IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2799-2804 OF 2016

SUBRATA ROY SAHARA & ORS. ..... APPELLANTS

VERSUS

JET AIRWAYS (INDIA) LIMITED & ANR. ..... RESPONDENTS

W I T H

CIVIL APPEAL NOS. 2805-2810 OF 2016

CIVIL APPEAL NOS. 2812-2817 OF 2016

O R D E R

In view of the order we are passing, it is not necessary to set down the chequered history and narrate the facts in detail.

2. Having lost before the Executing Court, the High Court of Judicature at Bombay[1], *vide* the impugned judgment/order dated 04.05.2011, the appellants - Subrata Roy Sahara and six others have preferred Civil Appeal Nos. 2799-2804/2016.

3. Respondent no.1 - Jet Airways (India) Limited[2], in the present appeals, has suffered and is undergoing proceedings under The Insolvency and Bankruptcy Code, 2016[3]. By the order dated 22.06.2021, the National Company Law Tribunal[4], Mumbai Bench has approved the resolution plan for revival of respondent no.1 - Jet Airways. In terms of the resolution plan, the

1 **For short, 'High Court'.**
2 **For short, 'Jet Airways'.**
3 **For short, 'IBC'.**
4 **For short, 'NCLT'.**

operational creditors, notwithstanding that a higher amount is due, are to be paid Rs.15,000/- (Rupees fifteen thousand only). This aspect and the resolution plan would be elucidated in the latter portion of this order.

4. First, we would like to examine the question of whether the appellants are secured creditors. The appellants have filed execution proceedings before the High Court for enforcement of the Consent Award dated 12.04.2007. The impugned judgment/order dated 04.05.2011 was passed in the said execution proceedings. As per the Consent Award, respondent no.1 - Jet Airways had agreed to pay to the appellants, the Selling Shareholders, a sum of Rs.1,450 crores (Rs.1,110 crores as consideration of equity shares of Sahara Airlines Limited and Rs.340 crores as consideration for all preference shares) in installments, with the stipulation that Rs.1,450 crores is the discounted price, and in case respondent no.1 - Jet Airways fails to pay by the due date(s) of any of the installments, the concession of Rs.550 crores shall automatically stand withdrawn, and the amount payable shall stand increased from Rs.1450 crores to the original price of Rs.2000 crores.

5. It is an accepted and admitted position that Rs.1450 crores has been paid by respondent no.1 - Jet Airways to the appellants/ Selling Shareholders. However, it is the claim of the appellants that the total amount payable in view of the defaults committed by respondent no.1 - Jet Airways is the original amount of Rs.2,000 crores. This contention of the

appellants has been rejected by the impugned judgment and has been questioned in the present appeal.

6. The second question raised by the appellants in this appeal relates to the rate of interest. The appellants submit that they are entitled to interest at the rate of 18% per annum, whereas the Executing Court i.e., the High Court, has awarded interest at the rate of 9% per annum.

7. As noticed above, respondent no.1 - Jet Airways has suffered insolvency proceedings and a resolution plan has been duly approved. In the resolution plan, the appellants have been treated as operational creditors and not as secured creditors. The appellants, in fact, had filed I.A. No. 2271/2020 before the NCLT challenging the decision of the Resolution Professional to classify the appellants as unsecured/other creditors, which was dismissed by the detailed separate order dated 22.06.2021. The appellants, in support of their submission to be considered as secured creditors, as in the present appeal, had before the NCLT, relied upon the order dated 06.05.2011 passed by the High Court in the execution proceedings, relevant portion of which reads as under:

> **"Mr. Janak Dwarkadas, learned senior counsel for the respondent no.1 states that the respondent no.1 has to develop its property in Bandra-Kurla complex, Mumbai and that in the proceedings of re-development they are going to get 1,50,000 sq.feet. of built–up-area property which the respondent no.1 does not propose to alienate or dispose of said built-up property and that the till next date of hearing, the respondent no.1 shall also not encumber 75,000 sq.feet built-up-**

> **area out of the said 1,50,000 sq.ft. of built-up-area.”**

The undertaking given in this order was extended from time to time. The order dated 02.12.2011 passed by this Court, while issuing notice in the present appeals, had recorded that the arrangements (*sic* the statement) made by the learned counsel for respondent no.1 - Jet Airways, as recorded in the order dated 06.05.2011 before the High Court, shall continue.

