(2019) 07 DEL CK 0505

In the Delhi High Court

Case No : Execution Petition No. 177 Of 2015

Tomorrowland Technologies Exports Limited APPELLANT

Vs

Mercantile Ventures Ltd. RESPONDENT

Date of Decision : 22-07-2019

Acts Referred:

Arbitration Act, 1940 — Section 20
Companies Act, 1956 — Section 446, 446(1)

Citation : (2019) 07 DEL CK 0505

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Pavan Sachdeva, Ishan Sachdeva, R.V. Prabhat

Judgement

Rajiv Shakdher, J

1. This is a petition which seeks execution of an ex-parte award dated 23.05.2012. The reply and rejoinder have been filed in the execution petition.

2. Mr. Pavan Sachdeva, learned counsel for the decree holder, has argued for enforcement of the award on behalf of the decree holder while Mr. R.V. Prabhat appears for the judgment debtor.

3. What has emerged from the record is that the decree holder had entered into an underwriting agreement dated 10.01.1995 with the earlier avatar of the judgment debtor. The earlier avatar of the judgment debtor went by the name Foresight Financial Services Ltd. (FFSL). On account of the disputes obtaining between the decree holder and FFSL, the aforementioned ex-parte award was passed in the background of the following circumstances.

4. The record shows that FFSL along with two other companies, going by the name Mercantile Credit Corporation Ltd. and Cameo Share Registry Ltd. merged in a company by the name Excel Finance Ltd. (EFL). The merger was brought out under a Scheme of Amalgamation (SOA). The SOA which was sanctioned by the Madras High Court on 17.04.1997, was made effective from 01.04.1996.

5. The record also shows that in and about May, 1997, the decree holder had filed a petition under Section 20 of the Arbitration Act, 1940 (in short "1940 Act") for appointment of an arbitrator.

6. The amalgamated entity (i.e. EFL), it appears, had applied for and was granted permission to change its name to MCC Finance Ltd. The change of name occurred on 23.05.1997.

6.1 Apparently, on 21.08.2000, the winding up proceedings were initiated against MCC Finance Ltd. These proceedings were instituted in Madras High Court. The Madras High Court on that date, i.e. 21.08.2000, appointed the official liquidator attached to it as the provisional liquidator.

7. Consequent thereto, on 03.08.2001, a winding up order was passed qua MCC Finance Ltd. As a result of which, next steps were taken in the matter by the Madras High Court qua MCC Finance Ltd. including appointment of an administrator to essentially deal with woes of depositors.

7.1 Towards this end, an advertisement was also taken out on 03.11.2006 in "The Hindu" to enable the persons, who had deposited money with MCC Finance Ltd., to lodge their claims.

8. In the interregnum, on 14.03.2007, this court, in the decree holder's petition under Section 20, appointed an arbitrator.

9. The record also shows that on 24.11.2011, an application was moved by the ex-promoters, management of MCC Finance Ltd. to revive its fortunes. The application was in effect a Scheme of Arrangement (SOR). The Madras High Court vide order dated 18.10.2012 approved the SOR.

9.1 However, before the SOR was approved, public notices were taken out in "The New Indian Express" and "Dina Malar" on 31.08.2012.

9.2 Furthermore, an opportunity was given by the Madras High Court to the Regional Director, Southern Region, Ministry of Corporate Affairs (in short "RD") to file a report with regard to its objections, if any, qua (the then) proposed SOR. The RD filed his report on 11.09.2012.

10. Upon the SOR being sanctioned by the Madras High Court, as indicated hereinabove, on 18.10.2012 the name of MCC Finance Ltd. was changed to its present name i.e. Mercantile Ventures Ltd. The change in name was brought about on 27.03.2013.

11. Insofar as the decree holder was concerned, it continued with the arbitration proceedings and, as indicated above, obtained an ex-parte award on 23.05.2012. Finally, the award metamorphosed into a decree by virtue of the orders passed by this court on 24.03.2014 and 17.12.2014. It appears that in and about July, 2018, the decree holder became aware of the SOA and the subsequent events, to which I have made a reference hereinabove.

12. Accordingly, an application was moved for seeking amendment in the memo of parties. It is in this backdrop that the judgment debtor/Mercantile Ventures Ltd. was brought into picture.

13. The principal objection taken on behalf of the judgment debtor i.e. Mercantile Ventures Ltd. is that the arbitration proceedings were continued against it while winding up proceedings were ensuing without obtaining leave of the court, as was required under Section 446 of the Companies Act, 1956.

13.1 There is also an objection taken on behalf of the judgment debtor by its counsel that the notices which were published by the decree holder did not advert to the addresses given in the official liquidator's status report dated 29.04.2009.

13.2 Learned counsel submits that in fact the solicitors employed by the decree holder had in the first instance sent notices to one of the addresses mentioned in the official liquidator's status report dated 29.04.2009. The address to which learned counsel for the judgment debtor makes a reference, as detailed out in the official liquidator's report, reads as follows :

"Temple Tower, 3rd Floor, 476/2, Anna Salai, Nandanam, Chennai-600035" 13.3 In contra-distinction, the address, which is referred to in the public notice dated 30.04.2008 printed in Trinity Mirror Daily, reads as "Karumuttu Centre, 7th Floor, 498, Anna Salai, Nandanam, Chennai".

13.4 Learned counsel thus contended that the decree holder ought to have referred to the former address and not the later one.

14. Mr. Pavan Sachdeva, who represents the decree holder, submits that the notice sent by the solicitors on 06.07.2007 at the former address was returned with the endorsement "left" and, therefore, the public notice taken out on 30.04.2008 referred to the other address to which reference is given hereinabove.

14.1 Mr. Sachdeva, however, does not dispute the fact that winding up order was passed by the Madras High Court on 03.08.2001. Mr. Sachdeva also does not and, perhaps, cannot dispute the fact that the Madras High Court had sanctioned the SOA on 17.04.1997 when FFSL along with two other entities, referred to hereinabove, merged into EFL which later on morphed into Mercantile Ventures Ltd. i.e. the judgment debtor.

15. Thus, having regard to the aforesaid facts and circumstances, what cannot be disputed, to my mind, by Mr. Sachdeva, is the fact that after the Madras High Court had appointed a liquidator qua the judgment debtor company, the arbitration could have only proceeded further with the permission of the concerned company court. In sum the liquidator had to be in seisin of the proceedings.

16. As indicated above, the arbitration proceedings initiated by the decree holder commenced only on 14.03.2007 after this court appointed an arbitrator. The

award which, as indicated above, was an ex-parte award, was passed on 23.05.2012 when the official liquidator, attached to the Madras High Court was still in seisin of the affairs of the judgment debtor company, albeit, under the supervision of the Madras High Court.

17. The SOA whereby the judgment debtor company was revived came to be sanctioned by the Madras High Court only on 18.10.2012. Therefore, clearly, the decree holder was required to approach the concerned company court for seeking leave under Section 446(1) of the Companies Act, 19561.

18. Mr. Sachdeva, does not dispute that no such application was moved before the Madras High Court.

19. Given these circumstances, to my mind, the instant ex-parte award dated 23.05.2012 cannot be enforced against the judgment debtor. Accordingly, execution proceedings are closed. Since the aforementioned ex-parte award was obtained without the official liquidator attached to the Madras High Court being given an opportunity to defend the same, the award naturally would be a nullity. The decree holder will hereafter have liberty to agitate its rights against the judgment debtor in accordance with the law.

