

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022
And
I.A. (IB) No. 1144/KB/2022
In
C.P. (IB) No. 1674/KB/2019

IN THE MATTER OF:

Punjab National Bank

.... Financial Creditor.

Verses

Basukinath Food Processors Limited

.... Corporate Debtor.

And

I.A. (IB) No. 204/KB/2022

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and the applicable provisions made thereunder.

IN THE MATTER OF:

Mr. Rajesh Lahila, having **Registration No. IBBI/IPA-001/IP-P00525/2017-2018/10950**, the Resolution Professional of Basukinath Food Processors Limited having its office at 11, Crooked Lane, Kolkata – 700069.

... Applicant.

Verses

West Bengal Industrial Development Corporation Ltd. having its office at 23, Camac Street, Kolkata – 700017.

... Respondent.

And

I.A. (IB) No. 1144/KB/2022

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and the applicable provisions made thereunder.

IN THE MATTER OF:

West Bengal Industrial Development Corporation Ltd. having its office at 23, Camac Street, Kolkata – 700017.

... Applicant.

Verses

Mr. Rajesh Lahila, having **Registration No. IBBI/IPA-001/IP-P00525/2017-2018/10950**, the Resolution Professional of Basukinath Food Processors Limited having its office at 11, Crooked Lane, Kolkata – 700069.

... Respondent.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

Pronouncement on: February 08, 2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For Resolution Professional: **Mr. Shaunak Mitra, Adv.
Mr. Subodh Kr. Agrawal, PCA
Mr. Rahul Auddy, Adv.
Mr. Aditya Gooptu, Adv.
Ms. Puja Agarwal, PCA**

**For the Applicant in
IA/1144/2022:** **Mr. Reetobroto Mitra, Adv.**

**For the Respondent in
IA/204/2022:** **Ms. Meenakshi Manot, Adv.**

Table of Contents

I.A. (IB) No. 204/KB/2022	3
<i>Factual Background:.....</i>	3
<i>Submissions made by the Applicant (RP):</i>	4
<i>Per contra submissions of the Respondent (WBIDCL):.....</i>	6
<i>The counter submissions of the Applicant herein:.....</i>	7
<i>Analysis and Findings:.....</i>	9
I.A. (IB) No. 1144/KB/2022	13
<i>Factual Matrix:</i>	13
<i>Applicant's Contentions:</i>	15
<i>Our Inference:</i>	15

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

ORDER

Per: D. Arvind, Member (Technical):

1. The Court assembled through blended mode.

I.A. (IB) No. 204/KB/2022

2. This application has been filed by Mr. Rajesh Lihala, the Resolution Professional of Basukinath Food Processors Limited (hereinafter referred as “Applicant/RP”) against West Bengal Industrial Development Corporation Limited (hereinafter referred as “Respondent/WBIDC”) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code” seeking direction to the respondent to hand over the possession of the assets of the Corporate Debtor, i.e., Basukinath Food Processors Limited.

Factual Background:

3. Vide an Order dated 11.01.2022, this Adjudicating Authority admitted the application, being **C.P. (IB) No. 1674/KB/2019** filed the Punjab National Bank (Financial Creditor) under Section 7 of I&B Code and the Corporate Debtor, Basukinath Food Processors Limited was put into Corporate Insolvency Resolution Process (for brevity “CIRP”). Mr. Rajesh Lihala (Applicant herein) was appointed as the Interim Resolution Professional (IRP) and on 13.01.2022, the IRP made public announcement in the newspapers.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

4. On 17.02.2022, the Applicant was appointed as the Resolution Professional (RP) to manage the CIRP of the Corporate Debtor and to take custody of all the assets of the Corporate Debtor and accordingly took steps. In the said process, the RP became aware about the property of the Corporate Debtor being in physical possession of the respondent herein.
5. The applicant met with officials of WBIDC several times and also sent emails apart from sending a formal letter on 24.01.2022 to hand over the possession of the property. As all his attempts met with no success this application has been filed.

Submissions made by the Applicant (RP):

6. The Learned Counsel for the applicant submits that the Corporate Debtor had availed loan of Rs. 20 Crore from the respondent in terms of loan agreement made between the parties on 21.08.2009, the copy of which is in the application. The Charge was created based on the agreement in terms of clause 4 on first equitable mortgage on all immovable properties both present and future. First charge on movable properties were also created for securing the borrowings made by the Corporate Debtor from the respondent for working capital requirements.
7. The Learned Counsel further admits that the Corporate Debtor defaulted amount payable to the respondent under the said loan agreement. As soon as the default occurred the respondent herein took possession of the factory situated at Paschim Medinipur, Kharagpur, West Bengal. In spite of several emails, letters and

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

personal follow up with the officials of WBIDC, the respondent did not cooperate and refused to hand over the possession of the said factory to the applicant.

