

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3157 OF 2021

Dewan Housing Finance Corporation
LimitedPetitioner
V/s.
Union of IndiaRespondent

ALONGWITH
INTERIM APPLICATION (ST.) NO. 14632 OF 2021
(INTERVENTION APPLICATION)

Kapil WadhawanApplicant/
Proposed Intervener

IN THE MATTER OF :

M/s. Dewan Housing Finance Corporation
LimitedPetitioner
V/s.
Union of India & anr. . . .Respondents

ALONGWITH
WRIT PETITION NO. 3221 of 2021

Piramal Capital & Housing
Finance LimitedPetitioner
V/s.
Central Bureau of Investigation,
EO-1, Delhi and Ors. . . .Respondents

Senior Advocate Mr. Ravi Kadam, a/w. Mr. Karan Kadam & Mr. Aditya Mithe a/w. Mr. Vivek Shetty a/w. Mr. Amey Mirajkar a/w. Mr. Nishant Upadhyay, Mr. Ayush Chaddha i/by. AZB & Partners, *Advocate for the petitioner in WP-3157- 2021.*

Mr. Aabad Ponda, Senior Advocate with Ms. Chitra Rental i/by. Trilegal, *Advocate for the petitioner in WP-3221-2021.*

Mr. Pranav Badheka a/w. Mr. Rohan Dakshini a/w. Ms. Pooja Kothari a/w. Ms. Urvi Gupte i/by. Rashmikant & Partners, *Advocate for the Intervenor in IA(ST.) No.- 14632-2021 and for respondents no.3 and 4 in WP-3221-2021.*

Mr. Ninad More a/w. Mr. Siddhant Rai i/by. Mr. Hiten Venegaonkar, *Advocate for Union of India.*

Mr. Y.M. Nakhawa, *APP for State.*

CORAM : SANDEEP K. SHINDE, J.

*Closed for Judgment on : 28th October, 2021.
Pronounced Judgment on : 16th November, 2021.*

JUDGMENT :

1. Rule. Rule, made returnable forthwith. By consent of the parties, taken up for hearing forthwith.

2. Writ Petition No. 3157 of 2021 under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, seeks to challenge order dated 20th August,

2021, by which the learned Special Judge, CBI, Greater Bombay in exercise of jurisdiction under Section 32A of the Insolvency and Bankruptcy Code, 2016 (“IBC” for short), declined to discharge Dewan Housing Finance Corporation Limited-Corporate Debtor, from the CBI Special Case No. 830 of 2021 and permitted prosecution of the, Corporate Debtor through its erstwhile Directors (accused nos. 2 and 3) in CBI Special Case No. 830 of 2021.

3. Petitioner, in Writ Petition No. 3221 of 2021, is the successful resolution applicant, whose Resolution Plan dated 22nd December, 2020 has been approved by the Committee of Creditors of Dewan Housing Finance Corporation Limited (DHFL)-(Corporate Debtor) with an overwhelming majority of 93.65% voting and thereafter by the National Company Law Appellate Tribunal (NCLAT), Mumbai, vide its order dated 7th June, 2021.

4. Applicant in Interim Application No. 14632 of 2021 is the erstwhile Chairman and Managing Director of Dewan Housing Finance Corporation Limited and the co-accused in Special Case No.820/2021.

5. Background facts disclosed in these petitions are as under :

(i) Dewan Housing Finance Corporation Limited (DHFL), is a Non-Banking Financial Company (“NBFC”) and Financial Service Provider (FSP), regulated by Reserve Bank of India (RBI). On 20th November 2019, RBI superseded Board of Directors of DHFL owing to governance concerns and defaults in meeting various payment obligations; whereupon Shri. R. Subramaniakumar was appointed as, Administrator to manage the affairs, of the DHFL.

