

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.11.2018

Delivered on : 04.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.(Comm. Div.) D.No.41408 of 2018

1.Mrs.Jai Rajkumar

2.Mr.V.R.Heamntraj

.. Plaintiffs

Vs.

1.Stanbic Bank Ghana Limited

Stanbic Heights

215, south Liberation Link

Airport City

Accra, Ghana

2.Rajkumar Impex Private Limited

CIN No.U52599TN1994PTC029136

Having its registered office at

4th Floor, Old No.93, New No.119

St. Mary's Road, Abhiramapuram

Chennai – 600 018

.. Defendants

Plaint filed under provisions of Order VII Rule 1 of the Code of Civil Procedure, 1908 read with Order IV Rule 1A of Original Side Rules and First proviso to Section 7 of the Commercial Courts Act, 2015 granting a declaration that the judgment/decreet/order dated 08.08.2017 passed by the High Court of Justice Queen's Bench Division Commercial Court, London in Case No.CL-2017-000235 filed by the 1st Defendant against the 2nd Defendant as non-conclusive judgment under Section 13 of the Civil Procedure Code, 1908 and consequently declare the judgment/decreet/order dated 08.08.2017 passed by the High Court of Justice Queen's Bench Division Commercial Court, London in Case No. CL-2017-000235 as null and void; declaring that the judgment/decreet/order dated 08.08.2017 passed by the High Court of Justice Queen's Bench Division Commercial Court, London in Case No.CL-2017-000235 filed by the 1st Defendant against the 2nd Defendant is unenforceable as against the 2nd defendant in India in any manner or whatsoever; granting a permanent injunction restraining the 1st respondent, its servants agents, representatives or any other person claiming under/through it from in any manner seeking enforcement of the summary judgment dated 8th August 2017 passed by the High Court of Justice Queen's Bench Division

Commercial Court, London in Case No.CL-2017-000235 in any manner whatsoever; to direct the 1st defendant to pay to the plaintiffs, a sum of INR 1,00,000/- (Indian Rupees One Crore Only) towards costs incurred and as damages for taking reckless and offensive actions against the 1st defendant without following appropriate procedures thereby adversely affecting the legal rights of the plaintiffs for enforcing the order dated 08.08.2017 passed by the High Court of Justice Queen's Bench Division Commercial Court, London in Case No.CL-2017-000235 and for costs of the suit.

For Plaintiffs : Mr.P.H.Arvinth Pandian,
Senior Counsel
for Mr. S.Aravindan
of M/s.Fox Mondal & Associates

For Defendants: Mr.Anirudh Krishnan,
Mr.Keerthikiran Murali
and Ms.Ramya Subramaniam for R1

Mr.R.Venkatavaradhan
Asst. by Mr.Chandramouli Prabhakar
for R2 (RP)

JUDGMENT

A proposed plaint has been placed before me along with an application in A.No.7361 of 2018 with a prayer seeking leave to sue under Clause 12 of Letters Patent. A perusal of the proposed plaint reveals that it has been filed in this Court on 25.09.2018 under Diary No.41408.

2.Leave to sue application has been filed primarily owing to the reason that first defendant in the proposed plaint is outside the territorial jurisdiction of this Commercial Division.

3. However, considering the peculiar facts and circumstances of the instant case, it has become necessary to examine whether Section 14,

more particularly Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter 'IB Code' for brevity) is attracted. If the answer to this question is in the affirmative, institution of suit vide the proposed plaint in this Commercial Division is prohibited and therefore, this Commercial Division will not deal with the leave to sue application at all.

4. Leave to sue application i.e., A.No.7361 of 2018 can be taken up, dealt with on merits and orders on the same can be passed only if the answer to the aforementioned neat question regarding Section 14(1)(a) of the IB Code is in the negative.

5. Considering the nature of the question i.e., whether Section 14(1)(a) of IB Code is attracted it became necessary to hear both sides of the story. I therefore directed the plaintiff to serve on 'Resolution Professional' ('RP' for brevity) who according to the proposed plaint is representing the second defendant. To be noted, with regard to first defendant, which is a Bank, Mr.Keerthikiran, learned counsel was before this Commercial Division, when this matter was first placed before this Commercial Division and he was ready to make submissions.

6. In the aforesaid backdrop, RP representing the second defendant was served. RP is also before this Commercial Division through a counsel. This Commercial Division now looks at the proposed plaint.

