

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(Insolvency) No.192/2021**

(Arising out of order dated 25.02.2021 passed by National Company Law tribunal New Delhi Court No.IV in IA No.1009/2021 in CP(IB) No.25/ND/2021.

In the matter of:

Indiabulls Asset Reconstruction Company Ltd,
One International Centre,
Tower 1, 4th Floor,
Senapati Bapat Marg,
Elphinstone Road
Mumbai 400013.

Appellant

Vs

Pawan Kapoor
GP-11 HSIIDC
Sector 18, Gurugram,
Haryana

Respondent

For Appellant:Mr Sumesh Dhawan, Ms Vatsala Kak, Mr. Raghav Dembla, Mr Kholi Rakuzhuro, Mr. Chirag Sharma, Ms Manmilan Sidhu, Mr. ravi Tyagi, Ms Saksha Jha, Advocates.

For Respondent:Ms Ranjana Roy Gawai, Mr Pervinder, Ms Vasudha Sen, Mr Shikher Upadhyay, Advocates.

JUDGEMENT**JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)**

This appeal is against an impugned order dated 25.02.2021 passed by the Ld.National Company Law Tribunal, New Delhi, Court-IV, in IA No. 1009 of 2021 in CP (IB) No. 25/ND/2021 whereby the possession of subject property belonging to the Respondent and which has been taken over by the appellant was directed to be restored with the IRP forthwith.

2. It is the submission of the Ld. Counsel for the Appellant prior to the proceedings under Section 95 of the Code, the Appellant had filed proceedings under Section 13 (4) of the SARFAESI Act, 2002 and on 20.06.2019 had taken symbolic possession of the subject mortgaged property.

3. Thereafter, on 16.03.2020 the Ld. District Magistrate, Gautam Budh Nagar, Uttar Pradesh had allowed an application filed by the appellant and had passed an order of possession of the said property. On 27.01.2021 the actual physical possession of the mortgaged property was taken over by Tehsildar, Dadri, Gautam Budh Nagar, Uttar Pradesh in lieu of the order dated 16.03.2020 passed by the District Magistrate. However, subsequent to 16.03.2020, *i.e. on 07.01.2021*, an application under Section 95 of the Code was filed to initiate insolvency proceedings against the Personal Guarantor. On 03.02.2021, the Ld. NCLT had initiated personal insolvency against the Respondent and held the moratorium had commenced in relation to all debts of the appellant upon filing of the Company Petition *w.e.f. 07.01.2021*.

4. The issue raised before this court is *if* the proceedings under the SARFAESI Act, 2002 were complete on 20.06.2019 when symbolic possession of the property of the Corporate Debtor was taken over by the Appellant and whether the moratorium under Section 96 of the Code would not affect the rights of the appellant. It is alleged by the appellant it had got a vested right in the subject property upon taking its symbolic possession and thus had become a *de-facto* owner of such property and thus had a vested right to dispose of such mortgaged property to its intending purchaser.

5. The crux of submissions of the learned counsel for the appellant is principles laid down in Section 14 of IBC shall be applicable to proceedings under Section 95 of the Code and as the subject property is a mortgaged property, whose symbolic possession has already been taken over by the appellant herein, such property would not fall within the ambit of Section 95 of the Code.

6. Heard.

7. This issue has already been answered in a recent judgement dated 2nd July, 2024 by Delhi High Court in Sanjay Dhingra Vs IDBI Bank Ltd & Ors WP(C) No.8131/2020 and CM Appl 26390/2020 as under:-

6. Pursuant to the aforesaid, the Court Receiver issued Possession Notices dated 19th March, 2020 and 03rd October, 2020, pursuant to which, physical possession of the property in question/secured asset, was taken over by the respondent no.1-bank.

9.5 The moratorium would not apply in the instant case. When bank takes possession under [Section 13\(6\)](#) of the SARFAESI Act, the asset will vest in the bank, free from all encumbrances.

9.6 In the present case, the bank had invoked its right under [Section 13\(2\)](#) of the SARFAESI Act on 27th September, 2018, thereby putting the petitioner to notice that the bank reserves its right to proceed against the properties in question. The Notice of Possession under [Section 13\(4\)](#) of SARFAESI Act, was issued on 02nd July, 2019. Therefore, on 02nd July, 2019, in terms of the judgment of Supreme Court in the case of Transcore Versus Union of India, (2008) 1 SCC 125, all rights vested in the bank.

