



**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT VI, NEW DELHI**

I.A. 3547/2022

IN

Company Petition No. (IB) – 659/(ND) /2019

*Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law
Tribunal Rules, 2016 r/w Section 425 of the Companies Act, 2013*

In the matter of:

Volkswagen Finance Pvt. Ltd.

Versus

UNJ Import Pvt. Ltd.

And in the matter of:

Mr. Utkarsh Jain (Ex-director of UNJ Import Pvt. Ltd.)

Office At: A-15, South Extention, Part-2,

New Delhi-110049

...Applicant

Versus

1. HDB Financial Services Ltd

Regd. office: Radhika Second Floor, Law Garden Road,

Navrangpura, Ahmedabad, Gujarat-380009

Also at: Branch Office: Khasra No. 47, 2nd Floor,

Opp. Dassehra Ground, Budella, Near Oxford School,



Vikaspuri, New Delhi-110018

...Respondent No. 1

2. Mr. Navneet Kumar Jain (Auction purchaser)

Regd. Office: D-804, 8th Floor, Aoslina,

Mayur Vihar Extention-1, Delhi-110091

...Respondent No. 2

3. Mr. Amit Sharma (Advocate & Court Receiver)

Office At: Chamber No. K-14, Tis Hazari Court,

New Delhi-110054

...Respondent No. 3

4. Mr. Kamal Aggarwal (Liquidator of M/s. UNJ Import Pvt. Ltd.)

Office At: 487/27, School Road,

Near Peeragarhi Metro Station, New Delhi-110087

...Respondent No. 4

Order Pronounced on: 02.03.2023

Coram:

Shri. Bachu Venkat Balaram Das, Hon'ble Member (Judicial)

Shri. Rahul Bhatnagar, Hon'ble Member (Technical)

For the Applicant: Mr. Geetesh Meena



ORDER

PER- BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present Application has been filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 read with Section 425 of the Companies Act, 2013 for the following reliefs:
 - a. To set aside the sale of the mortgaged property i.e. A-15, Basement, South Extention, Part-II, New Delhi-110049 and declare all the actions illegal and quash the entire proceedings initiated by the Respondent No. 1- HDB Financial Services Ltd. under SARFAESI Act, 2002 subsequent to the order of CIRP in respect of the corporate debtor.
 - b. To initiate contempt proceeding against the Respondents for willfully and deliberately disobeying the judgment dated 13/04/2021 of this Hon'ble tribunal passed in the IA/3918/2020 in CP (IB)1659/ND/2019.
 - c. To award an exemplary cost of Rs. 5,00,000/- on account of making breach of moratorium initiated U/s 33 of IB



Code, 2016 and making hindrance in the process of CIRP and another sum of Rs. 50,000/- being the cost of litigation and other miscellaneous expenses to the applicant.

d. Pass any other or further orders as this Tribunal may deem fit and proper in the facts and circumstances of the case.

2. The brief facts as averred by the Applicant for filing the present Application are as follows:

i. That the CIRP against the Corporate debtor was initiated vide order dated 03/02/2020 and this tribunal appointed Mr. Kamal Agrawal as the IRP as proposed by the financial creditor. The committee of creditors(CoC) was constituted with the single member i.e. M/s Volkswagen Finance Pvt. Ltd. and the IRP was then appointed as Resolution Professional (RP) by the only member of the CoC on 19/03/2020.

ii. That there were more than 7-8 banking/financial institutions and one individual financial creditor in the corporate debtor who had financed the corporate debtor but the RP had not called/ informed them for their claim and to become a part of CoC and with malafide intentions,



continued the CIRP in the absence of other financial creditors (Banks) just to gain illegally in the interest of the financial creditor who had proposed and appointed him as the Resolution Professional.

- iii. That this Tribunal upon an Application u/s 33 I&B Code, 2016 preferred by the then Resolution Professional (now liquidator) passed an order dated 13/04/2021 to liquidate the Corporate Debtor and the then RP (Mr. Kamal Aggarwal) was appointed as the Liquidator of the Corporate Debtor.
- iv. That a fresh moratorium under section 33 (5) of the Code was enforced and applicable upon the Corporate Debtor during the process of liquidation in view of the liquidation order dated 13/04/2021 and as per the order, no fresh suit or legal proceedings shall be initiated or continued against the Corporate Debtor.
- v. That the Liquidator was in possession of the all assets, records and registered office of the Corporate Debtor situated at A-15, Basement, South Extention, Part-II, New Delhi-110049 and thereafter one of the financial creditors i.e. HDB financial Ltd in utter violation of law and in grave contempt of this Tribunal's moratorium order dated



13/04/2021 filed a case u/s 14 of the SARFASEI Act, 2002 before the Ld. Chief Metropolitan Magistrate Court, Saket, Delhi on 20.12.2021 by suppressing the true facts and misleading the status of ongoing moratorium and obtained an order against the Corporate Debtor from court of Ms. Charu Gupta, Ld. Chief Metropolitan Magistrate court, South district, Saket Court, Delhi in Ct. Case No. 8/2022 and thereafter took the physical possession of the mortgaged property/office of corporate debtor with the help of court appointed receiver Mr. Amit Sharma on 14/01/2022.

