
(2019) 11 CAL CK 0054

In the Calcutta High Court

Case No : Civil Order/Misc.Cas (CO) No. 3224 Of 2019

Mackeil Ispat And Forging Limited

APPELLANT

Vs

State Bank Of India

RESPONDENT

Date of Decision : 20-11-2019

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 7(5), 9(5), 10(4), 12A, 13, 14, 16, 31, 33, 34, 42, 44, 49, 51, 54, 60(5), 60(5)(c), 61(1), 62
National Company Law Tribunal Rules, 2016 — Rule 55
Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 10
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 11 CAL CK 0054

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : S.N. Mookherjee, Pradip Kr. Tarafder, Sambuddha Dutta, S.K. Kapur, Suhani Dwivedi, Dipan Sarkar, Deepanjan Dutta

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The present application under Article 227 of the Constitution of India has been preferred against an order passed by the National Company Law Tribunal, Kolkata Bench, refusing leave to the corporate debtor/petitioner the leave to file a supplementary affidavit.

2. Learned senior counsel appearing for the petitioner argues that although, by the same order, the financial creditor was permitted to file a rejoinder much beyond the time which was stipulated by the tribunal itself for filing of the same, bias was exhibited in the impugned order by refusing the petitioner to file its supplementary affidavit in the same breath.

3. Learned senior counsel for the petitioner argues that, by an order dated June 19, 2019, a photocopy of which has been handed over on behalf of the opposite

party itself, the matter was fixed for further consideration on August 14, 2019 but only seven days was granted to the financial creditor to file rejoinder. However, the rejoinder was filed much thereafter. The corporate debtor, by the same order dated June 19, 2019, was granted time to file a reply within seven days as well.

4. In the impugned order, no reason was assigned as to why the belated rejoinder of the financial creditor was allowed to be filed as late as on August 14, 2019 but, in the same breath, the leave sought by the corporate debtor to file its supplementary affidavit was refused on the ground that no valid reasons were submitted.

5. This, according to the petitioner, exhibited a lack of impartial attitude on the part of the tribunal. It is argued that the cardinal rule of fair play was absent in such refusal on the part of the tribunal.

6. Learned senior counsel for the opposite party/financial creditor argues at the outset that an appeal lay under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (hereafter referred to as "the IBC"). As such, as settled by various High Courts and the Supreme Court, this court ought not to have entertained or to dispose of the present application under Article 227, since an equally efficacious alternative remedy is available under the IBC. By placing reliance on the preamble of the IBC, learned senior counsel for the opposite party argues that primacy was given to insolvency resolution in a time-bound manner for maximization of value of assets, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. As such, it is argued, in the event this court entertains the present application under Article 227 of the Constitution of India despite the availability of an appeal, the entire scheme of the IBC and allied Acts would be frustrated, thereby thwarting the legislative scheme of early resolution of such matters and opening up a floodgate of similar matters, which would overburden this court despite the availability of an appellate tribunal.

7. In this context, learned senior counsel for the opposite party places reliance on a judgment reported at (2014) 1 SCC 603 [Commissioner of Income Tax and others vs. Chhabil Dass Agarwal], for the proposition that the High Courts would not readily interfere in such matters under Article 226 or Article 227 of the Constitution of India in view of availability of an alternative remedy.

8. Learned senior counsel next argues that the filing of a further supplementary affidavit by the petitioner was, in any event, barred by Rule 55 of the National Company Law Tribunal Rules, 2016 (hereinafter referred to as "the NCLT Rules").

9. Rule 55 provides that no pleadings, subsequent to the reply, shall be presented except by the leave of the tribunal upon such terms as a tribunal may think fit.

10. It is next argued that the delay in filing the reply by the opposite party

remained unchallenged and cannot be a justification for the delay in filing the supplementary affidavit.

11. It is next submitted on behalf of the opposite party, on the question of maintainability of the present revisional application, that the expression "the order" in Section 61(1) of the IBC refers to any order passed under Part II of the IBC and includes the impugned order. It is submitted that a perusal of Section 60(5) shows that the National Company Law Tribunal (NCLT) shall have jurisdiction to entertain or dispose of, inter alia, any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this court. The present impugned order, it is argued, is a question of fact arising out of and in relation to an insolvency resolution and, as such, is covered by Section 60(5)(c) of the IBC, thus, bringing the said order within the fold of the appellable orders contemplated in Section 61(1) of the IBC.