8. The order dated 22.06.2021 passed by the NCLT dismissing the I.A. No. 2271/2020, in our opinion, rightly holds that the appellants do not enjoy the status of a secured creditor based upon the aforesaid undertaking. To reach the said conclusion, the NCLT has relied upon the judgment of this Court in *Oil and Natural Gas Corporation Limited* v. *Official Liquidator of Ambica Mills Company Limited & Ors.*[5], wherein it was held that an undertaking given to the Court or an injunctive order not to create a charge, encumber or alienate any particular asset, does not create enforceable charge or preferential right in favour of the party instituting the proceedings. Injunction order or undertaking against alienation and encumbrance etc. is to ensure that the party does not encumber or create a charge on the asset. But it does create any charge on the asset, or alter the status of the party at whose behest the injunction order has been passed or the undertaking is given. It creates no equities in favour of the said

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5 **(2015) 5 SCC 300.**

creditor/claimant. We would like to note some of the judgements mentioned in *Oil and Natural Gas Corporation Limited* (supra).

9. This Court in *Haryana Financial Corporation* v. *Gurucharan Singh and Another*[6] on consideration of Section 125 of the Companies Act, 1956 and Sections 59 and 100 of the Transfer of Property Act, 1882[7], has held that while charges can be created by the parties and/or by operation of law, a charge created by an act of the parties in respect of an immovable property as per the TPA is compulsorily registrable. When any immovable property is made security for payment of money to another and it does not amount to a mortgage, then all the provisions which apply to a simple mortgage, as far as may be, shall apply to such charge. Consequently, in view of Section 59 of the TPA, when there is a mortgage other than a mortgage by deposit of the title deeds, it can be affected only by a registered instrument.

10. It is accepted and admitted in the present case that there is no registered mortgage deed or instrument. No title deeds of the property were handed over to the appellants.

11. In *Haryana Financial Corporation* (supra), this Court has also examined and rejected the submission that an undertaking not to dispose of the properties during the pendency of loan would amount to a charge in law, observing that such undertaking

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6 **(2014) 16 SCC 722.**
7 **For short, 'TPA'.**

does not create a charge/interest in the immovable property, unless the undertaking is registered. Reference is made to the decision of this Court in *K. Muthuswami Gounder* v. *N. Palaniappa Gounder*[8], wherein the validity and legal effect of the security bond by which the parties undertook not alienate the properties till the decree was discharged was examined. Again, the submission that the security bond had created a secured interest was repelled, holding that the bond, notwithstanding the fact that it stated that the parties had agreed not to alienate the property in question till the decree is discharged, would be merely an undertaking, which did not create a charge.

12. The judgment in *Haryana Financial Corporation* (supra) also refers to the decision of this Court in *Bank of India* v. *Abhay D. Narottam & Others*[9], wherein one of the parties had given an undertaking for creating an equitable charge over a flat. It has been held that without a transfer of interest, there is no question of there being a mortgage, and a mere undertaking is not sufficient to create a charge. Thus, an undertaking that a party will not dispose of the property mentioned in the undertaking during the pendency of the loan will not create any charge over the property unless the charge is created by deposit of the title deeds or through a registered deed/document.

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8 **(1998) 7 SCC 327.**

9 **(2005) 11 SCC 520.**

13. We have quoted the undertaking as recorded by the High court in the order dated 06.05.2011, which states that respondent no.1 - Jet Airways has to develop a property in Bandra-Kurla Complex (BKC) at Mumbai, Maharashtra. They would be developing the built-up-area of about 1,50,000 sq.ft., which respondent no.1 - Jet Airways does not propose to alienate or dispose of. It also states that till the next date, respondent no.1 - Jet Airways shall not encumber 75,000 sq.ft. built-up-area out of the said 1,50,000 sq.ft. There is no charge or any right, title or interest in the property created in favour of the appellants.

