

Encore Asset Reconstruction Company ... vs Charu Sandeep Desai & Ors on 14 May, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 719 of 2018

(Arising out of Order dated 11th October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in IA 33 in C.P. (IB)-1554(MB)/2017)

IN THE MATTER OF:

Encore Asset Reconstruction Company Pvt. Ltd. ...Appellant

Vs.

Ms. Charu Sandeep Desai & Ors. ...Respondents

Present: For Appellant: - Mr. Sudhir K. Makkar, Senior Advocate with Mr. Amit Mahaliyan, Mr. Abhishek Chaudhary and Ms. Saumya Gupta, Advocates.

For Respondents:- Mr. Arun Kathpalia, Senior Advocate with Ms. Mahima Singh, Mr. Somasekar Sundaresan and Ms. Mohana Nyhawan, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the Appellant against the order dated 11th October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, in the matter of "State Bank of India Vs. Calyx Chemicals & Pharmaceuticals Ltd.", whereby the Adjudicating Authority directed the 'Dena Bank' to handover the possession of the mortgaged property in question.

2. In the 'Corporate Insolvency Resolution Process' against 'Calyx Chemicals & Pharmaceuticals Ltd.', 'Dena Bank' filed an application for interim order to restrain the 'Interim Resolution Professional' from demanding the custody of the property, as referred below:

"DESCRIPTION OF THE PROPERTIES MORTGAGED Address of the Property/ 1. Gala No.2 on the Ground Flor of the Marwah's security Complex, Marwah Industrial Estate, Sake Vihar Road, Andheri- East, Mumbai- 400072

2. Gala No 110 on the First Floor of the building known as "Marwah Industrial Premises" situated at 4, Marwah Industrial Estate, Saki Vihar Road, Andheri- East, Mumbai- 400072 Property in the name of Calyx Chemicals and Pharmaceuticals Limited Nature of the Property Commercial Premises

3. The case of the 'Dena Bank' was that in the year 2011, the 'Corporate Debtor' availed a loan against a property under the Scheme "Dena Mortgage Loan Scheme". As per the Scheme, a borrower has to create a charge by way of exclusive mortgage of an unencumbered property held in the name of borrower to be treated as a Security against the loan.

4. The loan had become "Bad" hence declared as "Non-Performing Asset" on 1st December, 2013. As a consequence, 'Dena Bank' initiated proceedings under the "Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002" ("SARFAESI Act, 2002" for short) to take physical possession under Section 13(4) of the 'SARFAESI Act, 2002'. It is informed that the procedure for obtaining physical possession was duly completed by issuing a Notice under Section 13(2) of 'SARFAESI Act, 2002' and on lapse of 60 days, a notice Company Appeal (AT) (Insolvency) No. 719 of 2018 under Section 13(4) of the said Act for taking over the possession. Physical possession was taken over on 13th September, 2017, is an undisputed fact.

5. It was pleaded that the 'Resolution Professional' was putting pressure to hand over the physical possession back to him, although the 'Corporate Debtor' on whose behalf the 'Resolution Professional' is commencing Insolvency Proceedings had already ceased to be the owner of the said property having no physical control on the said property.

6. The 'Moratorium' had commenced on admission of the case w.e.f. 6th February, 2018 pursuant to an application moved by the 'State Bank of India' under Section 7 of the 'I&B Code'. It was in this background, it was pleaded by 'Dena Bank' that physical possession was taken over before the date of commencement of 'Moratorium'. Therefore, the 'Resolution Professional' should not have demanded for taking over the possession of the said property.

7. 'Encore Asset Reconstruction Company Pvt. Ltd.' is an assignee of the 'Dena Bank' which has been substituted during the pendency of the appeal.

8. Learned counsel for the Appellant submitted that in the light of the decision of the Hon'ble Supreme Court in "M/s. Transcore v. Union of India & Anr. □(2008) 1 SCC 125", the Appellant has taken decision of the said secured assets title etc. which stood vested in the Bank. Company Appeal (AT) (Insolvency) No. 719 of 2018

9. The stand of the 'Resolution Professional' is that the Bank cannot be an owner and the 'Corporate Debtor' continued to be the owner of the property. Reliance has been placed on Section 14 of the 'I&B Code'.

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

11. Section 18 of the 'I&B Code' deals with 'Duties of Interim Resolution Professional'. As per which, it is the duty of the 'Interim Resolution Professional' to take over the control and custody of any assets over which the 'Corporate Debtor' has 'ownership rights' as recorded in the balance sheet of the 'Corporate Debtor' which includes the assets that may or may not be in possession of the 'Corporate Debtor' as apparent from clause (f)

(ii) of Section 18, relevant portion of which reads as follows:

"18. Duties of interim resolution professional.-- The interim resolution professional shall perform the following duties, namely:--

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to--

(i) business operations for the previous two years;

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(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of

securities or any other registry that records the ownership of assets including--

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

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(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.--For the purposes of this sub-section, the term "assets" shall not include the following, namely:--

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

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

13. It is not the case of the Appellant that the title of the assets has already been transferred or they have sold the assets in terms of Section 13(4) of the 'SARFAESI Act, 2002'. It is also not the case of the Appellant that the assets owned by a third party is in possession of the 'Corporate Debtor' in terms of Section 18, as it is the duty of the 'Interim Resolution Professional' to take control and custody of any asset over which the 'Corporate Debtor' has "ownership rights" as recorded in the balance sheet of the 'Corporate Debtor'. Even if it is not in possession of the 'Corporate Debtor', a person who is in possession of the same, including the 'Dena Bank' or 'Encore Asset Reconstruction Company Pvt. Ltd.' is bound to hand over the same to the 'Resolution Professional', when title still

vests with 'Corporate Debtor'.

14. Decision in "M/s. Transcore v. Union of India & Anr." 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 reads as follows:

"238. Provisions of this Code to override other laws.--The provisions of this Code shall have effect, notwithstanding anything inconsistent Company Appeal (AT) (Insolvency) No. 719 of 2018 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'.

16. In the aforesaid background, we hold that Section 18 of the 'I&B Code' will prevail over Section 13(4) of the 'SARFAESI Act, 2002' and the 'Dena Bank' cannot retain the possession of the property in question of which the 'Corporate Debtor' is the owner.

17. We find no merit in this appeal. It is accordingly dismissed. No costs.

(Justice S.J. Mukhopadhaya) Chairperson (Justice A.I.S. Cheema) Member(Judicial) NEW DELHI
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