IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOCHI BENCH

Interlocutory Application No. 3/KOB/2020

In

TIBA/10/KOB/2019
&

Interlocutory Application No. 4/KOB/2020

In

TIBA/31/KOB/2019

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Veera Brahma Rao Arekapudi, Member (Technical)

Date of Order: 12.03.2020

Between:

Securities and Exchange Board of India
Represented by its Manager
Mr.Javed Zaman TS. ..Applicant in both cases

Vs.

Kerala Housing Finance Limited represented
By Interim Resolution Professional
and others …Respondents in both cases

Appearance:

For Applicant … Mr. K.M. Jamaludheen, Advocate
For respondents … Mr. P.D.Vincent, PCS for R1
… Mr.Denu Joseph, Advocate for FCs

The IA No.3/KOB/2020 is filed in TIBA/10/KOB/2019 and IA No.4/KOB/2020 is filed in TIBA/31/KOB/2019 by the Securities and Exchange Bord of India represented

by its Manager, Mr.Javed Zaman T.S. against the Kerala Housing Finance Limited represented by the Interim Resolution Professional and ten others.

2. Kerala Housing Finance Limited (Corporate Debtor) is a company registered under the Companies, Act 1956 with Registrar of Companies, Ernakulam and incorporated on March 5, 1992. Its registered officer is at Thiruvananthapuram. The corporate debtor (CD for short) was also a Housing Finance Company registered with the National Housing Bank which registration was cancelled vide an order dated June 13, 2017 issued by NHB. Pursuant to a refence from NHB stating that the Corporate Debtor had raised capital from Public through issuance of sureties without issuing any prospectus or offer document, SEBI being the regulator for the securities market, initiate an examination into the alleged money mobilisation. Hence the SEBI has issued two interim orders dated 31.7.2015 in respect of deemed public issue of equity shares made by the corporate debtor and another dated 20.11.2015 issued in respect of deemed public issue of non-convertible debentures and preference shares. The aforesaid examination finally culminated in the passing of the final order dated 10.8.2017 where the SEBI found that the Corporate Debtor had not complied with the public issue norms ie., provisions of the Companies Act and SEBI regulations that govern the issue of securities to the public with respect to its issuances of equity shares, non-convertible debentures and preference shares. Hence by final order SEBI directed the CD and its directors jointly and severally to refund the monies collected from investors with interest at 15% per annum within six months making it clear that if they failed to comply with the direction of refund, SEBI shall initiate recovery proceedings in accordance with provisions of the SEBI Act. The CD filed an appeal before the Securities Appellate Tribunal (SAT) vide appeal No.262/2017.

Another Appeal No.5/2018 has been preferred by the directors. Both appeals were dismissed by the SAT on 20.5.2019 for want of prosecution. In view of the non-compliance by the CD and its directors to refund the monies due to the investors, as directed vide SEBIs final order, SEBI initiated recovery proceedings under Section 28A of the SEBI Act, by drawing up a Recovery Certificate against the Corporate Debtor and its directors/promoters for an amount of Rs. 261,35,50,640/- (Rupees two hundred and sixty one crore thirty five lakhs fifty thousand six hundred and forty only). Notice of Demand dated 26.6.20189 was issued by the Recovery Officer to the aforesaid defaulters demanding payment within fifteen days from the date of receipt of the notice. The Recovery Officer also issued attachment order dated 26.6.2019 in respect of all bank/demat accounts, mutual fund folios of the defaulters in execution of the said notices. As the defaulters failed to make the payment towards their dues, vie order dated 26.7.2019 the Recovery Officer directed the Banks to remit the amount as available in the bank accounts of the defaulters to SEBI. The mutual funds were also directed to redeem the units of mutual funds held in the name of the defaulters and to remit the amount to SEBI. The remittance received from Banks amounts to only Rs. 44,24,570 from the accounts of Mr. .P.Parameswaran, which has now been directed by SAT to be refunded to the said person vide order dated 27.11.2019 in Appeal No.5/2018. The Recovery Officer then issued a prohibitory order dated 2.8.2019, restraining the defaulters from disposing, transferring, alienating or rating charge on all their movable and immoveable properties. When the recovery proceedings were underway, SEBI was informed of this Tribunal's order dated 18.9.20190 directing commencement of CIRP appointing Mr. PD Vincent as the Interim Resolution Professional. On getting the information the SEBI responded to the IRP stating the facts and events that culminated in the initiation of recovery

proceedings by SEBI and stated that the SEBI would maintain status quo in the recovery proceedings and that they will be challenging the same under the relevant provisions of the Code 2016. Hence they filed the aforementioned I.As before this Tribunal.

