(2012) 10 BOM CK 0109

In the Bombay High Court

Case No : Insolvency Notice of Motion No. 47 of 2012 in Insolvency Notice No. N/19 of 2012

Rajendra N. Mehta, Mr. Ashok G. Ramchandani, Mr. Harshad Moorlidhar Shah and Mr. Arjun Ramchandra Pawar — APPELLANT

Vs

Prabhudas Liladhar Pvt. Ltd. — RESPONDENT

Date of Decision : 16-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 17, 34, 35, 36
Civil Procedure Code, 1908 (CPC) — Section 15, 2, 9
Presidency Towns Insolvency Act, 1909 — Section 5, 9(2)

Citation : (2013) 1 MhLj 532

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : P.V. Shah for the Judgment Creditors, for the Appellant; Sandip Parikh instructed by y Fox Mandal Partners for Judgment Debtor No. 3, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—Heard finally. One Mr. Harshad Moorlidhar Shah, Judgment Debtor No. 3 has taken out this Motion to set aside Insolvency Notice No. N/19 of 2012 dated 29 June 2012, which was issued by the Insolvency Registrar on the basis of Award dated 2 May 2005 in Arbitration Petition No. 543 of 2003/There was no stay of execution. Therefore, called upon to furnish the security for the awarded amount of Rs. 3,72,78,897/- along with interest at the rate of 15% p.a. from 12 June 2005.

2. The basic admitted position is as under:

On 24 September 2003, Award for Rs. 3,72,78,897/- plus interest thereon @ 15% p.a. from 1 December 2002 till payment against Shivam Multi-Services Private Limited, was passed, but rejected the Judgment Creditors'' claim against the Judgment Debtors (the Directors). On 2 December 2003, Arbitration Petition

No. 545 of 2003 filed by the Judgment Creditors, challenging the aforesaid rejection against the Judgment Debtors. On 6 January 2004, Arbitration Petition u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) was admitted.

3. On 2 May 2005, the Court modified the Award, by allowing Arbitration Petition No. 545 of 2003, and the Judgment Debtors were directed to pay Rs. 3,72,78,897 plus interest thereon @ 15 % p.a. from 1 December 2002 till payment and further directed to pay costs of Rs. 66,150/- also. On 7 July 2005, Judgment Debtor Nos. 1, 3 and 4 preferred Appeal No. 625 of 2005 under the Arbitration Act and challenged the modified award. On 30 July 2005, Judgment Debtor Nos. 1, 3 and 4 took out Notice of Motion No. 2121 of 2005 in the Appeal for stay of execution of the Award/Decree. On 8 August 2005, the Division Bench of this Court admitted the Appeal. On 3 March 2010, the Notice of Motion was dismissed.

4. On 29 June 2012, Insolvency Notice No. N/19 of 2012 was issued. The same was served on the Judgment Debtor on 26 July 2012. On 14 August 2012, Judgment Debtors filed affidavit in support of Notice of Motion No. 47 of 2012, registered on 16 August 2012 and served on 24 August 2012.

5. The learned counsel appearing for the Applicant has read and referred Paramjeet Singh Patheja Vs. ICDS Ltd., ; the Presidency Towns Insolvency Act, 1909 (for short, Insolvency Act) Section 9 read with Section 2 and 15 of the CPC (for short "CPC"); and the provisions of Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") and challenged the issuance of notice in question. The relevant observations are as under:-

58. Issuance of a notice under the insolvency Act is fraught with serious consequences: it is intended to bring about a drastic change in the status of the person against whom a notice is issued viz. To declare him an insolvent with all the attendant disabilities. Therefore, firstly, such a notice was intended to be issued only after a regularly constituted Court, a component of judicial organ established for the dispensation of justice, has passed a decree or order for the payment of money. Secondly, a notice under the Insolvency Act is not a mode of enforcing a debt; enforcement is done by taking steps for execution available under the CPC for realizing moneys.

