REPORTABLE

IN DEBTS RECOVERY APPELLATE TRIBUNAL, ALLAHABAD (AS IN-CHARGE, DRAT, KOLKATA)

Appeal Diary No. 54/2019

Gujarat Industrial Development Corporation, Reginal Office-Plot No. 624/B, GIDC, Ankleshwar, District Bharuch, Gujarat-393001.

…………………………………………………………………………….. Appellant

Versus

1. Srei Infrastructure Finance Ltd, "Viswakarma" 86C, Topsia Road (South), Kolkata-700046 and its corporate office at Room No. 12 & 13, 6A, Kiran Shankar Roy Road, Kolkata-700001.
2. Gujarat Hydrocarbons & Power Sez Limited, 301, J.K. Apartment, VIPPS Centre, Local Shopping Centre, Masjid Moth, Greater Kailash-II, New Delhi-110068.
3. Aditya Kumar Jajodia, R/o 3, Bhagwan Das Road, New Delhi-110001.
4. Assam Company Limited, Greenwood Tea Estate, Dibrugarh Assam.
5. Link Holding Private Limited, 52, Chowringhee Road, Kolkata-700071.

….……………………………………………………………………… Respondents

Present: Shri Dipankar Dhar alongwith Shri Rudra Dhar, counsel for the appellant.

Shri A. K. Dhandhania, Sr. Advocate assisted by Smt. Neelina Chatterjee, counsel for the respondent no. 1,

Shri Ajay Gaggar and Shri Rakhi Purnima Paul, counsel for the respondent nos. 2 & 4,

None for the respondents no. 3 & 5,

JUDGMENT

Date of decision : 22.11.2019

R. S. KULHARI, CHAIRPERSON

1. The present appeal has been preferred against the order dated 31.07.2018 passed by the Presiding Officer, DRT-I, Calcutta, whereby the Interim Application (I.A.) being No. 909/2017 filed by the respondent no. 1-Financial

Institution(F.I.) in O.A. No. 477/2012 was allowed with certain directions.

2. The brief facts of the matter are, that the respondent no. 2-company was engaged in development of Hydrocarbons and Power SEZ, so approached before the Gujarat Industrial Development Corporation (hereinafter referred to as “GIDC”) for lease of certain land. The GIDC and the respondent no. 2-company entered into a lease deed dated 21.02.2008 for the land admeasuring area of 276 hectares situated at Vilayat Industrial Estate, Vagra Taluk, Bharuch District in the State of Gujarat. The defendant no. 2 requested to GIDC seeking permission to mortgage the land with the respondent no. 1 i.e. Srei Infrastructure Finance Ltd. (in short “F.I.”) for taking loan for development of land. The permission was granted vide letter dated 04.01.2011. Thereafter, the F.I. sanctioned the loan of Rs. 100.00 crores, in which the said land was offered as security. The respondent no. 3, 4 & 5 stood as guarantors to the said loan. The loan was disbursed with the condition to be repaid in four equal installments commencing from 15.04.2012 and the last being 15.01.2013. Since the borrower-company failed to adhere to the repayment plan, hence the respondent no. 1-FI filed the original application (O.A.) No. 477/2012 on 15.12.2012 claiming a sum of Rs. 1,21,41,39,813/- against the borrower-company and the guarantors along with future interest @ 16.5% per annum.

3. It appears that the Tribunal below vide order dated 1.1.2013 appointed one learned Advocate as Special Officer to be assisted by one officer of the F.I. to act as Joint Special Officer and to take symbolic possession of the property and file their report with regard to the status of the same. The

Special Officers filed the report on 15.03.2013 stating that symbolic possession of the property has been taken by them in compliance of the order of the Tribunal below.

4. During the pendency of O.A., the appellant-GIDC was impleaded as defendant no. 5 vide order dated 28.02.2014. Thereafter, the Tribunal below accorded last chance to the GIDC to file written statement and further directed not to create any third party right or interest in the property in question and to ensure that the property is fully protected and no encumbrance shall take place.

