

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

IA No.245/2022 IN CP (IB) NO.307/ALD/2019

IN THE MATTER OF:

[An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016)]

IN THE MATTER OF:

M/S AARWANSS BUILDWELL AND INFRACON LLP

Address: 2151, Pocket A, Sector 16, Vashudhara, Ghaziabad
Uttar Pradesh 201012

....APPLICANT

AND

IN THE MATTER OF:

RAMESH HIRALAL SHARMA

R/O. FLAT NO. 1101,

SATGURU KALYAN,

JN. OF 13th AND 17th ROAD, KHAR (WEST)

MUMBAI-400052

.....APPLICANT/FINANCIAL CREDITOR

Versus

MODINAGAR PAPER MILLS LTD.

HAVING REGISTERED OFFICE AT:

ASHA RAM TYAGI ROAD, MODINAGAR

GHAZTABAD-201204

.....RESPONDENT/CORPORATE DEBTOR

Order pronounced on- 25th April, 2024

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Coram:

Mr. Praveen Gupta. : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Krishna Dev Vyas with : *For the Applicant in IA No.245/2022*

Sh. Sushil Kumar Antal, Adv.

ORDER

1. This application has been filed by Aarwanss Buildwell and Infracon LLP (hereinafter referred as the “**applicant**”) seeking the following prayer:

a. Allow the instant application and clarify that the property of the Corporate Debtor purchased by the Applicant in auction under SARFAESI prior to commencement of CIR Process be excluded from the assets of the Corporate Debtor and/or

b. Clarify that the Resolution Professional cannot take possession of the asset of the Corporate Debtor acquired by the Applicant pursuant to certificate for sale dated 08.12.2021. and/or;

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c. Pass any further order(s) as this Hon'ble Tribunal may deem fit and proper in the interest of justice.

- 2.** It has been averred in the application that the applicant had been issued a sale certificate dated 8th December, 2021 under the SARFEASI Act, 2002 in respect of the Corporate Debtor's assets, prior to the initiation of CIRP against the Corporate Debtor. The Resolution Professional is now attempting to take possession of the said assets.
- 3.** It is stated that initially an application U/s 7 of the Code was initiated by the Financial Creditor against the Corporate Debtor and on admission of the application filed U/s 7 of the Code, the CIRP was initiated on 06.04.2022. During the course of the aforementioned application, Kotak Mahindra Bank, submitted an intervention application to inform this Adjudicating Authority that the bank had realized and sold its security interest in the immovable properties and/or assets of the corporate debtor through an auction conducted under the (Security Interest Enforcement) Rules 2002. These submissions were acknowledged by the

Adjudicating Authority in paragraph 6 of the order dated 06.04.2022.

4. The said assets were sold pursuant to an e-auction conducted by the intervenor bank for a sum of Rs. 26,01,00,000/- to the applicant. The said sale was done in accordance with Rule 6 of the SARFAESI Act, 2002 for a consolidated lot of land situated located at Khasra no. 193(kha), 193 (cha), 193 (Chha), 193 (da), 194, 195 falls in Village Sikri Khurd, Pargana Jalalabad, Tehsil Modinagar, District Ghaziabad and the properties comprising Khasra no. 364, 365, 366, 367 falls in Village Sikri Kalan, Pargana Jalalabad, Tehsil Modinagar, District Ghaziabad, Uttar Pradesh admeasuring 28332 square yards.
5. Section 18 of the IBC, 2016 casts a duty upon the resolution professional to take custody over assets of the corporate debtor but in the present case, the asset was already sold to the applicant and the same was confirmed via the sale certificate dated 08.12.2021. The Applicant therefore, asserts that the resolution professional cannot take control of the assets not in possession of the Corporate Debtor.