12. In reply, learned senior counsel for the petitioner argues that Rule 55 of the NCLT Rules are not applicable to insolvency resolution proceedings under the IBC. By placing reliance on Rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the IBC Rules"), learned senior counsel argues that the specific rules of the NCLT Rules, 2016, which are applicable to IBC Proceedings, have been referred to there. Neither in Rule 10 nor in any other Rule of the IBC Rules, does Rule 55 of the NCLT Rules find mention. As such, Rule 55 is not applicable at all to the present IBC proceeding, merely because the NCLT was designated as the Adjudicating Authority under the IBC.

13. Learned senior counsel for the petitioner, in answer to the issue of maintainability raised by the opposite party, argues that Section 61(1) specifically refers to "the order of the Adjudicating Authority" under Part II of the IBC as being appellable. It is argued that the definite article "the" refers to orders which can be passed by the Adjudicating Authority under Part II of the IBC itself. By way of examples, learned senior counsel refers to Sections 7(5), 9(5), 10(4), 12A, 13, 14, 16, 31, 33, 34, 42, 44 ? 49, 51 and 54 of the IBC. All such provisions contemplate the orders which the Adjudicating Authority can pass under Part II of the IBC, which have been referred to as "the order" which can be passed under Part II. The refusal to grant leave for filing a supplementary affidavit not being any of such orders, it would be treated to be a mere interlocutory order which is not appellable at all under Section 61(1) of the IBC. As such, there would be no remedy other than Article 227 of the Constitution of India for the petitioner to avail against such an order.

14. Learned senior counsel for the petitioner cites a judgment reported at 2019 SCC Online SC 1292 [Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and others vs. Tuticorin Educational Society and others], wherein it was discussed as to there being a distinction between cases where the alternative remedy is available before civil courts in terms of the provisions of the Code of

Civil Procedure and in cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein, which happened to be quasi-judicial authorities and tribunals. It was held that in cases falling under the first category, which may involve suits and other proceedings before the civil court, the availability of an appellate remedy in terms of the provisions of the Code of Civil Procedure may have to be construed as a near total bar. However, the second category of cases of alternative remedy was treated to be on a lighter footing. Learned senior counsel for the petitioner argues on the basis of such proposition that, in any event, there would not be any absolute bar for this court to proceed under Article 227 of the Constitution of India in considering the legality and jurisdictional error of the impugned order even if there was a bar in the IBC, which does not provide an alternative remedy available before civil courts in terms of the provisions of the Code of Civil Procedure.

15. Upon hearing both sides, an examination of the scope of Section 61(1) of the IBC, as regards appellability of orders passed by the Adjudicating Authority, is to be undertaken first.

16. It is seen from Section 61(1) that the language used is, notwithstanding anything to the contrary contained under the Companies Act, 2013, any person aggrieved by the order of the Adjudicating Authority under that Part (Part II) may prefer an appeal to the National Company Law Appellate Tribunal.

17. However, in contrast, the very next Section, that is, Section 62 of the IBC provides for an appeal to the Supreme Court against "an order" of the NCLT to the Supreme Court, thereby creating an explicit distinction between the language of the two successive sections between the appeal preferable against the order of an Adjudicating Authority and that of the NCLT.

18. Seen in such context, it cannot be presumed that the legislature carved out such a distinction without any meaning or reason. Going through the provisions of Part II of the IBC, as rightly argued on behalf of the petitioner, specific provisions have been laid down in the said Part, which confer power on the Adjudicating Authority (the NCLT) to pass an order. There are no other provisions than those referred to by the petitioner for passing any order by the Adjudicating Authority under Part II.

19. The submission of learned senior counsel for the opposite party as regards the applicability of Section 60(5)(c) of the IBC to the present case is unacceptable, since the said clause merely provides for the jurisdiction and power of the NCLT. Sub-section (5) of Section 60 lays down that notwithstanding anything to the contrary contained in any other law for the time being in force, the NCLT shall have jurisdiction to entertain or dispose of the matters provided therein, including those mentioned in clause (c), that is, any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person

under the IBC.

20. The said provision does not empower the Adjudicating Authority to pass any order, as contemplated in Section 61(1) of the IBC, but merely confer jurisdiction on the NCLT (the Adjudicating Authority) to incidentally decide questions of facts as well, arising out of or in relation to the insolvency resolution. The said provision confers power and jurisdiction on the Adjudicating Authority to deal with such questions while deciding matters under the IBC, which would culminate in orders under Part II, but do not provide for any occasion for the Adjudicating Authority to pass an order. Section 60(5) of the IBC is merely enabling, charting out the territory of the powers of the Adjudicating Authority, and does not contemplate any order being passed by the said authority.

21. Moreover, the language of Section 62 of the IBC, which ex facie shows that "an order" that is, any order of the NCLT is appellable whereas, by explicit contrast, Section 61(1) provides for an appeal only against "the order of the Adjudicating Authority" under Part II. Since Section 61(1) cannot be read in isolation of the other provisions of Part II, the expression "the" has to be relatable to the previous provisions conferring authority on the Adjudicating Authority to pass orders.

