

IN THE HIGH COURT AT CALCUTTA
(ORDINARY ORIGINAL CIVIL JURISDICTION)
(ORIGINAL SIDE)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

E.C. No. 429 of 2019

GA/ 1/2020(Old No:GA/277/2020), GA/2/2023

E.C. No. 459 of 2019

GA/ 1/2020(Old No:GA/278/2020)

E.C. No. 460 of 2019

GA/ 1/2020(Old No:GA/279/2020)

***CANDOR GURGAON TWO DEVELOPERS &
PROJECTS PRIVATE LIMITED***

VS.

SREI INFRASTRUCTURE FINANCE LIMITED

For the Award-holder : Mr. Ranjan Bachawat, Sr. Adv.
Mr. Aakash Bajaj, Adv.
Ms. Shreya Singh, Adv.
Mr. Shubrojyoti Mookherjee, Adv.

For the Banks : Mr. Om Narayan Rai, Adv.
Mr. Rajdeep Mantha, Adv.
Mr. M. Rajeshwara Rao, Adv.

For the Award-debtor : Mr. Jishnu Saha, Sr. Adv.
Mr. Swatarup Banerjee, Adv.
Mr. Aditya Kanodia, Adv.
Ms. Suparna Sardar, Adv.

Hearing concluded on : 8th December, 2023

Judgement on : 20th December, 2023

Siddhartha Roy Chowdhury, J.:

1. By this common judgement, I propose to dispose of three sets of applications filed by the Award Holder for execution of three separate arbitral awards to the extent they allegedly remained unsatisfied.

2. Briefly stated, on 11th December 2017, the Arbitral Tribunal appointed by this Hon'ble Court duly made and published its final awards. By and in terms of such award the Arbitral Tribunal was pleased to direct the Award Debtor to pay to the Award Holder :

(i) The principal amount advanced under the underlying agreement along with interest calculated at the contractual rate of 10.9% per annum from January, 2012 till the date of filing of the statement of claim. This amount under the three awards was INR 224,05,72,875/-,

(ii) INR 1,50,00,000/- towards cost and

(iii) In the event of failure to pay the said sum under the award within 30 days from the date of publishing of the arbitral award, i.e. by 11th January, 2018 the award debtor would incur the liability to pay interest @ 16% per annum.

3. The Award Debtor, however, filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the awards but learned Single Judge dismissed the application. The Award Debtor assailed the said judgment of learned Single Judge before the Division Bench of this Hon'ble Court but the appeals being APO No. 153 of 2019, APO No. 154 of 2019 and APO No. 160 of 2019 were dismissed by orders on 3rd December, 2019. The Award Debtor made an unsuccessful attempt to get the judgement reversed before the Hon'ble Supreme Court. The Special Leave Petition (SLP) was dismissed by the Hon'ble Supreme Court on 17th December, 2019. Thereafter, the Award Debtor preferred a review application being

Review Petition (Civil) No. 5451 of 2020 against the order dated 17th December, 2019 before the Hon'ble Supreme Court seeking, *inter alia*, reduction in the rate of interest awarded by the Arbitral Tribunal and adjustment of an amount of INR. 33,33,00,000/- claimed to have been paid by Award Debtor to the Award Holder before filing of the statement of claim in the arbitral proceedings. During the pendency of the review application, another application being M.A. No. 9750 of 2000, seeking clarification of the order dated 17th December, 2019 passed in the SLP was filed by the Award Debtor before the Hon'ble Supreme Court. On 28th April, 2020 the review petition was dismissed by the Hon'ble Supreme Court and the application for clarification was also dismissed.

