IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (COURT-I)
KOLKATA

I.A. (IB) No. 896/KB/2022
in
CP (IB) No. 294/KB/2021

In the matter of

Reserve Bank of India

… Appropriate Regulator

Versus

SREI Equipment Finance Limited

…Financial Service Provider

And

I.A. (IB) No. 896/KB/2022

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016.

In the matter of

National Bank for Agriculture & Rural Development (NABARD)

… Applicant

Versus

SREI Equipment Finance Limited

Represented through Mr. Rajneesh Sharma, Administrator

… Respondent

Coram:

Shri Rohit Kapoor :Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Appearances (via hybrid mode):

For the Applicant : 1. Mr. Abhrajit Mitra, Senior Advocate
2. Mr. Shaunak Mitra, Advocate

3. Ms. Joveria Sabbah, Advocate
4. Ms. Paramita Trivedi, Advocate
5. Ms. Tanya Baranwal, Advocate

For Respondent : 1. Mr. Jishnu Saha, Senior Advocate
2. Mr. Debnath Ghosh, Advocate
3. Mr. Soumyajit Mishra, Advocate

For the CoC : 1. Mr. Anoop Rawat, Advocate
2. Mr. Sourav Panda, Advocate
3. Mr. Deepanjan Dutta Ray, Advocate
4. Ms. Arushi Chandra, Adovate
5. Ms. Rashi Sharma, Advocate

Order pronounced on: 01.02.2024

ORDER

Per: Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.

2. The I.A. has been filed by National Bank for Agriculture and Rural Development ("***NABARD/Applicant***"), under section 60(5) of the Insolvency and Bankruptcy Code, 2016 **("Code")** seeking the following reliefs:

   a) *That this Hon'ble Tribunal be pleased to pass appropriate orders directing the Administrator/Respondent to confirm and ensure priority of repayments of NABARD in full over all other payments by SEFL and pass on the recoveries out of the assets assigned to NABARD by SEFL in respect of the refinanced loans in view of the statutory provisions under NABARD Act;*

   b) *That pending the hearing and final disposal of this Application, this Hon'ble Tribunal be pleased to restrain the Administrator/Respondent from dealing with or dispose of or in any manner affect the refinanced receivables of NABARD held by SEFL in trust for the sole benefit of NABARD.*

c) *That this Hon'ble Tribunal be pleased to pass ad-interim reliefs in terms of prayer (b) above;*

d) *For such further and other reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case in the best interest of justice and equity.*

3. ***Submissions of the learned Senior Counsel appearing on behalf of the Applicant***

3.1. The learned Senior Counsel submitted that the Applicant is a body corporate constituted and established under the National Bank for Agriculture and Rural Development Act, 1981 ***("NABARD Act")*** and carries on its activities *inter alia* of providing credit for rural and agricultural development, including providing refinancing facilities to financial institutions licensed by the Reserve Bank of India.

3.2. It is submitted that in or about March 2017 the SREI Equipment Finance Limited **("SEFL")** approached the applicant to avail financial assistance by way of refinance under the refined refinancing scheme formulated by the applicant for NBFCs under section 25(1)(a) of the NABARD Act.

3.3. *Vide* sanction letters dated 16 March 2017, 15 June 2017, 07 May 2018, 27 June 2018, 24 August 2018 and 04 March 2019, NABARD sanctioned refinance to SEFL to the extent of Rs.2,212.50Crore on terms and conditions set out therein. SEFL duly accepted the terms and conditions of the Sanction Letters *vide* 21 March 2017, 21 June 2017, 07 May 2018, 28 June 2018, 28 August 2018 and 06 March 2019.

3.4. The learned Counsel referred to common Clause 10 in the General Refinance Agreements dated 21 March 2017, 23 June 2017, 11 May 2018, 28 June 2018, 28 August 2018 and 06 March 2019 which were executed by SEFL in favour of NABARD.

3.5. Further, the learned Counsel led us through clause 6 (vii) of the Deeds of Assignment of Book Debts dated 21 March 2017, 23 June 2017, 11 May 2018, 28 June 2018, 28 August 2018 and 06 March 2019 in favour of NABARD equivalent to an aggregate sum of Rs.2530Crore. The Clause states that each of

the debt is free from any lien, encumbrances, claim, assignments, charge etc. except the charge created in favour of NABARD. Hence, the loan is secured by First Charge.

