

Nayati Healthcare & Research Ncr ... vs Dewan Housing Finance Corporation ... on 31 January, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) Insolvency No. 77 of 2022

IN THE MATTER OF:

Yes Bank Ltd.
4th Floor, Max Towers,
Noida - 211301, Uttar Pradesh
Ph No.: +91-9999166111
Email: ankit.jain4@yesbank.in
raunak.dhillon@curilshroff.com

...Appellant

Vs.

1. Dewan Housing Finance Corporate Limited
Wareden House, 2nd Floor,
Sir P. M Road Fort,
Mumbai - 400001, Maharashtra
Ph No.: +91-8287760777
Email: savar.mahajan@chandhiok.com

...Respondent 1

2. Nayati Healthcare & Research NCR Private
Limited
A-14, Duggal Colony, Devli Road, Khanpur
South Delhi - 110062
Ph No. : +91-9899339777
Email: girirajsubramanium@grschambers.org,
niira@nayatihealthcare.com

... Respondent 2

For Appellant: Mr. Shyam Divan, Mr. Gopal Jain, Sr. Advocates with
Mr. Raunak Dhillon, Isha Malik, Nihaad Dewan,
Sgreesh Lalit, Mr. Shashank Agarwal, Advocates for
R-2.

For Respondent: Mr. Ramji Srinivasan, Sr. Advocate with Ms. Srishti
Kapoor, Ms. Pooja Mahajan, Savan Mahajan, Advocates
for R-1
Simarpal Singh Sawhney, Mr. Giriraj Subrmanium,
Abhishek Choudhary, Advocates for R-2

With
Company Appeal (AT)Insolvency No. 76 of 2022

IN THE MATTER OF:

M/s. Nayati Healthcare & Research NCR Private
Limited

...Appellant

2

A-14, Duggal Colony, Devli Road, Khanpur
South Delhi - 110062

Ph No. : +91-9899339777

Email: girirajsubramaniam@grschambers.org,
niira@nayatihealthcare.com

Vs.

1. M/s. Dewan Housing Finance Corporation
Limited

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raunak.dhillon@curilshroff.com

...Respondent 2

For Appellant:	Mr. Giriraj Subrmanium, Simarpal Singh Sawhney, Abhishek Choudhary, Advocates
For Respondent:	Mr. Ramji Srinivasan, Sr. Advocate with Ms. Srishti Kapoor, Ms. Pooja Mahajan, Savan Mahajan, Advocates for R-1 Mr. Shyam Divan, Mr. Gopal Jain, Sr. Advocates with Mr. Raunak Dhillon, Isha Malik, Nihaad Dewan, Sgreeshash Lalit, Mr. Shashank Agarwal, Advocates for R-2.

JUDGEMENT

Ashok Bhushan, J:

1. These two Appeals i.e. Company Appeal (AT) Ins. No. 77 of 2022 and Company Appeal (AT) Ins. No. 76 of 2022 have been filed against the same Impugned Order dated 31st December, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-IV) in I.A. No. 4516 of 2021 in CP(IB) No. 472/ND/2019. Company Appeal (AT) Ins. No. 77 of 2022 has been filed by the Yes Bank Ltd. who has filed an Application i.e. Company Appeal (AT) Ins. No. 77 and 76 of 2022 4516/ND/2021 before the Adjudicating Authority to vacate the Interim Order dated 30.09.2021 passed by Adjudicating Authority. Company Appeal (AT) Ins. No. 76 of 2022 has been filed by M/s. Nayati Healthcare and Research NCR Private Limited against whom Application under Section 7 of the Code has been filed by Dewan Housing Finance Corporate Limited (Respondent herein).

2. We need to notice only some of the facts of the case for deciding this Appeal.

3. The Respondent No. 1-Dewan Housing Finance Corporate Limited has extended certain 'Credit Facility' to M/s. Nayati Healthcare and Research NCR Pvt. Ltd.

