

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH- II
KOLKATA**

IA(IB)No.1267/KB/2022

IN

C.P (IB) No.1712/KB/2019

In the matter of

An application under section 19(2) read with section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

And

In the matter of:

Pankaj Tibrewal

Resolution Professional of M/s Dutta Agro Mills Private Limited

... Applicant

Versus

West Bengal Industrial Development Corporation

... Respondent

Date of hearing :21/02/2023

Order Pronounced on :01/09/2023

Coram:

Mrs. Bidisha Banerjee : **Member (Judicial)**
Mr. Balraj Joshi : **Member (Technical)**

Counsels appeared through Physically/ Video Conference

Mr. Shaunak Mitra,Adv.] For the RP
Mr. Siddhanth Makkar, Adv.]
Mr. Pankaj Tibrewal,RP in person]

Mr. Tirthankar Das,Adv.] For Applicant in IA/917/2022
Mr. Saubhik Chowdhury,Adv.]
Ms.Meenakshi Manot, Adv.]

Mr. Pritesh Bansod,Adv.] For R-2 in IA/917/2022
Mr.Supriyo Singh, Adv.]
Ms.Suchita Sharma, Adv.]
Ms.Sangjukta Singh, Adv.]

Mr. Nimish Mishra,Adv.] For suspended Members of BoD of CC
Mr.Debjit Mukherjee,Adv.]

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This is an application preferred by the Applicant/Resolution Professional in the matter of M/s. Dutta Agro Mills Private Limited (Corporate Debtor), under Section 19 (2) read with Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 and Rule 11 of the National Company Law Tribunal Rules, 2016, inter alia, seeking the following reliefs;

- i. Allow the present application.
- ii. Direct the Respondent to assist the Applicant to complete the Corporate Insolvency Resolution Process of the Corporate Debtor in a time bound manner.
- iii. Direct the Respondent to handover the possession of the movable and immovable properties/assets of the Corporate Debtor to the Applicant.
- iv. Pass any other Order or relief as this Hon'ble Tribunal deems fit and proper in the interest of justice.

2. The brief background necessitating filing of this application would be as under:

- (i) An application for initiation of the CIRP of the Corporate Debtor (M/s. Dutta Agro Mills Private Limited) was filed by IDBI Bank (the “Financial Creditor”), under Section 7 of the Code. The Corporate Debtor was admitted into CIRP vide an order dated 04.07.2022 passed by this Hon’ble Tribunal in CO/IB/1712/KB/2019 and the Applicant herein was appointed as the Interim Resolution professional of the Corporate Debtor.
- (ii) That pursuant there to, the Applicant made a Public Announcement on 06.07.2022 in two widely circulated newspapers in West Bengal in accordance with Section 15 of the Code, read with Regulation 6 of Chapter III of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (iii) The Applicant, as the Resolution Professional of the Corporate Debtor apprised the ex-management about the initiation of the CIRP of the Corporate Debtor vide email dated 07.07.2022 and requested to provide the complete details and requisite documents regarding the Corporate Debtor.
- (iv) That the ex-management of the Corporate Debtor vide its email dated 09.07.2022 informed that the physical possession of Dutta Agro Mills Private Limited has been taken over by West Bengal Industrial Development Corporation (hereinafter referred to as “WBIDC”), i.e., the Respondent herein, that all the employees of Corporate Debtor have left the organization and that the physical possession of the factory cum registered office of the Corporate Debtor was under the possession of the Respondent Corporation.
- (v) The applicant, in pursuance of the same wrote a letter dated 13.07.2022 to the Respondent Corporation and apprised it about Section 17 and 18 of the Code and requested the Respondent Corporation to hand over the possession of the properties and assets of the Corporate Debtor.
- (vi) Upon hearing that the documents/records/information in relation to the Corporate Debtor are in the factory premises which is in possession of the Respondent, the Applicant herein issued 11 reminder emails requesting to

confirm if the documents are in factory premises so that the requisite documents can be examined by the Applicant.

