

(2024) 03 NCLT CK 0019

In the National Company Law Tribunal

Case No : IA No. 903 of 2023 In CP(IB) No. 1523 of 2019

Shaikh Mahboob Subani & Anr

APPELLANT

Vs

Liquidator of K K Welding Limited

RESPONDENT

Date of Decision : 05-03-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 60(5), 60(5)(c), 238

Citation : (2024) 03 NCLT CK 0019

Hon'ble Judges : V.G. Bisht, Member (J); Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Justice Virendrasingh G. Bisht (Retd.), Prabhat Kumar, Amit Gharte, Mitali Bhatt

Final Decision : Allowed

Judgement

Prabhat Kumar, Member (Technical)

1. This Application bearing IA No. 903/2023 is filed by Shaikh Mahboob Subani and Firoz Shaikh Subani (?Applicant?) in the Liquidation process of K.K. Welding Limited (?Corporate Debtor?) under the provisions of the Insolvency and Bankruptcy Code, 2016 (?Code?) seeking the following reliefs :

a) Direct the Liquidator to keep the said property of the Applicants as described in Para No. 1 outside the Liquidation Estate created by the Liquidator in respect of the Corporate Debtor.

b) Return the original documents of the said property lying in the possession of the Respondent/Corporate Debtor.

Brief Facts

2. Applicant No. 1 is the Proprietor of M/s Wed Enterprises and is in the construction business. Applicant No. 1 is the father of Applicant No. 2. Applicant No. 1 built the Ground Floor and First Floor in the building Flora Avenue being constructed on the non-agricultural land bearing CTS No. 1313(part), Plot No.

371/E-2, Scheme No. II, Taluka Kurla, Registration Sub-District Mumbai Suburban, Registration District Chembur ("the said property"). Applicant No. 1 agreed to sell Flat No. 001 on the Ground Floor and Flat No. 101 on the First Floor to Applicant No. 2 for a consideration of Rs. 60,00,000/- (Rs. Sixty Lakhs Only) by way of an Agreement for Sale dated 29.12.2008, thereby making the Applicants co-owners of the said property.

3. Applicant No. 1 approached the Corporate Debtor seeking financial assistance of Rs. 3,00,00,000/- (Rupees Three Crores Only) for paying off some creditors including Bell Finvest (India) Ltd. from whom financial facilities had been availed by the Applicants. The Corporate Debtor, not being a corporate entity with a valid license from RBI for lending money, still granted loan facility of Rs. 3,00,00,000/- (Rupees Three Crores Only) at the rate of 4% interest per month subject to execution of the following documents with respect to the said property:

- a) Agreement for Sale
- b) Deed of Equitable Mortgage
- c) Memorandum of Understanding (?MoU?)

Submissions made by the Ld. Counsel on behalf of the Applicant

4. Applicant No. 1 submits that the Corporate Debtor asked Applicant No.1 to create two parallel documents one for Mortgage and one Agreement for Sale so that as and when the entire facility is repaid by Applicant No.1, the Corporate Debtor would cancel the Agreement for Sale and also the Mortgage and Loan Documents and the said property would go back to the Applicant No.1 and 2. For the purpose of creating a security, Applicant No. 1 executed an Agreement for Sale dated 26.04.2012 for sale of the said property in favour of the Corporate Debtor for a consideration of Rs. 4,65,00,000/- (Rupees Four Crores and Sixty Lakhs Only) and the same was signed by both the parties. However, Applicant No. 1 returned the amount of Rs. 1,65,00,000/- (Rupees One Crore and Sixty Five Lakhs Only) back to the Corporate Debtor on the very same date, for which the Corporate Debtor also issued a receipt to the Applicant. It is pertinent to mention here that the Corporate Debtor has made a declaration on the said receipt that the amount of Rs. 1,65,00,000/- (Rupees One Crore and Sixty Five Lakhs Only) received by him is exclusive of the interest of 4% as agreed upon between the parties. Therefore, the Sale Agreement, even if cancelled, will have a consideration which is equivalent to the loan amount i.e. Rs. 3,00,00,000/- (Rs. Three Crore only) and since the entire consideration i.e. Rs. 4.65 crores was not provided under the Agreement for Sale, it will never be absolute.

