

Indian Overseas Bank Vs. M/s. RCM Infrastructure Ltd. and Anr.

Civil Appeal No. 4750 of 2021

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Full judgment text

Indian Overseas Bank Vs. M/s. RCM Infrastructure Ltd. and Anr.

[Civil Appeal No. 4750 of 2021]

B.R. Gavai, J.

1. This appeal challenges the judgment dated 26th March 2021 passed by the National Company Law Appellate Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the NCLAT") in Company Appeal (AT) (Insolvency) No. 736 of 2020, thereby dismissing the appeal filed by the present appellant Indian Overseas Bank, which was in turn filed challenging the order dated 15th July 2020 passed by the National Company Law Tribunal, Hyderabad Bench1, Hyderabad (hereinafter referred to as "the NCLT") in I.A. No.832 of 2019 in C.P. (IB) No. 601/10/HDB/2018, vide which the learned NCLT had allowed the application filed by the respondent No.2 herein, former Managing Director of the respondent No.1 herein M/s RCM Infrastructure Ltd. (hereinafter referred to as the "Corporate Debtor") and set aside the sale of the assets of the Corporate Debtor.

2. The facts in brief, giving rise to filing of the present appeal, are as under: The appellant Bank had extended certain credit facilities to the Corporate Debtor. However, the Corporate Debtor failed to repay the dues and the loan account of the Corporate Debtor became irregular. As such, on 13th June 2016, the loan account of the Corporate Debtor came to be classified as "NonPerforming Asset" (NPA).

3. The appellant Bank issued a Demand Notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), calling upon the Corporate Debtor and its guarantors to repay the outstanding amount due to the appellant Bank. Since the Corporate Debtor failed to comply with the Demand Notice and repay the outstanding dues, the appellant Bank took symbolic possession of two secured assets mortgaged exclusively with it.

The same was done by the appellant Bank in exercise of powers conferred on it under Section 13(4) of the SARFAESI Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "said Rules"). One of the said properties stood in the name of Corporate Debtor and the other in the name of Corporate Guarantor. An Eauction notice came to be issued on 27th September 2018 by the appellant Bank to recover the public money availed by the Corporate Debtor.

4. In the meantime, on 22nd October 2018, the Corporate Debtor filed a petition being CP(IB) No. 601/10/HDB/2018 under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the IBC") before the learned NCLT. In the first Eauction held on 6th November 2018, no bids were received. As such, the second Eauction notice came to be issued on 27th November 2018, which was scheduled to be held on 12th December 2018. In the second Eauction, three persons became successful bidders by offering jointly a price of Rs.32.92 crore for both the secured assets.

On 13th December 2018, the sale was confirmed in favour of the successful bidders/auCTION purchasers in the public auction. The successful bidders deposited 25% of the bid amount, i.e., Rs.8.23 crore including the Earnest Money Deposit of the said amount and the appellant Bank issued a sale certificate to them. The auction purchasers were directed to pay the balance 75% of the bid amount within 15 days, i.e., prior to 28th December 2018.

5. It appears that the auction purchasers, on 28th December 2018, addressed a letter to the appellant Bank seeking handing over of peaceful and vacant possession of the secured assets and also prayed for extension of time to pay the balance 75% of the bid amount till 8th March 2019. The request made by the auction purchasers was accepted by the appellant Bank on 29th December 2018. It is the case of the appellant Bank that in exercise of its powers under Rule 9(4)(a) of the said Rules, it extended the period till

8th March 2019 for payment of the balance 75% of the bid amount.

6. The learned NCLT, vide order dated 3rd January 2019, admitted the petition filed by the expromoter of the Corporate Debtor. As a result of the said order passed under Section 10 of the IBC, the Corporate Insolvency Resolution Process (hereinafter referred to as "the CIRP") of the Corporate Debtor commenced. A moratorium as provided under Section 14 of the IBC was notified and an Interim Resolution Professional (hereinafter referred to as "the IRP") was also appointed.