9.7 The actual physical possession of the property has already been taken by the bank on 17th October, 2020. The proceedings under the IBC, 2016, against the petitioner, commenced only in June, 2021. Therefore, all the actions qua the property in question, have been taken, prior to the initiation of proceedings under the IBC, 2016. Thus, no debt is being enforced against the petitioner, since the rights in the property, already stand

transferred to the bank upon issuance of the notice under [Section 13\(4\)](#) of the SARFAESI Act.

9.8 Invocation of personal guarantee against the petitioner has nothing to do with the impugned orders, in which the bank has only proceeded in terms of the mortgage. Enforcement of security interest is not prohibited under Section 96 of IBC, 2016.

14. Section 96(1) provides that when an application is filed under Section 95, interim moratorium shall commence on the date of the application in relation to all the debts. Section 96(1)(b) provides that during the interim moratorium period, any legal action or proceedings pending in respect of any debt, shall be deemed to have been stayed. It is pertinent to mention here that the word used in Section 96 of the IBC, 2016, is „in relation to all the debts“, meaning thereby, that the interim moratorium shall apply to all the debts of the petitioner, including the mortgage of the property in question, that had been mortgaged by the petitioner with the respondent- bank, as a personal guarantor, which are subject matter of the SARFAESI proceedings initiated by the respondent-bank. Thus, in terms of the law of the land, any legal action or proceeding pending in respect of any debt of the petitioner, shall be deemed to have been stayed, upon commencement of the interim moratorium in terms of Section 96 of IBC, 2016.

15. Thus, holding that the interim moratorium under Section 96 of IBC, 2016, is intended to operate in respect of a debt, as opposed to a debtor and the purpose of interim moratorium is to restrain the initiation or continuation of legal action or proceedings against the debt, Supreme Court in the case of *Dilip B. Jiurajka Versus Union of India*¹, has held as follows:

"xxx xxx xxx

57. Section 96, as its marginal note indicates, deals with an "interim-moratorium". In terms of section 96, the interim moratorium takes effect on the date of the application. In other words, the very submission of an application under section 94 or section 95 triggers the interim moratorium which then ceases to have effect on the date of the admission of the application (under section 100). The consequences which flow from an interim moratorium are specified in clause (b) of sub-section (1) of section

96. The impact of the interim-moratorium under section 96 is that a legal action or proceeding pending in respect of any debt is deemed to have been stayed and the creditors or the debtors shall not initiate any legal action or proceedings in respect of any debt. The crucial words

which are used both in clause (b)(i) and clause (b)(ii) of sub-section (1) of section 96 are "in respect of any debt". These words indicate that the interim-moratorium which is intended to operate by the Legislature is primarily in respect of a debt as opposed to a debtor. Clause (b) of sub-section (1) indicates that the purpose of the interim-moratorium is to restrain the initiation or the continuation of legal action or proceedings against the debt.

58. This must be contra-distinguished from the provisions for moratorium which are contained in [section 14](#) in relation to the corporate insolvency resolution process under Part II. [Section 14\(1\)\(a\)](#) provides that on the insolvency commencement date, the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including proceedings in execution shall stand prohibited by an order of the Adjudicating Authority. Clause (b) of sub-section (1) of [section 14](#) empowers the Adjudicating Authority to declare a moratorium restraining the transfer, encumbrance, alienation or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein. Significantly, the moratorium under [section 14](#) operates on the order passed by an Adjudicating Authority. The purpose of the 2023 SCC OnLine SC 1530 moratorium under section 96 is protective. The object of the moratorium is to insulate the corporate debtor from the institution of legal actions or the continuation of legal actions or proceedings in respect of the debt.

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(Emphasis Supplied)

16. Thus, in view of the aforesaid, it is manifest that the moratorium imposed under Section 96 of IBC, 2016, would apply to the security interest created by an individual, under the personal guarantee. Therefore, after commencement of the insolvency proceedings under the IBC, 2016, against the petitioner, in his capacity as a personal guarantor with respect to default of a loan account, the interim moratorium shall be applicable to all the debts, including the debt owed by the petitioner to the respondent-bank, in his capacity as a personal guarantor, for which property in question was mortgaged by the petitioner, against which SARFAESI proceedings have been initiated by the respondent-bank.