5. It is settled law that an Agreement becomes effected only when both the parties perform their respective promises/actions as defined under the Agreement, However, in the present case, even if it is to be assumed for the sake of arguments that the Agreement in question was a Sale deed, even then only a part and not the complete consideration flowed from the Corporate Debtor to the

Applicant under the Agreement, as described above and hence, the sale of the said property cannot be said to be executed or completed in favour of the Corporate Debtor and the said Agreement dated 26.04.2012 becomes unaffected, unenforceable or completed on account of non-performance of the actions by the Corporate Debtor.

6. Pursuant to the understanding between Applicant No.1 and the Corporate Debtor, a Deed of Equitable Mortgage and Memorandum of Understanding, both dated 26.04.2012, were executed between Applicant No. 1 and the Corporate Debtor. Furthermore, it was agreed between the parties under Clauses 2 and 3 of the Deed of Equitable Mortgage and under Clauses 11 and 13 of the Memorandum of Understanding that the Corporate Debtor will hold the title deeds of the said property as security until repayment of complete amount of Rs. 3,00,00,000/- (Rupees Three Crores Only) and shall not part with the said property until the loan amount is completely repaid and upon such repayment of the entire loan, the Corporate Debtor shall execute a Cancellation Deed releasing the charge of the said property in favour of the Applicants. It had also been agreed that Applicant No. 1 had the right and title to deal with the said property as it may deem fit. Clause 8 of the Deed of Equitable Mortgage and Clause 3 of the MoU clearly show that the Applicants intended to avail a loan facility from the Corporate Debtor, to only create equitable mortgage in favour of the Corporate Debtor and there was no intention of the Applicant to sell the said property to the Corporate Debtor, of which the Corporate Debtor was aware and had agreed to the same.

7. It is submitted that the Agreement for Sale Deed dated 26.04.2012 was executed merely for the purpose of extension of financial assistance to Applicant No. 1 and creation of security interest in favour of Corporate Debtor. However, the Corporate Debtor was never given the possession of the said property. It can be seen from the clauses of the

Agreement that the said Agreement is an 'Agreement to Sell' and not an 'Agreement for Sale'. The Applicant never gave the possession of the said property to the Corporate Debtor as legal possession would have transferred only when the Conveyance Agreement would have been executed between the parties, which was never executed. The Respondent has also not produced any documentary evidence to show that the title of the said property was transferred to the Corporate Debtor.

8. The above-mentioned documents were neither signed nor witnessed by Applicant No.2 and Applicant No.1 proceeded to include the share of the Applicant No.2 as Applicant No. 1 was under the bonafide belief that the Corporate Debtor would return the said property and close the loan facility once the entire debt is repaid.

9. Applicant No. 1 further paid a sum of Rs. 26,00,000/- (Rupees Twenty Six Lakhs Only) and 2 cheques of Rs. 12,00,000/- (Rupees Twelve Lakhs Only) each

to the Corporate Debtor on the date of execution. After, the immediate return of this additional amount of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) the effective amount received was reduced further. Therefore, the net or effective loan facilities disbursed to Applicant No. 1 was Rs. 2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only) only.

10. Thereafter, Applicant No. 1 made further payments to the Corporate Debtor from time to time of which Rs. 96,00,000/- (Rupees Ninety Six Lakhs Only) were paid by 8 cheques of Rs. 12,00,000/- (Rupees Twelve Lakhs Only) each, Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) was paid through RTGS, Rs. 32,00,000/- (Rupees Thirty Two Lakhs) were paid directly to the Corporate Debtor by one Mr. Sachin Sankpal to whom Applicant No. 1 had sold the Ground Floor of the said property. Applicant No.1 had paid the entire balance amount by April 2015 through various RTGS/Demand Draft/Cheques and the payment from Mr. Sachin Sankpal. Therefore, nothing was due and payable by Applicant No.1 to the Corporate Debtor. Further, the Corporate Debtor had returned some of the cheques to Applicant No.1 on account of the payments made by Applicant No.1 however due to their fault did not return the cheques of 2013 and 2014.