- 8.** The Learned Counsel has asserted that though properties in dispute are pledged with the respondent as security for the loan advanced to the Corporate Debtor by the respondent, the ownership in property still remains with the Corporate Debtor and, therefore, the WBIDC will have to hand over the same for the purpose of completing CIRP proceedings.
- 9.** It is further asserted that in terms of moratorium declared under **Section 14** of the Insolvency and Bankruptcy Code, 2016, the following are prohibited: -
 - i. 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;*
 - ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;*
 - iii. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
 - iv. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

10. Further, it is asserted that should there be inconsistency between I&B Code and any other Act including State Financial Corporation Act, 1951 IBC would prevail in terms of *Section 238 of I&B Code which provides that 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.*
11. The Learned Counsel for the Applicant submits that the physical possession of the said factory will have to be handed over to the resolution professional for taking custody as mandated in the I&B Code, immediately to ensure that CIRP is not delayed any further.

Per contra submissions of the Respondent (WBIDCL):

12. The Learned Counsel for the Respondent (WBIDCL) submits that by virtue of Section 29 of State Financial Corporation Act, 1951, for brevity “SFC Act”, the WBIDC has become owner of the said property. It is submitted that I&B Code nowhere says that the rights of the WBIDC which has already taken effect will come to an end, on commencement of CIRP.
13. The Learned Counsel for the WBIDCL took us to *Section 29 of the State Financial Corporate Act, 1951 which says that where any industrial concern which is under liability to the Financial corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take*

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

over the management or possession or both of the industrial concerns, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

- 14.** It is further submitted that in terms of said Section 29(5) where the Financial Corporation has taken any action against an industrial concern under the provisions of sub-section (1), to the Financial Corporation 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. Therefore, he submits that the question of handing over the physical possession of the factory in question cannot arise when the Financial Corporation has invoked under Section 29 of the State Financial Corporation Act, 1951, and deemed to be the owner of the property.

The counter submissions of the Applicant herein:

- 15.** Ld. Counsel relied on the order passed by the Adjudicating Authority in the case of ***Mangturam Noranglal vs. Amit Hatcheries Private Limited*** order dated 25th February 2020. Placing reliance on the judgment of Hon'ble NCLAT in Encore Asset Reconstruction Company Private Limited wherein physical possession taken by the Dena Bank as per the terms and conditions even before the date of commencement of moratorium for enforcing its security rights, was rejected.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

- 16.** It is further asserted in that case the properties were physical possession of Dena Bank by virtue of enforcement of security interest even before commencement of CIRP. After hearing both the parties the Hon'ble NCLAT held that Section 238 of the I&B Code will prevail over any of the provisions of the SARFAESI Act, 2002 and the Dena Bank cannot retain the possession of the property in question to which Corporate Debtor is the owner.
- 17.** The Learned Counsel for the Applicant has placed strong reliance on the judgment of the Hon'ble High Court of Judicature at Patna rendered in the ***Bihar State Financial Corporation & Ors. vs. Parmanand Kumar*** reported in ***2008 SCC Online Pat 15***, where it is held that:

“13. A perusal of Section 29 of the Act makes it very clear that notwithstanding management, control and possession of the assets pledged, mortgaged, 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 of 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.”

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

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

from the recovery made from such assets. It is only after deducting or adjusting 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 authorised 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.

(Underlings Ours, for emphasis)

- 18.** Further, the Learned Counsel has relied on several other judgments including the judgment passed by the Hon'ble Supreme Court of India in the matter of ***Navichandra Steels Pvt. Ltd. v. SREI Equipment Finance Limited*** in **Civil Appeal Nos. 4230-4234** dated March 01, 2021 to drive home his point that the Corporate Debtor remains the owner of the said property and therefore, the same will have to be handed over to the applicant, once CIRP is commenced.