5. In the meantime, the respondent no.1-F.I. and borrowers/guarantors entered into debts repayment and settlement agreement on 25.03.2015 for the purpose of settling the outstanding dues alongwith another company namely Cromwell Securities Limited, but that could not be materialized and was terminated on 10.04.2017.

6. The respondent no. 1-F.I. filed the present I.A. on 11.05.2017 seeking reliefs as under:-

"(a) to allow the Receiver to take physical possession of the mortgaged property of the Defendant no. 1 and facilitate transfer of the land and/or any part thereof as may be required by the respective buyer and GIDC to facilitate the same.

(b) GIDC to allow the applicant to step into the shoes of the Defendant No. 1 and to develop the land within the parameters of FIDC Guidelines and GIDC to provide the necessary facilities to do the same.

(c) GIDC to allow the Receiver and the applicant company to divide the total land into small parcel of land and re-classify the land as industrial land, to enable the Receiver alongwith the applicant company to transfer the same to third party within the parameters of the GIDC.

(d) GIDC to receive development/conversion fee pro rata to the area of the land being transferred.

(e) the transfer proceeds received out of transfer of land be appropriated by the lender/applicant in protanto satisfaction towards its dues after paying the prorate development/conversion fees of GIDC".

7. The application was opposed by the appellant GIDC as well as by the borrower/guarantors by filing written statement. In the midst of it one resolution plan was filed before the Hon'ble NCLT, Guwahati against the corporate debtor-respondent no. 4, which is guarantor to the loan advanced by the F.I. The Hon'ble NCLT vide order dated 26.10.2017 declared moratorium covering the proceedings of the O.A. and finally resolution plan was approved vide order dated 20.09.2018. The resolution professional appointed by the Hon'ble NCLT has filed the copy of the order before the Tribunal below during the pendency of interim application. The Tribunal below, after hearing all the parties, vide impugned order dated 31.07.2018 allowed the interim application filed by the respondent-FI in the following terms:-

"i. the Special Officer Mr. D. Basu Ray along with the Nominee officer of the Applicant institution shall hand over actual physical possession of the mortgaged property/demised property, which has been taken symbolic possession by the Joint Special Officers to the Applicant institution.
ii. The Representative of Applicant Institution SREI Infrastructure Finance Limited, to be nominated by the Applicant Institution, is hereby appointed as joint Special Officer who shall be responsible for all the actions of the Applicant Institution hereafter directed to be undertaken by Application under these orders.
iii. The Defendant No. 1 shall co-operate with Special Officer in handing over the actual physical possession of mortgaged property to the Applicant Institution through Special Officers.
iv. The Applicant Institution will step into the shoes of the Defendant No. 1 and will be entitled to develop the mortgaged/demised properties and to sub lease the same to various parties for industrial purpose in the manner in which it could have been done by the Defendant No. 1 in terms of the Lease Deed dated 21.02.2008 entered into between Defendant

No. 1 and Defendant No. 5 and also as per the terms and conditions recorded in the minutes of the 56th meeting of the SEZ Board of Approval held on 18.01.2013 denotifying the SEZ status of the mortgaged/demised property.

v. The Applicant Institution will be entitled to sub lease the portion or portions of the demised land for the unexpired period of the lease deed dated 21st February 2008.

vi. The Applicant shall use and develop the mortgaged premises handed over to it as per terms of registered Lease Deed dat. 21.02.2008 entered between Defendant No. 1 and Defendant No. 5. GIDC, Defendant No. 5 shall co-operate with the Applicant in development of the mortgaged property as agreed to and undertaken by it under the Lease Deed.

vii. The Applicant Institution shall maintain a separate set of accounts for the purpose of this task and the Joint Special Officers have right and authority to inspect the accounts relating to mortgage property entrusted to applicant whenever they deem it necessary as per their discretion.

viii. The proceeds generated out of the operation of mortgaged property Viz; from Sub Lessees or transferees shall be appropriated towards loan account of the Defendant No. 1 lying with Applicant Institution and also will be utilized for reimbursing the expenses incurred by the Applicant institution for development/Sub leasing of the mortgaged/demised premises. The balance amount will be utilized on pro rata basis for paying the claim of the Defendant No. 5/GIDC towards rentals and its other legitimate claims in terms of the said Lease Deed and the claim of the Applicant on account of Principal, interest and other charges and will be subject to final orders in the OA. That in case of any dispute or misunderstanding/misinterpretation between the applicant institution and the Defendant No. 5/GIDC regarding the claim of GIDC, the same will be referred to the Joint Special Officers who shall decide the same.

