IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II

IA No. 532 of 2022
In
IA No. 2852 of 2021
In
IA No. 721 of 2021
In
CP (IB) No. 4258/(MB) 2019

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

IA 532 of 2022 :-

Barclays Bank PLC, Mumbai Branch

…. Applicant

V/s

Piramal Capital and Housing Finance Ltd.

… Respondent

IA 2852 of 2021 :-

Piramal Capital & Housing Finance Limited (Formerly known as Dewan Housing Finance Corporation Limited)

Having registered office at: Warden House, 2nd Floor, Sir P M Road, Fort, Mumbai- 400 001

…..Applicant

Vs.

1. **Bank of Baroda,**
2. **State Bank of India**
3. **HDFC Bank Ltd.**
4. **Kotak Mahindra Bank Limited**

5. Development Credit Bank
6. Barclays Bank PLC, Mumbai Branch
7. IDBI Bank Limited
8. Union Bank of India
9. Syndicate Bank
10. Punjab National Bank
11. Punjab and Sind Bank
12. Bank of India
13. Canara Bank

….. Respondents

In the matter of

Administrator of Dewan Housing Finance Corporation Limited

… Applicant

Vs.

Bank of Baroda & Ors.

… Respondents

In the matter between

Reserve Bank of India

… Financial Sector Regulator

Vs.

Dewan Housing Finance Corporation Limited

… Corporate Debtor/ Financial Service Provider

Order delivered on: 09.02.2023

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant (IA 2852/2021) : Sr. Counsel, Mr. Vikram Nankani, a/w Ms. Chitra Rentala

For the Applicant (IA 532/2022 and Respondent in IA 2852 of 2021) : Sr. Counsel, Mr. Sudipto Sarkar

ORDER

Per: Coram

1. The present Application is filed by the Applicant, Piramal Capital & Housing Finance Limited (Formerly known as Dewan Housing Finance Corporation Limited, hereinafter called DHFL for the sake of brevity), seeking amendment of the memorandum of parties in I.A. No. 721 of 2021 such that the Applicant is substituted in the place of Mr. R. Subramaniakumar, who originally filed the I.A. No. 721 of 2021 filed under Sections 25(2)(j), 43, 44 of the Insolvency and Bankruptcy Code, 2016 ("the Code") in his capacity as the Administrator of the Corporate Debtor which sought setting aside/ avoidance of certain preferential transactions carried out on behalf of the Corporate Debtor.

2. A brief account of the case is as follows. The Reserve Bank of India (RBI) superseded the Board of Directors of the Corporate Debtor on 20th November 2019 owing to governance concerns and defaults by the Corporate Debtor in meeting various payment obligations and appointed Mr. R. Subramaniakumar as the Administrator of the Corporate Debtor. Subsequently, RBI filed Company Petition being C.P. (IB) No. 4258/MB/2019 for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor and the same was admitted by this Tribunal vide Order dated 3rd December 2019. The Tribunal also confirmed the appointment of the Administrator to perform all the functions of the Resolution Professional mandated under the Code. The CIRP of the Corporate Debtor commenced and Piramal Capital and Housing Finance Limited ("erstwhile Piramal") and other prospective Resolution Applicants submitted their Resolution Plans to the Committee of Creditors (CoC) for their consideration. The CoC voted in favour of the Resolution Plan submitted by erstwhile Piramal by a majority of 93.65% and the Administrator filed an Application under Section 31 of the Code seeking approval of this Tribunal with respect to the Resolution Plan on 24th February 2021. This Application was approved by the Tribunal

vide Order dated 7th June 2021 by which the Resolution Plan was approved and permission was granted for the reverse merger of the erstwhile Piramal into and with the Corporate Debtor resulting into the creation of the instant Applicant in a new avatar. After the reverse merger took place on 30th September 2021, the Applicant remains the continuing legal entity for all practical purposes.

