

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 15.9.2020

Date of Decision: 09.10.2020

Appeal No.206 of 2020

Dewan Housing Finance Corporation Ltd.

1. Registered office at Warden House,
2nd Floor, Sir P.M. Road,
Fort, Mumbai – 400001.

2. National Office at HDIL Tower,
6th Floor, Anant Kanekar Marg,
Bandra (East), Mumbai 400051.

... Appellant

Versus

Securities and Exchange Board of India

1. SEBI Bhavan, Plot No.C4-A,
G Block, Bandra Kurla Complex,
Bandra (East), Mumbai – 400051.

2. Mittal Court 'B' & 'C', 1st Floor,
224 Nariman Point, Mumbai – 400021,
Maharashtra.

... Respondent

Mr. Ashish Kamat, Advocate with Mr. Vivek Shetty and
Mr. Nishant Upadhyay, Advocates i/b AZB & Partners
for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Mihir
Mody and Mr. Shehaab Roshan, Advocates i/b K. Ashar
and Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed questioning the legality and validity of the order dated 29th May, 2020 passed by the Adjudicating Officer under section 15-1 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') whereby the authority has imposed a penalty on the appellant for a sum of Rs.20 lakhs under section 15A(b) and 15HB of the SEBI Act. By the impugned order, the appellant was directed to pay the amount within 45 days from the receipt of the impugned order failing which recovery proceedings would be initiated under section 28A of the Act.
2. The facts leading to the filing of the present appeal is, that the appellant is a housing finance company, and at present, is undergoing corporate insolvency resolution process. On 20th November, 2019, the

Reserve Bank of India (hereinafter referred to as 'RBI') suspended the board of directors of the appellant under section 45-IE(2) of the Reserve Bank of India Act, 1934 and appointed an administrator to manage the affairs of the company. On 29th November, 2019 RBI filed a Company Petition before the NCLT under Rule 5(a)(1) of the Insolvency and Bankruptcy (Insolvency and liquidation proceedings of financial service provider and application to Adjudicating Authority) Rules, 2019 to initiate corporate insolvency resolution process against the appellant under the provisions of The Insolvency and Bankruptcy Code, 2016. The petition was admitted by NCLT by an order of 3rd December, 2019 and the administrator was appointed as the resolution professional. The moratorium provided under section 14 came in force upon the filing of the application by RBI under Rule 5(a)(i) of the Insolvency and Bankruptcy (Insolvency and liquidation proceedings of financial service provider and application to

Adjudicating Authority) Rules, 2019 on 29th November, 2019 in view of Rule 5(b) of the said rules.

3. On 24th December, 2019, the adjudicating officer issued a show cause notice to the appellant under Rule 4 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 to show cause as to why penalty should not be imposed for non-compliance of the provisions of Regulation 16(1) of Securities and Exchange Board of India (Issue of Listing of Debenture Securities) Regulations, 2008 (hereinafter referred to as 'ILDS Regulations') read with Rule 18(7)(b)(ii) and 18(7)(c) of Companies (Share Capital and Debentures) Rule, 2014 (hereinafter referred to as 'Share Capital and Debenture Rules') and Regulation 52(1) read with Regulation 52(4) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as 'LODR Regulations').

4. The show cause notice alleged that the appellant failed to create requisite debenture redemption reserve and failed to invest 15% of the amount of non-convertible debentures maturing as on 31st March, 2020 as required under the ILDS Regulations and failed to submit the audited financial result and line items as prescribed in the LODR Regulations.
5. In response to the show cause notice, the appellant submitted a reply dated 9th January, 2020 pointing out that in view of section 14 of Insolvency and Bankruptcy Code (hereinafter referred to as 'IBC') no proceedings could be instituted or continued during the currency of the moratorium period. In support of his submission the appellant also placed reliance upon certain decisions of the Supreme Court.
6. The adjudicating officer, after considering the matter, passed the impugned order imposing a penalty of Rs.20 lakhs upon the appellant. The adjudicating officer while imposing the penalty held that the moratorium declared under section 14 of the IBC

would not prevent the adjudicating officer from determining the liability of the corporate debtor and that the moratorium declared under the IBC would be applicable to the enforcement/recovery of the determined liability and that the instant proceedings are in the nature of determining the liability for the alleged non-compliance of the LODR Regulations and other Rules. For facility, the relevant finding of the adjudicating officer in this regard is extracted hereunder:-

