

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 159 of 2022

(Arising out of Order dated 03.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Cuttack Bench, Cuttack in IA No.139/CB/2021 in CP(IB)No.16/CB/2021)

IN THE MATTER OF:

Electrosteel Castings Limited
Rathod Colony, Rajgangpur,
Sundergarh, Odisha – 770 017.

.... Appellant

Vs

UV Asset Reconstruction Company Limited
704, 7th Floor, Deepali Building,
92 Nehru Place, New Delhi – 110 019.

... Respondent

Present:

For Appellant:

**Mr. Kapil Sibal, Sr. Advocate with
Mr. Ramji Srinivasan, Sr. Advocate
Mr. Shantanu Awasthi, Ms. Samridhi
Sharma, Mr. Hemans Kothari,
Mr. Arvind Varma, Advocates**

For Respondent:

**Mr. Huzefa Ahmadi, Sr. Advocate with
Mr. Krishnendu Datta, Sr. Advocate,
Mr. Dhruv Dewan, Harshita Choubey,
Ms. Chandni Ghatak, Advocates**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 03.02.2022 passed by National Company Law Tribunal, Cuttack Bench, Cuttack rejecting IA No.139/CB/2021 filed by the Appellant by which Appellant had prayed for stay of the proceedings in CP(IB)No.16/CB/2021.

2. Brief facts necessary for deciding this Appeal are:

- (i) Electrosteel Castings Limited (“ESL”) availed a financial assistance from SREI Infrastructure Finance Limited (“SREI”) for a sum of Rs.500,00,00,000/- on 26th July, 2021. The Facility Agreement was secured by a third-party mortgage by deposit of title deeds over the factory land of the Appellant at Elavur Village, Ponneri Taluk, Chingleput District, Tamil Nadu. On 27th July, 2011, Appellant had executed Deed of Undertaking, Warranty and Indemnity.
- (ii) The State Bank of India, one of the lenders of ESL filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “Code”), on which Corporate Insolvency Resolution Process (“CIRP”) was initiated against ESL vide order dated 21st July, 2017. In CIRP of ESL, a Resolution Plan was submitted by Vedanta Limited, which was approved on 17th April, 2018. In the Resolution Plan an amount of INR 5320 Crores was deposited in an escrow account, which was to be distributed to the Financial Creditors of the ESL. Simultaneously, with the deposit of the upfront payment, the unsustainable debt was converted into fully paid-up equity shares of ESL with a face value of INR 10/- each.
- (iii) SREI executed a Deed of Assignment in favour of UV Asset Reconstruction Company Limited (Respondent herein) on 30th June, 2018 and assigned the debt due and payable by ESL to the Respondent.

- (iv) The Respondent initiated proceedings under the SARFAESI Act, 2002 by issuing notice under Section 13, sub-section (2) on 27th December, 2018 to the Appellant. The possession notice was issued by the Respondent under Section 13, sub-section (4) of the SARFAESI Act on 19th June, 2019. The Appellant filed Application No.4322 of 2019 for leave before the Madras High Court to institute a suit. The Appellant also filed an Application under Section 17 of the SARFAESI Act before Debt Recovery Tribunal (“DRT”) on 17th July, 2019, which was returned by the Registry of DRT on 2nd August, 2019 pointing out defects. The learned single Judge of Madras High Court rejected the leave Application filed by the Appellant vide its judgment dated 13th September, 2019, against which order, the Appellant filed an Appeal being O.S.A. No.292 of 2019, which too was dismissed by the Division Bench of the Madras High Court vide judgment dated 13th August, 2021.
- (v) When the Appeal before the Madras High Court filed by the Appellant was pending, the Respondent has filed Application under Section 7 being CP(IB)No.16/CB/2021 on 20th April, 2021 before the Adjudicating Authority. On 12th August, 2021 the Appellant filed its affidavit in reply to Section 7 Application.
- (vi) Against judgment dated 13th August, 2021, the Appellant filed a Civil Appeal No.6669 of 2021 before the Hon’ble Supreme Court (converted from Special Leave petition being SLP (C)

No.13138/2021). The Hon'ble Supreme Court vide its judgment dated 26th November, 2021 dismissed the Civil Appeal No.6669 of 2021. The Hon'ble Supreme Court also granted the liberty to the Appellant to file an Application under Section 17 within two weeks before the DRT Chennai.

