

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH- IV

IA 4516/ND/2021

IN

IB No. 472/ND/2021

IN THE MATTER OF:

**Deewan Housing Finance Corporation Limited
... FINANCIAL CREDITOR**

VERSUS

**M/s Nayati Healthcare & Research NCR Pvt. Ltd.
... CORPORATE DEBTOR**

And IN THE MATTER OF:

**Yes Bank Limited
.....APPLICANT**

VERSUS

**Deewan Housing Finance Corporation Limited
.....RESPONDENTS**

Under Rule 11 of the National Company Law Tribunal Rules, 2016.

Order delivered on: 31.12.2021.

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

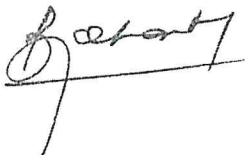
SH. PRASANTA KUMAR MOHANTY, HON'BLE MEMBER (TECHNICAL)

ORDER

Per: Sh. DHARMINDER SINGH, MEMBER (JUDICIAL)

1. The present application is filed by the applicant, Yes Bank Limited under Rule 11 of the National Company Law Tribunal Rules, 2016 with a prayer to vacate order dated 30.09.2021 passed by this Bench.

IA 4516/ND/2021 in
IB No. 472/ND/2021



2. Brief facts of the present matter is that the main IB petition no. 472/ND/2019 was filed by Financial Creditor namely, Deewan Housing Finance Corporation Limited for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor namely, M/s Nayati Healthcare & Research NCR Private Limited.
3. Further, the main Financial Creditor has filed an IA 4439/2021 to add the applicant herein, as Respondent No. 2, seeking following reliefs:
- a) Restraining the Corporate Debtor and applicant from selling, alienating and creating any 3rd party rights on the assets of the Corporate Debtor till the adjudication of main IB petition no. 472/ND/2019.
 - b) Ad-interim injunction on operation of possession notice dated 10.09.2021 issued by applicant under Section 13 (4) of SARFAESI Act.
 - c) Interim injunction on the operation of possession notice till the pendency of the present application.
4. The aforementioned IA was listed for hearing on 30.09.2021 and following order was passed:

"Application filed by the Financial Creditor seeking ad interim relief against the Corporate Debtor as well as the another Financial Creditor of the Corporate Debtor being Yes Bank. Learned Counsel for the Corporate Debtor accepts notice and makes a statement that as on date, the Corporate Debtor is in possession of the immovable property assets of the company. Issue notice to Yes Bank. Learned Counsel for the Corporate Debtor also undertakes to file reply within two weeks. In the

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meantime, both the respondents should maintain status quo with respect to assets of the company.”

The said application and main IB petition is still pending before this Bench.

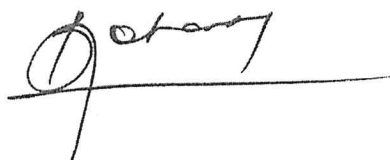
5. Now, the applicant has filed present application to vacate the interim stay granted by this Adjudicating Authority on 30.09.2021, on the ground that the stay was granted without giving reasonable opportunity as the copy of application or notice of hearing was not served upon the applicant, which violates the rules of natural justice.
6. It is also claimed by the applicant that the stay order dated 30.09.2020 violates the statutory rights the of applicant in terms of SARFAESI Act, which could not be adjudicated by this Adjudicating Authority while hearing Section 7 application. Since no order Under Section 7 of the Code initiating Corporate Insolvency Resolution Process (CIRP) has been passed the stay should not have been granted without making applicant a party to the proceedings.
7. It has been pointed out by applicant that through possession notice the possession of the asset of the corporate debtor has already been taken by the applicant and the statement of directors of the corporate debtor as recorded in the order dated 30.09.2021 is false.
8. Ld. Counsel for the applicant has placed reliance of the Order passed by Hon'ble Supreme Court in the matter of *State Bank of India Vs. Mathew K.C., (2018) 3 SCC 85*, in which it was observed that the High Courts should exercise restraint in exercising writ jurisdictions or granting stays while dealing with the petitions involving challenge to action taken for recovery of public dues, etc.

