

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA**

**IA (IB) No.1454/KB/2019
in
CP (IB) No.595/KB/2017**

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

And

In the matter of

1. SPS Steels Rolling Mills Limited [CIN L51909WB1981PLC034409]
2. Shakhambhari Ispat & Power Limited [CIN]

...Applicants

Versus

1. MSTC Limited
2. Mr. Vijay Kumar V. Iyer

...Respondents

Date of hearing: 07 June, 2022

Order pronounced on: 16 June, 2022

Coram:

Shri Rajasekhar V.K. : Member (Judicial)
Shri Balraj Joshi : Member (Technical)

Appearances (via video conferencing):

For the SRA : Mr. Anup Kumar, Advocate
: Ms. Sinthla Bala, Advocate

ORDER

Rajasekhar V.K., Member (Judicial)

1. This court convened *via* hybrid mode.
2. This is an Interlocutory Application filed under section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) by SPS Steels Rolling Mills Limited (*'Corporate Debtor'*) and Mr. Ashutosh Sharma, Authorised Signatory¹, Shakhambhari Ispat Power Limited (*'Successful Resolution Applicant' or 'Applicant no.2'*) against the MSTC Limited, a public sector undertaking of Government of India (*'Respondent No.1'*) and Mr. Vijay Kumar V. Iyer (*'Resolution Professional' or 'RP' or 'Respondent No.2'*), *inter alia*, seeking the following reliefs:-
 - a. A direction on the Respondents to refund a sum of Rs.8.56 Crore to the Applicant along with interest as claimed under paragraph 18 of the Application;
 - b. Injunction restraining the Respondents from operation their bank account without leaving a sum of Rs.8.56 crore together with interest.
 - c. A direction on the Respondents to secure the sum of Rs.8.56 Crore and the interest dues and accrued
3. *The Ld. Counsel appearing on behalf of the Applicants submits as follows;*
 - 3.1 This Adjudicating Authority *vide* its order dated 22 December, 2017 had initiated a Corporate Insolvency Resolution Process (*'CIRP'*) against the Corporate Debtor. Thereafter, Respondent No.2 was appointed as the Resolution Professional for the Corporate Debtor.
 - 3.2 During the course of the CIRP of the Corporate Debtor, MSTC Limited had filed an application being CA (IB) No. 1167 of 2018 before this Adjudicating Authority with the following prayers;

¹Duly authorised *vide* Board Resolution dated 04 September, 2019

- a. To confirm the claim of MSTC Limited under the umbrella of a Secured Creditor, and;
 - b. To declare the outstanding claim of MSTC Limited of Rs.300.44 crores be treated in priority and above the claims of other Financial Creditors; and direction on the Resolution Professional not to pledge without the prior permission of the MSTC Limited.
- 3.3 However, this Adjudicating Authority *vide* its order dated 08 April, 2019 did not allow the reliefs sought by MSTC on the grounds that this Adjudicating Authority finds no reason to interfere with the decision of the Committee of Creditors (*'CoC'*) in allotting the amount due to MSTC Limited and the same is in accordance with the Code.
- 3.4 In the 17th Meeting of the CoC on 14 February, 2019, the Operational Creditor enquired about the Liquidation Value, where the Authorised Representative of the RP mentioned that the Liquidation Value due to MSTC Limited is Rs.8.56 crore as determined by two independent valuers.² Subsequently, The Resolution Plan submitted by Shakhambhari Ispat Power Limited was approved by this Adjudicating Authority *vide* its order dated 08 April, 2019.
- 3.5 Pursuant to the said order dated 08 April, 2019, the Resolution Professional in consultation with the CoC at a meeting held on 11 April, 2019 advised Shakhambhari Ispat Power Limited, the Successful Resolution Applicant to deposit a sum of Rs.8.56 crore for payment to MSTC Limited on account of the iron ore, belonging to MSTC Limited, lying at the factory premises of the Corporate Debtor.³ Subsequently, the payment was made to MSTC Limited by the Shakhambhari Ispat Power Limited.⁴
- 3.6 The Resolution Professional and the CoC were not willing to entertain any plea to hand over the possession of the factory to the Successful Resolution Applicant till the dues of MSTC Limited are being cleared. The Factory Premises is situated at Durgapur.