3. The Applicant submits that the present Application was necessitated on the following grounds. The Administrator filed I.A. No. 721 of 2021 under Sections 25(2)(j), 43, 44 arraying 13 Respondents and praying for setting aside/ avoiding the preferential transactions in accordance with the said provisions of the Code. Even though the Resolution Plan was approved by this Tribunal on 7th June 2021, these Applications are still pending for adjudication. The Applicant submits that the Resolution Plan specifically lays down that applications filed by the Administrator seeking avoidance of transactions which appear to be preferential/ fraudulent/ undervalued/ extortionate are to be pursued by the Resolution Applicant. The relevant extract from the Plan is reproduced hereinbelow:

i. "*Under Section 3.13.2 of Part A of the Resolution Plan, the Successful Resolution Applicant has provided that it intends to pursue, on a best efforts basis, the applicants(s) filed by the Administrator before this Hon'ble Tribunal in respect of these Avoidance Transactions (as defined in the Resolution Plan). Any positive monetary recovery received by the Corporate Debtor as a result of orders passed in relation to the Avoidance Transactions shall be distributed, net of costs and expenses (including taxes), to the Financial Creditors pro rata to the extent the Financial Debt for Financial Creditors, provided that, the CoC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst Financial Creditors as laid down in Section 53(1) of the Code) and such decision of the CoC shall be accepted by the Successful Resolution Applicant, subject to there being no change in the Total Resolution Amount;*"

ii. *Under Section 2.13.3 of Part A of the Resolution Plan, the Successful Resolution Applicant ascribes value of INR 1 in respect of any transactions that may be avoided/set aside by this Hon'ble Tribunal in terms of Section 66 of the Code. Accordingly, any positive recovery as a result of reversal of transactions avoided or set aside by this Hon'ble Tribunal in terms of Section 66 of the Code would accrue to the sole benefit of the Successful Resolution Applicant. All the costs and expenses incurred or to be incurred towards litigation pertaining to Section 66 of the Code shall be to the account of the Successful Resolution Applicant.*

4. The Applicant further submits that the reverse merger resulted in a change in the management of the Applicant such that the Monitoring Committee is disbanded and the mandate of the Administrator has come to an end. It is stated that post the discharge of the Administrator, it is the new management of the Corporate Debtor that will henceforth represent the Corporate Debtor in any and all litigations pending before this Tribunal to the extent they are related to or connected with the Corporate Debtor in its individual capacity.

5. The Applicant argues that since the Administrator is no longer capable of representing the Corporate Debtor on account of: (1) the Administrator being discharged from its responsibilities; (2) the Corporate Debtor being taken over by a new management post the reverse merger; and (3) the Applicant being duly authorised by the Resolution Plan approved by this Tribunal to pursue I.A. No. 721 of 2021 in place of the Administrator, it is only reasonable to allow substitution of the Administrator with the present Applicant.

6. The Respondent No. 6 filed an Interlocutory Application being I.A. No. 532 of 2022 in the present Application i.e. I.A. No. 2852 of 2021

seeking dismissal of the present Application on the following grounds. The said Application 532 of 2022 has been considered as reply to the main substitution Application 2852 of 2021. Firstly, it is submitted that the I.A. 721 of 2021 was filed by the Administrator on 10th February 2021 i.e. 435 days from the CIRP Admission date which is way beyond the statutory limit of 135 days from CIRP date. Secondly, it is stated that at no point in time was the Respondent No. 6 aware of the provisions of the Resolution Plan including those related to the avoidance applications and despite repeated requests made to the Administrator and the Applicant, no copy of the Resolution Plan has been provided to the Respondent No. 6 on the purported ground of confidentiality. It is argued that since the Corporate Debtor has been taken over by the Resolution Applicant, the Resolution Plan is not a confidential document any more.

7. Thirdly and most importantly, the Respondent no. 6 submits that it is imperative for them to peruse the Resolution Plan in order to ascertain the manner in which the proceeds of the recovered amounts shall be distributed to a Respondent, such as the Respondent No. 6 themselves, who did not file proof of claim with the Administrator (since no cause

of action existed against the Corporate Debtor as on the date of CIRP) and is not a member of the CoC, but which involuntarily became a contingent financial creditor of the Corporate Debtor upon the filing of the Avoidance application vis-à-vis the other Conflicted Respondent Financial Creditors whose rights as the members of the CoC are already protected and safeguarded under the Resolution Plan. The Respondent No. 6 imputes that there is an adverse disparity between the Respondent No. 6 and the Conflicted Respondent Financial Creditors as if the Avoidance Application is allowed and the impugned transaction with the Respondent No. 6 is reversed, the Conflicted Respondent Financial Creditors stand to receive a pro rata distribution whereas, the Respondent No. 6 having become an actual creditor by virtue of reversal of the impugned transaction, would apparently be left without remedy since no new claims may be recognised after the approval of the Plan. This would have the effect of depriving the Respondent No. 6 of its right to recover its legitimate dues and the Resolution Plan is also silent in this regard.

