IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

I.A.(I.B.C) No.1482/KB/2022
IN
C.P.(IB) No. 440/KB/2018

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:

Huvepharma Limited, Sea (Pune) Private Limited registered under Private the provisions of the Companies Act, 1956 and being a Company within the meaning of the Companies Act, 2013, having its registered office at 42, Haridwar Bunglow, S.N. 213, Road No.2 A/B, Kalyani Nagar, Pune, MH 411006 and also at 501 & 502, Green Terraces, Lane No.5, South Koregaon Park, Kawdewadi, Pune-411 001**.**

... Operational Creditor

Verses

Amrit Feeds Limited registered under the provisions of Companies Act, 1956 and being a Company within the meaning of the Companies Act, 2013 having its registered office at 158, Lenin Sarani, Kolkata 700013, West Bengal**.**

…Corporate Debtor

And

IN THE MATTER OF:

Sunil Mohan Acharya, the Liquidator of M/s. Amrit Feeds Limited (In Liquidation), having his office at Intelligent IP Management Solutions Private Limited, YMCA Building, 2nd Floor, 25, Jawaharlal Nehru Road, Kolkata-700087 and also at 245/1, Bhattacharya Para, 6 No. Jheel Par Road, Ward No. 15, New Barrackpur, North 24 Parganas, Kolkata-700131.

…Applicant/Liquidator

Versus

1. **Punjab National Bank**, having its office at Punjab National Bank, Zonal Sastra Division, Kolkata, United Towers, 11 Hemanta Basu Sarani, Kolkata 700001.
2. **Haldiram Incorporation**, having its office at P Ltd, P-20, C.I.T Scheme VII-M Kolkata-700054.

…Respondents

Date of Pronouncement:12.01.2024

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CORAM:
Smt. Bidisha Banerjee, Member (Judicial)
Shri. D. Arvind, Member (Technical)

Appearances (via Hybrid Mode):

Mr. S. Dasgupta, Adv.	] For the Petitioner in IA (1.B.C)/531(KB)2022
Mr. A. Kumar Mukherjee, Adv.	]
Mr. S. Prasad, Adv.	]
Ms. Sreenita Thakker, Adv.	] For the Liquidator
Mr. Sunil Mohan Acharya,	] Liquidator-in-Person
Mr. D.N. Sharma, Adv.	] For the Applicant in IA (I.B.C)/556(KB)2022
Mr. Nirmalya Dasgupta, Adv.	]
Mr. Patrali Ganguly, Adv.	]
Mr. Aritra Basu, Adv.	] For the Applicant in IA (I.B.C)/307(KB)2022
Mr. P. Ghosh, Adv.	]
Mr. Pramit Bag, Adv.	] For the Applicant in IA (I.B.C)/796(KB)2022
Mr. Anuj Mishra, Adv.	]
Mr. Abhrajit Mitra, Sr. Adv.	] For the Applicant in IA (I.B.C)/891(KB)2021
Ms. Manju Bhuteria, Adv.	] And
Ms. Rajshree Kajaria, Adv.	] For the Respondent in IA (I.B.C)/556(KB)2022
Mr. Uttam Sharma, Adv.	]
Mr. Avishek Guha, Adv.	] For Respondent No.2 in IA](I.B.C)/1482(KB)2022

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Ms. Arunika Dutta, Adv.]
Mr. Kaustav De Sarkar, Adv.

Mr. Ratul Das, Adv.] For Punjab National Bank in
Ms. Urmila Chakraborty, Adv.]IA(1.B.C)/1482(KB)2022
Mr. Snehasish Chakraborty, Adv.]
Mr. Debasish Chakraborty, Adv.]

Mr. S.R. Kakrania, Adv.] In IA (1.B.C)/891(KB)2021
Mr. K. Sharma, Adv.]
Mr. N. Das, Adv.]

