

NATIONAL COMPANY LAW TRIBUNAL
INDORE SPECIAL BENCH
COURT NO. 1

ITEM No.201
MA/3(MP)2023
in
TP 60 of 2019 [CP(IB) 32 of 2017]

Proceedings under Sections 60(5) & 52(5) of IBC, 2016 r.w. Regulations 21A & 37 of IBBI Regulations, 2016 r.w. Rule 11 of NCLT Rules, 2016

IN THE MATTER OF:

Phoenix ARC Pvt Ltd
V/s

.....Applicant

Kuldeep Verma, Liquidator of K S Oils Ltd

.....Respondent

Order delivered on 16/02/2024

Coram:

Mahendra Khandelwal, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

MA/3(MP)2023

The case is fixed for pronouncement of the order.

The order is pronounced in open Court *vide* separate sheet.

Sd/-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

A. Bhadauria

Sd/-

**MAHENDRA KHANDELWAL
MEMBER (JUDICIAL)**

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH**

MA 3 of 2023

In

TP 60 of 2019 [CP(IB) 32 of 2017]

MA No. 3 of 2023

[An application under Section 60(5) & 52(5) of the Insolvency & Bankruptcy Code, 2016]

In the matter of

SREI Infrastructure Finance Limited

Financial Creditor

Versus

KS Oils Limited

Corporate Debtor

And In the matter of

Phoenix ARC Private Limited

Financial Creditor

(Trustee of Phoenix Trust FY 15-15)

Versus

Mr. Kuldeep Verma

Corporate Debtor

(Liquidator of KS Oils Limited)

Memo of Parties

Phoenix ARC Private Limited

(Trustee of Phoenix Trust FY 15-15)

Registered Office:

5th Floor, Dani Corporate Park

158, CST Road, Kalina, Santa Cruz (East)

Mumbai, Maharashtra-400098

Applicant

Versus

Mr. Kuldeep Verma

(Liquidator of KS Oils Limited)

3, Jagbandhu Modak Road

4th Floor, Shova Bazar

Kolkata-700005

Respondent

Order Pronounced on:16.02.2024

Coram: Mahendra Khandelwal, Member (Judicial)

Kaushlendra Kumar Singh, Member (Technical)

Appearance:

For the Applicant:

Ld. Sr. Counsel Mr. Amit Singh Chadha a.w. Ld.

Counsel Ms. Soumya Dharwa

For the Respondent: Ld. Sr. Counsel Mr. Vivek Sibal a.w. Ld. Counsel Mr.
Aditya J. Pandya

ORDER

1. This application is filed on 09.08.2023 under Section 60(5) of Insolvency & Bankruptcy Code, 2016 by Phoenix ARC Private Limited through its authorized representative Mr. Mahesh Malunjkar (applicant) - secured financial creditor and the member of the Stakeholders Consultation Committee (having 27.24% voting share) of the corporate debtor-KS Oil Limited against Mr.Kuldeep Verma- liquidator (respondent) of the corporate debtor. The applicant seeks direction to set aside the sale notice dated 19.07.2023 issued by the liquidator in respect of Haldia property, also to set aside the communication dated 14.07.2023 sent by the liquidator & any consequential action taken by the liquidator in respect of Haldia property and to direct the liquidator not to interfere in respect of Haldia property.

2. The prayer in the captioned IA reads thus:

- a) pass an order thereby quashing and setting aside sale notice dated 19.07.2023, issued by the Respondent/Liquidator in respect of Haldia property which is exclusively charged to the Applicant/Secured Creditor/Phoenix ARC and the security interest in respect of which has not been relinquished towards the liquidation estate, and;
- b) pass an order thereby quashing and setting aside the communications dated 14.07.2023 sent by Respondent/Liquidator and any consequential action taken by the Respondent/Liquidator in respect of Haldia property which is exclusively charged to the Applicant/Secured Creditor/Phoenix ARC and the security interest in respect of which has not been relinquished towards the liquidation estate, and;
- c) direct the Respondent/Liquidator, not interfere with the right of Applicant/Phoenix ARC to enforce its security interest on the Haldia property as only Applicant/Phoenix ARC has the exclusive right to realise its security interest through Haldia Property, and;

