BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, CHENNAI.

Arguments heard on 29.11.2016

Order passed on 12.01.2017

CA No.1 of 2016

In

C.P.No.68 of 2015

(T.C.P.No. 185 of 2016)

Under sections 397, 398, 402 of the Companies Act, 1956 and Section 59 of Companies Act, 2013

Applicants : Shri C.K.Sibi & Shri K.C.Baboo, represented by Practising Company Secretary Shri V.Mahesh

Vs

Respondents : M/s.Vijaya Hospitality & Resorts Ltd. & Ors – R1 to R6 represented by Shri Vineet Subramani & Shri Philip Paul, Advocates

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ANANTHA PADMANABHA SWAMY & CH MOHD SHARIEF TARIQ, MEMBERS (JUDICIAL)

Ch Mohd Sharief Tariq, Member (Judicial) (Oral)

1. Under adjudication is an application numbered as C.A.1 of 2016 filed in C.P.No.68 of 2015 before the CLB. The C.P. came to be transferred to NCLT and renumbered as T.C.P.No.185 of 2016. The C.A. has been filed by Shri C.K.Sibi and Power of Attorney holder Shri. Suresh George, both are the petitioners in the main company petition. The C.A. has been filed against the respondents.

2. Respondent-1 is the public limited company registered under the provisions of the Companies Act, 1956. The Applicants/petitioners were also directors of the company but stated to have resigned. It is on record that Respondent No.7

in the C.A. is Federal Bank from whom R1 company being principal borrower have availed various credit facilities including two term loans of Rs.7 crores on 2.11.2015 and Rs.10 crores on 14.07.2006 for financing the construction of "Elephant Court", a holiday resort at Thekkady, Kumili village and OD/EC limit of Rs.75 lakhs for meeting its working capital requirements. In this connection, R1 company represented by its directors executed fresh term loan agreement on 12.12.2014 undertaking, *inter alia*, to repay the balance of Rs.6,77,66,448/- outstanding in the above mentioned first term loan of Rs.7 crores and Rs.11,86,60,869/- outstanding in the second term loan of Rs.10 crores together with interest, charges and other expenses. As a security for the said loan, at the instance of R8 bank in the C.P., the directors have executed equitable mortgages in favour of the bank by depositing the title deeds of the properties of the directors as well as those of R1 company. The above said accounts turned into "Non performing assets" and so R7 bank who is R8 in the main C.P. initiated proceedings against the Respondents under the provisions of SARFAESI Act, 2002. The Respondents challenged the proceedings before the Debts Recovery Tribunal/Hon'ble High Court, Kerala, in S.A.No.308 of 2005 but could not get relief. Therefore, the bank approached the Chief Judicial Magistrate court, Thodupuzha by filing an application u/s 14 of SARFAESI Act and the Magistrate appointed an Advocate Commissioner to take physical possession of the properties of the Respondents and R1 company. The Advocate Commissioner has issued notice dated 18.1.2016 directing the respondents to surrender vacant possession of the Schedule property/Holiday resort i.e. Elephant Court, Thekkady.

3. The Applicants/Petitioners have submitted in the C.A. that if the outstanding amount of loan is not paid, the bank would escalate their efforts to dispose of the immovable and movable properties of R1 company at a throw away price for recovering their dues, thereby R1 company would lose its prime property,

resultantly an irreparable loss is likely to be caused to the company and the company would face liquidation. It has also been alleged that the main decision-maker i.e. R2 in the C.A. is in the middle-east, encouraging R3, R4 and R5 and his son R6 to swindle whatever income R1 company is generating from the said holiday resort, thereby lakhs of rupees are being pocketed by R2 to R6 in the form of cash, though as per record it is shown as loss.