Analysis and Findings:

- 19.** As per Section 18(f) of I&B Code it is the duty of the RP to take control and custody of any assets over which the Corporate Debtor has ownership rights as recorded in the balance sheet of the Corporate Debtor, or with information utility or the depository of securities or any other registry that records the ownership of the assets of the Corporate Debtor including assets that may not be in

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

possession of the Corporate Debtor at the date of commencement of CIRP.

- 20.** It is not in dispute that the said property which is in possession of WBIDC has been recorded in the balance sheet of the Corporate Debtor as its assets though it has been pledged with the respondent for the purpose of securing the borrowings made by the Corporate Debtor.
- 21.** Reference made to Section 238 of I&B Code, the Code prevailing over the relevant Sections contend in State Financial Corporation Act, 1951 has been examined. We find that Section 29(5) of the State Financial Corporation Act contains provisions which makes the Financial Corporation Corporation to be deemed owner of such concern, only for the purposes of initiating suits by or against the concern, and the State Financial Corporation shall sue and be sued in the name of the concern. This in our view is only for the purpose of initiating or defending any suit with reference to the property which has been pledged with the Financial Corporation, and do not make the State Financial Corporation the owner of such properties.
- 22.** This provision would not make the corporation, the owner of the property as rightly pointed out by the Ld. Counsel for the applicant placing reliance on the Hon'ble High Court judgment rendered in the case of ***Bihar State Financial Corporation & Ors. vs. Parmanand Kumar (Supra)***.
- 23.** The High Court has categorically held that merely by taking action under Section 29 of State Financial Corporation Act, 1951 the

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

Corporation does not become owner of the property nor in any sense the ownership rights in assets vesting in the promoters extinguish.

- 24.** We have noted that the respondent itself admits in the reply that the assets taken by them in possession were not appropriated against the loan amount and the respondent also filed its financial claim before the applicant which was not accepted due to delay in filing the claim of due to the dispute in hand. We find that on the one hand respondent had filed the claim with reference to the financial debt with Resolution Professional and on the other hand claiming the ownership of the assets and refusing to hand over the same to the applicant. This contrary stand does not serve the purpose of the respondent.
- 25.** We have also noted that no attempt has been made to transfer assets in favour of the corporation by executing appropriate documents of conveyance, after invoking section 29 of SFC Act. Any transfer of immovable property which has a value of more than hundred rupees can be made only by a registered instrument, as per Section 54 of Transfer of Property Act, 1882 and therefore WBIDC cannot be treated as owner of said properties. They are merely mortgage at this point in time, holding security interest.
- 26.** Further, we have noted that no such instrument in favour of the Corporation that has been executed and the Hon'ble Supreme Court in ***Madras Petrochem Ltd. vs. BIFR***, reported in **(2016) 4**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

SCC 1 have held that IBC would prevail over SARFAESI Act to the extent of inconsistency therewith.

- 27.** Reliance on several other similar judgments including the Hon'ble Supreme Court Judgement in **Navichandra Steels Pvt. Ltd. (Supra)** is placed to state that I&B Code would prevail over any Act, if there were any inconsistency. In this case, the inconsistency arises between Section 18 of the I&B Code and Section 29 of State Financial Corporation Act. While Section 18(f) of the I&B Code, the Code enunciates that any asset recorded the balance sheet of the Corporate Debtor as its assets, and it is the duty of the resolution professional to take custody of such assets of the Corporate Debtor. The explanation to the said Section 18 of I&B Code also provides that assets owned by Corporate Debtor but not in possession of Corporate Debtor will also need to be taken custody whereas Section 29 of State Financial Corporation Act provides that if the borrower fails to owner honour the terms and conditions of the borrowings then the Corporation which has got first charge over the immovable properties of the Corporate Debtor would be entitled to retain and dispose properties pledged. Thus, this inconsistency needs to be resolved and the same is resolved by applying Section 238 of I&B Code, which provides that IBC would prevail over any other statute in the case of such inconsistency.
- 28.** In view of the above finding above, we direct the WBIDC to hand over the possession of the property to the resolution professional within 15 days from the date of pronouncement of this order. This

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

application, being **I.A. (IB) No. 204/KB/2022** is accordingly **allowed** and **disposed of**.