- d) restrain the Respondent/Liquidator from dealing in any manner with the Haldia property as the security interest over the same is exclusively with Applicant/Phoenix AFC and has not been relinquished towards the liquidation estate, and;
 - e) restrain the Respondent/Liquidator from interfering in any manner with the right applicant/Phoenix ARC as exclusive charge holder who has not relinquished security interest in Haldia property in any manner whatsoever, as the right to sell the same remains exclusive with the Applicant/Phoenix ARC, and;
 - f) Pass any other further orders or reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.
3. The averments made by the applicant in the present application and as argued by the learned counsel are summarized as under:

(i) The corporate debtor took various financial facilities from Axis Bank & ICICI Bank and defaulted in repayment of the same. The said facility granted by Axis Bank & ICICI Bank was secured by the mortgage created on Haldia property.

(ii) The ICICI Bank and Axis Bank respectively assigned all their rights, title and interest in the non performing assets/debt of the corporate debtor in favour of the applicant – Phoenix ARC vide assignment deed dated 28.06.2013 and 25.09.2014 between Axis Bank & Phoenix ARC, Trustee of Phoenix Trust FY 14-3 and between ICICI Bank & Phoenix ARC, Trustee of Phoenix Trust FY 15-15 respectively. Therefore, the applicant became first exclusive charge holders on Haldia Property with the rights to recover the outstanding dues by enforcement of security interest on the said property as per law.

(iii) The corporate debtor was admitted into Corporate Insolvency and Resolution Process (CIRP) by this Adjudicating Authority vide

order dated 21.07.2017 on an application filed by one of the financial creditor i.e. SREI Infrastructure Finance Limited of the corporate debtor under Section 7 of the Code. Mr. Kuldeep Verma was appointed as Interim Resolution Professional (IRP) of the corporate debtor and then subsequently appointed as RP.

(iv) Pursuant to the claim filed by the applicant in Form C with respect to loans assigned by Axis Bank and ICICI Bank, the IRP duly admitted the said claim in the CIRP of the corporate debtor.

(v) During the course of the CIRP, an appeal was filed by the RP before the Hon'ble NCLAT bearing No. Comp/App (AT) (Ins) 98 of 2021 seeking order for initiation of liquidation of the corporate debtor. The appeal was allowed vide order dated 16.03.2021 and the RP was appointed as liquidator of the corporate debtor.

(vi) Following the liquidation order, the applicant, in respect of debt assigned by ICICI Bank filed its claim on 14.04.2021 in Form D for an amount of Rs. 793,45,16,428/- and the same was duly admitted. The said debt assigned by ICICI Bank was secured by exclusive first charge on Haldia Property in favor of ICICI Bank. In terms of rights under Section 52(1)(b) and 52(2) the applicant did not relinquish its security interest in Haldia Property and specifically mentioned the same in Form D.

In respect of debt assigned by Axix Bank the applicant filed its claim on 14.04.2021 in Form D for an amount of Rs. 15,45,64,37,776/- and the same was also duly admitted.

(vii) Meanwhile, The liquidator made paper publication on 26.03.2021 and 06.10.2021 inviting Scheme of compromise/arrangement (scheme) under section 230 of the Companies Act, 2013 (**Act**) for revival of the corporate debtor. Subsequently, one Jammu Pigments Limited submitted the scheme

dated 30.11.2021 which was revised from time to time. However, failed to submit final scheme within the stipulated time period and therefore, the Stakeholder Consultation Committee (SCC) in its 8th meeting held on 09.12.2021 and in its 10th meeting held on 23.02.2022 rejected the revised scheme.

(viii) Since no scheme was approved by the SCC, the liquidator published an auction notice on 21.12.2021 for the auction of assets of the corporate debtor excluding the Haldia Property. Meanwhile, the Jammu Pigments filed an application bearing No. IA 9 of 2022 before this Adjudicating Authority for setting aside the said auction notice and to direct the liquidator to consider the revised scheme submitted by Jammu Pigments.