3.6. NABARD disbursed an aggregating sum of Rs.2,212.50Crore to SEFL by way of refinance of its loans. SEFL defaulted on repayment of principal dues of Rs.266.87Crore as on 31 July 2020 and interest dues of Rs.39.80Crore on 01 August 2020. It is further submitted that after several follow ups, SEFL repaid a sum of Rs.49,80,29,899/- on 28 August 2020 which was adjusted towards principal and interest dues.

3.7. It is further submitted that the entire outstanding of SEFL was rescheduled upon request made by SEFL *vide* letter dated 20 October 2020 due to adverse business issues including the impact of COVID-19, which was accepted by NABARD *vide* its letter 28 October 2020.

3.8. It is submitted that in accordance with the terms of the rescheduled plan, SEFL repaid Rs.33.26Crore on 27 October 2020. After adjustment, the balance outstanding of Rs.820Crore was rescheduled to be repaid in 40 monthly instalments at the interest rate of 9.75% staring from November 2020. Post re-scheduling of the repayment schedule, SEFL failed to make payment of the monthly instalments and payment of interest.

3.9. It is submitted that even after issuance of several demand notices, SEFL neither replied to the demand notices nor repaid its monthly dues. Hence, the account of SEFL was classified as NPA in the books of account of NABARD.

3.10. It is submitted that Corporate Insolvency Resolution Process**("CIRP")** was initiated upon SEFL *vide* order dated 08 October 2021 passed by this Adjudicating Authority.

3.11. It is submitted that the total outstanding of SEFL is Rs.883,63,31,295/- (Rupees Eight Hundred Eighty Three Crore Sixty Three Lakh Thirty One Thousand Two Hundred and Ninety Five only) as on 08 October 2021.

3.12. It is submitted that that pursuant to the initiation of CIRP, NABARD filed its claim of Rs.883,63,31,295/- (Rupees Eight Hundred Eighty Three Crore Sixty

Three Lakh Thirty One Thousand Two Hundred and Ninety Five only) in Form C with the Administrator of SEFL on 21 October 2021. It is submitted that the Administrator of SEFL admitted to the loans beingin the nature of refinance.

3.13. It is submittedthat the NABARD Act, which is a Central Legislation gives special rights to the Applicant. It is further submitted that the entire outstanding amount with respect to refinanced loans were due and payable to NABARD in full priority over all other payments and did not form part of the common pool. It is submitted that the Chapter VI of the NABARD Act dealing with the credit functions of the NABARD, provides for various statutory safeguards in favour of NABARD. It states that the borrower's of NABARD shall hold the amounts advanced and outstand and the securities in trust for NABARD.

3.14. Relevant portion of section 29 is set out hereunder:

"29. (1) Anysums receivedby a borrowinginstitution inrepayment or realisation of loans and advances refinanced either wholly or partly by the National Bank shall, to the extent of the accommodation granted by the National Bank and remaining outstanding, be deemed to have been received by the borrowing institution in trust for the National Bank, and shall accordingly be paid by such institution to the National Bank, as per the repayment schedule fixed by the National Bank.

(2) Where an accommodation has been granted to a borrowing institution, all securities held, or which may be held, by such borrowing institution, on account of any transaction in respect of which such accommodation has been granted by the National Bank, shall be held by such institution in trust for the National Bank."

3.15. Accordingly, NABARD is a Financial Creditor with statutory rights. Section 29 makes it clear that "loans and advances refinanced" and the same remaining "outstanding" are to be held in "Trust".

3.16. It is further submitted that section 29 of the NABARD Act, mandates that sums received by borrowing institutions in the present case SEFL and securities are to be held in Trust. The learned Counsel thereafter led us through rule 10 of The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of

Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 **("FSP Rules")** clarifying third party assets to be held in trust is set out below:

> *"10. Assets of third parties, etc. - (1) For removal of doubts, it is clarified that the provisions of clause (b) of rule- 5 and section 14 shall not apply to any third-party assets or properties in custody or possession of the financial service provider, including any funds, securities and other assets required to be held in trust for the benefit of third parties.*
>
> *(2) The Administrator shall take control and custody of third-party assets or properties in custody or possession of the financial service provider, including any funds, securities and other assets required to be held in trust for the benefit of third parties only for the purpose of dealing with them in the manner, as may be notified by the Central Government under section 227."*