7. There are two plaintiffs and two defendants. Both the plaintiffs are individuals and natural persons.

8. First defendant is a Bank, which goes by the name 'Stanbic Bank Ghana Limited' and is situated in Airport City, Accra, Ghana (hereinafter referred to as 'Stanbic Bank' for convenience and clarity). This Commercial Division is informed that second defendant, which goes by the name 'Rajkumar Impex Private Limited' is a company incorporated in India under relevant laws in India and is therefore, a juristic person (hereinafter referred to as 'RIPL' for the sake of brevity, convenience and clarity).

9. Mr.P.H.Arvinth Pandian, learned Senior Advocate leading Mr. S.Aravindan of M/s.Fox Mondal & Associates on behalf of two plaintiffs, Mr.Anirudh Krishnan, learned counsel on behalf of first defendant and Mr.Venkatavaradhan, learned counsel on behalf of RP were before this Commercial Division.

10.This Commercial Division heard aforementioned senior counsel and two counsel on the aforesaid question as to whether Section 14(1)(a) of IB Code is attracted in the instant case owing to which institution of the instant suit vide the proposed plaint is prohibited.

11. Before advertng to the submissions made by aforesaid counsel, it may be necessary to set out short facts which are necessary for appreciating this order/proceedings.

12. Two plaintiffs are shareholders and also Directors in second defendant company i.e, RIPL. RIPL is a holding company qua a company which goes by the name 'Rajkumar Impex Ghana Limited' ('RIGL' for brevity). To be noted RIGL is a company incorporated under applicable laws of Ghana with Company Registration No.CA41134 having office at Mannet Gardens, Church Close, Tema Ghana and is a subsidiary of RIPL.

13. In a nutshell, RIGL, in the course of its regular business, had approached Stanbic Bank for financial assistance/loan facilities. Stanbic Bank did grant loan facilities to RIGL for which purpose four loan agreements (two dated 24.02.2012 and two more dated 15.04.2014) came to be executed. Suffice to say that first loan agreement is a Medium-Term Loan amount for over 5 Million dollars. To be noted 'dollars' as of currency of United States of America (hereinafter 'USD' for brevity), second loan agreement is a Short-Term Banking Facility for a commodity loan of 10 Million USD, third loan agreement is a Business Term Loan of over 2 Million USD and the fourth loan agreement is again a Short-Term Banking Facility for commodity loan of 8 million USD.

14. It unfurls from the plaint averments and emerges from the submissions made before this Commercial Division that aforesaid monies advanced by Stanbic Bank were to be utilized by RIGL towards purchase of raw material, namely cashew nuts, which were to be processed and sold by RIGL.

15. In the interregnum i.e, interregnum qua four loan agreements, to be precise after the first and second loan agreements and before third and fourth loan agreements, RIPL executed a Guarantee and Indemnity Agreement dated 12.04.2012. It also unfurls from the averments in the proposed plaint that RIPL, in its capacity as guarantor, had made available its assets as security only to the tune of 10 million Ghanaian cedis and assets of RIPL over and above the said amount would stand immuned from further action as far as the liability of its subsidiary RIPL is concerned. It is the stated position of plaintiffs that the Guarantee and Indemnity agreement was executed by RIPL on this basis.

16. Under the aforesaid circumstances, considering the scope of these proceedings, it is plaintiffs' say that goods of RIGL were ransacked between 20.05.2014 and 22.05.2014 resulting in huge loss. It has been alleged in the proposed plaint that Stanbic Bank had failed qua several of its obligations with regard to protecting RIGL qua ransacking. It is not necessary to go into these details considering the limited scope of these proceedings.

17. It is the further case of the plaintiffs that Stanbic Bank initiated proceedings in Courts in Ghana i.e, Republic of Ghana, could not succeed in proceedings against the assets of the RIPL, ultimately made a claim in the High Court of Justice, Queens Bench Division (Commercial Court) England (hereinafter 'UK Court' for brevity) and obtained judgment/decreed/order dated 08.08.2017 from the UK Court. This judgment/decreed/order dated 08.08.2017 made by the UK Court is the fulcrum of this suit.

18. Contending that the aforesaid judgment of the UK Court is in violation of Section 13 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) and placing reliance on Section 44-A of CPC, the instant suit has been filed by the plaintiffs primarily with prayers for declaration that the aforementioned UK Court judgment is null and void. In the interregnum, it is not in dispute that Stanbic Bank filed a petition under Section 7 of IB Code before the 'National Company Law Tribunal, Chennai' (hereinafter 'NCLT, Chennai' for brevity) vide CP/670/IB/2017 and an order dated 27.04.2018 declaring a moratorium for RIPL came to be passed in these proceedings. It is also not in dispute that this order of NCLT, Chennai was carried in appeal to the National Company Law Appellate Tribunal (Delhi) ('NCLAT' for brevity) and the same came to be disposed of by NCLAT by an order dated 29.08.2018 dismissing the appeal. In other words, the aforesaid order of NCLT, Chennai was confirmed by NCLAT.

