

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1726 of 2024

**[Arising out of the Impugned Order dated 03.07.2024 passed by the
Adjudicating Authority, National Company Law Tribunal, New Delhi
Bench-VI in I.A. No. 317/2024 in C.P. (IB) No. 10/ND/2024]**

In the matter of:

RAMESH KUMAR CHUGH

R/o.: 595-598, Sector 11-12,
HUDA Colony, Panipat, Haryana-132103
Email: rameshkumarchug8@gmail.com

...Appellant

Versus

**ASSETS CARE & CONSTRUCTION
ENTERPRISES LIMITED**

Regd. Office: 14th Floor, Eros Corporate
Tower, Nehru Place, New Delhi-110019
Email: acre.arc@acreindia.in

...Respondent

Present :

For Appellant : Mr. Mohit Chaudhary and Prakhar Mithal, Advocates.

For Respondent : Mr. Neeraj Malhotra, Mr. R.P. Agrawal, Ms. Reema and Mr.
Nimish Kumar, Advocates.

ORDER
(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 03.07.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench-VI) in I.A. No. 317/2024 in C.P. (IB) No. 10/ND/2024. By the impugned order, the Adjudicating Authority has dismissed I.A. No 317 of 2024 filed by the Appellant seeking restraint on the Respondent in the conduct of auction of sale notices dated 15.12.2023 under SARFAESI Act. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

2. We have heard Shri Mohit Chaudhary, Ld. Counsel appearing for the Appellant and Shri Neeraj Malhotra, Ld. Senior Counsel representing the Respondent.

3. The Ld. Counsel for the Appellant outlining the facts of the case submitted that a Company Petition under Section 95 of the IBC was filed by Operational Creditor-White Line Enterprises against Mr. Ramesh Kumar Chugh-Appellant who stood as a Personal Guarantor for repayment of the operational debt owed by M/s Sahil Home Loomtex Pvt. Ltd. With the filing of Section 95 petition on 22.12.2023, interim moratorium under Section 96 of IBC commenced and an Interim Resolution Professional was appointed in the Section 95 proceedings vide order dated 12.02.2024 of the Adjudicating Authority. The Appellant-Mr.

Ramesh Kumar Chugh (**“RKC”** in short) was also a partner in a partnership firm named M/s Sheena Exports which firm had availed of loan facilities from HSBC and Citi Bank. The Appellant was also a Guarantor to loan facilities given by PNB and IDBI to M/s Sheena Textile Ltd. (**“STL”** in short). Subsequently, HSBC, Citi Bank, PNB and IDBI had assigned the loans given to M/s Sheena Exports and STL along with underlying securities in favour of Respondent-Assets Care & Construction Enterprises Ltd. (**“ACRE”** in short). Due to non-repayment of debt, the Respondent had put up three properties for auction on 22.01.2024 in respect of M/s Sheena Exports for which sale notices were issued on 15.12.2023. In respect of STL, one property was put on auction on 22.01.2024 by the Respondent vide sale notice dated 15.12.2023. The Second sale notice was issued on 01.02.2024. For convenience, we propose to collectively call these properties as ‘subject property’.

4. It was submitted that the partnership firm, named M/s Sheena Exports, comprised of four partners including RKC-Appellant who enjoyed 25% share in the profits in terms of their Partnership Deed dated 01.04.2023. The Appellant had given a notice on 06.02.2024 to the remaining three partners regarding dissolution of the partnership firm. It was contended by the Appellant that the Adjudicating Authority has failed to appreciate that the partnership firm has been dissolved by virtue of notice dated 06.02.2024 and post dissolution, the liability of the partnership firm shifted on to the partners of the partnership firm by virtue of Section 45 of the Partnership Act. Submission was therefore pressed by the Ld. Counsel of the Appellant that the notice for auction of the aforementioned properties issued by ACRE under Rule 8(6) of the Security

Interest (Enforcement Rules), 2002 was in conflict with interim moratorium operating under Section 96 of the IBC.