ix. The Applicant Institution shall inform Defendant No. 1 and Defendant No. 5 of the progress of development of the mortgaged property from time to time and not later than once in 3 months and Defendant No. 1 and Defendant No. 5 shall co-operate with Applicant Institution in the development of mortgaged property.

x. The Applicant Institution shall bear the fees, expenses, actual accruals etc. of the Special Officer to be fixed from to time".

Being aggrieved by the said order, the present appeal has been filed by the appellant-GIDC.

8. Learned counsel for the appellant submitted that the proceedings of the O.A. were stayed by the Hon'ble NCLT during the moratorium period and the same was conveyed to

the Tribunal below. However, the Tribunal below has passed the impugned order during the currency of moratorium on 31.07.2018, whereas the resolution plan was finalized on 20.09.2017. Thus, the order impugned is liable to be set aside on this count alone.

9. The learned counsel has further contended that the land in question was given on lease for a period of 99 years to develop the Special Economic Zone with specific stipulations. Such land cannot be mortgaged with the respondent no.1-F.I. and instead, only the borrower could mortgage the lease hold rights. The owner of the property is still the appellant-GIDC, hence it cannot be transferred to any third party. Further, a sum of Rs. 134.00 crores is due against the respondent no. 2, which is required to be paid first. No relief was sought against the GIDC in O.A. by the respondent no. 1-F.I., whereas the Tribunal below has granted the relief against the GIDC and that too in the interim application, which is not permissible under the RDDBFI Act, therefore, the order impugned be set asset.

10. Learned counsel for the respondents no. 2 & 4, while adopting the arguments of the learned counsel for the appellant, further added that all the proceedings of the O.A. were stayed by the Hon’ble NCLT, therefore, the interim application filed by the F.I. could not have been entertained. If the F.I. was having any grievance to the said stay, it would have challenged the same or prayed for modification, but no such effort was made by the F.I. Hence the F.I. was bound by the stay passed by the Hon’ble NCLT. Further the Tribunal below has erred in granting the relief that the F.I. would step into the shoes of the respondent no. 2 and handover the

possession of the property to the F.I., which relief cannot be given even in the final adjudication of the O.A., in which only the recovery certificate may be issued to the tune of claimed amount, if the O.A. is allowed. The mortgage of the security cannot be enforced before the decision of the O.A. It was also contended that after resolution plan the respondent no. 4 has deposited Rs. 38.87 crores with the F.I. in compliance of the final resolution plan and that has been accepted by the F.I. without any objection, therefore, the interest of the guarantor-respondent no. 4 has also been involved in the property in view of section 140 of the Contract Act.

11. On the contrary, the learned counsel for the respondent-FI submitted that the complete premium price along with other charges, total amounting to Rs. 65.00 crores and odd had been deposited by the borrower with the GIDC and only some annual rent was to be paid, so it cannot be said that an amount of Rs. 134.00 crores is due to GIDC from the borrower. However, if there is any due, it would be paid to GIDC after receipt of funds from third parties in view of direction of the Hon'ble Tribunal. Further, the purpose of lease was wide and it was a type of sale. The loan was granted after permission of the GIDC, so the GIDC being a government entity should not be allowed to create hurdle in the recovery process of the F.I. However, the F.I. is ready to furnish the undertaking or indemnity to pay all the dues of the GIDC after realization from the development/sale of the property to the transferees.

12. It was also submitted that after impugned order, various meetings were held with GIDC in which it was transpired that as per Gujarat Industrial Development Act, the appellant may claim fee for division and conversion of land, so unless

such revenue charges and divisional charges are paid to the appellant, no further steps can be taken for development of the land, therefore, the order impugned be modified to the extent of allowing the F.I. to make upfront payment to the appellant in respect of the land revenue charges and such divisional charges as and when the F.I. receives the transfer/sub lease consideration from the new transferees and the appellant GIDC be directed to issue the provisional transfer order to the F.I.

