

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

**I.A. 3787/2022
IN
C.P. 1067/I&B/MB/2019**

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

Securities and Exchange Board of India.

...Applicant

Versus

Mr. Girish Siriram Juneja

Resolution Professional

For Osian's Connoisseurs of Art

Private Limited

.... Respondent

In the matter of:

IDBI Bank Limited

..... Financial Creditor

Virsus

For Osian's Connoisseurs of Art

Private Limited

..... Corporate Debtor

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt Madhu Sinha, Member (Technical)

Order Reserved on : 17.05.2023

Order pronounce on : 27.07.2023

Appearance:

For the Applicant: Mr. Mustafa Doctor a/w Adv. Gayatri Mohite

For the Respondents: Mr. Jay Zaveri, Ms. Rhea Prakash
i/b Crawford Baylay & Co.

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

ORDER

1. The above Interlocutory Application is filed by the SEBI claiming the following reliefs:

- i. *That this Hon'ble Tribunal be pleased to declare that the sum of Rs. 30,86,62,832/- (Rupees Thirty Crore Eighty Six Lakh Sixty Two Thousand Eight Hundred and Thirty Two only), along with the interest at the rate of 10% per annum on the principal amount collected from the investors, from the date when the amount to such investors first became due and till the date of closure of its scheme, to the Investors of 'Art Fund' which is subject matter of the SEBI Order dated 28.05.2021 be kept outside the resolution process/plan as it does not form part of the properties and assets of the Corporate Debtor;*
- ii. *That this Hon'ble Tribunal be pleased to direct the Resolution Professional to comply with the SEBI Order dated 28.05.2021 and to forthwith pay to the Applicant an amount of Rs. 30,86,62,832/- (Rupees Thirty Crore Eighty Six Lakh Sixty Two Thousand Eight Hundred and Thirty Two only), along with the interest at the rate of 10% per annum on the principal amount collected from the investors, from the date when the amount to such investors first became due and till the date of closure of its scheme, to the Investors of 'Art Fund';*
- iii. *This Hon'ble Tribunal be pleased to pass such other or further orders as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case, in the interest of justice and equity.*

2. The brief background of the above Interlocutory Application is as follows;

- a. The Corporate Debtor is an auction house and archive and has been primarily engaged in the business of holding public auctions of artworks for several years. The Corporate Debtor is also engaged in the business of providing investment advisory and art custodial management services.
- b. By a Trust Deed dated 10.03.2006, the Corporate Debtor settled a private Trust called Osian's Art Fund ("**Trust**") under the Indian Trusts Act, 1882, in respect of which Oseta Investments Trustee Company Private Limited ("**Trustee**") was appointed as a Trustee of the Trust. The Trustee in turn appointed the Corporate Debtor as an Asset Management Company of Trust. Hence, the Corporate Debtor was the sponsor and Asset Management Company of the Trust.
- c. In the year 2006, the Corporate Debtor being the Asset Management Company of the Trust launched a fund namely, "The Osian's Art Fund Scheme Contemporary 1" ("Art Fund") by investing subscriptions from various private investors to enable the Corporate Debtor to make investments in artworks, i.e. paintings, sculptures, graphic art and drawings of various artists. The objective of the scheme was to collect capital from select private high-net worth investors for investment by way of acquisition, holding, management, trading or disposal of Indian as well as foreign art, or any other property whatsoever including antiquities for the purpose of providing facilities for the participation by persons as beneficiaries in such properties of investments and in the profits or income arising

therefrom. From the aforesaid scheme the Corporate Debtor had collected an amount of Rs. 1,02,40,00,000/- from 656 investors for the purpose of acquiring artwork.