- 29.** Certified copies of the order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

I.A. (IB) No. 1144/KB/2022

- 30.** This application preferred by West Bengal Industrial Development Corporation Limited (hereinafter called as WBIDC/Financial Creditor/FC) against Mr. Rajesh Lihala, the Resolution Professional (hereinafter referred to as RP/Respondent) of Basukinath Food Process Limited, (hereinafter referred to as Corporate Debtor/CD) seeking following reliefs:

- a) The Resolution Professional be directed to determine the claim of the application to the extent of Rs.98,44,27,658/- (Ninety-Eight Crore Forty-Four Lakh Twenty-Seven Thousand Six Hundred Fifty-Eight only.)*
- b) The Resolution Professional be restrained by an Order of Injunction from calling any further meetings of CoC till disposal of instant application.*
- c) Alternatively, a mandatory injunction be passed directing the Resolution Professional to permit the Applicant to participate in the meetings of CoC.*
- d) Interim Orders or any such order this Tribunal deems just and proper in the interest of justice.*

Factual Matrix:

- 31.** West Bengal Industrial Development Corporation Limited advanced Rs. 20 Crore by virtue of an agreement made on August 21, 2009 consequent to which the entire land and fixed assets of

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

the Corporate Debtor was mortgaged in favour of the Applicant and charge credited.

- 32.** In view of the default committed by the Corporate Debtor a letter was issued by the Applicant on August 02, 2016, invoking under Section 29 of the State Financial Corporation Act, 1951.
- 33.** The applicant took possession of mortgaged assets of the Corporate Debtor on September 29, 2016, by involving of Section 29 of the State Financial Corporation Act, 1951, for brevity “SFC Act”.
- 34.** As per Sec 29 of SFC Act 1951, the Corporation (WBIDC) is entitled to take possession of the immovable and moveable properties pledged for securing the borrowings of the borrower (Corporate debtor)
- 35.** Meanwhile, an Order for CIRP of the Corporate debtor was passed by this Tribunal in an application filed under Section 7 of the IBC by one of the Financial Creditor, namely, Punjab National Bank and, accordingly, the CIRP of the Corporate Debtor commenced on January 11, 2022. The Applicant filed its claim in “Form C” on May 13, 2022 which was rejected by the Resolution Professional on the ground of delay.
- 36.** The Applicant filed an application before this Tribunal for condonation of delay and the same was condoned by this Tribunal and in spite of this the Respondent sent an e-mail to the Applicant on 11th August, 2022 that the claim would be kept in abeyance, as the Applicant was in possession of the properties of Corporate

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

Debtor Several correspondences were exchanged between the parties without any resolution and hence, this application.

- 37.** In spite of our direction to Resolution Professional to determine the claim of the Applicant, the Resolution Professional on the one hand failed to do so and on the other hand one the other hand has filed an application numbered as 204/KB/2022 seeking direction of this Tribunal to handover the possession of immovable property of Corporate Debtor that are in their possession of the Applicant.

Applicant's Contentions:

- 38.** The Learned Counsel for the Applicant brought to our attention the Order dated 13th June 2022 passed by this Adjudicating Authority, wherein we had condoned delay in filing claim with the Resolution Professional and directed that Resolution Professional shall collate the claim of the Applicant uninfluenced by the facts that the delay has been condoned.
- 39.** Accordingly, the Applicant filed its claim with Resolution Professional. However, the Applicant received an e-mail on 11th August 2022, stating as under "*on one side you have taken possession of assets and on the other side you have claimed the below amount. The claim filed by you is kept in abeyance till the final disposal of the application by the Hon'ble NCLT*".

Our Inference:

- 40.** we have disposed the application made by Resolution Professional in **I.A. (IB) 204/KB/2022** wherein we had directed WBIDC to

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 204/KB/2022 and
I.A. (IB) No. 1144/KB/2022
In C.P. (IB) No. 1674/KB/2019

handover the possession of the factory/movable property that belongs to Corporate Debtor immediately. In view of our direction in **I.A. (IB) 204/KB/2022**, we are of the view that Applicant cannot be put to double jeopardy and hence we direct the Resolution Professional to verify the claim of the Applicant and admit the claim as per law within 15 days.

- 41.** Upon admission of the claim the Resolution Professional is directed to admit WBIDC in the CoC of the Corporate Debtor and all meetings of the CoC will be conducted from now on after sending necessary notice for participation to WBIDC.
- 42.** Accordingly, this application, being **I.A. (IB) No. 1144/KB/2022** is **allowed** and **disposed of**.
- 43.** Certified copies of the order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This order is signed on the 08th Day of February, 2024.

Subhajit, G. [Steno]/AR [Steno]

Bose, R. K. [LRA]/Tiwari, V. [LRA]