3.17. Further, the Central Government by notification dated 30 January 2020 numbered S.O. 464 (E) under section 227 of the Code, notified the manner of dealing with third party assets whereby it is provided as follows:-

> *"1.Receivables for Third Parties:-Where a financial service provider is contractually obliged, as on the insolvency commencement date, to act as a servicing or collection agent on behalf of third parties in respect of a transaction such as securitisation or lending arrangement, the Administrator shall-...c. ensure that the receivables, in respect of such transactions, collected are deposited and maintained in a separate account and are not merged with the funds or other assets of such financial service provider;*
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> *...2. Assets of Third PartiesWhere the financial service provider has, as on the insolvency commencement date, in its custody or possession assets owned by its customers or counterparties or by counterparties of its customers under a contract, and is under an obligation to return or transfer such assets in accordance with the terms and conditions of such contract, the Administrator shallprepare a statement of such assets and the respective contracts;ensure that such assets are maintained in a separate and distinct*

manner, capable of identifying thecontract-wise, and are not merged with those of financial service provider;

(c)return or transfer such assets to the person entitled to receive it in accordance with the terms and conditions of such contract:Provided that when such assets shall not be returned by the Administrator, due to breach of the terms of the contract, the financial service provider has become entitled to retain such assets for itself or dispose of the same to realise its dues.

3.18. It is submitted that the amounts received by SEFL have been kept aside from the CIRP. The Administrator in its Reply Affidavit has admitted to having already realized Rs. 317.12Crore relatable to the NABARD's refinance facility and out of this amount Rs.197.54 crores is for pre-CIRP period. Further, the Administrator hasadmitted that the Applicant is entitled to "those amounts which are already received".

3.19. The Learned Counsel has placed reliance on ***Union Bank of India on behalf of the Committee of Creditors of Dewan Housing Finance Corporation Limited v. National Housing Bank & Another, CA (AT)(Ins) No. 461 of 2021***, wherein facts and circumstances identical to the instant case were considered.Section 16B of the National Housing Bank Act, 1987 (NHB) is nearly identical and in pari materia to section 29 of the NABARD Act. The Hon'ble NCLAT found no conflict between section 16B of the NHB Act with section 14 and section 238 of the Code. It specified that other financial creditors were not at par with NHB. Accordingly, it was clarified that the relationship between FSP (DHFL) and NHB was not of debtor and creditor and NHB had special rights under section 16B of NHB Act.

3.20. It is submitted that the decision by the Hon'ble NCLAT is squarely applicable to the instant case and the same ratio, principles, findings and conclusions will apply. It is submitted that a Civil Appeal no. 2558 of 2022 against the order of the Hon’ble NCLAT is pending before Hon'ble Supreme Court. However, as an interim measure, Hon'ble Supreme Court has directed for disbursal of the amount to NHB on 12.09.2022.

4. ***Submissions of the learned Counsel appearing on behalf of the Administrator***

4.1. The learned Counsel submitted that the very fact that NABARD has filed its claim in Form "C" before the Administrator and has claimed priority of payment of its dues is in itself acknowledgment of the fact that NABARD has claimed as a creditor of SEFL and has not sought enforcement of any trust obligation either under Clause 10 of the General Refinance Agreements or under section 29 of the NABARD Act.

4.2. In any event, the scheme of the section 29 of the NABARD Act contemplates back-to-back refinancing of loans and advances by NABARD. This means that monies advanced to a financial institution (in this case, SEFL) by NABARD, are to be used by SEFL to directly refinance loans and advances disbursed by SEFL to its customers. Separately, NABARD is secured by SEFL by way of a charge over SEFL's book debts.

4.3. Admittedly, under Clause 10 of the General Refinance Agreements, it is only when SEFL realizes any of the securities held by it either alone or jointly with NABARD, as security for the said loans and advances or whenever any repayment is received or recovery is made, from the ultimate borrower, that such monies are required to be made over directly to NABARD.

4.4. In this context it is relevant to note that it is not the case of the Applicant that there was any identification of the ultimate borrowers whose loans/ advances have been refinanced by way of the General Refinance Agreements and that any repayment that has been received or any recovery made by SEFL from the purported ultimate borrowers, is being held in trust for the Applicant and therefore must make over to the Applicant.

