

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

Comp. App. (AT) (Ins) No. 1049 of 2024

IN THE MATTER OF:

Pratibha Industries Ltd.

Through Its Liquidator Mr. Avil Menezes

...Appellant(s)

Versus

Yes Bank Ltd. & Anr.

...Respondent(s)

Present:

For Appellant : Mr. J. Rajesh, Mr. Dhrupad Vaghani, Md. Arsalan Ahmed, Mr. Yashwardhan Agarwal, Mr. Jaitegan Khurana Advocates.

For Respondents : Mr. Anupam Singh, Mr. Ajeyo Sharma, Ms. Nika Tiwari, Advocates for R-1 i.e. Yes Bank.

Mr. Sunil Fernandes, Sr. Advocate along with Ms. Rajshree Chaudhary, Ms. Diksha Dadu, Ms. Honey Satpal, Mr. Kanishk Khullar, Advocates for R-2.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Liquidator of the Corporate Debtor to challenge the order dated 08.04.2024, passed by the NCLT, Mumbai Bench-I (in short 'Tribunal'), by which an application filed by the Appellant bearing M.A No. 1662 of 2019, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'Code'), for reversing the sale transactions of the properties situated at E-10 and B-85 Defence Colony, New Delhi, has been dismissed.

2. Pratibha Industries Limited (Corporate Debtor) availed credit facility from Yes Bank/Respondent No. 1, by way of term loan of Rs. 50 Cr. and

created an exclusive mortgage on the following properties, namely, the front portion of the 3rd Floor alongwith servant quarter with attached toilet and two car parking spaces in the driveway of the property situated at E-10 Defence Colony, New Delhi (hereinafter referred to as the first property) and entire 1st Floor of the property situated at B-85, Defence Colony, New Delhi (herein after referred to as the second property).

3. The Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) vide order dated 01.02.2019. Mr. Sunil Kumar Choudhary was appointed as the Interim Resolution Professional (IRP) and moratorium under Section 14 of the Code was imposed.

4. Mr. Sunil Kr. Choudhary (IRP) was replaced by Mr. Anil Mehta on 14.03.2019 and since no resolution plan was approved during the CIRP period, therefore, the Tribunal passed the order of liquidation on 08.02.2021 and appointed Anil Mehta as the liquidator of the CD.

5. However, vide order dated 07.07.2023, the Tribunal replaced Mr. Anil Mehta and appointed Avil Menezes (Appellant herein) as the liquidator of the CD.

6. There were proceedings regarding the first and second property by the mortgagee/Respondent No. 1 under the SARFAESI Act, 2002 (in short 'Act'). The Respondent No. 1 issued a notice dated 10.05.2018 to the CD under Section 13(2) of the Act, demanding an amount of Rs. 87,53,58,171/- . Since, the CD failed to return the aforesaid amount, therefore, on 17.07.2018 notice for possession under Section 13(4) of the Act was issued

and physical possession was taken on 21.09.2018. The possession notice was published on 27.09.2018 in the local newspapers, namely, the Statesman and Vir Arjun.

7. After taking possession, the Respondent No. 1 issued first e-auction sale notice under Section 13(8) of the Act on 30.11.2018 but e-auction was declared unsuccessful on 03.01.2019 because no bid was received.

8. The second e-auction sale notice was issued on 11.01.2019 and sale was conducted on 28.01.2019 of the first property in which Respondent No. 2 gave the highest bid for a total sale consideration of Rs. 5,11,00,000/-. The bid was accepted by Respondent No. 1 and a letter of confirmation was issued on 28.01.2019 in favour of Respondent No. 2.

9. As per the letter of confirmation, the date of payment of the balance consideration was 12.02.2019. The Respondent No. 2 deposited 25% payment of the sale price including EMD on 29.01.2019 in terms of Rule 9(3) of the Security Interest (Enforcement) Rules, 2002. The remaining payment of the sale consideration, as per the timelines in the public notice, was made on 12.02.2019. The sale certificate was issued on 12.02.2019 and it was registered with the office of sub-registrar in favour of Respondent No. 2 on 18.02.2019.