4. After the dismissal of the Special Leave Petition filed by the Award Debtor, the Award Holder swung into action to recover its legitimate claim and three execution petitions were filed with a prayer for attachment to ensure the availability of the amount due under the arbitral award i.e. INR. 298,40,74,756/-. On 23rd December, 2019 the prayer for attachment was allowed by the learned Single Judge and further direction was given for encashment of demand drafts and invocation of bank guarantee deposited by the Award Debtor. Thus the attached properties including the account no. 077013100000007 with Union Bank (erstwhile Andhra Bank) and account no. 50017563859 with Indian Bank (erstwhile Allahabad Bank) were held by this Hon'ble Court in custodia legis. Pursuant to the order passed on 23rd December, 2019, the Award Holder requested the banks to

inform the Award Holder about the amount of money available in the accounts as on 23rd December, 2019 but bank did not respond to such communication of the Award Holder. This inaction or omission on the part of the banks led the Hon'ble Court to pass an order on 14th January, 2020, *inter alia*, directing the highest officials of the banks to appear in person with bank statement and to affirm an affidavit explaining the reason for non-compliance of the order of the Court by the bank, and steps taken or proposed to be taken against the delinquent employees. Pursuant to such direction the banks filed affidavits on 11th February, 2020 admitting their mistake, they tendered apologies and also placed on record the statement of accounts which revealed that in violation of the order of the Court dated 23rd December, 2019 the banks allowed the Award Debtor to withdraw nearly INR. 500,00,00,000/- from the accounts. Direction was given by the Court to the banks to replenish the accounts to bring it back to the status as was on 23rd December, 2019 and INR 499,99,52,837/- was credited into the account in Indian Bank. The Award Holder is seeking order to realize the unsatisfied award amount i.e. INR. 47,09,00,000/- out of sum attached by the Hon'ble Court but the Award Debtor at various stages tried to kill time and, thereafter, the bankers took the baton from the Award Debtor to frustrate the claim of the Award Holder.

5. It is the specific case of the banks that the cash credit accounts cannot be attached. Since banks were neither a party to the Arbitral Proceeding, nor even stood as guarantor, bank has/had no liability to

pay the decretal due or award. According to the Award Debtor with the approval of the Resolution Plan, all claims, beyond the Resolution Plan came to naught.

6. It is submitted by Mr. Bachawat, learned Senior Counsel representing the Award Holder that by the order of the Court, the amount was brought in for the specific purpose for satisfying the award and for the benefit of Award Holder. However, the said amount thereafter wrongfully debited by the banks for various heads such as interest, loans recovery etc. in the breach of the order of the Court passed on 28th February, 2020 which only permitted the banks to make withdrawal in regard to credit accumulation and any other bank charges and nothing else.
7. Mr. Bachawat, learned Senior Counsel further submits banks are holding money in trust and, therefore, cannot resist the claim of the Award Holder in any manner whatsoever for the satisfaction of the remaining amount of INR 47,91,58,533/- when the order of attachment passed on 23rd December, 2019 are in force being accepted by the banks and Administrators.
8. Mr. Bachawat further submits that the attachment orders were passed on 23rd December, 2019 prior to the initiation of insolvency proceeding on 8th October, 2021. Therefore, it is trite to say that the order of attachment passed before the insolvency proceeding took off must remain unaffected by such proceeding. It is further contended that the statement of claim by the Award Holder to the Administrator was without prejudice to the execution proceeding as well as without

prejudice to order of attachment. Even the Administrator on 15th September, 2023 made it explicitly clear that it had no objection towards payment of unsatisfied award amount to the Award Holder by the bank.

9. Mr. Bachawat submits that purpose of attachment is to ensure the satisfaction of the amount due under the decree/award, which is held by the Court in custodia legis. Under such circumstances, bank could not have dealt with the said amount in the accounts and appropriate the same towards various charges. Mr. Bachawat submits that amount of money once attached cannot be subjected to lien and set off. Therefore, the contentions of the banks are in the teeth of the attachment orders.

