

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH NEW DELHI

Company Appeal (AT) (Insolvency) No. 890 of 2020

In the matter of:

**Union Bank of India (erstwhile Andhra Bank)
Stressed Asset Management Branch,
3rd Floor, Andhra Bank Building, Koti,
Sultan Bazar, Hyderabad – 560 095**

...Appellant

Versus

1. Siripuram Developers Pvt. Ltd.

**Regd. Office: “MHR”, 8-2-350/5/a/24/IB
Road No.2, Panchavati Colony, Banjara Hills,
Hyderabad – 500034 .**

...Respondent No.1

2. Tirumani Developers Private Limited

**Regd. Office: “MHR”, 8-2-350/5/a/24/IB
Road No.2, Panchavati Colony, Banjara Hills,
Hyderabad – 500034 .**

...Respondent No.2

3. IVR PUDL Restorts & Clubs Private Limited

**Regd. Office: “MHR”, 8-2-350/5/a/24/IB
Road No.2, Panchavati Colony, Banjara Hills,
Hyderabad – 500034 .**

...Respondent No.3

4. IVR Prime Developers (Tuni) Private Limited

**Regd. Office: “MHR”, 8-2-350/5/a/24/IB
Road No.2, Panchavati Colony, Banjara Hills,
Hyderabad – 500034 .**

...Respondent No.4

5. Mr. Sutanu Sinha
Liquidator for IVRCL Ltd.
Floor No.4, Duck Back House,
41, Shakesperesarani,
Kolkata

...Respondent No.5

Present:

Appellant: Mr. Alok Kumar and Ms. Drishti Harpalani, Advocates.

Respondents: Mr. Krishna Dev J., Mr. Sai Kaushal, Mr. G. Aniketh Reddy and Mr. T.P.S. Harsha, Advocates for R-1 to 4. Mr. Shashank Agarwal, Advocate for R-5. Mr. Sutanu Sinha, Liquidator.

JUDGMENT

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present Appeal is filed by the Appellant – Union Bank of India (Andhra Bank now merged with Union Bank of India, vide G.S.R.154 (e) dated 04th March, 2020, under the Amalgamation of Andhra bank and Corporation Bank into Union bank of India scheme, 2020), under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) against the Impugned order dated 20.08.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) I.A No. 335 of 2020 in CP(IB) No.297/7/HDB/2017.
2. The Adjudicating Authority vide impugned order dated 20.08.2020 disposed of the Interlocutory Application and passed the following orders:

“Para -18. In view of the above observations, This Adjudicating Authority feels it proper to direct Respondent No.1 bank not to take any coercive steps such as sale of the properties mortgaged by the Appellant companies in favor of Respondent No.1 bank till the completion of Liquidation proceedings of the Corporate Debtor.

Para – 19 . Accordingly, Application bearing I.A No. 335 of 2020 stands disposed of.”

3. The Appellant has submitted that the Respondent No.1 to 4 had extended corporate guarantee for the financial debt released to corporate debtor vide Deed of Guarantees Agreements appearing at *Annexure-IV page No. 69 to 173 of the Appeal Paper Book* and they have also mortgaged for several of their properties as collateral to secure the financial debt availed by the Corporate debtor from various lenders. The Respondent No.1 to 4 had created equitable mortgaged by depositing the title deeds over the assets exclusively charged to the Appellant. The Assets mortgaged consists of open land of 133 properties admeasuring 75.94 crores located at Konnimeedu Village, Thindivanam (Mandal), Villupuram (District) Tamil Nadu. This is an **Exclusive Security** and is a property belonging to Respondent No.1 to 4 and exclusively executed in favour of the Appellant.

It has also been submitted that these properties are not a part of a liquidation estate or the assets memorandum and accordingly, do not belong to the corporate debtor. State Bank of India filed an Application before the Adjudicating Authority under section 7 of the Code to initiate Corporate Insolvency Resolution Process (for short 'CIRP') against the corporate debtor (IVRCL Limited) when its account classified as Non-performing Assets ('NPA') and the Adjudicating Authority has admitted the application on 23.02.2018 and as no successful resolution plan was approved by the Committee of Creditors ('CoC'), the Adjudicating Authority passed an order of liquidation under section 33 of the Code on 26.07.2019.