- (vii) The Respondent vide email dated 25.08.2022 agreed to allow the applicant, visit the factory Unit of the Corporate Debtor but without prejudice to the rights of the Respondents.
- (viii) The Applicant reverted to the said email the same day i.e., 25.08.2022 intimating that the visit to the premises of the Corporate Debtor is planned for 29.08.2022.

However, the visit to the premises of the Corporate Debtor was rescheduled for 02.09.2022 over telephonic conversation between the applicant and the representative of the Respondent.

- (ix) The applicant along with its team visited the premises of the Corporate Debtor on the scheduled date 02.09.2022 but neither the ex-management or any of their representative were available. To the utter shock of the Applicant it found, no documents/records/financial statement available at the premises as claimed by the Director of the Corporate Debtor. The said visit of the applicant to the premises of the Corporate Debtor was duly apprised by the Applicant in the 3rd CoC meeting dated 12.09.2022.
- (x) It became evident that, the Corporate Debtor in the year 2006 had availed a term loan of Rs.17,20,00,000 from the Respondent Corporation. As per the terms of the loan agreement, a charge was created by the Respondent upon the movable and immovable assets of the Corporate Debtor. The respondent being a Financial Corporation comes under the purview of Section 3 of the State Financial Corporation Act, 1951 (hereinafter referred to as the “SFC”) and had powers/rights to take over the management or possession or both of the Corporate Debtors by virtue of Section 29 of the SPC Act, 1951. But as a Resolution Professional of the Corporate Debtor, the applicant has right and power to take over the possession of the immovable and movable assets or properties the Corporate Debtor and by virtue of Section 19 and Section

25 of the Code to take custody and control of all the assets of the Corporate Debtor, whereas the SFC has not handed over the possession of the RP.

- (xi) The Respondent has also filed an interim Application before this Tribunal to restrain the Applicant from taking possession of the factory cum registered office of the Corporate Debtor.

3. At hearing, Ld. Counsel for the applicant/ Resolution Professional would place the following provisions and precedents:

A. STATUTORY PROVISIONS

i. Section 25 of the Code which provides the following:

“25. Duties of resolution professional

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purpose of sub-section (1), the resolution professional shall undertake the following actions, namely –

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) Raise interim finances subject to the approval of the committee of creditors under section 28;

(d) Appoint accountants, legal and other professionals in the manner as specified by Board;

(e) Maintain an updated list of claims;

ii. Rights of the Interim Resolution Professional in terms of Section 19 (2) of the IBC,2016:

“Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.

The Adjudicating Authority, on receiving an application under Section 19 (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

iii. Rights of the Corporation

Section 29 of SFC Act, 1951 envisages as under:

“ Rights of Financial Corporation in case of default, and stipulate

(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof 1 [or in meeting its obligation in relation to any guarantee given by the Corporation] or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have to see [right to take over the management or possession or both of the industrial concerned], as well as the 3 [right to transfer by way of lease or sale] and release the property pledged, mortgages, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of the powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred 5 [as if the transfer] had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods

forming part of the security held by it as it had with respect to the original goods.

(4) [Where any action has been taken against an industrial concern] under the provisions of sub-section (1), all costs, [charges and expenses which in the option of the Financial Corporation have been properly incurred] by it [as incidental thereto] shall be recoverable for the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such assets, charges and expenses and, secondly, in discharging of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) [Where the Financial Corporation has taken any action against an industrial concern/ under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the [the concern]

iv. Section 238 of the IBC stipulates as under:

“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 effect by virtue of any such law.”

B. JUDICIAL PRECEDENTS

i. IBC shall override any other law.

Hon’ble Apex Court in “**Indian Overseas Bank vs. RCM Infrastructure Limited and Another**” [(2022) 8 SCC 516] has categorically held that the Code (IBC) shall have an overriding effect over any other law, It held:

“24.It is clear that once CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property”.