- vi. That the above stated facts were immediately brought into the knowledge and information of the Liquidator (Mr. Kamal Agarwal) vide email communication dated 28/12/2021 along with the court order dated 24/12/2021 and receiver's notice. That the liquidator chose to remain silent and did not protect the assets of the Corporate Debtor and witnessed the contempt of the court moratorium order with malafide intentions.
- vii. That the Liquidator at a very belated stage wrote one email dated 12/01/2022 to the HDB Financial Services Ltd. and



also to the receiver Mr. Amit Sharma, for the deferment of the process of taking possession, but despite the email request of the liquidator, the HDB Financial Services Ltd. did not stop itself from moving forward on the illegal path of taking the possession of the office of the Corporate Debtor despite the moratorium in force.

viii. That despite of the direction of the Liquidator, the HDB Financial Services Ltd. (through its manager Mr. Vikas Anand) had taken over the physical possession of the mortgaged property/Office of the Corporate debtor (M/s UNJ Import Pvt. Ltd.) on 14/01/2022 in view of the order dated 24/12/2021 obtained from the court of Ms. Charu Gupta, Ld. Chief Metropolitan Magistrate, Saket Court, New Delhi under Section 14 of the SARFAESI ACT, 2002 with the help of the receiver Mr. Amit Sharma and other 20-25 unknown persons. That the bank officers broke open the locks of the office of the Corporate Debtor, where the records, books, registers, inventories were lying under the custody of the liquidator and trespassed the premises in the absence of the applicant in complete disregard to the law of insolvency and committed a criminal offence, but



neither any complaint was made by the liquidator nor any information was given to this Tribunal till date in this regard.

ix. That the the illegal acts of the Respondents continued and did not come to end even after taking the physical possession of the mortgaged property. Thereafter, the property was illegally auctioned and sold to one Mr. Navneet Kumar Jain on 29/04/2022 in complete disregard and total disrespect to this Tribunal's order dated 13/04/2021.

3. The Respondent No.1/1.HDB Financial Services Ltd has filed its reply and submitted as follows:

i. That the Respondent no.1 had granted secured loan to the Corporate Debtor and Mr. Pavitra Jain [the "Co-Borrower"] to the tune of Rs. 95,60,000/ [Rupees Ninety Five Lakhs Sixty Thousand] vide Sanction Letter dated 03.05.2016, for the purpose of business expansion.

ii. That to secure the said financial facility, the Co-Borrower created security interest by creating equitable mortgage of the immovable property bearing A-15, Basement, South Extension, Part 11, New Delhi 110049 admeasuring 234 Sq,



yards. and recorded in the name of Pavitra Singh/Co-borrower. The Corporate Debtor's registered office is situated at the said Mortgaged Property.

- iii. That the Corporate Debtor failed to remain regular in conduct of the aforesaid loan facility and neglected to maintain their financial discipline despite several requests and reminder, hence the loan account of Corporate Debtor was declared a NPA on 07.08.2019 as per the guidelines issued by RBI.
- iv. That the Respondent No. 1 had issued a notice dated 25.09.2020 under Section 13(2) of SARFAESI Act, 2002 calling upon the Corporate Debtor to pay an amount of Rs. 82,77,474.27/- .
- v. That in the month of October, 2020, Respondent No.1 was informed by the Corporate Debtor about the pendency of the Company Petition. As soon as the Respondent No.1 acquired the knowledge regarding the CIRP against the Corporate Debtor, it filed the impleadment application before Resolution Professional without any delay.
- vi. That vide order dated 03.02.2020, this Tribunal passed an order to initiate CIRP and also appointed Resolution



Professional for inviting Claim from all Secured Creditors in respect of abovementioned Corporate Debtor. However, the Respondent No. 1, despite being secured creditor, was not informed as no notice with wider circulation was issued for inviting the claims. As such the Respondent No. 1 could not file its claim before the Resolution Professional and the Respondent No.1 was not the part of Committee of Creditors (CoC) meetings.

- vii. That when the Respondent No. 1 came to know about the present CIRP, it approached the Resolution Professional for filing its claim. However, it was informed that time period for inviting claim has been closed.
- viii. That the subject property has already been sold in public auction held on 29.04.2022 and the sale has been confirmed in favour of Mr. Navneet Kumar Jain vide sale confirmation letter dated 29.04.2022.
- ix. That the Respondent No. 1 has also filed an affidavit before the RP u/s 110(2) of the IBC, 2016 thereby forfeiting its right to enforce its security with regard to the Corporate Debtor.