13. The learned counsel had further canvassed that the resolution plan was pertaining only to the corporate debtor, who was the respondent no. 4 before the NCLT, therefore, the moratorium declared by the NCLT has not restricted to proceed against the borrower during the pendency of O.A.. Hence no illegality has been caused by the Tribunal below in passing the impugned order.

14. Having heard the learned counsels for the parties and considering the material available on record including the written submission filed on behalf of the respondent F.I., it is apparent that more or less all the parties to the proceedings are aggrieved by the impugned order. The appellant GIDC, borrower- respondent no. 2 and guarantor-respondent no. 4 are vehemently opposing the order, as the direction for handing over the possession of the property has been passed, whereas the respondent F.I., in whose favour the impugned order was passed, is aggrieved that unless the order is modified with certain terms, the same cannot be given effect, so GIDC be directed to issue the provisional transfer order. Admittedly, the impugned order was passed during the pendency of the resolution plan and various directions were given to the appellant as well as the borrower

for taking steps for development of the land, keeping the accounts' appropriation of the amount amongst others. In my opinion, considering the factual and legal aspects of the matter, the order impugned passed at this stage of O.A. is not sustainable on the following grounds:-

I. There is no dispute on the point that the resolution plan was filed before the Hon'ble NCLT, stating the respondent no. 4- Assam Company India Ltd (ACIL) as a corporate debtor. The resolution plan was admitted by the adjudicating authority vide order dated 26.10.2017 and after taking note of the pendency of the O.A. no. 477/2012 at paragraph no. 76 to 79, the moratorium was declared till completion of Corporate Insolvency Resolution process or until the Bench approves the resolution plan. The said resolution plan was approved by the Hon'ble NCLT on 20.09.2018. Thus, it is clear that when the impugned order was passed on 31.07.2018, the moratorium declared by the Hon'ble NCLT was in force, which prohibited all the proceedings including the proceeding of the O.A. in view of section 14 of the Insolvency and Bankruptcy Code, 2016. Although it is true that the corporate debtor before the NCLT was only respondent no. 4 and the borrower respondent no. 2 was not shown as Corporate debtor as contended by the counsel for the respondent no. 1-F.I. but the Hon'ble NCLT has ordered to "cover the proceeding pending before the DRT-1 Kolkata being O.A. No. 477/2012" (Paragraph no. 79 of the order), the necessary implication of the order is that the proceedings in O.A. were stayed. If the borrower or the F.I. were having any grievance against this declaration or stay, they were free to challenge the order or to pray for modification of the same, but no such action was taken. The declaration of moratorium has been brought to the notice of the Tribunal below. Thus, the impugned order passed during the moratorium declared by the Hon’ble NCLT cannot be said to be proper and justified.

II. It is settled proposition of law that the final relief sought in the suit or in any proceedings cannot be granted by way of interim relief and further any relief, which is not sought against the parties or in the original suit cannot be granted against such party in any event. In the instant case, the GIDC was impleaded as defendant no. 5 at later stage. However, no relief in the O.A. has been sought against the GIDC nor the pleadings of the O.A. have yet been amended seeking any relief against the GIDC. Yet, the Tribunal below has directed the GIDC to comply certain specific conditions as detailed out in the impugned order.

III. The respondent F.I. has sought reliefs for a decree of Rs. 1,21,41,39,813.00 alongwith interest jointly and severely against the borrower/guarantors including cost and expenses and to issue the recover certificate to this effect and further for enforcement of the security. Thus, the O.A. was in the form of a money suit, in which the Tribunal was required to issue the recovery certificate, if the claim was found to be in order and thereafter the enforcement of the security may be effected in the execution proceedings conducted by the Recovery Officer in accordance with the provision of the RDDBFI Act. Thus, no relief qua taking possession of the property by the F.I. or for development and sub lease of the property was sought. Yet, the Tribunal below vide impugned order granted relief beyond the scope of the O.A. Even if the enforcement of the securities was to be given effect, the same was tobe adjudicated while deciding the O.A. finally after giving opportunity of adducing the evidence to all the parties. Taking note of this legal proposition, the Tribunal below has also observed at page no. 19 of its order in the following terms:-