4. The real intention shown by the Applicants/petitioners in the C.A. is that they are ready and willing to pump in funds in R1 company to settle the entire dues to R7 bank in the paramount interest of the company and its stake holders so as to save the valuable property and business of Five Star Resort i.e. "Elephant Court" in right earnest. In order to show their *bona fide,* R2 has already deposited a sum of Rs.11 crores as Fixed Deposit in the State Bank of Travancore, Thrissur NRI Branch, Kerala which is equivalent to more than 50 per cent of the dues payable to R7 bank. It has further been contended that the Applicant and/or their nominees would pump in further funds once R7 bank agrees to 'out of court settlement' provided this Bench grants permission to the applicants to invest the funds as share capital in R1 company. It is also prayed that R7 bank be given a direction to open "No lien Account" in the name of the company so that the investments from the applicants and their nominees could be deposited till it is duly appropriated against the dues of the bank with further direction that the said account would be jointly operated by the Applicant No.1 and R7 bank and not by R2 to R6. The Applicants/Petitioners also prayed for appointment of an Advocate Commissioner to go through the statutory records of the company and to submit a report thereon to the Bench w.e.f. March 2011 till date. For the sake of brevity, we do not feel it necessary to record other factual aspects.

5. We have heard both of the counsels. The counsel for Applicants/Petitioners submitted that this Tribunal has got ample powers u/s 242 (4) of the Companies Act, 2013 to regulate the conduct of the company's affairs upon such terms and

conditions as appeared to it to be just and equitable by passing any interim order on the applicant of any party to the proceedings. It has further been urged that under Rule 11 of the NCLT Rules, 2016, this Tribunal has inherent powers to pass such orders as may be necessary for meeting the ends of justice.

6. The counsel for R1 and R2 has strongly objected to the proposals contained in the C.A. The first issue that has been raised is that the amount of loan outstanding against R1 company in dispute. Therefore, there is no question of infusing funds by the applicants/petitioners. The Applicants/petitioners have, in their reply, stated that if any part of the amount outstanding against R1 company is disputed, the same can be paid under protest till the claim is settled either mutually or under legal proceedings. Therefore, there is no force in the submission of the counsel for R2. The second issue raised by counsel for R2 is that the C.A. that has been filed by the Applicants/petitioners is not maintainable because the Power of Attorney holder is not eligible to file the C.A. The applicants/petitioners have submitted that this issue would be taken up in the main petition and the C.A. is only for the purpose of protecting the interest of the company. We are persuaded by the submissions of the Applicants/petitioners. So we may deal with this issue in the main company petition in detail. The 3rd issue raised by the counsel for R2 is that the prayer made in the C.A. is a part of the main petition and therefore, the same cannot be prayed in the C.A. In this respect, we do not see that there is any bar to file the C.A. to seek an appropriate order for regulating the affairs of R1 company, when it is faced with the issue of "Non performing Assets". The submission of the counsel for R2 is not tenable in the eye of the law. The fourth issue is about the order that was passed on 14.09.2015 by CLB, the operative part of which reads as follows :

> *"From the perusal of the petition, the petitioners apart from the interim relief seeking directions from this Bench, permitting the petitioners to infuse the funds, sought various other reliefs mostly pertaining to the year*

2011. Seeking interim relief regarding permitting the petitioners to infuse the funds is in my view cannot be granted by this Bench. The petitioners have to make out a prima facie case seeking interim reliefs. In my view the petitioners have not made out any case for grant of interim reliefs. Accordingly, the request made by the petitioners in this regard cannot be considered."

