

Apogee Manufacturing Pvt. Ltd vs Akme Projects Limited & Ors on 14 September, 2021

Author: Sanjeev Narula

Bench: Sanjeev Narula

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P.(I) (COMM.) 467/2016
APOGEE MANUFACTURING PVT. LTD. Petitioner
Through: Mr. Darpan Wadhwa, Senior
Advocate with Mr. Anirudh Wadhwa,
Mr. Keshav Madhav Gulati, Ms.
Neelakshi Bhadauria, Mr. Amer Vaid
and Mr. Abhishek Kumar, Advocates.
versus
AKME PROJECTS LIMITED & ORS. Respondents
Through: Mr. Arjun Syal, Advocate for
Respondent No. 2.
CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA
ORDER

% 14.09.2021
[VIA VIDEO CONFERENCING]

I.A. 11192/2021 (application on behalf of Respondent No.2/Applicant under Section 151 CPC r/w Section 9 of the Arbitration and Conciliation Act, 1996 for modification of the order dated 27.02.2017 allowing the Respondent/Applicant to furnish bank guarantee as a security against the purported claim of the Petitioner) Factual Background

1. By way of the above captioned petition, the Petitioner at the pre-arbitration stage, approached this Court under Section 9 of the Arbitration and Conciliation Act (in short 'the Act') seeking interim measures of protection against the Respondents on account of disputes arising between the parties in relation to-

(a) Loan Agreement dated 28th October, 2013, whereunder Petitioner the lender, extended loan/ finance facility of an amount of Rs. 2 crores to Respondent No. 1 and Respondent No. 2 stood as guarantor.

(b) Side Letter Agreement dated 28th October, 2013 whereby the Respondents agreed to transfer the three flats (in 'AKME Raaga') detailed in para 16 of the petition, to the Petitioner in case of a default in repaying the loan amount by the stipulated date.

(c) Deed of Personal Guarantee dated 28th October, 2013 whereby Respondent No. 2 agreed to stand as a personal guarantor to the loan availed by Respondent No. 1.

(d) Addendum Agreement dated 29th October, 2013 whereby the Respondents agreed to repay the entire loan amount alongwith an additional interest of 13% per annum over and above the interest of 12% per annum agreed upon in the Loan Agreement.

The Petitioner also contended that Respondent No. 2 informed them about the property being 12C, Friends Colony (West), New Delhi-110065 (in short 'suit property') owned by Joint Investment Pvt. Ltd. ('JIPL') and that the said property could be sold in order to make good the amount due to the Petitioner.

2. Petitioner averred that neither could the loan amount be recovered, nor can the Petitioner invoke the collateral provided by the Respondents i.e., the three flats mentioned above as they were already encumbered. As on 25th November, 2016, an amount of Rs. 3,79,58,399/- was alleged to be outstanding and due from the Respondents.

3. The Petitioner sought several reliefs from this Court including an interim order restraining Respondent No. 2 from subletting, assigning, parting with possession or creating third-party interests in respect of the suit property.

4. Vide order dated 6th December, 2016, the Court while issuing notice, restrained the Respondents from selling, transferring, encumbering or in any manner alienating any of their immovable assets. Further, Respondents were also restrained from dealing with their movable assets except in the normal course of business.

5. Subsequently, on 27th February, 2017, taking note of averments made in para 43 of the petition, whereby Petitioner's claim was quantified at Rs. 3,79,58,399/-, the Court observed that the Petitioner was not entitled to a blanket order in respect of entire properties of the Respondents on account of its claim, which was only a fraction of the value of the property in question. Accordingly, Court modified the order dated 6th December, 2016 and restrained the Respondent from subletting, assigning, encumbering or in any manner alienating, parting with possession in favour of a third party or creating any third-party interests in the suit property except on making a deposit of the sum of Rs. 3,79,58,399/- with the Registrar General of this Court. It was also clarified that in case the Respondent was desirous of selling/transferring/encumbering/alienating the aforesaid property, they may do so subject to depositing the aforesaid sum with the Registry of this Court.

6. Then while disposing of the petition, liberty was granted to parties to approach the Arbitral Tribunal ('AT') for vacation of the above order making it clear that the AT would not be precluded from passing any order, either varying or vacating the same. The relevant portion of the order dated 27th February, 2017 reads as under:

"3. The learned counsel for the respondent has drawn the attention of this Court court to paragraph 43 of the petition which indicates that the petitioner has quantified its claim at Rs.3,79,58,399/-. He has also drawn the attention of this Court to paragraph 77 of the petition wherein the petitioner has claimed that the aforesaid property is valued at more than Rs. 36 crores at the prevailing circle rates.

