

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 1408 of 2019

In the matter of:

Rakesh Kumar Gupta
Director, M/S Gupta marriage halls Pvt. Ltd.
H. No.- C-7, Pushpanjali Enclave,
Pitampura, Delhi- 110034.

...Appellant

Vs.

1. Mahesh Bansal
Interim Resolution Professional
M/S Gupta Marriage Halls Pvt. Ltd.
SCF 24, 1st Floor,
Bhadaur House, Ludhiana- 1410008

...RespondentsNo. 1

2. Punjab National Bank
Having its Head Office at:
Plot No. 4, Sector- 10
New Delhi- 110075

AND

Having its Branch Officer at:
Assets Recovery Management Branch,
MayurVihar Phase- II,
Pocket 'E' CSC Delhi- 110091.

...Respondents No. 2

For Appellant: Mr. S.L. Gupta and Akanksha, Advocates.

For Respondent: Mr. Ashok Juneja, Mr. Akash Srivastav and Ms. Akshita Rishi, Advocates for R-1 (RP)
Mr. Shekhar Gupta, Mr. Mohd. Shahbaz, Mr. SibanandaBhanja and Mr. AtulRohilla, Advocates for R-2.

ORDER
(20.02.2020)

1. Heard learned Counsel for Appellant and the Respondents. The Appeal has been filed by the Appellant in view of admission of an Application under Section 7 of Insolvency and Bankruptcy Code 2016, (in short IBC) which was filled by the Respondent No. 2 Punjab National Bank (Financial Creditor) against Gupta Marriage Hall Private Limited (Corporate Debtor). The Application of the Financial Creditor was admitted by the Adjudicating Authority (NCLT, New Delhi Court No. III) in IB-979/ND/2019 on 3rd September, 2019. Thus, the present Appeal.

The learned Counsel for the Appellant referred to the Appeal. He is submitting that it is the case of the Appellant that the Corporate Debtor was not duly served with the Notice of Application under Section 7. The other ground raised is that, the Bank had already resorted to various proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and had also resorted to proceeding under recovery of debts due to Banks and Financial Institutions Act, 1993. The Counsel states that, as the Bank resorted to those remedies, the Bank could not have filed an Application under Section-7 of IBC and the Application should have been rejected.

2. The learned Counsel for the Appellant is relying on Judgement in the matter of **“Pegasus Assets Reconstruction Pvt. Ltd. Vs Haryana Concast Ltd. and Anr.”** reported in (2016) 4 Supreme Court Cases 47. The Counsel states that in that matter SARFAESI proceedings were resorted to and then parties resorted to proceedings under Company’s Act and Hon’ble Supreme Court observed:-

“30. Since we have held earlier in favour of views of the Delhi High Court, it is not necessary to burden this judgment with the case law which supports that view and have been noted by the High Court. We are in agreement with the submissions advanced on behalf of respondent Kotak Mahindra Bank as well as Respondent 2 that there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more into it. For the purpose it has been enacted, it is a complete code and the earlier judgments rendered in the context of the SFC Act or the RDB Act vis-à-vis Companies Act, cannot be held applicable on all fours to the SARFAESI Act. There is nothing lacking in the Act so as to borrow anything from the Companies Act till the stage the secured assets are sold by the secured creditors in accordance with the provisions in the SARFAESI Act and the Rules.”

Reference is then made to Paragraph 31:-

“31. The aforesaid view commends itself to us also because of the clear intention of Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court in tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Section 17 and 18 of the SARFAESI Act.”

3. The learned Counsel for Appellant submits that the securities held by the Bank were of value which was more than the claim which was said to be outstanding and this is clear from the Application under Section 7 which was filed. It is stated that because of this also the Application under Section 7 should not have been filed admitted.

4. The learned Counsel for Appellant states that the document at “Annexure-A-5”(Page 66) is Order dated 23rd April, 2019 which was passed by the Adjudicating Authority directing the Bank that notice should be issued to the Corporate Debtor through all modes to its registered address and should also be served on the Directors. Counsel states that that Bank did not serve all the Directors. The Counsel states that the “Corporate Debtor” was not duly served

as per directions of the Adjudicating Authority and thus principals of natural justice were violated.

5. The learned Counsel for the Respondent Bank submits that the Bank had made various efforts to serve the Corporate Debtor. Reference is made to “Annexure-A-6 (Colly) (Page 67), Annexure-A-7 (Colly) (Page78) and Annexure-A-8 (Colly) (Page 83) to demonstrate that the Bank took various efforts and steps to serve the Corporate Debtor. The Counsel pointed out that the Bank had even moved the Authorities of the Postal Department and they have reported (Page87) of notice being served on 1st May, 2019 and even given proof of the delivery at Registered Office of Corporate Debtor which is at Page 88.

6. The learned Counsel for the Respondent Bank is relying on Judgement of this Appellate Tribunal in the matter of **“Aditya Kumar Jajodia Vs. Srei Infrastructure Finance Ltd.and Ors.”**,Company Appeal (AT) (Insolvency) No. 292, 293 and 324 of 2017 dated 26th April, 2018, reported in MANU/NL/0079/2018, to submit that even if proceedings under SARFAESI had been moved or original Application was filed to DRT, that does not bar the Bank from resorting to Application under Section 7 of IBC. It is stated that in the present matter, the account became NPA on 28th October, 2016 and the Application under Section 7 of IBC, was filed on 23rd March, 2019. It is stated that when the account had become NPA the bank was bound to take action within time.