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court is congregated through hybrid mode.
2. Ld. Senior Counsels/ Counsels were heard.
3. The liquidator of Amrit Feeds, the Corporate Debtor (CD in short), has preferred this application to seek the following reliefs:
   a) Declaration that the purported sale certificate dated 6th November, 2019, copy whereof is annexed hereto and marked "**Annexure E**" is illegal, null and void and not binding upon the corporate debtor;
   b) The purported sale of the Corporate Debtor's asset at Mouza Agari, comprising of JL No. 27, RS Khaitan Nos. 556,866 and 558 with 557,264 RS Dag No. 23(P) 3736 corresponding LR Khaitan No. 2248, LR.Kh.No.2248, LR Dag No. 23(P), 23,38,39 P.S. Sankrail,

under Andul Gram Panchayat, ADSR Ranihati, Dist- Howrah by the Respondent no. 1 in favour of the Respondent no. 2 be cancelled.

c) Order directing the respondent no.2 to handover the peaceful possession of the said property of the corporate debtor to the applicant/Liquidator

d) Order of injunction restraining the Respondent no.2 from removing and/or in any manner dealing with the movable and immovable assets of the Corporate Debtor comprised in the said property.

e) Ad interim order in terms of prayer (d) above.

f) Pass any other orders and/or orders as this Learned Tribunal may deem fit and proper in the facts and circumstances of the present case.

4. <u>Facts in a nutshell</u>:

4.1 The Liquidator contends that the Corporate debtor was the owner of all that piece and parcel of Karkhana land measuring more or less about 210 decimal (2 Bighas 12 Chittacks, 2sqli, 2 Bighas 3 Cottahs, 2 Chittacks and 2 Bighas 3 Cottahs 13 Chittacks) at Mouza Agari, comprising of Jl. No. 27, RS Khaitan Nos. 556, 866 and 558 with 557,264 RS Dag No. 23 (P) 3736 corresponding LR Khatian No. 2248, LR. Kh. No. 2248, LR Dag No. 23 (P), 23, 38, 39 P.S. Sankrail under Andul Gram Panchayat, ADSR Ranihati PNB Dist- Howrah (referred to as the subject property).

4.2 In a meeting of the Applicant/Liquidator with PNB the Respondent No.1, held on 06th April, 2021, the respondent bank represented to the Applicant that it had sold the said property of the corporate debtor to the respondent No.2. The Applicant bonafide relied upon and believed the representation made by the respondent no.1 that the sale of the said property had been completed in favour of the respondent no.2 prior to the declaration of moratorium by the order dated 22nd October 2019.

4.3 By an email dated 06th May, 2021, the respondent no. 2 served a copy of the application filed by it in IA 495/KB/2021. The Applicant came to learn of the issuance of the sale certificate dated 06th November, 2019 by the respondent no.1 for sale of the said property in favour of the respondent no 2 for the first time on receipt of IA 495/KB/2021 The applicant/liquidator duly filed his reply opposing grant of any relief in IA.495/KB/2021.

4.4 The suspended board of directors of the Corporate Debtor filed an application before this Tribunal being IA. 511/KB/2021 seeking cancellation of the purported sale of the said property. However, before this Hon'ble Tribunal could hear IA 495/KB/2021 and IA 511/KB/2021 on merits, both these applications were withdrawn on 08th June. 2022.

4.5 That by virtue of section 238 of the Code, the Code will have an overriding effect on the provisions of the SARFESI Act. Accordingly, by reason of section 14(1)(a) continuation of sale proceedings including issuing sale certificate and handing over possession of the properties was prohibited after the commencement of the CIRP of the Corporate Debtor on 22nd October, 2019 and the purported sale certificate issued on 06th November, 2019 is null and void. The said property remains the property of the Corporate Debtor and will form party of the Liquidation estate of the Corporate Debtor.

4.6 That the auction purchaser is vested with rights in relation to the property purchased in auction only on issuance of the sale certificate in its favour and in this case, the Respondent no.2 did not acquire any right as no right could have been created or transferred in his favour by the respondent no. 2 after the declaration of moratorium on 22nd October 2019.

4.7 The applicant/Liquidator thus states that the respondent No.1 has wrongfully and illegally issued the sale certificate on 6th November, 2019 after commencement of CIRP and declaration of moratorium.

