

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

I.A. Nos. 4291, 4221, 4340 of 2022

in

Company Appeal (AT) (Insolvency) No. 1323 of 2022

IN THE MATTER OF:

Ashok Kumar Tyagi,

S/o Sh. Ram Nath Tyagi,
R/o, c-193, Devendra Puri,
Modinagar, Ghaziabad,
UP - 201204

...Appellant

Versus

1. UCO Bank,

A body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and having its Head Office at 10, B.T.M. Sarani, Kolkata – 700001, West Bengal and the Flagship Corporate Branch at 2, India Exchange Place, Kolkata – 700001, West Bengal.

Email: calind@ucobank.co.in

...Respondents

2. Mr. Santanu Brahma,

Registration No.

IBBI/IPA-001/IP-P01482/2018-19/12251,

Being the Interim Resolution Professional of Darjeeling Organic Tea Estates Private Limited, Having his office at AH 276 , Salt Lake, Sector II, Kolkata – 700091, West Bengal.

Email: santanubhrahma@gmail.com

Present:

For Appellant: Mr. Arvind Kumar Gupta, Ms. Purti Gupta, Ms. Henna George, Ms. Shivani Sharma, Advocates.

For Respondent: Mr. Abhijeet Sinha, Mr. Nittin Bhatia, Advocates for Indian Bank.

Mr. Akash Agarwal, Advocate for IRP
CMA Sumit Devralia

J U D G E M E N T

Ashok Bhushan, J:

1. Company Appeal (AT) Ins. No. 1323 of 2022 has been filed by the Appellant-Suspended Director of the Corporate Debtor challenging the Order

dated 28/10/2022 passed by the National Company Law Tribunal, Kolkata Bench (Court-II), Kolkata (Adjudicating Authority). By which Order, Section 7 Application filed by the UCO Bank-Respondent has been admitted.

2. The Appeal was taken by this Tribunal initially on 04th November, 2022 when Interim Order was passed directing the Interim Resolution Professional (IRP in short) not to constitute the Committee of Creditors (CoC in short). Appeal was further taken on 07th November, 2022 on which date following order was *passed*:

“07.11.2022: This Appeal has been filed against impugned order passed by the Adjudicating Authority on 28.10.2022 allowing Section 7 application filed by the UCO Bank. This Appeal was taken up on 04.11.2022 on which date following order was passed:

“O R D E R

04.11.2022: A request has been made on behalf of learned counsel for the UCO Bank to take the matter on 07.11.2022. Learned counsel for the Appellant submits that there is urgency in the matter. However, to give opportunity to the Respondent Bank we adjourn this Appeal to 07.11.2022.

Till the next date the IRP may not constitute the COC.

Indian Bank is permitted to file Intervention Application.”

Learned counsel for the UCO Bank submits that OTS proposal has already been received and it is under

consideration and time of few weeks shall be required to consider the OTS proposal.

Learned counsel appearing for the Indian Bank submits that Indian Bank has already filed application for intervention which may also be permitted to be listed along with this Appeal. It is submitted that there is some defects in the Intervention Application. Defects may be cured by the applicant and I.A. may also be listed along with this Appeal on the next date.

List this Appeal on 10.01.2023.

In the meantime, impugned order shall remain stayed.”

3. I.A. No. 4291 of 2022 has been filed by the Appellant making following prayers:

“(a) all directions given in para 8.14 (a) to (j) of the impugned order dated October 28, 2022 passed by the Ld. Adjudicating Authority, Kolkata Bench in Company Petition (IB) No. 1382(KB) of 2020, stand stayed.

(b) the IRP shall not act further in the management and control of the Company and the Board of Directors will continue in the management and control of the company and run the affairs and the day to day activities of the Company.

(c) the Board of Directors and persons authorized by them are permitted to operate the Bank Accounts of the Company and remit the expenses/liabilities of the Company including salary payments, electricity dues and other expenses incurred for the running of the Company.

(d) the Board of Directors can manage continuous operations of the Company and take all appropriate decisions regarding the operations, contracts and activities of the Company including sale and purchase of its' products.