11. It is submitted that as per the calculations of Applicant No.1, the Corporate Debtor has received more than Rs. 4.76 crores which include the payments from one Mr. Sachin Sankpal.

12. Thereafter, Applicant No.1 learnt that the Corporate Debtor availed a loan facility to the tune of Rs. 6,00,00,000/- (Rupees Six Crores Only) from an NBFC namely M/s Future Capital of India Limited ("Future Capital") against which the Corporate Debtor mortgaged the said property of Applicant No. 1 without informing and taking any permission from Applicant No. 1. It is submitted that the said Future Capital did not check the title of the property as it would have been visible that Applicant No.2 never signed any documents and never borrowed money therefore he never parted with his share in the said property in favour of anyone including the Corporate Debtor.

13. It is submitted that the equitable mortgage created by the Corporate Debtor is in blatant violation of the Deed of Equitable Mortgage dated 26.04.2012 executed between Applicant No. 1 and the Corporate Debtor, wherein it was specifically agreed between the parties that the Corporate Debtor shall hold the said property until repayment of the complete loan amount by the Applicant No. 1. The Corporate Debtor also included the share of the Applicant No.2 which was never consented to or signed by the Applicant No.2.

14. Applicant No.1 served a notice dated 22.12.2013 upon the Corporate Debtor raising grievances regarding the availing of loan facility from Future Capital and creating security interest on the said property in violation of the MoU and Deed of Equitable Mortgage executed between Applicant No. 1 and Corporate Debtor. Furthermore, Applicant No. 1 set out the payments made to the Corporate Debtor in the said notice. Applicant No. 1 requested the Corporate Debtor to

initiate the process of retrieving the original title documents of the said property from Future Capital. However, the Corporate Debtor never replied to the said notice and never informed the outstanding amount which was due and payable by Applicant No.1 despite follow-ups.

15. Thereafter, Applicant No.1 filed a suit bearing Suit No. 1363 of 2014 for restraining the Corporate Debtor and its management and employees from taking any coercive steps or creating any third-party rights on the said property. However, Applicant No.1 did not pursue the suit proceedings actively due to the assurances given by the then management of the Corporate Debtor. The Corporate Debtor requested for some time to arrange the return of the documents but the documents were never returned as from April 2015, there were several investigations and raids initiated by the Income Tax Authorities and Sales Tax Authorities against the Corporate Debtor due to which the Mehtas were on the run and could not be traced by Applicant No. 1. Despite making the entire payment as suggested by the Mehtas, the documents were not provided. Consequently, Applicant No.1 was not informed about the developments by its lawyer that the suit has been dismissed due to his absence and non-prosecution.

16. Thereafter, the present company petition bearing CP(IB) No. 1523 of 2019 was filed by Standard Chartered Bank Limited. The Tribunal admitted the said Company Petition vide Order dated 28.08.2019 and ordered CIRP to be initiated against the Corporate Debtor. Thereafter, a Liquidation Order was passed by this Tribunal on 07.01.2021. After passing of the Liquidation Order, it came to the knowledge of the Applicants that the said property has been included by the Liquidator in the liquidation estate without giving any prior intimation or notice to the Applicants and the Liquidator is proceeding to auction it as well.

17. It is submitted that the Applicants are the owners of the said property and the title deeds of the said property still exist in their names. It is settled law that no person can transfer a title which he himself does not possess. In the present case, the Corporate Debtor was never given the possession of the said property and the Corporate Debtor had no right to further mortgage/create security interest over the said property. Further, the acts of the Corporate debtor are fraudulent and therefore, no person other than the Applicants are entitled to the said property.

18. Furthermore, the clauses of the Agreements state that the Corporate Debtor can only sell or dispose off the said property by giving Applicant No. 1 two months' prior notice seeking repayment of the remaining amount before disposing off the said property. However, the Corporate Debtor did not give any such notice or opportunity to the Applicant No. 1 and directly created equitable mortgage over the said property.

