

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 179 of 2023

IN THE MATTER OF:

Surender Singh

...Appellant

Versus

Yes Bank Ltd. & Anr.

...Respondents

Present:

For Appellant : Mr. Krishnendu Dutta, Sr. Advocate with Mr. Utsav Mukherjee, Ms. Smriti Churiwal, Mr. Jaiveer Kant, Ms. Deepti and Mr. Palash S Singhai, Advocates.

For Respondents : Mr. Ramji Srinivasan, Sr. Advocate with Mr. Chitranshul A. Sinha, Mr. Jaskaran S. Bhatia, Mr. Tamanna Malik, Advocates for JC Flowers ARC.

Ms. Shruti Pandey and Ms. Namrata Sarogi, Advocates.

ORDER

16.02.2023: Heard learned Counsel for the parties.

2. This appeal has been filed against an order dated 10.02.2023 passed by the Adjudicating Authority (NCLT Mumbai) by which order the Adjudicating Authority has admitted Section 7 Application filed by Yes Bank, the Respondent No. 1 herein. The Appellant before us was extended various financial facilities by the Financial Creditor and on account of default committed by the Appellant, the Application was initiated alleging default of Rs. 4,689,990,947.45. The Adjudicating Authority heard the parties on 14.12.2022 and reserved the order. Subsequent to reserving of the order by the Adjudicating Authority, an Interlocutory Application was filed by the Corporate Debtor being I.A. no. 210/2023. In the I.A. the Corporate Debtor stated that final hearing in the Application took place on 14.12.2022 and the matter was

reserved for orders. It is submitted that Yes Bank has already assigned the debt in favour of JC Flowers Asset Reconstruction Company. Letter dated 13.12.2022 sent by Yes Bank has also been referred and in the Application following prayer was made:

“PRAYERS:

In view of the above, the Applicant abovenamed prays for the following reliefs from this Hon’ble Tribunal:

- a. that, this Hon’ble Tribunal be pleased to dismiss the Company Petition No. 301 of 2022 and Interlocutory Application No. 1257 of 2022;*
- b. that, pending hearing and final disposal of the present Interlocutory Application, this Hon’ble Tribunal be pleased to stay the proceedings in the Company Petition No. 301 of 2022 and the Interlocutory Application No. 1257 of 2022;*
- c. that, this Hon’ble Tribunal be pleased to grant costs to the Applicant for preferring the present Interlocutory Application;*
- d. interim relief in terms of prayer (b) above and,*
- e. that, this Hon’ble Tribunal be pleased to pass such other order(s) and/or directions(s) as the circumstances of the present case warrant.”*

3. The Application came before the Adjudicating Authority on 19.01.2023 on which date following order was passed:

“ORDER

IA 210/2023

Ld. Counsel appearing for the Applicant, Corporate Debtor is present. It is observed that the main Company Petition is heard extensively and was Reserved for Orders on

14.12.2022. The present Interlocutory Application is filed by the Corporate Debtor for bringing on record assignment of Debt. Ld. Counsel for the Respondent, Financial Creditor is present and waives service of notice and seeks time to file Reply. Let the same be done well before the adjourned date by duly serving copy to the other side well in advance. List this matter on Board on 21.02.2023.”

4. Subsequent to the order dated 19.01.2023, the Adjudicating Authority by the Impugned order dated 10.02.2023, admitted the Section 7 Application.

5. Shri Krishnendu Dutta, learned Sr. Counsel appearing for the Appellant contends that when the Corporate Debtor had filed an Application praying for dismissal of the Application and it was entertained on 19.01.2023 and 21.02.2023 was the date fixed in the Application, there was no occasion for the Adjudicating Authority to admit Section 7 Application. It is submitted that the Adjudicating Authority ought to have considered the consequences of assignment in the Application no. 210 of 2023.

6. Mr. Ramji Srinivasan appearing for assignee, J.C. Flower ARC has submitted that there is no consequence of the assignment made to the proceeding and even if the assignee is not brought on record, since the hearing completed on 14.12.2022, therefore the Adjudicating Authority could have pronounced well before 10.02.2023. It is submitted that the application filed by the Corporate Debtor on which notice was issued on 19.01.2023, it does not mean that the Adjudicating Authority shall consequently reopen the case and hear the parties again. It is submitted that after reserving of the order many applications are filed and mere fact that the notices were issued is

inconsequenced. He has further submitted that in view of the provision of Section 5(4) of SARFAECI Act, 2002, the proceeding could not have been abated merely because of an assignment and proceeding could have been continued and it was open for the assignee to come or not to come and there was no error in the order dated 10.02.2023. He has relied upon a judgment of the Hon'ble Supreme Court- **2016(1) SCC 730 titled "Sharadamma Vs. Mohammed Pyrejan (Dead) through Legal representatives and Another"**.