4.8 The Applicant has come to learn that although IA 495/KB/2022 was withdrawn, the Respondent no. 2 has taken over possession of the said property from Sector Realty Limited who was in wrongful and illegal possession thereof on the basis of a purported business conducting Agreement dated 01st July, 2017 and a purported arbitral award dated 30th September, 2019 which are under challenge in IA.852/KB/2021.

4.9 Hence the application by liquidator to take possession of the said property from the Respondent no. 2 directions on the Respondent no.2 to make over possession of the said property to the Applicant.

5. Per Contra PNB the respondent no. 2 would submit as under:

5.1 Respondent No.1 Bank was at all material times a secured creditor of the Corporate Debtor and had a security interest/mortgage over and in respect of the subject property at Howrah.

5.2 On or about July 27, 2019 (Annexure A to the reply) the respondent no. 1 Bank through its Authorized Officer, in exercise of powers under Section 13(4) of SARFAESI Act, 2002 made publication in the "Financial Express" for certain immoveable properties including the said property through E-auction. The E-auction sale notice duly provided that the properties would be sold on "Asiswhereis", "Asiswhatis" and "Whateverthereis" basis for recovery of the bank dues.

5.3 The respondent No.2 submitted its bid and duly deposited Earnest Money Deposit (for short, "EMD") of Rs.1 crore on August 13, 2019, within the time stipulated in terms of the E-Auction Sale Notice.

5.4 The E-Auction Sale under the SARFAESI Act was held on August 17, 2019 in accordance with the E-Auction Sale Notice. The Respondent No.2 participated in the said E-Auction and had emerged as the highest bidder with regard to the said property.

5.5 By a letter dated August 17, 2019, the respondent No.1 Bank duly informed the respondent No.2 that it had emerged as the highest bidder with a bid amount of Rs. 10,05,00,000/- for the said property. The respondent No.2 was requested to deposit 25% of the bid amount immediately and the balance 75% of the bid amount, i.e. Rs.7,53,75,000/- within 15 days of the receipt of the confirmation of sale as per the provisions of the SARFAESI Act, 2002 and the Rules framed thereunder.

5.6 On or about August 19, 2019, the respondent No.2 deposited a sum of Rs.1,51,25,000/- thereby completing payment of 25% of the bid amount.

5.7 By a letter dated August 20, 2019, the respondent No.1 Bank intimated to the respondent No.2 that the sale of the said property had been confirmed in favour of Haldiram the respondent No.2. The respondent Bank also acknowledged receipt of the sum of Rs.2,51,25,000/- being the 25% of the bid amount from the respondent No.2 and called upon the respondent No.2 to make payment of the balance sum of 75% amounting to Rs.7,53,75,000/- within a period of 15 days. A copy where of is annexed as ANNEXURE-"C" to the reply.

5.8 The respondent No. 2, Haldiram INC by its letter dated September 2,2019 (Annexure-D) requested the respondent bank to extend the date of payment and to allow them to make payment of the balance sum within the permissible period of 90 days under Rule 9(4) of the Security Interest (Enforcement) Rules, 2002. The

Respondent Bank extended the date for payment of the balance sale consideration by three months upto December 1, 2019.

5.9 Although the respondent No.2 had time till December 1, 2019 to make payment of the balance consideration, the respondent No.2 on October 18, 2019 by way of an RTGS deposited Rs.2,50,00,000/- and by its letter October 18, 2019 made over two cheques to the respondent No.1 Bank of Rs.2,43,70,000/- and Rs.2,50,00,000/- respectively, thereby completing the payment of the entire sale consideration as such, by October 18, 2019, the entire sale consideration for the sale of the said property was received by the respondent No.1 Bank from the respondent No.2.

5.10 That upon making payment of the entire sale consideration on October 18, 2019, the respondent No.2 with effect from October 18, 2019 became the sole, exclusive and absolute owner of the said property. In such circumstances, the respondent Bank issued a Sale Certificate dated November 6, 2019(Annexure-G) in favour of the respondent No.2 confirming the respondent No. 2 to be the purchaser of the said property.