- d. The Applicant learnt of the said Art fund through media reports and articles. With a view to understand the nature of activities carried on by the Corporate Debtor under the 'Art Fund', the Applicant sought certain information from the Corporate Debtor.
- e. The Applicant on examination, found that prima facie the character of the 'Art Fund' is similar to that of a 'Collective Investment Scheme' ("CIS") as defined under Section 11AA of the SEBI Act and as regulated by the SEBI (Collective Investment Scheme) Regulations, 1999 ("CIS Regulations"). The Corporate Debtor was carrying on the investment activities without obtaining a certificate of registration under the CIS Regulations and was therefore in violation of Regulation 3 of the CIS Regulations, 1999. As per the Section 12 (IB) of the SEBI Act, a certificate of registration is to be obtained for the purpose of carrying on the activity of venture capital fund or collective investment scheme. Further, Regulation 3 of the CIS Regulations make it mandatory for a company to obtain a certificate of registration for sponsoring or launching a CIS.
- f. The Applicant initiated inquiry proceedings under Section 11 and Section 11B of the SEBI Act against the Corporate Debtor for violation of the provisions of Section 12 (IB) of the SEBI Act and Regulation 3 of the CIS Regulations. Since, the Corporate Debtor was undertaking activities without obtaining a certificate of registration as required under Section 12 (IB) read with Section 11(2)

(c) of the SEBI Act and regulation 3 of the CIS Regulation, the applicant issued a show cause notice dated 12.10.2007 as to why action under section 11 and 11 B of SEBI Act should not be initiated against it. During the year 2011, the Applicant had also received various complaints from investors belonging to different parts of the country and even abroad i.e. from Mumbai, Lucknow, Chennai and USA.

- g. After considering the contentions of the Parties therein, on 15.04.2013, the applicant passed an order against the Corporate Debtor holding it guilty of sponsoring and managing CIS without obtaining certificate of registration from the applicant, in contravention of Section 12 (IB) of the SEBI Act and Regulation 3 of the CIS Regulations. By the Order dated 15.04.2013, the Applicant *inter alia* directed the Corporate Debtor to wind up the CIS and refund the monies collected to the investors. In addition, the Corporate Debtor was also directed to pay the amount of profits/income earned, if any, that was due to the investors as per the terms of its offer, or to pay interest at the rate of 10% p.a. on the amount invested from the date of investment till the date of refund, whichever is higher.
- h. Aggrieved against the above order dated 15.04.2013, Corporate Debtor preferred appeal bearing No. 62/2013 before Securities Appellate Tribunal which was disposed of vide order dated 13.10.2015 directing SEBI to decide the issue of refund afresh. The Corporate Debtor being aggrieved against the order passed by the Appellate Tribunal filed a Civil Appeal bearing No. 54/2016 before

the Hon'ble Supreme Court which was disposed of vide order dated 15.01.2016. Thereafter, SEBI filed interlocutory application bearing No. 2/2016, in the Civil Appeal praying for recall of the order dated 15.01.2016 passed by the Hon'ble Supreme Court which was allowed. Thereafter, by an order dated 12.02.2020 the Supreme Court allowed the Corporate Debtor to withdraw the Civil Appeal No. 54/2016 and thus the order dated 13.10.2015 passed by the Securities Appellate Tribunal became final. Thereafter, SEBI initiated proceedings U/s 11 and 11B of the SEBI Act and found during its inquiry/investigation that the Corporate Debtor had raised a sum of **Rs. 102,40,00,000/-** from 656 investors under the Art Fund Collective Investment Scheme out of which Rs. **30,86,62,823/-** remained to be refunded to the investors. Therefore, SEBI filed the above application claiming the above reliefs.

3. The respondent filed reply as well as written submission opposing the above application as follows:
 - a. As has been argued and pleaded by the Corporate Debtor at length, the Corporate Debtor and OAF are undeniable two separate entities. Accordingly, the assets of the Corporate Debtor stand segregated from the Trust Property of OAF. The said property was never in possession of the Corporate Debtor-the same was merely managed by the Corporate Debtor in the capacity of an Assets Manager and on behalf of the Trustee Company. At all times the Trust Property OAF was held in trust for the investors by the Trustee Company. To this effect, the Corporate Debtor has even carried out a forensic audit and produced the same before this Hon'ble Tribunal in order

to clear the air and establish that no direct investment/deposit from OAF reflects in the books of the Corporate Debtor.