However, this Adjudicating Authority vide order dated 06.01.2023 dismissed the prayer in the said IA for setting aside the auction notice dated 21.12.2021 and to further consider the revised scheme since the same was rejected by SCC. This Adjudicating Authority further directed the liquidator to proceed with the liquidation of the corporate debtor as per IBBI (Liquidation Process) Regulations, 2016.

(ix) Meantime, the liquidator filed an application IA 109 of 2022 before this Adjudicating Authority to extend the liquidation period by 1 year and accordingly, the liquidation period was extended by this Adjudicating Authority vide its order dated 16.09.2022.

(x) The applicant through its email dated 10.01.2023 intimated the liquidator regarding its unwillingness to relinquish security interest of the applicant in respect of Haldia Property and also requested the liquidator to hand over the possession of Haldia Property to the applicant to enable the applicant to exercise its rights available under the Code to enforce its security interest on the said property.

(xi) On 11.01.2023 and 14.01.2023 the liquidator published an e-auction notice of the sale of properties of the corporate debtor by excluding Haldia Property duly recognizing the rights of the applicant to realise its security interest on the said property by not relinquishing the same to the liquidation estate. The liquidator through its email dated 21.01.2023 handed over symbolic possession of Haldia Property to the applicant. Further, the respondent again issued auction notice on 11.03.2023 for sale of properties of the corporate debtor by excluding Haldia Property.

(xii) Meantime, Jmmu Pigments Limited filed an appeal bearing No. Comp App (AT) (Ins) No. 188 of 2023 before Hon'ble NCLAT against the order dated 06.01.2023 passed by this Adjudicating Authority. The Hon'ble NCLAT vide order dated 17.02.2023 granting one more opportunity to Jammu Pigments for approval of the scheme from the SCC. Pursuant to the said order the SCC in its meeting held on 28.02.2023 again rejected the revised scheme of Jammu Pigments and therefore, the said appeal before the Hon'ble NCLAT was dismissed vide its order dated 17.03.2023.

The workman of the corporate debtor also filed an appeal bearing No. Comp App (AT) (Ins) No. 195 of 2023 before Hon'ble NCLAT against the order dated 06.01.2023 passed by this Adjudicating Authority. However, the said appeal was dismissed by the Hon'ble NCLAT vide its order dated 20.03.2023.

(xiii) On 12.06.2023, the Refex group offered Rs. 265,50,00,000 (Rupees Two Hundred Sixty Five Crore Fifty Lakhs) to purchase the corporate debtor as going concern excluding Haldia Property since the security interest over the said property was with the applicant and the same was not relinquished to the liquidation estate.

(xiv) The applicant also received expression of interest for purchase of Haldia Property from EMCO Limited on 12.06.2023 and from

Neptune Barter Private Limited on 23.06.2023 for an amount of Rs. 40,00,00,000/- and Rs. 35,00,00,000/- respectively. On 19.06.2023, EMCO Limited deposited 10% of EMD amounting to Rs. 4,00,00,000/- with the applicant.

(xv) On an application filed by the liquidator, this Adjudicating Authority through its order dated 16.06.2023 allowed and extended the time period for liquidation for one year w.e.f. 16.06.2023.

(xvi) Even though the liquidator was aware that the sale of the Haldia Property was at the final stage, the liquidator through email dated 14.07.2023 stated that the Haldia Property will form part of the liquidation estate and also stated to take back the possession of the said property from the applicant. Thereafter, the liquidator published sale notice on 19.07.2023 for auction of liquidation estate including Haldia Property scheduled on 17.08.2023.

(xvii) The Liquidator has illegally attempted to include the security interest exclusively held by the applicant, in the liquidation estate for the liquidation proceedings of the corporate debtor. Thus, the applicant has filed the present application against the illegal act of the respondent by interfering in the rights of the applicant being secured creditor with respect to the security interest on the Halida Property.