(hereinafter referred to as 'Corporate Debtor'). In August, 2018, Yes Bank Limited had extended 'Financial Facility' to the Corporate Debtor in the month of September/November, 2018. Yes Bank Limited has issued 'Loan Recall Notice' on 10th June, 2021 due to the defaults committed by the Corporate Debtor and on 30th July, 2021, a 'Demand Notice' was issued under Section 13(2) of SARFAESI Act, 2002 to the Corporate Debtor.

By Section 13(2) Notice, Yes Bank Limited called upon the borrower to pay the Bank within a period of 60 days from the date of notice a sum aggregating to INR 358,30,78,500/- together with interest. On 26th August, 2021, Dewan Housing Finance Corporate Limited (Financial Creditor) filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'Code') for initiating 'Corporate Insolvency Resolution Process' (hereinafter referred to as "CIRP") against the Corporate Debtor. The case of the Financial Creditor in Application under Section 7 of the Code was that in August, 2018, the Corporate Debtor was sanctioned a Company Appeal (AT) Ins. No. 77 and 76 of 2022 loan for INR 144 Crores and an additional loan of Rs. 43 Crores was also disbursed. The Loan was recalled by Notice dated 08th November, 2019 and there are dues of amounting Rs. 2,40,47,935/- which having not been paid, an Application under Section 7 of the Code to initiate 'CIRP' was filed.

4. Application under Section 7 of the Code filed by the Financial Creditor was listed before the Court on 03.08.2021 and the matter was fixed for 23.08.2021 and on 29.08.2021 the Adjudicating Authority directed the Appellant to serve the Learned Counsel for the Corporate Debtor who has appeared before the Adjudicating Authority on 29.08.2021. In consequence to the Notice dated 30th July, 2021 under Section 13(2) of the SARFAESI Act, 2002, the Yes Bank Limited issued a Possession Notice dated 10.09.2021 under Section 13(4) of the SARFAESI Act, 2002 under Rule 8 of the Security Interest (Enforcement) Rules, 2002. The possession is claimed to have been taken by Yes Bank Limited on 10th September, 2021. An Application under Section 60(5) read with Rule 11 of the National Company Law Tribunal Rules, 2016 was filed by the Financial Creditor under Section 7 praying for following reliefs:

"The Applicant humbly prays that, in view of the aforesaid, this Hon'ble Adjudicating Authority may be pleased to:

a) Allow the present application and restrain the Corporate Debtor and Yes Bank from selling, alienating, creating any 3rd party rights on the assets of the Corporate Debtor till the adjudication of Section 7 application by this Hon'ble Adjudicating Authority;

b) Ad-interim injunction be granted on the operation of the Possession Notice, till the next date of hearing;

c) Interim injunction be granted on the operation of the Possession Notice, till the pendency of this application;

Company Appeal (AT) Ins. No. 77 and 76 of 2022

d) Pass any other orders or further relief(s) as this Hon'ble Adjudicating Authority may deem fit and proper in facts and circumstances of the present case."

5. The above Application was taken by the Adjudicating Authority on 30.09.2021 on which date the Adjudicating Authority passed the following orders:

"IA No. 4439/ND/2021:

Application filed by the Financial Creditor seeking ad interim relief against the Corporate Debtor as well as the another Financial Creditor of the Corporate Debtor being Yes Bank. Learned Counsel for the Corporate Debtor accepts notice and makes a statement that as on date, the Corporate Debtor is in possession of the immovable property assets of the company. Issue notice to Yes Bank. Learned Counsel for the Corporate Debtor also undertakes to file Reply within two weeks. In the meantime, both the respondents should maintain status quo with respect to assets of the company.