19. Learned senior counsel for plaintiffs submitted that the issue of aforesaid UK judgment was raised before NCLAT, the validity of the same was also raised before NCLAT and NCLAT has made certain observations (though it dismissed the appeal confirming the NCLT order) and submitted that the instant suit vide the proposed plaint has been filed on the basis of such observations. A specific reference was made to Paragraphs 11 and 12 of the order of NCLAT, which read as follows:

'11.The learned senior counsel appearing on behalf of the appellant submitted that the decree is an ex parte decree, but such issue can not be decided while entertaining an application under Section 7 or by the Adjudicating Authority or even by this Appellate Tribunal. The Adjudicating Authority has not been

empowered to give such declaration.

12. The decree passed by High Court of Justice, Queens Bench Division, Commercial Court of England, can be challenged only before the Court of Competent jurisdiction. The same cannot be assailed before the Adjudicating Authority, till its existence is denied.'

20. It is also not in dispute that the aforesaid order of NCLAT was carried in appeal to the Hon'ble Supreme Court of India vide a statutory appeal under Section 62 of IB Code. This statutory appeal in the Supreme Court is Civil Appeal No.9980 of 2018 and the same came to be dismissed in and by order dated 12.10.2018 stating that the Supreme Court does not find any reason to interfere with the aforesaid order of NCLAT dated 29.08.2018.

21. It was also submitted that in the light of the instant intended suit vide the proposed plaint having been filed by two shareholders in RIPL for the benefit of RIPL, it is a derivative action and therefore Section 14(1)(a) of IB Code will not apply.

22. The aforesaid argument was opposed by learned counsel for Stanbic Bank as well as RP by stating that the intended suit is clearly prohibited by Section 14(1)(a) of IB Code as the plaintiffs cannot do what RP is prohibited from doing. Such an argument of Stanbic Bank was *inter alia* by relying on Section 63 of IB Code, which reads as follows:

'63.Civil Court not to have jurisdiction._ No Civil Court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National

Company Law Tribunal or the National Company Civil Court not to have jurisdiction.'

23. In the light of aforesaid rival submissions, this Commercial Division proceeds to deal with the core issue as to whether Section 14(1)(a) of IB Code is attracted. In support of the submission that Section 14(1)(a) of IB Code is not attracted because it is a derivative action for the benefit of RIPL, which is the corporate debtor qua NCLT proceedings and in an attempt to buttress and bolster this submission, learned senior counsel pressed into service a judgment of a learned single Judge of the Delhi High Court dated 11.12.2017 made in ***Power Grid Corporation of India Limited Vs. Jyoti Structures Limited Case***. In Jyoti Structures case it was held that the object behind moratorium under Section 14 of IB Code would not apply to proceedings which are for the benefit of a Corporate Debtor. It was also held that in Jyoti Structures case for testing the applicability of Section 14 of IB code one has to see the nature of proceedings and see if such proceedings are against the corporate debtor or is in its favour.

24. Besides this Jyoti Structures case, learned senior counsel pressed into service, a judgment of this Court made by a learned single Judge in ***R.M.V.Vellachi Achi Vs. R.M.A.Ramanathan Chettiar*** reported in ***(1972) 2 MLJ 468***. This case turns on Section 44-A of CPC and it is essentially for the proposition that a foreign decree cannot be executed under CPC if it is hit by conditions adumbrated in Section 13 (a) to (f) of CPC. It is also regarding the validity of an *ex parte* foreign decree. As I am not going into the merits of the proposed plaint/intended

suit, I am of the view that this judgment is of no help to the plaintiffs at this juncture in these proceedings.

25. Countering the submissions made by learned senior counsel, learned counsel for defendants 1 and 2, as mentioned supra, drew my attention to Section 63 of the IB Code and submitted that no civil Court will have jurisdiction to entertain any suit in respect of a matter over which NCLT or NCLAT has jurisdiction under the IB Code.

26. By way of reply to Section 63 of IB Code argument, it was submitted on behalf of plaintiffs that NCLAT itself vide paragraphs 11 and 12 of its order (extracted supra) had made it clear that UK Court judgment in the instant case can be challenged only before a Court of competent jurisdiction. It was also pointed out that NCLAT has gone as far as saying that validity of the UK Court judgment cannot be assailed before the adjudicating Authority.