8. Fourthly, the Respondent No. 6 contends that no avoidance applications should have been pending after the Resolution Plan was

approved by the Tribunal and therefore, since the Application itself is not maintainable, the question of substitution will not arise at all.

9. The Original Applicant i.e. Piramal Capital & Housing Finance Limited has filed their reply dated 20.06.2022 to the maintainability Application. The Respondent submits that the Resolution Plan is approved by this Tribunal vide Order dated 07.06.2021. The Plan approved Order at pg. no. 50-51 specifically states that the Applications filed by the Administrator seeking avoidance transactions which appear to be preferential/fraudulent/undervalued/extortionate are to be pursued by the Resolution Applicant the same is reproduced above.

10. Further, whether a Resolution Plan is a confidential document in this regard the Respondents have placed reliance on the Judgement passed by Hon'ble NCLAT in *Association of Aggrieved Workmen of Jet Airways (India) Ltd vs. Jet Airways (India) Ltd. the Respondents have also relied on Section 24 (3) and 29 (2) of the Insolvency and Bankruptcy Code, 2016.*

Hence the Respondent in the IA 532 of 2022 i.e. Piramal Capital and Housing Finance Ltd. prays to dismiss the Application and allow the substitution Applications.

FINDINGS

11. We have heard the Counsel appearing for the Applicant and the Counsel for the Respondents at length. We have also taken due note of the submissions and documents placed before us in all other connected substitution Applications. On perusal of the documents annexed to the present Application, it is evident that the issues for consideration before us are :-

a. Whether the Applications under section 43,45 66 would survive beyond conclusion of CIRP;

b. Whether Applications under Section 66 to seek Order against other entities or organizations with whom any fraudulent business was carried out by the Corporate Debtor are maintainable;

c. As to who shall pursue the Applications under Sections 43,45, 66;

12. It is hereby observed that there is no quarrel on the fact that the issue pending before the Hon'ble Supreme Court arising from the challenge to the Order passed by NCLAT concerns only the distribution or appropriation of monetary recoveries if any under the Applications under Sections 43, 45 and or 66 concerning avoidable transactions or fraudulent business which are pending adjudication in the instant case. The said issue pending before the Hon'ble Supreme

Court is neither required to be dealt with at this stage, nor does it have any direct bearing for deciding the issues of maintainability and substitution. There is no impediment in deciding the issue of maintainability and substitution.

13. Further, the question as to whether the applications under section 43, 45 or 66 would survive beyond the conclusion of CIRP i.e. post approval of the Resolution Plan is now resolved and the issue is no more res integra. In the recent judgment dated 13.01.2023 of the division bench of Hon'ble Delhi High Court in ***TATA Steel BSL ltd. vs. Venus Recruiter Private Limited & Ors. – LPAs 37 & 43 both of 2021,*** it has been held that-

" *51. The IBC being a special statute endeavouring to ensure that the resolution process is time bound and efficient, Regulation 35A is in line with this object in attempting to make sure that an avoidance application is determined and filed at the earliest to facilitate resolution of the Corporate Debtor. The insertion of clause 3A to Regulation 35A requires that copies of such an application is provided to the prospective application to ensure that such transactions are factored in their plans at the time of submission. The amended Regulation makes it amply clear that an avoidance application can be pending even beyond the submission of the Resolution Plan. This is consistent with our findings in respect of the nature of such proceedings, which require proper scrutiny of facts*

and law and are likely to meet resistance, thereby being likely to last beyond the conclusion of CIRP.

52. Even otherwise, a perusal of other regulation also makes it clear that the IBC and extant regulations have envisaged since inception that avoidance applications can survive the successful resolution of the Corporate Debtor. Regulation 36 provides for the preparation of an Information Memorandum. Details of avoidable transactions can be made a part of the Information Memorandum to be prepared by the RP. During the pendency of the present LPAs, the IBBI also inserted Regulation 38(2)(d) which mandates that all Resolution Plans to be submitted before NCLT for approval on or after 14.06.2022 must provide for treatment of avoidance applications.

53.Therefore, the general position of law is that an avoidance application will survive the CIRP if all suspect transactions and applications filed in their respect have been accounted for in the Resolution Plan. Ultimately, all details of such pending applications are required to be placed before the NCLT for approval of the Plan under Section 31 of the IBC. There is nothing in the impugned judgment to imply otherwise. In fact, the impugned Judgment acknowledges that a Resolution Plan can permit the RP to function post CIRP.