61. In the light of the above discussion, we further hold that the Insolvency Notice issued u/s 9(2) of the P.T.I. Act 1909 cannot be sustained on the basis of arbitral award which has been passed under the Arbitration & Conciliation Act, 1996. We answer the two questions in favour of the appellant.

6. The learned counsel appearing for the Judgment Creditors, on the other hand, has relied on Section 9(2) of Insolvency Act and contended that if any order passed by the Court which is executable, such insolvency notice can be issued. He further contended that by order dated 3 March 2010, against the order passed by the Single Judge confirming and modifying the award, the Division

Bench of this Court not granted any stay and therefore, the modified award so passed, can be the foundation for insolvency notice as the Judgment Debtors, admittedly not paid the amount so awarded.

7. He relied on the judgment in Sharad R. Khanna and Others Vs. Industrial Credit and Investment Corp. of India Ltd. and Others, . In this Judgment, this Court after considering the situation and the case read with the Sections, dismissed the similar motion. The Arbitration Act was not considered. The facts and circumstances were distinct and distinguishable.

8. The relevant Sections 9(2) and (5) of the Insolvency Act, are as under:-

9 (2) Without prejudice to the provisions of subsection (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice (hereafter in this section referred to as the insolvency notice) as provided in sub-section (3) and the debtor does not comply with that notice within the period specified therein:

provided that where a debtor makes an application under sub-section (5) for setting aside an insolvency notice-

(a) in a case where such application is allowed by the Court, he shall not be deemed to have committed an act of insolvency under this sub-section; and

(b) in a case where such application is rejected by the Court, he shall be deemed to have committed an act of insolvency under this sub-section on the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later:

Provided further that no insolvency notice shall be served on a debtor residing, whether permanently or temporarily, outside India, unless the creditor obtains the leave of the Court therefor.

9 (5) Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the Court to set aside the insolvency notice on any of the following grounds, namely:-

(a) that he has a counter-claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that-

(i) he has made an application before the competent authority under such law for the setting aside of the decree or order; or

(ii) the time allowed for the making of such application has not expired;

c) that the decree or order is not executable under the provisions of any law referred to in clause (b) on the date of the application.

9. The Insolvency Act and the provisions so referred above itself contemplates that a Creditor, who has obtained a decree or order against the Debtor for the payment of money, which has become final and the execution whereof has not been stayed, can apply for Insolvency Notice. The Debtor if failed to comply with the same within a period prescribed, further steps will be taken in accordance with law. The provision itself permits the later to move an application u/s 5, for seeking Insolvency notice itself. Section 9 Sub-clause (5) provides the conditions where the Court can set aside the Insolvency Notice. It provides that the Debtors are entitled to apply for setting aside the insolvency notice on the various grounds, (a) to show that his Application to set aside the decree and/or order as filed is pending; (b) he is also entitled to challenge the decree and/or order under other law; and (c) he is also entitled to demonstrate that the decree or order is unexecutable under the provisions of law.

10. In the present case, admittedly, the Judgment Creditors challenged the award, as it was not passed against the individual Directors. By order dated 2 May 2005, the learned Single Judge of this Court has modified the order and held that all the Directors of the Company are also liable to pay the awarded amount. Some of the Directors preferred the Appeal u/s 37 of the Arbitration Act. The Appeal was admitted on 8 August 2005 and the same is pending for final hearing since then. By order dated 3 March 2010, the Motion taken out by the Directors in the Appeal, was dismissed by observing that "In our opinion, with the passage of time, this Motion has become infructious."

