

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

**I.A. 1047/2020
IN
C.P. 1600/I&B/MB/2019**

Under Section 60(5) Of the Insolvency and Bankruptcy Code, 2016

In the matter of

Mohanlal Ayyapan Pillai

Founder and Suspended Manging

Director of Virgo Marine Shipyards,

Flat No. 503 A&B, D-Wing, Golden Oak, Hiranandani Gardens,

Powai, Mumbai 400076.

.....Applicant

Vs

1. Virgo Marine Shipyards

Though its Interim Resolution Professional,
Shivam Raju Palvesam, having his office address at
214-215, 2nd Floor, Om Dutta CHS,
Khamdeo Nagar, 90 Feet Road,
Sion-Bandra Link Road, Mumbai

Respondent No. 1/Corporate Applicant

2. Nagpur Nagrik Sahkari Bank Ltd.

Having its head office at 79, Ambedkar Chawk,
Central Avenue, Nagpur- 440008 and one of its Branches at K-58,
Block, Groma Marg, Phase 2, APMC Market 1, Sector 19, Vashi, Navi
Mumbai- 400075

Respondent No. 2

3. Vyankatesh Engineers 7 Contractors Pvt. Ltd.

H. No. 37A, Plot No. 10, Ratha-Saptami Apartment,
Laxmi Nagar, Nagpur- 440022

Respondent No. 3

4. Corporation Bank (now merged with Union Bank of India)

Having its head office at Mangaldevi Temple Road,
Pandeshwar, mangalore- 575001 and one of its Branches at 'Raman
Smruit' Karani Road, Near Telephone Exchange, Ghatkopar (West),
Mumbai- 400086.

Respondent No. 4

5. The Akola Janata Commercial Co-op. Bank Ltd.

Saravodaya Market, Gandhibag, Nagpur- 440002.

Respondent No.5

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Order pronounce on 26.11.2021

Appearance:

For the Applicant: Mr. Shyam Kapadia, Advocate

For the Respondents: Adv. Avinash R Khanolkar for the Respondent
No. 2 and Adv. Raturaj Bankar for the
Respondent No.3

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. The above application filed by Mr. Mohanlal Ayyapan Pillai who is the Managing Director of the Suspended Board of Corporate Debtor M/s Virgo Marine Shipyards seeking following reliefs:

- a. That the Hon'ble Tribunal be pleased to hold the sale of the MV. VM Hopper Barge H-107 from Respondent No. 2 Bank

to Respondent No.3 as violative of the moratorium imposed under section 14 of the Insolvency and Bankruptcy Code, 2016.

- b. That the Hon'ble Tribunal be pleased to hold the sale of the MV. VM Hopper Barge H-107 from Respondent No. 2 Bank to Respondent No.3 as a Preferential, Undervalued & Fraudulent Transaction under the relevant provisions of the Insolvency and Bankruptcy Code, 2016
- c. That the Hon'ble be pleased to order the reversal of the sale of the MV. VM Hopper Barge H-107 from Respondent No.3 to the Corporate Applicant.
- d. That the Hon'ble Tribunal be pleased to issue directions to Respondent No. 3 to restore the MV. VM Hopper Barge H-107 back to the pool of assets of the Corporate Applicant being both violative of the moratorium imposed by this Hon'ble Tribunal and as being a preferential, Undervalued & Fraudulent Transaction and make the same available for the Corporate Insolvency Resolution Process.
- e. That the Hon'ble Tribunal be pleased to issue directions to Respondent Nos. 2,4 & 5 to confirm the appointment of the Interim Resolution Professional as appointed by this Hon'ble Tribunal and to extend all the necessary cooperation necessary to ensure the resolution of the Corporate Applicant as per the provisions of the Code.
- f. That pending the hearing and final disposal of the present Miscellaneous Application, this Hon'ble Tribunal be pleased to restrain the Respondents, their officers, servants, agents, assignees, and successors in office from in any way alienating or creating any further third-party rights in respect of MV.VM Hopper Barge H-107.

