(2022) 03 NCLT CK 0046

In the National Company Law Tribunal

Case No : IA No. 47/2020 InCP (IB) No.312/Chd/Hry/2018

M/s Gupta Exim (India) Pvt. Ltd. APPELLANT

Vs

Small Industries Development Bank of India (SIDBI) RESPONDENT

Date of Decision : 17-03-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 14, 18, 21, 30(2), 30(2)(b), 30(4), 31(1), 32, 53, 53(1), 60(5), 61(3), 238
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(4), 13(6)
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Regulation 38
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2022) 03 NCLT CK 0046

Hon'ble Judges : Harnam Singh Thakur, Member J;Subrata Kumar Dash, Member, T

Bench : Division Bench

Advocate : Munisha Gandhi, Harsh Garg, Harsh Garg, Deepender Singh, Radhika Suri, Dharam Paul Garg, Munisha Gandhi, Harsh Garg, Pulkit Goyal, R.S. Bhatia

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

1. That the CIRP in the case in hand has been initiated by Oriental Bank of Commerce (Now Punjab National Bank) by filing an application under Section 7 of IBC, 2016. The aforesaid application was admitted by this Adjudicating Authority vide order dated 29.10.2019. The Resolution Professional constituted the Committee of Creditors (CoC) as per provision of Section 21 of the IBC, 2016 consisting of two financial creditors or corporate debtors i.e. Oriental Bank of Commerce (Now Punjab National Bank) and Small Industries Development Bank of India (SIDBI), holding 97.7% and 2.03% voting share in CoC respectively.

IA No.47/2020

The present application is filed under Section 60(5) of the IBC, 2016 read with Rule 11 of the NCLT Rules, 2016 for directions to Respondent (SIDBI) to hand over the possession of the assets belonging to the corporate debtor which had taken over by the respondent vide possession noticed dated 10.01.2017 issued u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002.

2. It is submitted by the applicant that amongst the other members of CoC, the respondent is one of the members, who had filed its claim with the applicant on 14.11.2019 for an amount of Rs.12,95,33,923/-. The corporate debtor while availing financial facilities from the respondent had mortgaged two landed properties. The respondent had issued a possession notice dated 10.01.2017 while taking physical possession of the said properties mortgaged with it belonging to the corporate debtor.

3. It is averred by the applicant that for taking control/possession of the same above-said properties, the applicant had written a request letter on 30.11.2019 to the respondent for cancellation of the possession notice dated 10.01.2017 and to hand over the possession of the same to the Applicant-IRP/RP in view of the provisions of the IBC, 2016.

4. It is alleged by the applicant that the respondent replied back to the applicant/RP vide letter dated 22.01.2020 and refused to hand over the possession on the ground that the moratorium under IBC does not affect the existing rights of the respondent but only has an effect on suspension/abeyance to take any action for enforcement of such rights and stated that the possession over the above-mentioned properties of the corporate debtor were taken by the respondent on 10.01.2017 i.e. prior to the commencement of CIRP.

5. It is contended by the applicant that though the respondent had taken possession of the properties under SARFAESI Act, 2002 prior to the admission order dated 29.10.2019, the title of the same still vests with the corporate debtor. Moreover, SARFAESI Act, 2002 being an existing law, Section 238 of IBC would prevail over any of the provisions of SARFAESI Act, if it is inconsistent with any of the provisions of the IBC, 2016. Therefore, the meaning of Section 18 of the IBC, 2016 would prevail over the provisions of the SARFAESI Act.

6. The applicant in its submissions filed vide Diary No.01879/3 dated 07.02.2022 relied on the judgment passed by Hon’ble NCLAT, New Delhi in Company Appeal (AT) (Ins.) No.736 of 2020 titled as Indian Overseas Bank Vs. M/s RCM Infrastructure Ltd. and another, whereby it has been held that in view of Section 238 of the IBC, 2016, the IBC has an overriding effect over the other laws and including the SARFAESI Act, 2002.

7. The respondent (SIDBI) stated in its written submission filed by Diary No.01879/2 dated 07.02.2022 that consequent upon default in repayment of the Terms Loans sanction/disbursed by SIDBI to M/s Gupta Exim (India) Pvt. Ltd. (Corporate Debtor) the loan accounts were declared as NPA on 09.04.2016.

8. It is submitted by the respondent that SIDBI vide demand notice dated 19.07.2016 under Section 13(2) of SARFAESI Act demanded an amount of Rs.9,92,34,617/- as on 19.07.2016 together with interest thereon till payment. The respondent has taken over actual possession of the mortgaged properties on 10.01.2017 under the provisions of Section 13(4) of SARFAESI Act.

9. It is further submitted that mortgaged properties are in possession of SIDBI and their title stands vested in the bank by virtue of Section 13(6) of SARFAESI Act for which it has relied on the decision of the Hon'ble Supreme Court in a case titled as M/s Transcore V/s Union of India & Another 2008(1) SCC 125.

10. It is averred by the respondent that the moratorium in the present case came into effect on 29.10.2021. The physical possession of the secured assets as envisaged under Section 13(4) of SARFAESI Act was taken on 27.12.2017 i.e. much before the commencement of the moratorium. Therefore, in the present case, the respondent-SIDBI has not violated any process envisaged during the moratorium under Section 14 of the IBC, 2016.

