.3. Thereafter, an IA No.519 of 2024 in CP (IB) No. 77/CH/HP/2021 was filed for restoration of the said Insolvency petition filed under section 94 of the IBC to its original position. When this IA was listed before this Tribunal on 28.02.2024, the petitioner prayed that he may be permitted to withdraw the said IA for restoration with liberty to refile the Application under Section 94(1) of the Code as per law. Therefore, this Adjudicating Authority dismissed the said IA as withdrawn with liberty aforesaid vide order dated 28.02.2024.

4.4. The Applicant/ Personal Guarantor then filed the present Application under section 94 of the IBC, 2016 without challenging the earlier order dated 01.04.2024 vide which his earlier Application under section 94 of the IBC, 2016 was dismissed for non-compliance. Moreover, the Applicant while filing the present Application, has also stated that he was given liberty by this Adjudicating

Authority vide order 28.02.2024, to file fresh section 94 application. However, it is worth mentioning that the order dated 01.02.2024, vide which the Application bearing bearing CP (IB) No. 77/CH/HP/2021 was dismissed by this Tribunal, has attained finality as the Petitioner/ Personal Guarantor had chosen not to challenge the order in appeal before the Hon'ble Appellate Authority.

4.5 The present petition filed by the Applicant/ Personal Guarantor is nothing but abuse of the process of law and has been filed only with an intention to misuse the Interim moratorium granted under section 96 of IBC, 2016, while mis-utilizing the interim moratorium for more than 3 years, which is only aimed at defrauding its creditors and delaying the recovery proceeding under SARFAESI Act, 2002 and other provisions of law.

4.6 Once the Applicant/ Personal Guarantor has chosen not to pursue an earlier Application filed under section 94, which was dismissed for non-compliance, the Applicant without filing an appeal against the order dismissing the said petition, could not have filed the present fresh petition under section 94. In support of this contention, reliance is placed on the decision dated 11.02.2021 of Hon'ble NCLAT in the case of Suri Rajendra Rolling Mills V. Bengani Udyog Pvt. Ltd. bearing Company appeal (AT) (INS) No. 334 of 2020 which held that once a petition under section 9 of IBC for insolvency of a corporate debtor was dismissed as withdrawn by the petitioner, it could not have subsequently filed a similar petition against the same corporate debtor for the similar cause of action.

5. The Applicant/ Personal Guarantor filed a Written Submission dated 08.04.2024 making the following submissions:

5.1 The present petition is maintainable in light of the order dated 28.02.2024 of this Tribunal, wherein liberty was granted to the Applicant/ Personal Guarantor to file a fresh application under section 94(1) IBC, 2016 as per law. In furtherance of such liberty granted, the Applicant/ Personal Guarantor has preferred the present application the very next day i.e. on 29.02.2024. The order is reproduced below:

"This application has been filed by learned counsel for the applicant seeking restoration of the main Company Petition bearing CP(IB) No. 91(CH) 2021 filed under Section 94(1) of the Code, which was dismissed on 01.02.2024. After arguing sometime, it is stated by learned counsel for the applicant that he may be permitted to withdraw the present petition with liberty to refile the petition under Section 94(1) of the Code as per law. Keeping in view the statement made by learned counsel for the applicant, LA No. 519/2024 is dismissed as withdrawn with liberty aforesaid."

5.2 The Applicant/ Personal Guarantor has placed reliance on the following decisions of the Hon'ble NCLAT:

A. Venus Sugar Ltd. Vs SASF, Company Appeal (AT) (Insolvency) No. 1517/2019, where it was held that "If the earlier application under Section 7 was dismissed

for non-prosecution, it was always open to the Respondent to file fresh application under Section 7."

B. Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd. and Anr Company Appeal (AT) (Insolvency) No. 1423/2022 in which the Hon'ble NCLAT held that "the mere fact instead of reviving company petition, a fresh company petition has been filed under section 7 shall not be reason to reject the company petition and not to entertain the said company petition."

C. Md. Sadique Islam and Ors. v. Niraj Kumar Agarwal and Ors Company Appeal (AT) (Insolvency) No. 1081/2022, in which it was held by Hon'ble NCLAT that "We, thus, are of the view that the order passed by the Adjudicating Authority cannot be sustained. Order impugned is set aside. The Application LA. No.314/KB/2021 is revived before the Adjudicating Authority to be heard afresh and decided in accordance with law".

5.3 As regards the Suri Rajendra Rolling Mills V. Bengani Udyog Pvt. Ltd. case referred to by the IDBI Bank, the Applicant/ Personal Guarantor has contended that the above case differs from the present case, the Tribunal granted liberty to refile the application under Section 94(1) IBC. It has placed reliance on the following excerpts of the said judgment "A look at the order demonstrates that this Applicant was permitted to withdraw a similar application filed for the same cause of action without liberty to file fresh application. As such, the application is not maintainable. Hence, dismissed." Subsequently, it was also held as not maintainable by the Hon'ble NCLAT, Principal Bench New Delhi, which is unlike the present case, where specific liberty has been granted to the Applicant by this Hon'ble Tribunal to refile the application.