10. To buttress his point Mr. Bachawat relies upon the judgement of Hon'ble Bombay High Court in **BANK OF BARODA VS. FAIR GROWTH FINANCE SERVICES LIMITED** reported in **1993 SCC OnLine Bom 448**, wherein it is held :

“14.In Shanti Prasad Jain v. Director of Enforcement, [1962] 2 SCR 297, 328; [1963] 33 Comp Cas 231, 252, the rector of held that deposit of moneys by a customer with a bank may be a general deposit or a specific deposit. It was held by the court that deposit of moneys by a customer with a bank may generally create the relationship of debtor and creditor between the bank and the customer, but when money is entrusted to a bank for application to a particular specific purpose and is in the nature of a specific deposit, the aforesaid presumption would not operate. At page 328 (at page 252 of 33 Comp Cas) of the said judgment, Venkatarama Aiyar J., speaking for the Bench of the apex

court, approved the formulation of the relevant principles in *Paget's Law of Banking*, sixth edition, page 48, and in *Corpus Juris Secundum*, volume 9, pages 546 and 570. At page 48 of *Paget's Law of Banking*, sixth edition, it is stated that 'superimposed on this general relationship of banker and customer there may be special relationships arising from particular circumstances and requirements and that the express terms of those relationships override the Implied terms arising from the general relationship. The intention of the parties controls the character of the relation between bank and depositor, which may be that of bailee and bailor. At page 570 of *Corpus Juris Secundum* volume 9, it is stated as under:

'...When money is delivered to a bank for application to a particular specific purpose it is not a general deposit creating the relationship of debtor and creditor, but a specific deposit creating the relationship of bailee and bailor or trustee and beneficiary.'

The above statement of law was approved by the Supreme Court and lays down the relevant principles accurately. In *Shanti Prasad Jain's case*, [1963] 33 Comp Cas 231 (SC), the account was opened with the German bank with a stipulation that the said Mr. Jain was not to operate the said account except for the purposes specified and the bank was informed of the arrangement under which the deposit was made. It was held by Venkatarama Aiyar J. that in the circumstances, the bank had only custody of the money as if it was a stakeholder with liability to hand it over to the person who would become entitled to it under the arrangement. It was held by the court that the moneys so held by the bank under a special arrangement could not constitute a relationship of debtor and creditor but constituted the bank as a trustee or a stakeholder."

15. I shall now refer to the leading judgment of the House of Lords in the case of *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] 3 All ER 651; [1969] 39 Comp Cas 105 (HL). In my opinion, the ratio of this judgment and the formulation of relevant principles by the Court of Appeal in the case of *Quistclose Investments Ltd Ne Rolls Razor Ltd.* (1968] 1 All ER 613 [1968] 38 Comp Cas 810 (CA) also clinch the issue in favour of the applicants. In the above referred case, the House of Lords affirmed the decision of the Court of Appeal. Lord Wilberforce delivered the main Judgment on behalf of the House of Lords and Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest and Lord Pearce concurred with Lord Wilberforce. It is necessary to notice the material facts of the case before deducing the relevant principles laid down in the case. In an annual general meeting of R.R. Ltd. on July 2, 1964, payment of dividend was approved a general meeting of with the bank which exceeded the limit. The bank refused to make funds available to R. .R. Ltd. for the purpose of implementation of the resolution declaring dividends. The respondents agreed t to advance a loan to R.R. Ltd. for the specific purpose of paying the dividend. R.R. Ltd. deposited the cheque of the respondent with the bank with as covering letter clarifying the purpose and object of this special loan for a specific purpose. As required by the company, the amount of the cheque was credited in a separate account with the bank on the stipulation expressly agreed upon. The directors of R.R. Ltd. passed a resolution for voluntary liquidation of the company. The moneys in question were not utilised for distribution of dividends. The respondent claimed the amount from the bank contending that the moneys deposited with the bank were impressed with trust in favour of parties entitled to receive dividend and in favour of the respondents in case the above-referred primary purpose failed for some reason. The