27. I have bestowed my best attention and carefully considered the submissions made before this Commercial Division.

28. With regard to Jyoti Structures case, made by a learned single Judge of the Delhi High Court, even while pressing into service the said case, learned senior counsel fairly submitted that it is not a judgment rendered by a coordinate Bench and as the judgment has been rendered by a learned single Judge of another High Court, as a precedent, it could at best have persuasive value qua this Commercial Division. There is no

difficulty with regard to this aspect of the matter in the light of well settled principles regarding law of precedents. However, this Commercial Division had the benefit of carefully reading the judgment in Jyoti Structures written by a learned single Judge of the Delhi High Court. That was a case arising under Section 34 of the 'Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity).

29. The corporate debtor in that case was a respondent in the proceedings under Section 34 of the A & C Act. In other words, Corporate debtor had an award/decreed in its kitty, which is executable and from which monies could have been realized. Owing to pendency of Section 34 petition, Corporate Debtor was not able to launch execution proceedings and realize the monies due under the award / decree. Moreover, a careful perusal of Jyoti Structures case reveals that proceedings under Section 7 of the IB Code were initiated before the jurisdictional Company Law Tribunal during the pendency of Section 34 petition. None of these factual aspects are present in the instant case. On the contrary, it is a reverse situation in the instant case. Corporate Debtor i.e, RIPL has suffered a foreign decree and the same is likely to be executed against RIPL. Unlike Jyoti Structures case, where if the Corporate debtor realized monies under the award, it will go to the benefit of the creditors, in the instant case it is the creditor who is pitted against the corporate debtor. To be noted, Creditor, namely Stanbic Bank is Defendant No.1 in the proposed plaint. This takes us to the question as to who will examine the Validity or otherwise of the UK Court judgment / decree in the instant case. Learned senior counsel for plaintiffs is correct in referring to Paragraphs 11 and 12

of NCLAT order and saying that UK Court judgment can be challenged only in this Commercial Division which alone has competent jurisdiction in this regard. The observations made by NCLAT that the validity of the UK Court judgment should be challenged only in a Court of competent jurisdiction cannot be found fault with, but the problem for the plaintiffs presents itself in a different form i.e., who will assail or who can assail the UK Court judgment /decree in the instant case when moratorium has been declared for RIPL by NCLT and when the same has been confirmed by NCLAT. A perusal of the orders of the NCLT and NCLAT reveal that there is a definite discussion about the validity of the UK Court judgment/decree. As alluded to supra, NCLAT was absolutely correct in not embarking upon the exercise of testing the validity of the UK Court judgment/decree and holding that the same has to be assailed only in a Court of competent jurisdiction, but as RP has been appointed by NCLT (To be noted, RP is before this Commercial Division representing RIPL), it is for the RP to initiate proceedings assailing the decree.

30. In the considered view of this Commercial Division, in the light of Section 14(1)(a) of IB Code and in the light of prohibition of institution of suits thereunder, against the corporate debtor, it is for the RP to refer to the order of the NCLAT and move the Court of competent jurisdiction. In this view of the matter, this Commercial Division is also of the considered view that Section 63 argument of the defendants does not apply to the factual matrix of this case. The reason is straight and simple. This is not a case where this Commercial Division is going to embark upon the exercise of solvency or rights and liabilities of creditors qua RIPL. In

other words, this Commercial Division need not exercise jurisdiction in respect of matters over which NCLT and NCLAT have jurisdiction for the purpose of adjudicating and determining whether the UK Court Judgment/decreed is valid and binding.

31. Having said this, it is also to be noticed that the order of NCLT (confirmed by NCLAT and Supreme Court refused to interfere) says that a moratorium has been declared and the same shall have effect from the date of order till the completion of Corporate Insolvency Resolution Process for the purposes referred under Section 14 of IB Code. As of today, it is not in dispute that RP who was an Interim Resolution Professional within the meaning of Section 18 of IB Code has become Resolution Professional within the meaning of Section 25 of IB Code.

32. Be that as it may, the transition from Section 18 to Section 25 can at best be only in terms of replacement of the individual concerned depending on the majority view of the committee of creditors. What is of relevance is, duties of the Resolution Professional, which have been adumbrated in Section 25(2) of IB Code. As many as 11 duties/actions to be undertaken by the Resolution Professional have been adumbrated under Section 25(2) of IB Code i.e, Sub-clauses (a) to (k) of Section 25(2). In the considered opinion of this Commercial Division, what is of utmost relevance is sub-clause (b), which reads as follows:

'25. Duties of resolution profession(1).....

(2).....

(a).....

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial quasi-judicial or arbitration proceedings.'