4. In the circumstances, the petitioner is not entitled to any blanket order in respect of the entire property on account of its claims, which admittedly are only a fraction of the value of the property in question.

5. Accordingly, order dated 06.12.2016 is modified and the respondent is restrained from subletting, assigning, encumbering or in any manner alienating, parting with possession in favour of a third party or creating any third party interests in the premises situated at 12C, Friends Colony (west). New Delhi-110065 except on making a deposit of the sum of Rs.3,79,58,399/ with the Registrar General of this Court. In the event, the respondents are desirous of selling/transferring/encumbering/alienating the aforesaid property, they may do so subject to depositing the aforesaid sum with the Registry of this court.

6. The parties would be at liberty to approach the arbitral tribunal for variation or vacation of the above order. It is clarified that the arbitral tribunal, as and when constituted, is not precluded from passing any order either varying or vacating this order. Any other sum deposited by the respondent in compliance with this order, with the Registry of this court, shall also abide by the orders that maybe passed by the Tribunal."

7. Subsequent to the aforesaid order, the arbitration proceedings commenced, wherein the Petitioner has filed its statement of claim claiming refund of amounts due under the Agreements, quantified at Rs. 9,06,59,317/-. Besides other reliefs have been sought towards costs and interest. The said proceedings are currently pending.

8. There are also insolvency proceedings pending before the NCLT qua Respondents and moratoriums are in effect.

9. Now, Respondent No. 2 has filed the instant application, seeking modification of the order dated 27th February, 2017. He seeks to secure the amount in dispute in arbitration by offering a bank guarantee and lifting of the restraint on the suit property. The application seeks the following relief:

"a. Allow the present Application and thereby allow the Respondent No. 2 or (any other person acting through or on behalf of the Respondent No. 2) to furnish a Bank Guarantee for a sum of Rs. 3,79,58,399/- or any other reasonable amount from a nationalized bank as a security against the purported claim of the Petitioner and thereby remove the restraint imposed on the Respondents by way of the aforesaid order from selling/transferring/encumbering/alienating the Property"

Petitioner's Contentions

10. Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Counsel strongly resist the instant application and made the following submissions:

10.1 The Respondent No. 2 cannot be allowed to seek modification of the order of this Court dated 27th February, 2017 by submitting a bank guarantee of Rs. 3.79 crores. The order dated 27th February, 2017 in the captioned matter was prior to the constitution of the AT. The claim of the Petitioner before the AT exceeded Rs. 9 Crores, and the claim before the Resolution Professional ('RP') was verified and admitted for Rs. 11,53,42,124/- (11.53 Crore). This order has attained finality and has not been challenged.

10.2 In view of the insolvency proceedings pending against the Respondents, NCLT Delhi has jurisdiction to entertain or dispose of the reliefs prayed for.

10.3. On account of the Corporate Insolvency Resolution Process pending against Respondent No. 1 and the individual insolvency proceedings pending against Respondent No. 2, two moratoriums, NCLT Delhi, in terms of Section 60(5) of Insolvency and Bankruptcy Code, 2016 ('IBC') and Section 179(2) r/w Section 60(4), has the jurisdiction to entertain or dispose of the instant application.

10.4. The present proceedings before this Court stand stayed in terms of Sections 14 and 96 of the IBC r/w Sections 63, 181, 231 and 238 of the IBC. 10.5. On account of the Corporate Insolvency Resolution Process pending against Respondent No. 1 and the individual insolvency proceedings pending against Respondent No. 2, two moratoriums, i.e. (i) under Section 14 of IBC and (ii) Section 96 of IBC.

10.6. Further, since the NCLT, Delhi has jurisdiction to entertain the reliefs sought for in the instant application, the jurisdiction of all Civil Courts, including this Court, stands ousted by virtue of Sections 63, 180, 231 and 238 of the IBC [Reliance is placed upon : Embassy Property Developments Private Ltd. v. State of Karnataka & Ors., (2020) 13 SCC 308 (Para 30-35); Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan, (2018) 16 SCC 94 (Para 4-5); SBI v V. Ramakrishnan (2018) 17 SCC 294 (Para 26); Morgan Securities & Credits Pvt Ltd v VIL FAO(OS) 96/2019 (para 10-11); Hero Exports v Tiffins Barytes, 2019 SCC OnLine Del 8853 (Para 11-14)] Respondent No. 2's contentions

11. Mr. Arjun Syal, counsel for Respondent No. 2/Applicant has made the following submissions:

11.1 The reason for approaching this Court is that the AT has become defunct in view of the fact that the Claimant/ Petitioner has not paid the arbitral fee and email to that effect has been sent by the AT. Therefore, the AT has become functus officio in terms of Section 38 of the Act. 11.2 The moratorium under Section 14 of the IBC is only for Respondent No. 1 and not Respondent No. 2.

