* **IN THE HIGH OF DELHI AT NEW DELHI**

Reserved on: 12th July, 2022
Pronounced on: 8th August, 2022

\+ W.P.(C) 2983/2022 & CM APPL. 8630/2022

SANJAY SARIN ..... Petitioner

Through: Mr. Mrinal Harsh Vardhan and Mr. Kartik Sarin, Advocates.

versus

THE AUTHORISED OFFICER, CANARA BANK & ORS.

..... Respondents

Through: Mr. Hitesh Sachar and Ms. Anju Jain, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. The Petitioner, who stood as a guarantor to a loan facility, is aggrieved with the recovery action initiated by the bank, against the borrower and himself, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. According to him, once a resolution plan *qua* the borrower was approved under Section 31 of the under the Insolvency and Bankruptcy Code, 2016, the bank's claims stood addressed. Thus, it could not have sought recovery for amounts over and above the amount approved by the NCLT, and seeks a mandamus to that effect. Is the petition maintainable for the above reliefs, is the short question before this court.

2. Briefly stated, Mr. Sanjay Sarin ['***Petitioner***'], stood as a guarantor to a loan of Rs. 34 crores advanced by Canara Bank (formerly known as Syndicate Bank) ['***Respondent No. 1***'] to the borrower - Alphabet Heights Pvt. Ltd. (formerly known as Maple Realcon Private Ltd.) ['***Respondent No. 3***']. Subsequently, corporate insolvency resolution proceedings ['***CIRP***'] under the Insolvency and Bankruptcy Code, 2016 ['***IBC***'] were initiated against Respondent No. 3 (which became the corporate debtor) in 2018. Respondent No. 1 participated in the said proceedings as a financial creditor, and filed its claim (for Rs. 10,35,18,740/-) before the National Company Law Tribunal, New Delhi Bench ['***NCLT***']. A resolution plan, accepted by the Committee of Creditors ['***CoC***'] was approved by the NCLT *vide* approval Order dated 20th February 2020 ['***Approval Order***']. Under the approved resolution plan, the resolution applicant – Apex Heights Pvt. Ltd. ['***Respondent No. 2***'], was to make payment of Rs. 10,35,00,000/- to Respondent No. 1 (Rs. 03 crores in FDR on the date of the Approval Order, and the remaining in 24 equal instalments), but it defaulted.

3. Thereafter, proceedings were initiated by Respondent No. 1 under Section 13(4) of the SARFAESI Act, and in furtherance thereto, proceedings were also instituted under Section 14 of the SARFAESI Act, for taking possession of the security offered by the Guarantor – being the dwelling unit of the Petitioner – as well as for appointment of a receiver. The Petitioner is aggrieved by such action of Respondent No. 1.

PETITIONER'S SUBMISSIONS

4. Mr. Mrinal Harsh Vardhan, counsel for the Petitioner, has contended

as follows:

4.1. The impugned SARFAESI action has been initiated with the sole intent to recover amounts in excess of the resolution plan, and is thus, *ex facie* illegal and *ultra vires* the approval order of the NCLT.

4.2. During the pendency of CIRP, Respondent No. 1 had issued a demand notice dated 26th July 2019 under Section 13(2) of the SARFAESI Act, calling upon Respondent No. 3 and Petitioner to pay dues worth Rs. 12,31,43,655/-. Respondent No. 1 had then participated in the CIRP as a financial creditor and submitted its claims in Form C (for Rs. 10,35,18,740/-). Respondent No. 2 proposed a resolution plan, which was accepted by the majority of the CoC, of which Respondent No. 1 was also a member. It was then approved by the NCLT *vide* the Approval Order noted above and became binding upon Respondent No. 1 in the following terms:

> "(…) *Coming to the only other Financial creditor being a secured creditor i.e. Syndicate bank which had cast a dissenting vote in respect of the Resolution plan. The Plan provides that their claim of Rs. 10,35,00,000/- shall be extinguished in fully by releasing the matured proceeds under an FDR for Rs. 3 Crores held by them towards partial discharge of their admitted liability. The same can be appropriated immediately on pronouncement of this order. The remaining amount shall be paid in 24 equal monthly instalments.*
>
> *It is directed that the title documents of the project land shall be released by Syndicate Bank to the Resolution Applicant immediately on furnishing fresh personal guarantees & securities by the ex- Directors who have undertaken to do so. The Resolution Applicant shall ensure that the same is not mortgaged with any other financial institution for the purpose of raising a loan or encumbering the same in any manner. It is equally expedient to ensure that the Syndicate Bank holds sufficient security for the balance of their admitted claim. As the same is to be liquidated over a period of 24 months, equitable mortgage of properties belonging to the ex-Directors for the remaining admitted amount i.e., Rs. 7 Crores approx. shall be created/renewed in their favour or retained by them. In our opinion the same shall be sufficient to secure the balance of the admitted claim of the creditor*."

4.3. Once the resolution plan is approved, the loan stands restructured and the financial creditor is estopped from taking any further recovery action in respect of the same claims. However, even after the passing of the Approval Order, another possession notice was issued by Respondent No. 1 dated 02nd September 2021 under Section 13(4) of the SARFAESI Act. Thereafter, proceedings under Section 14 of the SARFAESI Act were launched by Respondent No. 1 before the Chief Metropolitan Magistrate, Karkardooma District Court, Delhi.[1] Initiation of SARFAESI proceedings on the basis of the aforenoted notices – issued before and after the Approval Order respectively, is bad in law. In fact, the Petitioner had filed an application under Section 17 of the SARFAESI Act before the DRT, Lucknow Bench in S.A. No. 404 of 2021 against the issuance of the same by Respondent No. 1.

4.4. Respondent No. 1 has not declared the restructured loan as a non-performing asset, in order to initiate any legal proceedings under Section 13 of the SARFAESI Act. The bank instead relied upon the default made by the corporate debtor prior to the Approval Order (as noted above). The alleged default is unrelated to the new management of the corporate debtor and therefore, the entire premise for proceedings under the SARFAESI Act is illegal and liable to be quashed.

4.5. Section 31 of IBC deals with the approval of the resolution plan. The resolution plan is approved by the NCLT only if the Adjudicating Authority (as defined in IBC) is satisfied that the resolution plan, as approved by the CoC under Section 30(4), meets the requirements of

[1] Misc. Crl. 101 of 2021 titled *Canara Bank v. Maple Realcon Pvt. Ltd. etc.*

Section 30(2) of the IBC. Once approval is granted, it is binding on the corporate debtor and all its members, employees, creditors including guarantors and other stakeholders involved in the resolution plan. Further, the IBC has an overriding effect over other laws as per Section 238. Thus, on a conjoint reading of Section 31(1) and 238 of IBC, it is evident that the provisions of the IBC must prevail, and therefore, the proceedings initiated by Respondent No. 1 after the approval of the resolution plan are in contravention of the IBC. The default in payment by Respondent No. 2, has to be recovered by Respondent No. 1 from Respondent No. 2, following due process of law, and no action can be initiated against the Petitioner in this regard.

4.6. Any deviation from the terms laid out in the resolution plan is detrimental to the interest of the majority stakeholders, and therefore, the Court should intervene and interdict the proceedings initiated by the bank under Section 13(4) of SARFAESI Act.

RESPONDENT NO. 1'S SUBMISSIONS

5. *Per contra*, Mr. Hitesh Sachar, counsel for Respondent No. 1, argued that the instant petition is misconceived, for the following reasons:

5.1. The remedy available with the Petitioner, if any, in respect of Section 13(4) of the SARFAESI Act, cannot be exercised before this Court. Petitioner, aggrieved with the action of Respondent No. 1, has already filed an application before the DRT, Lucknow.[2] This matter is sub-judice and listed for final disposal. Thus, the present petition should not be entertained by this Court.