4.5. In this context, it may be noted that even under Section 29 of the NABARD Act it is only sums received by a borrowing institution, i.e. SEFL in the instant case, against any repayment or realization of loans and advances refinancedare deemed to be held in trust. There is no averment whatsoever in the instant Application of any particular repayment or realization of loans made by SEFL from the ultimate borrowers. In the absence of any such averment, the Applicant cannot contend that any part or portion of its claim is comprised of such repayment or recovery, which must be made over to NABARD.

4.6. In so far as the "amount and security to be held in trust" under Section 29 of the NABARD Act is concerned, it must be understood that it is only all securities held, or which may be held, by such borrowing institutions (SEFL in the instant case) on account of any transaction in respect of which such accommodation has been provided by the ultimate borrowers for the loans (i.e. securities for the loans granted by SEFL to the ultimate borrowers) that are to be held in trust. There are no particulars which, however, have been provided for any such security in the instant Application. In this context it may be noted that the copy of the sample Deed of Assignment annexed as Annexure "B" to the Application (page 19) only mentions in Schedule –II (page 31) "assignment of present and future book debts". In such circumstances, no case has been made out by the Applicant to the effect that the Respondent No. 1, Administrator is in fact withholding any monies or securities which are being held in trust for the Applicant.

4.7. In this context it may also be noted that Section 6 of the Indian Trusts Act, 1882 provides that a trust is created, inter alia, when the author of the trust indicates with reasonable certainty by any words or acts, the trust property. Under and in terms of Clause 10 of the General Refinance Agreements and Section 29 of the NABARD Act, the trust properties are confined only to repayments made by or recovery made from the borrowing entities of SEFL whose debts have been refinanced by NABARD, and the trust securities are confined only to the securities that were provided by the ultimate borrowers to SEFL for the loans and advances availed by them, which were refinanced by NABARD. As the Applicant has failed to identify: (i) the ultimate borrowers; (ii) any monies repaid by, or any monies recovered from any such purported ultimate borrowers; and (iii) any of the securities provided by such purported ultimate borrowers, no case of wrongful withholding of the trust properties by the Respondent No.1, Administrator has been made out. There is consequently no question of NABARD being entitled to either outright or preferential payment of the amounts claimed by it.

4.8. To support its case the Applicant has, however, relied on paragraph 51 of the Administrator's affidavit which is reproduced hereunder as follows:

"51.As per the SEFL records, the total amount collected from such loan account which have not been paid to the applicant is Rs.317.12 crores for the period October 28, 2020 to August 31, 2022. Out of the above amount received/realized, the amounts received/realized by SEFL during the pre CIRP period (October 28, 2020 to October 7, 2021) is Rs. 197.54 crores whereas the amounts received/realized by SEFL during the CIRP period (August 31, 2022) is Rs. 119.58 crores. This does not and cannot constitute an admission by the Respondent No. 1, Administrator inasmuch such calculation of collections from book debts charged as security has been made by the Administrator in respect of all creditors of SEFL.

4.9. The 'loan accounts' referred to in the affidavit of the Administrator are the loans of SEFL marked as security for NABARD. Admittedly these loan accounts marked as security were subject to change. This is acknowledged in the letter from NABARD to SEFL dated October 14, 2021, wherein NABARD makes a specific request to replace the Stage II and Stage III accounts with Stage I accounts to maintain the security margin required under the General Refinance Agreements.

4.10. If these 'loan accounts' are subject to change, they cannot possibly be the 'loans and advances' referred to in Section 29 of the NABARD Act. The 'loans and advances' referred to in Section 29 of the NABARD Act are loans directly refinanced by SEFL out of the monies advanced by NABARD. Such loans and advances could not thereafter be substituted for some other loans and advances sanctioned by SEFL at some other time. Therefore, as per NABARD's own admitted understanding, the 'loan accounts' referred to in the affidavit in reply dated October 21, 2022 of the Administrator are only the loans marked for the purpose of maintaining the required security margin with NABARD.

4.11. In view of such submission made on behalf of the Applicant in the course of hearing of the instant Application, the Administrator filed an additional affidavit on 30 June 2023 wherein it is stated that at the time of entering into the General Refinance Agreements and Deeds of Assignment, no specific loans and advances of SEFL were identified by NABARD for the purpose of refinance.