33. Therefore, it is for the RP to act on behalf of Corporate debtor i.e., RIPL in this case with third parties and more importantly exercise rights for the benefit of the corporate debtor (second defendant i.e, RIPL in this case) in judicial proceedings. In other words, proposed plaint, which according to the plaintiff is said to be for the benefit of the Corporate Debtor, is a right, which at the highest can be exercised by RP and none else in the light of a conjoint and harmonious reading of Sections 14(1)(a) and 25(2)(b) of IB Code. It is open for RP to initiate suitable proceedings assailing the UK Judgment / decree in tune with the view of NCLAT. In the light of Section 14(1)(a) of IB Code, institution of this suit is prohibited until corporate insolvency resolution process under the IB Code is completed.

34. This Commercial Division now plunges and ploughs more into the aspect of whether the intended suit i.e., the proposed plaint can be entertained and there has to be clarity and specificity with regard to whether the intended suit/proposed plaint is a derivative action at all. To be noted, Paragraph 5 of the proposed plaint says that it is a derivative action being taken by the plaintiffs being shareholders of the second defendant and is being filed in the best interest of the second defendant company.

35. To be noted, it is not in dispute that two plaintiffs, who are

natural persons, constitute the entire shareholders in the second defendant company. Therefore, it is not a case where minority shareholders have come before this Commercial Division making a complaint against the majority shareholders on the ground that the company is in the hands of a wrongdoer.

36. In the aforesaid backdrop Mr. Anirudh Krishnan, learned counsel pressed into service what has now come to stay as Foss Vs. Harbottle principle.

37. Pith and substance of Foss Vs. Harbottle principle in my considered view is, majority is the hallmark of a corporate entity and the minority shareholders should always yield to the will of the majority shareholders. This Foss Vs. Harbottle principle was followed in several English decisions subsequently. To be noted, Foss Vs. Harbottle principle was propounded in 1843. Thereafter, there have been several elucidations and expositions of Foss Vs. Harbottle principle. As the law evolved and developed, it got crystallized that there can at best be only three exceptions to Foss Vs. Harbottle principle. The three exceptions are a) when an Act is ultravires the company or it is illegal; b) when an act constitutes a flaw against the minority and the wrongdoers themselves are in control of the company; or c) when a resolution that requires to be passed by a qualified majority, but has been passed by a simple majority. This has been set out in Palmer's Company Law , which was placed before me.

38. In the backdrop of the factual matrix of the instant case, this Commercial Division does not find any compelling reasons to disagree or

deflect from Foss Vs.Harbottle principle and the three exceptions.

39. If Foss Vs.Harbottle principle and the aforesaid three exceptions to the same are corner stones which define the boundaries of a derivative action, there is no reason to believe that the intended suit qua proposed plaint is a derivative action. Reasons are simple, clean and neat.

40. Two plaintiffs constitute the entire set of shareholders in the second defendant company and therefore, there is no scope for construing minority Vs. Majority. When RP under the IB Code is in control of the Corporate Debtor i.e., second defendant company, it is obvious that it cannot be pleaded that the company is in the hands of a wrongdoer.

41. Therefore, though the suit has been styled as a 'derivative action', this Commercial Division is unable to accept that the intended suit qua proposed plaint is a derivative action.

42. The fact that it is not a derivative action does not put an end to the discussion/deliberation that is being embarked upon as it has to be decided one way or the other as to who will challenge the foreign decree of the UK Court, if at all.

43. As alluded to supra, in this order/judgment the problem presents itself in a form wherein the issue is not a foreign decree or the challenge to the same, but as to who would assail the foreign decree, if at all and if that be so.

44. Therefore, notwithstanding my conclusion that the intended suit is not a derivative action qua second defendant company, this Commercial Division proceeds with the discussion and deliberation in this regard.

45. This takes us to the stated position of RP. RP has filed a counter affidavit dated 27.10.2018. A perusal of the counter affidavit of RP reveals that it is pivoted on Section 28 of IB Code and Regulation 25 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as 'IB Code Regulations'). To be noted, IB Code Regulations are a set of regulations made by the Insolvency and Bankruptcy Board of India *inter alia* by exercise of its Regulation making power under IB Code.

46. This Commercial Division deems it appropriate to extract entire Section 28 of IB Code and Sub-Regulation (2) of Regulation 25 of IB Code Regulation and the same read as follows:

'28. Approval of committee of creditors for certain actions

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely._

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor

is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholders of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.'

Sub-Regulation (2) of Regulation 25 of IB Code

Regulation:

'25. Voting by the committee

(1).....

(2) Any action other than those listed in Section 28 (1) requiring approval of the committee may be considered in meetings of the committee.