[2] *Bearing* SA No. 404/2021.

5.2. Despite the approval of the plan, Respondent No. 2 has failed to adhere to the timeline of payments. As on date, out of 24 instalments, 15 are still pending, amounting to Rs. 4,53,60,000/-, and Respondent No. 1 reserves its right to take appropriate legal remedy against Respondent No. 2 for the same. In fact, Respondent No. 1 had filed an application before the NCLT seeking directions to Respondent No. 2 with respect to payment of instalments in a time-bound manner. The said application was disposed of on 21st February 2022, with a direction to the resolution applicant to act strictly as per the approved resolution plan.

5.3. Irrespective, the Petitioner, as a guarantor, is not discharged of its liability on account of sanction and approval of a resolution plan by the NCLT. For this, reliance is placed on the judgment of the Supreme Court in ***State Bank of India v. V. Ramakrishnan and Anr.***,[3] and ***Lalit Kumar Jain v. Union of India and Ors***.[4]

5.4. While the amount of Rs. 10,35,18,740/- (including interest due as on the date of commencement of insolvency) was admitted for payment by Respondent No. 2 under the approved resolution plan, the total outstanding that Respondent No. 1 is entitled to receive is much more, and accordingly, it has lawfully invoked its remedy against the personal guarantors and issued notices under SARFAESI Act. As on 28th February 2022, the total outstanding has been calculated as Rs. 6,56,00,000/-. This right of Respondent No. 1 against collateral securities which is sought to be enforced by it, for recover of its dues, is independent of the plan which stood approved by the NCLT *vide* the

[3] 2018 SCC Online SC 963.
[4] 2021 SCC Online SC 396.

Approval Order.

ANALYSIS

6. The counsels have been heard at length. Petitioner has approached this Court aggrieved with: (i) Respondent No. 2's failure in adhering to the timelines of payments under the resolution plan, since as on date, 15 out of 24 instalments payable to Respondent No. 1 are still pending; and (ii) proceedings initiated by Respondent No. 1 under Section 13(4) of the SARFAESI Act; (iii) the institution of proceedings against the Petitioner by Respondent No. 1 for taking possession of the dwelling unit of the Petitioner and for appointment of a receiver, under Sections 14 of the SARFAESI Act before the Chief Metropolitan Magistrate, Karkardooma District Court.

7. The law relating to maintainability of a writ petition in matters relating to SARFAESI Act is no longer *res integra*. The Supreme Court in ***Phoenix ARC Pvt. Ltd. v. Vishwa Bharti Vidya Mandir and Ors.***,[5] has held that where proceedings are initiated under the SARFAESI Act, and the borrower is aggrieved by any of the actions of the bank for which the borrower has remedy under the SARFAESI Act, no writ petition should be entertained.[6] Similar views have been expressed by this Court in ***M/s Trinkeshwar Developers and***

[5] 2022 SCC Online SC 44.

[6] Reference is also made to: ***Authorized Officer, State Bank of Travancore and Ors. v. Mathew K.C.,*** 2018 SCC Online SC 55; ***Agarwal Tracom Pvt. Ltd. v. Punjab National Bank and Ors.,*** 2017 SCC Online SC 1368; ***General Manager, Sri Siddeshwara Cooperative Bank Limited and Anr. v. Ikbal and Ors***., 2013 SCC Online SC 755; and also in ***United Bank of India v. Satyawati Tondon and Ors.***, 2010 SCC Online SC 776, in which case, it was also separately noted that "*the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions*".

Builders Pvt. Ltd. v. North Municipal Corporation & Ors.,[7] wherein it was held that a petitioner cannot invoke the writ jurisdiction of the court under Article 226 of the Constitution of India to indirectly seek the relief which the petitioner has failed to obtain otherwise. As noted above, the Petitioner's challenge to the action of Respondent No. 1 is already the subject-matter of challenge before the DRT, which is pending adjudication, and therefore, the present writ cannot be entertained.