5.11 The Liquidator contends that the Sale Notice in respect of the said property being issued by the respondent No.1 Bank on July 27, 2019 under the SARFAESI Act and the Rules framed thereunder, much prior to the Order of Admission dated October 22, 2019 and the Earnest Money of Rs.1 crore being made on August 13, 2019, which is also much prior to the Order of Admission/CIRP commencement date on October 22, 2019 of the Corporate Debtor, the E-Auction being held on August 17, 2019 in respect of the said property under the SARFAESI Act long before the Order of Admission dated October 22, 2019. The entire sale consideration being paid by the respondent No.2 by October 18, 2019 which is prior to the Order of Admission dated October 22, 2019. The said property was not included in the Information Memorandum and the Request For Resolution Plan (for short, "RFRP") published in respect of the Corporate Debtor as the property which is already sold under the SARFAESI auction cannot be made part of the liquidation estate of the corporate debtor.

5.12 That property being sold prior to the commencement of moratorium under Section 14 of the IBC cannot be affected or hit by the moratorium.

5.13 The Liquidator constituted the Stakeholders Consultation Committee (for short, (SCC). Respondent No.1 Bank as a stakeholder in the SCC Meeting held on April 6, 2021, the Liquidator was duly informed by the respondent No.1 Bank about such sale of the Howrah Property on August 17, 2019, i.e. prior to the commencement of the CIRP.

5.14 The Sale Certificate dated November 6, 2019 was disclosed in an application being LA No.495/KB of 2021 filed by the respondent. No.2/ successful auction purchaser before this Hon'ble Tribunal, inter alia, praying for declaration that the said respondent No.2 is the sole and absolute owner of the said Howrah Property. That the suspended board of directors has challenged the sale of the Howrah Property by filing an application being I.A. No.511/KB. of 2021. By an Order dated June 8, 2022, both these two applications were withdrawn by the respective applicants and the Liquidator's no objection with regard to such withdrawal was also duly recorded in the said Order dated June 8, 2022.

5.15 The PNB thus strongly denies that the present application is maintainable or that the sale of the Howrah property of the Corporate Debtor under the SARFAESI Act can be cancelled.

6. The Haldiram INC being respondent no. 2 in support of PNB would contend as under:

6.1 The sale notice in respect of the subject property was published by the Authorized officer of the respondent no. 2 on 27.07.2019 i.e. long before the date of admission.

6.2 The payment of earnest money of Rs. 1,00,00,00 (rupees one crore) made on 13.08.2019. e auction held on 17.08.2019, acceptance of bid on 17.08.2019, confirmation of sale on 20.08.2019 and the payment of entire sale consideration on 18.10.2019 by way of cheque are all events which were took place before the date of admission of the Corporate Debtor under CIRP.

6.3 On 18.10.2018 the respondent no. 2 made a payment of Rs. 2,50,00,000 and handed over two cheques on account of balance payment for the sale consideration. It was because of the delay in clearance of the cheque which led to the issuance of the sale certificate after a lapse of more than two weeks, that is on 06.11.2019. That the sale consideration will be deemed to have been paid on the date when the cheque was forwarded unless it is dishonoured on subsequent date. By accepting the cheques there is an implied agreement on the date it has been tendered that, the cheques have been honored and payment has been made. Reliance is made on the following decisions:

a) Directorate of Income Tax v. Raunaq Foundation (2013) 2 SCC 62-(Para 10 and 12).

b) ***Vidushi Wires Private Limited v. Union of India and Ors (2013) 1 MhLJ 1015-(Para 17).***

c) ***Commissioner of Income Tax v. Ogale Glass Works Limited (1955) 1 SCR 185-(Para 19).***

6.4 When there are no allegations of fraud in an e-auction, there is no justification in setting aside the confirmation for sale (*Reliance placed on* ***Srinidhi Stone Crusher v. AO, The South Indian Bank (2019) SCC Online Kar 3027-Para 17****)*.

6.5 It is because of completion of sale that the subject property was not included in the Information Memorandum and RFRP.

6.6 None of the stakeholders, including the members of the COC and suspended directors refrained from objecting to the sale of the property during the entire CIRP period despite the issue having been deliberated upon from time to time.

