

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 789 of 2018

(Arising out of Order dated 27th November, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bench-III, New Delhi in CA No. 219/C-III/ND/2018)

IN THE MATTER OF:

Canbank Factors Ltd.

...Appellant

Vs.

Dharmendra Kumar

...Respondent

Present: For Appellant: - Mr. Kripa Shankar Prasad, Mr. T. Priyadarshini, Mr. Prabodh Kr. Singh, Ms. Vandana Yadav and Mr. A.N. Tiwari, Advocates.

**For Respondent:- Mr. Dharmendra Kumar, Advocate for IRP.
Mr. Parth Kochata and Mr. Rohit Rathi, Advocate.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The 'Corporate Insolvency Resolution Process' was initiated against 'M/s. IAP Company Pvt. Ltd.'- ('Corporate Debtor') on 28th February, 2018 and order of 'Moratorium' was passed. However, the 'Resolution Professional' noticed that the Appellant- 'Canbank Factors Limited' despite 'Moratorium' period in existence, proceeded with the recovery of dues by way of deduction of its instalments through exercising its right

to lien on the accounts of the 'Corporate Debtor' in support of which letter dated 10th July, 2018 was placed by the 'Interim Resolution Professional'.

2. After receipt of the said letter dated 10th July, 2018, the 'Interim Resolution Professional' asked the Appellant- 'Canbank Factors Limited' not to take any action of recovery during the period of 'Moratorium'. It is informed that despite the said letter dated 10th July, 2018, the Appellant- 'Canbank Factors Limited' recovered and retained a sum of Rs. 7,52,63,564/- which was payable to the 'Corporate Debtor'.

3. On hearing the parties, the Adjudicating Authority (National Company Law Tribunal), Bench-III, New Delhi, by impugned order dated 27th November, 2018 held that none of the creditors can enforce their security interest of their claims in relation to the property of the 'Corporate Debtor' including property of every description including receivables during the period of 'Moratorium'. In the circumstance, the Appellant- 'Canbank Factors Limited' was directed to refund the money which it has collected for the enforcement of its security against the receivables of the 'Corporate Debtor' to the extent of Rs.7,52,63,564/- within two weeks.

4. The case of the Appellant is as follows:

The Corporate Debtor i.e., 'M/s. IAP Co. Pvt. Ltd.' vide application dated 30th January, 2013 approached the Appellant- 'Canbank Factors Limited' for availing factoring facilities for the conduct of

its business. The Appellant- 'Canbank Factors Limited' is a 'Financial Creditor' which is engaged in the business of factoring and is governed by the 'Factoring Regulation Act, 2011'. Pursuant to the aforesaid application, the Appellant after due consideration and execution of various supporting documents including factoring cum pre-payment agreement on 30th May, 2013 as well as letter of guarantee dated 30th May, 2013 backed by power of attorney of the same date in favour of the Appellant/ 'Financial Creditor' with authorization letters issued on several dates. Based on the said documents, the sale bill factoring limits with recourse for a sum of Rs. 10,00,00,000 (Rupees Ten crore only) was initially granted. Subsequently, it was also enhanced to Rs. 13 crores on 14th July, 2014 and on 11th November, 2016 it was enhanced to Rs. 20 crore at the request of the 'Corporate Debtor'. However, since the 'Corporate Debtor' had failed to repay the outstanding dues towards the said factoring facilities availed by it taking into consideration the 'Reserve Bank of India' guidelines/regulations, the account of 'Corporate Debtor' had been declared as 'NPA' on 21st December, 2017. The transaction between the 'Corporate Debtor' and the 'Financial Creditor' is based on factoring agreement.