8. Next, the Petitioner has also raised a grievance regarding the proceedings being in derogation of the Approval Order of the NCLT, and implored for this Court's intervention on the ground that there is no other remedy available. This contention is founded on the plea that, with the approval of the resolution plan, the guarantors' liabilities are also discharged. This contention has been categorically negated by the Supreme Court in ***Lalit Kumar Jain v. Union of India*** (*supra*), wherein the Court held as under:

> *"107. In Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta* [(2020) 8 SCC 531] *(the "Essar Steel case") this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:*
>
> > *"106. Following this judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], is set aside."*
>
> *108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability.*

[7] 2022 SCC Online Del 415.

As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra State Electricity Board (supra) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:

> *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also In re Fitzgeorge Ex parte Robson [(1905) 1 KB 462])."*

xx ... xx ... xx

110. In Kaupthing Singer and Friedlander Ltd. (supra) the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that:

> *"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify*

> *S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."*
>
> *111. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract."* [Emphasis Supplied]

9. On a bare perusal of the afore-noted extract of the judgment, it is clear that the Supreme Court has, in very clear terms, held that discharge of the corporate debtor from a debt owed by it to its creditors, by way of an involuntary process such as insolvency proceedings, does not absolve the guarantor of its liability since it arises out of an independent contract. Thus, the passing of a resolution plan does not *ipso facto* discharge the personal guarantor. The judgment of the Supreme Court in ***State Bank of India v. V. Ramakrishnan*** (*supra*) also puts forth the aforementioned principle, and is contrary to the proposition canvassed by the Petitioner. As regards the extent of liability of a personal guarantor is concerned, the same would have to be determined in light of the agreement between the borrower, i.e., the corporate debtor, and the personal guarantor, for which the appropriate forum would be the Debt Recovery Tribunal and not this Court. Thus, if the Petitioner is not absolved of his liability, the proceedings initiated by the bank under the SARFAESI Act cannot be held to be unconstitutional or in derogation of the Approval Order of the NCLT.

10. In relation to the other grievance raised by Respondent No. 1 *qua* non-

implementation of the resolution plan, it must be noted that the aggrieved party is actually Respondent No. 1, who has not been paid in terms of the resolution plan approved by NCLT. As pointed out by the counsel for Respondent No. 1, there has been a default on the part of the resolution applicant in payment of instalments, and as per the counter affidavit (as noted above), 15 instalments amounting to Rs. 4,53,60,000/- remain pending. It is therefore for Respondent No. 1 to now take action for recovery of its dues from the resolution applicant, as it may deem fit, utilizing any remedy available to it under law.

11. We must also take note of Section 33(3) of the IBC, which envisages a liquidation process in the event of contravention of a resolution plan. The same reads as under:

> *"Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1)."*

12. Under the afore-noted provision, Respondent No. 1 certainly has the right to proceed against the collateral securities for recovery of its dues - which are independent of the resolution plan approved by the NCLT. If the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected, may make an application to the Adjudicating Authority for an order for liquidation. Where a resolution applicant succeeds as a corporate debtor, but fails to comply with its assurance in terms of the resolution plan, then subsequent step to be taken

has been specified in Section 33(3) of the IBC. This is the scheme under the IBC, and if the Parliament, in its wisdom, has only provided the remedy of a liquidation process under Section 33(3) of IBC as a consequence of non-implementation of the resolution plan by the concerned corporate debtor, this Court cannot create another remedy just because the afore-noted remedy is not sufficient or suitable for the Petitioner. Therefore, Petitioner's grievance regarding non-implementation of the resolution plan, too, cannot be a ground for this Court to entertain the instant petition.

13. In view of the above, this Court finds no merit in the present petition.

14. Dismissed along with pending application.

15. The court has not examined the merits of inter-se claims of parties and to that extent, their rights and contentions are left open.

SANJEEV NARULA, J

AUGUST 08, 2022
nk