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6. The Applicant has relied on the judgement of **Shakeena v. Bank of India** wherein the SC opined as follows:-

“10.17 The ratio laid down by the Division Bench of this Court in Arumugham, S. & 2 Others Vs. C.K. Venugopal Chetty & 5 others and the Supreme Court in B. Arvind Kumar Vs. Government of India & Ors, referred supra, squarely applied to the case in hand and we, therefore, have no incertitude to hold that the sale which took place on 19.12.2005 has become final which it is confirmed in favour of the auction purchaser and the auction purchaser is vested with rights in relation to the property purchased in auction on issuance of the sale certificate and has become the absolute owner of the property. Further, as held by the Division Bench of this Court in Arumugham, S. & 2 Ors. Vs. C.K. Venugopal Chetty & 5 Others, the sale certificate issued in favour of the Appellant does not require any registration in view of Section 17(2) (xii) of the Registration Act as the same has been granted pursuant to the sale held in public auction by the authorized officer under SARFAESI Act. 10.20 In view of our finding on this point, we hold that the sale of the secured asset in public auction as per section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per Rule 9(7) of the Rules is a complete and absolute sale for the purpose of SARFAESI

Act and the same need not be registered under the provisions of the Registration Act."

- 7.** The Respondent i.e., the Resolution Professional has filed a reply vide E-filing No.0902109005562022 dated 21st September, 2022, wherein the Respondent inter alia submitted that he was appointed as the Interim Resolution Professional in the CIRP of Modi Nagar Paper Mills Ltd. vide order dated 06.04.2022 and was later confirmed as the Resolution Professional.

- 8.** The Resolution Professional visited the factory premises of the corporate debtor and found security deployed by the Auction Purchaser/ Applicant. He was not allowed entry and discovered an order from the Debt Recovery Tribunal (DRT) Lucknow affixed on the premises, indicating a legal dispute involving the corporate debtor, Kotak Mahindra Bank, and the Auction Purchaser/Applicant. The DRT had issued an order regarding a petition filed by the corporate debtor against the auction of its assets by Kotak Mahindra Bank, alleging irregularities. The DRT had temporarily halted the sale process and the Allahabad High Court later restrained

the bank from executing any sale deed but allowed issuance of a sale certificate to the Auction Purchaser/ Applicant.

- 9.** The respondent avers that while the admission proceedings of the CD were going on, Kotak Mahindra Bank allegedly failed to disclose an order dated April 1, 2022, from the DRT Lucknow in SA No 423 of 2021, instructing parties to maintain status quo regarding the corporate debtor's property.
- 10.** The Respondent received a letter on 29th April, 2022 wherein the applicant apprised the respondent that it had bought assets of the CD which comprised of plant and machinery along with some immovable property. The sale certificate dated 08.12.2021 was also issued. Therefore, the respondent should exclude it from the list of assets of CD.
- 11.** Subsequently, the applicant was also impleaded as a respondent in SA 423 of 2021 which was pending before DRT, Lucknow. The applicant following the impleadment, filed an affidavit dated 14.01.2022. The affidavit stated that no third-party interest be created unless the final order is pronounced by DRT, Lucknow.

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12. The respondent alleged that the Debt Recovery Tribunal (DRT), through its order dated April 1, 2022, stated that the auction purchaser, was fully aware that Kotak Mahindra Bank had sold the property, including plant and machinery, buildings, structures, and stocks, yet it submitted an affidavit-cum-undertaking on January 20, 2022, stating it would refrain from creating any third-party interests regarding the land purchased through the auction conducted by Kotak Mahindra Bank Ltd. until the final judgment by the Tribunal in SA NO.423 of 2021. Moreover, on March 15, 2022, despite seeking time to submit a fresh affidavit due to the lack of details regarding plant and machinery in the earlier affidavit, the applicant submitted an affidavit on March 31, 2022, stating that they had entered into a Memorandum of Undertaking (MOU) with SNG Business Ventures Pvt. Ltd. on November 23, 2021, for the sale and disposal of the aforementioned plant and machinery, along with the specified terms and conditions. The court further remarked that instead of assisting the court in resolving the matter conclusively, they are deliberately complicating the issues. The Court then directed all parties to maintain the

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status quo regarding the subject property until the final resolution of the present case.