- b. It is submitted that the sole reason that the SEBI Order imposes liability upon the Corporate Debtor is that the Corporate Debtor acted as the Assets Manager of OAF. It follows that the liability imposed must also be circumscribed by the Asset Management Agreement. The Corporate Debtor as it stands today, under the Resolution Professional, cannot be held liable for the transactions, investments or actions taken by the erstwhile management of the Corporate Debtor. Thus, neither can the Corporate Debtor now be expected to reverse the actions taken by the erstwhile management-which is essentially what the applicant prays for. The Corporate Debtor is a distinct entity from OAF with segregated assets and, as admitted by the Applicant, the funds of OAF do not form part of the assets of the Corporate Debtor. The Corporate Debtor is not in possession of or even aware of the particulars of the assets of OAF. Thus, it is unfathomable for the Resolution Professional to take control of the assets of OAF, identify the assets of the investors, and set these aside in order to comply with the SEBI Order.
- c. In light of the aforesaid, the only manner in which the Corporate Debtor, can in fact, comply with the demands of the Applicant is to deal with the assets of OAF under the Resolution Plan, Admittedly, OAF is not undergoing the captioned proceedings, thus the assets of OAF remain out of purview. However, after undergoing the captioned proceedings, the Resolution Applicant shall take over the management of the Corporate Debtor and shall once again become

the Asset Manager of OAF. At such time, the successful Resolution Applicant would then be able to take successful steps towards the execution of the SEBI Order and see to it that the monies remaining in OAF may be refunded to the investors. It is for this reason that the refund amount has been dealt with in the Resolution Plan in a broad manner; in order to ensure-in the only manner possible of the Corporate Debtor-that the SEBI Order may see execution.

Power of the Corporate Debtor to manage OAF was governed by and on behalf of the Trustee Company:

- d. The Corporate Debtor states and submits that it is entirely unfounded for the Applicant to have passed the SEBI Order against the Corporate Debtor, when in fact, the Corporate Debtor did not occupy and sort of sovereign position in the functioning of OAF. The Trust Property of OAF was dealt with by the Corporate Debtor in a limited manner so as to improve, develop, and earn returns on the same for investors. However, the decision-making power was held by the Trustee Company. All actions taken by the Corporate Debtor were subject to the approval and direction of the Trustee Company.

The Order of the Applicant dated 28th May, 2021 is stayed by moratorium:

- e. In addition to and without prejudice to the submissions made herein, the Corporate Debtor states and submits that there is no question of execution of the SEBI Order at the present stage as the SEBI Order is undeniably stayed by moratorium. Admittedly, as under Section 14 of the Insolvency and Bankruptcy Code, 2016

(‘Code’), the commencement of the captioned proceedings has prohibited the continuation of pending proceedings against the Corporate Debtor, and specifically prohibited the execution of any order of any authority. The SEBI Order of the Applicant was passed on 28th May, 2021 and the captioned proceedings commenced by an order of this Hon’ble Tribunal dated 9th December, 2021. Thus, the moratorium prescribed by the Code squarely applies to the execution of the SEBI Order.

- f. Furthermore, upon a bare perusal of the SEBI Order, it is clear that the direction embodied in clause 16(a) thereof (whereby the Corporate Debtor was to pay out the Refund Amount within six months of the date of the SEBI Order alongwith interest thereon which was to be paid out within nine months from the date of the SEBI Order) Only came to force on 1st July, 2021. Thereafter, the captioned proceedings commenced within a period of 5 months and 8 days. Thus, as on the date that moratorium kicked in, neither of the deadlines/timelines established by the SEBI Order for the repayment of the Refund Amount or of the interest thereon had even arrived. Therefore, there can be no doubt that the execution of the SEBI Order was unconditionally stayed by the order of this Hon’ble Tribunal, and remained stayed as long as the captioned proceedings are ongoing.
- g. In addition to the aforesaid, the Corporate Debtor hereby states and submits that the explanation under Section 18 of the Code does not aid the case of the Applicant as it cannot operate as an exception to the moratorium under Section 14 in the present circumstances.