That the words “including any action under the SARFAESI Act are significant”. The legislative intent is clear that after CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover or enforce any security interest are prohibited.

Ld. Counsel for the RP, placing the above would strongly urge that:

The provisions of the IBC 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 and as such IBC shall prevail over **SFC Act**.

- ii. Ld. Counsel would submit that it has been consistently held that the IBC is a complete code in itself and in view of the provisions of Section 238 of the IBC, the provisions of the IBC would prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force. A reference in this respect was placed on the following judgments:

- i. **Innoventive Industries Ltd. V. ICICI Bank,**
- ii. **CIT v. Monnet Ispat & Energy Ltd. 12** and
- iii. **Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd.**

The Hon’ble Apex Court in **Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd. [(2021) 9 SCC 657]** noted as follows:

*“Given Section 238 of the Insolvency and bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income Tax Act. We may also refer in this connection to **Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.** and its progeny, making it clear that income tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.”*

We are of the view that the High Court of Delhi, is, therefore, correct in law. Accordingly, the special leave petitions are dismissed. Pending applications, if any, stand disposed of.”

iii. Where non-special statutes have non-obstinate clauses: -

Ld. Counsel would further submit that both the SFC Act, 1951 and the Code, 2016 are Special Acts and both the mentioned acts have their respective *non-obstante* clauses, as reproduced hereunder for clarity:

Ld. Counsel would strenuously urge that the Hon’ble Apex Court in **Solidare India Ltd vs. Fairgrowth Financial Services Ltd and Ors. [(2001) 3 SCC 71]**

“Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then, it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply”.

- iv. It is thus submitted that the respondent’s stand of not giving the possession of the factory cum registered office of the Corporate Debtor is creating a hindrance in the smooth conduct of the Corporate Insolvency Resolution Process of the Corporate Debtor whereas in terms of the law settled by the Hon’ble Apex Court the Respondent herein is liable to give the possession of the factory cum registered office of the Corporate Debtor in furtherance to enable the applicant conduct a smooth Corporate Insolvency Resolution Process of the Corporate Debtor.
- v. It was asserted that this Tribunal under Section 19 (2), 19 (3) and Section 25 (2) of the Code has the jurisdiction to issue appropriate directions to the Respondents to extend assistance and cooperation to the Applicant by providing

the relevant information and documents and give possession of the factory cum registered office of the Corporate Debtor as sought by the Applicant through various Emails and also to assist the Applicant during the CIRP with any other information required regarding the Corporate Debtor.

Section 238 of the Insolvency and Bankruptcy Code, 2016

238. Provisions of this Code to override other laws.

“The provisions of this Code 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.”

Section 46B - State Financial Corporation Act, 1951

46B. Effect of Act on other laws.

“The provisions of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.”

It was asserted that in view of the law pronounced in,

- (i) **International Coach Builders Ltd vs Karnataka State Financial Corporation (2003) 10 SCC 482;**
- (ii) **Rajasthan Financial Corpn. & Anr vs The Official Liquidator & Anr (2005) 8 SCC 190.** where both the special statutes have non-*obstante* clauses, such clause in the later statute prevails and IBC, 2016 is a later one.

A relevant extract from **Rajasthan Financial Corpn. & Anr vs The Official Liquidator & Anr.** (supra) would run thus: -

“8. In Karnataka State Financial Corporation Vs. Patil Dyes and Chemicals (P) Ltd. and ors. [(1991) 70 Comp. Cas. 38], the Hon’ble

Karnataka High Court held that rights under Section 29(1) of the SFC Act were available to the corporation only when the company is in charge and control of its assets and not when the company has lost control over its assets by the intervention of the company court and the Official Liquidator. Section 29 of the SFC Act did not justify a contention that where the creditor is a financial corporation, the assets of the company-in-liquidation pursuant to the order of the company court are taken outside the purview of the jurisdiction of the company court.