(e) Any other appropriate direction this Hon'ble Appellate Tribunal may be pleased to issue including the direction that the stay order dated 07.11.2022 means and implies that all directions given in para 8.4(a) to (j) of the impugned order dated October 28, 2022 passed by the Ld. Adjudicating Authority, Kolkata Bench in Company Petition (IB) No. 1382 (KB) of 2020, shall not operate till the final disposal of this Hon'ble Appellate Tribunal in the captioned appeal."

4. I.A. No. 4221 of 2022 has been filed by the Indian Bank praying to permit the Indian Bank to intervene in the Appeal.

5. I.A. No. 4340 of 2022 has been filed by the IRP-Respondent No. 2 seeking clarification with regard to the Order dated 07/11/2022. Following are the prayers made in I.A. No. 4340 of 2022:

"a) Order passed by this Hon'ble Tribunal on 07.11.2022 may clarify the role of the IRP, whether the applicant shall continue to act as IRP of the Corporate Debtor and shall take all steps to keep the Corporate Debtor as a going concern;

b) In the event this Hon'ble Appellate Tribunal directs the Applicant to maintain status quo and direct that the Corporate Debtor continues as a going concern, then necessary directions be passed on the applicant to facilitate raising of interim finance to the tune of INR 9 Crores in order to keep the operation of the Corporate Debtor as a going concern which shall

deem to comply with the provision of Section 28 of the IBC, 2016;

c) Pass any other order(s)/direction(s) as this Hon'ble Appellate Tribunal may deem fit in the interest of justice;"

6. We have heard the Learned Counsel for the parties.

7. Learned Counsel for the Appellant submits that in view of the Interim Order passed by this Tribunal on 07.11.2022, the IRP is not entitled to carry on any function qua the Corporate Debtor. It is submitted that the Corporate Debtor has been managing Tea Garden where large number of workers are working who have to be paid their wages weekly. Ration is also required to be paid to the workers apart from other necessary expenses like Electricity, Diesel, etc. After the Order dated 07.11.2022 staying the Corporate Insolvency Resolution Process (CIRP in short), it is submitted that no payments have been received by the workers causing a serious law and order problem. It is submitted that Appellant has already approached the UCO Bank for Settlement who is considering the prayer of the Appellant for Settlement. A strategic investor namely M/s. Lemon Grass Organic Tea Limited has entered into Agreement with Corporate Debtor to take over three Tea Gardens which are charged with the UCO Bank subject to entering into and funding the OTS. Learned Counsel submits that IRP has no role to play after the Interim Order dated 07.11.2022 has been passed and the Corporate Debtor is entitled to function and discharge all its obligation including payment of wages, etc.

8. Learned Counsel appearing for the Indian Bank submits that Corporate Debtor owes dues of more than Rs. 85 Crores and Corporate Debtor has also

mortgaged certain Tea Gardens to the Indian Bank and no Settlement can be permitted with the UCO Bank unless the dues of Indian Bank is also taken care of. Mr. Sinha submits that effect and consequence of the Interim Order dated 07.11.2022 is not that Corporate Debtor shall start functioning as it was functioning prior to admission of the CIRP. This Tribunal has stayed the Order impugned which means that no further action be taken in the CIRP. The Corporate Debtor is not entitled to be restored.

9. Learned Counsel for the Appellant opposing the submissions of Indian Bank contends that Indian Bank cannot interfere with the steps Appellant is taking for Settlement with UCO Bank. The Tea Gardens which are mortgaged to the Indian Bank are not being affected by any Settlement undertaken by the Appellant with the UCO Bank.

10. IRP in his application I.A. No. 4340 of 2022 has submitted that he has received the request for payment of wages and other expenses which are required to be urgently paid. It is submitted that Order dated 07.11.2022 does not ask for closure of the CIRP nor relieves the IRP. In the above context, the Applicant has prayed for clarification of the Order.

11. We have considered the submissions of Learned Counsel for the parties and have perused the record.

12. The Order passed on 07.11.2022 has already been noticed as extracted above. The moot question to be answered is the consequence and effect of the Order dated 07.11.2022. Whether by strength of the Order dated 07.11.2022, the Corporate Debtor is entitled to be restored and be permitted to function as it was functioning prior to 28.10.2022. The issue is no longer *res integra*.