5. It was canvassed by the Ld. Counsel of the Appellant that though Section 48 of the Partnership Act provides the mode of settlement post dissolution of the partnership firm which mode gives priority to repayment of the debts of the partnership firm, however, since interim moratorium under Section 96 had come into operation qua the Appellant, in such a scenario, Section 178 of IBC would prevail. Section 178 of the IBC gives priority to the payment of debts of the partnership firm over personal debts. Since IBC is a special legislation, by virtue of Section 238 of IBC it would prevail over the Partnership Act. Hence, if the sale of the assets is permitted under Security Interest (Enforcement Rules), this would amount to violation of the provisions of moratorium under Sections 96 and 178 of IBC.

6. It was contended that when an application is filed under Section 95 of the IBC, interim moratorium commences from the date of filing the application to all the debts and during the interim moratorium period any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed and the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. Though the initiation of moratorium was intimated to the Respondent, the Respondent has proceeded ahead in dealing with the assets of the Appellant in violation of Section 96 of IBC. It was submitted that the Appellant had therefore filed an application before the Adjudicating Authority to direct the Respondent to withdraw the notices issued under Rule 8(6) of Security Interest (Enforcement Rules) and to restrain them from taking any further action

pursuant to these notices in respect of property put to auction which has been erroneously dismissed by the Adjudicating Authority.

7. Refuting the contentions of the Appellant, the Ld. Sr. Counsel for the Respondent submitted that the Respondent had filed four Original Applications before the Debt Recovery Tribunal (DRT), New Delhi. All the four OAs have been decreed and Recovery Certificates were issued. The outstanding amount in the four OAs is about Rs 200 Cr. and Recovery Proceedings are pending before the Recovery Officer, DRT, New Delhi. It was contended that since the property in question were not owned by the Appellant but stood in the name of M/s Sheena Exports, the Respondent as a Secured Creditor is entitled to proceed in accordance with the SARFAESI Act for realisation of its dues by sale of the property in question. The Respondent has contended that it is not taking action against the Appellant or his personal property but against the partnership firm. In support of their contention, the Respondent has relied on the judgment of the Hon'ble Supreme Court in the matter of ***Rajendra Bajoria Vs Hemant Kumar Jalan 2021 SCC OnLine SC 764*** (***'Bajoria judgement'*** in short) wherein it has been held that the partners do not have any right, title or interest in respect of the assets and properties of a firm so long as the firm is carrying on business.

8. It is the case of the Respondent that the assets and properties of a partnership firm are distinguishable from the personal/individual assets of the partners. It is submitted that a partner is not the owner of any assets and properties of a partnership firm and is entitled only to his share in the profits of the firm. It has also been contended by the Respondent that the partnership dissolution notice issued by the Appellant is malafide and was filed with a view

to defeat the rights of the Respondent as the same was issued during the pendency of the SARFAESI proceedings. It has also been pointed out that even if the partnership firm M/s Sheena Exports has been dissolved, the Appellant as one of the partners therein will be entitled to the surplus of sale proceedings of the assets and properties of the firm, if any, only after meeting the liabilities of the firm to third parties, in the share ratio as agreed upon in the partnership deed.

9. It is contended that Section 95 petition was filed by White Line Enterprises stating that it had supplied goods to one M/s Sahil Home Loomtex Pvt. Ltd. wherein the Appellant stood as a personal guarantor for repayment of debt owed by Sahil Home Loomtex. Therefore, when the Section 95 application was not filed against the partnership firm, consequently, the property and assets of partnership firm, M/s Sheena Exports did not constitute the subject matter of Section 95 application. Since M/s Sheena Exports and its properties is unrelated and unconnected with Section 95 application hence the question of applicability of interim moratorium does not arise.

10. It is also the contention of the Respondent that the Appellant has concealed from the Adjudicating Authority the material fact that two Securitization Application Nos. 17/2024 and 18/2024 have been filed before the DRT-II, New Delhi, challenging the sale notices dated 15.02.2023. It was therefore contended that the Appellant is indulging in forum shopping which is an abuse of the process of law. In SA 17/2024, the stay application has already been dismissed on 14.08.2024 and the remedy therefore lies by way of appeal to DRAT and not before the NCLT.

11. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

12. The primary question before us for consideration is whether in the backdrop of Section 95 proceedings under IBC having been initiated against the Appellant in his personal capacity as a personal guarantor, can the Respondent be barred from conducting sale of the 'subject property', belonging to a partnership firm (under dissolution), in which the Appellant is a partner, on grounds of operation of moratorium under Section 96 of the IBC in respect of personal guarantee of the Appellant.

13. It is the case of the Appellant that the provisions of interim moratorium are applicable since the partnership firm had been dissolved by virtue of notice dated 06.02.2024 and post-dissolution, the liability of the partnership firm had shifted on to the partners of the partnership firm by virtue of Section 45 of the Partnership Act. Further, as RKC was one of the partners in the partnership firm on whom the liability of the partnership firm had, inter alia, devolved post-dissolution, by virtue of Section 95 proceedings having been initiated against him, the subject property belonging to the partnership firm (under dissolution) also stood subjected to the provisions of interim moratorium. Hence it is their case that the subject property cannot be subjected to sale proceedings by the Respondent. It is further contended that IBC being a special legislation, with the operationalisation of the interim moratorium, the provisions of Section 178 of the IBC which provides the priority to be followed during the distribution of the

debts of a partnership firm would prevail over Section 48 of the Partnership Act by virtue of the over-riding provisions of Section 238 of IBC.

14. Per contra, it is the claim of the Respondent that the subject property in question is not owned by the Appellant as the same stands in the name of M/s Sheena Exports and therefore the Respondent as a Secured Creditor is entitled to proceed in accordance with the provisions of SARFAESI Act for realisation of its dues by sale of property which is mortgaged in their favour by M/s Sheena Exports. Assertion had also been made that while the three properties put on auction in respect of M/s Sheena Exports were admittedly owned in the name of M/s Sheena Exports as a partnership firm, the property put up for auction to recover loan outstanding against STL, also stood in the name of M/s Sheena Exports in terms of a judgment dated 22.04.2006 passed by Additional Civil Judge, Panipat. It is submitted that the assets and the properties of the partnership firm are distinguishable and separate from the personal/individual assets of the Partners. The properties in respect of which proceedings have been taken up under SARFAESI Act are mortgage properties which stand in the name of the partnership firm and not in the name of Appellant in his personal capacity. It has been contended by the Respondent that as they are not taking any action either against Appellant or against any of his personal properties, the interim moratorium cannot apply to the subject property which has no bearing with the personal guarantee of the Appellant.

15. In support of their contention, the Respondent has relied on two judgements. One of them is the **Bajoria judgement** supra of the Hon'ble Apex Court wherein it has been held:

“It is trite law that the partners of a firm are entitled only to the profits of the firm and upon dissolution of the firm they are entitled to the surplus of the sale proceeds of the assets and properties of the firm, if any, after meeting the liabilities of the firm, in the share agreed upon in the partnership deed. The partners do not have any right, title or interest in respect of the assets and properties of a firm so long as the firm is carrying on business. Hence, the plaintiffs as legal heirs of some of the original partners cannot maintain any claim in respect of the assets and properties of the said firm. Their prayer for declaration of co-ownership of the assets and properties of the said firm is not maintainable in law.”

The other judgement relied upon is judgment of the Hon’ble High Court of Allahabad in **Onkar Rice Mill vs State of U.P. & Ors 2019 SCC OnLine All 5623** wherein it has been observed that so long as the partnership continues, no part of the assets of the partnership could be regarded as belonging to any individual partner and no individual partner can predicate his share in a particular property belonging to the partnership firm.

16. Having heard the rival contentions of both sides, to answer the above question outlined at para 12 above, we need to first note the relevant provisions of IBC contained in Part III of IBC which deal with insolvency resolution and bankruptcy of individuals and partnership firms.

17. Section 95 provides for filing of application by creditor to commence insolvency resolution process and the relevant provision reads as follows:

95. Application by creditor to initiate insolvency resolution process.—(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

In the present case, admittedly, White Line Enterprises had filed C.P.(IB)No.10/ND/2024 invoking Section 95 of the IBC against RKC for standing as a personal guarantor for repayment of operational debt owed by M/s Sahil Home Loomtex Pvt Ltd. following which resolution process had commenced. Clearly, therefore, it is the personal guarantee of the Appellant against which the Section 95 has been invoked and not against the property of the partnership firm.