9. In Kerala Financial Corporation Vs. Official Liquidator and anr. [(1991) 71 Comp. Cas. 324], the Hon'ble Kerala High Court held that Section 529A of the Act prevailed over Section 29 of the SFC Act in case of a conflict and since the workmen's dues which rank pari passu with the dues of the secured creditors will have to be paid from the proceeds of the assets of the company including the security given to the secured creditors, any dispute as to the apportionment of workmen's dues and the amount due to the financial corporation and other related questions could not be left to be decided by the financial corporation.

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12. In Gujarat State Financial Corporation Vs. Official Liquidator and ors. [(1996) 87 Comp. Cas. 658], the Gujarat High Court doubted the correctness of the decision of the Kerala High Court in Kerala Financial Corporation Vs. Official Liquidator and anr. (supra) and followed the decision of the Karnataka High Court in International Coach Builders Ltd. (In Liquidation) Vs. Karnataka State Financial Corporation (supra). The Court held that the right of the secured creditor to deal with his security and realize the same without intervention of the court, remains unaffected notwithstanding such vesting, or property coming in the custody of the company court. To the extent of the charge or mortgage, the property does not come to the court and is not available for distribution of dividends generally unless the mortgagee relinquishes it or the surplus, if any, comes

to the court. Enforcement of such right remains outside the insolvency proceedings or winding up proceedings. It was held that the power of recovery of loans by State Financial Corporations under Section 29 of the SFC Act was not in conflict with Section 529A of the Companies Act, 1956.

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The Hon'ble Apex Court in **Rajasthan Financial Corpn. & Anr vs The Official Liquidator & Anr** said:

“16. In International Coach Builders Limited Vs. Karnataka State Financial Corporation [(2003) 10 SCC 482], this Court considered the correctness of the views expressed by the Karnataka High Court and the Gujarat High Court. This Court held that a right is available to a financial corporation under Section 29 of the SFC Act against a debtor, if a company, only so long as there is no order of winding up. When the debtor is a company in winding up, the rights of financial corporations are affected by the provisions in Sections 529 and 529-A of the Companies Act. It was also held that the proviso to Section 529 of the Companies Act creates a "pari passu" charge in favour of the workmen to the extent of their dues and makes the liquidator the representative of the workmen to enforce such a charge.

The Hon'ble Apex Court summed up the legal position thus:

“18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

- (i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.*

- (ii) *A District Court entertaining an application under [Section 31](#) of the SFC Act will have the power to order sale of the assets of a borrower company- in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.*
- (iii) *If a financial corporation acting under [Section 29](#) of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of [Section 529-A](#) and [Section 529](#) of the Companies Act.*
- (iv) *In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the [SFC Act](#) are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the [Companies Act](#) regarding distribution of the assets of the company- in-liquidation.”*

5. Per contra the Respondents would aver as under:

- i. That the said application is not maintainable as the reliefs claimed in the said application against the respondent do not fall within the provisions laid down under Section 9 (2) as well as Section 60 (5) of the Code.
- ii. That the respondent is public limited Company incorporated under the Companies Act, 1956 and having its registered office at “PROTITI”, 22, Abanindranath Thakur Sarani (Camac Street), Kolkata - 700017, also

known as “The Corporation” and is governed by the State Financial Corporation Act, 1951.