Consequently, there could be no question of identification of a sum of Rs.317.12 crores collected by the Respondent No. 1 administrator from such purported loan accounts. Significantly, the Applicant has not sought to controvert such statement either by filing an affidavit or otherwise.

5. **Submissions of the learned Counsel appearing on behalf of the consolidated CoC**

5.1. The learned Counsel submitted that the loans and advances granted to SEFL by NABARD are not refinance of any specific loans or advances. It is submitted that there is nothing to substantiate that the loans given were actually for refinancing. It is submitted that the General Refinance Agreement dated 06 March 2019 executed between NABARD and SEFL indicated that the loan is for refinance or otherwise. The learned Counsel refers to several paragraphs of the I.A. at Page 20 and 21 and has given emphasis on the term "otherwise" wherever "refinance or otherwise" has been mentioned.

5.2. It is further submitted that merely by the nomenclature of the agreement being a "General Refinance Agreement", it cannot be said that the nature of loans and advances granted to SEFL by NABARD are in the nature of refinance. In support of this contention the learned Counsel has placed reliance on ***Namburi Basava Subrahmanyam v. Alpalti Hymavathi and Ors. (1996) 9 SCC 388*** (paragraphs 3 and 5) and ***Super Poly Fabriks Limited v. Commissioner of Central Excise, Punjab, (2008) 11 SCC 398*** (paragraphs8-11).

5.3. The learned Counsel referred to section 3(31)[1] of the Code wherein security interest has been defined and submitted that NABARD has not identified any list of loans and advances granted by SEFL that it has refinanced and has submitted that the repayment of the loan granted by NABARD to SEFL is secured by way of a charge on all present and future book debts and receivables of SEFL.

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(31) "**security interest**" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
Provided that security interest shall not include a performance guarantee

5.4. The learned Counsel has referred to clauses at Pages 28-29, 31 to highlight that the assignment of book debts by SEFL to NABARD is in the nature of a security interest.

5.5. It is submitted that in terms of the deed of assignment dated 06 March 2019, present and future book debts of SEFL are being assigned by way of the Deed of Assignment. Even according to the Sanction Letter issued by NABARD to SEFL dated 07 May 2018, one of the conditions specified by NABARD for the grant of loans to SEFL is the execution of the separate deed of assignment to cover all present an future debt, receivable etc. and also future loans and advances.

5.6. It is evident that the security provided by SEFL and NABARD is in the nature of security interest, it may also be noted that NABARD only sought to maintain a specified security margin, without assignment of particular/identified loan assets and any amounts recovered from the underlying security cannot be transferred to NABARD in preference over other stakeholders of SEFL and SIFL.

5.7. NABARD *vide* letter dated 14 October 2021 sent to the Administrator has sought to replace the underlying loan assets of SEFL assigned to in order to maintain the security coverage ratio, which evidences that in no manner there were no identified assets that were assigned to NABARD.

5.8. The learned Counsel has referred to sections 29 and 30 of the NABARD Act and submitted that the nature of loans granted by NABARD to SEFL are not the refinance contemplated by section 29 of the NABARD Act and therefore are precluded from the scope of NABARD Act. The security created for such loans is a floating security and is a security interest on book debts and there are no specific loans and advances that were refinanced by NABARD, the security created in favour of NABARD falls squarely under the definition of security interest of the Code making NABARD a secured creditor.

5.9. The learned Counsel led us through rule 10(2) of the FSP Rules which provides that the Administrator is required to take control and custody of third party assets or properties in custody or possession of the financial service providers including any assets that are required to be held in trust for the benefit of the third parties. The notification of the Ministry of Corporate Affairs dated 30 January 2020 also

lays out the manner of dealing with third party assets which the Corporate Debtor is acting as the servicing or collecting agent on behalf of third parties.

5.10. It is submitted that in the instant case, the security provided by SEFL to NABARD is only in the nature of a security interest and are not third party assets as they belong to SEFL. It is evident that the ownership of the assets of SEFL was not transferred to NABARD as there are no specific assets that are identified as being refinanced by NABARD.