17. It is no longer res integra that IBC, 2016, is a complete code in itself and the provisions of the IBC, 2016, would prevail notwithstanding anything inconsistent therewith, contained in

any other law for the time being in force. Further, mere fact that possession of the property in question has been taken over by the respondent-bank under SARFAESI proceedings, prior to the commencement of IBC proceedings against the petitioner, would have no effect on the interim moratorium that becomes applicable in terms of Section 96 of IBC, 2016. The applicability of interim moratorium under IBC, 2016, on the proceedings initiated by the respondent-bank under the [SARFAESI Act](#), cannot be excluded merely because the bank has taken possession of the property in question prior to commencement of the proceedings under the IBC, 2016.

19. At this stage, reference may be made to the judgment of the Supreme Court in the case of *Indian Overseas Bank Versus RCM Infrastructure Limited and Another*². In the said case, sale proceedings had already been initiated by the bank under the provisions of the [SARFAESI Act](#) and part- payment had been received by the bank prior to the commencement of the proceedings under the IBC, 2016. Subsequently, after the commencement of the proceedings under the IBC, 2016, balance payment was also received by the bank. In the said case, the Supreme Court held in categorical terms that sale was not complete upon receipt of the part-payment, and the sale could be said to be completed only upon receipt of the balance payment, which was received after the commencement of the proceedings under the IBC, 2016. Thus, the Supreme Court held that after the moratorium had come into place, the bank could not have continued with the proceedings under the [SARFAESI Act](#) and could not have accepted the balance payment after the commencement of the moratorium. Therefore, even in a case where the bank had already commenced the sale process, prior to the commencement of the proceedings under the IBC, 2016, the Supreme Court categorically held that in the absence of completion of sale prior to the moratorium, the bank could not have continued any further proceedings under the terms of the [SARFAESI Act](#).

20. In the present case, no sale process has commenced with respect to the property that had been mortgaged by the petitioner with the respondent- bank, as a personal guarantor. Therefore, in view of the law laid down by the Supreme Court, it is apparent that the bank cannot proceed any further under the [SARFAESI Act](#), after the commencement of the moratorium in the present case.

22. In view of the aforesaid, it is clear that once the interim moratorium has come into play on account of the insolvency proceedings against the petitioner under the IBC, 2016, the respondent-bank cannot proceed any further in the proceedings under the [SARFAESI Act](#) with respect to the property mortgaged

by the petitioner with the bank, in his capacity as a personal guarantor.

24. Besides, it is to be noted that Supreme Court in the case of [State Bank of India Versus V. Ramakrishnan and Another](#) (supra), itself has stated that the moratorium under Section 96 IBC, 2016, under Part III of the said Act, is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Thus, Supreme Court has held as follows:

"xxx xxx xxx

26. We are also of the opinion that Sections 96 and 101, when contrasted with [Section 14](#), would show that [Section 14](#) cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these sections is far greater than that of [Section 14](#) in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between [Sections 14](#) and 101 is for a reason.

26.1. [Section 14](#) refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why [Section 14](#) is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor -- often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.

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(Emphasis Supplied)

31. Considering the detailed discussion as above, it is held as follows:

31.1 The respondent-bank cannot proceed further under the [SARFAESI Act](#), in view of the interim moratorium, operating on account of the Insolvency Proceedings pending against the petitioner, the personal guarantor.

31.2 As and when the interim moratorium is lifted, and the respondent bank proceeds under the [SARFAESI Act](#), the petitioner shall be at liberty to approach the learned DRT and raise all issues, including issue regarding authority and jurisdiction of the respondent-bank to proceed under the [SARFAESI Act](#), in view of the loan having been sanctioned and disbursed in Dubai, by the respondent no.-2 bank, which is also situated in Dubai.

31.3 It is clarified that this Court has not given any finding on the merits of the issues, as raised by the petitioner, which shall be raised before the learned DRT, and decided on its own merits. All the rights and contentions of both the parties are left open.

8. Considering the above settled law, we are not inclined to interfere with the impugned order dated 25.02.2021 and direct that the appellant shall not proceed further under the SARFAESI Act *qua* the subject property till the moratorium is lifted.

9. The appeal thus stands dismissed. Pending applications, if any, also stands disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated:28-8-2024
Bm