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& Solicitors

SARFAESI proceedings cannot be continued against Corporate Debtor once CIRP starts and Moratorium is ordered.

Indian Overseas Bank v. M/S R.C.M Infrastructure Ltd. and Anr.

Citation	Civil Appeal No. 4750/2021
Date	18 May 2022
Court	Supreme Court of India
Coram	Hon'ble Mr. Justice L. Nagwewara Rao Hon'ble Mr. Justice B.R. Gavai

1. BRIEF FACTS:

- 1.1 Indian Overseas Bank (“**Appellant Bank**”) extended certain credit facilities to RCM Infrastructure Ltd. (“**Corporate Debtor**”). However, the Corporate Debtor failed to repay the dues and the loan account of the Corporate Debtor became irregular. As such, on 13th June 2016, the loan account of the Corporate Debtor came to be classified as “Non - Performing Asset (“**NPA**”).
- 1.2 The Appellant Bank issued a Demand Notice Under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI Act**”), calling upon the Corporate Debtor and its guarantors to repay the outstanding amount due. Since the Corporate Debtor had failed to comply with the Demand Notice to repay the outstanding dues, the Appellant Bank invoked the power granted to it under the Section 13(4) of the SARFAESI Act, read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (“**Rules**”) and took symbolic possession of two secured assets mortgaged exclusively with it. Out of the two properties, One stood in the name of Corporate Debtor and the other in the name of Corporate Guarantor. An E-auction notice came to be issued on 27th September 2018 by the Appellant Bank to recover the public money availed by the Corporate Debtor.
- 1.3 Meanwhile, on 22nd October 2018, the Corporate Debtor filed a petition being¹ under Section 10 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) before the NCLT. In the first auction held on 6th November 2018, bids were received. As such, the second auction notice came to be issued on the 27th of November 2018, which was scheduled to be held on 12th December 2018. In the second E-auction, three persons became successful bidders by offering jointly a price of Rs. 32.92 crore for both the secured assets. On 13th December 2018, the sale was confirmed in favor of the successful bidders/auction purchasers in the public auction. The successful bidders deposited 25% of the bid amount, i.e., Rs. 8.23 crore including the Earnest Money Deposit and thus the Appellant Bank issued a sale certificate to them. The auction purchasers were directed to pay the balance 75% of the bid amount within 15 days, i.e., prior to 28th December 2018.
- 1.4 Thereafter on the 28th of December 2018, the Auction Purchasers addressed a letter to the Appellant Bank seeking the handing over of the peaceful and vacant possession of the secured assets and prayed for an extension in time to pay the balance 75% of the bid amount till 8th March 2019, such request was agreed upon by the Appellant Bank on 29th December 2018, in exercise of its powers Under Rule 9(4)(a) of the said Rules.
- 1.5 The learned NCLT, vide order dated 3rd January 2019, admitted the petition filed by the ex-promoter of the Corporate Debtor. As a result of the said order passed Under Section 10 of the IBC, the Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor commenced. A moratorium as provided Under Section 14 of the IBC was notified and an Interim Resolution Professional (“**IRP**”) was also appointed.
- 1.6 The Appellant Bank thereafter on the 21st of January 2019, filed its claim with the IRP, upon it coming to know about the admission of the insolvency petition filed by the Corporate Debtor. According to the Appellant Bank, the balance 75% of the bid amount was not yet received on the said date and hence would not be excluded from the claim filed before the IRP. During the pendency of the CIRP, the Appellant Bank accepted the balance 75% of the bid amount, i.e., Rs. 24.69 crore on 8th March 2019.
- 1.7 Upon receipt of the payment, the Appellant Bank submitted its revised claim to the IRP on 11th March 2019. The Appellant Bank also intimated the IRP about the successful sale of the said secured assets. The promoter of the Corporate Debtor, i.e., Respondent No. 2 thereafter, filed an application² in the pending company petition³, thereby praying the learned NCLT to set aside the security realization during the CIRP period carried out by the Appellant Bank or in the alternative to cancel the impugned transaction. Vide order dated 15th July 2020, the learned NCLT passed an order thereby allowing the said application filed by the Respondent No. 2 and setting aside the sale of the property owned by the Corporate Debtor.