4. In the context, the defense placed by the liquidator in its reply and submissions made thereon and as presented/argued by the learned Counsel are summarized as under:

i. The respondent was appointed as the liquidator of the corporate debtor- K.S. Oils Limited vide order dated 16.03.2021. The present application is filed by the applicant relating to Haldia plant admeasuring about 20.89 acres (approx.) with all super structures and machineries thereon in district Purba Medinipur, Mauza Debhog, J.L. No. 149, Haldia.

ii. The applicant filed Form-D on 14.04.2021. The liquidation had commenced on 16.03.2021. The applicant in its said Form-D stated at point No.8 that it has first and exclusive charge over 12.84 acres of land at Haldia & buildings and machinery thereon and further in point No.8A stated that it is not relinquishing its security interest over Haldia Unit.

iii. The claim of the applicant was admitted by the liquidator , however, the applicant then submitted a revised claim for dues upto 16.03.2021 (i.e. liquidation commencement date) and the same was also admitted & conveyed by the liquidator on 09.08.2021.

iv. According to Regulation 21A(1) of Liquidation Process Regulations, a secured creditor is required to inform to the liquidator within 30 days from the liquidation commencement date of its decision to relinquish its security interest to the liquidation estate or realize its security interest , failing which the assets covered under the security interest are presumed to be part of the liquidation estate. For ready reference Regulation 21A(1) of Liquidation Process Regulations is reproduced hereunder:

21A (1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

v. The 30 days time period referred to in the above said Regulation expired on 15.04.2021 and therefore, the remaining Haldia Land (8.04 acres) and buildings and machinery thereon became part of the liquidation estate from the said date by operation of law.

vi. Further, though the applicant stated in Form-D not to relinquish 12.84 acres of land at Haldia Unit & buildings and

machinery thereon to the liquidation estate, failed to realize its security interest over the said property and did not even made any payment to the liquidator as provided under Regulation 21A(1) of IBBI (Liquidation Process) Regulations, 2016.

vii. Thereafter, there was a Stay over liquidation process from 21.01.2022 upto 06.01.2023. The Adjudicating Authority vide its order dated 06.01.2023, lifted the stay and directed the liquidator to proceed with the liquidation. However, there was no stay from 14.04.2021 (Date of submission of Form-D) upto 21.01.2022.

viii. The Applicant had through email dated 10.01.2023 reiterated its earlier decision of exercising its right to stand out of liquidation process and realize the security on its own under section 52(2) of the Insolvency and Bankruptcy Code, 2016 ("I&B Code") and had also requested to hand over the possession of the property to it. In response to the said mail the liquidator through its email dated 21.01.2023, intimated the applicant that all the documents indicate Security Interest of the applicant only qua 12.84 Acres of the Subject Property. The Liquidator gave symbolic possession of 12.84 Acres of land to Applicant and further asked to provide documents to support Security Interest for balance portion of Subject Property.

ix. Thereafter, the Applicant submitted another Form D (described as an Amendment to the submission of Proof of Claim) dated 28.01.2023 which, inter alia, states as follows:

".. the Borrower has created mortgage of only 12.84 Acres by way of mortgage, the Borrower had subsequently at the time of deposit of title deeds, however, deposited the title deeds of the balance property admeasuring 8.02 Acres with ICICI Bank."

".. The above facts of the mortgage creation of 8.02 Acres in favour of Phoenix and/or its assignor lender was not captured by Phoenix earlier reporting and filing on account of the inadvertent error and failure to verify the title documents

deposited by the Auhtorised Officer of the Phoenix handling the Account."

x. Through the said revised Form D dated 28.01.2023, the applicant has for the first time sought to communicate its decision to the Liquidator that it also has its security interest on the remaining 8.04 acres of Land at Haldia Unit and buildings and machinery thereon, and, further that it would not be relinquishing the same in favour of the liquidation estate. However, the same is time barred and cannot be entertained by the Liquidator since as per Regulation 21A the applicant was required to inform the Liquidator of its decision to relinquish the security interest to the liquidation estate or not within 30 days of the liquidation commencement date, i.e. by 15.04.2021.