7. The appellant Bank on 21st January 2019, filed its claim in Claim FormC with the IRP, upon it coming to know about the admission of the insolvency petition filed by the Corporate Debtor. According to the appellant Bank, since the balance 75% of the bid amount was not yet received on the said date, it was not excluded from the claim filed before the IRP. During the pendency of the CIRP, the appellant Bank accepted the balance 75% of the bid amount, i.e., Rs.24.69 crore on 8th March 2019. Upon receipt of the payment, the appellant Bank submitted its revised claim in Claim FormC to the IRP on 11th March 2019.

The appellant Bank also intimated the IRP about the successful sale of the said secured assets. The promoter of the Corporate Debtor, i.e., respondent No.2 herein, thereafter filed an application being I.A. No.832/2020 in the pending company petition being CP(IB) No. 601/10/HDB/2018, thereby praying the learned NCLT to set aside the security realization during the CIRP period carried out by the appellant Bank or in the alternative to cancel the impugned transaction.

Vide order dated 15th July 2020, the learned NCLT passed an order thereby allowing the said application filed by the respondent No.2 and setting aside the sale of the property owned by the Corporate Debtor. Being aggrieved thereby, the appellant Bank filed an appeal being Company Appeal (AT) (Insolvency) No. 736 of 2020 before the learned NCLAT and the same was rejected by the impugned judgment dated 26th March 2021. Being aggrieved thereby, the present appeal.

8. We have heard Shri Tushar Mehta, learned Solicitor General appearing on behalf of the appellant Bank, Shri C.S. Vidyathan, learned Senior Counsel appearing on behalf of the impleading applicants, i.e., the auction purchasers, Shri K.V. Viswanathan, learned Senior Counsel appearing on behalf of the respondent No.1 and Shri Aditya Verma, learned counsel appearing on behalf of the respondent No.2.

9. Shri Tushar Mehta submitted that the very initiation of the voluntary insolvency proceedings under Section 10 of the IBC, by the expromoter of the Corporate Debtor, was with mala fide intent and as such, hit by Section 65 of the IBC. It is submitted that the loan account of the Corporate Debtor was classified as "NPA" on 13th June 2016. Thereafter on 18th April 2018, the appellant Bank issued a Demand Notice under Section 13(2) of the SARFAESI Act.

He submitted that since the Corporate Debtor failed to make the payment, a symbolic possession came to be undertaken by the appellant Bank under Section 10 of the SARFAESI Act and an Eauction notice was issued on 26th September 2018. He submitted that the said notice was challenged by the Corporate Debtor by filing an application being SA No. 340/2018 before the learned Debt Recovery TribunalIII, Hyderabad (hereinafter referred to as "the DRT"). However, no stay was granted by the DRT in the said application.

It is submitted that on the contrary, an order came to be passed on 29th October 2018 by the learned DRT, whereby confirmation of sale was stayed, subject to deposit of Rs.12 crore by the Corporate Debtor. The Corporate Debtor failed to do so. After that, with mala fide intent, instead of making payment, a petition came to be filed under Section 10 of the IBC by the Corporate Debtor for the sole purpose of stalling the sale. He further submitted that the second Eauction notice was issued on 27th November 2018, which resulted in sale of the two properties.

10. Shri Mehta submitted that the order of the learned NCLT, admitting the petition under Section 10 of the IBC, came to be passed only on 3rd January 2019, i.e., prior to confirmation of sale. He submitted that it is thus clear that the CIRP was initiated only to stall the SARFAESI proceedings. It is submitted that though the issue with regard to Section 65 of the IBC was subsequently raised by the appellant Bank, neither the learned NCLT nor the learned NCLAT had considered the same.

It is submitted that the mala fide intention of the IRP is clear inasmuch as since the expromoters could not submit a credible plan, the learned NCLT, vide order dated 7th February 2022, has ordered for liquidation. It is submitted that a perusal of the said order dated 7th February 2022 would reveal that the delay was caused at the instance of the IRP, who has been seen to be helping the expromoters.

