NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (Ins) No.295/2024
(IA Nos.774, 775 & 776/2024)

In the matter of:
Malavika Hedge, Shareholder & Director
Of Coffee Day Enterprises Ltd. …Appellant
V
IDBI Trusteeship Services Ltd. & Anr. ...Respondents

Present :

For Appellant : Mr. P.H. Arvindh Pandian, Senior Advocate
For Ms. Lakshana Viravalli, Advocate
For Respondent : Mr. T.K. Bhaskar, Advocate
For Mr. Arun Karthik Mohan, Advocate, For Caveator

ORDER
(Hybrid Mode)

14.08.2024:

The Appellant in the instant Appeal puts a challenge to the Impugned Order rendered in CP(IB) No.152/BB/2023, wherein the application for initiation of CIRP under Section 7 of the I & B Code was filed by the Respondent herein and the same was admitted, resulting into the initiation of the CIRP Proceedings.

The Appellant questions the Impugned Order primarily on the ground that the Impugned Order happens to be in apparent non-compliance with the procedure as agreed in the Debenture Trust Deed that, has been contemplated under Clause 10, which is extracted hereunder.

> *"The Debenture Trustee shall, except in respect of matters on which it has been expressly authorised to take action (or omit to act) without reference to the Debenture Holders, seek the consent of the Debentures Holders prior to taking any actions (or omitting to act) under the*

Transaction Documents. The required majority of Debenture Holders for giving consent to any proposed action (or omission) by the Debenture Trustee shall be in accordance with paragraphs 39 to 44 of Schedule 2 (Provisions for Meetings and Decision Making)".

It is argued by the Learned Counsel for the Appellant that in accordance with Clause 10.1 of the said Debenture Trust Deed which is extracted above, prior to taking of any action for drawing a proceeding under Section 7 of the I & B Code, which admittedly was resorted to in 2023, there should have been prior decision-making process for taking such action as contemplated under 10.1(b) of the Debenture Trust Deed and that in the absence of there being any such prior decision-making process, prior to initiation of the proceedings under Section 7, the entire proceedings will stand vitiated. The Learned Counsel for the Appellant further submits that, apart from the said flaw, which is apparent from the Judgment itself, the Judgment is bad because of the reason that, the pleadings which he has made in Para 3 & 4 of his written statement/objection before the Tribunal with regard to the necessity of compliance of Clause 10.1(b) of the Trust Deed have not been considered in its true spirit with regards to the procedural implication for drawing the proceedings under Section 7 of the I & B Code. In order to assess the maintainability of the aforesaid argument raised by the Learned Counsel for the Appellant, the Respondents were called upon to place their Rejoinder affidavit (filed before NCLT), before this Court, as to in what manner they have replied to the aforesaid pleading raised by the Appellant in their objection to the proceedings before the Learned Adjudicating Authority.

On perusal of the Rejoinder, as preferred by the Respondent it is observed that there is no specific denial in the Rejoinder as such, with regards to the compliance of the provision contained under Clause 10.1(b) of the Trust Deed which was the document executed in agreement with all the parties and that, instead it had dwelt to the aspects dealing with the determination of the Appellant as to be a defaulter. We make it clear that, at this stage, we are not venturing into determining the status of the Appellant, as to whether she will be a defaulter or not, because that itself would be having bearing when the issue is to be decided finally on merits in this Appeal.

At this stage when the stay application was being considered, the Learned Counsel for the Respondent has submitted that, the determination has been made by the Learned Adjudicating Authority, by the Impugned Order, by referring to the Notification issued by the Ministry of Corporate Affairs in Reference No.S.O.1091(E) dated 27.02.2019, which was said to be issued in the exercise of Subsection(1) of Section 7 of the Insolvency and Bankruptcy Code, wherein the persons authorized for the purposes of initiation of the proceedings on behalf of the financial creditor have been notified. To buttress his argument, the Respondent had drawn the attention of the Tribunal to Clause 3.3 of the Debenture Trust Deed, which provides that, the Debenture Trustee would be the competent authority to file an application to initiate a proceeding under Section 7 of the I & B Code is provided therein.

In order to clarify the aforesaid aspect, though it has been taken as to be reason assigned for passing the Impugned Judgment we are of the tentative view that, the aforesaid notification only confers an authorization on an individual for the purposes of drawing a proceeding, but it will not override the procedural part as agreed in the covenants of the Trust Deed, for the purposes of initiation of the CIRP proceedings and that too particularly when the aspect of non-compliance of Clause 10.1(b), was not an aspect which was ever denied, in the Rejoinder and rather it was never attempted to be ever denied in the Rejoinder before the Learned Adjudicating Authority. In order to further elaborate his arguments the Learned Counsel for the Respondent has submitted that, the conditions of Clause 10.1(b) of the Trust Deed, stood complied with, owing to the fact that there had been a Director's resolution ratifying the action of Debenture Trustee, which was said to have been passed on 02.02.2024 and if the said resolution is taken in its entirety, it will be sufficient for satisfying the conditions contemplated under Clause 10.1(b) of Trust Deed. As far as this interpretation which has been given by the Learned Counsel of the Respondent stands, it may not be justified to accept but rather it would be contrary to the stand taken in the Rejoinder, as well as in the principal proceedings drawn by them under Section 7 of the I & B Code. Because under the Corporate Law, where the procedure has been laid down statutorily, it should mandatorily follow that the subsequent ratification of a condition which is mandatorily contemplated under the Trust Deed, cannot be taken as to be the basis to justify the satisfaction of the condition contained under