47. On the aforesaid basis, RP has taken the stated position that she does not have the locus standi, authority or power to challenge or initiate proceedings before Court questioning the foreign decree of the UK Court.

48. In the considered opinion of this Commercial Division, this is misplaced and is of no avail in the instant case as in the instant case what we are concerned with is, the duties of RP under Section 25 and not Section 28. A perusal of the scheme of IB Code would reveal that Sections 25 and 28 operate in different realms, though both provisions appear under the same chapter of IB Code i.e., Chapter II captioned 'Corporate Insolvency Resolution Process'. While Section 25 adumbrates the duties of the RP, Section 28 is an enumeration of certain actions of RP which requires prior approval of the committee of Creditors. In Section 25, more particularly sub-section (2) of Section 25 of IB Code, there is an enumeration of 11 duties of the RP and in Section 28, there is an enumeration of 13 actions of RP which requires prior approval of the creditors. In the instant case, we are concerned with one of the seven duties of the RP as contained in sub-clause (b) of sub-section (2) of Section 25. In other words, we are concerned with Section 25(2)(b). The duty of RP encapsulated in Section 25(2)(b) is not one of the actions enumerated in Section 28.

49. Therefore, the stated position of RP that she does not have locus standi, authority or power to initiate proceedings assailing the foreign decree of UK Court in the light of Section 28 of IB Code and Regulation 25 of IB Code Regulations, is unacceptable. In other words, it is made clear that if the RP were to assail the foreign decree of the UK Court, it will be pursuant to her duty under Section 25(2)(b) of IB Code, which has nothing to do with Section 28 or Regulation 25 of IB Code Regulations.

50. In this regard, it is necessary to mention that this Commercial Division has noticed that there is no mention about Section 25 in the four page counter affidavit of RP dated 27.10.2018 spanning 8 paragraphs.

51. This takes us to the next stage of the discussion / deliberation.

52. The next stage of the discussion/deliberation is whether RP can initiate a suit in this Commercial Division assailing the foreign decree of the UK Court in the instant case. In this regard, before I delve into this aspect of the matter, it is to be noticed that NCLAT in its order, particularly in Paragraphs 11 and 12 of its order has clearly said that validity of the foreign decree cannot be challenged before NCLAT and that it has to be done before an appropriate forum. There can be no doubt or debate about the obtaining position that this Commercial Division is the appropriate forum. Mr.Anirudh Krishnan submitted that this finding of NCLAT has been wiped out by the Supreme Court owing to the disposal of

the appeal being Civil Appeal No.9980 of 2018 on 18.10.2018. The reason advanced by learned counsel is, Civil Appeal in the Supreme Court is a statutory appeal under Section 62 of the IB Code and it is not a regular petition in the Supreme Court invoking residuary powers under Article 136 of the Constitution of India. According to him, the doctrine of merger operates and the order of NCLAT has merged with the Supreme Court order. The Supreme Court order dated 18.10.2018 reads as follows:

'Heard the learned counsel for the appellant.

We do not find any reason to interfere with the impugned order dated 29.08.2018 passed by the National Company Law Appellate Tribunal, New Delhi.

Accordingly, the civil appeal is dismissed.

Pending applications shall stand disposed of.'

53. A perusal of the aforesaid order reveals that Supreme Court has held that it does not find any reason to interfere with the order of NCLAT. This means, finding/observation made by NCLAT, particularly in Paragraphs 11 and 12 of its order dated 29.08.2018 remains. If at all, it has attained the status of an order, which has merged with that of the Supreme Court order. Therefore, this Commercial Division is unable to accept the argument that the order of NCLAT and particularly Paragraphs 11 and 12 does not operate any more. To be noted, Hon'ble Supreme Court has not set aside the order of NCLAT. On the contrary, Hon'ble Supreme Court has categorically held that it does not find any reason to interfere with the order NCLAT.

54. Now that this Commercial Division has held that the order of NCLAT, particularly Paragraph 11 and 12 operate, it takes us back to the question as to whether RP can initiate proceedings assailing the foreign decree of the UK Court under Section 25(2)(b) of the IB Code. To be noted, Section 25(2)(b) has already been extracted supra. A close and careful reading of the language in which it is couched reveals that it is the duty of RP to represent and act on behalf of the corporate debtor with third parties for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. If Section 25(2)(b) is broken down into components, philosophy and principles that go to make it, one can see that Section 25 is an enumeration of the duties of RP. Duties of RP, broadly is to preserve and protect the assets of the corporate debtor and for the purpose of preserving and protecting the assets of the corporate debtor, RP can represent and act on behalf of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. It talks about RP so representing and acting on behalf of corporate debtor (in judicial, quasi-judicial and arbitration proceedings) with third parties. Therefore, the question as to what the expression 'third parties' occurring in Section 25(2)(b) would mean assumes significance.

