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

\+ W.P.(C) 16540/2024 & CM APPL. 69944/2024 (waiver of pre-deposit)

ATS INFRABUILD PVT LTD AND ANR .....Petitioners

Through: Mr. Dayan Krishnan, Sr. Adv. with Mr. Kartik Nayar, Mr. Krish Kalra, Mr. Shukrit Seth and Mr. Ajit Kumar, Advs.

versus

IDBI TRUSTEESHIP SERVICES PRIVATE LIMITED .....Respondent

Through: Mr. Sanjeev Sharaia and Ms. Divya Joshi, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

O R D E R

% **29.11.2024**

CM APPL. 69945/2024 (Ex.)

Allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 16540/2024 & CM APPL. 69944/2024 (waiver of pre deposit)

1. The writ petitioners have instituted the present petition seeking to assail the order dated 07 November 2024 passed by the **Debt Recovery Tribunal**[1]-III in **ATS Infrabuild Pvt. Ltd. v. IDBI Trusteeship Services Limited**[2].

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[1] DRT
[2] SA No. 31/2024

2. The order of 07 November 2024 with which we are concerned, essentially rejects certain objections which were taken by the writ petitioners to the action initiated by the respondent under Sections 13 and 14 of the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002**[3].

3. The principal contention which appears to have been addressed for the consideration of the DRT was in respect of the proceedings initiated under Section 96 of the **Insolvency and Bankruptcy Code, 2016**[4] against the petitioner no. 2. It appears to have been argued that since the moratorium which comes into effect by virtue of Section 96 of the IBC is related to the "debt" owed as distinct from action initiated or referable to the "corporate debtor" and which is what Section 14 of the SARFAESI Act envisages, all action which the respondent proposed to take would not sustain.

4. The DRT, however, has taken the following position insofar as this submission is concerned.

> "12. The initiation of insolvency proceedings under Section 95 IBC against Mr. Getamber Anand and Mr. Udaivir Anand does not impact these proceedings against the Applicant. The debentures were subscribed to by the Applicant, who also bears the redemption obligation under the DTD. Therefore, the debentures do not constitute a debt of Mr. Getamber Anand or Mr. Udaivir Anand. Mr. Getamber Anand, acting in his official capacity as the Applicant's authorized representative, participated in the equitable mortgage, which is evident from the memorandum of entry dated 24.09.2018 and a contemporaneous declaration of mortgage clarifying his role. Even if amounts were recoverable from Mr. Getamber Anand or Mr. Udaivir Anand under the DTD, the Section 96 IBC moratorium would apply only to them personally, leaving the SARFAESI proceedings against the Applicant No-1 legally unaffected.
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> 13. The secured assets in question, comprising 36 mortgaged

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[3] SARFAESI Act
[4] IBC

apartments units in Phase I of Project Casa Espana, remain in the Applicant's share, with no title or interest vested in Mr. Getamber Anand or Mr. Udaivir Anand. Per Clause 4(b) of Schedule 3 of the DTD, titled "Covenants and Undertakings," the Applicant was required to obtain Respondent consent prior to proposing or selling any unit below the agreed minimum sales price. Thus, the Applicant routinely sought the Respondent's approval for discounted prices, which was documented in NOCs and related correspondences annexed in the application. The Applicant has not demonstrated any actions on these NOCs, which were conditionally issued, stipulating that sale consideration should be deposited into the ATS Infrabuild Pvt. Limited escrow account. The Applicant's March 2024 MIS report lists these seven units as unsold inventory, indicating no full payments were made, and as a result, the NOCs were voided, keeping the units under the Respondent's mortgage.

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21. Section 96 of the IBC applies specifically to the personal guarantors and does not extend to corporate entities such as the Applicant. Therefore, the IBC moratorium on proceedings against the personal guarantors does not legally bar the Respondent from proceeding under the SARFAESI Act against the corporate Applicant's assets.