Hon'ble Supreme Court has occasion to consider the effect and consequence of an Interim Order passed by a Court in "**Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association [1992 (3) SCC 1]**". In paragraph 10 of the Judgement, following has been laid down:

"10.....The appeal filed by the appellant-company under Section 25 of the Act against said order of the Board was dismissed by the Appellate Authority by order dated January 7, 1991. As a result thereof, no proceedings under the Act were pending either before the Board or before the Appellate Authority on February 21, 1991 when the Delhi High Court passed the interim order staying the operation of the Appellate Authority dated January 7, 1991. The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order result in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate

Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending.....”

13. The Judgement of the Hon’ble Supreme Court in “Shree Chamundi Mopeds Ltd.” has been consistently relied by Hon’ble Supreme Court in subsequent judgements. We may refer to Judgement of the Hon’ble Supreme Court in **(Civil Appeal No. 2417 of 2022) “State of U.P. through Secretary and Ors. Vs. Prem Chopra”**. In paragraph 18 of the Judgement, following has been stated:

*“(18) When the interim order was in force, the recovery of license fee was temporarily suspended. The restraint was only against the Department not to recover the license fee. There was no prohibition for the respondent to deposit the balance of license fee. It is to be stated here that the High Court has not quashed the demand of license fee made by the appellants. There is a difference between stay of operation of an order and quashing of an order which has been explained by this Court in **Shree Chamundi Mopeds Ltd. V. Church of South India Trust Association CSI CINOD Secretariat, Madras** as under:*

“While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.”

14. Learned Counsel for the Appellant has referred to and relied on the Judgement of **“B.P.T Ltd. & Ors. Vs. R. Sudhakar & Ors.” [2004 7 SCC 2019]**. In the above case, one of the questions which was framed by the Supreme Court was “what is the effect of the order passed by Delhi High Court dated 21.02.1991 staying the operation of the order dated 07.01.1991 passed by the Appellate Authority? Does it mean that after the passing of the said order by the High Court, the proceedings under the Act should be treated as pending and, if so, before which authority?”

15. The Hon’ble Supreme Court referred to “Shree Chamundi Mopeds Ltd.” and laid down following in paragraph 13 of “B.P.T Ltd. Ors.”

“13. In the case on hand the situation is entirely different. The Tribunal gets jurisdiction only on reference made by the Government. When the operation of the very order of reference was stayed the question of dispute pending before the Tribunal did not arise inasmuch as the reference order itself stood

suspended. So long as stay order was operating it could not be said that the dispute was pending before the Tribunal. Admittedly, when workmen were dismissed from service stay order was operating. Learned single Judge as well as the Division Bench of the High Court have proceeded on wrong footing relying upon the decision of this Court in Shri Chamundi Mopeds Ltd. (supra), that the order of reference was not wiped out by virtue of staying of the operation of order of reference. It is not the question as to whether the order of reference is wiped out but the question is what is the effect of the staying of the operation of order of reference itself. Once the operation of order of reference is stayed there is no question of dispute pending before the Tribunal so long as the said order remains in operation because reference precedes dispute. To put it differently, dispute could come up for adjudication by the Tribunal pursuant to the order of reference only. If in a pending proceeding operation of order is stayed pending disposal of the main matter such as an appeal or revision, obviously the impugned order does not get quashed or wiped out. It only remains suspended. But the position is different in this case, as already stated above. It was not a case where the dispute was pending and only further proceedings were stayed. When the order of reference itself was stayed the Tribunal did not have the jurisdiction to pass any further order. As such the question of either management making an application under the proviso to [Section 33\(2\)\(b\)](#) or the Tribunal passing an order of such application would not arise. In case any tribunal

proceeds to pass an order in spite of stay of the operation of the order of reference by the High Court it may amount to contempt of the order of the High Court. In case of some grave misconduct the management cannot afford to sit idle or simply wait to take action, particularly, when stay of the operation of the order of reference is obtained at the instance of union on behalf of the workmen, The case of Shri Chamundi Mopeds Ltd. is quite distinguishable and it is on the facts of that case. Even in that case it is stated that the order of stay did not amount to revival of appeal or proceeding.”