xi. Moreover, the applicant has failed to realize the security interest over the Haldia Property which was kept out of the liquidation estate (12.84 acres) within the timeline as specified in Regulation 21A of the Liquidation Process Regulation. Hence, the said asset has become part of the liquidation estate. The relevant part of the Regulation is reproduced hereunder:

21A (2)(b) the excess of the realized value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

xii. The mandatory time limit of 180 days as provided in Regulation 21A of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 ("Liquidation Process Regulation") expired on 21.09.2021. Further, the period of 180 days, even if counted from the date of the order of this Adjudicating Authority dated 06.01.2023, has expired on 05.07.2023 by which time the Applicant has failed to realize its security interest over 12.84 acres of the subject property.

xiii. In view of the above, the liquidator through its email dated 14.07.2023 to the applicant intimated that the entire Subject Property

now forms part of the Liquidation Estate. In response to the above communication, the Applicant had through email dated 14.07.2023 for the first time, intimated to the Liquidator that there are two interested parties for the Subject Property for Rs.40,00,00,000/- (Rupees Forty Crore Only) and Rs. 35,00,00,000/- (Rupees Thirty-Five Crore) respectively. The same was never been communicated to the Liquidator before.

xiv. However, the price indicated by the applicant pertains to the entire Haldia Asset, whereas only 12.84 acres with buildings and machinery thereon was kept out of the liquidation estate. Further, it is important to note that even as on 14.07.2023, the applicant had neither accepted any offer for sale of the Haldia Asset nor has paid or offered to make any payment to the liquidator as provided under Sub-regulation 2 of Regulation 21A of IBBI (Liquidation Process) Regulation, 2016. In view of the failure of the applicant to comply with the requirements of Sub-regulation 2 of Regulation 21A the land measuring 12.84 acres at Haldia Unit along with buildings and machinery thereon have also become part of the liquidation estate.

xv. The Liquidator had, through its email dated 18.07.2023 replied to the above email dated 14.07.2023 of the applicant, that the Subject Property including 12.84 acres for which symbolic possession was earlier given to the Applicant has now become part of Liquidation Estate.

xvi. It is also worthwhile to note that the reserve price of the property was Rs. 74,21,00,000/- (Rupees Seventy-Four Crore Twenty-One Lacs Only) when it was first put to auction by the Liquidator vide E-auction sale notice dated 19.07.2023 while the price which was proposed by the Applicant was almost half. It is in the interest of all the stakeholders including the Applicant, if the property fetches higher price.

xvii. It is further submitted that after first hearing of captioned Application by this Adjudicating Authority, 15th meeting of Stakeholder's Consultation Committee ("SCC") was convened on 12.09.2023 wherein Applicant was also present. In the said meeting, SCC unanimously advised the Liquidator to sell the Subject Property in a separate block by reducing the price by 10% than last auction price. The meeting was also attended by representative of Applicant who had unequivocally and categorically agreed to such a suggestion.

xviii. During the subsequent hearing dated 14.09.2023 of this matter by this Adjudicating Authority, the liquidator pointed out this fact before this Adjudicating Authority and the same was also recorded in the order. However, the Applicant had, immediately thereafter, through its email dated 14.09.2023 at 2:00 PM stated that it has not given any consent for the reduction of price of the Subject Property and through its another email on the same date at 3:04 PM stated that his consent in the minutes was recorded wrongly though the applicant has objected to the inclusion of Subject Property in Liquidation Estate.

xix. No such objection was made in the SCC meeting by the applicant. Moreover, pursuant to the above emails of the Applicant, various members of SCC had written to the Liquidator that the Applicant had agreed for reduction of price of the Subject Property in the said SCC meeting.

xx. The Liquidator through his email dated 18.09.2023 responded to the email dated 14.09.2023 of the applicant, clearly indicating that there was no objection of any party including the applicant that Haldia Property cannot be put to auction and further that there was unanimous agreement of all members at the SCC meeting for sale of assets of the Company including its Haldia Plant.

xxi. Further, the applicant has failed to realize its security interest in respect of Haldia Asset (12.84 acres) within the stipulated mandatory period of 180 days and is now trying to claim its right to realize security outside Liquidation Process in a manner which is impermissible in law. Further, the Subject Property has merged with the Liquidation Estate as per Section 52 of I&B Code read with Regulation 21A and Regulation 37 of the Liquidation Process Regulation, and the sale proceeds thereupon are to be distributed in terms of Section 53 of I&B Code, 2016. In light of the above-mentioned facts and legal provisions, it is submitted that the present application is required to be rejected with costs.