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9. Further reliance has been placed upon the judgment of Hon'ble Supreme Court in the matter of *Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta*, 2021 SCC Online SC 194, in which it was held that while the NCLT's residuary jurisdiction, though wide, is nonetheless defined by the text of IBC, specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do.

10. The respondent Dewan Housing Finance Corporation Limited has filed its reply to the application and submitted as follows:

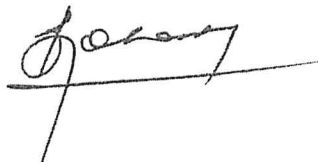
- a) Ld. Counsel for the respondent has relied upon the order passed by the NCLT, Chennai Bench in the matter of *Roxcel Trading Gmbh V. NUI Pulp and Paper Industries Pvt. Ltd.* IBA 598/2019, in which while exercising Inherent Powers under Rule 11 of NCLT Rules, corporate debtor and its directors were restrained from alienating, selling or creating third party rights on the assets of corporate debtor. It has been pointed out that the said order was upheld by Hon'ble NCLAT and later on by Hon'ble Supreme Court.
- b) The case of the respondent is that the stay on alienation of Hospital property of the Corporate Debtor is necessary for the proper resolution of the Corporate Debtor.
- c) The respondent has stated that the mere initiation of proceeding under SARFAESI Act does not transfer the rights of the property of Corporate Debtor and the stay order dated 30.09.2021 does not violate the statutory rights of the applicant.



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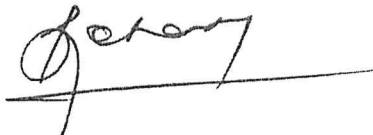
d) Further, the respondent has stated that the Code has overriding effect over SARFAESI Act in terms of Section 238 of the Code. The respondent has also pointed out that the applicant has filed WP (C) no. 11572/2021 titled as *Yes Bank Vs. Dewan Housing Finance Corporation and Anr.* alongwith C.M. Appl. 35687/2021 for relief from the stay order dated 30.09.2021 before the Hon'ble High Court of Delhi, which was dismissed by Hon'ble High Court vide order dated 08.10.2021 observing that it is the petitioner's (Appellant) own case that it has already taken possession of the subject properties and therefore, merely it has been directed to maintain status quo, no grave or irreparable loss is likely to be caused to the petitioner (Appellant) if the direction to maintain status quo continues further.

11. Learned Counsel for the applicant Yes Bank vehemently contended that the order of status quo has been granted by this Tribunal without hearing the parties i.e. Yes Bank. Even, Yes Bank was not impleaded as arrayed of the respondent in the main petition, therefore, order of 'status-qua' is not at all to be granted. Accordingly, the same is liable to be set aside. Further, it is also argued that the property-in-question, which was duly mortgaged and charged with the Yes Bank by the Corporate Debtor has been taken into possession physically. Apart that the notice under Section 13(2) SARFAESI Act was issued way back, thereafter, notice under Section 13(4) of SARFAESI Act was also issued as the Corporate Debtor could not



make the payment. Accordingly, the physical possession under Section 13 (4) of SARFAESI Act was taken, therefore, the substantive right has been created in favour of the Yes Bank. Accordingly, the order of the status qua cannot be continued at all. Learned Counsel for the applicant herein also relied upon citations **Hindon Forge Private Limited Vs. State of U.P through District Magistrate, Ghaziabad & Anrs.** reported as **(2019) 2 SCC 198** and contended that once the physical possession of the property-in-question has been taken by the secured creditors, the Corporate Debtor stands divested for the title in the secured assets. Further, DHFL i.e. the respondent No. 1 cannot be considered to be secured creditors of the Corporate Debtor, since it has not got registered any charge under the amended Section 77(1) of the Companies Act, 2013. Even the charge of the Yes Bank was also entered under CERSAI, therefore, there was material suppression of fact apart from DHFL before this Tribunal. In view of the above said contention, Learned Counsel for the Yes Bank prayed for setting aside the impugned order dated 30.09.2021. Further it is also contended that the injunction cannot be continued at all.