²Page 72 of the Application

³Annexure – D of the Petition at pages -100-111

⁴Annexure – E of the Petition. At pages 112 - 114

- 3.7 Upon taking possession of the Factory Premises, the Successful Resolution Applicant started preparing list of the inventories. The process of making inventories of assets and properties was concluded on 9 September, 2019, that is when the Successful Resolution Applicant noticed that the iron ore belonging to MSTC Limited was not present at the Factory Premises.
- 3.8 Thereafter, the Successful Resolution Applicant sent a letter dated 13 September, 2019 to the Respondents calling upon them to refund a sum of Rs.8.56 crores along with interests. The RP and MSTC Limited acted collusively and made the Successful Resolution Applicant pay a sum of Rs.8.56 crores.
- 3.9 As per the Resolution Plan MSTC Limited and the other Operational Creditors were entitled to a sum of Rs.1.5 Crore or the liquidation value, whichever is higher. The Successful Resolution Applicant was made to believe that the materials lying at the Factory Premises was worth up to Rs.8.56 crore.
- 4. *The Ld. Counsel appearing on behalf of the Respondent No.1 i.e., MSTC Limited submits as follows:***
- 4.1 This instant application is an afterthought and this Adjudicating Authority has no jurisdiction to entertain the said Application. The Application also suffers from the non-joinder of necessary parties as the CoC have not been made a party to this application. Further, all decisions regarding the payment of money was approved by the CoC. This application has been filed to defame the Respondents.
- 4.2 MSTC Limited submitted its claim for a sum of Rs.300.64 crores. As per the public disclosure made by the RP, MSTC Limited was admittedly a Secured Creditor against the pledged goods to the extent of Rs.282,16,56,230.62.
- 4.3 MSTC Limited had executed an Agreement for procurement of various raw materials required by the Corporate Debtor. The Agreement was extended from time to time and was lastly renewed on 25 August, 2017. The materials

provided by the MSTC Limited had to be pledged to MSTC Limited and the same were to be in the custody of a Custodian. However, after the initiation of the CIRP, RP and its agent had the custody of the pledged materials.

4.4 On 9 April, 2018, the RP had issued a process document on behalf of the CoC. As per Claus 1.6.5 of the process document, the Resolution Applicant shall be deemed to have conducted a due diligence exercise with respect to all aspects of the Corporate Debtor, including site visit.

5. *The Ld. Counsel appearing on behalf of the Respondent No.2 i.e., RP submits as follows:*

5.1 The iron ore deposits belonging to MSTC Limited, equivalent to a sum of Rs.8.56 Crore were allegedly lying at the factory premises of the Corporate Debtor but the same were not present when the RP took over the possession of the factory premises on 12 April, 2019. The Applicants are seeking for refund of the amount that has already been paid in terms of the approved Resolution Plan by this Adjudicating Authority *vide* order dated 08 April, 2019.

5.2 As per section 233 of the Code, the RP shall not be held liable for any thing which has been done or intended to be done in good faith under the Code. No issues were raised by the Applicants either before or immediately after the approval and implementation of the Resolution Plan.

5.3 The materials pledged to MSTC Limited were stored outside the premises of the Corporate Debtor and were entirely in custody of a third party independent custodian appointed by MSTC Limited. MSTC Limited had conducted physical verification of its pledged stock on 20 March, 2018⁵ as well as on 21 April, 2018⁶. It is evident from the physical verification statement that the materials were stored at Nassir Hussain Avenue, Durgapur, whereas, the factory is at Zakir Hussain Avenue, Durgapur.