bank asserted that the bank was entitled to set off these amounts against the liability of R.R. Ltd. in the overdraft account. The Court of Appeal as well as the House of Lords held that as between the respondent and R.R. Ltd., the terms on which the loan was made were such as to impress the money with a trust in favour of the respondents in the event of dividends not being paid, because the money was never to become part of the assets of R.R. Ltd., but was entrusted for being used only for payment of dividend coupled with the conditions that If for any reason the dividend was not paid, the money must be refunded and/or repaid to the respondent. The court held that law implied a primary trust for payment of dividends and secondary trust for benefit of the respondent if for some reason the primary trust failed. The court took note of the fact that the bank was fully aware of the terms on which the said amounts were entrusted by the respondents to R.R. Ltd., for the purpose of being deposited in a separate account with the bank. During the course of his judgment, Lord Wilberforce observed that the arrangements of this character gave rise to a relationship of a fiduciary character or the trust. The House of Lords discussed several decided cases on the subject and observed that the moneys advanced for the specific purpose did not with a th trust primarily for dividends and secondarily for the respondents. After referring to the leading judgment in the case of *Toovey v. Milne*, [1819] 2 B & Ald. 683; 106 ER 514, and several subsequent cases, Lord Wilberforce observed that these cases had the support of longevity, authority, consistency and good sense. The House of Lords affirmed the observations of Lord Justice Russell of the Court of Appeal in the same case to the effect that it would be giving a complete windfall to the Barclays Bank Ltd. if it was held that the bank had a right to retain the moneys in

question. It is obvious that our legal system could not provide for such a windfall in favour of the bank or anyone else.

16. In the above referred judgment of the House of Lords, it was held that even moneys advanced as a loan could be treated as impressed with trust when the moneys were advanced for a specific purpose, the same were duly earmarked and the relevant stipulations attached to the advance of moneys for a specific purpose were brought to the knowledge of the bank while depositing the amount in a separate account. It was held by the court that the mere fact that the transaction originated as a loan by itself did not destroy the character of the amount being trust fund or the amount being considered as impressed with a trust for a specific purpose. Applying the principles of the above referred judgment and other relevant cases already noticed above, I hold that the amounts in question were merely entrusted to the bank for specific purpose and the same were impressed with trust throughout primarily for the benefit of subscribers and secondarily for the benefit of the company, J.e., (1) to the extent of allotment moneys for the benefit of the company, and (ii) to the extent of refundable amount for the benefit of subscribers. These moneys continued and would continue to be impressed with trust for the purposes specified in section 73(3A) of the Act even after the release of the said moneys by the respondents and while the same are in the hands of the company or another banker under the authority of the company till the specified purposes are carried out. If the company or its directors have already refunded or undertaken to refund the refundable portion of the amount to the subscribers, the court can compel the bank to refund the entire amount to the company with or without Interest as the court deems fit.

17. Not only am I bound by this judgment, and the judgments of the Supreme Court which have been set out therein, but I am in complete agreement with the same. In this case, apart from the fact that the moneys were received from subscribers in the capacity as principal bankers, the third respondents have also given specific directions for utilisation of the moneys. Therefore, by reason of this specific direction the moneys are held in trust. They are held in trust for payment to the first respondent. They now stand attached. There can now be no contrary alienation. No Fight of lien or set off can now be exercised. In any event no right of lien or set off can exist whilst the amounts are in the account of the third respondent.”

11. Mr. Bachawat further submits that if the plea of bank is accepted it would defeat the very purpose of attachment and would render the orders passed by this Hon'ble Court hollow and without substance. It is further adverted that the stand taken by bank in course of hearing is not based on pleading. It is developed in course of hearing of the case. The bank was given liberty to collect bank charges or other charges which according to Mr. Bachawat, would be (a) Processing charges; (b) Commitment charges; (c) Unsatisfactory cumulative inflow in OCC account; (d) Delayed/non-payment of interest; (e) Unit inspection charges; (f) JLF/Consortium meeting charges; (g) Delayed/non-submission of stock statement; (h) Delayed/non-submission of QIS; (i) Non-submission of ABS.
12. It is finally submitted by Mr. Bachawat that the attachment orders passed by the Court are still valid and subsisting. The withdrawals made by the bank from the attached bank accounts are contrary to

the letter and spirit of the order of attachment. Banks deserves the mandate to release the unsatisfied amount of INR 47,91,58,533/- from the attached bank accounts.