12. Learned Counsel for the applicant also relied upon the citations **"Aqua Borwell Pvt. Ltd. Vs. Shyam Sunder Prabha and** contended the interim relief cannot be granted against the parties who are not impleaded at the arrays of respondent. Further, similarly, relied upon citations **"Kertala Bank"** similarly relied upon citation **"MC Mehta vs. Union of India"** and stated that injunction order passed in



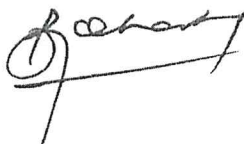
violation of principle of natural justice may not be sustained. Further also relied upon citations “ C-Max Construction, General Manager, volks Wagon, State Bank of Travancore Vs. Mathew K.C., 2018 3 SCC 85 : 2018 2 SCC (Civ) 41 : 2018 SCC OnLine SC 55.

13. On the other hand, Learned Counsel for respondent No. 1 i.e. DHFL laid stressed upon the arguments that the property in question mortgaged was prior in time to that of Yes Bank and an amount of Rs. 140 Crores of DHFL were due against the loan advanced, accordingly, after issuance of notice, the same has not been re-paid by the Corporate Debtor. Hence, the present petition under Section 7 of the IBC has been filed. It is further contended that there was an active collusion between the Corporate Debtor as well as Yes Bank, as the present petition under Section 7 of IBC was filed on 26th August 2021. Although, the notice under Section 13(2) was issued by the Yes Bank on 29th July 2021 and 60 days' time was given. Period of 60 days was to be expired on 28th September 2021, but prior to that, the notice for taking symbolic possession was issued under Section 13(4) of the SARFAESI Act on 10th September 2021, therefore, all the actions of the Yes Bank were in violation of the SARFAESI Act as notice under Section 13(2) was to be expired on 28th September 2021. Symbolic possession has been taken merely within 42 days, which was absolutely violation of the SARFAESI Act and was due to the collusion between the Corporate Debtor as well as the Yes Bank.

14. Learned Counsel for the DHFL further contended that the mere that charge has been registered, the same does not create absolute

right in favour of the Yes Bank, that too, when the property-in-question was mortgaged with the DHFL as well and that was prior in time to that of Yes Bank. Apart that the parties have now been heard and even one more Financial Creditor is there, as amount of approximately Rupees Two Crores has also been obtained as a loan for purchase machinery etc., therefore, there are three Financial Creditors and the petition under Section 7 of IBC has been filed by DHFL and the petitioner is likely to succeed as balance of convenience lies in the favour of petitioner and it would suffer irreparable loss, if injunction is set-aside. Therefore, merely on the basis that the order under Section 14 of IBC Code has not been passed does not mean that the ad-interim injunction cannot be granted in the favour of the respondent herein against the Corporate Debtor as well as the other Financial Creditor qua the property-in-question.

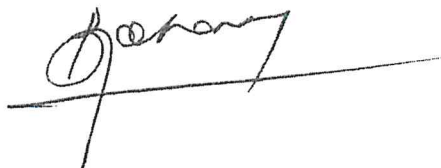
15. Learned Counsel for the respondent relied upon the citations **“NUI Pulp and Paper Industries Pvt. Ltd. Vs. M/s Roxcel Trading GmbH in Company Appeal (AT) (Insolvency) No. 664 of 2019.** Further, it is also contended that the order of status qua was passed by this Tribunal after hearing the Corporate Debtor and Learned Counsel for the Corporate Debtor clearly make a statement before this Tribunal that the Corporate Debtor was in possession of the moveable property/assets of the company, therefore, the Corporate Debtor as well as Yes Bank being Financial Creditor colluded with each other and suppress the material facts before this Tribunal. The handing over of possession before expiry of stipulated period was nothing, but



indicates the malpractices on the part of applicant to grab the property.