5. It was submitted by the learned counsel for the Appellant that the 'Corporate Debtor' vide letter dated 30th May, 2013 informed the 'M/s

National Informatics Centre Services Inc.’ that they have entered into factoring agreement with the ‘Financial Creditor’ for availing factoring facilities and as part of the system the ‘Financial Creditor’ alone is entitled to receive the payment in respect of the invoices factored with them. Further, vide letter dated 24th July, 2017, the ‘Corporate Debtor’ categorically and unequivocally stated that the payment is to be made to the ‘Financial Creditor’ and the payment instruction will not be changed unless the written communication from the ‘Corporate Debtor’ and the ‘Financial Creditor’ jointly received.

6. Learned counsel for the Appellant submitted that the ‘Insolvency Resolution Process’ in the present case was initiated vide order dated 28th February, 2018 in relation to the ‘Corporate Debtor’. Further, the ‘Corporate Debtor’ had provided the absolute right to the ‘Financial Creditor’ by executing the ‘POA’ for recovery of all dues receivable from its customers.

7. It was contended that vide letter dated 23rd November, 2017, 15th December, 2017 and 22nd December, 2017, the Appellant holds a statutory right towards the lien amount of Rs.7,52,63,564/- and the Appellant/ ‘Financial Creditor’ is entitled to exercise its lien over the amount of bills not factored until and unless the entire remaining outstanding amount is fully paid by the ‘Corporate Debtor’. It is stated that the aforesaid lien was imposed during the year 2017 i.e., much prior to the commencement of the Adjudicating Authority proceedings and the

demand to make payment had also been made much earlier to the commencement of the 'Moratorium' period and therefore, Section 14 (1) (c) would not come into play in the present facts and circumstances of the case.

8. It was also submitted that on perusal of the ledger account, it is very much apparent that no amount whatsoever has ever been recovered or deducted during the 'Moratorium' period and, therefore, the finding given by the Adjudicating Authority is factually incorrect.

9. The Appellant has filed four sets of volumes including the Books of Accounts to suggest that the amounts were recovered prior to order of 'Moratorium'. Though, this Appellate Tribunal was not inclined to go through the Books of Ledger alleged by the Appellant- 'Canbank Factors Limited' to submit the statement of accounts showing that the amounts were recovered prior to the order of 'Moratorium', in spite of such order, no Bank account has been enclosed to suggest that the amounts were recovered prior to the order of 'Moratorium' passed on 28th February, 2018.

10. The statement of prepayment account from 1st January, 2018 to 15th February, 2019 is prepared in a balance sheet and not a Bank account record and thereby, cannot be relied upon.

11. Learned counsel appearing on behalf of the 'Resolution Professional' submitted that despite the fact that the Appellant- 'Canbank

Factors Limited' has already filed a claim of Rs. 13.95 crores pursuant to the public announcement of 'Moratorium', the Appellant- 'Canbank Factors Limited' continues to resort to such coercive measures of individual recovery during the period of 'Moratorium'.

12. The Appellant has not brought on record their Bank Accounts wherein the amount collected were deposited. On the other hand, it has taken specific plea that by letters dated 23rd November, 2017, 15th December, 2017 and 22nd December, 2017, the Appellant holds a statutory right towards the lien amount of Rs.7,52,63,564/-, the Appellant who is a 'Financial Creditor' is entitled to exercise its lien over the amount of bills not factored until and unless the entire remaining outstanding amount is fully paid by the 'Corporate Debtor'.

13. The plea has been taken that the aforesaid lien having imposed during the year 2017 i.e., much prior to the commencement of the proceedings before the Adjudicating Authority (28th February, 2018) and the demand to make payment had also been made much earlier to the commencement of the 'Moratorium' period and, therefore, Section 14 (1) (c) would not come into play.

14. However, we do not accept such plea taken by the Appellant as 'Moratorium' will be applicable for any recovery which is made after 28th February, 2018.

15. The plea taken by the Appellant is that they can recover the amount even during the period of 'Moratorium' and, on the other hand, is making some sort of statement that the amounts have not been recovered during the 'Moratorium' period, being conflicting, the stand taken by the Appellant- 'Canbank Factors Limited' cannot be accepted.

16. We find no merit in this appeal. It is accordingly, dismissed. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

NEW DELHI
14th May, 2019

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