List on 15.11.2021"

6. By order dated 30.09.2021, the Adjudicating Authority directed the parties to maintain status quo and issued Notice to the Yes Bank and granted time to file Reply within two weeks. The Yes Bank filed an Application for vacating ex-parte Order dated 30.09.2021 vide I.A. No. 4516 of 2021 which came to be heard by the Adjudicating Authority on 31st December, 2021. Adjudicating Authority by the Impugned Order continued the Status-Quo Order till the next date of hearing. Aggrieved by the said Order, Yes Bank Limited and Corporate Debtor-M/a. Nayati Healthcare and Research NCR Private Limited have come up in these Appeals.

7. We have heard Mr. Shyam Divan, Mr. Gopal Jain, Sr. Advocates for the Appellant and Mr. Ramji Srinivasan, Sr. Advocate for Respondent No. 1 in Company Appeal (AT) Ins. No. 77 of 2022. Mr. Giriraj Subrmanium, Company Appeal (AT) Ins. No. 77 and 76 of 2022 Advocate for the Appellant and Mr. Ramji Srinivasan, Sr. Advocate for the Respondent No. 1 in Company Appeal (AT) Ins. 76 of 2022.

8. Mr. Shyam Divan, Sr. Advocate for the Appellant submits that Yes Bank Limited is a Secured Creditor of Corporate Debtor who is Registered Mortgagee and for enforcing security, proceedings under SARFAESI Act, 2002 were initiated by Notice issued on 30th July, 2021. The possession of the immovable asset of the Corporate Debtor mortgaged to the Bank has been taken possession on 10th September, 2021 by resorting measures under Section 13(4) of the Act. The Corporate Debtor has waived 60 days notice hence the possession was taken on 10th September, 2021 before the expiry of 60 days. It is submitted that possession having been taken by the Corporate Debtor on 10.09.2021 there was no occasion for Adjudicating Authority passing an Order maintaining Status-Quo. It is submitted that wrong statement was made on behalf of Corporate Debtor on 30th

September, 2021 before the Adjudicating Authority that Corporate Debtor is in possession which statement was corrected by the Adjudicating Authority itself by subsequent order dated 05.10.2021 and it is undisputed that possession was taken by the Yes Bank on 10.09.2021. It is submitted that proceeding under SARFAESI had to be proceeded and to be concluded to its logical end and Yes Bank has all right to sell, alienate its security assets and no injunction order can be passed by the Adjudicating Authority. It is further submitted that Application under Section 7 filed by the Financial Creditor on 26th August, 2021 has yet not been admitted and before admission of the Application, there is no jurisdiction with the Adjudicating Authority to pass any Injunction Order. It is submitted that taking possession under Section Company Appeal (AT) Ins. No. 77 and 76 of 2022 13(4) of the SARFAESI Act, 2002 by the Yes Bank Limited Corporate Debtor can no longer deal with the property and it is divested with its ownership on the mortgage property. Hence there was no object in granting any kind of injunction. It is submitted that Adjudicating Authority without recording any finding on prima facie case, balance of convenience and irreparable loss, has passed the Interim Order. It is further submitted that order dated 30.09.2021 was passed without hearing the Yes Bank Limited which is the affected party. It is well settled law that no adverse Order can be passed against a person who is not party to the proceeding. There being no eclipse on the proceedings under SARFAESI it should be allowed to have its free play and Adjudicating Authority cannot interdict the proceedings under SARFAESI Act. The mortgage property is no longer asset of the Corporate Debtor.

9. Mr. Gopal Jain, Sr. Advocate supplementing the submissions of Mr. Shyam Divan, Sr. Advocate contends that Judgment of the Hon'ble Supreme Court in 'Hindon Forge (p) Ltd. Vs. State of U.P. [(2019) 2 SCC 198 clearly laid down that after taking possession under Section 13(4) of the SARFAESI Act, 2002, the Corporate Debtor is divested of its ownership and title and cannot deal with Mortgage Property. Hence, there was no justification for passing any Interim Order injuncting the Yes Bank Limited from dealing with the property.

