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ACO No. 35 of 2018
ACO No. 37 of 2018
APO No. 302 of 2018
in
CP No. 233 of 2008
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

M/S. DUNLOP INDIA LIMITED
AND
SMIFS CAPITAL MARKETS LTD.
VS.
BHARTIYA HOTELS PVT. LTD. & ANR.

BEFORE:
The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE SUVRA GHOSH
Date: 29th January, 2019.

Appearance:
Mr. S. K. Kapur, Sr. Adv.
Ms. Manju Bhuteria, Adv.
Mr. Arijit Basu, Adv.
Mr. Surajit Dasgupta, Adv.

Mr. Hirak. Mitra, Sr. Adv.
Mr. Ratnanko Banerji, Sr. Adv.
Mr. S. Chatterjee, Adv.
Mr. M. K. Seal, Adv.

Mr. Paritosh Sinha, Adv.

Mr. Rajratna Sen, Adv.
Mr. Anupam Dasadhikari. Adv.

The Court: The appeal is of limited import. It arises out of an ad interim order dated September 5, 2018 passed on the appellant's application in winding-up proceedings pertaining to Dunlop India Limited (in liquidation). The appellant is aggrieved by the refusal of the company court to grant interim protection in what the appellant perceives to be a fraudulent act and a scam by the respondent ICICI Bank Limited.

By the order impugned of September 5, 2018, the company court noticed the "strong objection" raised on behalf of the ICICI Bank as to the maintainability of the application and certain orders of the Supreme Court passed on February 12, 2016 and September 9, 2016 in proceedings arising out of special leave petitions filed from a Division Bench order of this Court confirming the liquidation of Dunlop India Limited, before declining an ad interim order. The effect of refusing the order is that even if the application ultimately succeeds, the valuable property may no longer be recovered as irreversible changes could be brought about by third parties.

It is submitted on behalf of the appellant that the factual basis as recorded in the second paragraph of the order impugned is erroneous on the face of it and the relevant orders of the Supreme Court did not preclude the company court from entertaining the appellant's application. As to the objection on the ground of maintainability, the

appellant says that the order impugned does not indicate even a prima facie appreciation of how the company court, in seisin of winding-up proceedings against a company (in liquidation), could be said to lack authority in collecting or protecting the assets of the concerned company (in liquidation).

When this appeal was received on October 5, 2018, it was the same ploy that was adopted by the respondent bank. A point of maintainability was taken, both regarding the present appeal and the application before the company court. On October 5, 2018, the respondent bank was required to indicate the status of the Worli property, which is the subject-matter of the application and this appeal. On October 10, 2018, ICICI Bank claimed to be in possession of the Worli property. An ad interim order was passed in this appeal on such day in the following terms:

> "Without prejudice to the point of maintainability taken by ICICI Bank Limited, there will be an interim order restraining ICICI Bank Limited from creating any rights or further rights in respect of the Worli property or any part thereof in favour of any person without the previous leave of this Court."

During the several weeks thereafter that this matter has meandered through, most of the time has been taken on account of adjournments sought on behalf of the respondent bank. Several of the adjournments have not even been formally recorded. The initial

adjournments may have been sought by the respondent bank to proceed with its special leave petition from the order dated October 10, 2018. However, such petition has since been dismissed.

The ground of maintainability which has been raised is not so much as to the present appeal, but as to the application carried before the company court. Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been stressed on by the respondent bank to emphasise the two limbs covered by such provision: the first prohibiting a civil court from entertaining any suit in respect of any matter which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the said Act of 2002; and, the second restraining any injunction being issued in respect of such matters. To boot, Section 35 of the Act of 2002 is placed on behalf of the respondent bank to demonstrate that the *non obstante* clause therein would make Section 34 of such Act override all provisions of previous enactments.

All of such initial submission on behalf of the respondent bank was without reference to Section 37 of the Act of 2002 and the preservation of the provisions of, inter alia, the Companies Act, 1956 by such provision. Upon an interjection on behalf of the appellant to point out Section 37 of the Act of 2002, the respondent bank has spent several days in quoting from venerable text books on interpretation of statutes

and citing several judgments, even from beyond these shores, to assert that when a right is created for the first time, if such right did not previously exist in common law, the right had to be exercised in the manner as created by the statute and in no other form. Despite it being pointed out to the respondent bank at the outset that the principle was clearly inapplicable, several days of hearing have been wasted to flog a dead horse.

According to the respondent bank, Section 17 of the Act of 2002 confers a right on any person, including a borrower, to question the measures taken by a secured creditor under Section 13(4) of the Act of 2002 if such person is aggrieved thereby. The respondent bank asserts that such right did not exist prior to the Act of 2002 and, as such, if any person is aggrieved by the measures taken under Section 13(4) of the Act of 2002 by any secured creditor, the only remedy would be under Section 17 of the Act of 2002 and in no other manner. Prima facie, the contention is exceptionable. The Act of 1956, to the extent that it is still operational in respect of companies wound up by a Court, foists a duty on the company court to protect the assets of a company (in liquidation) and, at any rate, confers the authority to receive a complaint from a creditor or a contributory of a company (in liquidation) that any asset of the company (in liquidation) has been fraudulently transferred and such asset needs to be recovered. Such a prayer can be entertained by a company court in exercise of its authority under the Act of 1956 and

even the relevant property recovered in course of the winding-up proceedings. If the company court has such authority, any person interested has a right to invoke such jurisdiction. It is a statutory right that has been left unaffected by the Act of 2002.