3. The grounds for challenge are:

(a) Under the regulatory framework, SEBI performs executive functions, quasi-judicial functions and legislative functions.

(b) The recovery proceedings initiated under Section 28A of the SEBI Act was pursuant to non-compliance by the CD and its directors to make refunds to the investors who have subscribed to the securities issued by the said debtor in deemed public issues without complying with the required legal formal ties and compliances. Hence, the objective of SEBI is different than what is sought to be achieved by the Tribunals order.

© The claims made by the operational creditors in the matter amount to few lakhs. However, the recovery proceedings by SEBI is for recovery of Rs. 261 crores for all investors who had subscribed to the securities illegally/irregularly issued by the CD.

(d) The Tribunal has no jurisdiction to issue any order or direction in conflict to SEBI which is another statutory authority under an independent Central Legislation. The corporate insolvency resolution process would be inappropriate as it applies only in respect of a corporate debtor who has engaged only in lawful activity.

(e) As the order of SEBI was upheld by the SAT, the investors who had subscribed to the securities issued by the CD were covered by such action and monies recovered thereon would have been distributed to them.

(f) The Tribunal may not have jurisdiction as investors who subscribed to the securities issued by the CD cannot be termed as “financial creditors” or “operational creditors”.

(g) The provisions of SEBI Act 1992 are not overridden by the provisions of the IBC by virtue of Section 238 of the IBC 2016 since SEBI Act deals with investor protection issues and not with creditor and debtor issues though Section 238 has exhaustive mode in respect of the subject matter of creditor and debtor issues, It has no overlapping or overriding effect over investor protection issues dealt with under SEBI Act. As long as other law or jurisdiction under other law is not inconsistent with the IBC, Section 238 thereof cannot be invoked because triggering point for application of this section is inconsistency of other law with this Code. SEBI Act is fully applicable in the facts and circumstances of the case.

(h) The applicant herein (SEBI) has not been arrayed as a party respondent in the proceedings before the Tribunal. This gives a suspicion that the applications were made for circumventing the orders/proceedings of SEBI. About 10 writ petitions filed by investors of the CD seeking refunds are pending before the Hon’ble High Court of Kerala.

(i) Considering the proceedings of SEBI in the matter pertaining to the CD are in the nature of protecting the interest of investors who had lost monies because of failure on the part of the said CD and its directors to make refunds to them, and the applications are filed by investors who had

subscribed to the debt debenture bonds issued by the corporate debtor, it is proper to allow SEBI to perform its function under the SEBI Act.

Hence the applicant prays for the interference of this Tribunal in the above matter and to modify the order dated 18.9.2019 passed in the aforesaid IBAs.

4. The Resolution Professional filed a written statement to the IAs in which he has stated that the interlocutory application filed by the applicant is not maintainable either in law or on facts. The non-convertible debentures issued by the Corporate Debtor falls within the definition of “financial debt” under Section 5(8)(a)(c) of the IBC which says: “Financial debt” means a debt along with interest if any, which is disbursed against the consideration for the time value of money and includes: (a) money borrowed against the payment of interest; (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan, stock or any similar instruction. It is further stated that the submission of the learned counsel for the applicants that Section 28A of the SEBI Act 1992 will have overriding effect on the provisions of Section 114 of the I&B code cannot be accepted as Section 28A of SEBI Act relates to recovery of amounts; if a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of moneys or fails to comply with a direction for disgorgement order issued under Section 11 B or fails to pay any fees due to the Board, the Recovery officer may draw up under his signature and statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes:

(a) Attachment and sale of the persons moveable property

(b) attachment of the persons bank accounts.

© attachment and sales of the persons immoveable property

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

5. Appointing a receiver for the management of the persons' movable and immoveable properties, and for this purpose, the provisions of Sections 220 to 227,228A, 229,232, the second and third schedules to the Income Tax Act, 1961 and and the Income Tax (Certificate proceedings) Rules, 1962 as in force from time to time, in so far as may be, apply with necessary modifications as if the said provisions and the rules made thereunder were the provisions of this Act and referred to the amount due under this Act instead of income tax under the income tax Act. 1961.

6. He has further stated that Section 14(1) (a) of the IBC, the institution of suits or continuation of pending suits or predesigns against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal arbitration panel or other authority is prohibited. Hence Section 28A of the SEBI Act including Sub Section (3) therein is in contravention of Section 14 of the IBC. He has further cited the judgment of the Hon'ble Supreme Court in **Innoventive Industries. Vs. ICICI Bank and others reported in (2019) 1 SCC 407**, where the Hon'ble Supreme Court observed as follows:

> *"The non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the code."*
>
> Hence Section 238 of the IBC overrides Section 28A of the SEBI Act, 1992.