4. The Appellant submitted its proof of claim under Form-D dated 22.09.2019 and the Liquidator admitted the claim of Rs. 660.15 crore of the Appellant as a Financial Creditor. The Appellant relinquished its interest only in common securities belonging to corporate debtor in liquidation estate and did not relinquish its rights of **Exclusive Securities**. As per the submission of Appellant, the Liquidator in its reply 23.06.2020 in IA No. 335 of 2020 has not mentioned that the assets have been included in the liquidation estate. The Appellant has also initiated proceedings under SARFAESI Act in respect of the securities created by Respondent No. 1 to 4. The Demand Notice dated 18.12.2019 and Possession Notice dated 11.03.2020 were issued by the Appellant in accordance with the provisions of SARFAESI Act and Security Interest

(Enforcement) Rules, 2002. The Appellant is aggrieved by the order of Adjudicating Authority dated 20.08.2020 as they have directed the Appellant Bank not to take any coercive steps such as sale of the properties mortgaged to the bank by the Respondent Companies till the completion of the Liquidation proceedings of the corporate debtor.

5. The Respondents have objected to the Appellant's Demand Notice and Possession Notice issued under the provisions of SARFEASI Act, and relevant Rules. The Respondents being aggrieved by the Bank for issuing such notices filed IA No. 335 of 2020 in CP (IB) No. 294/7/HYD//2017 to set aside the Possession Notice dated 11.03.2020 and also to direct the Bank not to take any coercive steps against the Respondent till the closure of the liquidation proceedings. The Liquidator of the Corporate Debtor (IVRCL Limited) has intimated on 03.03.2020 to the National Stock Exchange about the bid for the corporate Debtor to be sold as a "going concern". The Adjudicating Authority accordingly has passed the impugned order setting aside the Possession Notice and other directions. They have also challenged that the Appeal is liable to be dismissed due to lack of authorization of the alleged authorized signatory to file the Appeal resulting from the merger of Corporation Bank into Union Bank of India. They have also submitted that Section 238 of the Code supersedes the provisions of the SARFAESI Act and hence the proceedings initiated by the Appellant Bank under the SARFAESI Act were illegal and had no bearing

on the “Code” proceedings. They have also cautioned if the action of the Appellant Bank under the SARFAESI Act were allowed to continue, it would have a negative impact on the sale of the corporate debtor as a going concern which would defeat the very purpose of liquidation process. They have submitted that the sale of assets of the Respondents, outside the liquidation process would scuttle the sale of corporate debtor as a going concern. They have also reiterated that the liquidator has considered the investment value of corporate debtor in its valuation vis a vis sale of corporate debtor as a going concern. Hence the action under the SARFAESI Act should not be considered and appeal needs to be dismissed.

6. The Adjudicating Authority has considered the sale of corporate debtor as a “going concern” in the process of liquidation and that one M/s. Gabs Megacorp Ltd has given a bid to take the corporate debtor as a going concern for a value of Rs. 1654.77 crores. The Adjudicating Authority has also considered its authority under Section 60(5)(c) of the Code and has maintained that the application is maintainable. The Adjudicating Authority has also asserted that the Appellant Bank (Respondent before Adjudicating Authority), if allowed to proceed with the possession notice, there is every chance that it would diminish the value of the liquidation estate and its shareholders. The Adjudicating Authority is of the view that there is no restraints on Financial creditor to proceed against the guarantor even after initiation of CIRP, approval of Resolution Plan or

liquidation proceedings being commenced or closed and considering these submissions, the Adjudicating Authority has passed the order stated above.

7. We have gone through the submissions made by the learned counsels both Appellant and Respondents and we observe that the followings facts are not in dispute:

- a. The Respondents are Corporate guarantors and are subsidiaries companies of the corporate Debtor under Liquidation.
- b. The Respondents have mortgaged some properties as collateral properties to secure the financial debt of Corporate Debtor and one **exclusive security** which is an open land consisting of 133 properties admeasuring 75.94 crore in Tamil Nadu as stated above.
- c. Initiation of CIRP against the Corporate Debtor by State Bank of India and finally appointing the Resolution Professional as Liquidator.
- d. The Appellant bank initiated SARFAESI proceedings and issued Demand Notice and Possession Notice.