10. In so far as, the second property is concerned, since no bid was received by Respondent No. 1, therefore, it issued letter of confirmation to itself of the said property for the total sale consideration of Rs. 5,30,00,000/- and issued the sale certificate on 30.01.2019.

11. It is alleged that the stamp duty of the said property was paid on 02.02.2019 which was registered with the office of the sub-registrar on 05.02.2019.

12. According to the Appellant, the insolvency commencement date for both the properties is 01.02.2019. Letter of confirmation of sale for both the properties is 28.01.2019. Issuance of sale certificate for the first property is 12.02.2019 and second property is 30.01.2019. Date of payment of balance sale consideration qua both the properties is 12.02.2019 and Registration of sale certificate qua the first property is 18.02.2019 and for the second property is 05.02.2019.

13. The Appellant being the liquidator, objected to the sale of the properties through email dated 15.02.2019 sent to R1 on the ground that the properties have been sold in breach of Section 14 of the Code and requested that the properties be handed over to him.

14. Respondent No. 1 responded to the email of the Appellant vide email dated 26.02.2019 alleging that there is no breach of law much less Section 14 of the Code.

15. Thus, the Appellant filed the application bearing M.A No. 1662 of 2019 in CP (IB) No. 3558/NCLT/MB/C-1/2018 for reversing the sale transactions of the properties which has been dismissed by the Tribunal and hence, the present appeal has been filed.

16. Counsel for the Appellant has submitted that e-auction of the first property was held on 28.01.2019. Respondent No. 1 accepted the bid of

Respondent No. 2 and issued the letter of confirmation on 28.01.2019 i.e. on the same date but the payment of balance consideration and issuance of sale certificate happened on 12.02.2019, after the date of CIRP i.e. on 01.02.2019, therefore, it is directly hit by Section 14(1)(c) of the Code. In this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of Indian Overseas Bank Vs. M/s RCM Infrastructure Ltd. & Ors. Civil Appeal No. 4750 of 2021.

17. In respect of second property, it is submitted that the sale has been conducted, relying on Section 13(5A) of the Act but before the registration of the sale certificate, CIRP was initiated against the CD and stamp duty regarding the sale certificate was paid only on 02.02.2019 and was registered with the office of the sub-registrar on 05.02.2019.

18. He has also submitted that the adjustment under Section 13(5B) is in conflict with Section 43(2) of the Code because the purchase by adjustment is prohibited. It is argued that in such circumstances, the Bank is deemed to have been given preference because if the CD transfer property for the benefit of any creditor, on account of any pre-existing debt owed by the CD and such transfer puts the creditor into a beneficial position than it would be a preferential transfer. In this regard, reliance has been placed upon decisions of the Hon'ble Madras High Court in the case of Putta RM. Ramanatha Iyer Vs. T.S Ramachaei and Anr., 1958 SCC OnLine Mad 144 and Venkatasuryya Vs. Suryanarayana, AIR 1938 Mad. 906.

19. He has further submitted that the Tribunal has committed an error in relying upon the decision of the Hon'ble Supreme Court in the case of

CELIR LLP Vs. Bafna Motors (Mumbai) Pvt. Ltd. & Ors. (2024) 2 SCC 1 because the said judgment did not consider the provisions of the Code and only dealt with the interpretation of the provisions of the Act. It is submitted that the Appellant shall not lose its right of redemption over the first property on the first notice of public auction i.e. 30.11.2018 rather the Respondent No. 2 shall get the right in the first property upon confirmation of sale.

20. On the other hand, Counsel appearing on behalf of Respondent No. 2, arguing in respect of the first property, has submitted that although the Tribunal has rightly dismissed the application filed by the Appellant holding that the confirmation of sale was issued on 28.01.2019 and the CIRP commenced on 01.02.2019 but according to him, the material date is not 28.01.2019 but 30.11.2018 when the first e-auction sale notice was issued in terms of Section 13(8) of the Act.