Sub-clause (a) of the explanation under Section 18 of the Code states that assets owned by a third-party in possession of the Corporate Debtor held under trust shall not be included in the meaning of the term 'assets' for the purpose of the section. Admittedly, it is settled law that the aforementioned explanation under Section 18 can form an exception to Section 14 and protect assets held under trust from moratorium as described above. However, the Applicant has chosen to overlook the fact that, though the concerned 'assets', being the funds of the investors, were third-party assets held under trust, these assets are *not in the possession of the Corporate Debtor and neither are they held in trust by the Corporate Debtor*. The concerned assets are and were always held in trust for the investors by the Trustee Company-Oseta- and the assets are not in the possession of the Corporate Debtor, but in fact strictly segregated from the assets of the Corporate Debtor.

h. It was held by the Hon'ble NCLT, Chandigarh Bench, in *Weather*

Maker Pvt. Ltd. vs. Parabolic Drugs Ltd. (2019 SCC Online NCLT 34903), by an order dated 26th April, 2019 as under:

18. A question is to be answered that what are the areas of operation of Sec. 14 vis-à-vis Sec. 18 of IBC. A fine distinction is available between these two enactments. The area of operation of Sec. 14 is in respect of property which is occupied or in possession of the Corporate Debtor. The property as defined U/s 3 (27) of the Code includes money, goods, land, actionable claims etc. If the property as defined in Sec. 3 is in possession of the Corporate

Debtor then such property cannot be recovered from the Corporate Debtor by the owner of the property on commencement of Moratorium. This is the general rule through which the Corporate Insolvency Resolution Process proceedings are being triggered on admission of an insolvency petition. Under the insolvency Code, later on an exception is provided U/s 18 (Explanation) against this general rule. However, the area of operation of Sec. 18 is distinct from Sec. 14. There is a fine distinction as appearing in Sec. 18 r/w explanation that for the purpose of this section the term “asset” shall not include an asset owned by third party **in possession of Corporate Debtor, either (i) under trust, or under (ii) contractual arrangements including bailment. Therefore, it is clear that the ambit of application of this explanation is confined to these two types of assets, i.e. either a trust asset or an asset in possession owing to contractual arrangement. Hence, a conclusion can be drawn that the exception as carved out through this explanation against the general rule of S. 14, which is limited in its operation in respect of these two types of assets only, although as per the main provision, an asset owned by a third party but in possession of the Corporate Debtor shall not be included U/s 18(1)(f) which prescribes taking control over the properties as described therein.**

- i. Thus, it is exceedingly clear that the fact and circumstances of the present case do not fulfil the necessary requirements for the

explanation under Section 18 to exempted to concerned assets from Sec. 14.

- j. In addition to the aforesaid, the SEBI Order dated 28th May, 2021 stipulated that in the event of the Corporate Debtor failing to refund the concerned amount, the Applicant would be empowered to recover the same from the Corporate Debtor in accordance with Section 28A of the SEBI Act. However, in light of the aforesaid, it becomes clear that even the recovery proceedings under Section 28A, if initiated, would be halted by the captioned proceedings and the moratorium. The Applicant would be halted by the captioned proceedings and the moratorium. The applicant would be estopped and, assuming without admitting that the refund amount was recoverable by the applicant from the Corporate Debtor, the only recourse open to the Applicant would have been to file a claim in the captioned proceedings in accordance with the recovery mechanism prescribed by the Code. Pertinently, it is apparent that even the Applicant was well and fully aware of the same as, by the Applicant's email dated 27th September, 2022, the Applicant has apprised the Resolution Professional of the Corporate Debtor of the SEBI Order and requested that the *'the form required for filing claims may be sent to the undersigned for the purpose of filing claims'*.
- k. In line with the aforesaid, as is the settled law, the Hon'ble NCLAT, in *Ms. Anju Agarwal Resolution Professional for Shree Bhawani Paper Mills Ltd. vs. Bombay Stock Exchange & Ors.* (Company Appeal (AT) (Insolvency) No.738 of 2018), by an order dated 23rd April, 2019, held as under:

19. Section 28A of the 'SEBI Act, 1992' being inconsistent with Section 14 of the 'I&B Code', we hold that Section 14 of the 'I&B Code' will prevail over Section 28A of the SEBI Act, 1992' and 'Securities Exchange Board of India' cannot recover any amount including the penalty from the 'Corporate Debtor'.

