

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) (Insolvency) No. 213 of 2017

(Arising out of Order dated 18th September, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in IA No. 05/2017 in Company Petition No. 510/IB/CB/ 2017)

IN THE MATTER OF:

State Bank of India

Stressed Assets Management Branch (SAMB),
1112, Raja Plaza, Avinashi Road,
Coimbatore- 641 037,
Rep. by Chief Manager.

...Appellant

Vs.

1. Mr. V. Ramakrishnan

Residing at C 104, BHEL Nagar,
REC Post, Thuvakudy,
Thiruchirapalli – 620 015

AND

2. M/s. Veasons Energy Systems Pvt. Ltd.

C-14/2, Industrial Estate, Thuvakudy,
Thiruchirapalli – 620 015

...Respondents

Present: For Appellant:- Mr. E. Om Prakash, Senior Advocate with Mr. G. Ashokepathy, Mr. M. Anbalagan, Mr. B. Karunakaran and Mr. Pawan Kishore, Advocates.

For Respondents:- Mr. K.B.S. Bedi, Advocate for 1st Respondent.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

Mr. V. Ramakrishnan (1st Respondent), Director of M/s. Veasons Energy Systems Pvt. Ltd. (“Corporate Debtor”) given personal guarantee and mortgagor of collateral securities of his assets with the Appellant-State Bank of India (“Financial Creditor”) against the facilities availed by the ‘Corporate Debtor’. In view of the personal Guarantee given by Mr. V. Ramakrishnan (1st Respondent), he comes within the meaning of ‘Personal Guarantor’ as defined under sub-section (22) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “I&B Code”)

2. The State Bank of India (“Financial Creditor”) invoked its right under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as “SARFAESI Act, 2002”) against the ‘Personal Guarantor’ under Section 13(2) on 4th August, 2015 for recovery of Rs. 61,13,28,785.48/- from the said 1st Respondent as securities. The notice was challenged by the ‘Corporate Debtor’ before the Hon’ble High Court of Madras, which was dismissed with costs on 17th November, 2016. Thereafter, the State Bank of India (‘Financial Creditor’) issued a Possession Notice dated 18th November, 2016 under Section 13(4) of the SARFAESI Act, 2002 and taken symbolic possession of the secured assets.

3. Having failed to get relief from Hon'ble High Court of Madras, the 'Corporate Debtor' invoked Section 10 of the 'I&B Code' which was admitted, order of 'Moratorium' was passed and an 'Interim Resolution Professional' was appointed.

4. Even after declaration of the 'Moratorium', the Appellant- State Bank of India ('Financial Creditor') continued to take measure under SARFAESI Act, 2002 and proceeded against the property of the 'Personal Guarantor' (1st Respondent) and issued Sale Notice on 12th July, 2017.

5. Being aggrieved the 'Personal Guarantor' (1st Respondent), who is also the promotor of the 'Corporate Debtor' filed application before the Adjudicating Authority (National Company Law Tribunal), Chennai, for stay of proceedings under SARFAESI Act 2002, including the auction notice dated 12th July, 2017. The Adjudicating Authority by impugned order dated 18th September, 2017 observed that 'Moratorium' prohibits transferring, **encumbering**, alienating or disposing of by the 'Corporate Debtor' any of its assets or any legal right or beneficial interest therein.

6. In view of the provisions of 'I&B Code', Section 140 of the Indian Contract Act, 1872 and the decision of the Hon'ble High Court of Madras, the Adjudicating Authority allowed the Interlocutory Application preferred by the 'Personal Guarantor', and restrained the Appellant- State Bank of India ('Financial Creditor') from proceeding against the 'Personal Guarantor' till the period of 'Moratorium' is over.

7. Learned counsel for the Appellant submits that the order of 'Moratorium' will not affect the assets of the 'Personal Guarantor'. On the other hand, according to counsel for the Respondents, in view of sub-section (1)(b) of Section 14 and sub-section (1) of Section 31 of the 'I&B Code', the Appellant- State Bank of India ('Financial Creditor') cannot proceed even against the 'Personal Guarantor'.