54. Insofar the Resolution Plan submitted by Tata Steel Ltd. is concerned, there is no such clause that provides for treatment of avoidance applications. However, the same could not have been done because the RP himself filed the avoidance application after the Resolution Plan had been submitted before the NCLT. Thus, the pertinent issue that arises is whether any pending

applications pertaining to avoidable transactions will lapse in cases where the Resolution Plan is unable to account for avoidable transactions.

"83. The LD. Single Judge has heavily relied upon the role of the RP in the context of the CIRP to hold that the RP becomes functus officio upon the conclusion of the CIRP. The role of the RP vis-s-vis the resolution plan ends, and rightly so, with the successful resolution of the corporate debtor. However, the Scheme of IBC makes it clear that avoidance applications and CIRP are a separate set of proceedings. The avoidance of a transaction requires discovery of dubious transactions which are complex in nature and adjudication of these by the adjudicating authority takes time and the resolution process need not await the outcome of the exercise. Therefore, a distinction can be drawn between the role of the RP vis-s-vis CIRP on one hand and avoidance applications on the other.

84. Accordingly, reliance placed upon sections applicable in the context of CIRP cannot be extended to the RP for the purposes of pursuing avoidance applications. The RP, before passing of the approval order, filed an application for avoidance of certain transactions, discharging the statutory burden laid out under Section 25(2)(j) of the Insolvency and Bankruptcy Code.

89. Conclusion

a) *The phrase "arising out of" or "in relation to" as situated under Section 60(5)(c) of the* Insolvency and Bankruptcy Code. *Is of a wide import and it is only appropriate that such applications are heard and adjudicated by the Adjudicating Authority, i.e. the NCLT or the NCLAT, as the case maybe,*

notwithstanding that the CIRP has concluded and the resolution applicant has stepped into the shoes of the promoter of the erstwhile corporate debtor.

b) *CIRP and avoidance applications, are, by their very nature, a separate set of proceedings wherein, the former, being objective in nature, is time bound whereas the latter requires a proper discovery of suspect transactions that are to be avoided by the Adjudicating Authority. The scheme of the IBC reinforces this difference. Accordingly, adjudication of an avoidance application is independent of the resolution of the corporate debtor and can survive CIRP.*

c) *The endeavour of the IBC and its rules and regulations is to ensure that all processes within the insolvency framework are time efficient. While the law mandates a resolution plan to necessarily provide for the treatment of avoidance applications if the same are pending at the time of submission of resolutions plans, it cannot be accepted that avoidance applications will be rendered infructuous in situations wherein the resolution plan could not have accounted for avoidance applications due to exigencies that delayed initiation of action in respect of avoidable transactions beyond the submission of a resolution plan before the adjudicating authority. This is because such an interpretation will render the provisions pertaining to suspect transactions otiose and let the beneficiaries of such transactions walk away, scot-free. Money borrowed from creditors is essentially public money and the same cannot be appropriated by private parties by way of suspect arrangements. Therefore, in cases such as the present one, wherein such transactions could not be accounted the Adjudicating Authority will continue to hear the application. Such benefit cannot be given in cases where the RP had already applied for prosecution of avoidance*

applications and the applicant ought to have been cognizant of pending avoidance applications but did not account for the same in its resolution plan.

In view of the above, at this stage, post the completion of successful CIRP, the objections on maintainability and continuing of the pending avoidance applications have no merits particularly when the approved Resolution Plan provides that the same would be pursued by the successful Resolution Applicant and an Order under Section 31 has been passed, inter alia, after being satisfied that the resolution plan has provisions for its effective implementation.

14. Further, whether applications under Section 66 seeking Order against other entities or organizations with whom any fraudulent business was carried out by the corporate debtor are maintainable.

We hereby observe that Section 66 contemplates seeking an Order to make contributions to the assets of the corporate debtor. Section 66(1) allows adjudicating authority to pass an Order against only those persons who were knowingly parties to the carrying on the business of the Corporate Debtor in a fraudulent manner. Ld. Senior Counsel Mr. Sudipto Sarkar and Ld. Counsel Mr. Mukesh Jain representing their respective Applications, while raising the issue of maintainability, submitted that the Adjudicating Authority cannot enlarge the ambit of Section 66 to pass such order also against other entities or organizations with whom such fraudulent business was carried out by the Corporate

Debtor and that applications under Section 66 qua such other entities or organizations were not maintainable.