Our Analysis

5. We heard the learned counsel for the applicant & the respondent and have perused the material available on record. It is noted that the corporate debtor took loans from Axis Bank & ICICI Bank against the mortgage created on Haldia property; the rights, title and interest of which was assigned by the respective banks to the applicant. It is noted that the corporate debtor was admitted into CIRP by this Adjudicating Authority vide its order dated 21.07.2017. Subsequently, since no resolution plans were received, the RP filed an application (bearing No. IA 165 of 2018) before this Adjudicating Authority seeking liquidation of the corporate debtor, however, the said application for liquidation was rejected by the Adjudicating Authority vide order dated 01.01.2021. Therefore, the RP filed an appeal before the Hon'ble NCLAT (bearing No. Company Appeal (AT) (Insolvency) No.98 of 2021) against the order of this Adjudicating Authority dated 01.01.2021. The Hon'ble NCLAT vide its order dated 16.03.2021 directed the liquidation of the corporate debtor and appointed the RP as liquidator. Following the said liquidation order the applicant filed its claim in Form- D on 14.04.2021 for 12.84 acres of land and buildings and machinery thereon of Haldia Unit.

6. It is further noted that pursuant to the order of liquidation the liquidator invited a Scheme of compromise/arrangement (scheme) under

section 230 of the Companies Act, 2013 (**Act**) for the revival of the corporate debtor. One Jammu Pigments Limited submitted the scheme which was revised time after time, however, the scheme was not found acceptable. Thereafter, the liquidator published the notice for e-auction of the assets of the corporate debtor in newspaper on 21.12.2021. Jammu Pigments Limited submitted another revised scheme on the same day i.e. 21.12.2021. Even though the said scheme was submitted after the expiry of the time prescribed, the liquidator and the members of the SCC discussed and considered the scheme in their 9th & 10th meeting held on 25.01.2022, 28.01.2022, 01.02.2022 & 23.02.2022. The scheme was however rejected by 74% of the secured financial creditors (Phoenix ARC Private limited, State Bank of India, IDBI Bank Limited and LIC of India) and 94% of unsecured financial creditors (SREI Infrastructure Limited).

7. Subsequently, Jammu Pigments Limited filed an application (bearing No. IA 9 of 2022) before this Adjudicating Authority against the liquidator for setting aside the sale notice for auction of certain assets of the corporate debtor and also to direct the liquidator to consider the revised scheme dated 21.12.2021 submitted by Jammu Pigments Limited. However this Adjudicating Authority rejected the said application vide order dated 06.01.2023 on the ground that the scheme was not supported by the requisite approval of 75% of the creditors as required under section 230(2)(C) of the Companies Act, 2013.

8. Pursuant to the said order Jammu Pigments Limited filed an appeal (Co. Appeal (AT) (INS) 188 of 2023) before the Hon'ble NCLAT. During the appeal, Jammu Pigments Limited was given a chance to obtain consent from 75% of the financial creditors, however, it failed to obtain the requisite consent. Therefore, the said appeal was dismissed by Hon'ble NCLAT vide its order dated 17.03.2023.

9. It is further noted that the applicant filed the present application in respect of its claim over Haldia property. The Haldia plant admeasures about 20.89 acres (approx.) with all super structures and machineries

thereon in district Purba Medinipur, Mauza Debhog, J.L. No. 149, Haldia. The applicant filed Form-D and claimed its right over 12.84 acres of land at Haldia Property and the same was admitted by the liquidator. The applicant did not claim its right over the remaining 8.04 acres of Haldia Property in the said Form-D. Subsequently the applicant through its email dated 10.01.2023 informed the liquidator its unwillingness to relinquish security interest in respect of the said property and further requested the liquidator to handover the possession of the said property. The liquidator handed over the symbolic possession of 12.84 acres of the said property through his email dated 21.01.2023 to the applicant.