6.7 Since the respondent no. 2 herein has paid the whole consideration towards satisfaction of the sale, long before commencement of CIRP and has received the Sale Certificate, the Applicant does not have any right to take over possession of the subject property or remove any movable assets therein.

6.8 The sale being completed much before the initiation of the CIRP Process, the subject property cannot be treated as assets of the Corporate Debtor and/or the liquidation estate. Offer, acceptance and intimation of acceptance of offer and payment consideration results in a binding contract. The Liquidator, being fully aware, has not included the subject property within the information memorandum.

6.9 Section 14 of the IB Code would have no application to a case where the entire sale consideration has been paid long before commencement of CIRP.

7. We have considered the rival contentions and perused records.

8. In **Director of Income Tax(Exemption), New Delhi -vs- Raunaq Education Foundation 2013(2)SCC 62**, the Hon'ble Apex Court has observed as under:

"***12***. *The submission made on behalf of the respondent assessee is supported by this Court in* ***Ogale Glass Works Ltd.*** ***(CIT v. Ogale Glass Works Ltd., AIR 1954 SC 429: (1955) 1 SCR 185)*** *Relying upon other authorities, this Court observed as under in the aforesaid case: (AIR p. 433. para 11)*

*"**11**…. When it is said that a payment by negotiable instrument is a conditional payment what is meant is that such payment is subject to a condition subsequent that if the negotiable instrument is dishonoured on presentation the creditor may consider it as waste paper and resort to his original demand (**Stedman v. Gooch**) **[(1793) 1 Esp 3:170 ER 262]**. It is said in Benjamin on Sale, 8th Edn., p. 788:*

'The payment takes effect from the delivery of the bill, but is defeated by the happening of the condition i.e. non-payment at maturity.'

*In **Byles on Bills**, 20th Edn., p. 23 the position is summarised pithily as follows-*

'A cheque, unless dishonoured, is payment.'

*To the same effect are the passages to be found in Hart on Banking, 4th Edn., Vol. 1, p. 342. In **Felix Hadley & Co. v. Hadley (1898) 2 Ch 680**, Byrne, J. expressed the same idea in the following passage in his judgment at Ch pp. 682-83:*

'... In this case I think what took place amounted to a conditional payment of the debt; the condition being that the cheque or bill should be duly met or honoured at the proper date. If that be the true view, then I think the position is exactly as if an agreement had been expressly made

that the bill or cheque should operate as payment unless defeated by dishonour or by not being met; and I think that that agreement is implied from giving and taking the cheques and bills in question.'

The following observations of Lord Maugham in ***Rhokana Corpn. Ltd. v. IRC(1938) AC 380: (1938)2 All ER 51 (HL)*** *are also apposite: (AC p. 399)*

'Apart from the express terms of Section 33 sub-section (1), a similar conclusion might be founded on the well-known common law rules as to the effect of the sending of a cheque in payment of a debt, and in the fact that though the payment is subject to the condition subsequent that the cheque must be met on presentation, the date of payment, if the cheque is duly met, is the date when the cheque was posted.'

In the case before us none of the cheques has been dishonoured on presentation and payment cannot, therefore, be said to have been defeated by the happening of the condition subsequent, namely, dishonour by non-payment and that being so there can be no question, therefore, that the assessee did not receive payment by the receipt of the cheques."

Similarly, in **Vidushi Wires Pvt.Ltd. vs. U.O.I 2003(1) Mh.L.J.**, the Hon'ble Court observed as under:

"*in law the date of payment is the date of delivery of the cheque*."

In view of the enumerations above there is no gain saying that on 18.10.2019 (before CIRP commencement date) when the cheques were handed over to the authorised officer under the SARFAESI, the sale consideration was not paid. Such being the position it cannot be held that there was no sale prior to Initiation of CIRP and kicking of moratorium u/s 14 of IBC. The sale thus cannot be cancelled.

9. Accordingly, the prayer made in the **IA (I.B.C)/1482(KB)2022** stands rejected. **IA (I.B.C)/1482(KB)2022** is thus dismissed.

10. Plain copy be made available to the parties for communication and compliance.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Order signed on the 15^{th} Day of January 2024

A.S. LRA