

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 188 of 2019

[Arising out of order dated 20th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP/2912/I&BP/NCLT/MAH/2018]

IN THE MATTER OF:

Peter Johnson John (Employee),
S/o. N. John,
Assistant Manager – Coordination,
No.2, 6th Cross, Tagore Nagar,
Lawspet, Puducherry – 605 008.

....Appellant

Vs

M/s KEC International Limited,
RPG House, 463,
Dr. Annie Besant Road,
Worli, Mumbai – 400 030
Maharashtra.

....Respondent

Present:

For Appellant: Mr. K. S. Ilangovan and Mr. P. Jegan, Advocates.

For Respondent: Mr. K. Datta, Mr. Shakunt Saumitra and Ms. Pallavi Srivastava, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

The Appellant is aggrieved of rejection of his application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') in terms of impugned order dated 20th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench on the ground that a dispute was existing between the parties regarding the debt and the application was not maintainable. The impugned order is assailed primarily on the ground that there was a default in discharging the debt qua the services rendered by the Appellant to the Respondent – 'M/s KEC International Ltd.' (Corporate Debtor) having its registered office at Worli, Mumbai, independent of the foreign decree passed in favour of the Appellant and the suit filed by the Appellant (Operational Creditor) for realization of decreed amount as per foreign judgment (Labour Court of Kinshasa at DR Congo) dated 11th April, 2013 could not be termed as a dispute to decline initiation of Corporate Insolvency Resolution Process.

2. The factual matrix leading to filing of application under Section 9 of I&B Code by the Appellant before the Adjudicating Authority need to be briefly adverted to. Appellant was appointed by the Corporate Debtor as Assistant Manager – Coordination Foreign Overseas Engagement vide

appointment letter dated 9th November, 2011. The Appellant was asked to lead a technical project but he declined to carry out the assignment as he lacked technical qualification. Allegedly, the Appellant was pressurized to resign but he declined. He was not assigned any work and no salary was paid to him. He was also not terminated from service. It was in utter desperation that the Appellant sought legal help in terms of Clause 9 of his appointment letter and filed a suit in the Labour Court of DR Congo. The suit was decreed. The Labour Court directed the Corporate Debtor to pay compensation of USD 37,500/- towards abusive termination and USD 13,997/- towards final liquidation. Besides repatriation costs of USD 1690/- in addition to arrears of salary computed at USD 80,000/- admissible from September, 2012 till date of order viz. 7th April, 2015 + interest was also awarded in favour of the Appellant. The Corporate Debtor did not comply with the judgment. Instead it wound up its operations and project in Congo. This forced the Appellant to seek shelter with the Indian Embassy in Congo and return to India. The Appellant filed suit no. 526 of 2017 under Section 13 of the Code of Civil Procedure 1908 before the Bombay High Court. The Appellant claimed unpaid Operational Debt calculated at INR 1,59,09,181/- from Corporate Debtor as according to the Appellant he continued to be on the roll of Corporate Debtor. Appellant issued demand notice under Section 8(1) of I&B Code which was served upon the Corporate Debtor on 12th June, 2018. Since the demand notice did not invoke any response from the Corporate Debtor within the prescribed period, but a delayed reply was received by the Appellant wherein

the Corporate Debtor raised the plea of dispute in regard to the Operational Debt in the form of suit commenced by the Appellant in Bombay High Court after issuance of demand notice. On consideration of the pleadings and documents relied upon and arguments advanced on behalf of the parties, the Adjudicating Authority declined to admit the application filed by Appellant under Section 9 of the I&B Code.

