

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH- II
KOLKATA**

IA(IB)No.917/KB/2022

IN

C.P (IB) No.1712/KB/2019

In the matter of

An application under section 19(2) read with section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

And

In the matter of:

West Bengal Industrial Development Corporation

... Applicant

Versus

Pankaj Kumar Tibrewal, Interim Resolution Professional of M/s Dutta Agro Mills Private Limited & Anr.

... Respondents

Order Pronounced on: 25/01/2024

Coram:

Mrs. Bidisha Banerjee : **Member (Judicial)**
Mr. Balraj Joshi : **Member (Technical)**

Counsels appeared through Physically/ Video Conference

Mr. Shaunak Mitra,Adv.] For the RP
Mr. Siddhanth Makkar, Adv.]
Mr. Pankaj Tibrewal,RP in person]

Mr. Tirthankar Das,Adv.] For Applicant in IA/917/2022
Mr. Saubhik Chowdhury,Adv.]
Ms.Meenakshi Manot, Adv.]

Mr. Pritesh Bansod,Adv.] For R-2 in IA/917/2022
Mr. Supriyo Singh, Adv.]
Ms.Suchita Sharma, Adv.]
Ms.Sangjukta Singh, Adv.]

Mr. Nimish Mishra,Adv.] For suspended Members of BoD of CC
Mr.Debjit Mukherjee,Adv.]

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Heard Ld. Counsel for the parties.
2. This is an application preferred by the Applicant/ West Bengal Industrial Development Corporation, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Rule 22 of the National Company Law Tribunal Rules, 2016, inter alia, seeking the following reliefs;
 - i. Order restraining the respondent no.1 from claiming the said asset being factory premises, land, plant and machineries situated at Dhunui, P.O. Paharhati, P.S. Memary, District Burdwan, West Bengal.
 - ii. Restraining the respondent no.1 from taking any steps to take possession of the subject assets which is situated at village Dhunti, Post Office, Paharhati, Police Station: Memari in Burdwan District;
 - iii. To scrutinize the claim and admit only such part of the claim which is valid and justifiable;
 - iv. To restrain the respondent no.1 to conduct any vote and take any decision in CoC till the claim of the respondent no. 2 is scrutinized and finalized by the respondent no.1;
 - v. Ad- interim order in terms of prayers (a) to (d) above;
 - vi. Such further or other order or orders be made and direction or directions be given as the Hon'ble Tribunal may deem fit and proper.

3. It is evident from the pleadings that the applicant, West Bengal Industrial Development Corporation (WBIDC) had been holding factory premises, land, plant and machineries situated at Dhunui, Post Office: Paharhati, P.S. Memary, District Burdwan, West Bengal (hereinafter referred to as the 'subject premises') that belong to the Corporate Debtor M/s Dutta Agro Mills, in exercise of its powers under section 29 of the State Financial Corporation Act, 1951. Section 29 of the State Financial Corporation 1951 is set out herein below:

Section 29: “Rights of Financial Corporation in case of default-

(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof 1 [or in meeting its obligation in relation to any guarantee given by the Corporation] or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have to see [right to take over the management or possession or both of the industrial concerned], as well as the 3 [right to transfer by way of lease or sale] and release the property pledged, mortgages, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of the powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred 5 [as if the transfer] had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) [Where any action has been taken against an industrial concern] under the provisions of sub-section (1), all costs, [charges and expenses

which in the option of the Financial Corporation have been properly incurred] by it [as incidental thereto] shall be recoverable for the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such assets, charges and expenses and, secondly, in discharging of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) [Where the Financial Corporation has taken any action against an industrial concern/ under the provisions of sub-section (1), the Financial 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 [the concern]

4. The applicant, WBIDC claims that:

- i. It is holding the subject premise as owner or at least as the beneficial owner thereof
- ii. The Corporate Debtor had taken a loan from the applicant through IDBI, which the corporate debtor had defaulted in repayment.
- iii. Having so defaulted, by exercise of the statutory provisions of the State Financial Corporations Act, 1951, the applicant, as the Financial Corporation is vested with the rights in the property and has become the owner thereof, having taken possession of the subject property on July 22, 2016.
- iv. The rights of the Applicant have fructified much prior to filing of the petition under section 7 of the IB Code, 2016 on September 24, 2019.
- v. The rights exercised by the applicant, by the operation of the statute. The State Financial Corporations Act, 1951 are that of an owner.