- 13.** The respondent also averred that Kotak Mahindra Bank has submitted its claim amounting to Rs. 22,96,44,674.22 Crores to the respondent in the ongoing case, following the sale of a majority of the assets, as disclosed by the Bank before this Tribunal in the order dated April 6, 2022. This amount appears to be arbitrary, especially considering that the records, including those of various legal proceedings, of the Corporate debtor are not accessible to the Resolution Professional (RP) in this case. The matter regarding the claim was deliberated with the bank, and after several meetings and exchanges of emails, the respondent/RP, in this case, made an estimation in accordance with the provisions of the Insolvency and Bankruptcy Code (IBC) and relevant Corporate Insolvency Resolution Process (CIRP) Regulations. Consequently, the claim was admitted to the extent of Rs. 6,56,98,355/- (Rupees Six Crore Fifty-Six Lakh Ninety-Eight Thousand Three Hundred and Fifty-Five Only) and communicated to Kotak Bank via email dated June 28, 2022.

Furthermore, an updated list of claims and creditors was submitted, and the second reconstitution report of the Committee of Creditors (COC) of Modi Nagar Paper Mills Ltd was filed before this Tribunal.

- 14.** The respondent averred that he convened the 4th Meeting of the Committee of Creditors on July 25, 2022, with participation from representatives of Kotak Mahindra Bank. During the meeting, the respondent highlighted discrepancies regarding assets claimed to have been sold by the Bank before the initiation of CIRP. These assets were subject to dispute in the Debt Recovery Tribunal Lucknow at the commencement of the CIRP. The respondent requested Kotak Bank to return possession of the property, or else indicated that he would pursue necessary action before the Tribunal. Kotak Bank responded by stating that possession had already been transferred to the auction purchaser, M/s Aarvanss Buildwell and Infracon LLP, implying the possession issue was no longer under their purview.

- 15.** The RP was thus unable to take possession in respect of the properties already sold and therefore filed an

application bearing IA No. 242/2022 before this Adjudicating Authority seeking interalia reliefs against the respondent bank for transfer of the assets.

- 16.** We have perused the application and the prayers sought therein for consideration of the request of the applicant for clarifying that the property of the Corporate Debtor purchased by the Applicant in auction under SARFAESI prior to commencement of CIR Process be excluded from the assets of the Corporate Debtor and the RP can thus not take possession of the same.
- 17.** In the present case, the CIRP was initiated on 06.04.2022 but the applicant claimed that the assets of the Corporate Debtor were already sold by an auction sale under the SARFAESI Act, 2002. A sale certificate dated 08.12.2021 was also produced by the applicant and annexed to his application. The applicant also averred that the sale was final and relied on a Supreme Court ruling namely **Shakeena v. Bank of India**. The applicant thus concluded that as a result of the sale being final, the

Respondent/Resolution Professional cannot take possession of the same.

- 18.** The Resolution Professional on the other hand, stated that when he visited the corporate debtor's factory premises, he was denied entry and a notice from the Debt Recovery Tribunal (DRT) Lucknow was affixed to the premises, indicating a legal dispute involving the corporate debtor, Kotak Mahindra Bank, and the Auction Purchaser/Applicant. The DRT had issued an order in response to a petition filed by the corporate debtor against the auction of its assets by Kotak Mahindra Bank, citing alleged irregularities. The DRT had temporarily suspended the sale process, and subsequently, the Allahabad High Court prohibited the bank from executing any sale deed but permitted the issuance of a sale certificate to the Auction Purchaser/Applicant. The respondent also alleged that the auction purchaser/applicant in disobedience of the direction of DRT, Lucknow to maintain status quo on the disputed asset filed an affidavit stating that it had entered into a Memorandum of Undertaking (MOU) with SNG

Business Ventures Pvt. Ltd. on November 23, 2021, for the sale and disposal of the aforementioned plant and machinery. The Resolution Professional in order to take possession of the said assets, filed an interlocutory application, namely IA 245/2022 before this Tribunal which is pending adjudication.