¹ CP(IB) No. 601/10/HDB/2018.

² I.A. No. 832/2020.

³ CP(IB) No. 601/10/HDB/2018.

1.8 Being aggrieved thereby, the Appellant Bank filed an appeal⁴ before the learned NCLAT and the same was rejected by the impugned judgment dated 26th March 2021. Being aggrieved thereby, the Appellant Bank filed an appeal⁵ to the Supreme Court of India.

2. ISSUES RAISED:

- 2.1 Whether the act to foreclose under SARFAESI is prohibited on the initiation of the moratorium under IBC?
- 2.2 Do the provisions under the Insolvency and Bankruptcy Code prevail over other similar laws in the country?
- 2.3 Whether a sale vide Auction is said to be completed on payment of partial consideration?

3. SUBMISSIONS OF THE PETITIONER:

- 3.1 The Petitioner i.e.: the Appellant Bank argued that the very initiation of the voluntary insolvency proceedings under section 10 of the IBC, was with mala fide and should be stopped as under section 65 of the IBC.
- 3.2 Demand Notice to the Corporate Debtor by the Appellant Banker, was challenged by the Corporate Debtor by an application⁶ filed with the Debt Recovery Tribunal-II, Hyderabad (“DRT”) wherein no stay was granted, the Corporate Debtor was ordered to deposit Rs. 12 Crore for the stay on the confirmation of the sale, which the Corporate Debtor failed to pay, after which with mala fide intent, the petition under section 10 under IBC was filed to stall the sale.
- 3.3 They further submitted that the NCLT order was passed on 3rd January 2019, i.e.: prior to the confirmation of the sale, hence the mala fide intention of the corporate debtor to stall the SARFAESI proceedings. Such intention is made even more clearer as the Liquidation order given by the NCLT on 7th February 2022 due to the lack of a credible plan by the ex-promoter. They further submit that upon the perusal of the order of the NCLT on 7th February 2022 would reveal the delay caused at the instance of the IRP, who has seen to be helping ex-promoters.
- 3.4 Since the moratorium under section 14 of the IBC has ceased to operate directing liquidation passed under section 52 of the IBC, and the secured creditors were allowed to realize their security interest. Hence there is no bar on the Appellant Bank to realize its money.
- 3.5 The Appellant Bank further submitted that as per the section 54 of the IBC, the sale was completed after the receiving and confirmation by the Appellant Bank of the 25% of the bid amount, hence the fact that the part of the bid money was received subsequently to the initiation of the CIRP would not affect the sale. Reference was made by the Appellant Bank to certain judgements *Vidhyadhar vs. Manikrao*.⁷, *B. Arvind v. Govt. of India*⁸ and *Kaliaperumal v. Rajagopal and Anr.*⁹
- 3.6 The Appellant Banker lastly submits that the Section 14(1)(c) of the IBC interdicts any action to foreclose, recover or enforce any security interest including any action under the SARFAESI, but cannot undo the actions that already lie complete.
- 3.7 Submission on behalf of Impleading Applicants (Auction Purchasers) - The Impleading Applicants supported the submissions made by the Appellant Banker and further submitted that the applicants were bona fide purchasers and were put into possession and hence should not be disturbed. They also contested that the right of redemption under section 60 of the Transfer of Property Act, 1882 (“TP Act”) and said right to redemption has been lost on the issuance of public notice of auction or tender as under Section 60 of the TP Act.
- 3.8 The Applicants further submitted that the fact that the applicants were not added as party Respondents in the proceedings before the NCLT after the successful auction purchasers, show the mala fide intention of the Corporate Debtor and the IRP, and that as per the paragraph (21) of the Insolvency Law Committee Report, 2018, the rights and priorities of creditors established

⁴ Company Appeal (AT) (Insolvency) No. 736 of 2020.

⁵ Civil Appeal No. 4750 of 2021.

