

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 665 of 2018**

(Arising out of Order dated 14<sup>th</sup> August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.P. No. IB-547(PB) /2018)

**IN THE MATTER OF:**

**Mr. Bohar Singh Dhillon**

**...Appellant**

**Vs.**

**Mr. Rohit Sehgal**

**(Interim Resolution Professional) & Ors.**

**...Respondents**

**Present: For Appellant: - Mr. Ajit Kumar Sinha, Senior Advocate with Mr. Sohel Rishabh and Mr. Ritesh Agrawal, Advocates.**

**For Respondents:- Mr. Kinshuk Chatterjee and Ms. Deepti Bhardwaj, Advocates for R.P.**

**Mr. Krishnendu Dutta, Mr. N. Raja Singh, Ms. Manisha Chaudhary and Mr. Niladree Chatterjee, Advocates for R2-R34.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant, Shareholder of 'M/s. HBN Dairies & Allied Ltd.'- ('Corporate Debtor') has preferred this appeal against the order dated 14<sup>th</sup> August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, whereby the application

under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) filed by the Respondents have been admitted.

2. Learned counsel for the Appellant submitted that ‘Securities and Exchange Board of India’ having already taken action against the ‘Corporate Debtor’, the application under Section 7 was not maintainable. The contesting Respondent is also not a ‘Financial Creditor’.

3. Learned counsel appearing on behalf of the 1<sup>st</sup> & 35<sup>th</sup> Respondents submitted that the ‘Corporate Debtor’ illegally collected money to the tune of Rs. 1136 Crores under its unauthorised ‘Collective Investment Schemes’. A recovery Certificate dated 14<sup>th</sup> September, 2017 for an amount of Rs. 1136 Crores was drawn up against the ‘Corporate Debtor’ pursuant to orders passed by the ‘Securities and Exchange Board of India’ as confirmed by the ‘Securities Appellate Tribunal’. Thereafter, the immovable properties held by the ‘Corporate Debtor’ were attached vide order dated 29<sup>th</sup> September, 2017 passed by the Recovery Officer, ‘Securities and Exchange Board of India’, Northern Regional Office, New Delhi.

4. It was further submitted that the group of investors (‘Financial Creditors’) including the contesting Respondents were completely frustrated by the long delay due to action of the ‘Securities and Exchange Board of India’, therefore, they filed jointly the Insolvency Petition

application under Section 7 of the 'I&B Code' for initiating the 'Corporate Insolvency Resolution Process', wherein the impugned order was passed.

5. Learned counsel appearing on behalf of 2<sup>nd</sup> to 34<sup>th</sup> Respondents submitted that the said Scheme of the 'Corporate Debtor' was held to be an un-authorised Collective Investment Scheme by the 'Securities Exchange Board of India' vide its order dated 12<sup>th</sup> February, 2015. The said order dated 12<sup>th</sup> February, 2015 passed by the 'Securities and Exchange Board of India' was challenged before the 'Securities Appellate Tribunal', Mumbai. In terms of the order dated 28<sup>th</sup> June, 2017 passed by the 'Securities Appellate Tribunal', the 'Corporate Debtor' and its Directors were directed to furnish list of their immovable properties so that the said properties may be sold by the 'Securities and Exchange Board of India' to repay the amounts due to the investors.

6. We have heard learned counsel appearing on behalf of the Appellant and Respondents and perused the record.

7. In the case of "***Ms. Anju Agarwal Vs. Bombay Stock Exchange & Ors.— Company Appeal (AT) (Insolvency) No. 734 of 2018***" by its Judgment dated 23<sup>rd</sup> April, 2019, this Appellate Tribunal observed and held as follows:

"10. Section 14(1) (a) of the 'I&B Code' relates to 'Moratorium' and reads as follows:

**“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;”

11. Section 17 while deals with ‘management of affairs of ‘Corporate Debtor’ by ‘Interim Resolution Professional’. Sub-section (2) of Section 17 empowers the ‘Interim Resolution Professional’ to act in terms of the provisions therein including clause (e) of Section 17(2) which reads as follows:

**17. Management of affairs of corporate debtor by interim resolution professional.—**(1) From the date of

*appointment of the interim resolution professional,—*

*(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;*

*xxx xxx xxx*

*(2) The interim resolution professional vested with the management of the corporate debtor shall—*

*xxx xxx xxx*

*(e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.”*

12. *From the aforesaid provisions, it is clear that the ‘Interim Resolution Professional’ is responsible for complying with the requirements under any law for the time being in force on behalf of the ‘Corporate Debtor’, which includes the ‘SEBI Act, 1992’ and ‘Securities Exchange Board of India (Listing Obligations and Disclosure Requirements), Regulations, 2015’ framed therein.*

13. *The question arises for consideration is whether on failure to perform the duties, if any, penal order is passed for penalty imposed on the 'Corporate Debtor' or any recovery can be made in terms of Section 28A of the 'SEBI Act, 1992'.*