55. All the counsel before me, very clearly submitted that there is no case law which explains what the expression 'third parties' occurring in Section 25(2)(b) means and which are the entities which are covered in its sweep. Therefore, in search of an answer, this Commercial Division embarked upon the exercise of looking at the legislative intent behind

Section 25(2)(b) of IB Code. The report of the Bankruptcy Law Reforms Committee was placed before this Commercial Division by Mr. Anirudh Krishnan and a careful perusal of the same shows that UNCITRAL Legislative Guide on Insolvency is a useful benchmark to ascertain the principles on which the IB Code has been platformed.

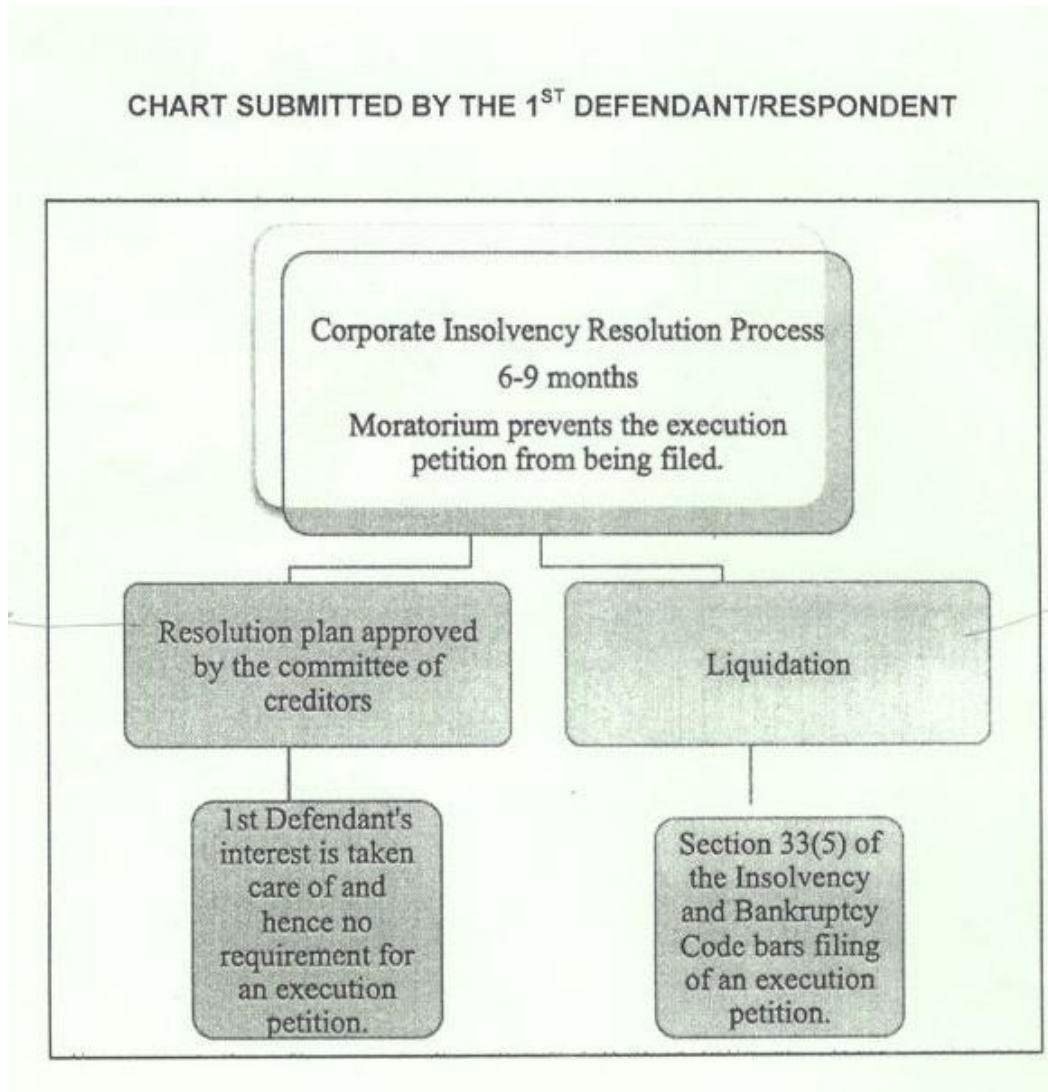
56. This takes us to the Legislative Guide on Insolvency Law of UNCITRAL. That portion of the legislative guide which talks about duties and functions of insolvency representative talks about exercising rights for the benefit of the Insolvency estate in respect of court, arbitration or administration proceedings underway. It can be said that it emerges with reasonable amount of certainty and specificity that Section 25(2)(b) is relatable to one such duty adumbrated in UNCITRAL Legislative Guide.