10. Mr. Ramji Srinivasan, Sr. Advocate appearing for the Financial Creditor-Dewan Housing Finance Corporate Ltd. refuting the submissions of the Learned Sr. Counsels for the Appellant submits that the Adjudicating Authority had every jurisdiction to pass any order for protecting the property Company Appeal (AT) Ins. No. 77 and 76 of 2022 of the Corporate Debtor even before admission of the Section 7 Application. It is submitted that whole intent and purpose of the CIRP is to protect and maximize the property of the Corporate Debtor. Learned Sr. Counsel disputed the claim of Yes Bank having taken possession on 10.09.2021. It is submitted that the possession was taken by the Yes Bank Ltd. even before expiry of 60 days. It is undue hurry on the part of the Yes Bank which has been noticed by the Adjudicating Authority also. It is submitted that by mere taking possession of assets of immovable property by Yes Bank the Corporate Debtor is not divested with its title and ownership. The assets are still of the Corporate Debtor. It is submitted that Financial Creditor-Dewan Housing Finance Corporate Limited has extended the Financial Facility to the Corporate Debtor before loan given by the Yes Bank Limited. The Financial Creditor has right to realise its dues which cannot be defeated by permitting the Yes Bank Limited to alienate the Property. It is submitted that the Corporate Debtor as well as the Yes Bank are in collusion. The Order passed by the Adjudicating Authority is well within its jurisdiction.

11. Mr. Giriraj Subramaniam, Advocate appearing for the Corporate Debtor submits that the statement recorded by the Adjudicating Authority on 30.09.2021 that Corporate Debtor is in possession was a wrongly recorded statement which on application of the Corporate Debtor, was corrected on 05.10.2021.

12. We have considered the submissions of Learned Counsel for the parties and perused the record.

13. On the submissions raised by Learned Sr. Counsel for the Appellant that Adjudicating Authority has no jurisdiction to pass any Interim Order of Company Appeal (AT) Ins. No. 77 and 76 of 2022 the Status - Quo prior to admission of Section 7 Application, Learned Sr. Counsel for the Respondent has relied on Judgment of this Tribunal in Company Appeal (AT) Ins. No. 664 of 2019 in the matter of 'NUI Pulp and Paper Industries Pvt. Ltd. Vs. M/s. Roxcel Trading GMBH' in which case also the Adjudicating Authority before admission of the Application under Section 9 of the Code had passed an Interim Order on 15th July, 2019. In an Appeal filed against the said order, it was contended that Adjudicating Authority has no jurisdiction to pass any Interim Order prior to admission of the application. This Tribunal after noticing the Rule 11 of the National Company Law Tribunal, Rules, 2016 laid down following in Paragraphs 9 to 12:

"9. From the aforesaid Rule 11, it is clear that the Tribunal (Adjudicating Authority herein) can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

10. From the aforesaid provisions, it is clear that once an application under Sections 7 or 9 is filed by the Adjudicating Authority, it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of 'Moratorium' under Section 14 of the 'I&B Code'. To ensure that one or other party may not abuse the process of the Tribunal or for meeting the ends of justice, it is always open to the Tribunal to pass appropriate interim order.

11. The Respondent- 'Operational Creditor' had issued Demand Notice under Section 8(1) and after receipt of the reply under Section 8(2), informed that the 'Corporate Debtor' has not made payment, filed an application under Section 9. It was at this stage, the 'Operational Creditor' brought to the notice of the Adjudicating Authority (National Company Law Tribunal) that there is an apprehension that the 'Corporate Debtor' may abuse the process of the 'I&B Code' to deny the creditors from its Company Appeal (AT) Ins. No. 77 and 76 of 2022 legitimate rights if admission of the application under Section 9.

12. The Appellant having not given any undertaking or made any specific reply and refused to say that they have no such intention, we are of the view that it is always open to the Adjudicating Authority to pass ad-interim order before admitting any application under Sections 7 or 9 or

10 of the 'I&B Code'. However, on reply, once the application is admitted, then the order of 'Moratorium' under Section 14 will follow, taking away the right of the Board of Directors of the 'Corporate Debtor' to take any decision on behalf of the 'Corporate Debtor' prohibiting others from taking any action against the 'Corporate Debtor' which is different from interim order. On the other hand, if application under Sections 7 or 9 or 10 is rejected, the interim order will automatically stands vacated."