7. When the learned Counsel for the Appellant raised the question of want of notice of the Application under IBC we asked the Counsel to tell us whether the Appellant can show that the debt was not due or not payable or that it was not in default. To this, the submissions of the learned Counsel for the Appellant are still on the basis that as actions were taken by the Bank with regard to SARFAESI and the proceedings were pending in DRT at Lucknow and the Application should not have been admitted. The Adjudicating Authority has at Page 4 of the impugned order observed as under:-

“In relation to the Corporate Debtor, it is brought to the notice of this Tribunal from the record of the proceedings that service of notice sent to the Corporate Debtor in relation to the proceedings pending before this Tribunal, there is no appearance on the part of Corporate Debtor, Ltd. Counsel for the petitioner in this regard points out to the affidavit which has been filed from time to time in compliance to the directions of this Tribunal as ordered and upon service of notice upon the Corporate Debtor dated 14.05.2019, 18.07.2019 & 07.08.2019, perusal of the affidavit collectively discloses that the Corporate Debtor has been duly served as is evident from the correspondence exchanged as between the petitioner as well as the Post Master, Saraswati Vihar Post Officer, Delhi-110034, wherein it is evident that the Corporate Debtor has been served with the notice of the

proceedings and acknowledged by the Corporate Debtor and in spite of these facts, there is no appearance on part of Corporate Debtor deliberately and we are constrained to proceed with the matter in the absence of Corporate Debtor.”

The Adjudicating Authority held that service has been done and considering the documents pointed out to us, we also do not find any reason to doubt that service was done. The learned Counsel for the Appellant no doubt is insisting that the Directors also should have been separately served, but even if for a moment it is to be said that service was not correctly done, no case is pointed out to us justifying remand.

8. Judgment in the matter of “Pegasus Assets”(supra) was in the context of provisions of SARFAESI in relation to earlier Companies Act. Last part of Para 30 of the Judgment needs to be kept in view, which reads as under:-

“Thus, it is evident that the required provisions of the Companies Act have been incorporated in the SARFAESI Act for harmonising this Act with the Companies Act in respect of dues of workmen and their protection under Section 529-A of the Companies Act. In view of such exercise already done by the legislature, there is no plausible reason as to take recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the Company Judge or the liquidator.

As noted earlier, the Official Liquidator as a representative of the borrower company under winding up has to be associated, not for supplying any omission in the SARFAESI Act but because of express provisions therein as well as in the Rules. Hence, the exercise of harmonising that this Court had to undertake in the context of the SFC Act or the RDB Act is no longer warranted in respect of the SARFAESI Act vis-à-vis the Companies Act.”

Insolvency & Bankruptcy Code 2016 is subsequent Code to SARFAESI Act of 2002 & Recovery of Debts Due to Banks & Financial Institution Act, 1993 with provision of Moratorium under Section 14 and Section 238 giving the Provisions of the Code overriding effect on other laws. The Judgment relied on by learned Counsel for Appellant does not appear to support the argument of learned Counsel for Appellant that if Bank had resorted to SARFAESI or proceeding before D.R.T. it is barred from resorting to IBC.

9. The defence raised by the Appellant to the Section 7 application is answered in Para 3 and 4 of Judgment of this Tribunal in the matter of “Aditya Kumar” (supra) where it is observed as under:-

“ 3. Learned counsel appearing on behalf of the Appellant submitted that the ‘Financial Creditor’ has already taken steps under Section 19 of the ‘Recovery of Debts Due to Banks and Financial Institutions Act, 1933’ (DRT Act. Further, according to

him, action has been taken under Section 13 (4) of the ‘Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002’ (the SARFAESI Act). Therefore, according to the Appellant, proceedings under the aforesaid provisions having already initiated, the Application under Section 7 of the ‘I & B Code’ is not maintainable.

4. *However, the aforesaid submissions cannot be accepted in view of the decision of this Appellate Tribunal in “M/s. Unigreen Global Private Limited v. Punjab National Bank & Anr.” Company Appeal (AT) (Insolvency) No. 81 of 2017”, wherein this Appellate Tribunal by its judgment dated 1st December, 2017 held:*

“25. Similarly, if any action has been taken by a ‘Financial Creditor’ under Section 13 (4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against Corporate Debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or appeal pending before the DebtRecovery Appellate Tribunal cannot be a ground to reject an application under Section 10, if the application is complete.

26. Any proceeding under Section 13(4) of the SARFAESI Act, 2002 or suit under Section 19 of the DRT Act, 1993 pending before Debt Recovery Tribunal or appeal pending before Debt Recovery Appellate Tribunal cannot proceed in view of the order of moratorium as may be passed.

27. It is also desirable to refer to Section 238 of the I&B Code, as quoted below:

“238. Provisions of this Code to override other laws- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

In view of the aforesaid provision also, I & B Code shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force including DRT Act, 1993; SARFAESI Act, 2002; money suit etc.”

The pendency of actions under the SARFAESI Act or actions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filling an Application under Section 7 of Insolvency and Bankruptcy Code 2016, specially in view of Section 238 of IBC. The Application is more to bring about a Resolution of Corporate Debtor than any penal action or any recovery proceedings. We do not find any substance in the Appeal.

The Appeal is dismissed.No costs.

[Justice A.I.S Cheema]
Member (Judicial)

[Justice AnantBijay Singh]
Member (Judicial)

[KanthiNarahari]
Member (Technical)

sim/md