5.11. The learned Counsel submitted that the decision of the Hon'ble NCLAT in National Housing Bank (supra) is not applicable to the present case as in the present I.A., there are no identified underlying assets of SEFL tagged in favour of NABARD as NABARD failed to place on record any evidence to substantiate the same, whereas in National Housing Bank (supra) it is clearly specified that there were earmarked/flagged loans with National Housing Bank had refinanced.

5.12. Further, as the refinance was granted to Dewan Housing Finance Limited by NHB against identified tagged loans, recoveries from the said tagged loans were identified as third-party assets and to the extent of the tagged loans were held in trust.

5.13. It is submitted that Trust cannot be created or deemed to be created without the identification of the trust property and since no assets are specifically identified/tagged to have been refinanced by NABARD, no trust can be created in absence of a trust property.

5.14. In the case of National Housing Bank (supra), National Housing Bank had reserved its rights under section 16B of the NHB Act, in Form C filed by NHB, whereas NABARD did not identify or reserve its rights under any statutory provisions.

5.15. The learned Counsel submitted that section 29(3) of the NABARD Act provides for the rights available to NABARD during liquidation and is silent on any rights available to NABARD during insolvency resolution process of its borrowers. Hence, the intention of the legislature is clear that no rights over and above the Code are available to NABARD.

5.16. It is further submitted that on one hand NABARD has filed Form C as a financial creditor in terms of the Code and on the other hand NABARD is seeking to claim exclusivity over certain assets of SEFL as a third party. NABARD on one hand accepts that the assignment of the book debts is a security provided to it by SEFl which would been that such assets essentially belong to SEFL and on the other hand NABARD has proceeded to claim exclusivity on the assets by claiming that the assets belong to NABARD bit are being held in a trust by SEFL by virtue of section 29 of the NABARD Act.

5.17. The learned Counsel submitted that the loans extended by NABARD to SEFL fall squarely within the definition of financial debt under section 5(8) of the Code and NABARD hence is a financial creditor as defined under section 5(7) of the Code. NABARD cannot claim priority of repayment over other members of the CoC and no special rights can be claimed by NABARD.

5.18. It is further submitted that NABARD is seeking to enforce its security interest which is prohibited during CIRP. Further, section 29 of the NABARD Act is in contravention of the provisions of the Code and in this respect the Code shall prevail over the NABARD ACT.

Analysis and Findings

6. Heard the learned Senior Counsel appearing on behalf of NABARD, SEFL and CoC and perused the records.

7. The issues that arise in the present I.A. are:

7.1. Whether the securities were held in trust and are third party assets?

7.2. Whether NABARD shall get priority payment over other creditors?

8. To consider the first issue, we need to consider section 29 of the NABARD Act. which is given below for reference:

"Section 29:Amounts and securities to be held in trust

(1) Any sums received by a borrowing institution in repayment or realisation of loans and advances refinanced either wholly or partly by the National Bank shall, to the extent of the accommodation granted by the National Bank and

remaining outstanding, be deemed to have been received by the borrowing institution in trust for the National Bank, and shall accordingly be paid by such institution to the National Bank, as per the repayment schedule fixed by the National Bank.

(2) Where an accommodation has been granted to a borrowing institution, all securities held, or which may be held, by such borrowing institution, on account of any transaction in respect of which such accommodation has been granted by the National Bank, shall be held by such institution in trust for the National Bank.

[(3) Notwithstanding anything to the contrary contained in any law for the time being in force, where a liquidator is appointed for winding up a borrowing institution, it shall be the duty of the liquidator to forthwith pass on to the National Bank the sums recovered by the borrowing institution or the liquidator, as the case may be, in repayment or realisation of the loans and advances refinanced either wholly or partly by the National Bank to the extent the refinance is outstanding and the National Bank shall be entitled to enforce the securities held by the borrowing institution in trust for the National Bank as if every reference to the borrowing institution in any contract, security or other document obtained by borrowing institution is a reference to the National Bank and accordingly, the National Bank shall be entitled to recover the balance sums due under such loans and advances from the constituents of borrowing institution and any discharge given by the National Bank to such constituent shall be a valid discharge and the liquidator shall, on demand made by the National Bank, deliver to it all such contracts, securities and other documents, for due enforcement thereof by the National Bank.

Explanation.--For the purposes of this sub-section, the word "liquidator" shall include liquidator or a provisional liquidator or any person or authority entrusted with the duty of liquidating the borrowing institution.]"

