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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 8th February, 2021

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W.P.(C) 1547/2021 & CM APPL. 4433/2021

UNION BANK OF INDIA E ANDHRA BANK Petitioner

Through: Mr. Alok Kumar, Advocate.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Jasmeet Singh, CGSC for UOI.
(M:9810064790)

Mr. Zoheb Hussain, Advocate for ED.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode (physical and virtual hearing).

CM APPL. 4434/2021 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

W.P.(C) 1547/2021 & CM APPL. 4433/2021 (for stay of the provisional attachment order)

3. The Union Bank of India has approached this Court challenging the provisional attachment order dated 15th October, 2020 passed by the PMLA Adjudicating Authority i.e., Deputy Director, Directorate of Enforcement, under the provisions of Prevention of Money Laundering Act, 2002 (*hereinafter referred as "PML Act"*).

4. The case of the Petitioner, Union Bank of India E Andhra Bank (*hereinafter, "Bank"*), is that the account of the Respondent No.4 – M/s. Deccan Chronicles Holding Limited, was declared as a Non-Performing Asset ("*NPA*") on 31st December 2012. Thereafter, proceedings were

initiated before the Debt Recovery Tribunal by the Petitioner against Respondent No. 4 and a recovery certificate was issued in its favour by the DRT. Further, action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereafter referred as “SARFAESI Act”) was also taken by the Petitioner Bank, which at that stage was called the Andhra Bank.

5. During the pendency of the SARFAESI proceedings, Canara Bank, one of the lenders to the said debtor/ Respondent No. 4, approached the National Company Law Tribunal, Hyderabad (hereinafter referred as *NCLT*) under Section 7 of The Insolvency and Bankruptcy Code, 2016 (*hereinafter referred as the “IBC”*) for initiation of the Corporate Insolvency Resolution Process (*hereinafter referred as “CIRP”*) against the debtor. The Resolution plan, submitted by the SREI Multiple Asset Investment Trust- Vision India Fund was finally approved by the NCLT on 3rd June, 2019.

6. However, while the implementation of the resolution plan was in process, the impugned order has been passed by the Directorate of Enforcement (*hereinafter referred as “ED”*) attaching the properties of Respondent No.4, including three properties already mortgaged to the Bank. It is the case of the Petitioner that this has had a negative impact on the CIRP and realization of the debt of the Petitioner from the Respondent No.4.

7. Mr. Alok Kumar, ld. counsel appearing for the Petitioner submits that in another similar matter involving another debtor, titled ***JSW Steel Ltd. v. Mahender Kumar Khandelwal and Ors. (AT) (Insolvency) No. 957/2019***, the present issue of conflict, was raised before the Union of India, Ministry of Corporate Affairs through its Department of Financial Services, and the

stand of Ministry of Corporate Affairs, in their Counter Affidavit, was clear that such intervention by the ED or any such authority would have a negative effect on the entire CIRP process. The statement of the Ministry of Corporate Affairs, as recorded in the judgment of the National Company Law Appellate Tribunal, Delhi, in **JSW Steel (Supra)** is set out below:

“3) That pursuant to the captioned notice, the Ministry had called for meeting of the officials of Department of Financial Services and the Banks who were members of the Committee of Creditors on October 3rd, 2019 to ascertain their views and formalize the response of this Ministry, in view of rippling effects it would have in this case as well as other cases as well. In the meeting, it was unanimously recognized that the rights of Secured Financial Creditors are to be protected in the resolution of the Corporate Debtor and the incumbent resolution applicant is bona fide investor who acquires and takes over the Non-performing Assets (NPA) company as a going concern and facilitates maximization of the value of assets of the corporate debtor, revival of a failing company and realization of dues of creditors to the extent possible under an open, transparent National Company Law Tribunal (NCLT) supervised process.

4) It is submitted that under the process envisaged under the Insolvency & Bankruptcy Code, 2016 ("IBC"), once a Resolution Plan is approved by the Ld. Adjudicating Authority, it is binding on all stakeholders. Before approving the Resolution Plan, objections are heard by the Ld. Adjudicating Authority and once hearing on the Resolution Plan and objections is completed before the Ld. Adjudicating Authority and the Resolution Plan is approved, such approved Resolution Plan is binding on all stakeholders, including all government agencies. The provision of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 by which Section 31(1) was amended, makes it amply clear that a resolution plan is

binding on Central Government and all statutory authorities.

5) It is submitted that if any Corporate Debtor is undergoing investigation by the Central Bureau of Investigation ("CBI"), Serious Fraud Investigation Office ("SFIO") and/ or the Directorate of Enforcement ("ED"), such investigations are separate and independent of the Corporate Insolvency Resolution Process ("CIR Process") under the IBC and both can run simultaneously and independent of each other. It is further submitted that the erstwhile management of a company would be held responsible for the crimes, if any, committed under their regime and the new management taking over the company after going through the IBC process cannot be held responsible for the acts of omission and commission of the previous management. In other words, no criminal liability can be fixed on the successful Resolution Applicant or its officials.

