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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 06.04.2022

+ ARB.P. 295/2021

TATA CAPITAL FINANCIAL SERVICES LIMITED Petitioner

versus

NAVEEN KACHRU PROPRIETER OF M/S
SOUTH DELHI MOTORCYCLE & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Saryasachi Sahai and Mr. Kushagra Aman, Advocates.

For the Respondent: Mr. Ritesh K.Chowdhary, Advocate.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

I.A. 12308/2021

1. The Supreme Court by its orders 23.03.2020, 27.04.2021 and 10.01.2022 in Suo Motu Writ Petition (Civil) No.3 of 2020 has suspended the period of limitation in view of the ongoing pandemic. Accordingly, there is no delay in filing the application.

2. The application is disposed of.

I.A. 12306/2021

3. Learned counsel for the respondent/applicant submits that he

has filed the rejoinder, however, the same is not on record. A copy of the rejoinder has been handed over in the Court today. The same is taken on record. The Registry is directed to place the rejoinder on record.

4. Respondent/applicant by this application Under Order 9 rule 13 C.P.C., seeks setting aside of order dated 07.05.2021 whereby an arbitral tribunal constituted by a sole arbitrator was appointed to adjudicate the disputes between the parties.

5. Applicant contends that the order is ex parte and the applicant could not appear before the Court on 07.05.2021. It is contended that both the respondent as well as the counsel were under the impression that only urgent matters were being taken up as the COVID-19 situation was at its worst in the last week of April and first week of May, 2021.

6. It is further contended that the respondent has already applied for being declared as an insolvent under the Provincial Insolvency Act, 1920 and the insolvency proceedings are pending.

7. By order dated 21.09.2021 when the application under Order 9 Rule 13 CPC was listed before the Court, the predecessor of this Court had directed the arbitrator not to proceed further during the pendency of the subject application.

8. This petition was filed during the period of lockdown in 2021 and notice was issued for 19.03.2021. Counsel for the respondent had

appeared on 19.03.2021 and 06.04.2021, however absented on 07.05.2021.

9. The fact that this petition was listed during the lockdown period and respondent had been appearing shows that the plea raised by the respondent for not appearing on 07.05.2021 that he was under an impression that only urgent matter were being taken up, is not sustainable.

10. Learned counsel for the respondent submits that in the last week of April, 2021 respondent along with his family were tested positive and as such he could not appear on 07.05.2021.

11. In view of the above plea that the applicant was tested covid positive and as such could not appear, it was deemed expedient to examine the defense of the respondent on merits to the application for appointment of an arbitral tribunal.

12. In support of the said plea learned counsel for the respondent submits that respondent has already initiated proceedings for being declared as an insolvent under the Provincial Insolvency Act, 1920 (hereinafter referred to as the Insolvency Act).

13. He submits that an order of admission has been passed on 01.11.2019 and as such the proceedings before the arbitral tribunal cannot continue.

14. He further submits that under Sections 4 & 5 of the Insolvency Act, petitioner could have approached the concerned Insolvency Court

for appropriate orders for continuance of proceedings. He relies on the decision of the High Court of Judicature at Madras in *Ramalingam vs. Radha & Ors* to contend that even before final adjudication insolvency Court has inherent powers to pass interim orders.

15. Further reliance is placed on the judgment of the Supreme Court in *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Others* (2011) 5 SCC 532 to contend that the proceedings of insolvency and winding up matters are beyond the adjudicatory power of an arbitral tribunal.

16. Further it is contended that the proceedings would be hit by Section 10 CPC as the insolvency petition filed by the respondent before the Insolvency Court is a prior petition in point of time.

17. Learned counsel further submits that respondent does not dispute the liability to the petitioner however, contends that respondent does not have any money to pay the amount and is insolvent.

18. Learned counsel for the petitioner disputes that respondent does not have the funds to pay. He submits that respondent has initiated the proceedings before the Insolvency Court only to try and defeat the rights of the petitioner to recover his money.

