IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.08.2020

DELIVERED ON : 03.09.2020

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
and
THE HON'BLE MRS.JUSTICE R.HEMALATHA

WP.Nos.31140 of 2019 and 31432 of 2019
and
WMP.Nos.31608, 31609 and 31263 of 2019

WP.No.31140 of 2019

B.Rajesh ... Petitioner

Vs.

1.Union of India,
Rep. by its,
Ministry of Corporate Affairs,
Shastri Bhawan, Dr.Rajendra Prasad Road,
New Delhi - 110 001.

2.The Registrar of Companies, Tamilnadu, Coimbatore,
No.7, AGT Business Park, I Floor, Phase II,
Avinashi Road, Civil Aerodrome Post,
Coimbatore - 641 014.



3.The National Company Law Tribunal,
Chennai Bench, Rep. by,
The Deputy Registrar,
Corporate Bhawan (UTI Building),
3rd Floor, No.29 Rajaji Salai, Chennai - 600 001.

4.Insolvency and Bankruptcy Board of India,
Rep. by its Chairperson,
7th Floor, Mayur Bhawan,
Shankar Market, Connaught Circus,
New Delhi, Delhi 110 001.

5.Mr.R.Raghavendran,
Resolution Professional for M/s. Everon Casting P Ltd.,
IBBI/IPA-001/IP-P00211/2017-18/10411,
Flat No.3, Dhruvatara Apartments,
241, Dr.Rajendraprasad Road, Tatabad,
Coimbatore - 641 012.

6.Mr.S.MuthuRaju,
Interim Resolution Professional for M/s.Everon Castings P Ltd.,
IBBI/IPA-002/IP-N00009/2016-17/10013,
No.3, Sundaram Brothers Layout,
Opp. to All India Radio, Trichy Road,
Ramanathapuram, Coimbatore - 641 045.

7.State Bank of India,
Rep. by its Branch Manager,
CITY/SAM Branch,
1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

8.Mr.N.Sivachalam,
Liquidator of
M/s.Everon Castings Pvt. Ltd.,
No.12, Govindarajulu Street, (Stanes Road),
Avinashi Road,
Tirupur - 641 602. ... Respondents



Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus directing the 4th respondent viz., Insolvency and Bankruptcy Board of India represented by its Chairperson to dispose the complaint dated 23.01.2019 submitted by the petitioner to them in Form A against 5th, 6th and 7th respondents within the time frame as may be fixed by this Court.

WP.No.31432 of 2019

S.Dhanalakshmi ... Petitioner

Vs.

1.State Bank of India,
Rep. by Assistant General Manager & CLO - 1,
Stressed Asset Management Branch,
1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

2.State Bank of India,
Rep. by Authorised Officer,
Stressed Asset Management Branch,
1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the respondents culminating in the impugned letter bearing No.SAMB/CBE/CLO-I/436 dated 02.06.2018 issued by the first respondent declaring the account of Everon Castings Pvt. Ltd., as NPA culminating in sale notice dated 13.09.2019 SAMB/CBE/CLO-IV/556 issued by the second respondent and quash the same as illegal and arbitrary and consequently forbear the respondent from taking any further coercive action including any measures to enforce by sale or auction the security offered by the petitioner in respect of the borrowings of M/s.Everon Castings Pvt. Ltd., situated at Coimbatore Corporation in old TS.No.7/3082 and New TS.No.7/116/1A part in this Southern Portion of site No.6 within the Coimbatore Registration District.

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| For Petitioner (in both petitions) | : | Mr.N.L.Rajah, Senior Counsel for E.Jayashankar |
| For Respondents | : | Mr.M.L.Ganesh, for R7 in WP.No.31140 of 2019 for R1 in WP.No.31432 of 2019 |

COMMON ORDER

(Order of the Court was delivered by R.HEMALATHA, J.)