3. The Adjudicating Authority noticed that the Appellant sought initiation of Corporate Insolvency Resolution Process on the basis of claim on account of salary dues adjudicated by the Labour Court of Kinshasa and a civil suit is pending regarding the same before Bombay High Court seeking declaration in regard to executability of the decree passed by the foreign court in India. It noticed that since there was no reciprocating treaty with Democratic Republic of Congo whereby a decree passed by Labour Court of Kinshasa, Congo could be executed in India, Section 44A of CPC whereunder a foreign decree could be directly executed in India was not applicable. Such foreign decree was required to be adjudicated upon by a Court in India in view of Section 13 of CPC. It also noticed that the Appellant had already approached the Hon'ble High Court of Judicature at Bombay for declaration in regard to executability of the Kinshasa Labour Court Decree in India and that suit is still pending adjudication. The Adjudicating Authority was of the view that since application under Section 9 of I&B Code was filed by Appellant during the pendency of the aforesaid suit and the Appellant's claim was based on the foreign decree, it

constituted an existing dispute between the parties on the date of filing of application under Section 9 of I&B Code before the Adjudicating Authority.

4. Learned counsel for the Appellant submitted that in the instant case the Operational Debt being a claim for services rendered during employment and non-payment resulting in accumulation of arrears of salary constituted default. It is further submitted that the Corporate Debtor has admitted contract of employment and no record has been produced to show that the services of Appellant have been terminated in terms of the contract of employment. He also submits that the Respondent has not produced any record to show that the salary was paid to the Appellant from the date it fell due. It is submitted that the Respondent also did not take any steps for setting aside of the foreign decree. Thus, default in payment of salary constituted a legally enforceable debt and the salary not being paid being an Operational Debt, the Appellant was justified in invoking jurisdiction of Adjudicating Authority under Section 9 of the I&B Code. It is lastly submitted that Corporate Insolvency Resolution Process could be invoked by the Appellant irrespective of the foreign judgment. According to learned counsel for Appellant, the foreign decree is only a record supporting Appellant's claim for debt in respect whereof default has been committed by the Corporate Debtor and there being no pre-existing dispute between the parties, the impugned order cannot be sustained.

5. Per contra learned counsel for Respondent submits that the alleged debt as claimed by the Appellant is not due and payable by the Respondent as the alleged debt is not crystallized by a court of competent jurisdiction. It is submitted that the foreign decree relied upon by the Appellant being an ex-parte decree passed by a court in a non-reciprocating territory is not an enforceable decree in India unless held to be conclusive and executable in India under Section 13 of CPC. The alleged debt till then would not be a debt payable in law as on the date of filing of insolvency application suit filed by the Appellant was pending adjudication before the Hon'ble High Court of Bombay and the foreign decree was yet to be held conclusive and executable.

6. Heard learned counsel for the parties and perused the record. The only issue requiring determination is whether in absence of adjudication of the foreign decree passed by a court in a non-reciprocating, territory, which is relied upon by the Appellant, the Appellant was legally justified in seeking initiation of Corporate Insolvency Resolution Process under Section 9 of the I&B Code against the Corporate Debtor. It is not in controversy that the claim upon which default of Operational Debt is founded arises out of a contract of employment. The fact that the Appellant was engaged as Assistant Manager – Coordination by the Corporate Debtor for an Overseas Project in terms of Appointment Letter dated 9th November, 2011 and that the Appellant was entitled to salary in terms of contract of employment for the services rendered to Corporate Debtor bringing the salary dues accruing

as per the specified mode of payment within the fold of Operational Debt is not disputed. It is also not in dispute that the Appellant, upon denial of his salary dues, filed a suit before Labour Court of Kinshasa in Democratic Republic of Congo where he was posted by the Corporate Debtor for rendering services in terms of contract of employment as in terms of Clause 9 of the contract such disputes were to be resolved as per local legal framework. Admittedly, the suit was decreed in ex-parte which has not been appealed against by the Respondent – Corporate Debtor. It is also not in controversy that there is no reciprocal arrangement between India and Congo. Therefore, Section 44A of Civil Procedure Code providing for execution of a foreign decree by filing of a certified copy of such decree passed by a superior court in a reciprocating territory in a District Court has no application and the observations of the Adjudicating Authority in this regard cannot be termed as unwarranted.