Clause 10.1(b) of the Trust Deed, and that too, when the ratification happens to be of 02.02.2023 that is much after the initiation of proceedings under Section 7, as drawn in September 2023. The Counsel for the Respondent has drawn attention of this Tribunal particularly as to the context as contained in the resolution of the directors while referring to Clause A which is extracted hereunder: -

> *"the Directors considered and concluded for the purposes of **avoidance of any doubt and out of abundant caution**, hereby ratifies the act of IDBI Trusteeship Services Limited, the Debenture Trustee, to institute proceedings bearing case number Company Petition (IB) 152/2023 before the Bengaluru bench of the National Company Law Tribunal, on behalf of the Company".*

What he intends to interpret is that owing to the language which has been used in the part referred to above, the aforesaid resolution became necessary to be passed on 02.02.2024, as a matter of caution in order to avoid any complication or any doubt with regard to the initiation of proceedings under Section 7 of the I & B Code. A careful reading of Clause A as above, where it uses the word **"for the purposes of avoidance of any doubt out of abundant caution",** shows that the necessity was felt for ratification of the action of the Respondent by passing of the resolution on 02.02.2024, and this itself casts doubt on the bonafide of the action taken by the Respondent for drawing the proceedings under Section 7, as against the Appellant in the absence of there being a prior compliance of terms and conditions which was agreed between the parties by virtue of the Trust Deed, as contained under Clause 10.1(b).

The Learned Counsel for the Respondent has particularly harped upon a fact that the aspect of the Appellant being a defaulter is not in debate. As far as the status of the Appellant being a defaulter at this stage is concerned, we are avoiding to make any observation because that will be a subject to be decided finally at the stage when the controversy pertaining to Section 7, itself is decided on merits and at this stage, since we are only considering the argument extended by the Parties pertaining to the procedural flaw committed by the Respondent in drawing the proceeding under Section 7 of I & B, Code, in variance to the admitted terms of the Trust Deed, as relied by the parties.

Even so far as the interpretation which has been given in the Impugned Judgment, which is under challenge before this Appellate Tribunal is concerned, and the conclusion which has been arrived at from Para 6 onwards, does not specifically deal with the issue, as to what implication would the notification of the Government of India would have, in so far as it was authorising the initiation of proceedings under Section 7 of I & B Code, vis-a-vis Clause 3 and 10.1(b) of the Trust Deed, as it has been observed above. Exclusively, the notification in itself may not be having an overriding effect over the procedure prescribed under the Trust Deed, as contained under Clause 10.1(b). Thus, the Impugned Judgment itself apparently suffers from vices for the time being, as it seems that despite specific pleadings taken by the parties the same have not been dealt with by the Tribunal, by assigning any logical reasons.

The Learned Counsel for the Respondent in support of his contention has placed reliance upon the Judgment reported in **2006 (Volume 5) SCC Page 96 Maharashtra State Mining Corporation Vs Sunil S/o. Pundikarao Pathak** wherein he refers to Para 7, 8 & 9 of the said Judgment which is extracted hereunder: -

> *"7. The High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently "rectified" by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim ratihabitio mandato aequiparatur, namely, "a subsequent ratification of an act is equivalent to a prior authority to perform such act". Therefore ratification assumes an invalid act which is retrospectively validated.*
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> *8. In Parameshwari Prasad Gupra the services of the General Manager of a company had been terminated by the Chairman of the Board of Directors pursuant to an resolution taken by the Board at a meeting. It was not disputed that meeting had been improperly held and consequently the resolution passed termination the services of the General Manager was invalid. However, a subsequent meeting had been held by the Board of Directors affirming the earlier resolution. The subsequent meeting has been property convened. The Court held : (SCC pp. 546-47, para 14)*
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> *"Even if it be assumed that the telegram and the letter termination the services of the appellant by the Chairman was in pursuance of the invalid resolution of the Board of Directors passed on 16.12.1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because he purported to act in pursuance of the invalid*

resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, date of the act ratified and so it must be held that the services of the appellant were validly terminated on 17.12.1953".

The view expressed has been recently approved in High Court of Judicature for Rajasthan v. P.P. Singh

9. The same view has been expressed in several cases in other jurisdictions. Thus in Hartman v. Hornsby it was said:

" 'Ratification' is the approval by act, word, or conduct, of that which was attempted (of accomplishment), but which was improperly of unauthorisedly performed in the first instance."

The ratio of a Judgment has to be read in the context of the subject which was before the Court rendering the Judgment on which the reliance has to be placed. We have to bear in mind that the Hon'ble Apex Court in the said Judgment of Maharashtra State Mining Corporation (Supra), was dealing with the act of misconduct of a delinquent employee, which will exclusively pertain to the "service jurisprudence", which would fall to be a subject matter under List II of Schedule 7 of the Constitution of India, as framed under Article 246. Since the Corporate Law and more specifically the matters in relation to Section 7 of the I & B Code, it fall under List I of Schedule 7, of the Constitution of India, the said Judgment cannot be read in parlance to justify the apparent procedural flaw committed by the Learned Adjudicating Authority, while passing the Impugned Order in question. In these eventualities, the Respondents are directed to file their Counter Affidavit within the period of three weeks from today.

Till the next date of listing, the effect and operation of the Impugned Order admitting the Appellant to Section 7 proceeding should be kept in abeyance.

List the Appeal on **15.10.2024,** under the caption, 'For Admission (After Notice)'.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

VG/TM