Both the writ petitioners are connected to M/s.Everon Castings Private Limited. The petitioner, Mr.Rajesh in WP.No.31140 of 2019 is the founder director of the company and the petitioner in WP.No.31432 of 2019, Mrs.Dhanalakshmi is a third party guarantor who offered one of the collateral securities for the company to avail credit facilities from State Bank of India. In brief, the company, M/s.Everon Castings Pvt. Ltd. (hereinafter referred to as Corporate Debtor) was promoted in 2008. It was a manufacturing unit for large size steel castings. By 2010, it commenced the operations and was supplying big fortune 500 companies and had a strength of 300 employees. According to the petitioner in WP.No.31140 of

2019, in 2014-2015, when the crude oil prices crashed, the trouble started and company stared at a severe cash crunch. The respondent in WP.No.31432 of 2019, State Bank of India, took over the existing loan facilities of the company from Karur Vysya Bank in 2017. The company had availed many credit facilities from State Bank of India.

2. One of the operational creditors of the company, M/s.Precision Machine and Auto Components Pvt. Ltd. moved a petition CP/666/IB/2017 under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy Code, 2016 in National Company Law Tribunal (NCLT) which admitted the company to the Corporate Insolvency Resolution Process (CIRP) on 29.12.2017 after declaring it as insolvent. The petitioner in WP.No.31140 of 2019, who is also the Managing Director of the company (Corporate Debtor) having found lacunae and inordinate delay in the commencement and implementation of CIRP approached the NCLT by filing MA/498/2018 in CP/666/IB/2017 seeking the following reliefs.

a) Exclude 120 days of the CIRP Process from the date of commencement of the CIRP viz., 29.12.2017 and direct the continuation of the CIRP Process for a further period of 120 days;

b) Set aside the decision of the COC dated 26.07.2018 whereby the Applicant No.1 was held disqualified under Section 29A (g);

c) Set aside the decision of the COC dated 18.09.2018 whereby the Applicant No.2 was held disqualified under Section 29A (g);

d) Consequent to the above, direct the Resolution Professional and COC to consider the Resolution Plan submitted by these applicants jointly and severally afresh without being influenced by their previous biased decisions;

e) Declare the decision of the 2nd respondent to treat the Corporate Debtor as an NPA on 26.03.2018 as being illegal;

f) Such other orders in the interests of justice.

But the petition was dismissed. One of the important reliefs sought was to declare the decision of the State Bank of India to treat the Corporate Debtor as Non-Performing Asset on 26.03.2018 as illegal. Another plea to exclude the period of alleged delay (120 days) on the part of Interim Resolution

Professional from the 270 days period, also failed. Both the resolution plans submitted to the Committee of Creditors (COC) by the petitioner on behalf of the Corporate Debtor were also rejected. Simultaneously, MA/460/2018 in CP/666/IB/2017 was filed by the Resolution Professional (RP) and the Corporate Debtor, M/s.Everon Castings Pvt. Ltd. against the operational creditor, M/s.Precision Machine and Auto Components Pvt. Ltd., and the Managing Director of the Corporate Debtor, Mr.Rajesh Balasubramanian which was disposed off with the passing of the liquidation order. The petitioner in WP.No.31140 of 2019 preferred a complaint against the said order in MA/498/2018 with the Insolvency & Bankruptcy Board of India. In the meanwhile, the appeals against the order of NCLT in MA/460/2018 under Section 33 (1) of the Insolvency and Bankruptcy Code, 2016 for liquidation of the company, M/s.Everon Castings Pvt. Ltd., (the Corporate Debtor) and the order in MA/498/2018, rejecting the plea to exclude 120 days from the CIRP period, and the plea to reconsider the two resolution plans by COC were dismissed by the National Company Law Appellate Tribunal (NCLAT).