18. This brings us to the statutory provision relating to date of commencement of moratorium. That interim moratorium shall commence, on the date of application, in relation to all the debts is provided in Section 96, which reads as under:

“96. Interim moratorium.—(1) *When an application is filed under section 94 or section 95—*

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period—

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.”

We have already noticed that by the order of the Adjudicating Authority dated 12.02.2024, interim moratorium had commenced from the date of Section 95 application which is 22.12.2023.

19. Going deeper into the provisions of Section 96(1)(a), we find that it provides that interim-moratorium shall commence on the date of the application in relation “to all the debts”. This is reinforced by Section 96(1)(b) which lays down that during the moratorium period (i) any legal action or proceeding pending in respect “of any debt” shall be deemed to have been stayed; and (ii) the “creditors of the debtor” shall not initiate any legal action or proceedings “in respect of any debt”. The use of the expression “all the debts” and “any debt” are phrases with a very wide amplitude and it clearly covers debts other than the debt basis which moratorium has commenced. Though encompassing in nature, the moratorium relates only to the specific debt and not to the debtor. In addition, we notice the use of the phraseology of “creditors of the debtor” in Section 96(1)(b)(ii) which obviously refers to other creditors of the debtor apart from the creditor on whose application interim moratorium has commenced. Thus, the interim moratorium under Section 96(1)(b)(ii) creates a prohibition on the other creditors of the debtor from initiating any legal action in respect of the debt for which Section 95 has been initiated.

20. We find that the Adjudicating Authority has endeavoured to find out the nuances and implications of interim moratorium under Section 96 of IBC. Relying on the judgement of the Hon’ble Supreme Court in ***Dilip B. Jiwrajka Versus Union of India MANU/SC/1274/2023*** (***‘Jiwrajka judgment’*** in short), the Adjudicating Authority has observed in the impugned order at para 8 that the scope of interim moratorium under Section 96 of IBC is intended to operate in respect of a debt only. The relevant para is as extracted below.

“8. Thus, interim moratorium under Section 96 operates in respect of debt only. The Interim Moratorium u/s 96 of IBC commences upon filing of application under Section 94 or 95 as the case may be. However, the scope of such interim moratorium applies only to stay of any legal action or proceeding pending or that could potentially be initiated by creditors of the debtor only in respect of debt.

9. The applicant has stated that he is a guarantor. It is further an admitted fact that the applicant is partner in the undivided share of the partnership firm. The interim moratorium u/s 96 of the IBC applies on the debt of the guarantor, however the proceedings before Debt Recovery Tribunal are related to the property of the partnership firm which do not belong to the applicant i.e. Mr. Ramesh Chugh.”

21. For better appreciation and clarity, at this stage, we may notice the relevant paragraphs from the **Jiwrajka judgment** which explains the essence of interim moratorium under Section 96 of IBC which reads to the effect:

“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 subsection (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 subsection (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 subsection (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 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.”

(Emphasis supplied)

22. It is clear from the above judgement that it has distinguished the provisions of moratorium contained in Section 14 and Section 96 of the IBC and held that moratorium in respect of Section 96 is intended to operate in respect of a debt as opposed to a debtor and that the purpose of interim moratorium under Section 96 is to restrain the initiation or continuation of legal action or proceedings against the debt. It also does not escape our attention that the Hon’ble Apex Court has laid emphasis that the “crucial words” used are "in respect of any debt" both in clause (b)(i) and clause (b)(ii) of Section 96(1). The moratorium imposed under Section 96 of IBC, 2016, would therefore strictly apply to the security interest created by the Appellant in his personal capacity wherein personal guarantee is given in respect of the operational debt qua White Line Enterprises and will not extend to the cover the subject property being the property of the partnership firm against which Section 95 had not been invoked.