(ii) On November 29 2019, RBI filed Company Petition under the Insolvency and Bankruptcy (Insolvency and Liquidation proceedings of Financial Service Provider and Application to Adjudicating Authority) Rules, 2019 to initiate Corporate Insolvency Resolution Process (CIRP) against DHFL under IBC.

(iii) On December 3 2019, National Company Law Tribunal (NCLAT) admitted the said Company Petition and directed commencement of moratorium period in terms of Section 14 of IBC, from the date of filing of the Company Petition and confirmed the appointment of Administrator.

(iv) On March 7, 2020, respondent no.1-CBI registered FIR against the DHFL, its erstwhile Directors, Kapil Wadhwan (accused no.2), Dhiraj Wadhwan (accused no.3) and others including one, Mr. Rana Kapoor under Section 420 read with Section 120B of the Indian Penal Code and Sections 7, 12, 13(2) read with Section 13(1)(B) of the Prevention of Corruption Act, 1988.

(v) All the transactions which form the subject matter of the FIR were prior to initiation of CIRP against the DHFL.

(vi) On June 25 2020, CBI filed a chargesheet before the learned Metropolitan Magistrate under Section 420 read with Section 120B of the Indian Penal Code and Section 7(12), 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act.

(vii) In the meantime, as required by provisions of the IBC the Administrator appointed by NCLAT and nominated by RBI in discharge of its duties invited Resolution Plans from prospective resolution applicants to resolve the Insolvency of DHFL under the provisions of IBC.

(viii) The Resolution Plan submitted by Piramal Capital and Housing Finance Limited ([Petitioner in Cri. Writ Petition No.3221 of 2021) was approved by majority of 93.65% of votes in the Committee of Creditors (CoC).

(ix) Pursuant, to approval of Resolution Plan by CoC and no-objection being granted to the same by RBI, on February 24, 2021 the Administrator filed an application under Section 31 of IBC, before the NCLAT (Adjudicating Authority), seeking approval to Resolution Plan of Piramal Capital.

(x) On 7th June 2021, NCLAT approved Piramal Capitals' Resolution Plan for DHFL with effect from 7th June, 2021 and appointed Interim Monitoring Committee.

(xi) On 6th July 2021, Piramal Capital obtained all requisite regulatory and statutory approvals in relation to the scheme of arrangement between Piramal Capital and Corporate Debtor i.e. Reverse Merger of the Piramal Capital and Housing Finance Limited, into and with DHFL, the Corporate Debtor.

(xii) The Resolution Plan order dated 7th June, 2021 was challenged by one, 63, Moons Technologies Limited, before the NCLAT by filing Company Appeals.

(xiii). On 6th July, 2021 and 23rd July, 2021, NCLAT, rejected 63 Moon's prayer for a stay on implementation of Resolution Plan (i.e. order dated 7th June, 2021).

(xiv) In the meantime, Mr. Kapil Wadhwan, erstwhile Chairman of the DHFL, also challenged the said Section 31 order, and Resolution Plan before NCLAT. On 2nd August, 2021 NCLAT issued notice in this Appeal. However, no interim relief was granted.

(xv) On 2nd July 2021, DHFL filed an application under Section 32A of IBC, seeking discharge from CBI case in view of the order passed by the NCLT under Section 31 of the IBC.

(xvi) On 5th August, 2021, Kapil Wadhwan (intervenor herein), sought intervention in the application of the DHFL under Section 32A of the IBC. Although the application by co-accused was not

maintainable, it was allowed and Mr. Kapil Wadhwan was permitted to intervene in 32A application, proceedings.

(xvii) On August 20, 2021 the CBI Court partially allowed the 32A application by which the prayer for discharge made by the DHFL, was rejected; yet Corporate Debtor was permitted to be prosecuted through its erstwhile Directors, Kapil Wadhwan (accused no.2) and Dhiraj Wadhwan (accused no.3).

6. Feeling aggrieved by the order dated 20th August, 2021 DHFL and Piramal Capital Housing Finance Limited, a successful resolution applicant, have challenged this order in these petitions, under Article 227 read with Section 482 of the Criminal Procedure Code.