1. Accordingly, the Hon'ble NCLAT in the aforesaid Order affirmed the settled position of law that, as statutory dues to the Central Government or the State Government come within the meaning of 'Operational Debt', if any amount is payable to the Securities Exchange Board of India, in such case, it may claim as an 'Operation Creditor', but cannot recover the same during the Resolution Process.

The right of the successful Resolution Applicant to take over on a clean slate cannot be abrogated:

- m. As has been argued and pleaded by the Corporate Debtor, it is hereby submitted that the Resolution Applicant has a settled right to take over the management of the Corporate Debtor on a clean slate. It follows that the Resolution Plan is the basic of Resolution Applicant's ability and intention to take over the Corporate Debtor. Claims or liabilities not laid out in the Resolution Plan would become undecided claims that could blindsides the Resolution Applicant and endanger the resolution process. It is trite to mention that it is also well-settled law that the approval of the Resolution Plan by the Adjudicating Authority shall extinguish all those claims against the Corporate Debtor which are not included in the Resolution Plan. It is for these very reasons that, in the present case, the Refund Amount has been dealt with and secured

through the Resolution Plan, thereby signifying that the successful Resolution Applicant shall step into the shoes of the Corporate Debtor and then, as the new assets manager of OAF, taking steps towards the execution of the SEBI Order.

- n. In *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.* [(2020) 8 SCC 531], the Hon'ble Apex Court, on 15th November, 2019, held:

*“107... A successful **resolution applicant cannot suddenly be face with “undecided” claims after the resolution plan submitted by him has been accepted** as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the **successful resolution applicant does on a fresh slate...**”*

- o. In *Ultra Tech Nathdwara Cement Ltd. v. Union of India & Ors.* (2020 SCC Online Raj 1097), The Hon'ble Rajasthan High Court, on 7th April, 2020 held:

*“18... The purpose of the statute is very clear that it intends to revive the dying industry by providing an opportunity to a resolution applicant to take over the same and begin the operation on a **clean slate**. For that purpose, the evaluation of all dues and liabilities as they exist on the date*

of finalization of the resolution plan have been left in the exclusive domain of the resolution professional with the approval of the COC. The courts are given an extremely limited power of judicial review into the resolution plan duly approved by the COC...”

- p. In *Ghanshyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited* [(2021) 9 SCC 657], the Hon’ble Apex Court, on 13th April, 2021, held:

“102.1... On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.”

- q. In the light of the aforesaid, the Corporate Debtor states and submits that it was, not only appropriate, but also necessary for the Refund Amount to have been dealt with under the Resolution Plan. The Applicant has chosen to pass the SEBI Order against the Corporate Debtor and place the accountability and/or liability of the Refund Amount upon the Corporate Debtor; despite the Corporate Debtor being an entirely separate entity from OAF whose assets are segregated from that of the Corporate Debtor. Thus, though these assets are not in possession of the Corporate Debtor do not form part of the Corporate Debtor’s assets, the Corporate Debtor has dealt with such liability in a limited manner as the Corporate Debtor may only be bound by the obligations under the Assets Management Agreement. Thus, owing to

the fact that the Corporate Debtor shall continue on as a going concern and as the Asset Manager of OAF, the Resolution Plan reads as under:

“Contingent liability (if any), arrived after the approval of Resolution Plan, such liability shall be taken into consideration and the payment will be made with other operational creditor from the amount offered to their category. Further, the contingent liability which may arise on account of “Osian’s Art Fund” shall only be paid out the proceeds of Sale of Assets belonging to the said fund.

- r. In conclusion, the Corporate Debtor states and submits that the captioned Interlocutory Application suffers from fundamental factual and legal defects and has failed to make out a case for the reliefs prayed for therein. The Corporate Debtor, as it currently stands under the management of the Resolution Professional is barred from executing the SEBI Order, yet has proceeded in a manner best suited to the interests of the investors and in the only way that the Code may allow.