13. Mr. Om Narayan Rai, learned Counsel representing the banks vigorously submits that the Indian Bank and Union Bank of India are the creditors of the Award Debtor. The Award Debtor was liable to pay a sum of Rs. 2847,45,00,000/- to the Union Bank and Rs. 2031.38 corer to Indian Bank. Neither the Union Bank nor the Indian Bank was party to the arbitral proceeding between the Award Debtor and Award Holder. Therefore, the award is not binding on the banks. According to Mr. Rai, the Award Holder wrongfully, surreptitiously included the cash credit facilities as a part of the assets of the Award Debtor in his execution application although the Award Debtor used to maintain cash credit account. The cash credit facility extended to an entity is an asset of the bank and not the assets of the Award Debtor. Hon'ble Court by order dated 28th February, 2020 granted liberty to the banks to reorganize the bank credit facilities that Award Debtor enjoys by making necessary adjustment in the two accounts so as to reflect the account position of both the accounts as on 23rd December, 2019. According to Mr. Rai, the said order was passed fully without prejudice to the rights and contention of the parties. According to Mr. Rai, cash credit account cannot be attached and to buttress his point Mr. Rai places his reliance upon several judicial pronouncements in ***K.M. Adam vs. Income Tax Officer*** reported in **(1957) 70 LW 1016; *Sargam Food Private Limited & Anr. Vs.***

State of Maharashtra & Ors. reported in **(2010) 7 MAH Law LJ 41** : ***Jugol Kishor Dan vs Union of India and Ors.*** reported in **2013 SCC OnLine Cal 19941**. According to Mr. Rai, banks do have a lien over the assets of the borrower/Award Debtor since there is a debit balance lying in the cash credit account of the Award Debtor and to substantiate his point Mr. Rai relies upon the judgement in ***Syndicate Bank vs. Bijay Kumar*** reported in **(1992) 2 SCC 330**. Mr. Rai further submits that the banks were not arrayed as party in the arbitral disputes and banks are not sureties and guarantors of the Award Debtor. Therefore, banks cannot be saddled with any responsibility in the execution proceedings.

14. Mr. Jishnu Saha, learned Senior Counsel representing the Award Debtor submits that in order to appreciate the issues involved in this execution proceedings and the narrative of the parties including the Award Debtor, Court shall have to look through the windows of the Insolvency and Bankruptcy Code, 2016. It is submitted by Mr. Saha that the applications for execution were filed on 29th October, 2019 and order of attachment of the bank account of the Award Debtor mentioned in 'B' schedule of each of the applications was passed by the Court on 23rd December, 2019. Subsequent thereto Corporate Insolvency Resolution Process (CIRP) of the Award Debtor was commenced, pursuant to the order by National Company Law Tribunal (NCLT), Calcutta Bench on 18th October, 2021. Section 14 of the Insolvency and Bankruptcy Code (hereinafter referred to as 'IBC',

2016) was pressed into service and, thereafter, moratorium was imposed.

15. Thereafter, the insolvency of the award debtor was resolved with the approval of the Resolution Plan by the National Company Law Tribunal by an order dated 11th August, 2023. Pursuant to the order passed by National Company Law Tribunal the Administrator of the Award Debtor was directed to determine the claims of the Award Holder for the three awards and it was determined at Rs. 2,52,00,000/- in view thereof all other claims of the Award Holder stood extinguished in view of the provisions laid down under Section 31 of the IBC, 2016. To substantiate his submission Mr. Saha makes this Court to go through the provision as laid down under Section 31(1) of the IBC, 2016 which says :

“Section 31. Approval of resolution plan.

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, ¹[including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan.

²[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this

sub-section, satisfy that the resolution plan has provisions for its effective implementation.]”