⁶ SA No. 340/2018.

⁷ MANU/SC/0172/1999: (1999) 3 SCC 573.

⁸ MANU/SC/2834/2007: (2007) 5 SCC 745.

⁹ MANU/SC/0421/2009: (2009) 4 SCC 193.

prior to insolvency under commercial laws should be upheld to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationship.

4. SUBMISSIONS OF THE RESPONDENT:

- 4.1 Respondent 1 supported the impugned judgements passed by the learned NCLAT as well as the order filed by the NCLT and submitted that the title would be passed over only after the receipt of full sale consideration and issuance of sale certificate, and that the said title cannot be conveyed to the auction purchasers merely upon the confirmation of the sale. He further submitted that such contentions are totally contrary to the provisions of SARFAESI and the provisions of IBC¹⁰, and relied on the case of, "*Hindon v. State*."¹¹
- 4.2 They further submitted that Section 13(8) of the SARFAESI Act itself provides a right of redemption of secured assets to the owner/debtor and relied on the case of, "*S. Karthik v. N. Subhash*."
- 4.3 They also submitted that upon the approval of Resolution Plan ("**RP**"), in view of section 31(1) of IBC, all the debts stand legally resolved and the same is binding on all the parties including the Corporate Debtor, its employees, members, creditors, all Govt. dues and the successful resolution applicant would be entitled to start on a clean slate, and that under section 238 of the IBC, the provisions contained therein will override all other laws for the time being in force and the provisions contained of the IBC would prevail over any other instrument having effect by virtue of another laws, with the respondent relying on the case of "*Anand v. Varsha*."¹²
- 4.4 Respondent 1 further submitted that the continuation of any proceeding including the proceeding under the SARFAESI Act by the Appellant Bank and the receipt of the balance sale consideration was violative of section 14(1)(c) of the IBC, and that the amount payable by the Corporate Debtor to the other Financial Creditors is much more than the amount received by the Appellant Bank during the pendency of the CIRP and that under the provisions of the IBC, all the Financial Creditors would be entitled to a share in the amount received upon realization of the assets of the Corporate Debtor and the Appellant bank cannot keep it in entirety.
- 4.5 They also submitted that the allegations made regarding mala fide are made only to prejudice the court, and that the application under the Section 10 of IBC, Corporate Debtor has clearly mentioned about declaration of NPA by the appellant and the Andhra bank and that the initiation of auction process by both banks, and the initiation of proceedings under IBC for overall resolution of debts of the corporate debtor cannot be taken to be a mala fide attempt. He also submitted that section 65 of the IBC expressly provides for the mechanisms and the remedy for addressing frivolous or malicious proceedings initiated under SARFAESI Act. However, the Appellant Bank has chosen not to take recourse to such proceedings.
- 4.6 Respondent 2 supported the impugned judgement passed by the NCLAT as well as the order passed by the NCLT and submitted that the Appellant Bank never challenged the order of NCLT to commence CIRP on the 3rd of January 2019, and that the order of liquidation passed by the learned NCLT on 7th February 2022 was stayed by the NCLAT on 8th March 2022.
- 4.7 They also submitted that upon the initiation of the CIRP, the Appellant bank itself has submitted its claim on 21st January 2019 for amount of Rs.79.94 crore, which included full value of that assets. It is, therefore, submitted that the Appellant is estopped from the contending that the amount of Rs. 8.2 crore cannot be included in the amount available for CIRP.

5. DECISION OF THE SUPREME COURT:

- 5.1 From the Section 14(1) of IBC is clear that after initiation of CIRP, the moratorium for any action to foreclosure, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under SARFAESI Act, i.e.: there is a complete prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property. The legislative intent is clear from the words,

¹⁰ Sections 14(1)(c), 31(1) and 238 of the IBC.

¹¹ MANU/SC/1250/2018: (2019) 2 SCC 198.

¹² MANU/SC/1602/2019: (2020) 14 SCC 198.