7. Before adverting to deal with the contentions of rival parties, events post impugned order, which has bearing over the issue, are as under :

DHFL (Corporate Debtor) vide purshis dated 12th October, 2021 brought on record the fact that;

(i) Piramal Capital and Housing Finance Limited, has merged into DHFL with effect from 30th September, 2021, pursuant to the reverse merger as contemplated under

the scheme of arrangement provide under the Resolution Plan, and;

(ii) On 1st October, 2021 intimation to that effect was provided to the National Stock Exchange of India Limited and Bombay Stock Exchange Limited by DHFL and Piramal Enterprises Limited and further apprised that consequent to reverse merger, DHFL shall issue such number of equity shares to the shareholders of Piramal Enterprises Limited in accordance with the scheme of arrangement provided under the Resolution Plan, and;

(iii) Vide intimation letter dated 1st October, 2021 DHFL, apprised BSE and NSE of the change in management of DHFL, by way of appointment of six additional Directors, namely Mr. Ajay Gopikisan Piramal, Ms. Swati Ajay Piramal, Mr. Anand Ajay Piramal, Mr. Gautam Bhailal Doshi, Mr. Khushroo B. Jijina and Mr. Sohail Amin Nathani.

8. Heard Mr. Ravi Kadam, learned Senior Counsel for the petitioner in Writ Petition No. 3157/2021, Mr. Aabad Ponda, learned Senior Advocate with Writ Petition No. 3221/2021 and Mr. Pranav Badheka for Intervenor and Mr. Venegaonkar, Learned Prosecutor for the CBI.

Issue :

9. Broad question raised in these petitions is :
“Whether Section 32(1)(a) of IBC lays down a direction that, Corporate Debtor, would be absolved of all criminal offences committed prior to commencement of CRIP, from the date of approval of Resolution Plan, although, appeals against Section 31 order of the IBC were pending before the NCLAT ?”

Submissions :

10. Mr. Ravi Kadam, Learned Senior Counsel submitted that, Corporate Debtor would not be liable for any offence committed prior to commencement of CRIP and prosecution would not continue against once Resolution Plan is approved by the Adjudicating Authority. Mr. Kadam, learned Senior Counsel would rely on the provisions of Section 32(1)(a) of the IBC, as inserted by Insolvency of Bankruptcy Code (Amendment) Act, 2020 and would also rely on the judgment of the Apex Court in the case of **Manish Kumar V/s. Union of India, 2021 5 SCC 1**. Mr. Kadam, would largely rely on paragraph no.317 of *Manish Kumar* (supra), to submit that, Section 32A is divided into three parts, consisting of sub-sections (1) to (3). Under sub-section (1), liability of a Corporate Debtor for an offence committed prior to CRIP, ceases and the Corporate Debtor shall not be liable to be prosecuted for such an offence subject to conditions that, (i)a

Resolution Plan with regard to Corporate Debtor must be approved by the adjudicating authority under Section 31 of the Code, (ii) the Resolution Plan, so approved must result in change in the management or control of Corporate Debtor and (iii) the change in management or control under the approved Resolution Plan must not be in favour of a person who was Promoter and in management or control of Corporate Debtor or in favour of related party of the Corporate Debtor.

11. Mr. Kadam learned Senior Counsel submitted that, herein Resolution Plan was approved by the Adjudicating Authority on 7th June, 2021 and pursuant thereto, Piramal Capital and Housing Finance Limited has merged into DHFL with effect from 30th November, 2021 as contemplated under scheme of arrangement (reverse merger) provided under the Resolution Plan. Mr. Kadam, further submitted that, consequent to reverse merger, six Directors have been appointed as Additional Directors on the Board of Directors of DHFL, with effect from 30th September, 2021 to hold the office until the conclusion of next Annual General Meeting of DHFL. Mr. Kadam, thus submitted that, with effect from 30th September, 2021 new Board superseded the Administrator and the Monitoring Committee which was constituted under the Resolution Plan. It is therefore argued that, there is a change of management and control of Corporate Debtor and such change in the management or control is in favour of party, who

is not related to Corporate Debtor. Mr. Kadam, therefore submitted that in view of the subsequent events/developments, the requirements of Section 32A of the Code, are fully satisfied.