10. It is further noted that since nothing was realized from the said property even after so many days, the liquidator through email dated 14.07.2023 informed the applicant that the property now forms part of the liquidation estate and it was only at that time that the applicant informed the liquidator that there are two interested parties for the subject property, however, sale was not effected.

11. During the arguments the learned counsels referred Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016. For ready reference the same is reproduced hereunder:

Presumption of security interest.

21A (1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the asset covered under the security interest shall be presumed to be part of liquidation estate.

(2) Where a secured creditor proceeds to realise its security interest, it shall pay-

(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it has relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and

(b) the excess of realized value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

12. The issue involved in this case is about the interpretation of sub Regulation (2) and (3) of the Regulation 21A of the IBBI (Liquidation Process) Regulation 2016. Following issues arises for our consideration:

- i. where the amount payable by the secured creditor under sub-Regulation (2) (a), is not certain, whether liquidator is mandated to inform the secured creditor the estimated amount;
- ii. if liquidator has not informed the estimated amount, whether provision of sub-Regulation (3) would apply or not?
- iii. Whether first proviso is an exception to sub-Regulation (2) which mandates the secured creditor to pay the amount within 90 days.

13. During the course of arguments, Ld Sr Counsel on behalf of the applicant has referred to certain judgments of Supreme Court and High Court. A judgment of Delhi High Court in **Ford Motor Company & Anr. Versus C.R. Borman & Anr. 2008 SCC OnLine Del 1211** has been cited wherein the Hon'ble High Court has stated that "While interpreting a statutory provision, it is incumbent on the Court to start with an assumption that no part of the statute is otiose or superfluous."

In respect of interpretation of 'proviso' Ld Sr Counsel has referred to judgment of Hon'ble Supreme Court in **Nagar Palika Nigam v. Krishi Upaj Mandi Samiti, (2008) 12 SCC 364** wherein the Hon'ble Supreme Court has observed as under:

"9. "10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment."

14. Another judgment of the Supreme Court in **Union of India v. VKC Footsteps (India) (P) Ltd., (2022) 2 SCC 603** was cited wherein the Supreme Court has stated as under:

"Construing the proviso

91. Provisos in a statute have multi-faceted personalities. As interpretational principles governing statutes have evolved, certain basic ideas have been recognised, while heeding to the text and context. Justice G.P. Singh, in his seminal text, Principles of Statutory Interpretation [Justice G.P. Singh, Principles of Statutory Interpretation, (14th Edn. , Lexis Nexis, 2016) pp. 215-234.] formulates the governing principles of interpretation which have been adopted by courts while construing a statutory proviso. The first rule of interpretation is that:

"The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment."

15. We have considered these judgments and have also perused the provision contained in Regulation 21A of the IBBI (LP) Regulations 2016. It is a settled law that while interpreting a statute, courts have to see the intention of the legislature. Further, when the words of an Act or Regulations are clear and unambiguous, courts are bound to give effect to those words. In this regard we may refer to Judgment of 5 Judges of the Supreme Court in **Commr. of Customs v. Dilip Kumar & Co., (2018) 9 SCC 1** wherein the Supreme Court has stated as under:

"20. It is well accepted that a statute must be construed according to the intention of the legislature and the courts should act upon the true intention of the legislation while applying law and while interpreting law. If a statutory provision is open to more than one meaning, the Court has to choose the interpretation which represents the intention of the legislature.

21. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous,

it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the legislature."

16. The language of Regulation 21A is plain and simple. It cast a duty on the secured creditor who proceeds to realise its security interest, it has to pay the liquidator either an amount referred to in sub-Regulation (2)(a), or an amount referred to in first proviso. Failing which, the asset shall become part of the liquidation estate as mentioned in Regulation 21A(3).

