

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 509 of 2019
[arising out of Order dated 8th April, 2019 by NCLT, Mumbai Bench,
Mumbai in M.A. No. 1123/2018 in CP No.
172/IBC/NCLT/MB/MAH/2017]

IN THE MATTER OF:

State Bank of India

...Appellant

Versus

Anuj Bajpai (Liquidator)

...Respondent

Present:

For Appellant : Mr. P.V. Dinesh, Mr. Ashwini Kumar Singh, Mr. R.S. Lakshman and Ms. Sindhu T.P., Advocates

For Respondent : Mr. Rajendra Beniwal, Mr. Kumar Sumit, Mr. Shriram and Mr. Vishal, Advocates

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process’ of ‘Sanaa Syntex Private Limited’ (Corporate Debtor), the ‘Liquidator’ filed an application under Section 60(5)(c) of the ‘Insolvency and Bankruptcy Code, 2016’ (for short, ‘the **I&B Code**’) seeking necessary directions of the Adjudicating Authority’s decision of ‘Secured Financial Creditor’ - ‘State Bank of India’ to keep its mortgaged assets out of liquidation of the ‘Corporate Debtor’. The reliefs sought in the said application are as under:

- i. Directions to SBI that in case they want to opt out of liquidation, no contravention of Section 35(1)(f) takes place.

- ii. The Respondent Bank to give an undertaking to the liquidator that it shall not sell the mortgaged property to any person who is not eligible to be a Resolution Applicant, in case they realise their security interest on their own.
- iii. SBI to ensure all sums due to any workman or employee from the provident fund, pension fund and gratuity fund be paid first out of monies realised from selling mortgaged assets by SBI in terms of Section 36(4)(a)(iii), when SBI exercises its rights u/s 52 of the Code and such dues should not be made a part of the liquidation estate u/s 53.

2. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai by impugned order dated 8th April, 2019 disposed of the application while partly allowed by granting permission to the 'Secured Creditors' to opt out of the liquidation process but impose bar on the 'secured creditors' to sell the assets of the 'Corporate Debtor' to disqualified persons under Section 29A.

3. The State Bank of India – the 'Secured Creditor', who moved such application for opting out of Section 53 by filing an application under Section 52(1)(b) before the Liquidator, has challenged the impugned order. As according to it, there is no bar for 'secured creditor' to sell the assets to any person including the 'Promoters' and others who have ineligible in terms of Section 29A of the 'I&B Code' for filing the 'Resolution Plan'.

4. The question arises for consideration in this appeal is whether the Appellant, who is a 'Secured Financial Creditor', while opting out of liquidation process under Section 52(1)(b) of the 'I&B Code' is barred from

selling the secured assets to the ‘Promoters’ or its related party or the persons who are ineligible in terms of Section 29A of the I&B Code?

5. Learned counsel appearing on behalf of the Appellant submitted that once a secured creditor has opted out of the liquidation process under Section 52(1)(b) of the ‘I&B Code’ then such creditor is entitled to realize the security interest in terms of Section 52(4) of the ‘I&B Code’. Section 52(4) in turn states that a secured creditor may enforce, realize, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realized and to the secured creditor and apply the proceeds to recover the debts due to it, which reads as under:

“52. Secured creditor in liquidation proceedings.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.”

6. Learned counsel appearing on behalf of the Appellant while relying on the decision of the Hon’ble Supreme Court in ‘**Pegasus Assets Reconstruction Private Ltd. v. Haryana Concast Limited**’ – (2016) 4 SCC 47)’ and held that ‘SARFAESI Act’ leaves no manner of doubt that for

enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the court or tribunal but details procedure has also been prescribed to take care of various eventualities.’

7. It was submitted that in the cases of **‘S. C. Sekaran v. Amit Gupta & Ors.’** and **‘Y. Shivram Prasad v. S. Dhanapal & Ors.’** this Appellate Tribunal by its last judgment dated 27th February, 2019 left it open to the promoters to enter into a scheme of arrangement or compromise with the creditors. Therefore, according to the counsel for the Appellant the ‘Promoter’ is permitted even at the stage of liquidation to purchase the assets.

8. Learned counsel appearing on behalf of the ‘Liquidator’ submitted that in a situation if ‘Secured Creditor’ is allowed to sale the ‘Secured Assets’, after opting out of the liquidation process, to any person including a person who is disqualified under Section 29A of the ‘I&B Code’, then the entire purpose of Section 29A of the ‘I&B Code’ would get defeated. According to him, the objective of the restriction imposed upon the liquidator under the ‘Explanation given below to Section 35(1)(f) are in two-fold - (i) firstly, to ensure protection of public interest to keep the ‘not eligible person’ out of the process to ensure that the assets should not go back to the same management or defaulting parties, who have committed the default and (ii) secondly, to prevent the misuse and impose restriction in order to ensure that any cartel that may be formed by the defaulting parties hand in glove with the ‘Financial Creditor’, and if allowed will defeat the objective of the ‘I&B Code’ of maximization of value of stressed assets which has putting to ‘Liquidation’.