14. Faced with the legal position, it was submitted that the wording and language of sub-sections (30) and (31) to Section 3 of the IBC are different and, therefore, these decisions would have no application. Sections 3(30) and 3(31) of the IBC read as under:

> **"3. Definitions.— In this Code, unless the context otherwise requires —**
>
> **xx xx xx**
>
> **(30) "secured creditor" means a creditor in favour of whom security interest is created;**
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> **(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person."**

15. Sub-section (30) to Section 3 of the IBC states that "secured

creditor" means a creditor in whose favour security interest is created. The term "security interest" is defined in sub-section (31) to Section 3 of the IBC, to mean any right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation. It is not the case of the appellants that they fall under or satisfy the first part of the definition. In view of our findings, there is no mortgage, charge, hypothecation, assignment and/or encumbrance created in favour of the appellants. Reliance on the words "other agreement or arrangement securing payment or performance of any obligation of any person" is misplaced as what is recorded in the High Court order dated 06.05.2011 is the undertaking that a certain portion of the built-up-area shall not be encumbered. This undertaking has been extended from time to time. The undertaking cannot be read as an "agreement or arrangement securing payment or performance of any obligation of any person". We would clarify that we are not interpreting the last portion of sub-section (31) to Section 3 of the IBC, as this is not required for the purpose of present order. However, we would like to refer to the legal rights of a party that applies for and secures an order of attachment.

16. Order XXXVIII, Rules 5[10] and 10[11] of the Code of Civil Procedure, 1908 and general principles applicable to cases of insolvency decide the legal position. Rule 10 to Order XXXVIII states that attachment before judgment does not affect prior rights of third parties, or any person holding a decree from applying for sale of property under attachment. An attachment only confers a right on the decree holder to have the property kept in *custodia legis* for being dealt with in accordance with law. It merely prevents and avoids alienation and does not confer any right, title or interest on the attaching creditor, or create a charge or lien upon the attached property.[12] Further, the doctrine of *pari passu* and equal treatment of class of creditors is of relevance and has an important bearing in cases of insolvency. Multiple and independent coercive actions are detrimental to the creditors and impede realization and fair and equitable distribution/ payment of

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10 **5. Where defendant may be called upon to furnish security for production of property.— (1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—**

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

11 **10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.— Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.**

12 **See 'Mulla on The Code of Civil Procedure' *viz.* Section 64, 18th Edition, Volume 1, Page 777, Paragraph 16.**

dues.[13] The underlying scheme is that there should not be a scramble for assets, and no creditor should be permitted to take unfair advantage to the exclusion of other similar class of creditors.

17. We must also record that the appellants did not challenge the order dated 22.06.2021 dismissing their I.A. No. 2271/2020. The contention of the appellants is that the order dated 22.06.2021 specifically records that the view taken by the NCLT in the order shall have no bearing on the litigation between the parties relating to the execution case pending before the High Court or this Court. This statement, in our opinion, does not imply that the question of whether or not the appellants are secured creditors would be agitated and argued before this Court. The object and purpose of the observation is to ensure that the order dated 22.06.2021 would not impede the execution proceedings pending before the High Court or the present appeals before this Court.

18. In view of the aforesaid position, we have to hold that the appellants are not secured creditors, but are operational creditors or other creditors, who would be governed by Section 30(2)(b) read with 53(1)(d) of the IBC.

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13 **This is the objective and purpose behind classification of creditors and payment of dues as envisaged under Section 53 of the IBC. See decision of the Gujarat High Court in *Ananta Mills Ltd.* v. *City Deputy Collector*, (1972) 42 Comp Cas 376, which refers to the provisions of the Companies Act, 1956. Refer Section 326 of the Companies Act, 2013, corresponding to Section 529-A of the Companies Act, 1956, and Sections 53 and 30(2) of the IBC. See decision in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and Others*, (2020) 8 SCC 531.**

19. **The order dated 22.06.2021 passed by the NCLT in I.A. No. 2081/2020 accepting the resolution plan, as noted above, states that the all operational creditors would be paid Rs.15,000/- (Rupees fifteen thousand only) irrespective of a higher claim amount. Paragraph V in the resolution plan relates to the "Treatment of Operational Creditors" and states that the liquidation value would be insufficient to cover even the debts of financial creditors in full. The liquidation value payable to the operational creditors including the government dues, taxes or the other creditors or stakeholders, including the dues of the employees other than the workmen, is presumed to be nil. Nevertheless, the Successful Resolution Applicant[14] had agreed to pay a fixed sum of Rs.15,000/- (Rupees fifteen thousand only) each to the claimants classified as operational creditors irrespective of their claim amount, given that the total amount paid to the operational creditors towards settlement of their outstanding dues shall not exceed Rs.10 crores.**

20. **A reading of the order dated 22.06.2021 reflects that it does refer to the property located in Bandra-Kurla Complex, in paragraph IX under the heading "Treatment of Airport and Parking Dues". Thereupon, it is recorded that the SRA has proposed two scenarios: first, by including the Bandra-Kurla Complex property, and second, by excluding the Bandra-Kurla Complex property for the purpose of the resolution plan. This**

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14 **For short, 'SRA'.**

was possibly done in view to deal with all eventualities, given the undertaking and the claim of the appellants as secured creditors *viz.* the Bandra-Kurla Complex property. As held above, the appellants are not secured creditors, and the Bandra-Kurla Complex property is not a secured asset.