- iii. The respondent had agreed to lend an advance to the Corporate Debtor a Term Loan of Rs.1720.32 lakhs for expansion of existing Rice Bran Oil Refining Plant from 50 TPD to 250 TPD at their existing factory [remises at Village Dhumui, Post Office: Paharhati, Police Station Memari in Burdwan District. The terms and conditions being embodied in the Term Loan Agreement dated 20th March, 2009. (Annexure “A”)
- iv. That in terms of the said term loan agreement the respondent had agreed to lend of Rs.1720.32 lakhs only on the terms and subject to the condition. That the said loan was supposed to be repaid by 19 equal quarterly installments of Rs.86.02lakhs and 1 installment of Rs. 85.94 lakh. The said loan was secured by the corporate debtor in terms of the said Term Loan Agreement. The description of the assets of the company which are mortgaged and hypothecated to the respondent as given in the schedule of the Term Loan Agreement.
- v. That the corporate debtor also executed an Unattested Memorandum of Hypothecation dated March 20, 2009 in pursuance of the same being Annexure “B”.
- vi. That in terms of the said agreement from time to time a sum of Rs. 1426.00 lakhs has been disbursed by the respondent. However, the Corporate Debtor failed to make payment of the sum due and payable and after making few payments it became a defaulter in terms of the events of defaults of the said Term Loan Agreement.
- vii. That after creation of the charge the said charge was also registered with Ministry of Corporate Affairs by filing Form 8 on March 20, 2009 as in Annexure “D”.
- viii. That thereafter, for meeting the requirement of further funds the Corporate Debtor along with IDBI Bank (petitioner in the main section 9 petition) approached the respondent with a proposal that the respondent will lend

and advance financial facilities to the Corporate Debtor up to the limit of Rs.14,00,00,000.00/- (Rupees Fourteen Crore only). Upon modification of charge to the extent that IDBI Bank being the other financial creditor will have hypothecation at the plant and machinery etc. the business of the corporate debtor both present and future by way of 2nd charge as additional and/or collateral security for the accommodation facilities by way of overdraft/cash credit/bank guarantee etc.

- ix. By an unattested Supplementary Deed of Hypothecation dated June 17, 2009 the Borrower hypothecated *inter alia* all the current assets of the Borrower including raw materials, book debts, finished debts, finished and unfinished goods, goods in transit, etc. (other than plant and machinery etc. of the Borrower on which the Corporation held first charge) situated and lying at or to be brought into and/or to be stored into the factory or go-down of the Borrower at Mauza Dhunui, Post Office Paharhati, Police Station Memari, District Burdwan, West Bengal in favour of the Corporation as and by way of Second Charge with the prior permission of the Bank (who held the first charge over the current assets of the Borrower) as additional and/or collateral security for due repayment of the term loan of Rs.1720.32 lakh only granted by the Corporation to the Borrower together with interest, additional interests, charges, costs and expenses for observance and performance of the obligations of the Borrower to the Corporation under the Corporation security.
- x. That the aforesaid agreement was reduced in writing in terms of a Tripartite Agreement executed between the respondent, the corporate debtor and IDBI Bank on August 13, 2010 (Annexure E). The charge created was modified and uploaded in the website of the Ministry of Corporate Affairs.
- xi. That upon series of defaults by the Corporate Debtor the respondent, as the secured creditor was left with no option, but to issue a further notice under Section 29 of the State Financial Corporation Act, 1951 on June 17,

2014 by the operation and of law and keeping in tune with the legal fiction created therein, the respondent has taken action against the Corporate Debtor under the aforesaid Act, and has become the owner of the premises since 2016 much prior to the commencement of CIRP, in so far as the Corporate Debtor is concerned.

- xii. That, the Financial Corporation became owner of the assets in view of Section 39(5) of the Act in terms of Section 29 of State Financial Corporation Act on July 22, 2016 the immovable assets of the Corporate Debtor including the factory premises, land, plant and machineries situated at Dhunui, Post Office Paharhati, Police Station Memari, District Burdwan, West Bengal was taken possession by the respondent on or about July 22, 2016 and the Financial Corporation has the right to take over the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation when the Corporate Debtor is in default of the payment of its financial liability to the Financial Corporation.
- xiii. That the Act is a special Act providing security to the Financial Corporation for purposes of recovery of its dues and the rights of a Financial Corporation thus must be protected.
- xiv. That the respondent received a notice from the IRP calling for Committee of Creditors (COC) meeting dated August 10, 2022 wherein the respondent was directed to appear. The Financial Corporation became owner of the assets in view of Section 29 (5) of the Act. Upon careful scrutiny of the notice of the second meeting of COC it came to learn that one of the agendas of the said meeting was “to appoint security agency replacing the existing security agency appointed by WBIDCL upon getting possession from WBIDCL for manufacturing Unit-cum-Registered office of the Corporate Debtor.