14. *According to learned counsel for 'Securities Exchange Board of India' and the 'Bombay Stock Exchange', Section 28A of the 'SEBI Act, 1992' will have overriding effect on the provisions of Section 14 of the 'I&B Code'. However, such submission cannot be accepted for the reasons as mentioned and discussed below.*

15. *Section 28A of 'SEBI Act, 1992' relates to 'recovery of amounts' and reads as follows:*

***"28A. Recovery of amounts.—*** (1) *If a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B or fails to pay any fees due to the Board, the Recovery Officer may draw up under his*

*signature a statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:—*

*(a) attachment and sale of the person's movable property;*

*(b) attachment of the person's bank accounts;*

*(c) attachment and sale of the person's immovable property;*

*(d) arrest of the person and his detention in prison;*

*(e) appointing a receiver for the management of the person's movable and immovable properties, and for this purpose, the provisions of sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, in so far as may be,*

*apply with necessary modifications as if the said provisions and the rules made thereunder were the provisions of this Act and referred to the amount due under this Act instead of to income-tax under the Income-tax Act, 1961.*

*Explanation 1.— For the purposes of this subsection, the person's movable or immovable property or monies held in bank accounts shall include any property or monies held in bank accounts which has been transferred directly or indirectly on or after the date when the amount specified in certificate had become due, by the person to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property or monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable*



*property or monies held in bank accounts for recovering any amount due from the person under this Act.*

*Explanation 2.— Any reference under the provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 to the assessee shall be construed as a reference to the person specified in the certificate.*

*Explanation 3.— Any reference to appeal in Chapter XVIII and the Second Schedule to the Income-tax Act, 1961, shall be construed as a reference to appeal before the Securities Appellate Tribunal under section 15T of this Act.*

*(2) The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers under sub-section (1).*

*(3) Notwithstanding anything contained in any other law for the time being in force, the recovery of amounts by a Recovery Officer under sub-section (1), pursuant to non-*

*compliance with any direction issued by the Board under section 11B, shall have precedence over any other claim against such person.*

*(4) For the purposes of sub-sections (1), (2) and (3), the expression Recovery Officer “means any officer of the Board who may be authorised, by general or special order in writing, to exercise the powers of a Recovery Officer.”*

16. *As per Section 14 (1) (a) of the ‘I&B Code’, 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** is prohibited.*

17. *Thus, we find that Section 28A of the SEBI Act, 1992 including sub-Section (3) therein is in contravention of Section 14 of the ‘I&B Code’.*

18. *Section 238 of the ‘I&B Code’ is overriding provision and reads as follows:*

**“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.”*

19. Section 28A of the ‘SEBI Act, 1992’ being inconsistent with Section 14 of the ‘I&B Code’, we hold that Section 14 of the ‘I&B Code’ will prevail over Section 28A of the ‘SEBI Act, 1992’ and ‘Securities Exchange Board of India’ cannot recover any amount including the penalty from the ‘Corporate Debtor’. The ‘Bombay Stock Exchange’ for the same very reason cannot take any coercive steps against the ‘Corporate Debtor’ nor can threaten the ‘Corporate Debtor’ for suspension of trading of shares.

20. The ‘Bombay Stock Exchange’ deals with the shares. The shares of the ‘Corporate Debtor’, if listed with the ‘Bombay Stock Exchange’, can be dealt with by the ‘Bombay Stock Exchange’. However, in view of Section 18 of the ‘I&B Code’, the ‘Interim Resolution Professional’ while taking control and custody of any

*asset including the tangible and intangible assets, cannot sell the shares of the 'Corporate Debtor' during the period of 'Moratorium' except in accordance with the provisions of the 'I&B Code' and with the approval of the 'Committee of Creditors'. Therefore, dealing with the shares of the 'Corporate Debtor' by the 'Bombay Stock Exchange' during the period of 'Moratorium' normally does not arise. The shares can be transferred only in the manner prescribed under the 'I&B Code' and following requirements framed under the 'SEBI Act, 1992' and the 'Companies Act, 2013'.*”

8. In view of the aforesaid position of law, we hold that the application under Section 7 is maintainable and till the period of 'Moratorium' continues, the 'Securities and Exchange Board of India' cannot recover any amount nor can sell the assets of the 'Corporate Debtor' during the 'Moratorium' period.

Though we have held that the application under Section 7 is maintainable while step has been taken by the 'Securities and Exchange Board of India' the 'Resolution Professional' is required to act in terms of Section 17(2) (e) of the 'I&B Code' for complying with the requirements under the 'Securities and Exchange Board of India Act' and Regulations framed thereunder as well as the guidelines issued by the Regulatory Authority. It is also made clear

that the 'Securities and Exchange Board of India' is however entitled to take action against individual including the former Directors and Shareholders of the 'Corporate Debtor'.

9. In view of the aforesaid position of law, we are not inclined to grant any relief and dismiss the appeal with the aforesaid observations. No costs.

(Justice S.J. Mukhopadhaya)  
Chairperson

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

(Kanthi Narahari)  
Member(Technical)

NEW DELHI  
9<sup>th</sup> May, 2019  
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