- “including any action under the SARFAESI ACT”, which also call for the prohibition of action to foreclosure, recover or enforce any security interest under the SARFAESI Act.
- 5.2 Also as per Section 238 of the IBC it can be seen that the provisions of the IBC 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. It is further stated that the court hold IBC as a complete code in itself and such section 238 would prevail notwithstanding anything inconsistent therewith contained in any other law in force for the time being and relied on the judgements in *Innoventive v. ICICI*¹³, *Principal v. Monnet*¹⁴ and *Ghanashyam v. Edelweiss*.¹⁵
- 5.3 The court recognizes the judgment of this court in the case of *Vidhyadhar* (Supra), wherein it was held that even if full price of property has not been paid, the transaction of the sale will take effect and the title would pass on that transaction. However, the court held that the real test is the intention of the parties.
- 5.4 In the case of *B. Arvind Kumar* (Supra), the suit property was sold in public auction the sale of which was confirmed by the District Judge, Civil and Military Station, Bangalore. The court is of the opinion that when a property is sold by public auction in pursuance of the order of the court and the bid is accepted and the sale confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser, it is held that the sale certificate is issued to the purchaser only when the sale becomes absolute, however in the case the court found that the title was intended to be passed only on the payment of the balance consideration.
- 5.5 Also in the case of *Kalaiperumal* (Supra) the sale deed was registered on partial payment of consideration, however the court held that the intention of parties was of paramount importance, it was held that in this case ownership of the property was intended to be passed only on the payment of the balance consideration. Furthermore, as the sale in the present case arises out of a statutory sale, the sale would be governed by rules 8 and 9 of the said Rules, thus the sale would be complete only when the auction purchaser makes the entire payment and the authorised officer, exercising the power of sale, shall issue a certificate of sale of property in favour of the purchaser.
- 5.6 The court has followed the followed the rationale derived in the case of, “*Shakeena v. Bank of India*¹⁶” whereby I was held that the sale certificate did not require registration and that the sale process was completed on issuance of the sale certificate of sale of property in favour of the purchaser in the Form given in the said Rules, this was followed by the court in the case of *S. Karthik* (supra). In the present case the balance amount has been accepted by the Appellant Bank on 8th March 2019, the sale as under the said Rules would be completed only on 8th March 2019, which falls much after 3rd January 2019 i.e.: on which date CIRP commenced and moratorium was ordered and hence the sale was complete upon receipt of the part payment.
- 5.7 The Court hence found that no case was to be made out for interfering with the concurrent orders passed by the learned NCLT dated 15th July 2020 and learned NCLAT dated 26th March 2021. Hence the Court held the following in the present case in Section 238 of IBC, it was held that, “*After the CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover or enforce any security interest are prohibited.*” IBC is a complete Code in itself, “*The provisions of the IBC would prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*”
- 5.8 As per Rules 8, 9 of the Security Interest (Enforcement) Rules, 2002, “*The sale would be complete only when the auction purchaser makes the entire payment and the authorised officer, exercising the power of sale, shall issue a certificate of sale of the property in favour of the purchaser in the Form given in Appendix V to the said Rules - The sale certificate does not require registration and the sale process is complete on issuance of the sale certificate.*”

6. PSL OPINION:

¹³ MANU/SC/1063/2017: (2018) 1 SCC 407.

¹⁴ MANU/SC/1018/2018: (2018) 18 SCC 786.

¹⁵ MANU/SC/0273/2021: (2021) 9 SCC 657.

¹⁶ MANU/SC/1119/2019: (2019) SCC OnLine SC 1059.

6.1 Hon'ble Supreme Court in its judgement clarified that sale under statutory scheme as contemplated under Rule 8 and 9 of the Security Interest (Enforcement) Rules, 2002 shall deem to be completed only when entire payment for the sale is made and on the issuance of the certificate of sale by authorised officer in favour of the purchaser. It was also rightly observed by the Hon'ble Supreme Court that provision of section 14(1)(c) of the IBC, will have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by Corporate Debtor in respect of the property including any action under SARFAESI Act is prohibited.