

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court-II)  
KOLKATA**

I.A. No. 718/KB/2021  
In  
CP(IB) No. 546/KB/2019

*In the matter of:*

**Tata Hitachi Construction Machinery Company Private Limited**

*....Operational Creditor*

*Versus*

**Earth Mover Consultancy Private Limited**

*.....Corporate Debtor*

**I.A. No. 718/KB/2021**

*An Application under section 42 of the Insolvency and Bankruptcy Code, 2016*

*In the matter of:*

**Indusind Bank Limited**

*....Applicant*

*Versus*

**Pramod Kumar Singh, Liquidator, Earth Mover Consultancy Private  
Limited**

*....Respondents*

**Date of hearing: 17 January 2023**

**Date of pronouncing the order: 02 August 2023**

**Coram:**

**Smt. Bidisha Banerjee**

**: Member (Judicial)**

**Shri Balraj Joshi**

**: Member (Technical)**

**Appearances (via video conferencing/ physical):**

*For Applicant in IA 766/KB/2021*

Mr. Santosh Kr. Ray, Adv.  
Ms. Rituparna Sanayal, Adv.  
Ms. Surnana Mukherjee, Adv.

*For the Liquidator:*

Mr. Arani Guha, Advocate  
Ms. Madhuri Pandey, PCS  
Mr. Pramod Kr. Singh, Liquidator in person

*For the RRFC:*

Mr. Satyendra Agarwal, Adv.  
Mr. Gautam Mallick, Adv.

*For Applicant in IA 380/KB/2022*

Mr. Anujit Mukherjee, Adv.

*For Applicant in IA 718/KB/2021*

Mr. S. Chakraborty, Adv.  
Mr. S. Bhattacharjee, Adv.  
Mr. S. Chandra, Adv.

**ORDER**

***Balraj Joshi, Member (Technical)***

1. This Court convened through hybrid mode.
2. The interlocutory application being I.A. No. 718/KB/2021 has been filed by Mr. Aziz Husain, being the erstwhile managing director of the Corporate Debtor under section 76 of the Insolvency and Bankruptcy Code, 2016 (IBC) seeking the following reliefs against the Respondents herein:
  - a) *To set aside the impugned decision dated July 26, 2021 passed by the Ld. Liquidator;*
  - b) *To pass appropriate Order and/or Orders, Direction and/or Directions in order to secure the rights and claims of the Applicant as a secured financial creditor in conformity with the Code;*

- c) *To pass appropriate Order and/or Orders, Direction and/or Directions upon the Ld. Liquidator to take appropriate steps in order to ascertain the location and whereabouts of the said asset being 1 (one) Hitachi Zaxis 120 Excavator bearing Chassis No. 01S1050275 and Engine No. 958344;*
- d) *Such further and/or other Order and/or Order, Direction and/or Directions be given as this Tribunal deem fit and proper.*

3. **Submissions of the Applicant:**

- 3.1 The case of the Applicant herein is that the Corporate Debtor executed a loan agreement dated June 28 2011 *vide* Contract No. BJJ00018E with the Applicant. In terms of the said Agreement the Applicant had provided financial assistance to the Corporate Debtor to the tune of Rs.31,35,000/- for purchasing 1 (one) Hitachi Zaxis 120 Excavator bearing Chassis No. 0151050275 and Engine No. 958344 [hereinafter referred to as the "said asset"] on the terms and conditions mentioned in the aforesaid Agreement in which time constituted was an essence of the Agreement. The aforesaid loan was repayable by the Corporate Debtor in 35 monthly installments, however committed a default of Rs.4,27,078.10/- in repayment.
- 3.2 Subsequently the Applicant recalled the loan and initiated claim before the Sole Arbitrator Mr. S. G. Ramesh Cumar by invoking the Arbitration Clause of the said Agreement. The Ld. Arbitrator subsequently passed an Award dated April 07, 2016 thereby directing the Corporate Debtor to pay Rs.8,10,204/- alongwith future interest.
- 3.3 The Applicant came across the Public Announcement under Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, dated June 01, 2021, and subsequently being a financial creditor filed proof of claim under Regulation 18 of the said Regulations of 2016, dated June 15, 2021.