16. In paragraph 18, the Hon’ble Supreme Court again held that distinction has to be drawn between the stay of an order and quashing of an order. In the facts of the above case, there was interim order passed by the High Court staying the order making a reference under the Industrial Dispute Act, 1947 at the instance of workers. Question was as to whether in view of the stay of the reference order whether the proceedings shall be treated to be pending before the Industrial Tribunal. Hon’ble Supreme Court held that since the reference order itself was stayed, proceedings was not pending before any Tribunal since reference order was pre condition for initiating any proceeding before the Tribunal. No dispute was pending before the Tribunal since reference precedes dispute.

17. The ratio of the Judgment of this Tribunal in “B.P.L. Ltd. & Ors.” (Supra) is the same as was laid down in the Judgement of Hon’ble Supreme Court “Shree Chamundi Mopeds Ltd.” (supra) which has been followed by the Hon’ble Supreme Court. The above judgement in no manner helps the

Appellant in the present case since present is a case where Order of Admission of CIRP under Section 7 has been stayed by this Tribunal. Proceeding under Section 7 were initiated before the Adjudicating Authority in which final order was passed. Factual matrix of the present case is clearly different from those which was considered in “B.P.L. Ltd. & Ors” (supra).

18. The difference between stay of an Order and quashing of any Order are well settled as noticed above. In event on the stay of the admission of Section 7 Application, the Corporate Debtor is allowed to function and position as was existing prior to 28.10.2022 is restored, there shall be no difference in staying an Order and quashing of an Order. What the Appellants are asking/praying is restoration of the position as was prior to admission of Section 7 Application. We can not accept such request made by the Appellant. The Admission Order of Section 7 Application has only been stayed and not quashed thus the Corporate Debtor can not be permitted to function as it was functioning prior to 28.10.2022.

19. However, in view of the stay of the Order dated 28.10.2022, the IRP can not carry on any functions since the IRP was appointed by the same order and by stay of the Order, no further action can be taken by the IRP in pursuance of the Order dated 28.10.2022. The Order dated 28.10.2022 has become inoperative in view of the Interim Order of this Tribunal dated 07.11.2022. Hence the Appellant is right in his submission that IRP can not discharge any function after the Impugned Order dated 07.11.2022.

20. The question which needs to be considered in this Application is that how the day-to-day functioning of the Tea Gardens may be carried on when

IRP is not entitled to discharge any function and the Corporate Debtor also cannot be restored as it was functioning prior to 28.10.2022. There are wages to be paid to the workers, Ration is also to be distributed by the Company to its workers, there are electricity dues and some other necessary expenses. The workers of the Corporate Debtor and its functioning can not be made to suffer in the facts of the present case. We thus are of the view that for the purposes of payment of wages to the workers and distribution of ration, payment of electricity dues and other necessary expenses, ways and means have to be found out so that Corporate Debtor may continue as a going concern. In the facts of the present case, we are of the view that difficulties in running the corporate debtor as a going concern, can be mitigated by issuing following directions:

- I. The Chief Executive Officer (CEO)/Officers of the Corporate Debtor authorized to operate the Bank Accounts are permitted to make payment of wages of workers, workmen and employees as was being paid earlier to passing of the order dated 28.10.2022. The payment of Electricity Dues and other necessary expenses may also be carried out by the officials as mentioned above subject to submitting all details of expenditure on weekly basis to the IRP as well as to the Suspended Managing Director of the Corporate Debtor.
- II. That for making any other payment it is always open for the Appellant to file an appropriate application for seeking leave of this Court.

- III. The Settlement, if any, by the Suspended Directors of the Corporate Debtor with UCO Bank shall require leave of this Tribunal.
- IV. I.A. No. 4221 of 2022 is allowed. Indian Bank is permitted to intervene in the matter. I.A. No. 4291 of 2022 and I.A. No. 4340 of 2022 are disposed of, as above.

The order being pronounced today, the same be not listed on 23.11.2022 as earlier ordered. List the Appeal on date fixed i.e. 10.01.2023.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Mr. Barun Mitra]
Member (Technical)**

**21st November, 2022
New Delhi**

Basant