“I note from the above observations of the Insolvency Law Committee that a proceeding for assessing or determining the liability is different from a proceeding initiated to recover the assessed or determined liability. The Committee further observes that a moratorium on determination of the liability may not have been the intent of the IBC. Hence, I am of the view that the moratorium declared under section 14 of the IBC will not prevent instant proceeding from determining the liability of the corporate debtor and the moratorium declared under the IBC will be applicable to the enforcement/recovery of the determined liability. I note that the instant adjudication proceedings against the Noticee are in the nature of determining the liability of the Noticee for the alleged non-compliance of relevant provisions of the ILDS Regulations, 2008 and LODR Regulations, 2015 and hence the same can be continued.”

7. We have heard Mr. Ashish Kamat, Advocate assisted by Mr. Vivek Shetty and Mr. Nishant Upadhyay, Advocates for the Appellant and Mr. Mustafa Doctor, Senior Advocate assisted by Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates for the Respondent through video conference.
8. The contention of the learned counsel for the appellant is, that the impugned order passed by the adjudicating officer is not only illegal but perverse and is directly against the judgement of the Supreme Court in the case of *Alchemist Asset Reconstruction Company Ltd. vs. Hotel Gaudavan Pvt. Ltd & Ors. (2018) 16 SCC 94* and in the case of *Rajendra K. Bhuta vs. Maharashtra Housing and Area Development Authority (2020) SCC Online 292*. It was contended that the adjudicating officer has patently ignored the decision of the Supreme Court inspite of it being cited and has ventured into giving a finding that he has the power to proceed which is directly against the decision of the Supreme Court and

amounts to contempt of the decision of the Supreme Court. The learned counsel further contended that the provisions of section 14 is patently clear and explicit and is not vague which requires use of an external aid. It was submitted that when the provision is clear and there is a direct decision of the Supreme Court it was not open to the adjudicating officer to use external aid in interpreting the provisions of section 14 of the IBC. The learned counsel contended that the use of external aid by the adjudicating officer while relying upon the Insolvency Law Committee's Report dated March, 2018 was wholly erroneous and amounts to contempt of the decision of the Supreme Court.

9. On the other hand, the learned senior counsel for the respondent submitted that he has instructions to state that the order of the adjudicating officer to the extent of directing the appellant to pay the amount and on failure to pay the amount the recovery proceedings would be initiated was incorrect and against the tacit provisions of section 14 of the IBC. It was contended that to that extent the respondent will not seek to

recover the amount during the moratorium period. The learned senior counsel however contended that the ambit of the word 'proceedings' under section 14(1)(a) of the IBC needs to be given a wider meaning and if one considers the Insolvency Law Committee Report of March, 2018 one would find that the IBC Act and moratorium prescribed under section 14 was basically for the creditors and not for the regulators/statutory authorities, namely, the respondent. It was submitted that the proceedings for assessing or determining the liability was different from proceedings initiated to determine the assessed liability. The learned senior counsel contended that the moratorium declared under section 14 of the IBC does not prevent the adjudicating officer from determining the liability of the corporate debtor and that the moratorium declared under IBC would be applicable only to the enforcement/recovery of the determined liability. The learned counsel thus contended that the adjudicating officer had full powers to proceed against the appellant for the purpose of determining the liability for the alleged non-

compliance of the ILDS Regulations and the LODR Regulations. In support of his submission the learned senior counsel placed reliance on a decision of Supreme Court in the case of Babu Lal vs. M/s. Hazari Lal Kishori Lal & Ors. (1982) 1 SCC 525 and in P.L. Kantha Rao and Others vs. State of A.P. & Ors. (1995) 2 SCC 471 wherein the word ‘proceedings’ have been explained.

10. Having heard the learned counsel for the parties at some length it would be appropriate to peruse section 14(1) of the IBC which is extracted hereunder:-

“Moratorium

14(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 judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- (b) transferring, encumbering, alienating or disposing off 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;

(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.