7. The perusal of the order stated above shows that the CLB was of the view that the permission for infusing of funds cannot be granted by the CLB. But it is not clear that for what reason the same has been recorded. It may be further added that perhaps for the reasons that the applicants at that point of time have not been in a position to make out a prima facie case for grant of interim reliefs. But at this stage, the circumstances are at different footings and if not taken care of, R1 company is likely to lose its prime assets i.e. "Elephant Court". The counsel for R2 further contended that the order dated 14.09.2015 operates as *res judicata* in relation to the C.A. On this issue, it has specifically been asked by the Bench that as to whether the very ingredients of the principle of *res judicata* are fulfilled in this case. But the counsel for R2 has not been able to satisfy this Bench on this query for the reasons that the issue for infusing funds has not been decided finally. So, the principle of *res judicata* is not applicable in the facts and circumstances of the case including the nature of the order passed by the then CLB. The fifth issue raised is that as to why the Applicants/Petitioners are willing to infuse funds at this stage which is not warranted in the facts and circumstances of the case. But we see it is farfetched arguments, if the prevailing circumstances are taken into consideration which go to show that if any appropriate action is not taken by R1 company through its shareholders, the valuable property of the company will be sold resulting in irreparable loss to the assets of R1 company. The last point taken by the counsel for R2 is that the notice dated 25.11.2016 is sent to the registered office of R1 company by the

Requestionists for conducting EGM which provides under Item-1 of the Agenda for infusing funds into the company and issuing of shares on preferential basis by way of private placements. Therefore, the counsel for R2 pleads that the Tribunal may be kind enough to wait for the outcome of the EGM proposed by the requestionists. In this connection, it may be stated that Section 100 of the Companies Act, 2013 lays down the procedures for calling and getting the EGM conducted but considering the non seriousness of the Respondents, the said EGM could not be successful without participation by the Respondents who are opposing the C.A. The C.A. itself contains a proposal for infusing the funds of R1 company for liquidation of the amount of loan taken from R7 bank. So, the item which is proposed for the EGM cannot see the light of the day for these reasons. However, it is pertinent to mention here that the reply filed by R2 clearly points out towards the allegation against Applicants/Petitioners for non-contribution of funds to R1 company. As can be seen from the pleadings, the Applicants/ Petitioners have in their main petition prayed for interim relief to infuse funds into R1 company to settle the dues to Federal Bank to protect the valuable property of the company but the same has been opposed by R2 throughout the proceedings. The conduct of R2 appears to be contrary to his contention that the Applicants/Petitioners did not contribute to R1 company. In other words, the very conduct of R2 to oppose the application of the Applicants/petitioners seeking a direction to infuse funds clearly appears to be against the interest of R1 company. Thus, in the given circumstances, there is an urgent need to pass an interim direction to regulate the conduct of the company's affairs upon suitable terms and conditions.

8. In the light of the above discussions, the settlement of legitimate dues of R7 bank and for the purpose of saving valuable assets of the company, C.A.1 of 2016 is allowed with the following directions :-

i) Applicants/Petitioners and their nominees are permitted to infuse funds in R1 company as share capital within a reasonable time, which shall duly be appropriated against the dues of R7 bank;

ii) R7 bank is directed to open "No lien Account" in the name of R1 company so that the deposits by the Applicants/Petitioners and their nominees could be made and appropriated against the dues of the bank;

iii) the "No lien Account" shall be jointly operated by Applicant No.1 and R7 bank and not by R2 to R6;

iv) If any part of dues to be paid to R7 bank is disputed, the same shall be paid to the bank under protest till the claim/dispute is settled either mutually or under legal proceedings, if any, initiated; and

v) R1 company is directed to issue shares on preferential basis by way of private placement in favour of Applicants/Petitioners and their nominees in consideration of infusing funds as share capital of R1 company.

9. The Applicants/Petitioners have also prayed for appointment of Advocate Commissioner but it is felt that an expert person can only carry out auditing of R1 company. Therefore, we appoint M/s.Sundaram and Srinivasan, Chartered Accountants to go through the statutory records of R1 company for conducting audit from 1st March 2011. The CA is directed to submit report to this Bench within a period of three months from the date the copy of this order is received. The CA is authorised to supervise the implementation of the above given directions in letter and spirit. The CA is permitted to fix his remuneration as per the practice in vogue and inform the Applicants/Petitioners, who shall pay the same. Accordingly, C.A.1 of 2016 is disposed of.

K.ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)

CH. MOHD SHARIEF TARIQ
MEMBER (JUDICIAL)