

(2017) 09 CAL CK 0029
In the Calcutta High Court
Case No : 2791of 2017 WITH CS247of 2010

KANAK PROJECTS LIMITED

APPELLANT

Vs

STEWARTS & LLOYDS OF INDIA LIMITED

RESPONDENT

Date of Decision : 11-09-2017

Acts Referred:

Constitution of India, Article 300A, Article 254(1) - Persons not to be deprived of property save by authority of law - Inconsistency between laws made by Parliament and laws made by the Legi

Citation : (2017) 09 CAL CK 0029

Hon'ble Judges : Sahidullah Munshi

Bench : SINGLE BENCH

Advocate : Deb Nath Ghosh, Sarosij Dasgupta, Samanwita Roy Chowdhury, Ritabrata Mitra, Sidhartha Sharma, Namrata Basu

Judgement

1. This G.A.No.2791 of 2017 has been filed by the defendant in a suit for recovery of khas possession and for mesne profit, praying for stay of all further proceedings in C.S.No.247 of 2010 on the ground that an insolvency proceeding has started under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the said Code).Although, no affidavit-in-opposition has been filed to the application filed by the defendant/petitioner.

2. Mr.Deb Nath Ghosh, Learned Counsel appearing for the plaintiff/respondent submits that the order passed at the instance of the defendant/petitioner by the authority under the Insolvency Code (hereinafter referred to as the said Code) has no manner of application in the present case.

3. He submits that according to the provisions of Section 14 of the said Code where moratorium has been declared, at the highest, the execution of the proceeding can be stayed.

4. He submits that Section 14(1) (d) of the said Code is relevant for the present purpose which says that only recovery of any property by an owner or lessor

where the property is occupied by or in the possession of the corporate debtor, is prohibited.

5. Therefore, according to him, there can be no order staying further proceeding of the present suit.

6. He further submits that Section 18 (1) (f) of the said Code which relates to the duties of interim resolution professional, specifies that the interim resolution professional shall perform duties amongst other to take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance-sheet of the corporate debtor.

7. Section 18(1) (f) is set out below : 18. Duties of interim resolution professional.

(1) The interim resolution professional shall perform the following duties, namely: (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country; (ii) assets that may or may not be in possession of the corporate debtor; (iii) tangible assets, whether movable or immovable; (iv) intangible assets including intellectual property; (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies; (vi) assets subject to the determination of ownership by a court or authority; Mr.Ghosh, learned Counsel for the plaintiff/respondent submits that admittedly, the defendant is a corporate debtor, who has got no ownership right in respect of the suit property for which recovery has been sought for by the plaintiff/respondent.

8. According to him, if the interim resolution professional cannot take control and custody of any asset over which the corporate debtor has no ownership rights, mere appointment of interim resolution professional cannot stand in the way of proceeding with the suit where admittedly, the defendant, although, is a corporate debtor but not the owner of the suit property.

9. According to him, the suit should proceed and there cannot be any stay.

10. Mr.Ghosh, learned Counsel has also drawn attention of this Court to the preamble to the Act and submits that the Act is of very recent origin and there cannot be any provision in the law to interfere with his independent right for eviction of a tenant guaranteed under some other law and if that is allowed the same will tantamount to interference with his Constitutional Right to Property Protected under Article 300A of the Constitution of India.

11. Therefore, there can be no proposition of law to hold that an owner or a landlord is debarred from proceeding with a suit against his tenant in respect of whom an insolvency proceeding is pending.

12. A question often arises whether the right guaranteed under the rent legislation by which a landlord is empowered to evict a tenant on certain given circumstances whether by virtue of the provisions of the Insolvency Code such rights of the landlord or landlady be allowed to be suspended.

13. However, in view of the provisions made under Section 238 of the Insolvency Code such right can obviously be suspended inasmuch as provisions of the Code shall have effect notwithstanding anything consistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

14. In that view of the matter it will not be unreasonable to hold that provisions of the Code will have overriding effect on the provisions of rent legislation.