3. In the other petition, WP.No.31432 of 2019, the petitioner Mrs.S.Dhanalakshmi is a guarantor to the loans availed by the Corporate Debtor and also has provided her property as one of the collateral securities for the credit facilities availed from State Bank of India ( the respondent) by the company, M/s.Everon Castings Pvt. Ltd. (the Corporate Debtor). She had pleaded that the declaration of Non Performing Asset when the CIRP was in process, is illegal and that therefore all proceedings including the sale notice be declared *void ab initio*. Her contention also was that she was in no way connected with the decision making process of the company (Corporate Debtor) and therefore, this aspect also needs to be considered by this Court.

4. On the part of both the petitioners, the learned Senior counsel Mr.N.L.Rajah assisted by Mr.E.Jayashankar made the following submissions:

(a) The financial creditor (State Bank of India) who is the common respondent in both the petitions was without any jurisdiction, while proceeding against the Corporate Debtor as the CIRP was in progress and consequent moratorium imposed.

(b) The declaration of Non Performing Asset by the financial creditor even when the petitions with NCLT and the appeals with NCLAT were pending was totally illegal and against the basic tenets of Insolvency and Bankruptcy Code, 2016.

(c) The pendency of the complaint by the Managing Director of the Corporate Debtor under Sub Regulation (3) of Regulation (3) of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulation 2017 was not considered by the NCLAT while dismissing the appeal.

(d) Notwithstanding the aforesaid submissions, the financial creditor is restricted by the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016.



5. The learned counsel further relied on the decision in Union of India vs. Infrastructure Leasing and Financial Services Ltd. and others decided by NCLAT, New Delhi in which it was held that "Non Performing Asset relates to an Asset, ie., loan or advance which becomes non-performing when it

ceases to generate income for the Bank. Thus, it relates to the Banks and we are satisfied that declaration of Non Performing Asset by the Bank in no manner will affect the Corporate Debtor to continue as a going concern".

6. The learned counsels for the respondent bank, State Bank of India, M/s.M.L.Ganesh and S.Arunkumar would contend that the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016, would not apply to a personal guarantee of a Corporate Debtor as settled by the Hon'ble Apex Court in State Bank of India vs. V.Ramakrishnan reported in 2018 (9) SCALE 597. Thus their contention was that the assets of the surety are separate from those of the Corporate Debtor and therefore the recourse against the guarantor was outside the liquidation proceedings and had no restrictions under Insolvency and Bankruptcy Code, 2016. It is their further contention that Section 14 clearly applies only to the security interests over the assets of the Corporate Debtor.



7. It was also pointed out by them that the declaration of Non Performing Asset of the account of the Corporate Debtor during the

moratorium was challenged in NCLT in MA/498/2018, but, the latter did not buy the argument when dismissing the petition and it remained unchallenged in NCLAT.

8. Moreover, the learned counsels of the respondent bank further contended that the respondent bank had sold the property belonging to Mrs.Dhanalakshmi on 05.10.2019 and the sale was already confirmed by the Debt Recovery Tribunal (DRT), Coimbatore as provided for under Section 17 of the SARFAESI Act. Their further contention was that neither the notice under Section 13 (2) of SARFAESI Act nor the possession notice under Section 13 (4) of SARFAESI Act and the subsequent sale notices were challenged by the guarantor Mrs.Dhanalakshmi.

9. The learned senior counsel for the petitioner has relied on the prevailing conundrum surrounding the moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 and the personal guarantor's liability. His further contention is that it is true that Insolvency and Bankruptcy Code, 2016 primarily envisages a resolution process for a

Corporate Debtor, and only if it is unsuccessful contemplates an adversarial process. Thus any claims made by individual creditors must not be allowed to supercede the process of resolution ie., when CIRP is underway. According to him, Corporate Debtor is obliged to repay dues of all the creditors in due proportion and its capacity. Such liberties given to the creditors to enforce guarantee is a clear violation of equality to be maintained *inter se* amongst the creditors.