- 19.** It is worthwhile to note that DRT, Lucknow in SA 423 of 2021 in its final order dated 02.05.2023 opined that the present SA should have been filed by IRP and not suspended Directors of Applicant no.1 Company or guarantors and thus is non-maintainable and liable to be dismissed. Paragraphs 9 and 11 of the judgment elucidates the same point:-

“9. It is an admitted fact that the subject property is owned by Applicant No.1 Company and not by the other applicants. It is also an admitted fact that vide order dtd.6-04-22, IRP has been appointed by Hon'ble NCLT Allahabad and perusal of order dtd.25-11-22 and 19-12-22 passed by this Tribunal in the present case reveals that Counsel for IRP has caused his appearance however on the later dates till date of final arguments none has caused appearance on behalf of IRP. Sec. 17(1) (b) of IBC 2016 provides that "from the date of appointment of IRP, the powers of the Board of Directors or the partners of the Corporate Debtor, as the case may be, shall

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stand suspended and be exercised by the IRP." Thus, the suspended Directors of Applicant No.1 Company can no longer represent the Applicant No.1 Company/ Corporate debtor from the date of appointment of IRP. As regards contention of the Applicants that there are four other applicants in the present SA, since the subject property is owned by Applicant No.1 Company therefore any dispute with regard to action taken by the bank against the said property can be raised by IRP and not by the suspended Directors or guarantors. The facts and circumstance of the case law cited by applicants is different from the facts of the present case and therefore the said judgment does not help the applicants”

....

11. In view of above discussions, I am of the considered opinion that after appointment of IRP by Hon'ble NCLT, Allahabad vide order dtd.06-04-22, the present SA should have been prosecuted by IRP and not by the suspended Directors of Applicant NO.1 Company or guarantors. Thus, it has to be held that the present SA is not maintainable and is liable to be dismissed.”

- 20.** Another reason why the DRT held that the said SA was non-maintainable and liable to be dismissed because the applicants, i.e., the Corporate debtor and its guarantors had waived their right to challenge the Bank's (Kotak Mahindra Bank) action in any court of law by way of a Memorandum of

Understanding (MoU). The relevant excerpt from the judgement of DRT has been produced hereunder:-

“12. Counsel for bank had also raised the issue of maintainability of the SA on the ground that applicants have signed Memorandum of Understanding dtd.08-01-21 (for short MOU) wherein they have given peaceful possession of the subject properties and had agreed not to challenge any action initiated by the bank in any Court of Law. Counsel for the applicants, on the other hand, contended that only Applicant NO.1 Company waived its right to the extent of challenge to physical possession done on 08-01-21 by bank and not otherwise and never waived its right to challenge further/future action/auction sale of property. It is also contended that Applicant No.2 to 5 had never waived their right to challenge the action of the bank in the capacity of guarantors of Applicant No.1 Company.

13. Perusal of Annex.A-10 filed by the bank alongwith its reply reveals that Dr.Anubhav Gupta (Applicant NO.2 in the present SA) who has been duly authorised vide Board Resolution dtd.04-01-21 passed by Applicant No.1 Company has stated in Para 2 of the said MOU dtd.08-1-21 that he in the capacity of a director as well as guarantor of Modinagar Paper Mills (Applicant NO.1 Company in the present SA) will not challenge any action initiated by the Kotak Mahindra Bank in any Court of Law. Thus, it is apparent that applicants have not stated

that they will not challenge action of bank with regard to physical possession but have categorically agreed that "they will not challenge any action initiated by the Kotak Mahindra Bank in any Court of Law." In the event, it has to be held that applicants have waived their right to challenge any action of the bank in r/o of the subject properties. Hon'ble Apex Court in Civil Appeal No.3203/2008 – Babulal Badriprasad Varma Vs. Surat Municipal Corporation & Ors. MANU/SC/7606/2008 has held in Para 24 that "A person may waive a right expressly or by necessary implication. He may in a given case disentitle himself from obtaining an equitable relief particularly when he allows a thing to come to an irreversible situation." In Para 35 it is further held that "If appellant through his conduct, has waived his right to an equitable remedy, such conduct precludes and operates as estoppel against with respect to asserting the right over a portion of the acquired land..."