19. While considering the application seeking recall of the order appointing the Arbitrator, this Court has also examined the defense of the respondent on merits, to consider as to whether this would be an

appropriate case in which the order appointing an arbitral tribunal should be recalled even if assuming respondent was prevented by way of a sufficient cause from appearing before this Court.

20. In respect of the plea of the respondent that he has filed a petition under the Insolvency Act is concerned and as such the Arbitral Tribunal cannot proceed, Section 29 of the Insolvency Act may be considered.

21. Section 29 stipulates that any Court in which a suit or proceeding is pending against a debtor, on proof of an order of adjudication having been made against the debtor, shall either stay the proceedings, or allow it to continue on such terms as such the Court may impose.

22. It is an admitted position that as of now only an order admitting the petition has been passed and there is no order of adjudication against the respondent.

23. First of all, Section 29 empowers the Court, where a suit is pending against a debtor, to stay the proceedings or continue the proceedings on such term as the Court may decide. There isn't an absolute prohibition on said Court in proceeding with the suit against the debtor.

24. Furthermore, the embargo of Section 29 comes into play only after an order of adjudication has been made. The procedure prescribed under Section 23 of the said Act clearly establishes that

there is a difference between an order admitting a petition and an order of adjudication. For the reason that there are steps provided between an order of admission and an order of adjudication to be undertaken by the debtor before the Insolvency Court.

25. Clearly, in the present case said embargo does not apply. Further the fact that the Insolvency Court has powers to pass an order under Sections 4 & 5 is again of no consequence for the reason that there is no application filed by the borrower under Section 4 & 5 of the Act to seek stay of any proceedings against the borrower. Thus the judgment of the High Court of Madras in *Ramalingam (Supra)* has no applicability to the facts and circumstances of the present case.

26. Further the reliance placed by learned counsel for the respondent on the Judgment of the Supreme Court in *Booz Allen (Supra)* also does not also forward the case of the respondent for the reason that the Supreme Court has held that non arbitrable disputes are *inter alia* disputes pertaining to insolvency and winding up.

27. Petitioner is not seeking reference of the insolvency proceedings to the arbitral tribunal but, his claim for recovery of money. This is a pure and simple contractual dispute which can certainly be referred to the arbitral tribunal.

28. Further, submission of learned counsel for the respondent that Section 10 CPC lays an embargo in proceeding with the arbitral proceedings because of the pendency of the insolvency proceedings is again not sustainable for the reason that Section 10 CPC comes into

play only in a case where the proceedings are between the same parties and the matter in issue is directly and substantially in issue in the previously instituted suit.

29. The petition filed by the respondent before the Insolvency Court is not a *lis* between the respondent and the petitioner but it is a *lis in rem*. Even though debt of the petitioner may have been mentioned in the said proceedings it does not become a *lis* between the respondent and the petitioner and the issues involved in the insolvency proceedings and the issue involved in the present proceedings are completely different and as such the embargo of Section 10 CPC also does not apply.

30. Further, submission of learned counsel for the respondent that he admits the debt of the petitioner but does not have the money to pay which is disputed by learned counsel for the petitioner gives rise to an arbitrable dispute which requires reference to an arbitral tribunal.

31. Even if this Court were to form an opinion in favour of the respondent that he was prevented from sufficient cause from appearing on 07.05.2021 when this petition was disposed of and the arbitral tribunal was constituted, this Court does not find any justification to recall the order for the sole reason that the respondent has been unable to show any defense to the petition seeking appointment of an arbitral tribunal and it would be a futile exercise to set aside the order dated 07.05.2021 and then dismiss the objections of the Respondent and again appoint an Arbitrator.

32. In view of the above, the application under Order 9 Rule 13 is accordingly dismissed. Interim order dated 21.09.2021 requesting the arbitral tribunal not to proceed further with the arbitral proceedings is vacated.

SANJEEV SACHDEVA, J.

APRIL 06, 2022

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