9. Section 29 of the NABARD Act can be read with rule 10 of the FSP Rules and hence the NABARD Act is not in contravention with the Code, but it is also important to consider till what aspect.

10. Before proceeding further, we would like to take heed of the judgment of Hon'ble Supreme Court in ***Swiss Ribbons Private Limited and another v. Union of India, (2019) ibclaw.in 03 SC*** has observed at paragraph 23 that "***23***. *A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition."*

11. Let us now examine the definition of the financial debt as per the code and for the sake of ease of reference, the same is extracted hereunder:

> ***Section 5(8)*** *"financial debt" means a debt alongwith interest, if any, which is disbursed againstthe consideration for the time value of money and includes–*
>
> *(a) money borrowed against the payment of interest;*
>
> *(b) any amount raised by acceptance under any acceptancecredit facility or its dematerialisedequivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds,notes, debentures, loan stock or any similar instrument;*
>
> *(d) the amount of any liability in respect of any lease or hire purchase contract whichis deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
>
> ***(****e) receivables sold or discounted other than any receivables sold on non-recoursebasis;*

(f) any amount raised under any other transaction, includingany forward sale orpurchase agreement, having thecommercial effect of a borrowing;

*[1]**[Explanation**. -For the purposes of this sub-clause, -*

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

*(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 ofthe Real Estate (Regulation and Development) Act, 2016 (16 of 2016);**]***

(g) any derivative transaction entered into in connection with protection against orbenefit from fluctuation in any rate or price and for calculating the value of anyderivative transaction, only the market value of such transaction shall be taken intoaccount;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond,documentary letter of credit or any other instrument issued by a bank or financialinstitution;

(i) the amount of any liability in respect of any of the guarantee or indemnity forany of the items referred to in sub-clause (a) to (h) of this clause;

12. It is also of relevance to have a look at the definition of a secured creditor and that of the security interest, whereby a creditor becomes a " Secured" or Unsecured creditor. Section 3(30) and 3(31) defines them as follows:

(30) "secured creditor" means a creditor in favour of whom security interest is created;

(31) "security interest" means right, title or interest or a claim to property, created infavour of, or provided for a secured creditor by a transaction which secures payment orperformance of an obligation and includes mortgage, charge, hypothecation, assignment andencumbrance or any other agreement or arrangement securing payment or performance ofany obligation of any person:Provided that security interest shall not include a performance guarantee;

13. In the above conspectus, and upon conjoint reading of Section 5(8) and section 3(31), which creates a charge on the book debts of the Corporate debtor, is clear that the present case of NABARDgiving a loan to the Corporate debtor is clearly a Financial debt and since the same has been secured against the book debts of the CD in favour of NABARD, it makes NABAD a **Secured creditor**. Having arrived at a decision that NABARD is a secured financial creditor, RP is dutybound to treat it as a SECURED Financial Creditor for all intents and purposes of the code. There is no other special treatment to any of creditors envisaged in the code and all Secured creditors have to be treated equally as a class. This assertion is also supported by Section 30(4) , which provides as follows:

> [1]**[(4**) The committee of creditors may approve a resolution plan by a vote of not lessthan [2]**[sixty-six]** per cent. of voting share of the financial creditors, after considering itsfeasibility and viability, [3]**[**the manner of distribution proposed, which may take intoaccount the **order of priority amongst creditors as laid down in sub-section *(1)* of section53, including the priority and value of the security interest of a secured creditor]** and suchother requirements as may be specified by the Board:
>
> **(Emphasis applied)**

14. It is pertinent to cite the provisions of Section 53 which also stresses on the payment hierarchy as directs for giving equal treatment to the creditors as a class . The explanation given under 53(3) make it further unambiguous which provides for treatment to "same class of recipients." Thus nowhere in the code a special treatment is envisaged within a class. It is also noteworthy that NABARD had filed its claim with the Administrator inFORM C and the claim had been collated by the Administrator and the claim was admitted. The claim of NABARD was accepted as NABARD had given financial debt to SEFL and also had securities of SEFL assigned as charge. Hence, NABARD clearly falls into the category of a **Secured Financial** Creditor.
15. It is also of relevance to note that, NABARD was a member of the CoC as a secured Financial Creditor and in the submissions of NABARD that in the COC

meetings, NABARD had repeatedly requested the Administrator to apprise appropriate treatment with regard to the claims of NABARD, but no document has been filed to substantiate the submission.