11. In this background, therefore, we have to consider the scheme of the Arbitration Act also. Once the award is passed, an Application for setting aside the Arbitral Award is filed in the Court u/s 34 of the Arbitration Act unless it is decided finally, it is not enforceable. The relevant portion of Sections 35, 36 and 37 of the Arbitration Act are as under:-

35. Finality of arbitral awards.- Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. Enforcement.- Where the time for making an application to set aside the arbitral award u/s 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

37. Appeals orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal-

(a) accepting the plea referred to in subsection (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

12. It is clear, therefore, from the above position that the award attains finality subject to above provisions. The Application to set aside the award, if expired and/or refused, the award shall be enforceable under the CPC, in the same manner, as if it were the decree of the Court. It is relevant to note the provisions of Appeals u/s 37 as available under the Arbitration Act. In the present case, it is against the refusal to set aside the Arbitral Award. This section itself contemplates and provides a statutory Appeal against the orders passed under the respective Section. Section 34 is one of it. The Appeal, therefore, so provided under the Arbitration Act, unless decided finally, in my view, itself means the award has not attained finality. Mere rejection of Application to set aside the Arbitral Award itself cannot be the reason to enforce the award by treating the same as the final decree or order. The Arbitration Appeal under the Arbitration Act, definitely falls within the ambit of "provisions of any law". The pendency of such Appeal, just cannot be overlooked to treat the modified award as enforceable decree and/or order as contended by the learned counsel appearing for the Creditors.

13. Section 9 (2) read with Sub-section (5) of the Insolvency Act, also contemplates a situation, where before issuing such notice, it is necessary to consider whether the money decree and/or order has attained finality. In the present case, admittedly, the Appeal against the order is pending. The effect and the power of the Appellate Court, u/s 37 is quite settled. The order passed u/s 34, may be set aside or modified. The modified award in no way can be stated to be the final decree and/or final order. The transaction in question is a commercial transaction. The stake, the parties name and fame cannot be overlooked. Merely because there is award passed against one party, that itself is not sufficient to invoke the provisions of Insolvency Act in such fashion at this stage, basically when, the award/order has not attained finality.

14. The submission that the Appellate Court rejected the Motion for stay in 2010, that itself cannot be the reason to accept the case of the Creditors that the modified award has attained finality. Considering the scheme and purpose of Arbitration Act, there is no express provisions for stay of the award and the order passed by the Single Judge, while confirming the award, therefore, merely because the Motion was dismissed as recorded above, that situation itself cannot falls within the ambit of "the execution whereof has not been stayed". I am of the view that, unless the award become enforceable, a decree and/or order,

there is no question of execution of the same treating it to be "a decree of the Court" as contemplated u/s 36 of the Arbitration Act, as it has not attained the finality, as contemplated u/s 35 of the Arbitration Act. Therefore, the dismissal of the Motion by the Division Bench, as recorded above, cannot be treated the modified award as the final and executable decree and/or order.

15. The learned counsel appearing for the Judgment Creditors submits that the judgment Paramjeet Singh Patheja (Supra) in fact supports the submission/case. The situation is different here. We are concerned the situation where the modified award itself has not attained finality, and therefore, it is unenforceable under the Arbitration Act. Therefore, the invocation of the Insolvency Act, in this background, is also unacceptable. In my view, the Insolvency Notice so issued, is impermissible and contrary to the law. The Applicant has made out the case to set aside the Insolvency Notice dated 29 June 2012.

16. The Court has modified and passed the Award against all the Directors. The Appeal was preferred by 3 Directors only. The present motion is taken out only by one Director. At this stage, in view of the above observations, the modified award itself has not attained finality, the challenge made by one Director, and not by others, in my view, should not be the reason to overlook the provisions of both the Acts.

17. It is difficult to dissect, as contended by the learned counsel appearing for the Creditors that the Motion be maintained against the other Directors, for the simple reason that the modified award is against all the Directors but admittedly the Appeal is still pending. It is made clear that, once the modified award attains finality, the Creditors may take out the proceedings, if permissible, in accordance with law. Therefore, I am inclined to set aside the Insolvency Notice, in question. The Motion is accordingly allowed in terms of prayer clauses (a) and (b). There shall be no order as to costs.