There is no quarrel that for avoidance of transactions under Section 43 or 45 such other entities or organizations would be necessary parties.

So far as applications under Section 66 are concerned, for deciding this issue of maintainability it would be apposite to refer to Section 66(1) which reads as under :-

"66. Fraudulent trading or wrongful trading – (1) if during the Corporate Insolvency Resolution Process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit".

As against the same, Section 339 (1) of the Companies Act, 2013 reads as under :-

"339. Liability for fraudulent conduct of business – (1) if in the course of the winding-up of a company, it appears that <u>any business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose,</u> the Tribunal, on the application of the Official Liquidator, or the Company Liquidator or any creditor or contributory of the company, any, if it thinks it proper so to do, declare that <u>any person, who is or has been a director, manager, or officer of the company or any persons who were knowingly parties to the carrying on of the business in the manner aforesaid</u> shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct :

Provided that on the hearing of an application under this sub-section, the Official Liquidator or the Company Liquidator, as the case may be, may himself give evidence or call witnesses. "

A perusal of these two statutory provisions show that the Sub-Section (1) of Section 66 is pari materia to Section 339 of Companies Act, 2013.

In the context of Section 339 of the Companies Act, 2013 in ***Usha Ananthasubramanian Vs. Union of India-*** *(2020) 4 SCC 122,* the Hon'ble Supreme Court has already settled the position in this regard as under-

> *"7. Section 337 refers to penalty for frauds by an officer of the company in which mis-management has taken place.* ***Likewise, Section 339 refers to any business of the company which has been carried on with intent to defraud creditors of that company.*** *Obviously, the persons referred to in Section 339(1) as persons who are other than the parties "to the carrying on of the business in the manner aforesaid" which again refers to the business of the company which is being mismanaged and not to the business of another company or other persons.*
>
> *8. This being the case,* ***it is clear that powers under these Sections cannot possibly be utilized in order that a person who may be the head of some other organization be roped in, and his or her assets be attached. This being the case, we set aside the Impugned order passed by the NCLAT and well as the NCLT.*** *The appeal is allowed in the aforesaid terms.*

9. We may clarify that nothing stated in this judgment will have any effect insofar as the investigation conducted by CBI or the investigation by SFIO is concerned."

Therefore, the pending applications, which are under Section 66, should be considered only against the persons responsible for carrying on of the business of the Corporate Debtor in a fraudulent manner. Since section 66 can be passed against entities/persons with whom fraudulent business was carried out by the corporate debtor, applications qua them solely under Section 66 would not be maintainable. Therefore, such entities/persons shall stand deleted from the memo of parties in the applications solely under Section 66. Needless to say, that all civil and criminal remedies, concerning debts due and recoverable from the entities and persons with whom avoidable transactions or fraudulent business carried out by the Corporate Debtor, would continue to remain open as independent remedies.

15. **Who shall pursue the applications under Sections 43, 45 or 66:**

It is to be noted that Section 43, 45 and 66 of Insolvency & Bankruptcy Code contemplates filing of applications thereunder only by

RP/liquidator as the case may be. However, there is no embargo on who shall pursue any such application filed by RP which has also been accounted for in the approved resolution plan on successful completion of CIRP process and passing of an order under Section 31. Thus, post successful completion of CIRP process and order of adjudicating authority under Section 31, the pending applications under Section 43, 45 and 66 can be pursued by any such person or entity, as may have been agreed by CoC while approving the resolution plan having provision for its effective implementation.

In the instant case, the Resolution Plan is approved by the CoC and thereafter by the Adjudicating Authority and thus it contemplates that these pending Applications would be pursued by the successful Resolution Applicant at its own expense. If CoC is now asked to pursue these applications through RP, it would not only amount to foisting them with additional burden of the litigation cost not contemplated in the resolution plan but would also be contrary to the approved Resolution Plan. Hence, the Applications for substitution to pursue the pending applications by the Applicant herein under Section 43, 45 or 66 are hereby allowed.

16. In view of the foregoing reasons, we find it fit to allow this Applications. With the above observations, I.A. No. 2852 of 2021 is accordingly **allowed** and disposed of and IA 532 of 2022 is hereby rejected.

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**JUSTICE P. N. DESHMUKH**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**