FINDINGS

Heard, Mr. Mustafa Doctor, Counsel appearing for the SEBI and Mr. Jay Zaveri, Counsel appearing for the Respondent RP and perused record. Both the counsels addressed their arguments on the lines of their pleadings and written submissions.

1. As mentioned supra, the admitted case of the applicant SEBI is that the Corporate Debtor collected amounts from 656 investors through a fund called the “The Osian’s Art Fund Scheme Contemporary-1” which was launched by a Trust called “Osian’s Art Fund” constituted by the Corporate Debtor. The Trustee of the Trust was “Oseta Investments

Trustee Company Private Limited” and the Corporate Debtor was merely the assets management company for the Trust and had no proprietary rights whatsoever in respect of the property of the Trust and/or in respect of any funds collected by the Trust.

2. The sole reason for the SEBI for imposing liability upon the Corporate Debtor is that the Corporate Debtor acted as the Assets Manager of OAF and the deposits were collected from investors under “CIS” without approval from SEBI. The Corporate Debtor is a distinct entity from OAF with segregated assets and, as admitted by the SEBI the funds of OAF do not form part of the assets of the Corporate Debtor. All the times the Trust property of OAF was held in trust for the investors by the Trustee company and the said property was never in possession of the Corporate Debtor and the Corporate Debtor merely managed in the capacity as an Asset’s Manager on behalf of the Trustee company. SEBI having requested the RP to send the claim form in order to submit their claim before the RP did not choose to file the same for the reasons best known to them.
3. Even though SEBI did not submit their claim, the issue of refund of SEBI’s amount has been dealt with by COC as well as in the Resolution Plan in a broad manner; and in order to comply the SEBI Order. It is provided that after approval of the Resolution Plan, the Resolution applicant shall take over the management of the Corporate Debtor and shall once again become the Asset’s Manager of OAF and at such time the SRA would then be able to take successful steps towards the execution of the SEBI Order and the monies may be refunded to the

investors. Since, the issue of approval of Resolution Plan is *subjudice* before this Tribunal, this Tribunal is not expressing anything about the entitlement of the Corporate Debtor to continue as the Asset's Manager of the OAF.

4. As rightly contended by the RP, SEBI cannot insist for compliance of its order by RP after commencement of moratorium and knowing well that the Corporate Debtor is merely an Asset's manager of the OAF. The above application is nothing but an illegal attempt by SEBI to enforce the order knowing well that the moratorium U/s 14 has kicked in against the Corporate Debtor and no legal proceedings can be instituted or continued against Corporate Debtor.

5. As rightly submitted by the RP the Hon'ble NCLAT in *Ms. Anju Agarwal Resolution Professional for Shree Bhawani Paper Mills Ltd. vs. Bombay Stock Exchange & Ors.* (Company Appeal (AT) (Insolvency) No.738 of 2018), by an order dated 23rd April, 2019, held as under:

19. Section 28A of the 'SEBI Act, 1992' being inconsistent with Section 14 of the 'I&B Code', we hold that Section 14 of the 'I&B Code' will prevail over Section 28A of the SEBI Act, 1992' and 'Securities Exchange Board of India' cannot recover any amount including the penalty from the 'Corporate Debtor'.

6. As rightly contended by the RP the Resolution Plan deals only with assets and liabilities of the Corporate Debtor and no direct investment/deposit from OAF reflects in the books of the Corporate Debtor.

7. It is always open to the SEBI to initiate necessary criminal proceedings, prosecutions, against the wrong doers who have collected the money from investors by violating of the rules and regulations of SEBI by lifting the Corporate Veil. Nothing prevents SEBI from taking necessary legal action against the members of the suspended board and instead of proceeding further against them in their individual capacity as per law, filed the above application only to recover from the assets of Corporate Debtor as an after thought which is not legally permissible.
8. Therefore, for the aforesaid reasons, this bench is in complete agreement with the submissions of RP that the above I.A. suffers from fundamental, factual and legal defects and the Petitioner is not entitled to any reliefs claimed in the application and the same is deserves to be dismissed.

Sd/-
MADHU SINHA
MEMBER (T)

Sd/-
H.V. SUBBA RAO
MEMBER (J)