7. The RP has produced an order of the NCLAT in **Bohar Singh Dhillon Vs. Mr.Roghit Sehgal (IRP) and others in CA(AT(Insolvency) No.65 of 2018 dated 9th May, 2019** in which it was observed as under:

> "Till the period of 'Moratorium' continues, the 'Securities and Exchange Board of India' cannot recover any amount nor can sell the assets of the 'Corporate Debtor' during the 'Moratorium' period. Though NCLAT have held that the application under Section 7 is maintainable while step has been taken by the 'Securities and Exchange Board of India' the 'Resolution Professional' is required to act in terms of Section 17(2) (e) of the 'I&B Code' for complying with the requirements under the 'Securities and Exchange Board of India Act' and Regulations framed thereunder as well as the guidelines issued by the Regulatory Authority. It is also made clear that the 'Securities and Exchange Board of India' is however entitled to take action against individual including the former Directors and Shareholders of the 'Corporate Debtor'.

Hence till the period of Moratorium continues the Securities and Exchange Board of India cannot recover any amount nor can sell the assets of the Corporate debtor during the Moratorium Period.

8. The applicant in the IA filed a counter to the written statement of the RP reiterating most of his contentions in the IA. He has further stated that the applicants in the TIBA have suppressed material facts and without impleading SEBI obtained an order appointing the IRP in the above matter.

9. The financial creditors have filed a written argument stating that Parliament was very well aware about the SEBI Act at the time when IBC which is a complete code in itself was enacted. Section 238 of the IBC unequivocally provides that the provisions of the IBC shall have the 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. Therefore, he opined that any provision under any other enactment including SEBI Act which contravenes or that portion which stands inconsistent with the provisions of the IBC will have any effect, if covered by the provisions of IBC 2016. Therefore, consequently any exercise of power under SEBI Act which stands inconsistent or which collides with the action initiated under IBC will not be operational. The proceedings initiated as per IBC is to ensure that the above class of persons coming under the definition of financial creditors as per section 5(8) of IBC are provided with a mechanism to get their amounts recovered. They also contended that the inadequacy of the proceedings under SEBI Act is evident from the fact that inspite of initiation of proceedings as early as in 2015, no effective action has been taken and the corporate debtor and its defaulter directors continued to cheat the public indiscriminately. It is clear that SEBI have failed to stop the functioning of the corporate debtor in spite of the fact that they identified malpractices committed by the corporate debtor. They also pointed out the inadequacy of SEBI to proceed with the recovery of the assets of the corporate debtor, is evident from the fact that there is no mechanism under SEBI Act to recover the amount lent out by corporate debtor to public with and without security. Whereas the proceedings under IBC entails the clear modality wherein the resolution professional can initiate, either sell of the loans lent out to the public by the corporate debtor as an asset or even proceed to legally effect recovery of the amounts.

10. At any rate he submitted that if the contention of SEBI is accepted, the recovery of the amounts a mentioned will be stalled against the common interest of recovery of public money and accordingly he prayed for the dismissal of the application.

Findings:

11. We have gone through the averments made by the learned counsel for the applicant as well as the submissions made by the learned Resolution Professional and the financial creditors and have perused the case records as well a case laws submitted by the learned counsels of both parties in support of their arguments

From the above averments we have framed the following issue:

(A) Whether Section 14 and 238 of IBC 2016 have an overriding effect on the provision of Section 28 of SEBI Act?

We accordingly gone though Section 28A of the SEBI Act 1992 which relates to recovery, reads as under:

"(i) if a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of moneys or fails to comply with a direction for disgorgement order issued under Section 11 B or fails to pay any fees due to the Board, the Recovery officer may draw up under his signature and statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes:

(a)Attachment and sale of the persons moveable property
(b) attachment of the persons bank accounts.
© attachment and sales of the persons immoveable property
(d) arrest of the person and his detention in prison"

12. To determine whether Section 28A has a contravention with Section 14(`1)(a) of the IBC, we have gone through Section 14(1)(a) which reads as under:

> ”The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal arbitration panel or other authority is prohibited.”

13. IBC which is a complete code in itself was enacted in the year 2016 and the law makers after considering the various acts prevailing at that time have framed the IBC to have a faster resolution process at par with developed countries with the primary objective of maximisation of value of assets to all stake holders. The preamble of IBC clearly mentions that the objective of the Code is maximisation of value of assets, to promote entrepreneurship, availability of credit and balance the interest of all stake holders in a time bound manner, whereas the primary object of SEBI is to protect the interest of the investors in securities market and to promote the development to regulate the securities and for matters connected therewith. From the above it is evident that IBC is clearly a time bound action with a wider remit, whereas SEBI was given a broad mandate to protect the interest of investors and the IBC which had brought into force after considering various acts prevailing at that point of time must have also been considered SEBI Act and its implication in the corporate debtor and its operations. Therefore Section 14(1) in IBC which came into force after the enactment of IBC 2016 has precedence over Section 28A of SEBI Act.