14. In view of above, it has to be held that applicants have waived their right to challenge any action of the bank by signing MOU dtd.08-01-21 and therefore the present SA is liable to be dismissed on this ground also.

15. In these circumstances, I am of the considered opinion that the present SA is not maintainable and is accordingly dismissed."

21. The above decision of the DRT also finds strength in the Supreme Court's adjudication of the case **Haldiram**

Incorporation Limited vs. Amrit Hatcheries Pvt. Ltd. And

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Ors wherein two blocks of land of the Corporate Debtor i.e. Amrit Hatcheries Pvt. Ltd. in Howrah District of West Bengal were sold in auction sale under SARFAESI Act. Payment was completed on 16.08.2023. Sale certificate was issued on 19th August, 2023. A petition was filed by Operational Creditor for initiation for CIRP, which was admitted on 20.08.2019. The NCLT was of the view that sale was not complete and vide order dated 25.02.2020 withheld issuance of sale certificate and handing over of property illegal and held that the aforesaid property were assets of the Corporate Debtor. Appeal before the NCLAT was dismissed.

- 22.** The Supreme Court noted that sale had been concluded before declaration of moratorium. The Supreme Court relied on *Esjaypee Impex pvt. Ltd. vs. Assistant General Manager and Authorised Officer, Canara Bank* (2021) 11SCC537 wherein it has been held that the mandate of law in terms of Section 17 (2) (xii) read with Section 89 (4) of the Registration Act, 1908 only required the authorized officer of the Bank under the SARFAESI Act to hand over the duly validated sale certificate to the auction-purchaser with a copy forwarded to

the registering authorities to be filed in Book I as per Section 89 of the Registration Act.

- 23.** The Supreme Court noted that the Bank does not dispute the factual position that the sale stood concluded before declaration of moratorium. The Court held that properties in question cannot be treated as liquidation estate of the Corporate Debtor and set aside the order of the Adjudicating Authority to the extent of the two properties in question. The relevant excerpts of the judgement have been produced hereunder:-

“4. As we have already indicated, the Liquidator (now representing the Corporate Debtor in liquidation), the erstwhile Director/Promoter of the Corporate Debtor as also the Bank does not dispute the factual position that the sale stood concluded before declaration of moratorium. No reason was cited before us to demonstrate as to why the sale certificate would be held illegal. No case has been made out before us on behalf of the respondents about any defect or default in forwarding the sale certificate in terms 4 of Section 89(4) of the Registration Act, 1908. On the other hand, all the three respondents have concurred at the time of hearing on the point that the sale stood concluded.

5. In these circumstances, the present appeal shall stand allowed to the extent the properties in question are concerned. These properties cannot be treated to be liquidation assets of the Corporate Debtor for the purpose of further steps to be taken in the liquidation proceeding. The impugned order is set aside and that would also render the order of the Adjudicating Authority invalid to the extent the two properties of the Corporate Debtor located in the district of Howrah are concerned.”

24. We, therefore, consider the request made in the application as being bonafide since the auction sale was valid and made prior to the initiation of CIRP of Corporate Debtor in view of the aforesaid judicial precedents applicable in the context of the present case.

25. We, therefore, pass the following order, which as under: -

- (1).** The property of the Corporate Debtor purchased by the Applicant in auction under SARFAESI prior to commencement of CIR Process shall be excluded from the assets of the Corporate Debtor and
- (2).** The Resolution Professional cannot take possession of the asset of the Corporate Debtor acquired by the Applicant pursuant to certificate for sale dated 08.12.2021.

26. The above **IA No.245 of 2022** is thus allowed in terms of the above directions. All interim orders, if any passed, shall stand vacated.

27. Ordered accordingly.

-Sd-

(Ashish Verma)
Member (Technical)

-Sd-

(Praveen Gupta)
Member (Judicial)

Date: 25th April, 2024