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Interim moratorium under the Insolvency and Bankruptcy Code 2016 will impact the pending proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 despite secured lender having possession of the asset

On July 2, 2024, the Hon'ble Delhi High Court ("Delhi HC"), in the case of *Sanjay Dhingra vs. IDBI Bank Limited and Ors*¹, has held that the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI") wherein the secured asset is in possession of the secured creditor even prior to commencement of interim moratorium under Section 96 of the Insolvency and Bankruptcy Code 2016 ("IBC"), cannot continue if the sale process has not been completed.

Brief Facts

1. IDBI Bank ("IDBI") had granted certain facilities to a company based in Dubai ("Corporate Debtor") through its Dubai Branch ("IDBI Dubai").
2. Sanjay Dhingra ("Personal Guarantor") had guaranteed the payments of the Corporate Debtor by mortgaging certain immovable properties ("Secured Asset") in favour of IDBI Dubai.
3. Owing to defaults being committed by the Corporate Debtor, IDBI (on behalf of IDBI Dubai) initiated proceedings under Section 13 of SARFAESI.
4. Thereafter, an application was filed by IDBI before CMM (West), Tis Hazari Court ("CMM") under Section 14 of the SARFAESI. By way of an order dated March 12, 2020, the CMM appointed a receiver ("Court Receiver") for taking physical possession of the Secured Asset. On March 19, 2020, and October 3, 2020, the Court Receiver issued possession notices and thereafter, IDBI (on behalf of IDBI Dubai) took physical possession of the Secured Asset.
5. Being aggrieved by the above, the Personal Guarantor filed a writ petition before the Delhi HC impugning the order appointing the Court Receiver and the consequential issuance of the possession notices. In the writ petition, the Personal Guarantor also highlighted that the facility was granted by IDBI Dubai, however, the steps under SARFAESI were undertaken by IDBI.
6. IDBI challenged the maintainability of the writ petition owing to an efficacious remedy being available under Section 17 of SARFAESI.
7. During the pendency of the writ petition, in December 2023, an application was filed by the Union Bank of India under Section 95(1) of IBC, to initiate insolvency process against the Personal Guarantor proposing Mr. Nitin

¹ 2024 SCC OnLine Del 4521

Narang as the Resolution Professional (“**RP**”). As per the provisions of Section 96 of IBC, an interim moratorium was imposed upon filing of the said application.

8. Thereafter, on December 21, 2023, the National Company Law Tribunal passed an order appointing the RP. In the said order, the tribunal reiterated that the moratorium under Section 96 of IBC was kicked in upon filing of the petition and continues to remain in force.
9. Seeking protection of interim moratorium under Section 96 of IBC, the Personal Guarantor approached the Delhi HC under the writ petition contending that in view of the interim moratorium sought to suspend the actions initiated by IDBI under SARFAESI.

Issues

1. Whether interim moratorium under Section 96 of IBC would apply to assets, possession of which has been taken by the secured creditor under Section 14 of SARFAESI?
2. Whether objections in relation to the maintainability of a proceeding under SARFAESI can be raised before a High Court in its extraordinary writ jurisdiction?

Analysis and Findings

The Delhi HC after appreciating the submissions advanced by the parties and having regard to settled law, held as follows:

1. the Delhi HC observed that under Section 96 of IBC, usage of the words ‘in relation to all the debts’ implies that the interim moratorium will apply to all the debts of the Personal Guarantor, including the mortgage created over the Secured Asset, which is the subject matter of SARFAESI proceedings;
2. while placing reliance on the Supreme Court of India’s (“**Supreme Court**”) decision in *Dilip B. Jiwrajka vs. Union of India*², the Delhi HC stated that the purpose of interim moratorium under Section 96 of IBC is to restrain both, the initiation as well as the continuation of legal action or proceedings against a debt;
3. the Delhi HC opined that even though IDBI had taken possession of the Secured Asset prior to the commencement of insolvency proceedings against the Personal Guarantor under IBC; the same would have no effect on the interim moratorium in terms of Section 96 of IBC;
4. since IDBI had not completed the sale process under SARFAESI, prior to the initiation of moratorium of the Personal Guarantor, the Secured Asset continued to remain an asset of the Personal Guarantor. Thus, the Delhi HC was not inclined to allow SARFAESI proceedings to continue, in light of the provisions of Section 96 of IBC;
5. in relation to the second issue, the Delhi HC relied on the Supreme Court’s decision in *Celir LLP vs. Bafna Motors (Mumbai) Private Limited and Ors*³ wherein it held that considering there being an effective remedy available under Section 17 of SARFAESI, a High Court cannot entertain a petition under Article 226 of the Constitution of India concerning a SARFEASI dispute; and
6. while disposing off the writ petition the Delhi HC held that since the sale process under SARFAESI was not completed, mere possession was no ground to impede moratorium under Section 96 of IBC. Therefore, IDBI cannot continue with SARFAESI process until the operation of the interim moratorium is lifted.

² 2023 SCC OnLine SC 1530

³ (2024) 2 SCC 1

Conclusion

The primacy of IBC over SARFAESI is a settled position of the judiciary in India. This is in line with the Supreme Court's decision in *Indian Overseas Bank vs. RCM Infrastructure Limited and Anr*⁴ wherein it was held that the sale process under SARFAESI is not completed until issuance of the sale certificate. Thus, if the sale of a secured asset is not completed prior to the imposition of the moratorium, a secured creditor cannot continue proceeding under SARFAESI. This decision has clarified the stance that financial institutions and lenders cannot impede the interim moratorium period enforced by IBC by continuing proceedings under SARFAESI.

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⁴ (2022) 8 SCC 516

		
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