11. A perusal of the aforesaid provision indicates that the adjudicating authority by order declare moratorium for prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement or order in any court of law, tribunal, arbitration panel or other authority.

12. In our view, the provision is clear and explicit and needs no further elaboration. Pursuant to a moratorium declared under section 14 the institution of suits or proceedings against the corporate debtor is prohibited or continuation of a suit or proceedings. Further, execution of any judgement or order in any court of law, tribunal, arbitration panel or other authority is also prohibited.

13. Thus, where a moratorium has been declared under section 14 of IBC, the authority which in the instant case is SEBI/AO will have no jurisdiction to institute any proceedings. Where a proceeding has already been instituted and during the pendency of the proceedings a moratorium order is passed under section 14 then the authority is prohibited from continuing with the proceedings. This is clear from a bare reading of the provisions of section 14(1) of the IBC.

14. In Alchemist (supra) the facts in brief are that despite a moratorium issued under section 14(1)(a) of the IBC an arbitrator was appointed who entered upon reference and issued notices to the parties.

The Supreme Court held :-

“4. The mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect Under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against corporate debtors.

5. This being the case, we are surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under Section 37 of

the Arbitration Act are being entertained. Therefore, we set aside the order of the District Judge dated 6.7.2017 and further state that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.”

15. In *Rajendra K Bhutta (supra)* the Supreme Court while considering the provisions of section 14(1)(d) of the insolvency code held as under:-

“However, when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the Adjudicating Authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management.”

16. Reliance was also made by the counsel for the appellant to the two decisions of NCLT in *Ms. Anju Agarwal vs. Bombay Stock Exchange & Ors. Company Appeal (AT) (Insolvency) No.734 of 2018 decided on 10th September, 2018* and *Mr. Bohar Singh Dhillon vs. Mr. Rohit Sehgal Company Appeal (AT) (Insolvency) No.665 of 2018 decided on 14th August, 2018* wherein the NCLT held that Section 28A of the SEBI Act was inconsistent with Section 14 of the IBC and, therefore, section 14 would prevail and SEBI cannot recover any penalty from corporate debtor.

17. In addition to the aforesaid in *M/s. Innoventive Industries Ltd. vs. ICICI Bank Ltd. (2018) 1 SCC 407* the Supreme Court held that any proceedings under any law against a corporate debtor cannot be proceeded once moratorium is in effect. It is apparently clear that once moratorium has been declared under section 14, SEBI/AO cannot proceed under the SEBI laws against a corporate debtor.

18. In the light of the aforesaid, the contention of the respondent that the word ‘proceedings’ depicted in section 14(1) has to be given an expansive meaning cannot be considered either by the adjudicating officer as it would amount to contempt of court. In any case, the prohibition is on the institution of a proceeding. In the instant case, the moratorium kicked in when the petition was filed on November, 2019 under Rule 5(a)(i) of the Insolvency and Bankruptcy (Insolvency and liquidation proceedings of financial service provider and application to Adjudicating Authority) Rules, 2019 and thereafter it was admitted on 3rd December, 2019. The adjudicating officer issued notice subsequently on 24th December, 2019. It is quite clear that the proceedings was initiated by the adjudicating officer after the moratorium had come into effect. In our view no proceedings could be instituted in view of section 14(1) of the Act.

19. We are also of the opinion that external aid can only be considered when there is an ambiguity in

the provision. In this regard, the provision of section 14 is very clear and explicit and there is no room for any ambiguity. Further, the Supreme Court has categorically explained the effect of section 14 of the IBC. We, therefore, find that the adjudicating officer could not have considered the report of the insolvency committee to come to the conclusion that he had the power to proceed under SEBI law inspite of a moratorium having come into effect under section 14 of the IBC.

20. For the reasons stated aforesaid, the impugned order imposing a penalty and proceeding to recover under section 28A of the Act upon failure to pay cannot be sustained and is quashed. Since the proceedings could not be instituted, we also quash the show cause notice and the entire proceedings. The appeal is allowed.

21. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the

registry. In these circumstances, this order will be digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

Dr. C. K. G. Nair
Member

Justice M.T. Joshi
Judicial Member

09.10.2020
RHN