- 3.4 Subsequently the Respondent intimated the Applicant that the location of the said asset could not be traced and in case the Applicant is unable to disclose the whereabouts, the Applicant shall be marked as an unsecured creditor of the Corporate Debtor.
- 3.5 The Applicant duly intimated the Respondent and forwarded the charge register pertaining to the Corporate Debtor wherefrom it was evident that the charge is registered in favour of the Applicant and the same subsists till date. The Respondent however failed to acknowledge the proof of existence of security charge by the Applicant as a secured creditor and it was thereafter *vide* the impugned decision the Applicant was classified as an unsecured creditor.
- 3.6 The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 under Regulation 21 provides that a secured creditor can prove existence of security interest on the basis of registration of charge before the Registrar of Companies. The existence of charge was registered in favour of the Applicant and this was acknowledged by the Liquidator. As such, the Respondent could not have classified the Applicant as an unsecured financial creditor solely on the basis that the said asset was not traceable, even after acknowledging the fact that the charge in favour of the Applicant has been registered with the Registrar of Companies.
- 3.7 It is submitted that the impugned decision suffers from non-application of mind since the Respondent could not have deprived the Applicant from the category of a secured financial creditor where the Respondent should have made endeavor to ascertain the location of the asset by calling upon the responsible personnel to come up with necessary information and to cooperate in the liquidation process.
- 3.8 On the contrary, the Respondent called upon the Applicant on July 22, 2021 to take responsibility of ascertaining the location of the asset by contacting the previous Directors of the Corporate Debtor and made the Applicant to go from pillar to post. However, without offering any

further assistance and/or discussion, the Respondent suddenly passed the impugned decision on July 26, 2021.

3.9 It is further submitted that the Respondent ought to have considered the Applicant a secured financial creditor and further had recourse to approach the Appropriate Authority under Regulation 9 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 to call for appropriate disclosure from the persons concerned in order to ascertain the location of the said asset.

3.10 It is submitted that the Respondent by way of the unreasoned impugned decision has deprived the Applicant from exercising its rights under Section 52 and 53 of the Insolvency and Bankruptcy Code, 2016.

4. **Submissions of the Respondent:**

4.1 The Respondent has submitted that he, as the IRP as well as RP in this matter had requested the Applicant *vide* email dated 20/11/2019 to provide the details of the location of their secured assets because it was not available in the premises of Corporate Debtor. But the Applicant didn't extend any co-operation to Respondent in finding out the location of secured assets.

4.2 It is further submitted that the question was raised in the Committee of Creditors (COC) meeting held on 26th November, 2019 and 9th December, 2019 with regard to the identification of the Secured Asset to which reply was received by the Applicant that they are not aware about the secured assets. Thereafter, on the commencement of Liquidation, the Applicant had filed their claim in Form-D within time limit and the same was also considered by the Respondent while checking the claim.

4.3 It is submitted that *vide* email dated 21/07/2021 it was again requested from the Applicant to provide the details of secured assets but they were unable to provide any clue about their secured assets. The Respondent had informed the Applicant *vide* email dated 22/07/2021, since secured assets is not available and traceable so the same cannot

be included in the liquidation estate of Corporate Debtor. He had also informed the Applicant that it cannot be considered in the priority list as secured creditor under section 53.

4.4 It is submitted that the Applicant had replied to the mail of Respondent on 22/07/2021, but still location of the secured asset was not provided by them in order to enable the respondent to trace it. Since the secured assets of Applicant were not available for inclusion in the liquidation estate of Corporate Debtor, hence the Respondent accepted the claim and placed the Applicant in the category of unsecured creditor, on the basis that, how could a creditor, who could not keep eye on their secured assets and same is not available, share in the security interest of other secured creditor, whose assets are available.

5. **Rejoinder on behalf of the Applicant:**

5.1 The Applicant has denied that the Applicant did not extend any co-operation to Respondent in finding out the location of the secured asset. The Applicant is a Financer and extended financial support to the Corporate Debtor for purchasing 1 (one) Hitachi Zaxis 120 Excavator bearing Chassis No. 01S1050275 and Engine No. 958344 (hereinafter referred to as the "said asset"). The asset was in complete and exclusive possession of the Corporate Debtor and as such the whereabouts of the said asset would only be known to the previous management of the Corporate Debtor.