22. The present impugned order not being such an order, no appeal lies under Section 61(1) of the IBC.

23. The use of the indefinite article "an" to qualify appellable orders in Section 62 and the definite article "the" in Section 61 (1) of the IBC reflects the intention of the Legislature and cannot be construed to be redundant. Such intention of the Legislature has to be attributed a meaning and cannot be ignored while construing the statute.

24. The judgment cited on behalf of the petitioner is besides the point, inasmuch as the said judgment lays down a distinction between alternative remedies of civil nature and other alternative remedies, which does not take away from the sanctity of the alternative remedy in any manner.

25. Even the judgment cited on behalf of the opposite party does not lay down the proposition that an alternative remedy is an absolute bar for a High Court to exercise its jurisdiction under Article 226 or Article 227 of the Constitution of India. It is well-settled since long that, although there is no absolute bar if alternative remedies are available, if such remedies are equally efficacious, the High Court exercises a self-imposed restriction in not frustrating the scheme of the concerned statute by interfering, but generally chooses to leave the matter for being challenged before the appropriate forum, of course, unless there is any inherent jurisdictional error hitting the root of the authority passing the order.

26. Be that as it may, the aforesaid propositions are entirely irrelevant for the present purpose, since the present application under Article 227 of the Constitution of India was entertained and is being disposed of not despite the

availability of an alternative remedy but on the ground that there is no alternative remedy at all for challenging the impugned order. Since Section 61(1), providing for an appeal against "the order" of the Adjudicating Authority is the only provision for challenge in Part II of the IBC, and the present impugned order is not covered by the said provision, there would be no other remedy before the petitioner against the impugned order but to approach this court, either under Article 226 or under Article 227 of the Constitution of India.

27. Hence, the issue of maintainability raised by the opposite party is turned down and it is hereby held that the present application under Article 227 of the Constitution is very much maintainable.

28. As regards the applicability of Rule 55 of the NCLT Rules, the contention of the petitioner is more acceptable, in so far as the said Rules govern the functioning of the NCLT, that is, the National Company Law Tribunal and does not automatically apply to the IBC, unless specifically provided for. Since the IBC has its own Rules, being the IBC Rules, 2016, and such Rules, despite specifying certain rules of the NCLT Rules to be applicable to IBC matters, does not mention Rule 55 of the same, it is evident that Rule 55 of the NCLT Rules cannot be automatically invoked in IBC matters.

29. Even if it was taken for the sake of argument that Rule 55 was applicable to the present case, the said Rule specifically provides for leave being given by the tribunal to present pleadings subsequent to the reply. It is conspicuous that no written application for leave is contemplated in the said section.

30. The tribunal, in the present case, merely attributed a single sentence in holding that no valid reasons were submitted by the corporate debtor/petitioner to file the supplementary affidavit, in spite of having accepted the rejoinder filed by the financial creditor in specific violation of the time?frame stipulated earlier, about one?and?a?half months after such time expired, without even assigning any reason. The said modus operandi reeks of bias and a partisan approach and ought to be deprecated.

31. It may be mentioned here that the argument advanced by the opposite party as to the entertainment of the present application under Article 227 of the Constitution opening a flood gate for the litigants to come up against every order passed by the Adjudicating Authority under the IBC, is misplaced in view of the discussions made above. There are several orders which can be passed by the Adjudicating Authority under Part II of the IBC, which are appellable under Section 61(1), as referred to in the present judgment. However, in the event the order impugned does not fall within the category of such appellable orders, the principle of *ubi jus ibi remedium* would be squarely hit, if this court shuts its eyes to a patent perversity or jurisdictional error committed by the tribunal.

32. In the present case, the perversity occasioned by meting out a step?motherly treatment to the parties respectively is, by itself, a sufficient ground to interfere with the impugned order. Moreover, the supplementary affidavit sought to be

filed being apparently relevant for a proper and complete adjudication of the proceeding, ought to have been permitted to be filed by the petitioner.

33. Accordingly, C.O. No. 3224 of 2019 is allowed on contest, thereby setting aside the impugned order in so far as the refusal to grant the petitioner leave to file its supplementary affidavit is concerned. The corporate debtor/petitioner is hereby granted leave to file such supplementary affidavit before the NCLT on the next available date, if not already filed. The NCLT shall thereafter proceed with the hearing of the main matter, upon considering all the pleadings and other materials, including the supplementary affidavit so filed by the corporate debtor.

34. There will be no order as to costs.

35. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.