15. In paragraph 66 of the said judgment it has been further held it is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act.

16. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code. Mr.Ritabrata Mitra, learned Advocate appearing for the defendant/petitioner, submits that the object of the Code is to promote investments as well as resolution of insolvency of corporate persons, firms and individuals in a time-bound manner.

17. He submits that the Code provides for designating the National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT) as the Adjudicating Authorities.

18. He also submits that the Court separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects and this is the reason the Act has been enacted.

19. He further pointed out that there is no single law in India that deals with insolvency and bankruptcy provisions related to insolvency and bankruptcy for companies can be found in Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013.

20. These Statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR).Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals.

21. Liquidation of companies is handled by the High Courts.

22. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and is dealt with by the Courts.

23. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delay in resolution, therefore, the present legislation has been enacted by the Legislature.

24. It also appears that the Insolvency and Bankruptcy Code, 2015 has been brought to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, the partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the priority of payment of Government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto.

25. Therefore, according to him, the statement of object and reasons behind the enactment of the Code are categorical.

26. He submits that the Code itself prohibits continuation of any suit where bankruptcy proceeding is pending and there is no reason to proceed with the suit during the pendency of the proceeding under Section 10 of the said Code.

27. Mr.Ritabrata Mitra, in support of his submission says that once moratorium has been declared under Section 14 of the aforesaid Code it is the duty of the Court to restrain the party from proceeding with the suit or proceeding, as the case may be, and he relies upon a decision in the case of M/S.Innovative Industries LTD. versus ICICI Bank & Anr., reported in AIR 2017 SC 1025 He draws the attention of this Court to paragraph 63 to 66 which are set out below :
63. There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as under : 9. Bankruptcy and insolvency 64.

On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority vide Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc.cannot be proceeded with.

This continues until the approval of a resolution plan under Section 31 of the said Code.

In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

65. It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Section 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act.

There is no doubt that by giving effect to the State law, the aforesaid plan or

scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional.

Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course.

In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a matter that will not be possible to go ahead with the insolvency resolution process outlined in the Code.

Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254(1), would operate to render the Maharashtra Act void vis-vis action taken under the later Central enactment. Also, Section 238 of the Code reads as under : Sec.

238. Provisions of this Code to override other laws. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. 66.

28. It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act.

29. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code. I have heard the parties at length.

30. The moot question whether the present suit should be allowed to continue or not.

31. Before discussing further, provisions of Section 14 are required to be taken into consideration fiRs. and those are set out below : 14.

32. Moratorium. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law,

tribunal, arbitration panel or other authority; b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. Sub-Section (1) of Section 14 says that the adjudicating authority shall, by order, declare moratorium for prohibiting all the following those are mentioned under (a) to (d). In the present case, National Company Law Tribunal, Kolkata Bench, in a company petition being No.213/KB/2017, in exercise of its power under Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has pronounced an order on 1st May, 2017.

33. Such exercise has been made on the basis of the application by the defendant/petitioner, Stewarts and Lloyds of India Limited of 41, Chowringhee Road, Kolkata 700071, being the corporate debtor/corporate applicant.

34. In such proceeding an interim resolution professional has been appointed whereby he has been directed to commence the proceedings of corporate insolvency resolution process as per the procedure prescribed under the Insolvency and Bankruptcy Code, 2016.

35. Moratorium, within the meaning of Section 14 of the said Code, has also been declared.

36. The interim resolution professional has been directed for making public an announcement for initiation of corporate insolvency resolution process and to call for submission of claims in terms of Section 15 of Insolvency and Bankruptcy Code, 2016 and also progress report has been directed to be submitted within 15

days from the date of the said order.

37. Section 13 of the said Code deals with declaration of moratorium and public announcement which is set out below : 13.

38. Declaration of moratorium and public announcement. (1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order (a) declare a moratorium for the purposes referred to in section 14; (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and (c) appoint an interim resolution professional in the manner as laid down in section 16.