- (vii) On 4th December, 2021, the Appellant filed S.A. No.434 of 2021 under Section 17 of the SARFAESI Act before the DRT Chennai. On 16th December, 2021, the Appellant filed an IA No.139 of 2021 before the Adjudicating Authority seeking order of stay or keeping in abeyance the Section 7 Application until the final adjudication and disposal of the Application filed before DRT Chennai.
- (viii) The learned Adjudicating Authority after hearing the parties vide impugned order dated 3rd February, 2022 rejected the IA No.139 of 2021. Aggrieved against the order dated 3rd February, 2022, the present Appeal has been filed by the Appellant.

3. We have heard Shri Kapil Sibal, learned Senior Counsel and Shri Ramji Srinivasan, learned Senior Counsel of the Appellant; Shri Huzefa Ahmadi, learned Senior Counsel and Shri Krishnendu Datta, learned Senior Counsel for the Respondent.

4. Shri Kapil Sibal, learned Senior Counsel submits that Hon'ble Supreme Court vide judgment dated 26th November, 2021 having permitted the Appellant to file an Application before DRT under Section 17 of the

SARFAESI Act to adjudicate whether or not any debt was due and payable by the Appellant to the Respondent, Section 7 Application ought to await the adjudication by the DRT. It is submitted that Adjudicating Authority committed error in rejecting IA No.139 of 2021 filed by the Appellant, which rejection in the teeth of judgment of the Hon'ble Supreme Court dated 26th November, 2021. It is submitted that before the DRT Chennai, one of the prayers made by the Appellant is Assignment Agreement executed in favour of Respondent be declared null, void and ab-initio. Shri Kapil Sibal, learned Senior Counsel further submits that Assignment Agreement is invalid in view of the discharge of entire debt of ESL through a combination of upfront cash payment and conversion of debt into equity shares. There being no debt of ESL in existence, the Assignment of the debt by SREI in favour of the Respondent on 30th June, 2018 is void and ab-initio. Consequently, the Application under Section 7 filed by the Respondent also deserve to be dismissed, there being no debt or default on the part of the Appellant. It is further submitted that position of discharge of entire debt under the Resolution Plan has been duly pleaded and placed on record before the NCLT in reply dated 12th August, 2021 filed by the Appellant in Section 7 Application. Shri Sibal further submits that in view of the judgment of the Hon'ble Supreme Court dated 26th November, 2021, the DRT should decide the issue whether there is a valid debt payable by the Appellant to the Respondent or not. The proceeding before the DRT Chennai is prior in time, it should be allowed to continue. The Adjudicating Authority has erroneously observed that the Application filed by the Appellant before DRT

Chennai is of no bearing without appreciating the very status of the Respondent as Financial Creditor of the Appellant is being adjudicated by the DRT Chennai.

5. Shri Huzefa Ahmadi, learned senior Counsel for the Respondent refuting the submissions of learned senior Counsel for the Appellant contends that the Adjudicating Authority has not committed any error in rejecting the Application filed by the Appellant for staying of Section 7 proceedings. It is submitted that the judgment of Hon'ble Supreme Court dated 26th November, 2021 is being misinterpreted by the Appellant. The Hon'ble Supreme Court dismissed the Appeal filed by the Appellant, which arose out of judgment of the Madras High Court dismissing the Application to leave filed by the Appellant as barred by Section 34 of the SARFAESI Act. It is on the request of the Appellant that Hon'ble Supreme Court had granted liberty to initiate proceedings under Section 17. The Hon'ble Supreme Court permitted the Appellant to file Section 17 Application within two weeks. Further the Hon'ble Supreme Court did not decide the claim of the Appellant on merits and judgment of Hon'ble Supreme Court has neither expressly, nor impliedly interdicted the Section 7 Application filed by the Respondent before the NCLT. The Hon'ble Supreme Court judgment cannot be read as taking away the statutory right of the Respondent to pursue the Section 7 Application. The jurisdiction of the Adjudicating Authority to determine whether there is a financial debt and default is plenary in nature and as provided under Section 238 of the Code, will override all other laws in the event of inconsistency. The pendency of action

under SARFAESI Act does not create an obstruction for filing Application under Section 7 of the Code. It is further submitted that there is no complete discharge/ extinguishment of debt as erroneously contended by the Appellant. The Appellant is attempting to pre-empt such adjudication by Adjudicating Authority. The Resolution Plan contains clauses which preserve the right of Financial Creditor of ESL to proceed against any third party in relation to the portion of the unsustainable debt secured or guaranteed by third parties. The submission of learned Counsel for the Appellant that that preliminary issue framed before the Adjudicating Authority regarding the default in discharge is an attempt to truncate the hearing before the Adjudicating Authority. The Appellant having already filed reply before the Adjudicating Authority, it is open to the Appellant to press all its contention before the Adjudicating Authority when the Application under Section 7 is heard.