19. It is also submitted that where there are co-owners or co-sharers of the property, such property cannot be sold or disposed off or transferred or assigned or mortgaged without the consent of all the co-owners or co-sharers of the said

property. In the present case, Applicant No. 1 had been dealing with the Corporate Debtor all this time, however, Applicant No.1 did not seek the consent/ no objection of Applicant No. 2 before creating a mortgage in favour of the Corporate Debtor and therefore, where ?no objection? of a co-owner of the said property was not taken, the Applicant No.1 and thereafter the Corporate Debtor had no right over the said property to either sell or dispose or create any third party rights over the said property.

20. It is the Applicant's case that due to non-payment of the entire consideration, the title of the Corporate Debtor under the said Agreement for Sale is imperfect and no possession or title was ever transferred to the Corporate Debtor. Therefore, the Respondent ought not to have included the same in the liquidation estate of the Corporate Debtor. It is submitted that the title of the said property or the title of the Corporate Debtor cannot be determined by this Tribunal. The Hon'ble Supreme Court in the judgment of Embassy Properties has clearly held that this Tribunal does not have the power to determine the title of the properties and the same needs to be decided by the appropriate forum. In light of the said judgment, it is submitted that the title over the said property of Applicant No. 1 is disputed and the same needs to be kept out of the liquidation estate created by the Liquidator.

Submissions made by the Ld. Counsel on behalf of the Respondent

21. The Respondent submits that the Applicant had sold the property to the Corporate Debtor in the year 2012 vide Sale Agreement dated 26.04.2012 for a consideration of Rs. 4,65,00,000/- (Rupees Four Crores and Sixty Five Lakhs Only) and hence, lacks any legal right over it. Therefore, the Applicant has no locus to place such Application before this Tribunal.

22. The Respondent submits that the Applicants have not raised any objections in the past 11 years and are now just trying to drag out the process in order to prevent the Respondent from moving further with the Liquidation process of the Corporate Debtor.

23. The Applicant has submitted the following timeline with respect to the ownership of the said property :

a) Original Conveyance Deed dated 12.03.1990 executed by Mr. Vidyadhar Vinayak Kale in favour of Mrs. Sowdhamini Padmanabhan and Mr. V. Padmanabhan.

b) Development Agreement dated 11.07.2005 made between Mr. & Mrs. Padmanabhan as the owner of the property and M/s. Shilpkruti Pvt. Ltd.

c) Subsequently, a Development Agreement dated 10.01.2006 was executed between M/s. Shilpkruti Developers Pvt. Ltd., M/s. Wed Enterprises, through Mr. S. M. Subani as purchaser and Mr. & Mrs. Padmanabhan as Vendors and M/s. Wed Enterprises purchased the entire property.

d) An Agreement of Sale dated 29.12.2008 was executed between M/s. Wed Enterprises and Mr. Firoz Shaikh and the following part of the property was purchased by Mr. Firoz Shiekh :

? Non-Agricultural Land bearing CTS No. 1313 (part), Plot NO. 371/E-2, Scheme No. SS-II, admeasuring 460 sq.mtrs; and

? Flat No. 001 on the Ground Floor and Flat No. 101 on eth First Floor of Flora Avenue, CTS No. 1313 (part), Plot NO. 371/E-2, Scheme No. SS-II, Taluka Kurla, Chembur

e) Agreement of Sale dated 24.04.2012 was executed between M/s. Wed Enterprises and K K Welding Limited and through this Agreement, Mr. S.M. Subani sold the property of Ground Floor and First Floor, admeasuring 2300 sq. ft. (carpet area) in the building known as Flora Avenue, Non-Agricultural Land bearing CTS No. 1313 (part), Plot No. 371/2, Scheme No. SS-II, Taluka Kurla, Chembur. The Respondent further submits that the property was purchased for investment purposes by the Corporate Debtor and relies on the Sale Agreement which states that the said property is free from all encumbrances and has a clear and saleable title. The Respondent also submits that the said property is reflected in the audited Balance Sheet of the Corporate Debtor.