"There is substance in the arguments of the learned counsel for the defendants inasmuch as those prayers sought by the applicant touching upon altering the nature of premises and transferring to third parties etc. or reliefs which may arise for consideration in final disposal of O.A. They are beyond the jurisdiction of this Tribunal at this interim stage. However, considering the circumstances and facts of the case, which warrant optimum and proper utilization of mortgaged property to realize the public money due to it, this Tribunal is of the view that applicant institution can be entrusted with the possession of the mortgaged land of 276 hectares for the purpose of developing the same within the terms of lease deed dated 21.02.2008."

Thus, it is clear that the Tribunal below has passed the impugned order considering the circumstance of the fact on the basis of equity overreaching the legal proposition, but the equity cannot be override the law. It is the law which prevails over the equity.

IV. By the impugned order, the Tribunal below has almost decided all the rights and liabilities of the parties and if the same is implemented, then the whole scenario of the matter would be changed. In case, the F.I. remains unsuccessful in O.A. for any valid reason, then it would be impracticable to restore back the situation as the rights and interest of so many parties/transferees would be involved in the process. The issue, as to whether the respondent F.I. may step into the shoes of the borrower or not, whether third parties including FI have any right to develop the land and to sub-lease to other transferees, whether the objectives of the GIDC for development of special economy zone for power are achieved or not, whether the GIDC is entitled for recovery of its dues for Rs.134.00 crores or any other amount and also that what is the impact of the permission granted by the GIDC on 04.01.2011 for granting the loan to the borrower and various documents executed for mortgage and lease deed including the effect of permission given on 18.01.2013 in 56th meeting of governing body for de-notification of the land for industrial purposes, are the issues which can only be decided in the O.A. and cannot be adjudicated at the time of deciding the interim application.

V. The Tribunal below has appointed the Advocate Commissioner (Special Officer) and Joint Special Officer vide order dated 01.01.2013. The symbolic possession of the property has been taken by special officers and the report has also been placed on record. Section 19(18) of the RDDBFI Act provides for taking such step including taking possession, custody or management of the property by the receiver, but this provision does not empower the Tribunal below to handover the possession of the property to the claimant itself during pendency of the proceedings by impugned order. The rights and liability of the parties have not yet been decided and the physical possession of the property was ordered to be handed over to the claimant of the O.A. for further development and transfer, which is not within the purview of the provisions of the statute.

VI. The contention that the borrower has given authority to the F.I. to take possession, dispose of, create encumbrances, sell all the mortgaged property without intervention of the court in view of the permission given by the GIDC on 04.01.2011 and mortgage deed executed between the F.I. and borrower on 06.01.2011, is of no avail at this stage. The interpretation of the provisions mentioned in permission letter and mortgage deed would be taken care at the time of final decision of the O.A. If the F.I. was authorized to sell the property without intervention of the court, then it was free to take recourse of the SARFAESI Act for disposing of the property, but the possession of the same cannot be taken in the O.A. by way of Interim relief.

VII. The issue with regard to impact of the order of the resolution plan and deposit of Rs. 38.87 crores by the respondent no. 4, is not the subject matter of this appeal. Hence, it would not be proper to ponder over this aspect. However, it has been stated that the respondent no. 4 had filed an application before the DRT for dismissal of the O.A. on the ground of resolution plan, so it is open for all the parties to argue the same before the DRT and the same will be decided by the Presiding Officer, DRT in O.A. in accordance with law.

15. In view of the aforesaid, the impugned order is not sustainable. Accordingly, the appeal is allowed and the impugned order dated 31.07.2018 is set aside. All the pending interim applications also stand disposed off. Since a huge amount is involved in the matter and the interests of the respondent no. 1 F.I. and the appellant GIDC are also at stake to a great extent, hence in these circumstances, the Tribunal below is directed to decide the O.A. pending since 2012 as expeditiously as possible, but in any case within two

months from the date of receipt of this order. No order as to costs.

16. A copy of this order be supplied to the parties as well as to the DRT concerned.

CHAIRPERSON

VN Giri