5.2 The management of the Corporate Debtor knowingly refused to disclose the whereabouts of the said asset to the Applicant. However, it was wrong on part of the Respondent to hastily conclude that it should be the Applicant alone who should know the whereabouts of the said asset. It is repeated and reiterated that the Respondent called upon the Applicant on July 22, 2021 to take responsibility of ascertaining the location of the asset by contacting the previous Directors of the Corporate Debtor and made the Applicant to go from pillar to post.

However, without offering any further assistance and/or discussion, the Respondent suddenly passed the impugned decision on July 26, 2021.

5.3 It has been stated that the Respondent should have himself taken proactive steps for ascertaining the location of the asset by contacting with the previous management of the Corporate Debtor. Had it been the case that the Respondent failed to receive any cooperation from the previous Management, he also had remedy under Section 19(2) of the Insolvency and Bankruptcy Code, 2016.

5.4 It is submitted that the Respondent preferred to sit tight over the issue and made the Applicant suffer. It is apparent from the correspondences annexed to the said Reply Affidavit that the Respondent has taken no active steps to render any assistance to The Applicant. The conduct of the Respondent was such that the said asset was at all times under the control of the Applicant and that the previous management of the Corporate Debtor has now no further role to play in disclosing information regarding the whereabouts of the said asset. It is submitted that the Respondent had resources to collect information from the previous management of the Corporate Debtor and as such collected information that the asset was allegedly dismantled. There was no proof of dismantling and the said asset weighed roughly about 180 tons making it cumbersome to be dismantled.

5.5 It has been submitted that the previous management of the Corporate Debtor intentionally refused to disclose the whereabouts of the said asset. It is not the responsibility of the applicant to keep track on the said asset every day especially when the said asset is in control of the Corporate Debtor. It is submitted that the Respondent avoided to consider the issue of the Applicant and hastily classified the Applicant as an unsecured creditor.

6. **Analysis and Findings:**

6.1 Heard the Ld. Counsel on behalf of the Applicant and the Ld. Counsel on behalf of the Respondent and perused the record.

6.2 The Applicant is a Financial Creditor of the Corporate Debtor. It has extended a loan to the Corporate Debtor for the purpose of purchasing machinery. The machinery was hypothecated to the Financial Creditor. Upon the initiation of the Liquidation Process, the Financial Creditor filed a claim to the Liquidator. However, since the assets over which the Financial Creditor enjoys a charge was not available to be included into the Liquidation Estate, the Applicant was categorized as an unsecured creditor. The issues to be decided upon in this matter include:

- i. Whether the decision of the Liquidator to categorise the Applicant as an unsecured creditor for the purposes of distribution of assets under section 53 a correct one?
- ii. Whether the Liquidator failed to fulfil his duties under section 35 of the Code?

6.3 In order to decide on these issues, we would first refer to the duties of the interim resolution professional as provided under section 18 of the Code. According to section 18, the interim resolution professional shall perform the following duties, namely:

- (a) Collect all information relating to the assets, finances and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor, including information relating to –
  - (i) business operations for the previous two years;
  - (ii) financial and operational payments for the previous two years;
  - (iii) list of assets and liabilities as on the initiation date; and
  - (iv) such other matters as may be specified;
- (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made Under Sections 13 and 15;
- (c) constitute a committee of creditors;
- (d) monitor the assets of the Corporate Debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

- (e) *file information collected with the information utility, if necessary; and*
- (f) *take control and custody of any asset 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 assets including –*
- (i) *assets over which the Corporate Debtor has ownership rights which may be located in a foreign country;*
  - (ii) *assets that may or may not be in possession of the Corporate Debtor;*
  - (iii) *tangible assets, whether movable or immovable;*
  - (iv) *intangible assets including intellectual property;*
  - (v) *securities including shares held in any subsidiary of the Corporate Debtor, financial instruments, insurance policies;*
  - (vi) *assets subject to the determination of ownership by a court or authority;*
- (g) *to perform such other duties as may be specified by the Board.*