11. Shri Mehta further submitted that since the moratorium under Section 14 of the IBC has ceased to subsist after the order directing liquidation was passed under Section 52 of the IBC, the secured creditors were allowed to realise their security interest. It is therefore submitted that now, there is no bar on the appellant Bank to realise its money.

12. Shri Mehta submitted that in view of the provision of Section 54 of the IBC, the sale was complete after the appellant Bank had received 25% of the bid amount and the said was confirmed. He submitted that merely because a part of the sale consideration was received subsequently, it could not affect the sale. A reference in this respect is placed on the judgments of this Court in the cases of Vidhyadhar v. Manikrao and Another¹, B. Arvind Kumar v. Govt. of India and Others² and Kaliaperumal v. Rajagopal and Another³.

13. It is lastly submitted by Shri Mehta that Section 14(1)(c) of the IBC interdicts any action to foreclose, recover or enforce any security interest including any action under SARFAESI. However, it does not undo actions which have already stood completed.

14. Shri Vaidyanathan, learned Senior Counsel also supported the submissions of the learned Solicitor General made on behalf of the appellant Bank. It is submitted that the promoters of the Corporate Debtor have indulged into forum shopping with the malicious intent and as such, the learned NCLT ought not to have granted relief in their favour. It is submitted that the applicants were bona fide purchasers and put into possession and therefore should not be disturbed. It is submitted that the Corporate Debtor's right in respect of the mortgaged property is the right of redemption under Section 60 of the Transfer of Property Act, 1882 (hereinafter referred to as "the TP Act"). It is submitted that under Section 13(8) of the SARFAESI Act, as amended in 2016, the right of redemption is lost on issuance of public notice of auction or tender.

15. Shri Vaidyanathan further submitted that the mala fide intention of the Corporate Debtor and the IRP are glaring inasmuch as the applicants were successful auction purchasers and they were not added as party respondents in the proceedings before the learned NCLT. Relying on paragraph (21) of the Insolvency Law Committee Report, 2018, Shri Vaidyanathan submitted that the rights and priorities of creditors established prior to insolvency under commercial laws should be upheld to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationship.

16. Shri Viswanathan, learned Senior Counsel has supported the impugned judgment passed by the learned NCLAT as well as the order passed by the learned NCLT. He submitted that the title of the secured assets cannot be conveyed to the auction purchasers merely upon confirmation of sale even before receiving full sale consideration. He submitted that the title would be passed over only after receipt of the full consideration and issuance of sale certificate.

The learned Senior Counsel submitted that such contentions are totally contrary in view of various provisions of the SARFAESI Act, the said Rules as well as Sections 14(1)(c), 31(1) and 238 of the IBC. He submitted that only after the transfer takes place under Rules 8 and 9 of the said Rules, the title would be passed over to the auction purchasers. He relies on the judgment of this Court in the case of Hindon Forge Private Limited and Another v. State of Uttar Pradesh through District Magistrate, Ghaziabad and Another⁴.

17. Shri Viswanathan further submitted that Section 13(8) of the SARFAESI Act itself provides a right of redemption of secured assets to the owner/debtor. He relies on the judgment of this Court in the case of S. Karthik and Others v. N. Subhash Chand Jain and Others⁵ in support of this proposition.

18. Shri Viswanathan submitted that upon approval of the Resolution Plan (hereinafter referred to as "the RP"), in view of Section 31(1) of the IBC, all the debts stand legally resolved and the same is binding on all parties including the Corporate Debtor, its employees, members, creditors, all Govt. dues and the successful resolution applicant would be entitled to start on a clean slate. The learned Senior Counsel submitted that the Jural relationship of Creditor/Debtor would get altered/severed under a new contract upon approval of a new RP.