16. Mr. Saha further places his reliance on a judgement of Hon’ble Supreme Court in ***Ghanashyam Mishra & Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited*** reported in **(2021) 9 SCC 657**, to submit that once the Resolution Plan is approved by the adjudicating authority it shall stand frozen and will be binding on the corporate debtor its employee, members, creditors including Central and State Government and local authority.
17. It is further submitted by Mr. Saha that the security interest as defined under Section 3 (31) of the IBC, 2016 unerringly indicates the order of attachment passed by the Hon’ble Court. Since IBC, 2016 does not permit any preferential transaction including making of any preferential payment to any creditor there can also be no question of the sums lying in the bank account attached by order of the Court being used to make a preferential payment to the Award Holder. The Award Holder is not entitled to any payment out of the sums lying in the bank accounts of the Award Debtor, if any, even if it is attached by order dated 23rd December, 2019. The Award Holder has accepted the approved Resolution Plan. It is further submitted by Mr. Saha that in view of Section 238 of the IBC, 2016, Section 64 of the Code of Civil Procedure though it is not void generally shall be void as against all claims enforceable under the attachment.
18. To my understanding, we need to swivel the arch light on the following issues for the adjudication of the execution petitions :

1. Whether the execution proceedings are maintainable in view of the advent of the Insolvency and Bankruptcy Code, 2016 in the arena?
 2. Whether the attachment order passed prior to the Initiation of Corporate Insolvency Resolution Process of the award debtor shall remain unaffected to ensure the realization of the decretal dues or award?
19. The proceedings in the execution are set into motion with an object to yield complete benefit of award and to satisfy the claim amounting to Rs. 47,09,00,000/-.
20. From the attending facts of the case it is admitted that the order of attachment of bank accounts was passed before the Corporate Insolvency Resolution Process was commenced by the order of the National Company Law Tribunal (NCLT), Kolkata Bench on 8th October, 2021.
21. According to Mr. Bachawat, learned Senior Counsel, the Court is to draw a border line between pre-CIRP era and CIRP era. The order of attachment passed by judicial authority on 23rd December, 2019 has the required immunity to remain unaffected by any order of NCLT, towards adjudication of Insolvency and Bankruptcy proceedings.
22. Therefore, in my humble opinion, various provisions of Insolvency and Bankruptcy Code, 2016 relating to reorganization and insolvency

resolution of corporate persons should be taken into consideration to adjudicate the issues.

23. Section 14 of the IBC, 2016 provides, *inter alia*, that on the insolvency commencement date, the Adjudication Authority by an order shall declare moratorium.

24. My attention is drawn to Section 14 of the IBC, 2016 that says :

“Section 14. Moratorium.

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(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);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

¹*[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit,*

registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

¹*[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;]*

²*[(3) The provisions of sub-section (1) shall not apply to--*

³*[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]*

(b) a surety in a contract of guarantee to a corporate debtor.].

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

25. Security interest is defined under Section 3(31) of the IBC, 2016 in the following manner :

“Section 3. Definitions.

In this Code, unless the context otherwise requires,-- (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;”

26. Following the procedure as laid down under the IBC, 2016, once Resolution Applicant submits resolution plan and it is approved by the committee of creditors, the Adjudicating Authority is to take the call and once such plan is accepted the moratorium under Section 14 of the Code ceased to operate. But that does not permit the proceeding including one in the execution to dance back to life. The provision as laid down under Section 31 of the Code of 2016 takes over. Once the Adjudicating Authority accepts the Resolution Plan

there shall be no further moratorium. In this case the Resolution Plan was approved by an order dated 11th August, 2023 passed by National Company Law Tribunal (NCLT).

27. As a part of proceeding, pursuant to the order of NCLT, the Administrator of the Award Debtor was directed to determine the claims of the Award Holder under the three awards, which are also the subject matter of the execution proceedings. Such claim of Award Holder to the tune of Rs. 50,43,58,533/- was considered, entitlement was assessed to the tune of Rs. 2,52,00,000/- and it was communicated accordingly by the Resolution Professional of the Award Debtor to the Award Holder.