12. Mr. Kadam, learned Senior Counsel submitted that, constitutional validity of Section 32A of IBC was, challenged in *Manish Kumar* (supra), wherein the Apex Court held; :

“(i) That no case whatsoever is made out to seek invalidation of Section 32A.

(ii) 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.

(iii) 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.

(iv) That the impugned provision is part of an economic measure.

(v) Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.

(vi) 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.

(vii) 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.

(viii) 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.

(ix) Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgment of the legislature.”

13. Mr. Kadam, therefore submitted, having fulfilled conditions contemplated under Section 32A of IBC and Corporate Debtor and its property, in context of the Scheme of the Code, being a distinct subject matter, justifying special treatment accorded to them, the learned Special Judge, unnoticing the law enunciated in *Manish Kumar* (supra), erroneously permitted, the prosecution of the Corporate Debtor through its erstwhile Directors, accused nos.2 and 3.

14. Mr. Kadam, has taken me through the impugned order to submit that, the learned Judge has failed to appreciate

rational of Section 32A of the IBC, in as much as, although he was satisfied that the approval of the Resolution Plan by the NCLAT has, caused change in the management, yet prosecution of the Corporate Debtor has been permitted through erstwhile Directors, overlooking the object of Section 31A of the IBC which intends to give a, 'clean break', to the successful resolution applicant. Nextly, he submitted that, pendency of appeals before the NCLAT against the Section 31 order of the IBC would not impede the operation of provisions of Section 32A of the Code, once its requirements are satisfied which stood fully satisfied and thus submitted, the impugned order be quashed and set aside and DHFL, be absolved of criminal liability and offences committed prior to commencement of CRIP.

15. Mr. Badheka, learned Counsel for the Intervenor, would contend that, execution of the Resolution Plan is subject to outcome of appeals preferred by Mr. Kapil Wadhwan and 63 Moons Technologies Ltd. and therefore, pending final adjudication, the discharge of DHFL under Section 32A of the Code is overhasty. Mr. Badheka, submitted that, outcome of the appeal would be crucial consideration in discharge of DHFL from all criminal liabilities and in the event, the appeal is adjudged in favour of intervenor, it would become burdensome for prosecution agencies to once again initiate proceedings against DHFL, which may not be possible once DHFL is

discharged from all criminal liabilities. Besides, Mr. Badheka, argued that, in any event, the management or control of DHFL has not yet changed and vested in resolution applicant, which is essential condition, before Corporate Debtor seeks discharge. Mr. Badheka has taken me through the Affidavit of Mr. Kapil Wadhwan (Intervenor) sworn on 22nd September, 2021 in support of this contention. Mr. Badheka, submitted that if DHFL is discharged at this stage and if Appeal is adjudged in favour of the Intervenor, again a cognizance cannot be taken against a Corporate Debtor since cognizance of an offence, can only be taken once. In support of the submission, he has relied on the judgment of the Apex Court in the case of **Balveer Singh V/s. State of Rajasthan (2016) 6 SCC 680**. His next contention is, once an Appeal is filed before the NCLAT, the order Section 31 cannot be said to have attained finality and therefore discharge plea was pre-mature. In support of the submission, Mr. Badheka, would rely on the judgment of the Apex Court in the case of **Union Of India and Others V/s. West Coast Paper Mills Limited and Another (2004) 2 SCC 747**. It is therefore submitted that, impugned order being passed in application under Section 32A which was pre-mature, it be kept in abeyance till the Section 31, order attains finality.