Ld. Counsel would refer to the following: -

- i. **Gloria Rodriguez, aka Carmen Santiago 1987 SCC Online us SC 40** which says:

“Whatever furthers the statute’s primary objective must be the law”.

- ii. **KSL and Industries Limited Vs. Arihant Threads Limited and Others** where the Hon’bl Apex Court propounded “*Provisions of Act shall be in addition to and not in derogation of another law or laws*”. It was argued that bot the acts should co-exist and one shall not other.

6. Ld. Counsel Mr. Shaunak Mitra for IDBI would cite the following extract from the Judgment in **Bihar State Financial Corporation & Ors. Vs. Parmanand Kumar etc. [2008 SCC Online Pat 105]** which refers to the SFC Act reads as under: -

“13. A perusal of Section 29 of the Act makes it very clear that notwithstanding management, control and possession of the assets pledged, mortgages, hypothecated or assigned to the Financial Corporation, may have been taken over by the Corporation, yet the ownership right remain with the Corporation until such assets are transferred and vested to transferee. Sub-Section (2) of Section 29 of the Act unequivocally states that any transfer of property made by the Financial Corporation, in exercise to its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred had been made by the owner of the property. This is indicative of the fact that merely by taking action under Section 29 of the Act, the Corporation does not become owner of the property nor in any sense the ownership rights in assets vesting in the promoters extinguish. Corporation is only authorized by law to effect transfer of such assets for recovery of the dues. The transfer of debtor’s assets is allowed by the Corporation, not as property of Corporation but only as property of the debtor unit. It is considered as transfer by the owner vesting the owner’s interest in the property in the transferee. Until the transfer actually takes effect, the proprietary rights continues to vest in the promoters and the right is not defeated even if the Corporation has made abortive attempt to transfer the

property by any of the methods envisaged under the provisions. Therefore, the rights, title of the defaulter promoter qua the property remains the same until his/its rights are extinguished by completion of transfer. Until the transfer is completed and the promoter's rights are extinguished, his status continues to be a defaulter owner of the assets and the Corporation continues to be in control of its assets which has been pledged, mortgaged, hypothecated or assigned by way of security for the purpose of management, with a right to effect recoveries therefrom by exercising its right of transferring the property and appropriate the recoveries towards its dues."

Therefore, Ld. Counsel would urge that the property of CD having not vested into the Corporation remains with the CD, the defaulter promoter and Corporation is merely in control over the assets.

7. The rival contentions have been carefully noted.

Admittedly, the Respondent Corporation is governed by the State Financial Corporation Act, 1951 (SFC Act).

8. **Analysis and Findings**

The issue that fell for consideration is whether the Section 29 of the SFC Act, 1951 shall override the provisions of IBC,2016 ignoring Section 238 in IBC.

No authority, post framing of IBC has been cited to substantiate the view that an earlier Special Act (have SFC Act, 1951) with a *non obstante* clause shall prevail over the IBC which is a later one.

A. **The Statutory Provisions applicable to this case:**

i. **Section 238 of IBC is explicit that the Provisions of this Code shall override other laws. It reads:**

"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."

ii. Whereas **Section 46(B)** of the **State Financial Corporation Act** envisages the following:

46B. Effect of Act on other laws.

“The provisions of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.”

iii. **Section 29C** of the **State Financial Corporation Act** reads as under: -

“ (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, make any default in repayment of any loan or advance or any instalment thereof (or in meeting its obligations in relation to any guarantee given by the Corporation) or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the (right to take over the management or possession or both the industrial concerns), as well as the (right to transfer by way of lease or sale) and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred (as if the transfer) has been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or

partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) (Where any action has been taken against an industrial concern) under the provisions of sub-section(1), all costs, (charges and expenses which in the opinion of the Financial Corporation have been properly incurred) by it (as incidental thereto) shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) (Where the Financial Corporation has taken any action against an industrial concern) under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of (the concern).”