22. In light of the above considerations, the Applicant has not demonstrated a prima facie case or irreparable harm that would justify the grant of interim relief. The balance of convenience does not favor the Applicants, as the Respondent's right to enforce the security under the SARFAESI Act arises from the Applicant's defaults and subsequent events of default as per the DTD. Accordingly, the interim relief sought by the Applicant is hereby **dismissed**."

5. As is manifest from the above, the DRT was of the opinion that the moratorium which comes into effect in terms of Section 96 of the IBC would not bar the respondent from proceeding against the assets of the corporate-applicant and who is before us as petitioner no. 1.

6. Undisputedly, the aforesaid order was sought to be questioned by the writ petitioners preferring **ATS Infrabuild Pvt. Ltd. & Anr.**

vs. IDBI Trusteeship Services Private Limited[5]. The said writ petition, however, came to be dismissed as withdrawn on 12 November 2024, subject to all rights and contentions of all parties being reserved and it being left open for the writ petitioners to adopt appropriate remedies in accordance with law.

7. Pursuant to the liberty so accorded, we are informed that a statutory appeal referable to Section 18 of the SARFAESI Act has come to be filed. That appeal is stated to have been called before the **Debt Recovery Appellate Tribunal**[6] today. According to the writ petitioners, a passover was sought when the matter was called in the first round. However, and it is so alleged, that the matter was never called thereafter and as a result of which they are constrained to approach this Court, since the respondent intend to take possession and execute the action under Section 13 tomorrow.

8. The respondent, however, dispute the narration with respect to the proceedings which unfolded before the DRAT today. According to Mr. Sharaia, learned counsel representing the respondent, the DRAT had merely adjourned the matter for five minutes at the request of counsel for the writ petitioners and whereafter and since the counsel for the petitioner never appeared, the matter could not be taken up.

9. We do not intend to go into these aspects as we find that there exists an emergent justification to entertain the writ petition since the appeal has now been posted for 05 December 2024 and the coercive action flowing from Section 13 would come to be executed tomorrow. It is the aforesaid facts which constrain us to entertain the present writ petition.

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[5] W.P.(C) 15660/2024
[6] DRAT

10. For the purposes of considering whether protection is liable to be accorded to the writ petitioners till the appeal is entertained and considered by the DRAT, we deem it appropriate to take note of the following facts.

11. The purported event of default, according to the respondent, occurred in respect of a Debenture Trust Deed which was executed between the petitioners and the respondent. This led to a notice being issued on 07 July 2023, on the allegation that the petitioners had failed to renew mandatory regulations, defaulted in infusion of funds to the extent of INR 18,00,00,000/- as well as payment of interest. It was this which led to the issuance of a notice referable to Section 13(2) of the SARFAESI Act. The objections of the petitioners thereafter came to be rejected by the DRT by its order of 07 November 2024.

12. Mr. Krishnan, learned senior counsel who appeared in support of the writ petition, submitted that in light of the scope and intent of Section 96 of the IBC, as explained by the Supreme Court in **State Bank of India v. V. Ramakrishnan And Another**[7] and which stands reiterated in **Dilip B. Jiwrajka v. Union of India And Others**[8], the DRT has clearly erred in construing Section 96 as being restricted to the debts of the personal guarantor alone. While expounding upon the scope of Section 96, the Supreme Court in *Dilip B. Jiwrajka* had made the following pertinent observations:-

> "**57.** Section 96, as its marginal note indicates, deals with an "interim moratorium". In terms of Section 96, the interim moratorium takes effect on the date of the application. In other words, the very submission of an application under Section 94 or Section 95 triggers the interim moratorium which then ceases to have effect on the date of the admission of the application (under Section 100). The consequences which flow from an interim

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[7] (2018) 17 SCC 394

[8] (2024) 5 SCC 435

moratorium are specified in clause (b) of sub-section (1) of Section 96. The impact of the interim moratorium under Section 96 is that a legal action or proceeding pending in respect of any debt is deemed to have been stayed and the creditors or the debtors shall not initiate any legal action or proceedings in respect of any debt. The crucial words which are used both in clause (b)(i) and clause (b)(ii) of sub-section (1) of Section 96 are "in respect of any debt". These words indicate that the interim moratorium which is intended to operate by the legislature is primarily in respect of a debt as opposed to a debtor. Clause (b) of subsection (1) indicates that the purpose of the interim moratorium is to restrain the initiation or the continuation of legal action or proceedings against the debt.