*Explanation. - For the purposes of this section, the term "assets" shall not include the following, namely:*

- (a) *assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment;*
- (b) *assets of any Indian or foreign subsidiary of the Corporate Debtor; and*
- (c) *such other assets as may be notified by the Central Government in consultation with any financial sector regulator.*

6.4 Further, the duties of the Resolution Professional under section 25 of the Code are as follows:

*(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) <sup>1</sup> *[(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the Corporate Debtor and such other conditions as may be specified by the Board, to submit a resolution plan or 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.*

6.5 Lastly, the powers and duties of the Liquidator under section 35 of the Code have been provided hereinunder:

(1) *Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: -*

- (a) *to verify claims of all the creditors;*
- (b) to take into his custody or control all the assets, property, effects and actionable claims of the Corporate Debtor;
- (c) *to evaluate the assets and property of the Corporate Debtor in the manner as may be specified by the Board and prepare a report;*
- (d) to take such measures to protect and preserve the assets and properties of the Corporate Debtor as he considers necessary;

- (e) to carry on the business of the Corporate Debtor for its beneficial liquidation as he considers necessary;*
- (f) subject to section 52, to sell the immovable and movable property and actionable claims of the Corporate Debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body Corporate, or to sell the same in parcels in such manner as may be specified: 1 [Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the Corporate Debtor in liquidation to any person who is not eligible to be a resolution applicant.]*
- (g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the Corporate Debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the Corporate Debtor in the ordinary course of its business;*
- (h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the Corporate Debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;*
- (i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;*

- (j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;*
  - (k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the Corporate Debtor;*
  - (l) to investigate the financial affairs of the Corporate Debtor to determine undervalued or preferential transactions;*
  - (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;*
  - (n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the Corporate Debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and*
  - (o) to perform such other functions as may be specified by the Board.*
- (2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53:  
Provided that any such consultation shall not be binding on the liquidator:  
Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.*

6.6 As mentioned in section 18 and section 25, the Interim Resolution Professional (IRP) and the the Resolution Professional (RP), both have

the duty to take into possession the Assets of the Corporate Debtor. From the Minutes of the Meeting of the Committee of Creditors (CoC) held on 26.11.2019, it can be seen that the Respondent (then IRP) had received and collated the claims of various claimants. The claim of the Applicant had also been accepted by the IRP. It is further mentioned in the said Minutes of the CoC Meeting that neither the books of accounts of the Corporate Debtor was traceable, nor the whereabouts of the Directors of the Corporate Debtor could be ascertained. The IRP has also mentioned therein that no details and traceability of the assets of the Corporate Debtor except that of its premises was available and that the concerned people were requested to hand over the assets of the Corporate Debtor to the IRP. In the said meeting, the IRP was appointed as RP as mentioned in Item No. 12.

6.7 Further, upon being asked to hand over the possession of the assets by the IRP i.e the Respondent at the very beginning of the CIRP, the Applicant has admitted to not knowing the whereabouts of the said hypothecated assets, as is made clear from item no. 10 of the minutes of the CoC meeting held on 26.11.2019 as well as item no. 8 of the minutes of the CoC meeting held on 09.12.2019.

6.8 Further, from the aforementioned Minutes of the CoC Meetings, it is clear to us that while the Applicant was a part of the CoC having voting share of 1.34%, it was never deemed a secured creditor by the Respondent.

6.9 It is to be noted that during the CIRP, the steps taken by the Respondent as the IRP/RP include:

- a. Constitution the CoC;
- b. Communication to various charge holders regarding the initiation of CIRP against the Corporate Debtor;
- c. Receipt and collation of various claims against the Corporate Debtor;