10. This contention raises a major question as to whether creditors can independently proceed against the guarantor. The Hon'ble Apex Court had laid to rest this argument about whether the moratorium on the Corporate Debtor will apply to the guarantor or not. It has categorically held that moratorium does not apply to the personal guarantor. However, unlike in most of the cases, in the instant case, the guarantor is not directly involved in the management of the company. She is a third party. It is also observed in the instant case that the securitization notice under Section 13 (2) is dated 13.02.2019 and is not an independent notice. It is not only for the guarantors property when the appeal of the company under NCLAT was

pending, but for all the properties taken as collateral securities for the credit facilities to the corporate Debtor. The final order of the NCLAT is dated 25.02.2019 and this in fact marked the culmination of the proceedings under the Insolvency and Bankruptcy Code, 2016, though technically speaking the CIRP was over on 24.09.2018. The outcome of the appeal in NCLAT was crucial because the petitioner / appellant had wanted further extension of time. Moreover, the financial creditor, State Bank of India did not proceed against the personal guarantor separately. It was only by way of the securitization notice dated 13.02.2019 issued to the Corporate Debtor with copies to all the guarantors. Notwithstanding the aforesaid observations made by this Court, the petitioner in WP.No.31432 of 2019 is permitted to approach the DRT/NCLT for any relief in this regard as alternative efficacious remedy is available for the petitioner. The WP.No.31432 of 2019 is disposed of with these directions. The prayer in the WP.No.31140 of 2019 is filed for writ of mandamus directing the Insolvency and Bankruptcy Board of India to dispose of the complaint dated 23.01.2019 submitted by the petitioner to them in 'Form A' against the orders in NCLT in MA/498/2018 and MA/460/2018 in CP/666/IB/2017. Mr.M.L.Ganesh, learned counsel appearing for the 7th respondent / State Bank of India, contended that the writ petition itself has become infructuous since the 4th respondent had already considered the complaint dated 09.01.2019 (and not 23.01.2019 as mentioned in the writ petition) and the same has been closed after verification of records submitted by the IRP / RP. He would further contend that the 4th respondent had also directed the RP to follow the liquidation rules. This writ petition is also infructuous for the reason that the NCLAT on an appeal preferred by the petitioner in this writ petition had disposed of both the petitions filed by him against the orders of NCLT with the following observation.

> *"In view of the aforesaid decision, we are of the view that the liquidator should act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members of the 'Corporate Debtor' or the 'creditors' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the National Company Law Tribunal, in terms of the observations as made in 'S.C.Sekaran vs. Amit Gupta & others - Company Appeal (AT)(Ins.) No.495 & 496 of 2018'. On failure, as observed above, steps should be taken for outright sale of the 'corporate debtor' so as to enable the employees to continue in service on such outright sale."*

11. In the result, WP.No.31140 of 2019 is closed and WP.No.31439 of 2019 is disposed of accordingly. Consequently, the connected Miscellaneous Petitions are closed. No costs.

(M.M.S., J.) (R.H., J.)
03.09.2020

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To

1.Ministry of Corporate Affairs,
Union of India,
Shastri Bhawan, Dr.Rajendra Prasad Road,
New Delhi - 110 001.
2.The Registrar of Companies, Tamilnadu, Coimbatore,
No.7, AGT Business Park, I Floor, Phase II,
Avinashi Road, Civil Aerodrome Post,
Coimbatore - 641 014.
3.The Deputy Registrar,
The National Company Law Tribunal,
Chennai Bench, Corporate Bhawan (UTI Building),
3rd Floor, No.29 Rajaji Salai, Chennai - 600 001.
4.The Chairperson,
Insolvency and Bankruptcy Board of India,
7th Floor, Mayur Bhawan,
Shankar Market, Connaught Circus,
New Delhi, Delhi 110 001.
5.The Branch Manager,
State Bank of India,
CITY/SAM Branch,
1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

M.M.SUNDRESH, J.
and
R.HEMALATHA,J.

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6.The Authorised Officer,
State Bank of India,
Stressed Asset Management Branch,
1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

WP.Nos.31140 of 2019
and 31432 of 2019
and
WMP.Nos.31608, 31609
and 31263 of 2019



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