- g. Any other order that this Hon'ble Tribunal deem fit in the interest of justice, equity and good conscience.
2. Mr. Shivam Raju Palavesam, IRP was arrayed as Respondent No.1, Nagpur Nagrik Sahakari Bank Ltd., Corporation Bank and the Akola Janata Commercial Co-Op. Bank Ltd. arrayed as Respondent Nos. 2, 4 and 5 respectively. M/s Vyankatesh Engineers & Contractors Pvt. Ltd who is the auction purchasers of the M.V. VM Hopper Barge H-107 from the Respondent No.2 i.e. Nagpur Nagrik Sahakari Bank Ltd was arrayed as Respondent No. 3.
 3. Except the Respondent No. 2 namely Nagpur Nagrik Sahakari Bank Ltd. the remaining respondents did not file their replies in the above I.A. The Respondent No.2 filed detailed reply opposing the above application contending that the applicant Mr. Mohanlal Ayyapan Pillai who is the Managing Director of the Suspended Board of the Corporate Debtor has no locus to file the above application. The Respondent No. 2 further contended as follows:
 - a. The Respondent No.2 submits that the application filed by the Suspended Director viz. Shri Mohanlala Ayyapan Pillai of the Corporate Debtor and the provisions of the Insolvency and Bankruptcy Code, 2016 nowhere provides to file application by the suspended Director for the purpose of the prayers asked in the Application.
 - b. The Respondent No.2 submits that he has advanced credit facilities of Rs. 5,00,00,000/- and Rs. 1,50,00,000/- on 21.03.2021 and 25.05.2018 respectively. The said facilities were advanced against the primary security of MV.VM Hopper Barge-1 H-107. The said Mortgage Deed was entered into between the Corporate Debtor and the

Respondent No.2 on 21.03.2017 and 23.05.2018 respectively.

- c. The Respondent No.2 further submits that there were defaults in re-paying the facilities by the Corporate Debtor and consequentially the Loan Account of the Corporate Debtor was declared as Non-Performing Asset (NPA) by the Respondent No. 2 as per the guidelines of the Reserve Bank of India on 30.06.2018. Since the Loan Account was declared as NPA the Respondent No. 2 enforced its rights under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as SARFEASI Act).
- d. Accordingly, the Respondent No.2 had issued a Demand Notice under Section 13(2) of the SARFEASI Act to the Corporate Debtor on 27.08.2018. Further, the Respondent No.2 issued a Possession Notice under Section 13(4) of the SARFEASI Act on 02.11.2018 and took the physical possession of the vessel on the same date.
- e. The Respondent No.2 further submits that the Applicant had filed Securitization Application before the Debt Recovery Tribunal-II, Mumbai against the possession notice. However, it is noteworthy to mention that there was no stay granted by the DRT to the actions taken by the Respondent under SARFEASI Act against the Corporate Debtor. Further, the Respondent No.2 attempted to sale the vessel and issued public notices for public auctions on various dates such as 19.12.2019. However, on the scheduled date of auction no interest buyer submitted its bid for the purchase of the vessel.

- f. The Respondent No.2 submits that the Respondent No. 3, after receipt of the 'Sale Confirmation Letter' issued by the Respondent No.2, had immediately made the payment of 25% of the bid amount i.e. 1,23,75,000/- in favour of the Respondent No.2 and agreed to pay the remaining 75% amount within mutually agreed time i.e. by 17.12.2019.
- g. Since, the Respondent No.3 made the payment and the 'Sale Confirmation' was already issued, the Respondent No.2 issued the Sale Certificate to the Respondent No.3 on 03.02.2020 and handed over the physical possession of the Vessel.
- h. The Respondent No.2 further submits that it is settled principle of Law that once the property is sold under provisions of the SARFEASI Act through public auction and the highest bid is accepted and further the sale is confirmed by the Secured Creditor in the favour of the said bidder then such sale becomes absolute and the title of the property is vest with such bidder. An issuance of sale certificate to the said purchaser is mere an evidence to such title. Hence, the sale of the Vessel was confirmed on 02.12.2019 i.e. much prior to the commencement of CIRP against the Corporate Debtor and mere sale Certificate was issued by the Respondent No. 2 to the Respondent No.3 after the commencement of the CIRP. Therefore, the provisions of the sale Section 14 of the Code nowhere have been contravened either by the Respondent No.2 or by the Respondent No.3.
- i. The Respondent No.2 further submits that if we look into the provisions of the Rule 7 of the Security Interest (Enforcement) Rules, 2002, it is provided that the Sale

Certificates is only to be issued after whole payment of the bid had been made and the payment terms shall be as per the Auction Notice or as per the mutually agreed terms between the parties. In this case the Respondent No.2 had, on specific request of the Respondent No.3, extended the time limit for making the full payment as per its bid. And when the payment is made the Sale Certificate was issued and the possession of the Vessel was handed over however, the title of the Vessel was already vested with the Respondent No. 3 since 02.12.2019 and therefore, the averments made by the Applicant regarding the violation of Moratorium re no longer survives and the prayer to that regard be dismissed at very outset.