- d. Attempt towards tracing the books of accounts of the Corporate Debtor;
  - e. Requesting various financiers to hand over the assets of the Corporate Debtor;
  - f. Making public announcements;
  - g. Appointment of registered valuers as per regulation 27 of the CIRP Regulations;
  - h. Opening new current account of Corporate Debtor;
  - i. Initiation of insolvency proceedings against personal Guarantor.
- 6.10 Thereafter, as a liquidator of the Corporate Debtor, the Respondent has taken the various steps including but not limited to:
- a. Preparation of list of stakeholders;
  - b. Collection, verification and collation of claims of stakeholder;
  - c. Constitution of Stakeholders Committee;
  - d. Preparation of Preliminary Report;
  - e. Preparation of Asset Memorandum;
  - f. Making public announcements;
  - g. Filing periodic progress reports;
  - h. Updating books of account of the Corporate Debtor till the date of commencement of liquidation;
  - i. Holding custody of the assets of the Corporate Debtor in possession of the Respondent.
- 6.11 From the aforementioned Minutes of the CoC Meetings as well as the Progress Reports filed by the Respondent, it becomes clear that the Respondent, then in the role of IRP and RP, had taken the required steps to collate the claims of the claimants and further had taken steps to trace the assets of the Corporate Debtor to take the same into possession. Thereafter, the Respondent had been appointed as the Liquidator by this Adjudicating Authority vide order dated 28.05.2021.
- 6.12 After the appointment of the Respondent as the Liquidator, the Applicant submitted his claim to the Respondent vide email dated 17.06.2021.

thereafter, the Respondent an email dated 21.07.2021 to the Applicant, mentioning therein that he had been told by the directors of the Corporate Debtor that the assets in question were scrapped out and were no longer available. The Respondent had also asked the Applicant if any FIR was filed by the Applicant for the disposal of the the said assets. It was again re-iterated by the Respondent in the said email that he was unable to find the assets secured to the Applicant.

6.13 As a reply to the said email dated 21.07.2021, the Applicant had sent an email dated 22.07.2021 to the respondent. However, the Applicant never reverted back to the queries raised by the Respondent in regards to the FIR and identification and location of the secured assets.

6.14 While the charge of the Applicant over the assets of the Corporate Debtor is registered, the same cannot be the sole criterion for categorization of the Applicant as a secured creditor, especially in the absence of the assets over which such charge is enjoyed.

6.15 Further, from the very beginning of the CIRP i.e 21/10/2019, the Applicant has known that the assets in question were missing. However, the Applicant neither took one step to locate the same or nor did it assist the Respondent in tracing the same. As such after nearly two years, the Applicant cannot suddenly wake up and hold the Respondent solely responsible for finding the said assets.

6.16 From the aforementioned facts and circumstances, it is clear to us that the assets in question were neither in the possession of the Applicant, nor with the Liquidator. Infact, there was no trace of the machinery and as such it could not be included in the Liquidation Estate. As such, the realization of the security interest was never possible and the Applicant had notice of the said fact. In such circumstances, the decision of the Liquidator to not include the name of the Applicant as a Secured Creditor was a correct one.

6.17 Further, from the Minutes of the CoC meetings and the Progress reports mentioned above, it can be seen that the Liquidator has taken all possible

steps in the direction of tracing the assets of the Corporate Debtor and taking them into possession. The Liquidator has tried to trace the books of Accounts of the Corporate Debtor and the directors of the Corporate Debtor too. After getting in touch with the directors of the Corporate Debtor, the Liquidator was informed that the assets of the Corporate Debtor in question were scrapped out and were no longer available.

- 6.18 As such the Liquidator has fulfilled his duty under section 35 (1)(a) &(b) of the Code. As far as the duty to protect and preserve the assets of the Corporate Debtor under section 35(1)(d), it cannot be determined from the record before us when the assets in question were scrapped out or removed from the possession of the Corporate Debtor. As such, we refrain from questioning the steps taken by the Liquidator in facilitating the liquidation.
- 6.19 Having considered the aforementioned facts of the matter, we are of the considered opinion that the instant application should be **rejected**.
7. Accordingly, **I.A. (I.B.C.) 718/KB/2021** shall stand *dismissed*.
8. List CP No. 180/KB/2021 on **18.08.2023**.
9. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
10. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
Member (Technical)

**Bidisha Banerjee**  
Member (Judicial)

**Signed on this, the 2<sup>nd</sup> day of August, 2023**

SM[LRA]