21. Counsel for Respondent No. 2 has submitted that right of the borrower/CD stood extinguished on 30.11.2018 qua the first property when the date of e-auction sale notice was issued on 30.11.2018 in respect of the said asset. In this regard, it is submitted that there has been an amendment in Section 13(8) of the Act w.e.f. 01.09.2016 as per which the right of the borrower to redeem the mortgage stands extinguished on the date when the e-auction sale notice is issued and once the jural link is snapped on 30.11.2018, the IRP/RP who steps into the shoes of the CD/Borrower only on 01.02.2019 does not have the right over the asset which can be claimed by the liquidator later on.

22. He has further submitted that the decision in the case of Indian Overseas Bank (Supra) relied upon by the Appellant, is not at all applicable because in the said case there was no discussion/interpretation of Section 13(8) of the Act except Section 14(1)(c) of the Code.

23. It is further submitted that the decision in the case of Celir LLP (Supra) is squarely applicable because in that case the Hon'ble Supreme Court has thoroughly discussed the impact of Section 13(8) before amendment and after the amendment.

24. It is argued that before the amendment of Section 13(8) it was provided that if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, then secured asset shall not be sold but with effect from 01.09.2016 it has been provided in Section 13(8) that where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction is made then the secured asset shall not be sold.

25. It is submitted that the first e-auction sale notice was issued on 30.11.2018 and the Appellant/CD could have paid the entire amount of the secured creditor in order to avoid the sale. It is further submitted that the amendment has been brought to instill confidence in the purchaser that henceforth there shall not be any reversal of the sale at the instance of the borrower.

26. In so far as the second property is concerned, Counsel for the Respondent No. 1 has submitted that the sale of the property has been conducted in terms of Section 13(5)(6) of the Act. It is submitted that e-auction sale notice for the second property was given on 03.01.2019 but since the sale could not succeed in the first instance as no bid was received, therefore, Respondent No. 1 published the second e-auction sale notice scheduling the sale of the property on 28.01.2019. It is submitted that no payment was made by the borrower for avoiding sale on or before 03.01.2019 whereas the sale was affected on 28.01.2019 and sale certificate was issued on 30.01.2019. He has also submitted that the same principle as enshrined under Section 13(8) would apply. It is also argued that the contention of the Appellant regarding the sale by way of adjustment under sub-section 5B of Section 13 is directly in conflict with Section 43(2) of the Code, is totally fallacious because Respondent No. 1 is permitted by law to purchase the property in question in terms of Section 13(5)(6) of the Code.

27. We have heard Counsel for the parties and perused the record.

28. Since, the Appellant has relied upon Section 14(1)(c) of the Code for avoiding the sale of both the properties on the ground that the sale has been affected after the imposition of the moratorium, therefore, it would be relevant to refer to Section 14(1)(c) of the Code which is reproduced as under;-

“Section 14. Moratorium

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);”

29. Similarly, the Respondents have relied upon Section 13 of the Act, therefore, the same is also reproduced as under:-

“13. Enforcement of security interest.—(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(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 secured creditor as non-performing asset, then, the secured creditor may require 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).

[Provided that— (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets

intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. 2

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate 3[within fifteen days] of receipt of such representation or objection the reasons for non acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

(4) In case the 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 measures 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 realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

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 for the debt;]

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

(d) require 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.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.

(5C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).]

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than 1[sixty per cent.] in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured

creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.—For the purposes of this sub-section,—

(a) “record date” means the date agreed upon by the secured creditors representing not less than 1 [sixty per cent.] in value of the amount outstanding on such date;

(b) “amount outstanding” shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets

referred to in the notice, without prior written consent of the secured creditor.”