It is submitted that as a consequence, the security created under the old contract would stand released by operation of law and the relationship would be governed by the terms of the approved plan and the mortgage created under the old contract would get extinguished/novated. It is submitted that in any case, in view of Section 238 of the IBC, the provisions contained therein will override all other laws for the time being in force and the provisions of the IBC would also prevail over any other instrument having effect by virtue of any other law. A reliance in this respect is placed on the judgment of this Court in the case of Anand Rao Korada, Resolution Professional v. Varsha Fabrics Private Limited and Others⁶.

19. Shri Viswanathan further submitted that the continuation of any proceeding including the proceeding under the SARFAESI Act is totally illegal in view of Section 14(1)(c) of the IBC. It is, therefore, submitted that the continuation of any action under the SARFAESI Act by the appellant Bank and the receipt of the balance sale consideration was violative of Section 14(1)(c) of the IBC.

He submitted that the amount payable by the Corporate Debtor to the other Financial Creditors is much more than the amount received by the appellant Bank during the pendency of the CIRP. He submitted that under the provisions of the IBC, all the Financial Creditors would be entitled to a share in the amount received upon realization of the assets of the Corporate Debtor and the appellant Bank cannot keep it in entirety.

20. Shri Viswanathan submitted that the allegations with regard to mala fide are made only in order to prejudice the Court. It is submitted that in the petition filed under Section 10 of the IBC, the Corporate Debtor has clearly mentioned about declaration of NPA by both the appellant Bank and Andhra Bank and also initiation of auction process by both the Banks.

He submitted that in any case, initiation of the proceedings under the IBC for overall resolution of debts of the Corporate Debtor cannot be labelled as a mala fide attempt. He submitted that Section 65 of the IBC expressly provides for the mechanism and the remedy for addressing frivolous or malicious proceedings initiated under the SARFAESI Act. However, the appellant Bank has chosen not to take recourse to such proceedings. As such, the allegations of mala fide cannot be heard.

21. Shri Verma, learned counsel also supported the impugned judgment passed by the learned NCLAT as well as the order passed by the learned NCLT and the submissions made by Shri Viswanathan. It is submitted that the appellant Bank has never challenged the order dated 3rd January 2019, vide which the learned NCLT commenced the CIRP. He submitted that though the order of liquidation was passed by the learned NCLT on 7th February 2022, the same has been stayed by the learned NCLAT on 8th March 2022.

22. It is further submitted by Shri Verma that as a matter of fact, after the CIRP was initiated, the appellant Bank itself has submitted its claim in Claim Form C on 21st January 2019 for an amount of Rs.79.94 crore, which included the full value of the assets. It is, therefore, submitted that the appellant is estopped from contending that the amount of Rs.8.23 crore cannot be included in the amount available for CIRP.

23. For appreciating the rival submissions, it will be apposite to refer to Section 14(1)(c) of the IBC:

"14. Moratorium. - (1)

(a)

(b)

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

....."

24. It is thus clear that after the CIRP is initiated, there is moratorium for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act. It is clear that once the CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property. The words "including any action under the SARFAESI Act" are significant. The legislative intent is clear that after the CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover or enforce any security interest are prohibited.

25. It will also be relevant to refer to Section 238 of the IBC:

"238. Provisions of this Code to override other laws. - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

26. It could thus be seen that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

27. It has been consistently held by this Court that the IBC is a complete Code in itself and in view of the provisions of Section 238 of the IBC, the provisions of the IBC would prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force. A reference in this respect could be placed on the judgments of this Court in the cases of *Innovative Industries Limited v. ICICI Bank and Another*⁷, *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited*⁸ and *Ghanashyam Mishra and Sons Private Limited through the Authorised Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director and Others*⁹.

28. It is the contention of the appellant Bank that the sale in question was complete on its confirmation on 13th December 2018 and as such, the admission of the petition on 3rd January 2019 by the learned NCLT would not affect the said sale. Relying on the provisions of Section 54 of the TP Act, the learned Solicitor General submitted that merely because a part of the payment was received subsequently after initiation of CIRP, it will not deprive the appellant Bank from receiving the said money in pursuance to the sale which has already been completed. A reliance in this respect is placed on various judgments of this Court.