7. We have heard the parties and perused the records. There is no dispute between the parties that Section 7 Application was heard on 14.12.2022 and order was reserved. After reserving of the order by the Adjudicating Authority, I.A. No. 210 of 2023 has been filed by the Corporate Debtor. In paragraph-3 of the Application the fact it is clearly mentioned that the order was reserved and hearing took place on 14.12.2023.

8. The events which took place pertaining to assignment in favour of JC Flower ARC has been mentioned in paragraphs 4 to 7. It is useful to extract the contents of paragraphs 3 to 7

"3. The Applicant states that, the 'Final Hearing' of the Petition took place on 14th December 2022. After hearing the Ld. Senior Counsels representing the parties extensively, this Hon'ble Court was pleased to reserve the matter 'For Orders'.

4. During the hearing of the Petition, the Respondent represented to this Hon'ble Court that, it is the 'financial creditor' to the present Applicant. However, for reasons best known to itself, the Respondent has suppressed from this Hon'ble Court that, as on the date of final hearing of the

Petition, the Interlocutory Application No. 1257 of 2022 and the Interlocutory Application No. 3769 of 2022, i.e., on 14th December, 2022, it has already agreed to assign the (alleged) debt of the Applicant, as well as the debts of the Principal Borrowers in favour of the J.C. Flowers Asset Reconstruction Private Limited (hereinafter referred to herein as 'JC Flower ARC'). It is obvious that the Respondent was in discussions with JC Flower ARC to enter into terms of assignment of the debt much prior to 14th December 2022 as the total debt being assigned was in the sum upwards of Rs. 4,80,00,00,00,000/- (Rupees Forty-Eight Thousand Crores) which would require an extensive amount of time, deliberation and due diligence by the parties involved.

5. *The Applicant states that, on 30th December 2022 the Respondent addressed letters to the Principal Borrowers and the present Applicant respectively, thereby intimating the addresses that, "...pursuant to the execution of Assignment Agreement dated December 16, 2022 between YBL and JCF ARC ("Assignment Agreement"), we have absolutely assigned and transferred, unto and in favour of JCF ARC, the Loans and all the amounts due and monies stipulated in or payable under the Financing Documents by the Borrower to YBL, together with all underlying security interests... and our rights, title and interests (of whatsoever nature) in relation to the same".*

Copies of the letters dated 30th December 2022 issued by the Respondent to the Applicant and the Principal Borrowers are annexed hereto and marked as 'Exhibit B(Colly)'.

6. Thereafter, on 2nd January 2023, JC Flowers ARC addressed letters to the Principal Borrowers and the present Applicant, thereby informing the addressees thereto that,

“... Yes Bank Limited (“YES Bank”) has absolutely assigned and transferred all the rights, title and interests in the financial assets pertaining to ... together with the security created thereof in favour of J.C. Flowers Asset Reconstruction Private Limited (“JCF ARC”) vide assignment agreement executed in favour of JCF ARC acting in its capacity as trustee of JCF YES 2022-23/4 Trust on December 16, 2022..

Pursuant to the above, JCF ARC has become the lender and all the rights, title and interest of YES Bank with respect to the financial assets pertaining to the Borrower together with security created thereof stands vested in JCF ARC pursuant to the provisions of Securitisation and Reconstruction of Financial assets and Enforcement of Security Interest Act, 2022...”

Copies of the letters dated 2nd January 2023 issued by JC Flowers ARC to the Applicant and the Principal Borrowers are annexed hereto and marked as ‘Exhibit C(colly)’.

7. Under Section 60(5)(a) of the Code read with Rule 11 of the NCLT Rules, this Hon’ble Tribunal has the inherent jurisdiction to entertain or dispose off any application or proceedings by or against the corporate or corporate person for meeting ends of justice and/or to prevent abuse of process of this Hon’ble Tribunal. For the reasons as set out herein, the present IA is required to be decided by this Hon’ble Tribunal.”

9. The submission which has been made by learned Counsel Mr. Ramji Srinivasan is relying on Section 5(4) of the SARFAESI is that the proceeding could have been continued and assignment had no effect on the proceeding. Section 5 deals with acquisition of rights and interest on financial assets which provides as follows:

“Section 5 in The Securitisation And Reconstruction Of Financial Assets And enforcement Of Security Interest Act, 2002

5. Acquisition of rights or interest in financial assets.-

(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution-

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the securitisation company or the reconstruction company, such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

(3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers- of- attorney, grants of legal representation, permissions, approvals, consents or no- objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub- section (1) and to which the concerned bank or financial institution is a party or which are in fa our of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company o reconstruction company, as the case may be.