23. We have gone through the Partnership Deed of M/s Sheena Exports as placed at pages 320-323 of Appeal Paper Book (“**APB**” in short) which at Clause 7 provided that the profit of partnership was to be divided amongst the four

partners equally in the ratio of 25% for each of the four partners. At Clause 8, it states that the partnership shall not be responsible for any of the liabilities or losses incurred by any of the partners through their separate business or profession nor shall take into account profits earned by them. In the present case it is manifestly clear that the personal guarantee given qua the debt owed by Sahil Home Loomtex to White Line Enterprises was personal to the Appellant and not a guarantee given by the partnership firm. We have also noticed the dissolution notice of the partnership firm was sent by RKC on 06.02.2024 to the other 3 original partners as may be seen at page 341 of the APB. The Notice of Dissolution only mentions about dissolving the partnership so that the assets/liabilities can be distributed in appropriate shares as per the Partnership Agreement/Deed and makes no mention of the Section 95 application though the same was clearly filed prior to the notice of dissolution of the partnership deed. It would be misconstrued to infer that merely because notice for dissolution of the partnership firm was given by the Appellant entailing the devolution of liabilities of the partnership on the partners, that the partnership firm can in turn be said to be saddled with the liabilities arising out of the personal guarantee of the Appellant.

24. Now coming to the judgements relied upon by the Respondent, we are fully in agreement with the proposition of law laid down by the Hon'ble Supreme Court in ***Bajoria judgment*** supra that the partners of a firm are entitled only to the profits of the firm and upon dissolution of the firm they are entitled to the

surplus of the sale proceeds of the assets and properties of the firm after meeting the liabilities of the firm in the share agreed upon in the Partnership Deed. The partners do not have any right, title or interest in respect of the assets and properties of a firm. We find that in the judgment of the Hon'ble High Court of Allahabad in ***Onkar Rice Mill vs State of U.P. & Ors 2019 SCC OnLine All 5623*** it has been held that no part of the assets of the partnership could be regarded as belonging to any individual partner and no individual partner can predicate his share in a particular property belonging to the Firm. It also held that share in the properties of the partnership would accrue only after the assets have been converted into money and that too after the debts and liabilities of the firm have been paid and discharged. These two judgements definitely come to the aid of the Respondent that the assets held in the name of the partnership firm is not the personal property of the Appellant and cannot be subjected to the provisions of interim moratorium merely because a Section 95 application has been filed against a partner of the firm in respect of a personal guarantee given for a party other than the partnership firm.

25. Given this backdrop, we are of the considered view that in the present facts of the case, the moratorium imposed under Section 96 of IBC would apply only to the security interest created by the Appellant under the personal guarantee in his capacity as a personal guarantor with respect to default of operational debt qua White Line Enterprises. Merely because the Appellant claims to be an erstwhile partner of partnership firm-Sheetal Exports whose dissolution has been purportedly triggered by the Appellant, the interim

moratorium would not cover the subject property against which SARFAESI proceedings have been initiated by the Respondent. We have no quarrel with the contention of the Appellant regarding the overarching nature of Section 238 of IBC. It is well settled that Section 238 of IBC bestows on IBC the priority over other laws. Section 238 of IBC provides 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. This non-obstante clause of Section 238 makes the IBC prevail over any other law for the time being in force. Be that as it may, we are not persuaded by the contention of the Appellant that since Section 178 of the IBC gives priority to the payment of debts of the partnership firm over personal debts, it would prevail over the Partnership Act and sale of the subject property if permitted under Security Interest (Enforcement Rules), would tantamount to violation of the provisions of moratorium under Sections 96 and 178 of IBC. In the present case, when we have come to the considered view that interim moratorium has come into play only with respect to the personal guarantee of the Appellant as personal guarantor and not of the partnership firm, we find no good grounds for the Adjudicating Authority to have entertained the application of the Appellant to withdraw the notice issued under Rule 8(6) of Security Interest (Enforcement Rules) and restrain the Respondent from taking further action on these notices with respect to subject property having been put to auction.

26. In view of the foregoing discussion, we find no cogent grounds to interfere with the impugned order. The Appeal is devoid of merit and is set aside. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**Place: New Delhi
Date: 15.10.2024**

Abdul/Harleen