14. Learned Sr. Counsel-Mr. Ramji Srinivasan submits that against the said Judgment dated 17.07.2019, Civil Appeal was also filed before the Hon'ble Supreme Court of India which was dismissed confirming the Order of this Tribunal.

15. The above is clear authority for holding that the Adjudicating Authority even before admission of the Application under Section 7 or 9 of the Code can pass an appropriate Order. The object of conceding such power to the Adjudicating Authority is very clear, when an Application is filed under Section 7 or 9 of the Code there are several reasons due to which Corporate Debtor may like to dispose and alienate its properties in hurry to defeat the rights of the Creditors. If any such fact is brought before the Adjudicating Authority, it does not lack jurisdiction to protect the properties of the Corporate Debtor till the Applications are admitted or rejected. We thus accept the submissions of the Learned Sr. Counsel for the Respondent that Adjudicating Authority had jurisdiction to pass order dated 30.09.2021. Company Appeal (AT) Ins. No. 77 and 76 of 2022 In so far as the submissions of Mr. Shyam Divan, Sr. Advocate that Order dated 30.09.2021 was passed against Yes Bank Limited not being party to the Proceedings suffice it to say that in the Order dated 30.09.2021 itself Adjudicating Authority has directed to issue notice to the Yes Bank Limited. The Adjudicating Authority had jurisdiction to pass ex-parte Interim Order and the Order of the Adjudicating Authority to issue Notice to Yes Bank Limited and hear them amply protected the intention of the Yes Bank Limited. It is well settled that Court or Tribunal having jurisdiction to pass Interim Order can also pass ex-parte Interim Order. The mere fact that Yes Bank Limited was not party to the proceeding does not disentitle the Adjudicating Authority to pass any Interim Order affecting the Yes Bank Limited more so when Yes Bank was already issued notice by the same Order.

16. Learned Counsel for the Appellants have placed reliance on the Judgment of the Hon'ble Supreme Court of India in 'Hindon Forge (p) Ltd. Vs. State of U.P. [(2019) 2 SCC 198] especially paragraph 25 and 31 which are to the following effect:

"25. When we come to section 13(4)(a), what is clear is that the mode of taking possession of the secured assets of the borrower is specified by rule 8. Under section 38 of the Act, the Central Government may make rules to carry out the provisions of the Act. One such rule is rule 8. Rule 8(1) makes it clear that the authorised officer shall take or cause to be taken possession. The expression cause to be taken only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected under sub-rule (1) of rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the Company Appeal (AT) Ins.

No. 77 and 76 of 2022 property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from the borrower and complete title given to the purchaser, as is mentioned in section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a section 13(2) notice, section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given under rule 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

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31. Another argument made by learned senior counsel for the respondents is that if we were to accept the construction of section 13(4) argued by the appellants, the object of the Act would be defeated. As has been pointed out hereinabove in the Statement of Objects and Reasons of the original enactment, paragraphs 2(i) and 2(j) make it clear that the rights of the secured creditor are to be exercised by officers authorised in this behalf in accordance with the rules made by the Central Government. Further, an appeal against the action of any bank or financial institution is provided to the concerned Debts Recovery Tribunal. It can thus be seen that though the rights of a secured creditor may be exercised by such creditor outside the court process, yet such rights must be in conformity with the Act. If not in conformity with the Act, such action is liable to be interfered with by the Debts Recovery Tribunal in an application made by the debtor/borrower. Thus, it can be seen that the object of the original enactment also includes secured creditors acting Company Appeal (AT) Ins. No. 77 and 76 of 2022 in conformity with the provisions of the Act to realise the secured debt which, if not done, gives recourse to the borrower to get relief from the Debts Recovery Tribunal. Equally, as has been seen hereinabove, the Statement of Objects and Reasons of the Amendment Act of 2004 also make it clear that not only do reasons have to be given for not accepting objections of the borrower under section 13(3-A), but that applications may be made before the Debts Recovery Tribunal without making the onerous pre- deposit of 75% which was struck down by this Court in *Mardia Chemicals* (supra). The object of the Act, therefore, is also to enable the borrower to approach a quasi-judicial forum in case the secured creditor, while taking any of the measures under section 13(4), does not follow the provisions of the Act in so doing. Take for example a case in which a secured creditor takes possession under rule 8(1) and 8(2) before the 60 days period