14. To fortify his contention, the learned counsel for the applicant has produced various judgments in **Clariant International Ltd and another Vs. Securities and Exchange Bord of India, (1004) 8 SCC 425, A.B.Krishna and others Vs. State of Karnataka and others, 1998 KHC 866: 1998(3) SCC 495 and S.P.Chengalvaraya Naidu V. Jagannath and others – 1994(1) SCC 1**

15. We have considered the various case laws submitted by the learned counsel for SEBI which were all before the enactment of the IBC. Therefore, we feel that they may not be of much relevance in the instant application.

16. We have also gone through the case laws submitted by the counsel for the financial creditors as well as the Resolution Professional. In this context it is pertinent to go through the judgment of the Hon'ble Supreme Court in **Innoventive Industries. Vs. ICICI Bank and others reported in (2019) 1 SCC 407**, where the Hon'ble Supreme Court observed as follows:

> *"The non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the code."*

The above judgment of Hon'ble Supreme Court shows the primacy of IBC over other Acts. By a plain reading of the judgment, we are of the view that SEBI Act is not an exception of this ruling of the Hon'ble Supreme Court. We have also gone though the judgment given by the Hon'ble NCLAT in **Bohar Singh Dhillon Vs. Mr.Roghit Sehgal (IRP) and others in CA(AT(Insolvency) No.65 of 2018 dated 9th May, 2019** in which it was observed as under:

> "Till the period of 'Moratorium' continues, the 'Securities and Exchange Board of India' cannot recover any amount nor can sell the assets of the 'Corporate Debtor' during the 'Moratorium' period. Though NCLAT have held that the application under Section 7 is maintainable while step has been taken by the 'Securities and Exchange Board of India' the 'Resolution Professional' is required to act in terms of Section 17(2) (e) of the 'I&B Code' for complying with the requirements under the 'Securities and Exchange Board of India Act' and Regulations framed thereunder as well as the guidelines issued by the

> Regulatory Authority. It is also made clear that the 'Securities and Exchange Board of India' is however entitled to take action against individual including the former Directors and Shareholders of the 'Corporate Debtor'.

17. From the above decided case laws, the issue framed in the instant application got an overwhelming affirmative answer that Sections 14 and 238 of IBC has an overriding impact on Section 28A of SEBI Act when an application is admitted under CIRP under Section 7, 9 or 10 of IBC. This decision of ours got reinforced when we look at the time from the first interim order passed by SEBI, way back in the year 2015 which has not resulted in the protection of investors. Even after the interim order, the gullible investors were duped by the corporate debtor. Unlike SEBI, the resolution process under IBC is a time bound process, intended to protect the interests of all stake holders by maximising the value of assets of Corporate Debtor. As both the Central Acts are having similar objectives, instead of clinging to over the supremacy of the Act the Recovery Officer appointed by the SEBI under Section 28A may cooperate with the Resolution Professional in protecting the interests of the investors as well as finding a quicker resolution in the instant application. We, therefore, suggest to SEBI to direct their Recovery Officer to cooperate with the Resolution Professional and if required be a part of the CoC as an observer for a quicker resolution and maximisation of the value of the assets of the corporate debtor. Even though the question before us only is to decide on the IAs filed for modification of the Tribunal's order, we have gone a step forward and suggested this for consideration by the SEBI.

O R D E R

18. After going through the averments and records submitted before us, and from the findings of the discussions, we pass the following order:

(i) We hold that Section 14 and Section 238 of IBC 2016 has an overriding effect on Section 28A of SEBI Act. As such there is no need to modify our earlier order dated 18.9.2019.

(ii) However, SEBI is not barred from taking any action as it may deem fit, against the directors, shareholders and key management personnel of the Corporate Debtor for their fraudulent acts.

(iii) We have gone a step forward and suggest that, as the purpose of both the Central Acts are similar, instead of clinging on to decide over the supremacy of the Acts, the "Recovery Officer" appointed under Section 28A of SEBI Act may cooperate with the Resolution Professional to protect the interests of investors as well as finding a quicker resolution in the instant application. The Recovery Officer if it is feasible, participate in CoC meetings as an observer to find quick resolution to the issue.

19. Accordingly, the I.A Nos. 3/KOB/2020 and I.A.No.4/KOB/2020 in TIBA/10/KOB/2019 and TIBA/31/KOB/2019 are dismissed.

Dated the 12th day of March, 2020

Sd/-
(Veera Brahma Rao Arekapudi)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)