(4) If, on the date of acquisition of financial asset under sub- section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub- section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or

*against the securitisation company or reconstruction company,
as the case may be.”*

10. The provisions of Section 5(4) of SARFAESI Act are clear and categorical that mere assignment during pendency of the proceeding, as referred in 5(4) of SARFACEI Act, shall not be prejudicially affected by the reason of acquisition of financial debt by the said JC Flower ARC as the case may be, but the suit or appeal or other proceeding may be continued, prosecuted and enforced by the assignee JC Flower ARC.

11. In the facts of the present case, we proceed on the premise that by virtue of Section 5(4) of SARFAECI Act, the Application could have been continued and would not have been prejudicially affected by reason of acquisition of the financial asset. But present is the case, where an application has been filed by the Corporate Debtor praying for dismissal of Section 7 Application on which application the Adjudicating Authority passed the order on 19.01.2023 taking note of the Application and granted time to Financial Creditor to file Reply since it has waived notice. Adjudicating Authority categorically directed that the Reply be filed before the adjourned date after duly serving copy to the Corporate Debtor.

12. Hon'ble Supreme Court in the matter of **“Sharadamma Vs. Mohammed Pyrejan (Dead) through Legal representatives and Another”**.(supra) where the Hon'ble Supreme Court had occasion to consider order 22, Rules 10 & 11 of Civil Procedure Code after noticing the aforesaid provisions in paragraphs 4 & 5, the following have been laid down:

“4. Order 22 Rule 10 and Order 22 Rule 11 CPC are extracted hereunder:

Order 22 Rules 10 & 11

“10. Procedure in case of assignment before final order in suit. – (1) *In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.*

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

11. Application of Order to appeals. - in the application of this Order to appeals, so far as may be, the word ‘plaintiff’ shall be held to include an appellant, the word ‘defendant’ a respondent, and the word ‘suit’ an appeal.”

5. A bare reading of the provisions of Order 22 Rule 10 makes it clear that the legislature has not envisaged the penalty of dismissal of the suit or appeal on account of failure of the assignee to move an application for impleadment and to continue the proceedings. Thus, there cannot be dismissal of the suit or appeal, as the case may be, on account of failure of the assignee to file an application to continue to proceedings. It would be open to the assignor to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject-matter of dispute. He can continue the proceedings for the benefit of assignee.”

13. Hon’ble Supreme Court on considering the aforesaid Rules had held that on account of failure of assignee to file application to continue the proceeding, the application could not have been dismissed, the original Applicant could

have continued the proceeding for the benefit of assignee. There can be no dispute to the proposition laid down by the Hon'ble Supreme Court in reference to provision under Order 22, Rules 10 & 11 of CPC. In the present case we are considering the case where Section 7 Application was filed by the Yes Bank where hearing took place before the Adjudicating Authority, the fact of assignment was brought under notice and prayer was made to dismiss Section 7 Application. Application was entertained by the Adjudicating Authority and notices were issued on 19.01.2023 fixing 21.12.2022 as the next date.

14. We are of the view that the Adjudicating Authority, it having already issued notice on the application, granted time to the Financial Creditor to reply the Application, ought to have considered the Application. At this stage when the Application has not been considered, we are of the view that it is not necessary for us to express any opinion on the merits of the Application which may prejudice the parties before the Adjudicating Authority. The fact that the Adjudicating Authority itself has fixed the date 21.02.2022 on the application in the same CP(IB) 301(MB) 2022, before considering the said Application it was not be appropriate to deliver the order under Section 7 Application.

15. The submission of Mr. Ramji Srinivasan that after reserving of the order, several applications are filed and if notices are issued, that should not prejudice the matter which has already been reserved, does not appeal to us. In the present case, the Adjudicating Authority has issued Notices and prayer of the Financial Creditor to file Reply was acceded to, it was necessary to decide the said application. Hence, before the date fixed for consideration of the case,

the Adjudicating Authority ought not to have admitted Section 7 Application. In view of the above, we allow this Appeal and set aside the order dated 10.02.2022. I.A. No. 210/2023 may be considered by Adjudicating Authority and dispose of in accordance with law. We make it clear that we are not expressing any opinion on the merits of Section 7 Application and it is open for the parties to raise all submissions as permissible in law.

16. Learned Counsel for the Assignee submits that assignee may also be permitted to file response to the Application and it may also be permitted to be brought on record. In view of the aforesaid, the assignee be impleaded in I.A. No. 210 of 2023 and time is allowed to file response to the Application before the next date before the Adjudicating Authority. We also make it clear that we have not expressed any opinion about the merit of I.A. No. 210 of 2023. Let Adjudicating Authority consider the Application and pass fresh order both on Application IA No. 210 of 2023 and Section 7 Application in accordance with law.

All contentions of both the parties are left open.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

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