6. We have heard and considered the submissions of the learned Counsel for the parties and perused the record.

7. The first submission of learned Counsel for the Appellant is on the strength of the judgment of the Hon'ble Supreme Court dated 26th November, 2021 in Civil Appeal No.6669 of 2021. As per Shri Kapil Sibal, learned Senior Counsel for the Appellant, Section 7 Application should await the determination by DRT regarding existence of debt.

8. The copy of judgment of the Hon'ble Supreme Court has been brought on record as Annexure B to the Appeal. The Appeal was filed by the Appellant before the Hon'ble Supreme Court challenging the Division

Bench judgment of the Madras High Court, by which Division Bench of the High Court dismissed the Appeal preferred by the original plaintiff rejecting the plaint/ suit filed by the Appellant on the ground that suit is barred by Section 34 of the SARFAESI Act. During the hearing of the Appeal before the Hon'ble Supreme Court, Appellant has also raised the submission that Assignment Deed was fraudulent. The Hon'ble Supreme Court did not accept the submission, which was made to get away from the bar of Section 34 of the SARFAESI Act. The Hon'ble Supreme Court has affirmed the judgment of the Madras High Court that suit was barred by Section 34 of the SARFAESI Act. In paragraph 8 of the judgment, Hon'ble Supreme Court made the following observation:

“8. Having considered the pleadings and averments in the suit more particularly the use of word ‘fraud’ even considering the case on behalf of the plaintiff, we find that the allegations of ‘fraud’ are made without any particulars and only with a view to get out of the bar under Section 34 of the SARFAESI Act and by such a clever drafting the plaintiff intends to bring the suit maintainable despite the bar under Section 34 of the SARFAESI Act, which is not permissible at all and which cannot be approved. Even otherwise it is required to be noted that it is the case on behalf of the plaintiff – appellant herein that in view of the approved resolution plan under IBC and thereafter the original corporate debtor being discharged there shall not be any debt so far as the plaintiff – appellant herein is concerned and therefore the assignment deed can be said to be ‘fraudulent’. The aforesaid cannot be accepted. By that itself the assignment deed cannot be said to be

‘fraudulent’. In any case, whether there shall be legally enforceable debt so far as the plaintiff – appellant herein is concerned even after the approved resolution plan against the corporate debtor still there shall be the liability of the plaintiff and/or the assignee can be said to be secured creditor and/or whether any amount is due and payable by the plaintiff, are all questions which are required to be dealt with and considered by the DRT in the proceedings initiated under the SARFAESI Act. It is required to be noted that as such in the present case the assignee has already initiated the proceedings under Section 13 which can be challenged by the plaintiff – appellant herein by way of application under Section 17 of the SARFAESI Act before the DRT on whatever the legally available defences which may be available to it. We are of the firm opinion that the suit filed by the plaintiff – appellant herein was absolutely not maintainable in view of the bar contained under Section 34 of the SARFAESI Act. Therefore, as such the courts below have not committed any error in rejecting the plaint/dismissing the suit in view of the bar under Section 34 of the SARFAESI Act.”

9. Before the Hon’ble Supreme Court, the Appellant itself had made an alternative submission praying for giving opportunity to the Appellant to file the pleadings before the DRT, which fact has been noticed in paragraph 5.7 of the judgment itself to the following effect:

“5.7 In the alternative, it is prayed by Dr. Singhvi, learned Senior Advocate appearing on behalf of the appellant that in case this Court is not inclined to entertain the present appeal, confirming the judgment

and order passed by the High Court rejecting the plaint/ dismissing the suit, in that case the original plaintiff – appellant may be given an opportunity to file the proceedings before the DRT under the SARFAESI Act and all the contentions including that assignment agreement is null and void; that assignee cannot be said to be the secured creditor under the assignment agreement dated 30.06.2018; and that there are no dues so far as the appellant – plaintiff is concerned may be kept open. He has stated that in that case the appellant shall file appropriate proceedings before the DRT within a period of two weeks from today.”