8. We have heard learned counsel for the parties and perused the record.

9. 'I&B Code, 2016' is in three parts. Part I- 'Preliminary' including the definitions given therein applies to both Part II- 'Insolvency Resolution and Liquidation for Corporate Persons' and Part III- 'Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms'.

10. As per Part II, 'Insolvency Resolution' and 'Liquidation Proceedings' can be initiated only against the 'Corporate Persons' and not against an individual, including 'Personal Guarantor', as defined under sub-section (22) of Section 5 of the 'I&B Code' and reads as follows: -

"5. Definitions. –(22) "personal guarantor"
means an individual who is the surety in a contract
of guarantee to a corporate debtor."

11. For the purpose of sub-section (8) of Section 5 of the 'I&B Code', though counter-indemnity obligation in respect of a guarantee, if

disbursed against the consideration for the time value of money comes within the meaning of 'Financial Debt', no insolvency and liquidation proceeding can be initiated against the 'Personal Guarantor' under Part II.

12. Part III relates to 'Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms', including a person who is 'Personal Guarantor'. For the said reason, in a case where proceeding has been initiated against the 'Corporate Debtor', if simultaneous proceeding is to be initiated against the 'Personal Guarantor' for bankruptcy proceedings, an application relating to the 'Insolvency Resolution or Bankruptcy' of a 'Personal Guarantor' of such 'Corporate Debtor' require to be filed before the same Adjudicating Authority (National Company Law Tribunal) hearing the 'Insolvency Resolution Process' or 'Liquidation Proceedings' of a 'Corporate Debtor'. This is, as apparent from sub-sections (2) & (3) of Section 60 of the 'I&B Code', which is quoted below: -

“60. Adjudicating Authority for corporate persons. – (2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of

a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.”

13. Therefore, a ‘Financial Creditor’, including Appellant-State Bank of India, if intends to proceed against the ‘Personal Guarantor’ of the ‘Corporate Debtor’, may file an application relating to ‘Bankruptcy’ of the ‘Personal Guarantor’ before the same Adjudicating Authority (‘Division Bench, Chennai’ herein). Though, Part III of the ‘I&B Code’ has not yet notified but the Adjudicating Authority is vested with all the powers of the Debt Recovery Tribunal (Adjudicating Authority under Part III) as contemplated under Part III of the ‘I&B Code’ for the purpose of sub-section (2) as apparent from sub-section (4) of Section 60 of the ‘I&B Code’ as quoted below: -

“60. Adjudicating Authority for corporate persons. – *(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).*

14. Section 14 of the 'I&B Code' empowers the Adjudicating Authority to declare 'Moratorium' for prohibiting all of the matters as stipulated thereunder and quoted below:

“14. Moratorium. – (1) *Subject to provisions of subsections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

(a) 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 other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

15. On bare perusal of the aforesaid provisions, it is clear that not only institution of suits or continuation of pending suits or proceedings against the 'Corporate Debtor' are prohibited from proceedings, in terms of clause (b) of sub-section (1) of Section 14 of the 'I&B Code', transfer, encumbrance, alienation or disposal of any of its assets of the 'Corporate Debtor' and/ **or any legal right or beneficial interest therein** are prohibited. Clauses (c) & (d) of sub-section (1) of Section 14 of the 'I&B Code' prohibits recovery or enforcement of any security interest created by the corporate debtor in respect of its property including the property occupied by it or in the possession of the 'Corporate Debtor'.

16. Sub-section (1) of Section 31 relates to 'approval of resolution plan', which reads as follows: -

“31. Approval of resolution plan. – (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.”

17. From the aforesaid provisions, it is clear that 'Resolution Plan' if approved by the 'Committee of Creditors' under sub-section (4) of Section 30 and if the same meets the requirements as referred to in sub-section (2) of Section 30 and once approved by the 'Adjudicating Authority' is not only binding on the 'Corporate Debtor', but also on its employees, members, creditors, guarantors and other stakeholders involved in the 'Resolution Plan', including the 'Personal Guarantor'.

18. In view of the aforesaid provisions, we hold that the 'Moratorium' will not only be applicable to the property of the 'Corporate Debtor' but also on the 'Personal Guarantor'.

19. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 18th September, 2017 passed by the Adjudicating Authority and dismiss the appeal. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI
28th February, 2018

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