21. The appellants submit that since the Bandra-Kurla Complex property is not a secured asset, the value must be included for the disbursement/payment to non-secured creditors including the appellants in terms of clause (d) to Section 53(1) of the IBC. Rs. 10 crores in the resolution plan of the SRA is a pittance, and the amount payable to the unsecured creditors under clause (d) to Section 53(1), on inclusion of the Bandra-Kurla Complex property, would increase substantially.

22. There are several fundamental difficulties in accepting the said argument. First, in terms of clause (a) to Section 52(1) of the IBC, if a secured creditor in liquidation proceedings relinquishes his security interest, he is covered by sub-clause (ii) to clause (b) to Section 53(1). We do not know whether, in the present case, the secured creditors have relinquished their security interest in terms of clause (a) to Section 52(1) of the IBC and would fall under sub-clause (ii) to clause (b) to Section 53(1). What would be the true way to give effect to the provisions of the IBC for computing the amount payable under Section 53(1)(b)(ii) read with Section 52(1)(a) and Section 30(2)(b)(i) of the IBC is not the subject

matter of the present appeal. Thus, and secondly, this Court is not examining the correctness or otherwise of the order of the NCLT dated 22.06.2021 accepting the resolution plan. A resolution plan was approved by the Adjudicating Authority and can be challenged in terms of Section 61 of the IBC and then before this Court under Section 62 of the IBC. Any challenge to the resolution plan will have its own consequences and all the relevant parties have to be impleaded and heard. Timelines under the IBC are important for everyone including the creditors.

23. Given the aforesaid background and reasoning, we are not inclined to adjudicate the present appeals on merits, as that would be of academic interest only. Thus, we are not deciding the two issues; first, whether the Executing Court i.e., the High Court has rightly held that the appellants are not entitled to further payment of Rs.550 crores in terms of the Consent Award dated 12.04.2007, and secondly, the question of the rate of interest. However, to protect the interest of the appellants, it is clarified that if need arises, it will be open to the appellants to ask for revival of these appeals and adjudication of the two issues raised by them on merits before this Court.

24. We deem it appropriate to clarify that the interim order passed by this Court on 02.12.2011 and continued on 14.03.2016 will cease to operate.

25. The appeals are disposed of in the aforesaid terms, without

any order as to costs.

26. Pending application(s), if any, shall stand disposed of.

..................J.
(SANJIV KHANNA)

..................J.
(M.M. SUNDRESH)

NEW DELHI;
MARCH 16, 2023.

ITEM NO.102 COURT NO.7 SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 2799-2804/2016

SUBRATA ROY SAHARA . & ORS. **Appellant(s)**

VERSUS

JET AIRWAYS(INDIA) CHAIRMAN & ANR. **Respondent(s)**

WITH
C.A. No. 2805-2810/2016 (III)
(FOR MODIFICATION ON IA 101865/2020
IA No. 101865/2020 - MODIFICATION)

C.A. No. 2812-2817/2016 (III)

Date : 16-03-2023 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE M.M. SUNDRESH

For parties
Mr. K.V Viswanathan, Sr. Adv.
Mr. Sanjay Kapur, AOR
Mr. Devesh Dubey, Adv.
Ms. Megha Karnwal, Adv.
Ms. Devesh Dubey, Adv.

Mr. C. Aryama Sundaram, Sr. Adv.
Mr. Gautam Awasthi, AOR
Mr. Ayush Choudhary, Adv.
Ms. Rohini Musa, Adv.
Mr. Devanshu Yadav, Adv.
Mr. Sameer Pandey, Adv.
Mr. Abhishek Gupta, Adv.

UPON hearing the counsel, the Court made the following
O R D E R

The appeals are disposed of in terms of the signed order.

Pending application(s), if any, shall stand disposed of.

(BABITA PANDEY) **(R.S. NARAYANAN)**
COURT MASTER (SH) **COURT MASTER (NSH)**
(Signed order is placed on the file)