24. The Respondent submits that the Applicants have placed nothing on record to substantiate their claim that they have repaid the entire loan amount of Rs. 3,00,00,000/- (Rupees Three Crores Only) or that they still hold the property?s title in their names or hold any authority to deal with it and are just making general assertions.

25. The Respondent states that the said Notice was never sent to the Corporate Debtor but was sent to M/s. Future Capital/Capital First. There has been no communication with the Respondent concerning the said property. Therefore, it cannot be said there is any dispute with regard to the said property.

Findings

27. Heard learned Counsel and perused the material available on record.

28. At the outset, we would like to rely on Ramesh Singh Rawat vs. SPG Global Distribution Pvt. Ltd. decided by the Hon?ble National Company Law Appellate Law Tribunal (?NCLAT?) in Company Appeal (AT)(Insolvency) No. 872 of 2023. The issue in this case is in regard to the title of the property of the Corporate Debtor which is in CIRP and the Hon?ble NCLAT has held that as per Section 60(5)(c) of the Code the question of fact as to whether the asset of the Corporate Debtor is the property of the Appellant on account of the agreement or is the property of the Corporate Debtor in CIRP is a question relating to the insolvency resolution. The relevant extracts of the judgment are reproduced below-

?14. Section 60(5) of IBC provides the power to the Adjudicating Authority which

can be invoked to entertain or dispose of any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and also 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 Code. Section 238 of the Code creates an overriding effect which provides that 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.

19. The contention raised by the Appellant that the Adjudicating Authority had no jurisdiction to decide the lis between the parties in so far as the application is concerned, is rejected ?

29. Hence, it is settled that this Tribunal is well within its jurisdiction in deciding the present Application.

30. It can be seen from the documents placed on record that the dispute is related to the interpretation of the arrangement entered into by the Applicants and the Corporate Debtor in the year 2012. The Applicant contests that the arrangement contemplated execution of various Agreements to give effect to the underlying loan facility availed by the Applicant from the Corporate Debtor required to repay their creditors.

Per contra, it is the Respondent's contention that the arrangement gave way to an absolute Sale of the said property in favour of the Corporate Debtor, and that they had every right to mortgage it further to secure funding for their operations, thereby, claiming ownership of the said property.

31. The Applicant has also opposed the fructification of the Sale on the ground that Applicant No. 2, the co-owner of the said property had not signed the Agreement for Sale, thereby rendering it unenforceable.

32. We are of the view that it is the MoU that clarifies the intention of the arrangement between the parties. The MoU clearly indicates that the primary intention was granting a loan to the Applicants and the Equitable Deed of Mortgage was to be executed to create a security in favour of the Corporate Debtor against the loan of Rs. 3,00,00,000/-(Rupees Three Crores Only) advanced by them. According to the entries of disbursal of amounts to the Corporate Debtor placed on record by the Applicant, it can be seen that the Applicant has repaid Rs. 4,76,44,750/-(Rupees Four Crores, Seventy Six Lakhs, Forty Four Thousand, Seven Hundred and Fifty Only).

33. The Liquidator is directed to verify the receipt of such cash/amounts as placed on record by the Applicants in the books of the Corporate Debtor. After verification of cash receipts as per the books of accounts, the Liquidator shall determine the interest @ 4% p.a. due from the Applicant in terms of the Agreement between the parties and determine the total amount receivable from

the Applicant after deducting therefrom the amounts having been received from Applicant as per verification from books of account. The Liquidator shall inform them of the amounts due and payable and upon receipt of such amounts, execute a Cancellation deed as contemplated in the MoU and return the original documents of the said property lying in the possession of the Corporate Debtor to the Applicants. In either case, until repayment, the charge on the property, in question, shall remain in the favour of the Corporate Debtor.

34. In light of the above, the Liquidator is directed to keep the said property of the Applicants outside the Liquidation Estate created in respect of the Corporate Debtor.

35. Accordingly, IA No. 903/2023 is allowed.