B. The Judicial Pronouncements to be looked into:

i. In Bihar State Financial Corporation (supra) while discussing the implication of section 29 of the SFC Act 1951, (extracted above) Hon’ble Court in paras 14,17,21 of its Judgement, clarified the following: -

“14. In the context of the present controversy, sub-section (4) also assumes importance inasmuch as it provides that all the expenses incurred for taking steps for transfer of the property are the liability of the owner of the assets and to be deducted from the recovery made from such assets. It is only after deducting or adjusting the expenses or cost of expenses of transfers, the remainder is adjusted against the outstanding dues to Corporation.” After outstanding of Corporation is satisfied the balance is to be applied to satisfy the other debts of the loanee. Residue

if any, goes to the promoters or its successors. Under the statutory scheme the Corporation while transferring the assets of debtor, acts only as a person authorized by law to deal with assets of debtor and acts only as such in applying the proceeds of transfer for discharging the liabilities of owner of assets so transferred. This provision conclusively establishes the statutory scheme of continued ownership of debtor promoters until assets vest in transferee as transferees from the owners.”

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17. Whenever the assets of debtor is sought to be transferred for realization of dues, whether under statutory power as under Section 29 of the Act or in execution of a decree of the Court under Code of Civil Procedure, it is now well accepted norm that before the sale is concluded and debtor's rights in property to be transferred are extinguished, an opportunity is required to be given to the defaulter to pay the realizable sale price as has been offered for it by the prospective buyer and retain the same for himself. It is only after this exercise that the sale can be concluded by the Corporation and the cost of conducting such transfer may be first adjusted against the realization. Only remainder can be appropriated towards the outstanding of the creditor-Corporation in the first place, and thereafter towards other debts. The action of attempting to sale or transfer the asset of debtor is not depended on the debtor's will but is the action of Corporation vested with statutory authority to take such action.

In view of the above, the argument advanced by the WBIDC that there has been a change of ownership in favour of WBIDC before enactment of IBC, has no legs to stand upon. The CD is a defaulter debtor but the WBIDC the Creditor Corporation is not the owner of the property hypothecated/mortgaged to it by the CD, it is rarely in control over the assets of the CD.

ii. **IBC is a Special statute that prevails over General Statutes**

Further in **A. Navinchandra Steels Private Limited** (Supra) where it has been held as under: -

“14. It is important to restate a few fundamentals. Given the object of the IBC as delineated paragraphs 25 to 28 of Swiss Ribbons (P) Ltd. v. Union of India (2019) 4 SCC 17 [Swiss Ribbons) clarifies that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being restored to in case all attempts of revival fail. Vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute must prevail in the event of conflict, but has a non-obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.

It is, therefore, explicit by virtue of Section 238 of IBC, the provisions of IBC will prevail over the other Statutes.

iii. **A Special Statute can also at times be a general Statute in certain cases:**

In **Allahabad Bank Vs. Canara Bank, (2000) 4 SCC 406**, Hon’ble Apex Court had to deal with whether the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [“RDB Act”] that was a special statute qua the Companies Act, 1956.

Hon’ble Court restated the following:

“Special law v. General law

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39. There can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis yet another legislation. Such situations do arise as held in LIC of India v. D.J. Bahadur [(1981) 1 SCC 315: 1981 SCC (L&S) 111: AIR 1980 SC 2181].

“... for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law”.

For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in Damji Valji Shah v. LIC of India [AIR 1966 SC 135 :(1965) 3 SCR 665] (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the Companies Act, 1956 can be treated as a general statute. This is clear from para 19 of that judgment. It was observed:

“Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general Act, viz., the Companies Act which is an Act relating to companies in general.”

Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute.