prescribed under section 13(2) is over. The borrower does not have to wait until actual physical possession is taken (this may never happen as after possession is taken under rule 8(1) and 8(2), the secured creditor may go ahead and sell the asset). The object of providing a remedy against the wrongful action of a secured creditor to a borrower will be stultified if the borrower has to wait until a sale notice is issued, or worse still, until a sale actually takes place. It is clear, therefore, that one of the objects of the Act, as carried out by rule 8(1) and 8(2) must also be subserved, namely, to provide the borrower with instant recourse to a quasi-judicial body in case of wrongful action taken by the secured creditor."

Referring to above Judgement of Hon'ble Supreme Court, Learned Counsel for Respondent submits that on 10.09.2021 possession taken by the Appellant in exercise of power under Section 13(4) of the SARFAESI Act, 2002 is not in accordance with law, since although 60 days notice was issued on 31.07.2021 under Section 13(2) but before expiry of 60 days, the possession is claimed to be taken. The Adjudicating Authority has taken into consideration of taking possession by Appellant before expiry of 60 days. The Company Appeal (AT) Ins. No. 77 and 76 of 2022 possession having not been taken in accordance with law the title of the property still vests in Corporate Debtor, which need to be protected to safeguard the interests of Corporate Debtor as well as other Creditors.

17. The Order passed by the Adjudicating Authority on 31st December, 2021 indicates that the Status-Quo Order dated 30.09.2021 has been continued till the next date of hearing. We have been informed by the Learned Counsel for the parties that the matter both on I.A. 4516 of 2021 as well as the main CP (IB) No. 472/2021 has been fixed for 15th February, 2022. The Order dated 30.09.2021 is now continuing for last more than three months and now 15th February, 2022 is the next date fixed in the matter, we are of the view that at this stage it is not necessary for us to express any final opinion regarding the various issues raised by the parties regarding title and ownership of the immovable properties whether it is still in ownership of the Corporate Debtor or stand transferred to Yes Bank Limited. What is nature of claim of the Financial Creditor-Dewan Housing Finance Corporate Limited quo the immovable property which is also mortgaged to Yes Bank Limited, all these issues have to be considered and decided by the Adjudicating Authority finally. The Adjudicating Authority has only continued Interim Injunction dated 30.09.2021 till the next date of hearing i.e. 15th February, 2022 fixed before the Adjudicating Authority. We hope and trust that the Adjudicating Authority shall consider the I.A. 4516 of 2021 and the main Company Petition i.e. CP (IB) No. 472/ND/2021 on the next date or as early as possible thereafter.

18. We thus do not find any ground to interfere with the Order dated 31st December, 2021 at this stage. However, as observed above the I.A. 4516 of Company Appeal (AT) Ins. No. 77 and 76 of 2022 as well as main petition i.e. CP(IB) No. 472/ND/2021 be heard and decided at an early date.

Both these Appeals are disposed of, accordingly.

[Justice Ashok Bhushan] Chairperson [Dr. Ashok Kumar Mishra] (Member (Technical)) [Dr. Alok Srivastava] Member (Technical) New Delhi 31st January, 2022 Basant/nn Company Appeal (AT) Ins. No. 77 and 76 of 2022