10. Ultimately, in paragraph 9 of the judgment, the Hon’ble Supreme Court dismissed the Appeal filed by the Appellant, however, the Hon’ble Supreme Court observed that it shall be open for the Appellant to initiate appropriate proceedings before the DRT under Section 17. Paragraph 9 of the judgment is as follows:

9. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, it will be open for the appellant herein to initiate appropriate proceedings before the DRT under Section 17 of the SARFAESI Act against the initiation of the proceedings by the assignee – respondent No.1 herein under Section 13 of the SARFAESI Act inter alia on the ground:- (1) that the assignee cannot be said to be secured creditor so far as the appellant is concerned; (2) that there is no amount due and payable by the plaintiff – appellant herein on the ground that in

view of the proceedings under IBC against the corporate debtor and the corporate debtor being discharged after the approved resolution plan, there shall not be any enforceable debt against the appellant. If such an application is filed within a period of two weeks from today the same be considered in accordance with law and on merits after complying with all other requirements which may be required while filing the application under Section 17 of the SARFAESI Act. However, it is made clear that we have not expressed anything on merits in favour of either of the parties on the aforesaid two issues. Present appeal is accordingly dismissed, however, in the facts and circumstances of the case there shall be no order as to costs.”

11. From the perusal of the judgment of Hon’ble Supreme Court, it is clear that it was on the prayer of the Appellant that liberty was granted by the Hon’ble Supreme Court to file an Application under Section 17 of the SARFAESI Act before the DRT on the grounds as noted in paragraph 9. The Hon’ble Supreme Court has also noticed that in fact proceedings before DRT were initiated by the Appellant under Section 17, which fact has been noticed in paragraph 2.4 of the judgment. Before the Hon’ble Supreme Court, there was no issue regarding Application filed under Section 7 of the Code by the Respondent against the Appellant, which was pending at the time when Hon’ble Supreme Court decided the Appeal. No observation has been made by the Hon’ble Supreme Court with regard to Section 7 Application of the Code, nor it can be held that judgment of Hon’ble Supreme Court even impliedly interdicts the Application under Section 7

filed by the Respondent against the Appellant. We, thus, are of the considered opinion that the prayer of the Appellant before the Adjudicating Authority in IA No.139 of 2021 to stay the proceedings under Section 7 of the Code was meritless, which submission has been rightly rejected by the Adjudicating Authority.

12. Now we come to the submission of the learned Counsel for the Appellant that the entire debt of ESL under the Resolution Plan was discharged by upfront cash payment and conversion into fully paid-up equity shares of ESL. The submission is that there being no debt of ESL pending, Application under Section 7 of the Code by Assignee of SREI cannot be allowed to proceed. We have already noticed that Appellant has filed its reply to Section 7 Application, where all the issues including the contention that there is no debt in existence has already been raised. The Adjudicating Authority has yet to consider the said submission of the parties and take a decision.

13. In the IA No.139 of 2021, the Appellant has made a prayer for staying the proceedings under Section 7 of the Code or keeping in abeyance the hearing of Section 7 Application until the final disposal of the Application filed by it before the DRT Chennai. The IA No.139 of 2021 having been heard by the Adjudicating Authority on merit and rejected, we are of the view that no further issue need to be considered and decided in this Appeal. The issues, which have been raised by the Appellant before the Adjudicating Authority, have to be gone into by the Adjudicating Authority and the said issues need not be gone in this Appeal, which arises out of an

order rejecting the prayer of the Appellant to stay the Section 7 proceedings. The Appellant is at liberty to raise all his contentions and issues regarding existence/ non-existence of debt as is sought to be raised before us.

14. In view of the foregoing discussion, we are of the view that Adjudicating Authority did not commit any error in rejecting IA No.139/CB/2021 filed by the Appellant. We only observe that in Section 7 Application filed by the Respondent, it is open for the Appellant as well as Respondent to raise all pleas and contentions available to the respective parties. With the above observation, the Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

9th March, 2022

Ash/NN