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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CO.APP. 9/2019 and CM APPL. 17941/2019 (stay)**

IDBI BANK LTD ..... Appellant

Through: Mr.Rohit Kumar, Advocate.

versus

ELECTRA POWER PVT. LTD. & ANR. ..... Respondents

Through: Ms.Ruchi Sindhwani, Sr.Standing Counsel with Ms.Megha Bharara, Advocate for OL.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

<u>O R D E R</u>

% **31.07.2019**

1. The IDBI Bank Ltd. is in appeal against an order dated 4th December 2018 passed by the learned Company Judge in CA No. 770 of 2018 in Company Petition No.194 of 2013. By the impugned order, the IDBI, which is a secured creditor of the Respondent No.1 Electra Power Pvt. Ltd. ('EPPL'), has been permitted to take over the property at A2/2-25, Site B, Surajpur Industrial Area, Greater Noida, U.P. mortgaged by EPPL with it, subject to the Appellant agreeing to meet the liabilities of the workmen under Section 529A of the Companies Act, 1956 and also the costs of security provided at the property by the Official Liquidator (OL) attached to this Court.

2. The facts in brief are that the Appellant advanced credit facilities to EPPL for which two properties of EPPL – one of which was the aforementioned property - were mortgaged with the Appellant. As a result of EPPL defaulting in making payments to the Appellant, recovery proceedings were initiated by the Appellant against EPPL before the Debt Recovery Tribunal (II) ('DRT') Delhi under the Recovery of Debts and Bankruptcy Act, 1993 ('RDB Act'). By an order dated 18th March 2016 of the DRT, a recovery certificate in the sum of Rs.2,21,76,169/- and further interest was passed against EPPL and in favour of the Appellant.

3. The Appellant managed to sell one of the two mortgaged properties and after recovering those sale proceeds, the outstanding amount due to the Appellant as on 27th February 2019 was Rs.4,68,71,925.85 with further interest charges etc. The Appellant states that during the pendency of the recovery proceedings, it was noticed that the property in question i.e. A2/2-25, Site B, Surajpur Industrial Area, Greater Noida, U.P. had been sealed by the Commercial Tax Department (CTD) of the State of Uttar Pradesh. Accordingly the Appellant filed an application before DRT for de-sealing of the premises.

4. By orders dated 5th September and 12th October 2017 the DRT directed the CTD to de-seal the property. The Appellant states that consequent to the above orders being passed, the property in question was de-sealed. However, when on 31st October 2017, the Appellant's official visited the aforementioned property, it was noticed that on account of the order of the learned Company Judge in Company Petition No.194 of 2013, the OL

attached to this Court had taken possession of the property. It is then stated that the Appellant moved the learned Company Judge with CA No. 770 of 2018 seeking the de-sealing of the said property.

5. The submission of Mr. Rohit Kumar, learned counsel for the Appellant, is that the Appellant should not be required to bear the liability towards the workmen's dues and the cost of the security provided at the site by the OL to protect the property in question, since in any event the Appellant as a secured creditor stood outside the winding up proceedings. As far as the workman's dues are concerned, learned counsel for the Appellant referred to Section 31B of the IDBI Act which according to him gives priority to the secured creditors.

6. On the other hand, Ms. Ruchi Sindhwani, learned counsel for the OL, has pointed out that the Appellant has been totally lackadaisical in making any attempt to protect the property mortgaged with it. She repeatedly insisted that this Court should require the Appellant to disclose when it first came to know that the property had been sealed by the by the CTD. Her submission is that since the Appellant made no effort to protect the property in question, the OL should not be made to bear the liability for providing security to the property. She refers to the provisos under Sections 529(1) and 529(2) of the Companies Act, 1956. She also relies on the decision in ***Pegasus Assets Reconstruction v. M/s. Haryana Concast Ltd. (2016) 4 SCC 47***.