8. As far as the issue of authorization given by the Appellant to file the Appeal is concerned it is in accordance with the clause 4(8) of the Scheme of

Amalgamation of the Banks as per G.S.R. dated 04.03.2020 stated above and reproduced below:

“Unless otherwise expressly provided in this Scheme, all contracts, deeds bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect, immediately before the commencement of this scheme and to which Transferor bank 1 or Transferor Bank 2 is a party or which are in favour of the Transferor Bank 1 or 2 shall be of full force and effect against or in favour of the Transferee bank, and may be enforced or acted upon as fully and effectively as if in the place of the Transferor bank 1 or the Transferor Bank 2, the Transferee bank had been a party thereto or as if they had been issued in favour of the Transferee Bank thereto and it shall not be necessary to obtain the consent of any third party or other person who is a party to any of the aforesaid instruments or arrangements to given effect to the provisions of this sub-paragraph.”

9. On going through the Minutes of Meetings of the lenders (CoC) of Corporate Debtor (IVRCL Limited) under Liquidation as per Paper Book

Annexure-11 page 330 it clarifies on the issue of subsidiary assets as a part of liquidation estate or not and the same is reproduced below:

a. "The claim submitted for Corporate Guarantee given for subsidiary companies will not form part of Liquidation Estate. b.

The claim admitted amount is subject to return of bank guarantee means if the bank guarantee is not utilized and returned to bank will not form part of claim and will be reduced from the admitted claim amount.

c. Some assets given interest to SREI was taken over by SREI before CIRP period, so the corresponding claim amount of SREI is being reduced to that extent.

d. Charge created on the assets of subsidiaries will not form party of Liquidation Estate. In the Liquidation estate, Liquidator has considered the assets of IVRCL Limited only and we have considered the investment value of subsidiary companies not the assets of subsidiary companies."

This clarifies that **exclusive security** given for subsidiary companies is not forming party of liquidation estate.

10. **Liquidation Estate**

Section 36(4)(d) is reproduced below:

“Section 36(4)(d) :The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor;

Hence, the assets of the subsidiaries are outside the purview of liquidation estate and as such cannot form part of the liquidation estate. The Appellant Tribunal itself in Company Appeal (AT) (Ins) No. 167 of 2020 has held on 28.01.2020, the following:

“After hearing learned counsel for the Appellant for a while we find that the claim sought to be enforced by the ‘Corporate Debtor’ has been rightly declined by the

Adjudicating Authority (National Company Law Tribunal) Division Bench, Chennai as in terms of provisions of Section 36 (4) (d) of the 'Insolvency and Bankruptcy Code, 2016' assets of its subsidiary did not fall within the ambit of liquidation Estate. Learned counsel for the Appellant vehemently tried to stress that under sub-Section 3(a) of section 36 of the 'Insolvency and Bankruptcy Code, 2016' assets over which the 'Corporate Debtor' has ownership right including all rights and interests herein as evidenced in the balance sheet of the 'Corporate Debtor' or an information utility etc. comprise the liquidation Estate of 'Corporate Debtor'.

However, the provision itself has been subjected to the exclusion clause engrafted in sub-Section 4 and assets of subsidiary of the 'Corporate Debtor' are not included in the liquidation Estate."

11. The Adjudicating Authority and Appellate Authority being the creation of statute will have to ensure generally all the statutory compliances, unless it goes against the principle of natural justice and the intention of the legislature.

12. Since, these **exclusive securities** were not forming part of liquidation estate, correctly done by Liquidator to comply with the provisions of Section 36 of the Code and precedence of this Appellate Tribunal already exists & the Code vide Section 36(4)(d) prohibits inclusion of assets of Indian or Foreign subsidiary of the Corporate Debtor in the liquidation estate, we have to set aside the impugned order of the

Adjudicating Authority and allow the present appeal. The Appeal is accordingly allowed. Pending applications, if any, stands disposed of. No order as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

25th February, 2021

New Delhi

Raushan.K



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