9. Section 35(1)(f), reads as under:

“35. Powers and duties of liquidator.- (1)

Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: –

(f) subject to section 52, to sell the immovable and moveable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant;”

From the plain reading of the said provision, it is clear that the ‘Liquidator’ cannot sell the assets of the ‘Corporate Debtor’ to the persons who are ineligible in terms of Section 29A of the ‘I&B Code’.

10. In **‘Jindal Steel & Power Limited vs. Arun Kumar Jagatramka & Anr.’** – ‘Company Appeal (AT) (Insolvency) No. 221 of 2018’ this Appellate Tribunal while noticed the decision of **‘S. C. Sekaran v. Amit Gupta & Ors.’** and **‘Y. Shivram Prasad v. S. Dhanapal & Ors.’** held that :

“12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the ‘Corporate Debtor’.

13. The National Company Law Tribunal by impugned order dated 15th May, 2018, though ordered to proceed under Section 230 to 232 of the Companies Act, failed to notice that such application was not maintainable at the instance of 1st Respondent-Arun Kumar Jagatramka (Promoter), who was ineligible under Section 29A to be a ‘Resolution Applicant’.

Therefore, it is clear that a Member, Shareholder/Promoter whoever is ineligible under Section 29A cannot take over the ‘Corporate Debtor’ by way of arrangement and scheme under Section 230-232 of the Companies Act.

11. Section 52(1)(b) of the ‘I&B Code’ empowers as secured creditor and liquidation proceedings to relates its security interest in the manner as prescribed in the said Section and sub-section (4) of Section 52 a secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it, which is as follows:

“52. Secured creditor in liquidation proceedings. – (1) A secured creditor in the liquidation proceedings may-

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.”

12. From sub-section (4) of Section 52, it is clear that secured creditor is entitled to enforce, realise, settle, compromise or deal with the secured assets ***in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.***

13. In terms of ‘I&B Code’ the secured assets and the interest of the secured creditor to recover the proceeds of debts due to it has not been specifically prescribed, it does not make that the procedure prescribed under the ‘SARFAESI Act, 2002’ will be applicable to secured creditor to sale the proceeds.

14. The object of the ‘I&B Code’ is to maximize the assets of the ‘Corporate Debtor’ and then to balance the stakeholders including maximization of the assets of the ‘Financial Creditor’ and other creditors including secured creditors. In **‘Arcelor Mittal India Private Limited vs. Satish Kumar Gupta & Ors. – (2019) 2 SCC 1’**, the Hon’ble Supreme Court while

interpreting Section 29A has reiterated that the person not eligible under Section 29A cannot be permitted to submit the 'Resolution Plan' if default still exists. The Hon'ble Supreme Court at para 34 therein observed that ***"it is thus clear that, where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil."*** The aforesaid principle is even applied to the group companies.

15. Even if Section 52(4) is silent relating to sale of secured assets to one or other persons, the Explanation below Section 35(1)(f) makes it clear that the assets cannot be sold who are ineligible under Section 29A,

16. If during the liquidation process assets cannot be sold to a person who is ineligible under Section 29A, the said provision only applicable to the 'Liquidator' but also to the 'secured creditor', who opt out of Section 53 to realise the claim in terms of Section 52(1)(b) read with Section 52(4) of the 'I&B Code'.

18. Section 52 does not create any right in favour of one or other 'secured creditor' to realise its security interest in the manner specified in the said Section where the 'secured creditor' realises security interest under clause (b) of Section 52 is required to inform the liquidator of such security interest and identify the assets subject to such security interest (Section 52(2) of the I&B Code). Before security interest is realised by the 'secured creditor' under Section 52, the 'Liquidator' is required to verify security interest and permit the secured creditor to realise only such security interest, the existence of

which may be proved either by the records of such security interest maintained by an information utility or by such other means as may be specified by the Board (See Section 52(3) of the I&B Code). If it comes to the notice of the 'Liquidator' that a secured creditor intends to sale the assets, the person who are ineligible person in terms of Section 29A, it is always open to reject the application under Section 52(1)(b) read with Section 52(2) and (3) of the 'I&B Code'.

17. In such case, after obtaining the conditional permission from the competent authority that the 'Liquidator' to sale the assets under Section 52, secured creditor cannot challenge the said condition as imposed by the 'Liquidator' as affirmed by the Adjudicating Authority.

We find no merit in this appeal. It is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Kanthi Narahari]
Member (Technical)

New Delhi

18th November, 2019

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