7. It is well settled that foreign decree either of reciprocating or non-reciprocating territory not passed on merits or not satisfying the requirements of Section 13 of CPC cannot be the basis of winding up petition. An ex-parte decree based on default summary judgment for non-appearance before a foreign court cannot be relied upon for seeking winding up of a company. Such decree cannot be held conclusive as it has not been given on merits of the case. Reference may profitably be made to law laid down by Hon'ble High Court of Delhi in **“Rajkumar Gupta Vs. Barnes Investments Ltd. & Ors.”, reported in 2007 (99) DRJ 629** and Hon'ble

High Court of Bombay in **“Marine Geotechnics LLC Vs. Costal Marine Construction and Engineering Ltd.”**, reported in (2014) 183 CompCas 438 (BOM). It cannot be disputed that the concept of winding up under the Companies Act, 2013 tantamount to liquidation under the I&B Code and viewed in perspective of legislative change it has to be accepted that the liquidation being culmination of the process under I&B Code as a sequel to failure of Insolvency Resolution, a foreign decree passed in ex-parte for default in appearance of the Corporate Debtor and not on merit could not be the basis for initiation of Corporate Insolvency Resolution Process.

8. Learned counsel for Appellant tried in vain to persuade us that the requirement of filing of a suit on the foreign decree in keeping with the mandate of Section 13 of CPC would not preclude the Appellant – Operational Creditor from triggering Corporate Insolvency Resolution Process. This argument, on the face of it, is sound neither in technique nor in substance. One wonders as to how can an Operational Creditor seek initiation of Corporate Insolvency Resolution Process without the debt having crystallized and being payable in law or in fact. Admittedly, under the terms of contract (service conditions governing the engagement of Appellant) during the period of Appellant’s posting at the foreign location he would be governed by the local rules and regulations of the country of posting. Since, the dispute arose in regard to his engagement, performance of duties, salary and emoluments, the Appellant chose to approach the Labour Court at Kinshasa, Democratic Republic of Congo, where the suit

was decreed in his favour in ex-parte, albeit on account of non-appearance of the Respondent - Corporate Debtor. It is not disputed that such ex-parte decree of a foreign court would not be executable in India until adjudicated upon by a Civil Court in India within the ambit of Section 13 of CPC and having regard for the same, the Appellant has chosen to file suit before Hon'ble High Court of Bombay, which is still subjudice. Unless the decretal amount is adjudicated upon by the Hon'ble High Court of Bombay as a legally payable claim, the same would not constitute a "Debt" in the hands of Appellant - Operational Creditor and unless the debt is crystallized and payable in law, the issue of default would not be attracted. Admittedly, Appellant is pursuing the litigation before the Bombay High Court in regard to the foreign decree and claim payable thereunder. He cannot be permitted to circumvent the appropriate legal remedy, already pursued, by invoking provisions of Section 9 of I&B Code, thereby defeating the fundamental provisions of law governing execution of a foreign decree obtained in ex-parte from a court located in a non-reciprocating territory. Such course is neither legally permissible nor warranted as admittedly the matter is not covered under Section 44A of CPC. The argument advanced warrants outright rejection and is accordingly rejected.

9. For what has been discussed hereinabove, we are of the considered opinion that the adjudication initiated by the Appellant before Bombay High Court wherein adjudication is sought in regard to foreign decree obtained ex-parte falls within the purview of a pre-existing dispute placing an

embargo on the powers of Adjudicating Authority to initiate Corporate Insolvency Resolution Process at the instance of a Corporate Debtor. This is apart from the fact that until such adjudication fructifying in a decree favouring the Appellant, the claim of Appellant cannot be held to have crystallized into a “Debt payable in law”. We find no scope for interference with the impugned order. The appeal being devoid of merit stands dismissed.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Judicial)

NEW DELHI

3rd July, 2019

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