Special law v. special law

40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in Maharashtra Tubes Ltd. v. State Industrial and Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the

“1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the

1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one”. (SCC p. 157, para 9)

It was held

“Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts.”

(emphasis added)

iv. **An earlier Special statute always prevails over the later general statute.**

In **Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills, (2008) 15 SCC 1**, Hon’ble Apex Court, in the context of the **State Financial Corporations Act, 1951** [“SFC Act”] and the Companies Act, 1956, held that though the SFC Act was an earlier Act of 1951, yet, it would prevail over the winding up proceedings before a Company Judge, given that the SFC Act is a special statute qua the general powers of the Company Judge under the Companies Act. It was stated as follows:

“37. The 1951 Act indisputably is a special statute. If a financial corporation intends to exercise a statutory power under Section 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.

38. There cannot be any doubt whatsoever that the proceedings under Section 29 of the 1951 Act would prevail over a winding-up proceeding before a Company Judge in view of the decision of this Court in International Coach Builders Ltd. v. Karnataka State Financial Corpn. [(2003) 10 SCC 482] wherein it has been held: (SCC p. 496, para 26)

“26. We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights under Section 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the

Division Bench of this Court in *A.P. State Financial Corpn. Case [A.P. State Financial Corpn. v. Official Liquidator, (2000) 7 SCC 291]*. This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529-A of the Companies Act, 1956, inasmuch as SFCs cannot exercise the right under Section 29 ignoring a *pari passu* charge of the workmen.”

The view taken therein was reiterated by a three-Judge Bench of this Court in *Rajasthan State Financial Corpn. v. Official Liquidator [(2005) 8 SCC 190]* wherein it was stated: (SCC pp. 201-02, para 18)

v. **A later Special Statute prevails over an earlier special one only in a situation where the reach of its non obstante clause is not limited like the earlier one.**

In Madras Petrochem Ltd. v. BIFR, (2016) 4 SCC 1, Hon’ble Apex Court had to consider whether a predecessor statute to the IBC, which has been repealed by the IBC, namely, the **Sick Industrial Companies (Special Provisions) Act, 1985**, prevails over the **SARFAESI Act** to the extent of inconsistency therewith. The Court noted that in the case of two statutes which contain *non-obstante* clauses, the later Act will normally prevail, holding:

“36. A conspectus of the aforesaid decisions shows that the (Sick Industrial Companies (Special Provisions) Act, 1985) prevails in all situations where there are earlier enactments with non obstante clauses similar to the (Sick Industrial Companies (Special Provisions) Act, 1985). Where there are later enactments with similar non obstante clauses, the (Sick Industrial Companies (Special Provisions) Act, 1985) has been held to prevail only in a situation where the reach of the non obstante clause in the later Act is limited—such as in the case of the Arbitration and Conciliation Act, 1996—or in the case of the later Act expressly yielding to the Sick Industrial Companies (Special Provisions) Act, 1985, as in the case of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Where such is not the case, as in the case

of *Special Courts Act, 1992*, it is the *Special Courts Act, 1992* which was held to prevail over the *Sick Industrial Companies (Special Provisions) Act, 1985*.

C. **IBC vs. SFC**

IBC, 2016 is indubitably and indisputably a Special Statute as also a later statute vis-a-vis the SFC Act of 1951, both having *non obstante* clause.

We have already reproduced the *non obstante* clause of both the IBC and SFC, Act. The reach of non obstante clause of SFC Act is limited by Section 46 B of the Act, whereas non obstante clause of IBC shows that it prevails in all situations.

Thus, IBC as a Special statute has a *non obstante* clause which does not have a limited reach unlike SFC Act.

D. **Conclusion**

In view of above enumerations, for all purposes, provisions of IBC, 2016 should prevail over SFC Act, 1951.

9. In view of the foregoing analysis, the application being IA(IB) No. 1267/KB/ 2022 is allowed.

10. The RP is directed to act in accordance with the provisions of the Code.

11. Urgent Certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 1st day of September, 2023

PJ