In the present case, the contention of the appellant is that a property that belonged to the company prior to its liquidation, as on the date on which the first of the creditors' winding-up petitions was filed against such company, was sought to be alienated or transferred during the pendency of the winding-up proceedings which culminated in an order of winding-up being passed. The law under the 1956 Act is that when an order of winding-up is passed, it relates back to the date of the institution of the petition. The other part of the appellant's submission pertains to the perceived fraudulent conduct of the erstwhile management of the company (in liquidation) and how the respondent bank may have been hand in gloves with such recalcitrant erstwhile management. It must also not be missed that the right the appellant canvases is in its representative capacity as a creditor of the company (in liquidation) and not exclusively for itself.

Once an order of winding-up was passed in respect of a company by a company court, before the introduction of the more adventurous statutes as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the said Act of 2002, the Act of 1956 envisaged that the official liquidator attached to the relevant company

court would be solely responsible for all the assets and properties of the company (in liquidation). Such official liquidator functions subject to the directions of the relevant company court and such company court is empowered to protect all assets of the company (in liquidation), undo acts of fraudulent preference and recover assets sought to be alienated illegally to ensure that the interest of the creditors of the company (in liquidation) are not prejudiced. The introduction of the Companies Act, 2013 has not altered the position pertaining to companies already in liquidation.

The extraordinary jurisdiction pertaining to companies (in liquidation) vested in company courts by the Act of 1956 cannot be overstated. Section 446 of the Act of 1956, for instance, requires the leave of the relevant company court to be taken in respect of any other suit or proceedings that may be instituted or proceeded with against a company (in liquidation). In course of such leave being granted, it is also open to the company court to require the proceedings to be instituted or transferred before itself. The width of Section 446 of the Act and the subsequent provisions pertaining to companies (in liquidation) cannot be undermined. While it may not be unusual in this Court, which otherwise exercises ordinary original civil jurisdiction, for a suit proposed to be instituted against a company (in liquidation) to be required to be filed before the company court here when leave under Section 446 of the 1956

Act is sought, such a course of action is also open to a company court in a High Court not exercising ordinary original civil jurisdiction.

There are several provisions in the 1956 Act which permit creditors and others interested in a company (in liquidation) to approach the company court for appropriate directions to be issued to the official liquidator for the preservation of the assets and properties of the company (in liquidation).

Since Section 37 of the Act of 2002 specifically records that the provisions of the Act of 2002 are not be "in derogation of" the provisions of certain other Acts, including the Act of 1956, the procedure under the 1956 Act and the authority of the company court under the 1956 Act remain undisturbed notwithstanding the provisions of the Act of 2002. A direct judgment on the point has been placed by the appellant and nothing more need be said in such regard in the light of the order proposed to be made.

Prima facie, therefore, the application carried by the appellant before the company court appears to be maintainable; though no final pronouncement is made on such score, given the limited ambit of the present appeal arising out of an ad interim order.

The bogey raised by the respondent bank by brandishing some Supreme Court orders was also in display in course of this appeal. It was somewhat short of intimidation; but the message was loud and

clear that the matters need not be looked into at this level since the sale, apparently, had the imprimatur of the highest Court of the land.

Again, in view of the limited scope of the present appeal, such matters need not be conclusively addressed. Suffice it to say that neither the order of the Supreme Court permitting the sale to be conducted nor the subsequent order of the Supreme Court allowing the disbursement of the sale proceeds in accordance with law took into account the circumstances relating to the sale nor were such matters required to be looked into in the light of the scope of the Supreme Court proceedings, since they had arisen from a Division Bench order of this Court confirming the order of liquidation pertaining to Dunlop India Limited.

The simple complaint of the appellant creditor of the company (in liquidation) before the company court is that one of the most valuable properties of the company (in liquidation) had been sought to be alienated at a time when the law prohibited it; and for little or nothing by way of consideration. If there are road-blocks on the grounds of maintainability, such road-blocks need to be addressed by the company court to assess whether the merits of the matter can ultimately be addressed. Since it, prima facie, appears that the issue of maintainability asserted on behalf of the respondent bank may be a red herring only to try and dodge the core issue being addressed on merits,

the entire matter is left for the consideration of the company court and for its decision in accordance with law.

The observations here are tentative and without prejudice to the rights and contentions of the two leading parties in this appeal and without prejudice to the rights and contentions of the others interested in the company (in liquidation) and the Worli property.

APO No.302 of 2018 along with ACO No.35 of 2018 and ACO No.37 of 2018 are disposed of by continuing the order passed on October 10, 2018 as quoted hereinabove. Such order will remain in force till the relevant application is decided by the company court.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)

kc/bp