28. At this juncture, we need to consider the claim of the Award Holder in the execution proceeding taking lumen from the provision as laid down of IBC, 2016. Section 31(1) of the IBC, 2016 envisages :

“Section 31. Approval of resolution plan.

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, ¹[including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan.

²[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this

sub-section, satisfy that the resolution plan has provisions for its effective implementation.]”

29. Upon plain reading of Sub-Section 1 of Section 31 it appears that once the Resolution Plan is approved it assumes the binding nature on the Corporate Debtor or the Award Debtor, its employees, members, creditors (including Central Government or any State Government or any local authority) to whom a debt in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan. All debts of the corporate debtor beyond the Resolution Plan approved by NCLT stand extinguished.

30. Hon’ble Supreme Court in **GHANASHYAM MISHRA & SONS PRIVATE LIMITED VS. EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED** reported in **(2021) 9 SCC 657** held :

“102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

102.2. The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.”

31. Section 18(1)(f) of the IBC, 2016 obliges interim Resolution Professional to take control and custody of any asset over which the corporate debtor has ownership as recorded in the balance sheet or with non-utility or the depositor securities or any other registry that records ownership right which may be located beyond the territory of India subject to the determination of ownership by a Court or authority. Resolution Professional replaces the interim resolution and shoulders the similar obligation under Section 25 (1) and (2) of the Code, 2016 which provides that it shall be the duty of the Resolution Professional to preserve and protect the assets of the Corporate Debtor including the continued business operation of the Corporate Debtor.

When we look at the issue taking lumen from the provision as laid down under Section 43 of the IBC, 2016 the execution proceeding appears to be not maintainable for the simple reason that if by way of execution the claim is satisfied and thereby the quantum of money is realized and given to the Corporate Creditor (in this case the Award Holder) it would amount to preferential transaction, which is not permitted under Section 43 of the IBC, 2016.

32. The provision of Section 231 of the IBC, 2016 is eloquent about ouster of jurisdiction of Civil Code in respect of matter in which the

Adjudicating Authority or the Board is empowered by or under the Code of 2016. Section 238 of IBC, 2016 says :

“Section 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.”

The order of attachment in favour of the Award Holder, in view of Section 238 of the IBC, 2016 as a natural corollary shall be void.

33. Under such circumstances, by operation of law the claim of Award Holder in the execution proceeding virtually cannot be acknowledged. Such claim under award in view of Section 31 of IBC, 2016 shall have to cave in.

34. Hon’ble Apex Court in ***M. MARATHACHALAM PILLAI VS. PADMAVATHI AMMAL & ORS.*** reported in **(1971) 3 SCC 878** held :

“6. ... By Section 64, Code of Civil Procedure, the attachment is only void as against all claims enforceable under the attachment, and it is not void generally.”

35. In my humble opinion, the execution proceedings under consideration are not maintainable in view of subsequent proceedings under Insolvency and Bankruptcy Code, 2016.

36. With the invocation of provisions of IBC, 2016 for reorganization and Insolvency Resolution of Corporate persons, the border even if drawn, as suggested Mr. Bachawat, between pre-CIRP and CIRP era, such border cannot withstand the thrust of law as laid down in IBC, 2016 particularly in absence of any evidence to demonstrate the role

of banks as surety in a contract of guarantee to a Corporate Debtor, as enunciated under Sub-Section 3(1)(b) of Section 14 of the IBC, 2016.

37. Under such circumstances, the dispute raised by the banks as to the applicability of the order of attachment in respect of cash credit accounts, becomes mere academic and does not deserve any further deliberation. Thus, the E.C. No. 429 of 2019, E.C. No. 459 of 2019 and E.C. No. 460 of 2019 are disposed of being not maintainable in law. Pending applications, if any, stand disposed of.
38. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)

Later

Ms. Shreya Singh, learned Counsel for the Award-Holder prays for stay of the operation of the judgement for three weeks. Prayer is considered and not acceded to.

(SIDDHARTHA ROY CHOWDHURY, J.)