29. Insofar as the judgment of this Court in the case of *Vidhyadhar* (supra) is concerned, no doubt that it has been held that even if the full price of the property has not been paid, the transaction of the sale will take effect and the title would pass on that transaction. This Court has further held that the real test is the intention of the parties.

It has been held that the parties must intend to transfer ownership of the property and that they must also intend that the price would be paid either in praesenti or in future. However, it is to be noted that in the said case, the defendant No.2 had not only executed the sale deed in favour of the plaintiff but had presented it for registration, admitted its execution before the SubRegistrar before whom the remaining part of the sale consideration was paid and thereafter, the document was registered.

30. In the case of *B. Arvind Kumar* (supra), the property in question was a suit property and was sold in a public auction. The sale was confirmed by the District Judge, Civil and Military Station, Bangalore. What has been held by this Court is that when a property is sold by public auction in pursuance of the order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser.

It has been held that a sale certificate is issued to the purchaser only when the sale becomes absolute. It was held that when the auction purchaser derives title on confirmation of sale in his favour and a sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. Additionally, in the said case, the Court found that the sale certificate itself was registered.

31. In the case of *Kaliaperumal* (supra) also, the sale deed was registered on partial payment of consideration. However, in spite of registration of the sale deed, in the facts of the said case, the Court held that what was important is the intention of the parties. It was held that normally the ownership and the title of the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed.

However, that was not an invariable rule. What was paramount, was the intention of the parties. In the facts of the said case, the Court held that the parties intended that the ownership of the property would be transferred to the appellant only after the receipt of the entire sale consideration by the vendors as a condition precedent. Upon interpretation of the sale deed, the Court found that the title was intended to be passed only on the payment of the balance consideration.

32. It is further to be noted that the present case arises out of a statutory sale. The sale would be governed by Rules 8 and 9 of the said Rules. The sale would be complete only when the auction purchaser makes the entire payment and the authorised officer, exercising the power of sale, shall issue a certificate of sale of the property in favour of the purchaser in the Form given in Appendix V to the said Rules.

33. In the case of *Shakeena and Another v. Bank of India and Others*¹⁰, which was a case arising out of SARFAESI Act, this Court has held that the sale certificate issued in favour of the respondent No.3 did not require registration and that the sale process was complete on issuance of the sale certificate. The same has been followed by this Court in the case of *S. Karthik* (supra).

34. Undisputedly, in the present case, the balance amount has been accepted by the appellant Bank on 8th March 2019. The sale under the statutory scheme as contemplated under Rules 8 and 9 of the said Rules

would stand completed only on 8th March 2019. Admittedly, this date falls much after 3rd January 2019, i.e., on which date CIRP commenced and moratorium was ordered. As such, we are unable to accept the argument on behalf of the appellant Bank that the sale was complete upon receipt of the part payment.

35. In view of the provisions of Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act is prohibited. We are of the view that the appellant Bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated and the moratorium was ordered.

36. Insofar as the contention of the appellant Bank that the petition filed by the Corporate Debtor was mala fide is concerned, we do not find any merit in the said contention. All the details with regard to action taken by the appellant Bank have been specifically mentioned in the petition filed by the Corporate Debtor. Insofar as the contention with regard to liquidation order being passed is concerned, the same is already under challenge before the learned NCLAT. As such, we need not make any observation with regard to the same.

37. We, therefore, find that no case is made out for interfering with the concurrent orders passed by the learned NCLT dated 15th July 2020 and learned NCLAT dated 26th March 2021.

38. In the result, the present appeal is dismissed. Pending application(s), if any, shall stand disposed of in the above terms. No order as to costs.

1 (1999) 3 SCC 573

2 (2007) 5 SCC 745

3 (2009) 4 SCC 193

4 (2019) 2 SCC 198

5 2020 SCC OnLine SC 787

6 (2020) 14 SCC 198

7 (2018) 1 SCC 407

8 (2018) 18 SCC 786

9 (2021) 9 SCC 657

10 2019 SCC OnLine SC 1059

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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