⁵Page 15 of the Reply by the Respondent No.2

⁶Page 16 of the Reply by the Respondent No.2

- 5.4 Section 30 of the Code envisages that at least liquidation value to the Operational Creditor is required to be paid to them. As per the Resolution Plan, at page no.23, Part B, point no. 1(d), a sum of Rs.1.5 crores or liquidation value, whichever is higher, is to be paid to the Operational Creditors.
- 5.5 Further, in the 3rd and 4th meeting of the Monitoring Committee, the members passed resolution in respect to distribution of funds to the creditors in terms of the approved resolution plan, which included payment for a sum of Rs.8.56 crore to MSTC Limited.
- 5.6 *Vide* email dated 04 May, 2019, the RP had provided a detailed calculation to the Successful Resolution Applicant, as to how the liquidation value due to MSTC being secured Operational Creditor was arrived at.⁷ The liquidation value were arrived on the basis of the report by two independent valuers i.e., RBSA Advisors and Duff & Phelps.
- 5.7 Further, the Successful Resolution Applicant was invited for a site visit to the premises of the Corporate Debtor, including the premises where the pledged materials to MSTC Limited was held by the custodian appointed [*refer to clause 1.1.4 and 1.1.7 of the process document*].⁸
- 5.8 All the information regarding the assets and liabilities of the Corporate Debtor, including the stock verification report as on 22 December, 2017 was available on the Virtual Data Room and the applicant had availed full access. The Successful Resolution Applicant was provided multiple opportunities but chose not to visit site either prior or after submission of its Resolution Plan.

⁷ Annexure – D at Page 120 of the Reply by the Respondent No.2

⁸Page 136 of the Reply by the Respondent No.2

6. *Supplementary Affidavit duly notarised on 08 June, 2021 filed by the Successful Resolution Applicant*

6.1 MSTC Limited had filed a Special Leave Petition⁹(‘SLP’) against the Judgment dated 12 July, 2019, passed by the Hon’ble High Court at Calcutta. In the said SLP, MSTC Limited has enclosed certain document which has nexus with this instant application, details of which are as follows;

- i. Letter dated 27 November, 2017 from the erstwhile director of the Corporate Debtor to MSTC Limited, wherein they stated that their representative at Durgapur Factory had informed that the quantity of the pig iron appears to be less than on 01 April, 2017 at the time of verification. Upon enquiry they have found that there is a shortage of approximately 19,500 metric of Pig Iron. Such shortage has occurred by reason of wastage or inadvertent consumption.
- ii. Pursuant to the said letter MSTC Limited replied *vide* its letter dated 30 November, 2017, where they contended that it is incomprehensible that the entire stock of one material has been inadvertently wasted or consumed. However, as per the agreement, in case of any shortage on account of the Corporate Debtor payment to be made for the shortage amount.
- iii. Further, on volumetric analysis of the goods dated 01 December, 2017 by Geo-Chem Laboratories Private Limited in two location (i) Zakir Hussain Avenue, Durgapur and (ii) Nassar Hussain Avenue, Durgapur, the following materials were found

Zakir Hussain Avenue (inside factory premises)	MS Billet – 3451.200
	Pig Iron – 940.896
Zakir Hussain Avenue (old stock yard outside factory premises)	Sponge Iron – 23863.470
	Iron Ore – 24314.879

⁹SLP (CrI.) No.9574-9575/2019

- iv. Thereafter, MSTC Limited again wrote a letter dated 12 December, 2017 to the erstwhile directors of the Corporate Debtor with respect to the unauthorised removal of the pledged material from the stockyard of the Corporate Debtor. MSTC Limited contended that as per the volumetric assessment here is a shortage for Pig Iron alone at 19,360.42 MT, constituting 95.40% of shortage.
- 6.2 As per the volumetric analysis it is clear that the premises where the materials were lying is very much part of the Corporate Debtor, which is old stock yard outside factory premises.
- 6.3 As a matter of fact there were no inventories pledged to MSTC Limited were left at the premises or stockyard of the Corporate Debtor as on 12 April, 2019, when the Successful Resolution Applicant took over the physical possession of the premises.

Analysis and Findings

7. We have heard the Ld. Counsel appearing on behalf of the parties and perused the record. The Successful Resolution Applicant has also placed the approved Resolution Plan on record by way of the Supplementary Affidavit duly notarized on 08 September, 2021. The timeline of the Corporate Insolvency Resolution Process of the Corporate Debtor is as follows;

Application under section 7	24 August, 2017
Erstwhile Directors of the Corporate Debtor informing reduction in the materials through letter.	27 November, 2017
Volumetric Analysis by Geo-Chem Laboratories Private Limited in two location (i) Zakir Hussain Avenue, Durgapur and (ii) Nassar Hussain Avenue, Durgapur	01 December, 2017
Corporate Debtor was <i>admitted</i> into CIRP and appointment of IRP. Subsequently, the IRP was also appointed as the RP	22 December, 2017
Valuation Report by Uttam Agarwal & Associates	11 January, 2018