4. The Respondent No. 2/Mr. Navneet Kumar Jain (Auction purchaser) has filed its reply and submitted as follows:
- i. That M/s. HDB Financial Service Ltd had decided to opt out of the liquidation process under IBC, 2016 and decided to execute its security interest on immovable property situated at A-15, South Extn-II, New Delhi.
 - ii. That the said property was mortgaged in favour of M/s. HDB Financial Services Ltd by Mr. Pavitra Jain who was the co-borrower for the financial limits borrowed by Corporate Debtor from M/s. HDB Financial Services. Accordingly, the Applicant Mr. Utkarsh Jain has no locus to file the current application.
 - iii. That M/s. HDB Financial Services Ltd filed a case no. 8/22 u/s 13 of SARFAESI Act, 2002 before the court of Ms. Charu Gupta, Ld CMM, South District, Saket Court, Delhi and after taking favourable order, took the physical possession of the mortgaged immovable property on 14.01.2022 with the help of Court appointed receiver and put the property to auction after issuing sale notice dated 24.03.2022.



- iv. That the Applicant, despite being aware of entire proceeding before Ld. CMM's Court, Saket ; receipt of possession notice u/s 13(4) and receipt of sale notice dated 24.03.2022 did not raise any objection on the process. It is only after the completion of entire e-auction process and sale of immovable property, the applicant has approached this Tribunal. This itself suggest that this application is a result of malafide intention and an afterthought after sale of immovable property.
- 5.** The Respondent No. 3 failed to appear despite due service and notice and therefore, was set ex-parte vide order dated 19.12.2022.
- 6.** The Respondent No. 4/Liquidator has filed its reply and submitted as follows:
- i. That the Applicant and his family members along with the Corporate Debtor availed financial assistance from Respondent No. 1 against the mortgage of the basement portion and first floor portion of A-15 South Ex-II New Delhi. Upon default, the account was declared as an NPA and the father of the Applicant sold the First Floor Portion



to one Rakesh Agarwal and the sale proceeds were directly credited in the account of Respondent No. 1.

ii. That the Respondent No. 1 had filed a delayed claim with the RP at the CIRP stage and after commencement of liquidation vide order dated 13.04.2021 of this Tribunal in IA 3918 of 2020, it opted not to file any claim before the liquidator and instead took recourse to SARFAESI Act and took possession of the basement portion of A-15 South- Ex Part II through Respondent No 3 Mr Amit Sharma duly appointed as Court Receiver vide order dated 24.12.2021 of Ld CMM Charu Gupta South District/ Saket Courts.

7. Vide order dated 17.01.2023, the parties were given liberty to file written submissions. The written submissions have been duly filed.

8. We have heard the parties and perused the case records, averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have also been examined.

9. The first prayer of the Applicant is for setting aside the sale of the mortgaged property i.e. A-15, Basement, South Extention,



Part-II, New Delhi-110049 (herein referred to as “subject property”) and for declaring all the actions illegal and quashing the entire proceedings initiated by the Respondent No. 1- HDB Financial Services Ltd. under SARFAESI Act, 2002 subsequent to the order of CIRP in respect of the Corporate Debtor. With respect to the same, it has been established beyond doubt that the subject property belongs to Mr. Pavitra Singh in his personal capacity, who is also the co-borrower as per the loan agreement dated 11.05.2016. The proceedings under SARFAESI Act, 2002 were initiated by Respondent No. 1 against the Corporate Debtor as well as the ex-Directors of the Corporate Debtor namely, Mr. Pavitra Singh, Mr. Utkarsh Jain i.e. the Applicant in the present Application and Mr. Nishkarsh Jain. The contention of the Applicant that such proceedings were in violation of Section 14 of the IBC, 2016 as CIRP had already been initiated against the Corporate Debtor and that the Respondent No. 1 had not disclosed the fact that the Corporate Debtor is undergoing CIRP before the Ld. Metropolitan Magistrate, Saket Court, Delhi cannot be entertained at this stage as the Applicant being a party to the said proceedings had ample opportunities



to disclose this fact to the court which he failed to do. Even otherwise, the Respondent No. 1 was granted an order for possession of the property belonging to Mr. Pavitra Singh and not the Corporate Debtor. However, the said proceedings were initiated on 20.12.2021, i.e., after the CIRP of the Corporate Debtor was initiated by this Tribunal vide order dated 03.02.2020 and since the Corporate Debtor was also made a party to the said proceedings, there is clear violation of Section 14, IBC, 2016. The Resolution Professional, Mr. Kamal Aggarwal (now Liquidator) was duty bound in light of Section 25(2)(b) of the IBC, 2016 to intimate the Ld. Chief Metropolitan Magistrate Court, Saket where proceedings were initiated by the Respondent No. 1 against the Corporate Debtor in violation of Section 14, IBC, 2016 about the ongoing CIRP of the Corporate Debtor. The Resolution Professional/Liquidator is bound to protect the interests of the Corporate Debtor and in the instant case, the Resolution Professional has failed to fulfil his duties with utmost sincerity. Further, the Respondent No. 1 i.e., HDB Financial Services Ltd. should have filed claim with the Resolution Professional. The Respondent No. 1 has claimed that it was not aware of the