6. We heard the Applicant as well as the Caveator/Respondent IDBI Bank and perused the pleadings on record. At the outset, we would like to examine whether the present application is maintainable or not. The Respondent/Caveator contends that as the previous Section 94 petition No. 77/Chd/HP/2021 was dismissed for non-compliance, the Personal Guarantor cannot refile the same at the later stage, and has placed reliance on the Hon'ble NCLAT's decision in Suri Rajendra Rolling Mills V. Bengani Udyog Pvt. Ltd. ("The Bengani Case"). The Caveator/Respondent has further contended that the present Application is filed by the Applicant/Personal Guarantor only with an intention to misuse the Interim moratorium granted under section 96 of IBC, 2016, while misutilizing the interim moratorium for more than 3 years, which is only aimed at defrauding its creditors and delaying the recovery proceeding under SARFAESI Act, 2002 and other provisions of law. Per contra, the Applicant has contended that the present petition is maintainable in the light of the order dated 28.02.2024 of this Tribunal, wherein liberty was granted to the Applicant to file a fresh application under section 94(1) IBC, 2016 as per law. In furtherance of such a liberty, the Applicant has preferred the present application. At this stage, we would like to refer to the order dated 01.02.2024, which reads thus:

"It is seen that the present petition was filed in the Year 2021 and vide order dated 06.05.2022, learned counsel for the petitioner was directed to make compliance under Section 94(4) & (5) of the Code within four weeks. However, it is seen that from the last few dates of hearing neither did he appear before the Court nor did he comply with the order. On the last date of hearing, he was given one last opportunity to appear before the Court and comply with the order dated 06.05.2022. Valid AFA of the proposed RP has also not been filed for last so many dates of hearing.

At this stage, it is pointed out by learned counsel for the Petitioner that he has already filed the affidavit in compliance with the order dated 06.05.2022 vide Diary No. 01343/1 dated 17.02.2023, but the same was not taken on record because of the non-appearance of the petitioner before the Court. As he has not complied with the order in due course of time, the same is not be taken on record. Moreover, he has also stated that the valid AFA of the proposed RP has not been filed yet.

It is pointed out by learned counsel for the Respondent-Corporate Bank-IDBI that the mortgaged property of the Petitioner is being put for auction under the provisions of the SARFAESI Act, 2002 but because this interim moratorium has been misused by the petitioner for the last three years and there is no need to adjourn the matter again.

In these circumstances, there is no reason to again adjourn the matter for necessary compliance. Thus, the present petition is dismissed for non-compliance. However, we are refraining ourselves from imposing the cost upon the learned counsel for the Petitioner for misuse of the process of law. File be consigned to record room."

(Emphasis placed)

8. From the aforesaid order dated 01.02.2024 of this Adjudicating Authority, we observe that: (a) In that order, this Adjudicating Authority had noted that from the last few previous dates of hearing neither did the Applicant appear before the Court nor did he comply with the earlier order. On the last date of hearing, he was given one last opportunity to appear before the Court and comply with the order dated 06.05.2022. However, the Applicant failed to do so; (b) the Applicant had even failed to file the valid AFA of the proposed RP; (c) hence, the petition was dismissed for non-compliance. It is also noted that the Adjudicating Authority refrained from imposing the cost upon the Petitioner for misuse of the process of law.

9. Further, we observe that not only the Applicant failed to comply with the directions of this Adjudicating Authority in complying with the provisions of Section 94(4) and 94(5) to make the Application complete but also did not challenge the order dated 01.02.2024 of this Adjudicating Authority. Hence, in our considered view the order dated 01.02.2024 attained finality.

10. We cannot also be oblivious to the fact that (a) SARFAESI proceedings against the Applicant/Guarantor are pending; (b) the earlier Application No. No. 60/Chd/HP/2021 was filed by the Applicant on 24.09.2020 and he did not bother to complete the application in all respect, which proves the contention of the Caveator/Respondent that the sole objective of filing that Application was to mis-utilize the interim moratorium, which gets triggered on the very date of filing of a Section 94 application, in order to delay the action under SARFAESI Act.

11. All the three judgments as mentioned in para 5.2 above and relied upon by the Applicant do not apply to the facts and circumstances of the present case in as much as none of them pertain to Section 94 or Section 95 of IBC nor there was any issue of misuse of interim moratorium involved. In Venus Sugar Ltd. Vs SASF, application under Section 7 was dismissed for non-prosecution. In the case herein, the application of Section 94 was dismissed for non-compliance of the directions of this Adjudicating Authority. Similarly, in Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd. and Anr., the matter related to revival of Section 7 application in terms of consent terms vs. fresh petition and there was no issue of misuse of interim moratorium involved. In Md. Sadique Islam and Ors. v. Niraj Kumar Agarwal and Ors., the appeal was relating to the Adjudicating Authority not giving any reason for its conclusion or adverting to any pleadings or materials relating to PUFEE transaction record.

12. Even if the liberty by this Adjudicating Authority was given to the Applicant to file a fresh Application, we are of the view that this Adjudicating Authority is sufficiently empowered to examine maintainability of an Application. We find that the Applicant herein has preferred a second Application based on the same facts and for the same cause of action, without bothering to file a complete earlier application No. 77/Chd/HP/2021 either suo moto or pursue the same after complying with the directions given by this Adjudicating Authority vide order dated 06.05.2022 (that were not complied by the Applicant for a prolonged period of more than one year and nine months), which clearly indicates the blatant misuse of interim moratorium available under Section 96 of IBC 2016, by the Applicant.

13. In the facts and circumstances discussed above, we have no other option but to dismiss the present application No.60/Chd/HP/2024.