(2) The public announcement referred to in clause (b) of subsection (1) shall be made immediately after the appointment of the interim resolution professional. The said provision shows that adjudicating authority, after admission of application under Section 7 or Section 9 or Section 10, shall, by order, declare moratorium for the purposes referred to in Section 14.

39. Section 7 deals with initiation of corporate insolvency resolution process by financial creditor.

40. Section 7 is set out below : 7.

41. Initiation of corporate insolvency resolution process by financial creditor. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred. Explanation. For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under subsection (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (b) the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2).ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).(5) Where the Adjudicating Authority is satisfied that (a) a default has occurred and the application under subsection (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or (b) default has not occurred or the application under subsection (2) is incomplete or

any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application: Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5). (7) The Adjudicating Authority shall communicate (a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor; (b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be. Provisions of Section 7 appear to be not applicable in the present case because the process is to be initiated by the financial creditor not by the corporate debtor.

42. Section 9 deals with application for initiation of corporate insolvency resolution process by operational creditor.

43. The said provision is also not applicable in the present case.

44. Section 10 deals with initiation of corporate insolvency resolution process by corporate applicant.

45. Section 10 is set out below : 10.

46. Initiation of corporate insolvency resolution process by corporate applicant.
(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to (a) its books of account and such other documents relating to such period as may be specified; and (b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order (a) admit the application, if it is complete; or (b) reject the application, if it is incomplete: Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section. Sub-Section (1) of Section 10 says, where a corporate debtor has committed a default, a

corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the adjudicating authority.

47. Sub-Section (5) of Section 5 defines corporate applicant which also means a corporate debtor.

48. Therefore, the application made within the scope of Section 10 by a corporate applicant which includes corporate debtor is very much maintainable and the proceeding being maintainable the other consequential reliefs mentioned under Section 14 of the said Code is equally applicable in the present case.

49. Sub-Section (1) (a) of Section 14 clearly prohibits institution of suits or continuation of pending suits or proceeding against the corporate debtor including execution of any judgment, decree or order in any Court of law, Tribunal, arbitration panel or other authority.

50. Therefore, when the said Code prohibits institution and/or continuation of a suit or proceeding, I find no reason to allow the plaintiff to proceed with the suit.

51. The submission on behalf of the plaintiff that only restriction for stay of execution has been created under Section 14(1) (d) of the said Code, does not appear to be logical at all.

52. It depends upon the circumstances where the parties stand, if it is before the institution of the suit then the suit cannot be instituted, if it is in the midst of the suit then the suit cannot be continued and if the suit has been decreed then the execution should not be allowed to continue.

53. However, it has been clearly submitted by the learned counsel appearing for the plaintiff/respondent that this Court can proceed with the trial of the suit but at best the plaintiff can be restrained from proceeding with the execution.

54. Such submission may be considered to be fair but cannot be accepted, inasmuch as, before a suit is tried it cannot be presumed whether the suit will be decreed or dismissed.

55. Such a question can arise only after the suit is decreed but this Court has not yet reached such stage and if admittedly a decree cannot be executed there is no reason to allow the suit to proceed which may lead to multiplicity of proceedings.

56. Those apart, this Court is not oblivious of the provisions of Section 12 of the said Code which fixes up time limit for completion of insolvency resolution process.

57. Section 12 is set out below : 12.

58. Time-limit for completion of insolvency resolution process. (1) Subject to sub-section (2).the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.

(3) On receipt of an application under sub-section (2).if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may be order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days: Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once. It says that subject to Sub-Section (1) of Section 12 and subject to Sub-Section (2).the corporate insolvency resolution process shall be completed within a period of 180 days from the date of admission of the application to initiate such process.

59. Sub-Section (2) says that the resolution professional shall file an application to the adjudicating authority to extend the period of the corporate insolvency resolution process beyond 180 days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares.