16. Mr. Venegaonkar, learned Counsel for the CBI, would rely on the judgment of the Apex court in the case of **Dharam Pal and Others V/s. State of Haryana, (2014) 3**

SCC 306 to contend that, a cognizance of the offence cannot be taken twice and therefore until statutory appeals are decided, it would not be appropriate to discharge the Corporate Debtor of criminal liability incurred prior to CRIP.

Reasons :

17. Facts of the case and in particular subsequent events (stated above), has indisputably established, change in management of a Corporate Debtor. This fact is hardly disputed by the Intervenor in his Affidavit, contending that, “DHFL ought to issue equity shares to shareholders of PCHFL i.e. PEL and thereafter upon allotment, DHFL will become a wholly owned subsidiary of PEL.” It may be stated that, Intervenor has not disputed appointment of six Additional Directors on the Board of Director of DHFL, with effect from 30th September, 2021, consequent to reverse merger and implementation of Resolution Plan. The objection in respect of subsequent events, sought to be raised by Mr. Badheka, learned Counsel for Intervenor is that, petitioners ought to have followed the, due procedure, to place on record the subsequent events and certainly not by filing a, ‘purshis’. Mr. Badheka, has placed reliance on judgment of the Delhi High Court in the case of **PTI Employees Union Vs. Press Trust of India, (2021) SCC Online Del 939** wherein it was held that;

“It is well settled that the parties have to amend their pleadings to incorporate new facts and documents. This Court deprecates the manner in which new averments and documents beyond pleadings are sought to be filed without permission of this Court, as such a belated stage for which no explanation has been given.”

. Mr. Badheka, would therefore submit that this Court shall not take cognizance of the subsequent events. In the alternative, it is submitted that let the subsequent events, be first assessed by the trial Court and therefore Mr. Badheka, urged that parties be relegated to the trial Court for reconsideration.

18. It may be stated that, the subsequent events were placed on record vide purshis dated 12th October, 2021 and thereafter intervenor had filed a reply Affidavit, dated 20th October, 2021 and dealt with subsequent events extensively. As such, I do not think it appropriate to keep the subsequent events out of consideration and relegate the parties to the trial Court for reconsideration.

19. Herein, subsequent events indisputably caused change in management and control of Corporate Debtor. The immunities sought by the Corporate Debtor though conditional; yet all these conditions have been fulfilled and satisfied; viz

(i) Resolution Plan in regard to Corporate Debtor has been approved by the Adjudicating Authority under Section 31 IBC.

(ii) Resolution Plan approved caused and resulted in change in management of Corporate Debtor.

(iii) change in management is in favour of persons who were not related to party of Corporate Debtor.

. Thus, in my view, immunities under 32A of IBC, cannot be denied to Corporate Debtor.

20. For these reasons, I hold that, the petitioner-DHFL, stands discharged from the CBI Special Case No.830 of 2021 pending before the CBI Cases Sessions Court, Mumbai.

21. The next question is, “Whether successful resolution applicant was eligible to invoke Section 32A of IBC, when appeals against the order of the Adjudicating Authority, were pending before NCLAT ?”

22. Mr. Badheka, learned Counsel for the Intervenor, would submit that, once Appeal is admitted, the correctness of order of Adjudicating Authority becomes “made open” and in such an Appeal, the Court is entitled to go into both, questions of facts, as well as law, and in such an event, the correctness of the order dated 7th June, 2021 is in jeopardy. It is therefore argued that, until Appeals which are statutorily provided under