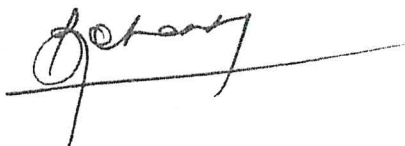
16. Moreover, the order of status qua was passed just to protect the property in question so that it could not be alienated in any manner. Hence, there was no question of suppression of fact on the part of DHFL. Further, it is also contended that where the petition under Section 7 of IBC Code, has been filed, Yes Bank is fully entitled to lodge its claim before the IRP, if the petition stands accepted and order under Section 14 has been passed. Merely that the under Section 13(4) has been issued and the symbolic possession has been taken by Yes Bank, does not create a full fledge right in its favour, that too, when the right of redeeming of the property lies with the owner of the property in question i.e Corporate Debtor. Hence, the mere taking of physical possession under the SARFAESI Act also does not create any absolute right and title in the favour of the Yes Bank. In view of the above said submissions, Learned Counsel for the respondent No. 1 i.e. DHFL prayed that the application being false and frivolous may kindly be dismissed with costs.

17. Further, Learned Counsel for the Corporate Debtor argued that this Tribunal has limited residuary power under Section 60 (5) (c) of the IBC Code, therefore, it cannot exercise such power, which the IBC specifically not provided and relied upon "**Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta, 2021 SCC OnLine SC 194**" and contended that the order of injunction cannot be passed against Yes Bank and Yes Bank has rightly taken the actual and physical possession of the



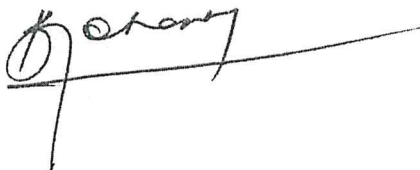
property after due compliance of notice under Section 13(2) and 13(4) of the SARFAESI Act. Accordingly, Learned Counsel for the Corporate Debtor vehemently contended that Yes Bank being actually in physical possession, the petition under Section 7 cannot be maintained and the respondent No. 1 has no right, title and interest in the same. Further, it is contended that no case has been made out in the petition under Section 7 of IBC Code and false frivolous claim has been lodged. Accordingly, prayed for vacation of status qua order.

18. Heard. Records have been thoroughly perused. Admittedly, vide order dated 30th September 2021, this Tribunal directed the parties to maintain status-quo, although, no detailed order was passed on that day, but it is a matter of fact that the proceedings before the IBC are in nature that assets of the Corporate Debtor should be protected, so that it could not have been siphoned off during this period. In this context, the reference can be made that **NUI Pulp and Paper Industries Pvt. Ltd. Vs. Roxcel Trading GmbH, decided by Hon'ble NCLAT vide order dated 17.07.2019**, wherein, the Hon'ble NCLAT categorically held that NCLT has inherent power to pass orders for ensuring substantial justice and preventing abuse of process. In the said matter, the order was passed by the NCLT, whereby ad-interim injunction in the favour of Operational Creditor against the Corporate Debtor and its directors has passed and they were restrained from alienating encumbering or creating any third party interest on the assets of the respondent No. 3 company till further order. Whereas the respondents referred to a citation **Gujraj Urja Vikas Nigam Ltd. Vs.**



Amit Gupta & Ors. 2021 7 SCC 209, wherein it is held the NCLT cannot exercise its jurisdiction over matter de-hors the insolvency proceedings since such matters fall outside the realm of IBC. Simultaneously, Hon'ble Supreme Court of India also held that the objective of the statute to ensure that the Corporate Debtor remains 'going concern'. Thus, while passing the order at 09:30 p.m. pertaining to maintain the status qua, the object of this Tribunal was only to protect the assets of the Corporate Debtor. Hence, the said order was in consonance with the objective of the IBC and falls in the line of inherent power exercised by this Tribunal.