7. In the present case, the Court finds that the Appellant was before the DRT seeking to recover its dues. Admittedly, the property in question was sealed

by the CTD and the orders passed by the DRT ordering the de-sealing of the property at the instance of the Appellant have been placed on record. It is plain that at least till the date of passing of the orders dated 5th September and 12th October 2017 by the DRT, the Appellant could not have taken possession of the property in question. However, at the same time it is plain that after the said orders were passed and the officer of the Appellant visited the property in question on 31st October 2017, the Appellant could not claim that it was unaware that the possession of the property had been taken over by the OL.

8. Ms. Sindhwani informed this Court that when the OL went to the property in question, he found the seal of the CTD. Nevertheless he placed his own locks additionally on the property on 20th May 2016 and from that day onwards, since there was no security, the OL deployed two security guards for 8 hour shifts aggregating 6 security guards per day of M/s. P. S. Security Services. She submitted that if the Appellant was keen that the possession of the property should be restored to it, it ought to have taken immediate action by moving the learned Company Judge.

9. It is sought to be submitted on behalf of the Appellant by Mr. Kumar that the citation regarding appointment of the OL for EPPL was not published and, therefore, the Appellant was not required to acknowledge the OL having taken possession of the property in question. This submission requires to be rejected. Once the Appellant was at the property in question and saw the locks placed on it by the OL, it could no longer pretend to be unaware of the fact that in the proceedings before the learned Company

Judge, the OL had in fact been directed to take over possession of the property in question.

10. Sections 529(1) and 529(2) of the Act with the respective provisos read as under:

> "529. Application of insolvency rules in winding up of insolvent companies.
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> (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-
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> (a) debts provable;
>
> (b) the valuation of annuities and future and contingent liabilities; and
>
> (c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:
>
> Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen' s portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-
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> (a) the liquidator shall be entitled to represent the workmen and enforce such charge;
>
> (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied ratably for the discharge of workmen' s dues; and
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> (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen' s portion in his

security, whichever is less, shall rank pari passu with the workmen' s dues for the purposes of section 529A.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section,

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.

Explanation: For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security."

11. It is plain that in terms of the proviso to Section 529(1), the security of every secured creditor is deemed to be subject to a *pari passu* charge in favour of the workman to the extent of the workman's dues. Consequently, the impugned order of the learned Single Judge requiring the Appellant to undertake the liability of workmen's dues cannot be said to be contrary to the law.

12. As far as the obligation of the Appellant to provide security at the site of the property in question is concerned, the proviso to Section 529(2) of the Act is clear in this regard that if the secured creditor proceeds to realise

security, it 'shall be liable to pay his portion of expenses incurred by the liquidator' for preservation of security.

13. In the present case, even if one were to consider that the Appellant could not have proceeded to realise the security till it actually got possession of the property in question i.e. from the date it was ordered to be de-sealed by the DRT i.e. 12th October 2017, certainly the obligation to preserve the property thereafter was that of the Appellant.

14. Therefore, in modification of the order of the learned Single Judge only to the extent of the Appellant having to reimburse the costs incurred by the OL in providing security, it is directed that the Appellant will be handed over possession of the property in question by the OL subject to the Appellant

(1) paying the workman's dues including EPF.

(2) paying the costs of the security provided by the OL at the site from 12th October 2017 till the date of handing over of the possession.

(3) Either continuing the security arrangements made by the OL or immediately substituting it with the agency engaged by the Appellant so that there is no gap in providing security at the property.

15. It will be open to the Appellant now to sit with the OL to work out the precise date on which it is prepared to take over possession subject to fulfilment of all of the above conditions.

16. It is also clarified that this order is being passed in the facts and

circumstances outlined hereinbefore. The apprehension of learned counsel for the OL that this order may constitute a precedent for other cases as well is unfounded. Each case will have to be decided on its own facts.

17. The appeal and the pending application are disposed of in the above terms. The interim order is vacated.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 31, 2019
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