6) In so far as the corporate debtor or its assets are concerned, after the completion of the CIR Process, i.e. a statutory process under the IBC, there cannot be any attachment or confiscation of the assets of the Corporate Debtor by any enforcement agencies after approval of the Resolution Plan. The CIR Process is an open and transparent statutory process wherein under Resolution Plans are invited from bona fide Prospective applicants who are not hit or disqualified under Section 29A of the IBC.

7) Resolution Plan submitted by the interested Resolution Applicants are duly examined and validated by the Resolution Professional and the Committee of Creditors ("CoC"). Once the Resolution Plan is voted upon and approved by the CoC, it is submitted to the Ld. Adjudicating Authority for its approval. The Ld. Adjudicating Authority after hearing the objections, if any, and being satisfied that the Resolution Plan is in compliance with the provisions of the law, approves the Plan. The CIR Process is desired to ensure that undesirable persons do not take control of the Corporate Debtor by virtue of Section 29A of the IBC. The

purpose and scheme of the CIR process is to hand over the company of the corporate debtor to a bona fide new resolution applicant. Any threat of attachment of the assets of the corporate debtor or subjecting the corporate debtor to proceedings by investigating agencies for wrong doing of the previous management will defeat the very purpose and scheme of CIR process, which inter-alia includes resolution of insolvency and revival of the company, and the efforts of the bank to realise dues from their NPAs would get derailed.

Otherwise too, the money realised by way of resolution plan is invariably recovered by the banks and public financial institutions and other creditors who have lent money to the erstwhile promoters to recover their dues which they have lent to the erstwhile management for creation of moveable or immoveable assets of the corporate debtor in question and therefore, to attach such an asset in the hands of new promoters or resolution applicant would only negate the very purpose of IBC and eventually destroy the value of assets.

8) In light of the above, it is respectfully submitted that the ED while conducting investigation under PMLA is free to deal with or attach the personal assets of the erstwhile promoters and other accused persons, acquired through crime proceeds and not the assets of the Corporate Debtor which have been financed by creditors and acquired by a bona fide third party Resolution Applicant through the statutory process supervised and approved by the Adjudicating Authority under the IBC. In so far as a Resolution Applicant is concerned, they would not be in wrongful enjoyment of any proceeds of crime after acquisition of the Corporate Debtor and its assets, as a Resolution Applicant would be a bona fide assets acquired through a legal process. Therefore, upon an acquisition under a CIR Process by a Resolution Applicant, the Corporate Debtor and its assets are not derived or obtained through proceeds of crime under the Prevention of Money Laundering Act, 2002 ("PMLA) and need not be subject to

attachment by the ED after approval of Resolution Plan by the Adjudicating Authorities."

8. Mr. Zoheb Hossain, Id. counsel appearing for the ED, at the outset, submits that this Court does not have jurisdiction to entertain the present writ petition in view of the judgement of the Id. Division Bench in ***Aasma Mohammed Farooq v. UOI & Ors., [W.P.(C) 12494/2018, decided on 5th December, 2018]***. He submits that the appropriate Court would be the High Court of Andhra Pradesh. He also submits that the three assets which are already stated to have been mortgaged by the Bank, are not a part of the resolution plan.

9. Considering the fact that the resolution plan has already been approved in this matter, and that the ED's order of provisional attachment of the properties of Respondent No. 4 has been passed after the approval of the resolution plan by the NCLT, the said provisional attachment would *prima facie* be contrary to Section 32A of the IBC. The recent judgment of the Supreme Court in ***Manish Kumar v. Union of India (WP(C) No. 26/2020, decided on 19th January 2021)*** has extensively dealt with this issue in context of Section 32A of the IBC and held:

"256. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short, the PMLA) are pressed before us. It is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being

manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the home buyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a Resolution Plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stake holders.

257. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the Interim Resolution Professional and thereafter into the hands of the Resolution Professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the

object of the statute we hardly see any manifest arbitrariness in the provision.

258. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor. The corporate debtor and its property in the context of the scheme of the code constitute a distinct subject matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgement of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximisation of the value of the assets which again is to be achieved at the earliest point of time cannot become the subject of judicial veto on the ground of violation of Article 14. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgement and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some it cannot unless it strikingly ill squares with some constitutional mandate

suffer invalidation.”

10. Accordingly, till the next date in this matter, there shall be a stay of the proceedings in ECIR No. ECIR/HYZO/02/2018 before the Adjudicating Authority arising out of the provisional attachment order dated 15th October 2020, passed by the ED, subject to the condition that the Petitioner Bank shall place on record any details of the steps taken to monetize the assets and the recovery made, if any.

11. The ED shall file a detailed counter affidavit. Further, since the issue in this petition is related to the attachment of assets post the resolution plan being approved, the Ministry of Finance, Union of India shall also place on record its stand on this issue.

12. Let copy of the resolution plan be placed on record by the Petitioner Bank. Counter affidavit be filed within four weeks. Rejoinder thereto, if any, be filed within four weeks thereafter. The ED is permitted to take the above objections, with respect to the jurisdiction of this court, in its counter affidavit. The same shall be heard as a preliminary objection.

13. List for hearing on 18th May, 2021.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 8, 2021

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