MSTC Limited conducted physical verification of its pledged stock at Nassir Hussain Avenue, Durgapur.	20 March, 2018 and 21 April, 2018
Approval of the Resolution Plan by the Adjudicating Authority	08 April, 2019
Inventory of assets and properties concluded by the Successful Resolution Applicant	9 September, 2019

8. Upon perusal of the record it is evident that as per the Volumetric Analysis on 01 December, 2017 done by Geo-Chem Laboratories Private Limited in two location (i) Zakir Hussain Avenue, Durgapur and (ii) Nassar Hussain Avenue, Durgapur the materials were present in the said premises of the Corporate Debtor. Further as per the verification report dated 11 January, 2018 by Uttam Agarwal & Associates, Chartered Accountants to the Interim Resolution Professional, the Raw material pledged to MSTC Limited were valued at Rs.20,94,34,531/- (including Iron Ore) and Coal Fines at Rs.21,83,783/-.¹⁰
9. It is also pertinent to mention that the RP also appointed two independent valuers i.e., RBSA Valuation Advisors LLP and Duff & Phelps India Private Limited to determine the valuation of the Corporate Debtor. As per the report of the independent valuers the Liquidation Values of MSTC Limited were as follows;

<i>Valuers</i>	<i>Liquidation Value</i>
RBSA Valuation Advisors LLP	Rs.5,63,12,488.00
Duff & Phelps India Private Limited	Rs.11,49,21,408.00

[At page 120 -121 of the Reply by the RP]

10. Nevertheless, when the Successful Resolution Applicant concluded the process of making an inventory of assets and properties on 9 September, 2019, the Successful Resolution Applicant noticed that the materials belonging to MSTC Limited were not present at the Factory Premises.

¹⁰Annexure B of the Reply by the RP, pages 20-21

11. At this juncture, the question that arise are as follows;
- i. *If there were no materials present then how did the valuers come to the liquidation value of MSTC Limited and the same were relied on by the RP?*

Alternatively, if the materials were present then Did the Resolution Professional take appropriate steps to preserve and protect the assets of the Corporate Debtor as envisaged under section 25¹¹ of the Code?
If yes, then;
 - ii. *How come no materials were found when the Successful Resolution Applicant concluded the process of making an inventory of assets and properties?*
12. However, be that as it may, these issues *stick the blame either on the conduct of the RP or the valuers.* It is also pertinent to mention that there has been a gross-negligence on the part of the Successful Resolution Applicant, Shakhambhari Ispat & Power Limited; they should have verified the existence of the material prior to the payment.
13. With respect to the jurisdiction of this instant Application, it is pertinent to mention that such conduct of the parties has left this Adjudicating Authority in a ludicrous situation. Although, there has been a abdiction of duties on the part of the parties (either the RP or the valuers and the SRA) but, as envisaged under section 236 no Court shall take cognisance of any offence

¹¹ Section 25 - Duties of resolution professional

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:— (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor; (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings; (c) raise interim finances subject to the approval of the committee of creditors under section 28; (d) appoint accountants, legal or other professionals in the manner as specified by Board; (e) maintain an updated list of claims; (f) convene and attend all meetings of the committee of creditors; (g) prepare the information memorandum in accordance with section 29; (h) invite prospective lenders, investors, and any other persons to put forward resolution plans; (i) present all resolution plans at the meetings of the committee of creditors; (j) file application for avoidance of transactions in accordance with Chapter III, if any; and (k) such other actions as may be specified by the Board.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH – I

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punishable under the Code, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

14. Further, the Resolution Plan was approved on 08 April, 2019 by this Adjudicating Authority and as per provision 74 (3) the Adjudicating after the approval of the Resolution Plan it can only intervene when there has been a conscious and wilful contravention of terms of the Resolution Plan. Hence, in the light of the above facts and circumstances, no jurisdiction lies with the Adjudicating Authority to entertain this instant Application. Accordingly, the *IA (IB) No.1454/KB/2019* in *CP (IB) No.595/KB/2017* is *dismissed*.
15. However, the Applicant is at liberty to file appropriate applications before the Insolvency and Bankruptcy Board of India as regard his complaint regarding dereliction of duty on the part of the Resolution Professional. Registry is directed to send the copy of this order to the Insolvency and Bankruptcy Board of India to take necessary steps.
16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

BALRAJ
JOSHI

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Balraj Joshi
Member (Technical)

Rajasekhar
V K

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