- j. Further, the Proviso to Section 43(3) provides that any transfer made pursuant to the Court Order shall not be treated as Preferential one. Since the Respondent No.2 has acted under provisions of the SARFEASI Act such transaction cannot be treated as Preferential one and having legislative force.
 - k. The Respondent No. 2 submits that the sale of the Vessel was already confirmed much prior to the commencement of the CIRP and therefore there is no contravention of the provisions of the Moratorium imposed under Section 14 of the Code. This application is filed by the Director (with suspended powers) without any authority to do so and hence, this Application be dismissed on this ground alone and exemplary cost be imposed on the Applicant for abusing process of Law.
- 4.** Heard the argument of Mr. Shyam Kapadia, counsel appearing for the Applicant, and Mr. Avinash R. Khanolkar, counsel

appearing for the Respondent No.2 along with Mr. Ruturaj Bankar counsel appearing for the Respondent No.3.

- 5.** Before going into the merits of the Application, it is important to note here that the present application is filed by the Applicant Mr. Mohanlal Ayyapan Pillai who is none other than the Managing Director of the Suspended Board of the Corporate Debtor and not through IRP.
- 6.** It is the very case of the Applicant that CIRP process of the Corporate Debtor has come to a halt on account of non-cooperation amongst the Financial Creditors who are not ready and willing to liquidate the Corporate Debtor for which the Resolution Professional is also not in a position to take any decision.
- 7.** It is borne out from record that the Vessel HV. VM Hopper Barge H-107 against which the Respondent No.2 is having primary charge has been disposed of by Respondent No. 2 under SARFAESI proceedings to the Respondent No.3 out of liquidation process and the Respondent No.3 has already taken physical possession by paying the entire sale consideration and also obtained sale certificate in their favour from Respondent No.2.
- 8.** It is also an admitted fact that the present Applicant had filed Securitization Application before the Debt Recovery Tribunal-II, Mumbai challenging the possession notice issued under the SARFAESI Act by Respondent No.2 and the matter is subjudice before the competent DRT and the DRT has refused to grant any stay to the applicant.
- 9.** It is also borne out from record that the Respondent No.2 attempted to sell the vessel through various public auctions dated 19.12.2018, 14.06.2019, 10.08.2019, 14.09.2019 and

31.10.2019 and the admission order was passed in the above matter on 21.01.2020 and whereas the sale in respect of the Vessel has been confirmed by Respondent No.2 on 02.12.2019 and Respondent No. 2 also received 25% sale consideration from the Respondent No.3 on 02.12.2019.

- 10.** In the light of above facts and circumstances, this Bench is of the considered view that the only issue that needs to be decided in the above application is:

Whether the Applicant has locus to file the above application?

- 11.** As stated above the application is filed by the Ex-Managing Director of the Suspended Board of the Corporate Debtor. As rightly contended by Respondent No.2, the code does not provide for filing any application by the Member of the Suspended Board since the affairs of the Corporate Debtor Company were controlled and managed by the IRP after admission of the Company Petition.

- 12.** As rightly contended by the Respondent No.2, the Applicant has already approached the Competent DRT challenging the SARFAESI measure initiated by Respondent No.2 and the proceedings are pending. The issue as to whether the sale conducted by the Respondent No.2 in respect of Vessel is hit under Section 31 (d) of the SARFEASI Act or not can be decided by DRT. The Applicant cannot continue simultaneous proceedings both in NCLT and DRT Especially without any locus. Since the above application is not filed by the IRP or RP and since this Bench is inclined to dismiss the above application on the locus of the applicant, this Bench is not giving any findings on the other issues raised by the petitioner. Whether the sale proceeds of the vessel have to be

brought back to the liquidation estate of Corporate Debtor or not is a call to be taken by COC by applying its commercial wisdom and it is not open to the petitioner.

- 13.** With the above observations, the above Application No. 1047/2020 is dismissed.

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)