17. As far as meaning of 'proviso' is concerned, we may also refer the judgment cited by the Applicant **Union of India v. VKC Footsteps (India) (P) Ltd., (2022) 2 SCC 603** wherein the Supreme Court has also stated as under:

94. While enunciating the above principles, S. Sundaram Pillai [S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591] took note of the decision in Hiralal Rattanlal v. State of U.P. [Hiralal Rattanlal v. State of U.P., (1973) 1 SCC 216: 1973 SCC (Tax) 307] where K.S. Hegde, J., speaking for a four- Judge Bench of this Court observed that while ordinarily, a proviso is in the nature of an exception, the precedents indicate that sometimes a proviso is in the nature of a separate provision, with a life of its own.

The contention of the Applicant that the liquidator has not intimated him the estimated amount, therefore, he was not obliged to pay, is not a correct proposition. When the applicant proceeded to realize the security interest, it was his duty to ask the liquidator for an estimated amount. No document has been shown to indicate that the applicant has asked the same from the liquidator.

Further, the IBBI (LP) Regulations, 2016 have been framed in exercise of power conferred under the IBC, 2016. Regulation 44 provides for the timeline within which the liquidation process has to be completed. If we accept the contention of the Applicant, then the liquidation process cannot be completed within the stipulated/ reasonable period. Such an interpretation as suggested by the Applicant would defeat the objective of the IBC i.e. Resolution/liquidation in a time-bound manner.

18. As per the above Regulation 21A(1) a secured creditor is required to inform the liquidator about its decision to relinquish security interest to the liquidation estate or to realize its security interest; the said decision is to be communicated within 30 days from the liquidation commencement date failing which the assets covered under the security interest are presumed to be part of the liquidation estate. Accordingly, 30 days expired on 15.04.2021 and the remaining part of the Haldia Property admeasuring 8.04 acres became part of the liquidation estate. However, the applicant through its revised Form-D dated 28.01.2023 had for the first time claimed its security interest over remaining 8.04 acres of the property.

19. The learned counsel for the applicant referred to the first proviso of Regulation 21A(2) and stated that where the amount payable is not certain the estimate was to be given by the liquidator and since no estimation was ever given by the liquidator, the Regulation 21A is not applicable on the applicant. Whereas, learned counsel for the liquidator emphasized on the opening sentence of Regulation 21A(2) which says “*Where a secured creditor proceeds to realise its security interest, it shall **pay***” and thereby argued that use of words ‘realise’ and ‘pay’ makes it obligatory on the part of the applicant to realise the security interest and to pay the amount as stated therein at clause (a) & (b) within the prescribed time.

20. In view of all the above, we are of the considered view that the plea of the applicant that since the estimate was not given by the liquidator and therefore, Regulation 21A is not applicable on it is quite misplaced. Rather the issue of estimate would arise only when the applicant had realized the security interest and inquired the liquidator about the proportionate amount payable by him, however no such steps were ever taken by the applicant. Therefore, we are of the view that the interpretation made by the applicant is not acceptable at all. The law is very clear that the secured creditor has to realise and pay the CIRP cost within 90 days and also to pay the excess realized value of the asset, if any, within 180 days. Thus the applicant had to complete the entire process within 180 days itself, failing which the entire

subject property would form part of liquidation estate as per Regulation 21A(3) of the IBBI (Liquidation Process) Regulations, 2016. As far as claim of the applicant for 8.04 acres is considered we are of the view that the same should also have been communicated within 30 days from the date of the liquidation commencement order, failing which Regulation 21A(3) would apply and the said part of the property will form part of the liquidation estate.

21. The applicant failed to comply with the requirements of the Regulation and therefore, the decision of the liquidator that the entire property forms part of the liquidation estate is not contrary to law. Accordingly, the present application deserves to be rejected and dismissed.

22. Thus MA 3 of 2023 in TP 60 of 2019 [CP(IB) 32 of 2017] is rejected and dismissed.

Sd/-

Kaushalendra Kumar Singh
Member (Technical)

Sd/-

Mahendra Khandelwal
Member (Judicial)

Swati Khandelwal