16. NABARD has relied on the judgment of ***National Housing Bank (supra)*** in support of its pleadings but the facts of the instant I.A. do not completely match with the facts of ***National Housing Bank (supra).*** The CoC of DHFL had in its commercial wisdom come into an arrangement with NHB and the same was mentioned in the Resolution Plan that was approved by the CoC and the Adjudicating Authority.

17. Be that as it may, in the present I.A., the CoC have not come into any arrangement with the Applicant and the successful Resolution Applicant with respect to the payments. Further, the Resolution Plan has been approved by this Adjudicating Authority on 11 August 2023 and in paragraph 1.5. of the Resolution Plan states that:

> **"Treatment of Third-Party Assets or Receivables**
>
> The Resolution Applicant has sought a prayer under Paragraph 14 of **Part E (*Other Reliefs*)** of **Section 10 (*Prayers and Reliefs Sought*)** of this Resolution Plan, that the Third-Party Assets Agreements or the Servicer Agreements (*as defined hereinafter*) shall stand terminated or renegotiated, at the option of the Resolution Applicant on and from the NCLT Approval Date."

18. Paragraph 14 of the plan states the following:

> *"The Hon'ble NCLT be pleased to give or issue necessary directions, instructions such that on and from the Effective Date, the Servicer Agreements and/or any other Third Party Assets Agreements shall stand terminated or renegotiated, at the option of the Resolution Applicant and any liability under the Servicer Agreements and/or the Third Party Assets Agreements,, whether general or specific, claimed or unclaimed, due or contingent, asserted or unasserted, crystallised or not, known or unknown, disputed or undisputed, shall be deemed to be permanently extinguished with effect from the Effective Date by virtue of the order of the NCLT approving this Resolution Plan and the Corporate Debtors or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto."*

19. It would be of relevance to reiterate the judgment of the Hon'ble Supreme Court in ***Anuj Jain , IRP for Jaypee Infratech Limited v Axis Bank Limited, (2020) ibclaw.in 06 SC***, wherein the Hon'ble Supreme Court has observed at paragraph 39.3 that "*the enunciation aforementioned illuminates the reasons as to why at all a financial creditor is conferred with a major, rather pivotal, role in the processes contemplated by Part II of the Code. It is the financial creditor who lends finance on a term loan or for working capital that enables the corporate debtor to set up and/or operate its business; and who has specified repayment schedules with default consequences. The most important feature, as this Court has said, is that a financial creditor is, from the very beginning, involved in assessing the viability of the corporate debtor who can, and indeed, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress. Hence, a financial creditor is not only about in terrorem clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically inter-woven with the well-being of the corporate debtor."*

20. In the present circumstance NABARD was a part of the CoC and was well aware of the terms and conditions envisaged in the Resolution Plan. Once the Resolution Plan has been approved by the Adjudicating Authority, the Resolution Plan is binding on all the stakeholders, which includes the Applicant as well. The applicant as a member of the CoC have not raised the issue of Section 29 of NABARD act before the CoC and now that after the Plan has been approved, this plea which is akin to a preferential treatment, cannot be sustained being in clear contravention of the Code.

21. Under the Resolution Plan, NABARD has received certain amount as proposed by the Successful Resolution Applicant in full and final payment. Hence in view of the observation made in *Anuj Jain supra*. it can be said that NABARD as a secured Financial Creditor had an important role to play in the revival of SEFL. NABARD cannot be allowed to sail in two boats, claiming the benefit from wherever it is possible.

22. In view of the above circumstances and observations, we are of the view that NABARD cannot be given the right to claim his dues being a secured financial creditor any differently than other financial creditors notwithstanding their claim that the Financial Service Provider had kept aside his claim in a trust fund. The same would amount to *res judicata.*

23. The rights of NABARD with respect to the claim against SEFL has also been extinguished after the approval of Resolution Plan by this Adjudicating Authority.

24. In view of the above observations. I.A. (IB) No. 896/KB/2022 is hereby **rejected.**

25. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

26. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

27. File be consigned to the record.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order signed on the 1st day of February, 2024

GGRB_LRA