58. This must be contra-distinguished from the provisions for moratorium which are contained in Section 14 in relation to CIRP under Part II. Section 14(1)(a) provides that on the insolvency commencement date, the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including proceedings in execution shall stand prohibited by an order of the adjudicating authority. Clause (b) of sub-section (1) of Section 14 empowers the adjudicating authority to declare a moratorium restraining the transfer, encumbrance, alienation or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein. Significantly, the moratorium under Section 14 operates on the order passed by an adjudicating authority. The purpose of the moratorium under Section 96 is protective. The object of the moratorium is to insulate the corporate debtor from the institution of legal actions or the continuation of legal actions or proceedings in respect of the debt."

13. The respondent, on the other hand, has drawn our attention to a judgment handed down by a learned Single Judge of this Court in **Sanjay Dhingra v. IDBI Bank Limited and Others**[9] and in which the following observation came to be made:-

"**16.** Thus, in view of the aforesaid, it is manifest that the moratorium imposed under Section 96 of IBC, 2016, would apply to the security interest created by an individual, under the personal guarantee. Therefore, after commencement of the insolvency proceedings under the IBC, 2016, against the petitioner, in his capacity as a personal guarantor with respect to default of a loan account, the interim moratorium shall be applicable to all the debts, including the debt owed by the petitioner to the respondent-bank, in his capacity as a personal guarantor, for which property in question was mortgaged by the petitioner, against which

[9] 2024 SCC OnLine Del 4521

SARFAESI proceedings have been initiated by the respondent-bank."

14. It is on a reading of the aforesaid passage that learned counsel for the respondent would contend that since the asset and the property against which action is proposed to be taken is not owned by the petitioners, the moratorium would not apply.

15. In our considered opinion, the submissions which are addressed would be liable to be examined by the DRAT bearing in mind and alongside the observations which appear in *Dilip B. Jiwrajka* and *V. Ramakrishnan*. However, we do not propose to render any definitive or conclusive findings in this respect, since it is this very question which would have to be examined by the DRAT in the first instance. It would, therefore, be incorrect for us to rule on this question at this stage and deprive parties of the right to contest before the DRAT. All that we do deem appropriate to observe is that the rival contentions which are addressed on the ambit of Section 96 would appear to merit further consideration of the DRAT.

16. We bear in mind the pendency of proceedings referable to Section 96 against the petitioner no. 2, who is stated to have extended a personal guarantee and it is against the said petitioner that proceedings of personal insolvency are stated to be pending. The aspect of whether the secured asset is under the ownership of the petitioner nos. 1 and 2 or not and whether that would be a question relevant or germane to understanding the scope of the moratorium which applies by virtue of Section 96, clearly gives rise to triable issues which would warrant due examination by the DRAT.

17. However, and since in the interim no effective hearing on the appeal has been undertaken and the coercive action is to be enforced

tomorrow itself, we deem it apposite to frame the following protective measures in the interim and till the appeal is taken up for consideration and entertained by the DRAT.

18. We accordingly and at this stage dispose of the writ petition by providing that the appeal as instituted may be duly examined by the DRAT in accordance with law on the date fixed. All rights and contentions of respective parties including in respect of its maintainability would be open to be addressed before the DRAT. Till then, the respondent shall stand restrained from taking further coercive action pursuant to the Section 13 notice dated 13 November 2024.

19. We further observe that this interim protection is being accorded in light of the apparent need to balance the interests of parties and since the appeal could not be heard today.

20. We thus, and though needless to state, observe that the grant of this interim protection shall not be liable to be construed as an expression of opinion on the merits of the rival contentions raised or insofar as the maintainability of the appeal is concerned. It would thus be open to the DRAT to proceed further in accordance with law.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

NOVEMBER 29, 2024/RW