11. We have carefully perused the records available and the submissions made by the learned counsel for the applicant and respondent.

12. In the present case, the issue for consideration is whether the possession of the impugned property should be handed over to the Applicant/Interim Resolution Professional/Resolution Professional under the provisions of the IBC, 2016. It is a trite law that the IBC has an overriding effect over the other laws, including the SARFAESI Act, 2002. The law on this issue has been clearly laid down in the following extract from the decision from the Hon'ble NCLAT in the aforementioned case of Indian Overseas Bank Vs. M/s RCM Infrastructure Ltd. and another (supra) and relied upon by the applicant.

"29. ……….We are of the view that the Appellant Bank lost sight of the fact that IBC is a complete Code itself and Section 238 of IBC has overriding effect over all other laws including SARFAESI Act, 2002. The paragraph-11 of the Judgment of the Hon'ble Apex Court in the matter of "Anand Rao Korada, Resolution Professional Vs. Varsha Fabrics (P) Ltd. and Others" is reproduced hereunder:

...

"11. Section 238 gives an overriding effect to the IBC over all other laws. The provisions of the IBC vest exclusive jurisdiction on the NCLT and the NCLAT to deal with all issues pertaining to the insolvency process of a corporate debtor, and the mode and manner of disposal of its assets. Section 238 reads as follows:

"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."

...

30. The Hon'ble Supreme Court in paragraph-10 of the aforesaid judgment in - "Anand Rao Korada, Resolution Professional Vs. Varsha Fabrics (P) Ltd. and Others" held as under:

...

"10. Section 14 provides that on the insolvency commencement date, the Adjudicating Authority shall by order, declare a moratorium prohibiting the institution of suits, or continuation of pending suits or "proceedings" against the corporate debtor, including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or any other authority."

..

31. The Hon'ble Supreme Court held that Section 14 IBC on the insolvency commencement date, the Adjudicating Authority shall by order, declare a moratorium prohibiting the institution of suits, or continuation of pending suits or "proceedings" against the corporate debtor, including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel, or any other authority. Further, the Hon'ble Supreme held that Section 238 IBC give an overriding effect to the IBC over all other laws.

32. The Hon'ble Supreme Court at paragraph-14 of the aforesaid judgment in - "Anand Rao Korada, Resolution Professional Vs. Varsha Fabrics (P) Ltd. and Others" clearly held that once the proceeding under IBC had commenced and an order declaring moratorium was passed by NCLT, on 04.06.2019, the High Court was not justified in passing the order dated 14.08.2019 and 05.09.2019 for carrying out auction of the assets of the Respondent i.e., Corporate Debtor before the NCLT.

33. We are of the view that imposition of moratorium as per Section 14 of IBC is to protect the interest of the Corporate Debtor by protecting the assets of the Corporate Debtor for the sole objective to maximisation the value of assets. This Tribunal in the matter of "Encore Asset Reconstruction Company Pvt. Ltd. Vs. Charu Sandeep Desai and Others" also held that Section 238 of IBC will prevail over any of the provisions of the SARFAESI Act, 2002 if it is inconsistent with any of the provisions of IBC. Paragraphs 12, 14 & 15 of the said judgment is reproduced here at:

...

"12. From the explanation below Section 18, it is clear that the terms "assets" do not include the assets owned by a third party in possession of the 'Corporate Debtor'.

14. Decision in "Transcore v. Union of India" was rendered in the year 2008 when the 'I & B Code' was not in existence. The 'I & B Code came into force w.e.f. 1st December, 2016 and Section 238 read as follows: "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.

15. 'SARFAESI Act, 2002' being an existing law, Section 238 of the 'I & B Code' will prevail over any of the provisions of the 'SARFAESI Act, 2002' if it is inconsistent with any of the provisions of the 'I & B Code.'"

...

34. From the above judgment of the Hon'ble Supreme Court it is clear that when the Adjudicating Authority commences the CIRP proceeding and imposes moratorium, no proceeding shall be continued or commenced and not to carry out any auction of the assets of the Corporate Debtor. Therefore, in the facts of the present case and upon deliberating the issues as framed in paragraph 22 above, we hold that:

1) When the moratorium was imposed by the learned Adjudicating Authority, receipt of the balance sale consideration is illegal and the learned Adjudicating Authority rightly set aside the sale transaction.

2) Further Section 238 of IBC, have overriding effect over other laws as held by the Hon'ble Apex Court, and this Tribunal in Encore Asset Reconstruction Company Ltd."

(emphasis supplied)

13. It is also clear that the decision in the case of M/s Transcore V/s Union of India & Another 2008(1) SCC 125 (supra) relied upon by the respondent is of no help to it, as this decision was rendered in the year 2008 when the I&B Code was not in existence. It is pertinent to note that this decision in the case M/s Transcore Vs. Union of India & Another (Supra) has been considered in the aforementioned decision of the Hon'ble NCLAT and observations are underlined in the foregoing Paragraph 12.

14. In view of this, this Bench directs the Respondent (SIDBI) to hand over the possession of the assets belonging to the corporate debtor which were taken over by them vide possession notice dated 10.01.2017 issued u/s 13(4) of the SARFAESI Act, 2002 within one month. The IA No.47/2020 is allowed and disposed of accordingly.