57. Viewing in aforesaid backdrop, it is the considered view of this Commercial Division that the term/expression 'third parties' occurring in Section 25(2)(b) of IB Code is only to enable RP to interact with any or every other entity on behalf of the corporate debtor without being challenged that the RP does not have statutory backing to do so. As an illustration, if the RP were to take up an issue with a Nationalized Bank on behalf of a corporate debtor, the Nationalized Bank may take the position that it is under no obligation to interact with the RP or interact with the RP as RP does not have legislative backing to embark upon such an action though the RP may have been appointed by NCLT, which is a statutory body. Legislature in its wisdom has brought in the expression 'third

parties’ and built it into Section 25(2)(b) of IB Code as part of adoption of UNCITRAL legislative guide of insolvency, which is the bedrock on which IB Code has been built.

58. From the aforesaid discussion and deliberation it follows as a necessary corollary and inevitable sequitur that RP can act on behalf of corporate debtor against any one. When such an action on behalf of Corporate Debtor runs into the interest of the financial creditor, it necessarily is an issue which has to be looked into, dealt with and decided by NCLT by applying the IB Code. In this regard Section 63 of IB Code kicks in. In other words, the question as to whether RP should file a suit assailing the foreign decree has to be examined and answered by NCLT as it is against the financial creditors in the instant case. Once NCLT comes to the conclusion that such a suit has to be filed by RP, the scenario shifts to this Commercial Division without being hit by Section 63 (as rightly held by NCLAT). It is clarified that NCLT will not have to decide about actions of RP in cases where the suit is not against the financial or operational creditor.

59. The logic is, IB Code is a complete and comprehensive code wherein when the Corporate Insolvency Resolution Process commences, there are only two broad routes it can take. Those two broad routes are as follows:



60. Section 238 of the IB Code buttresses the position that IB Code is a complete and comprehensive code. To be noted, Section 238 of IB Code reads as follows:

'238. Provisions of this Code to override other laws

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.'

61. Therefore, this Commercial Division deems it appropriate to leave it open to the corporate debtor to assail the stand of the RP that she does not have the locus standi, authority or power to challenge or initiate proceedings before a Court. This can be done by the corporate debtor by taking resort to Section 60(5) of the IB Code, which reads as follows:

'60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of._

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.'

62. This Commercial Division has already held supra that the issue as to what course is to be adopted by RP when an action under Section 25(2)(b) runs to the interest of the financial creditor is something which the NCLT alone will have jurisdiction to decide. In this regard, the judgment of Supreme Court in ***Arcelormittal India Pvt. Ltd., Vs. Sathish Kumar Gupta and Ors.*** reported in **2018 SCC Online SC 1733** referred to by senior counsel Mr.P.H.Aravind Pandian is of relevance. The most relevant portion is contained in Paragraph 81 and most relevant

portion of paragraph 81 of the said judgment reads as follows:

'81.....Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.'

63. To be noted, the corporate debtor in the instant case is no stranger to Section 60(5) of IB Code, as the corporate debtor has already filed a petition under Section 60(5) being MA 404 of 2018 with regard to the question as to whether guarantee given by RIPL is limited to a particular quantum.

64. Before parting with this case, this Commercial Division deems it appropriate to notice that proceedings under IB Code are time bound in the light of ***Arcelormittal India Pvt. Ltd., Vs. Sathish Kumar Gupta and Ors.*** reported in ***2018 SCC OnLine SC 1733***. If ultimately RP assails the UK Judgment, as that will be in the Commercial Division, there will be no difficulty in such suit being fast-tracked by applying the amended CPC procedure as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) particularly by Section 16 of the said Act.

In the light of the narrative, discussion and deliberation supra, this suit is held to be not maintainable, but reserving the rights of corporate debtor (second defendant) to approach NCLT under Section 60(5) of IB Code and further reserving the right of Resolution Professional to file a suit on the same ground with regard to the same issue if the NCLT permits the Resolution Professional to do so.

04.12.2018

Speaking order

Index : Yes

gpa

M.SUNDAR.J.,

gpa

Pre-Delivery Judgment in
C.S.(Comm. Div.) D.No.41408 of 2018

04.12.2018