19. Further, there is no dispute about the proposition laid down by the Hon'ble Supreme Court of India in the matter of "**Aqua Borwell Pvt. Ltd. (supra)**", whereby it is held that no order can be passed against the party, who has not been impleaded at the arrays of the respondents. However, this Tribunal vide order dated 30th September 2021, specifically recorded that Learned Counsel for the Corporate Debtor while accepting notice make a statement that on day the Corporate Debtor was in the possession of the immoveable property of the assets of the company. Although, it was ordered that notice was to be issued to Yes Bank, but Learned Counsel for the Corporate Debtor categorically stated, "***the possession of the immoveable property has not been transferred to the other person***". Thus, the said order was passed in the very presence of the Learned Counsel for the Corporate Debtor, who suffered a specific statement that the Corporate Debtor was still in the possession of the property. Hence, it



could not be stated that said order was passed in the absence of any of the party. Moreover, only symbolic possession may be said to be taken and physical possession was still with the Corporate Debtor.

20. Although, on the behalf of the Yes Bank, it is being stated that Yes Bank has taken the possession of property in question under SARFAESI Act and from that very date, Yes Bank had become the owner of property-in-question. In this context, before proceeding further, it would be appropriate to go through Section 13(2) and Section 13(4) of SARFAESI Act, which are as under:

“13(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)

13 (4) In the case of borrower fails to discharge his liability in full within the period specified in sub-section(2), the secured creditor may take recourse to one or more of the following measure to recover his secured debt, namely:-

(a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured assets;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured assets;

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt ;}

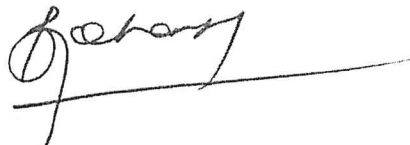
(c) Appoint any person (herein after referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) Required at any time, by notice in writing, any person who has acquired any of the secured assets from the borrower and from

whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.”

21. In the present matter in hand, it is to be noted that the notice under Section 13(2) of the SARFAESI Act was issued by the Financial Creditor i.e Yes Bank on 29th July 2021 to the Corporate Debtor, accordingly, the statutory period of 60 days was to expire on 28th September 2021, but the notice of symbolic possession was given on 10th September 2021, and the symbolic possession was taken merely within 42 days without completing the statutory period of 60 days as laid down under the 13(2) SARFAESI Act. Thus, the above said hurry up acts/omissions on the part of Yes Bank and Corporate Debtor indicates that there might be some collusion between them, in order to help the Corporate Debtor to redeem the property. In the matter of **Mathew Varghese V. M. Amritha Kumar And Others (supra)**, the Hon'ble Apex Court categorically held that the secured assets can be redeemed by the Corporate Debtor at any time before the execution of conveyance and registration of transfer of mortgage interest by registered instrument. Thus, the purpose and object of this Tribunal while passing the order dated 30th September 2021 was only to protect the property in question and to secure rights of all the creditors and also of Corporate Debtor.


22. Further, in the present matter, the present petitioner is one of the Financial Creditor and the charge was also duly created in its favour also by the Corporate Debtor. It is settled principal of law, while creating charge on a property, only an intention is required to be seen. Once, the said intention is reflected from the act & conduct of



the Corporate Debtor, it is to be presumed that the charge has been duly created in the favour of the Financial Creditor/petitioner herein also. Moreover, merely that the charge has not been entered under the CERSAI, that does not mean that the preferential right has been created in the favour of the Yes Bank. Hence, in the present matter, where the petitioner herein being a Financial Creditor have a prime facie case in its favour although, the Yes Bank has also extended credit facility to the Corporate Debtor, therefore, until the petition is being heard finally, it is appropriate to protect & preserve the property of the Corporate Debtor not only for the benefit of all the creditors, but also for the Corporate Debtor. Therefore, in view of the above said facts and circumstances, we are of the affirmed view that the injunction order of maintaining status qua must continue till the next date of hearing.

However, it is made clear that maintaining the status quo will not have any bearing on the merit of the main Application filed which shall be heard on the date already fixed i.e. 19.01.2022

Let, the copy of the present order be served to the parties concerned.


(PRASANTA KUMAR MOHANTY)
MEMBER (T)


(DHARMINDER SINGH)
MEMBER (J)