60. Mr.Ghosh has relied on a decision in the case of Sree Chamundi Mopeds LTD. versus Church of South India Trust Association CSI Cinod Secretariat, Madras, reported in (1992) 3 SCC 10and tried to argue that taking into similar provisions contained in Sick Industrial Companies (Special Provisions) Act, 1985, the Honble Supreme Court has refused to grant stay in an identical situation.

61. So far the decision cited by Mr.Ghosh in the case of Shree Chamundi (supra).it relates to applicability of the provisions of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, praying suspension of proceedings for winding up of industrial company filed under Section 433(e) of Companies Act, 1956 by the respondent before the Honble Supreme Court whose premises was taken on rent by the appellant company.

62. It was held by the Honble Supreme Court that proceeding initiated by landlord against tenant sick industrial company on ground of arrears of rent not covered by such category of proceedings leasehold interest in the premises in occupation of the company as the statutory tenant also not property and eviction proceeding resulting in deprivation of such interest not covered by the proceedings contemplated under Section 22(1) of the aforesaid Act of 1985.

63. It has been further held that such an interpretation is in consonance with the object and purpose of the Act.

64. However, the Honble Supreme Court while arriving at such a decision has held that it cannot agree with the contention of the learned counsel for the

appellant company that the leasehold interest of the appellant company in premises leased out to it is property for the purpose of Section 22(1) of the said Act and the appeal was dismissed.

65. The fact situation involved in the aforesaid decision is quite different from the case which we are dealing now.

66. In the case at hand the corporate debtor is somehow in a different situation than the appellant company in the aforesaid decision in *Re: Chamundi* (supra). Therefore, the said decision being distinguishable on fact has no bearing on the fact situation of the present case.

67. That apart, Sick Industrial Companies (Special Provisions) Act, 1985 has been repealed by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003.

68. The aforesaid decision of the Honble Supreme Court on 29th April, 1992 and the Sick Industrial Companies (Special Provisions) Act, 1985 was repealed in 2003.

69. Therefore, when the decision came into effect, Sick Industrial Companies (Special Provisions) Act, 1985 was very much in force.

70. After repeal of the said Act no useful purpose will be served to compare with the provisions of Section 14 of the aforesaid Code with those of the provisions of Sick Industrial Companies (Special Provisions) Act, 1985.

71. Per contra the decision in *M/S. Innoventive Industries* (supra) it has been held that the moment initiation of the corporate insolvency resolution process takes place a moratorium is announced by the adjudicating authority vide Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with.

72. This continues until the approval of a resolution plan under Section 31 of the said Code. If an adjudicating authority is satisfied that the subject matter of the case is such that the Corporate Insolvency Resolution Process cannot be completed within 180 days it may, by order, extend the duration of such process beyond 180 days of such further period as it thinks fit, but not exceeding 90 days.

73. The proviso to sub-section (3) further says that any extension of the period of Corporate Insolvency Resolution Process under the said execution shall not be granted more than once.

74. Therefore, on a conjoint reading of the sub Sections under Section 12 it appears that the resolution process has to be completed within 180 days and further 90 days of extension (once only). If the provisions of the Code are compared with its object, it gives a logical conclusion that the Courts are prohibited from proceeding with the suits and proceedings which has direct nexus with the provisions of Section 14 of the said Code.

75. Admittedly, the defendant is a corporate debtor.

76. Admittedly, in a proceeding under Section 10 a moratorium has been declared, an Insolvency Resolution Professional has been appointed on and from the date of the order under Section 10 of the said code, i.e., 01.05.2017.

77. We are now in September 2017.

78. Therefore, it is expected that within the timeframe mentioned in Section 12 the Insolvency Proceeding will be completed and it is prudent to hold that the trial of the suit will be stayed for the present for a period of four months from date with liberty to the plaintiff to bring it to the notice of the Court with regard to further development in the Insolvency Proceeding.

79. Therefore, I am inclined to stay the proceedings of the suit only for a period of four months for the present with liberty to the parties to pray for extension if situation so demands.

80. The application stands disposed of.