ongoing CIRP process of the Corporate Debtor until October 2020 and that it approached the Resolution Professional for filing claim as soon as it acquired knowledge about the ongoing CIRP. However, the claim was not accepted as the time period for inviting claims had elapsed. The defence of the Respondent No. 1 that it wasn't aware of the ongoing CIRP holds no ground as public announcement regarding same was made by the Resolution Professional. Be that as it may be, upon attaining knowledge about the ongoing CIRP of the Corporate Debtor, the Respondent No. 1 should not have filed a case against the Corporate Debtor. Rather, the Respondent No. 1 should have proceeded under SARFAESI Act, 2002 only against the Co-borrowers including Mr. Pavitra Jain who was the owner of the subject property. The Resolution Professional (now Liquidator) was in possession of the books of accounts of the Corporate Debtor and hence, he must have been aware of the debt owed by the Corporate Debtor to the Respondent No. 1 and being in charge of the affairs of the Corporate Debtor, the Resolution Professional (now Liquidator) should have contacted Respondent No. 1 and made him a part of the CoC. In light of the above, the Liquidator Mr. Kamal Aggarwal is



being given a stern warning by this Tribunal to be more careful and diligent in fulfilling his duties under the IBC, 2016. However, at this juncture, setting aside the sale of the subject property would not change the outcome of the ongoing resolution process of the Corporate Debtor as the subject property does not belong to the Corporate Debtor. The Hon'ble Supreme Court in *P. Mohanraj & Ors. Versus M/s. Shah Brothers Ispat Pvt. Ltd.* Civil Appeal No.10355 OF 2018 held as follows:

Thus, for the period of moratorium, since no Section 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.



From the above quoted judgement, it is clear that there is no bar to initiate proceedings under SARFAESI Act, 2002 against the ex-directors of the Corporate Debtor undergoing CIRP. Therefore, even though the initiation of proceedings against the Corporate Debtor under SARFAESI Act, 2002 after the initiation of CIRP are barred by the moratorium u/s 14, IBC, 2016, the proceedings against the co-borrowers i.e. Mr. Pavitra Singh, Mr. Utkarsh Jain and Mr. Nishkarsh Jain cannot be said to be barred by Section 14, IBC, 2016 and since the subject property was held by Mr. Pavitra Singh in his personal capacity, its sale does not contravene the provisions of IBC, 2016.

10. The moratorium u/s 14, IBC, 2016 ceased to have effect on initiation of Liquidation proceedings vide order dated 13.04.2021. Therefore, since the subject property does not belong to the Corporate Debtor, it was not a part of the liquidation estate formed as per Section 36 of the IBC, 2016. The Applicant has further contended that since the subject property was also the registered office of the Corporate Debtor, the sale of the subject property by Applicant No. 1 contravenes Section 14, IBC, 2016. However, the sale of the



subject property was completed through public auction on 29.04.2022, i.e, after the initiation of Liquidation proceedings when moratorium u/s 14, IBC, 2016 had ceased to exist and moratorium under Section 33(5) was imposed. Section 33(5), IBC, 2016 states as follows-

“Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”

The moratorium u/s 33(5) is not an impediment to the sale of the subject property by Applicant No. 1 who being a Secured Creditor was well within his rights to sell the subject property which was duly mortgaged to it by Mr. Pavitra Singh, the co-borrower of the loan facility granted by the Respondent No. 1 to the Corporate Debtor. Therefore, the Applicant has no locus to file an application for setting aside the sale of the said property.

RAHUL
PRASAD
BHATNAGA
R

Digitally signed by
RAHUL PRASAD
BHATNAGA
Date: 2023.03.06
12:47:08 +05'30'



11. With respect to the other prayers of the Applicant, we are of the view that since the subject property does not belong to the Corporate Debtor, we find no case for initiating contempt proceedings against the Respondents.

12. Accordingly, the present application i.e., I.A/3547/2022 stands dismissed.

Let a copy of order be served to parties.

RAHUL PRASAD BHATNAGAR
Digitally signed by RAHUL PRASAD BHATNAGAR
Date: 2023.03.06 12:47:23 +05'30'

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

BACHU VENKAT BALARAM DAS
Digitally signed by BACHU VENKAT BALARAM DAS
Date: 2023.03.06 15:48:12 +05'30'

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)