11.3. The interim moratorium under Section 96 of IBC is only with respect to the proceedings against the personal guarantor initiated by the creditors and not on the assets of the personal guarantor.

11.4. There is no moratorium under Section 101 of the IBC as Section 95 application has not been admitted yet. The matter before the NCLT is pending at the stage of Section 100 of IBC to be admitted or rejected by NCLT.

11.5. Even otherwise, the Respondent No. 1 has no stake in the suit property. The same is owned by JIPL in which the Respondent No. 2 has majority share.

11.6. The opposition to the instant application reeks of malafides as Respondent No. 2 is ready and willing to secure the claimed amount before the NCLT i.e., Rs. 11,53,42,124/- by way of bank guarantee before this Court.

Analysis and findings

12. The Court has considered the objections of the Petitioners and does not see any bar in entertaining the present application. The Court while disposing of the petition on 27th February, 2017 had categorically given a two-fold liberty to the Respondents. First, the order itself made clear that, should the Respondents desire to sell or transfer the property, they could do so by depositing the amount in question with the Registry of this Court i.e., 3,79,58,399/-. Further, the Court also give liberty to the Respondents to seek modification of the order in case the situation so required. Now, since the AT is stated to be defunct, the only remedy available with the applicant is to approach this Court. Besides, in view of the liberty granted, Court does not see any legal impediment in entertaining the present petition.

13. The plea of pendency of corporate insolvency resolution process qua Respondent No. 1 and individual insolvency proceedings against Respondent No. 2, operating as a bar to entertain the present application, is devoid of merit. By modifying the order dated 27th February, 2017, the Court is not passing any order that would dilute any of the assets of Respondent No. 1 or 2. In fact, the suit property belongs to JIPL, against which there is no pending resolution process before the NCLT. Respondent No. 1 has no stake in JIPL. Thus, the judgments relied upon by the Petitioner regarding the exclusive jurisdiction of NCLT are irrelevant and not applicable.

14. Respondent No. 2 is a majority shareholder in JIPL- the owner of the suit property. This shareholding of Respondent No. 2, as of date is also not under any embargo or restraint. Qua Respondent No. 2, the guarantor, as of now, only interim moratorium under Section 96 is operating. Under the said provision, there is a stay on any legal action or proceeding pending in respect of any debt and there is an embargo for the creditors of the debtor to initiate any legal action or proceedings in respect of any debt. There is no interim moratorium against the assets of

Respondents No. 2, the personal guarantor. Respondent No. 2 has informed that the application under Section 95 of IBC is yet to be admitted. The moratorium contemplated under Section 101 of the IBC that specifically provides for restraint on transfer, encumbrance, alienation or disposal of any of his assets has not triggered as yet.

15. The Court also does not find merit in the contention of the Petitioner that since the claim before RP was verified and admitted for Rs. 11,53,42,124/-, the order cannot be modified.

16. The Court is not in any way, passing an order that is at variance or inconsistent with the moratorium imposed qua Respondent No. 1 or 2. As observed above, the order of modification would not dilute the claim admitted before the RP. The contention is misconceived.

17. Significantly, this Court has passed an interim measure of protection qua the amount in dispute. The value of the asset under restraint is much more than the admitted claim of the Petitioner, as also noted in the order dated 27th February, 2017. Modification is being sought to enable the owner of the suit property to deal with its assets. In order to secure the amount in dispute in arbitration, Respondent No. 2 is willing to furnish a security in the nature of the bank guarantee. It is also pertinent to note that the original loan amount was Rs. 2 crores. The petition was filed to secure an amount of Rs.

3,79,58,399/-. Thereafter, the claim in arbitration exceeded Rs. 9 crores. Then, the claim before the RP is slated to have been admitted for Rs. 11,53,42,124/-. Nonetheless, counsel for Respondent No. 2 has very fairly stated that his client is willing to furnish a bank guarantee for the entire admitted claim amount of Rs. 11,53,42,124/-. This security would thus address all the concerns of the Petitioner. No prejudice will be caused to the Petitioner in case the order is modified.

18. Accordingly, the order dated 27th February, 2017 is modified and it is directed that subject to the Respondent furnishing a bank guarantee for an amount of Rs. 11,53,42,124/- in the name of Registrar General of this Court, the restraint qua the suit property being 12C, Friends Colony (West), New Delhi-110065 shall stand vacated.

19. As and when the bank guarantee is furnished, list this matter before the Registrar General for verification and satisfaction of the bank guarantee.

20. Needless to say, the bank guarantee furnished by Respondent shall abide by further orders to be passed by the appropriate forum.

21. The application stands disposed of in the above terms.

SANJEEV NARULA, J SEPTEMBER 14, 2021/ v