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IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-III

CA 332/2018 in **IB-189 (ND)/2017**
filed under Section 60 (5) r/w Section
14 of the Insolvency and Bankruptcy
Code, 2016 r/w Rule 4 of the
Insolvency and Bankruptcy
(Application to Adjudicating Authority)
Rules, 2016.

*In the matter of **Namdhari Food International Private Ltd.***

RAKESH KUMAR GUPTA

....Applicant/ Liquidator

Versus

1. **HOME SECRETARY, STATE OF MAHARASHTRA,**
2. **DEPUTY COLLECTOR AND COMPETENT AUTHORITY FOR NSEL,
OFFICE OF COLLECTOR AND DISTRICT MAGISTRATE BOMBAY CITY**

....Respondents

Order delivered on 15th January, 2020

CORAM:

CH. MOHD. SHARIEF TARIQ
Member (Judicial)
MS. SUMITA PURKAYASTHA
Member (Technical)

*For Applicant: Mr. Abhishek Anand, Mr. Tushar Tyagi, Mr. Arvind
Naya, Mr. Sandeep Bisht, Mr. Anuj Tiwari, Ms. Upasana
Chandra Shekaran, , Mr. Viren Sharma, Ms. Maya
Gupta, Mr. Sarthak Gupta, Advocates*

ORDER

CA 332/2018

1. The Counsel for the Liquidator is present. The Counsel representing NSEL is present. It is noted that vide order dated 13.12.2019 the show cause

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notice was given and liquidator was directed to send private notice to the Home Secretary, State of Maharashtra and Deputy Collector and Competent Authority for NSEL, Office of Collector and District Magistrate Bombay City. Pursuant to which the Counsel for the Liquidator has filed an affidavit of service with the proof of sending notice to the respondents as was directed on 13th of December, 2019, the proof of delivery of notice is also attached with the affidavit filed. In spite of the service of notice, there is no representation on behalf of the respondents, service against them is held sufficient, therefore, Home Secretary, State of Maharashtra, the Collector, District Magistrate Bombay City are proceeded **Ex-Parte**.

2. The Counsel for the Liquidator submitted that the CD, Viz., *M/s. Namdhari Food International Pvt. Ltd.*, is under liquidation process and the assets were attached by Deputy Collector, District Magistrate and Competent Authority for NSEL vide order dated 22nd of October, 2018. The Counsel for the Liquidator submitted that Section 32A inserted by way of Ordinance dated 28.12.2019 provides that no action shall be taken against the property of the Corporate Debtor in relation to an offence committed prior to the commencement of CIRP or sale of liquidation assets under the provisions of Chapter III of Part II of the Code. For the purpose of easy reference the provisions of Section 32A inserted vide Ordinance dated 28.12.2019 are extracted below :-

“ 32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled:

Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor’s liability has ceased under this sub-section.

*(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or **sale of liquidation assets under the provisions of Chapter II of Part II of this Code** to a person, who was not –*

- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation:- For the purposes of this sub-section, it is hereby clarified that,-

- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
- (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.” (Emphasis Supplied)

3. In the light of the above, it becomes clear that no action including **attachment** can be taken against the liquidation assets of the CD, for the offences committed prior to the commencement of the CIRP. The Ordinance operates with retrospective effect. It is further submitted that vide notification

dated 31.03.2017 the State of Maharashtra has lodged a complaint against the CD viz., *M/s Namdhari Food International Pvt. Ltd.*, alongwith other entities on the accusation of the investors that they have deposited the money with NSEL but were defrauded. Further, the offences have been registered against the accused by EoW vide CR No. 89/13 under Section 409, 465, 467, 468, 471, 474, 477 (A) and 120 (B) of Indian Penal Code, 1860 (IPC) read with Section 3/4 of Maharashtra Protection of Interest of Depositors (in financial establishment) Act, 1999 (MPID Act). It is further submitted that the Hon'ble High Court of Bombay in one of the related matters has held that the NSEL is not a financial establishment. The said order was passed on 2nd of August, 2019 in WP No. 1181 of 2018, which was challenged before the Hon'ble Supreme Court, and is pending.

4. The Counsel for the Petitioner further clarified that in WP No. 1181 of 2018, the notifications dated 4th, 7th, 11th and 19th of April, 2018 and the notifications dated 15th of May, 2018, 19th of September, 2018 and 21st of May, 2019 were under challenge. Therefore, the present notification dated 31st March, 2017 and the attachment order dated 22nd of October, 2018 are not the subject matter in the said petition and the CD viz., *M/s Namdhari Food International Pvt. Ltd.*, was neither a party before the Hon'ble High Court nor the Hon'ble Apex Court.

5. The Ld. Counsel appearing on behalf of the Liquidator has rebutted the contentions of the Ld. Counsel appearing on behalf of the NSEL, which is not a party in the present CA. It is further submitted by Ld. Counsel for the Liquidator that since the NSEL is not a party in the CA, therefore, any submission made by the Counsel on behalf of the NSEL cannot be considered. It is further submitted by the Ld. Counsel for the Liquidator that the insertion of Section 32A in the Ordinance dated 28.12.2019 is with the object that the CIR Process or the liquidation process under the IBC may not get effected in

any manner, so that the liability of the CD towards the lender banks, Operational Creditors and other investors could be settled. Besides this it is submitted by Ld. Counsel for the Liquidator that the Section 238 of the IBC also contains the *non-obstante* clause, which virtually overrides the provisions of the other legislations including the MPID Act, and in case any attachment is allowed to be continued that will affect the rights of the creditors of the CD adversely and liquidation process cannot be completed in any manner. In short, it is prayed that the attachment order dated 22nd of October, 2018 and r/w 31.03.2017 needs to be vacated in order to give effect to the provisions of the IBC to proceed with the liquidation process of the CD and to sell the assets as prescribed, so as to distribute the proceeds to the creditors as per the water fall mechanism provided under Section 53 of the IBC [subject to the provisions of 52 of the Code]. The Investors/Creditors cannot raise any objection as they were at liberty to file their claims with the liquidator within the stipulated time under Section 35 (j) of the IBC, 2016. The submissions of the liquidator are plausible, which are accepted.

6. The registration of CR No. 89/13 under the Provisions of the IPC and the MPID Act, is in relation to the alleged offences committed by the erstwhile management of the CD and other entities. But the Company (CD) cannot be prosecuted under the said provisions. Hence, the satisfaction of the claims of the creditors of the CD is possible only under the provisions of IBC. Therefore, in public interest, the Order dated 22nd October, 2018 read with notification dated 31st of March, 2017 is hereby **set aside** on the grounds stated by the Ld. Counsel for the Liquidator, to the extent of the attachment of the assets of the CD viz., Namdhari Food International Pvt. Ltd., with the direction to the Home Secretary of the State of Maharashtra and Deputy Collector, District Magistrate and Competent Authority for NSEL to hand over the assets of the CD viz., M/s *Namdhari Food International Pvt. Ltd.*, to the Liquidator viz. Mr Rakesh Kumar Gupta, within three weeks from the date the copy of this order is received.

7. A copy of this order will be obtained by the Ld. Counsel for the Liquidator for submission to the Home Secretary of the State of Maharashtra and Deputy Collector, District Magistrate and Competent Authority for NSEL for compliance.

8. The Order is dictated and pronounced in the open court. Accordingly, CA stands **disposed of**.

- Sd -

(SUMITA PURKAYASTHA)
MEMBER (TECHNICAL)

- Sd -

(CH. MOHD. SHARIF KHAN)
MEMBER (JUDICIAL)