30. It is also pertinent to mention that Section 13(8) has been amended on 01.09.2016, therefore, both unamended and amended Section 13(8) are being reproduced by way of a table for a quick reference :-

Section 13(8) before amendment	Section 13(8) after amendment on 01.09.2016
If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.	Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets: (i) The secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor; and

	(ii) In case, any steps has been taken by the secured creditor for transfer of such amount under his sub-section, no further steps shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.
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31. There is no dispute that both the properties were mortgaged by the CD in favour of the Respondent No. 1 for availing the term loan. It is also not in dispute that the first property was put to e-auction on 30.11.2018 for the first time. Till, 30.11.2018 the CD/Appellant did not come forward to pay the dues of Respondent No. 1. The first property was sold on 28.01.2019 and sale was confirmed. The CIRP commenced on 01.02.2019. The remaining payment of sale consideration is made on 12.02.2019 and sale certificate was issued on the same date and it was registered on 18.02.2019.

32. The issue in this regard is as to whether the relationship in respect of first property between the CD and the R1 came to end on the day when the notice for e-auction was issued in terms of amended provision of Section 13(8) of the Act. In this regard, it may be mentioned that a specific question was formulated by the Hon'ble Supreme Court in the case of Celir LLP

(Supra) which read thus:- “what is the impact of the amended section 13(8) of the Act on the borrower’s right of redemption in an auction conducted under the Act? Or in other words, what is the effect of amendment to Section 13(8) of the Act r/w Section 60 of the 1882 Act?”

33. In this regard, the Hon’ble Supreme Court has held that “in view of the aforesaid discussion, we hold that as per the amended section 13(8) of the Act, once the borrower fails to tender the entire amount of dues with all costs and charges to the secured creditor before the publication of auction notice, his right of redemption of mortgage shall stand extinguished / waived on the date of publication of the auction notice in the newspaper in accordance with Rule 8 of the 2002 Rules.”

34. In the presence of direct decision of the Hon’ble Supreme Court interpreting Section 13(8) of the Act, the decision relied upon by the Appellant in the case of Indian Overseas Bank (Supra) which has only interpreted Section 14(1) of the Code does not apply because Section 13(8) was not brought to the notice of the Hon’ble Court.

35. The Hon’ble Supreme Court has also discussed sanctity of public auction from paras 88 to 93 in its decision in the case of Celir LLP (Supra). The relevant portion of the said order are reproduced as under:-

“91. Thus what is discernible from above is that it is the duty of the courts to zealously protect the sanctity of any auction conducted. The courts ought to be loath in interfering with auctions, otherwise it would frustrate the very object and purpose behind auctions and deter public confidence and participation in the same.

92. Any other interpretation of the amended section 13(8) will lead to a situation where multiple redemption offers would be encouraged by a mischievous borrower, the members of the public would be dissuaded and discouraged from participating in the auction process and the overall sanctity of the auction process would be frustrated thereby defeating the very purpose of the Act. Thus, it is in the larger public interest to maintain the sanctity of the auction process under the Act.”

36. In respect of the second property, the first public notice was issued on 03.01.2019. By that time the Appellant did not move to redeem the property by making the payment of the Bank. However, the first sale could not take place, therefore, the public notice was again published scheduling the sale of the properties on 28.01.2019. In that sale, the Bank itself purchased the property which is permitted under Section 13(5A) & 13(5B) of the Act and adjusted the amount which it had to recover from the CD.

37. The jural relationship between the parties in respect of second property also came to an end on 03.01.2019 or 28.01.2019 which was much earlier than the date of commencement of CIRP on 01.02.2019. In this case, even the letter of confirmation was issued on 28.01.2019 and sale certificate was issued on 30.01.2019 much before the date of commencement of the CIRP on 01.02.2019. The Hon’ble Supreme Court has held in the case of Celir LLP (Supra) while interpreting Section 13(8) that the relationship between the parties i.e. mortgager and mortgagee, for the purpose of redemption exists till the date of issuance of notice of sale, if the property is being sold under Section 13(8) of the Act then in that situation also the Appellant has no right to the property for the purpose of raising the dispute.

38. The contention of the Appellant that non-deposit of the sale consideration in the estate of the CD effects the right of the secured creditor is of no avail.

39. Thus, looking from any angle, we do not find any merit in the present appeal, therefore, the same is hereby dismissed though without any order as to costs.

I.As, if any, pending are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi
04th April, 2025.
Sheetal