the IBC, are finally disposed off, there is no finality to the order Section 31 of IBC, and therefore application under Section 32A moved by the successful resolution applicant was premature and not maintainable. Mr. Badheka, has relied on the judgment of the Apex Court in the case of **Union of India V/ s. West Coast Papers Mills, 2004 2 SCC 747**. In this case, a suit was filed by respondent-plaintiff based on declaration dated 18th April, 1966 made by the Railway Rates Tribunal, qua, revised freight charges. Order of tribunal was challenged in Special Leave Petition by Railways. Apex Court passed, limited interim orders but refused to grant stay. In January 1972, Supreme Court dismissed the Special Leave Petition. Whereafter, plaintiff instituted a suit in December, 1973 against the Railways to recover excess freight charges. A plea of limitation was raised by the Railways. It was turned down by two Courts. After which, Union filed Civil Appeal before the Hon'ble Supreme Court. In the context of these facts, the Apex Court has held that, "*lis* unless determined by last Court cannot be said to have attained the finality. The observations in paragraphs no.41 and 42 in *West Coast* (supra) were in context of law of limitation, vis-a-vis a doctrine of merger. Be that as it may, in the case in hand, certain appeals under Section 32 read with Section 31 of IBC have been filed by various parties including intervenor against the plan approval order with prayers for interim relief. However, the NCLAT, refused to stay, the plan approval order, in the following terms :

“Suffice it to say that having gone through the rival contentions of the Learned Counsel for both sides, we do not find that these are Appeals wherein interim order should be passed for grounds being raised by the Appellant. The objections raised to the Resolution Plan which has been challenged in Company Appeal (AT) (Insolvency) No. 455 of 2021 are also based on similar footing. The rival claims, which are more questions of law would require deliberation and decision at appropriate stage. If the averments made by the Appellant are juxtaposed with averments made by Respondents, we do not find it a fit case to pass interim orders as sought. We do not think that any interim order as sought with regard to Resolution plan approved needs to be passed.”

23. Be that as it may, although Section 32 provides for appeal against an order approving the Resolution Plan, yet, mere filing of appeal would by itself not operate as a stay, until a specific prayer in this regard is made and orders thereon are passed, as held in the case of **Madan Kumar Singh V/s. District Magistrate, (2009) 9 SCC 79**. Infact, herein appeals were filed with a specific prayer to grant stay to the Section 31 order. However, the NCLAT by reasoned order, declined to stay the order. In this regard, the order of the Division Bench of this Court in the case of **Sai Shipping Services Private Limited V/s. Union of India, 2017 SCC**

Online Bombay 6655, would support the contention of the petitioners, in which the Division Bench has held;

“The tribunal is last fact finding court of appeal and presided over by retired judge of the High Court. They exercise judicial powers. In the circumstances, their orders bind the parties. Once, the appeal of the revenue in this case has been admitted, but interim stay is refused, then we do not think that, the Tribunals order can be kept in abeyance and indefinitely.”

. Thus, in consideration of the facts of the case and in view of the law laid down in aforesaid judgment and order, I hold that the application preferred by the successful resolution person, was not pre-matured. The point is answered accordingly.

24. It takes me to the last submission of the petitioners who contended, that impugned order permitting to prosecute the Corporate Debtor through accused nos.2 and 3 was erroneous and perverse, in as much as, accused nos.2 and 3, who were Directors of the Corporate Debtor, were ousted from the Board of Directors by the Reserve Bank of India, approximately two years ago and has since no control over the management of the petitioner. I do not see any reason to discard this submission to hold that, the learned Judge has committed an error by permitting the prosecution of the

Corporate Debtor to the accused nos. 2 and 3, who were ousted from Board of Directors, by the RBI two years ago.

25. For the reasons stated above, the impugned order is quashed and set aside. The application of Dewan Housing Finance Corporation Limited moved under Section 32A of the Insolvency and Bankruptcy Code, 2016 in Criminal Complaint No.355/PW/2002 corresponding Sessions Case No. 830 of 2021 is granted.

26. Rule is made absolute in aforesaid terms. Petitions are disposed off.

27. With disposal of the petitions, the intervention application does not survive. The same also stands disposed off.

28. At this stage, the Counsel for the Intervenor seeks stay to the operation of the judgment. The request is rejected.

[SANDEEP K. SHINDE, J.]