- vi. Presently, the Resolution Professional is seeking to foist section 52 on the applicant by negating its right to choose an option as envisaged in Section 52 of IBC. This is in gross violation of the statute, and, therefore, impermissible.
- vii. There is no conflict in so far as the provisions of State Financial Corporations Act, 1951 and the Insolvency and Bankruptcy Code, 2016 are concerned. However, as stated in the decision of **Naveen Chandra Steels Private Limited -vs- SREI Equipment Finance Limited** reported in **2021 4 SCC 435** paragraph 18 the Hon'ble Supreme Court had held that the State Financial Corporations Act will prevail over the general powers of the Company Judge under the Companies Act. The said judgement follows the decision of the Hon'ble Supreme Court in **Bakemans Industries Private Limited vs. New Cawnpore Flour Mills and ors.** Reported in **2008 15 SCC 1**, paragraphs 37 and 38. The Hon'ble Apex Court had held that the SFC Act is special statute and that the same shall prevail over winding up proceedings as enumerated under the Companies Act.
- viii. **The order of CIRP of July 4, 2022 records the total claim of IDBI Bank to be Rs. 90,46,34,744/- (Rupees Ninety Crores Forty Six Lakh Thirty Four Thousand Seven Hundred Forty Four only) which has now been inflated to Rs.158,00,45,448/- (Rupees One Hundred Fifty Eight Crores Forty Thousand Four Hundred Forty Eight only) .The applicant is unaware about the basis of the claim which has been made by the respondent no.2 in the petition under section 7 of “the Code” as if how and in what manner finance of Rs. 14,00,00,000/- (Fourteen Crore) has been calculated to be over 90,00,00,000/- (Ninety Crore).**

- ix. **The IDBI (respondent no.2 herein) is providing an inflated claim in order to have a higher voting right in the CoC which is malafide and contrary to law.**
- x. **As per a tripartite agreement dated August 13,2010 the amount lent and advanced by the respondent no.2 was Rs. 14 Crore and how the figure of Rs. 158 crore is being claimed by the Respondent no.2 is something that needs to be checked and ascertained by the Respondent No.1 before the claim of the Respondent No.2 is admitted, pursuant to which the Respondent No.2 shall be allowed to vote in the CoC in favour or against any resolution plan that may be formulated. Therefore, the Respondent No.1 should evaluate the claim of IDBI Bank before taking any decision in terms of the voting share of the financial creditors, and a further direction upon the Respondent No.1 that the notto take any steps with regard to the assets being factory shed situated at village: Dhunui, Post Office: Paharhati, Police Station: Memari in Burdwan District as the same will be beyond the scope of the CIRP process.**
- xi. **Further that, the applicant has become the owner of the immovable assets which, previously belonged to the Corporate Debtor including factory premises, land, plant and machineries situated at village Dhunui, Post Office : Paharhati, Police Station: Memari in Burdwan District. Upon taking possession of the same under section 20 of the State Financial Corporation Act, 1952 in the year 2016, the said asset ceased to be of the Corporate Debtor any more and the said asset is out of the purview of CIRP.**

5. This Adjudicating Authority notes that by way of IA 1267 of 2022 in CP 1212 of 2019, the Resolution Professional of the Corporate Debtor M/s Dutta Agro Mills had sought for the following reliefs:

- i. Allow the present application.*
 - ii. Direct the Respondent to assist the Applicant to complete the Corporate Insolvency Resolution Process of the Corporate Debtor in a time bound manner.*
 - iii. Direct the Respondent to handover the possession of the movable and immovable properties/assets of the Corporate Debtor to the Applicant.*
 - iv. Pass any other Order or relief as this Hon'ble Tribunal deems fit and proper in the interest of justice.*
6. This Adjudicating Authority, in regard to the same factory premises of the Corporate Debtor observed and held as under:
 - i. An application for initiation of the CIRP of the Corporate Debtor (M/s. Dutta Agro Mills Private Limited) was filed by IDBI Bank (the “Financial Creditor”), under Section 7 of the Code. The Corporate Debtor was admitted into CIRP vide an order dated 04.07.2022 passed by this Hon'ble Tribunal in CP/IB/1712/KB/2019 and the Applicant herein was appointed as the Interim Resolution professional of the Corporate Debtor.
 - ii. An application for initiation of the CIRP of the Corporate Debtor (M/s. Dutta Agro Mills Private Limited) was filed by IDBI Bank (the “Financial Creditor”), under Section 7 of the Code. The Corporate Debtor was admitted into CIRP vide an order dated 04.07.2022 passed by this Hon'ble Tribunal in CP/IB/1712/KB/2019 and the Applicant herein was appointed as the Interim Resolution professional of the Corporate Debtor.
 - iii. It became evident that, the Corporate Debtor in the year 2006 had availed a term loan of Rs.17,20,00,000 from the Respondent Corporation. As per the terms of the loan agreement, a charge was created by the Respondent upon the movable and immovable assets of the Corporate Debtor. The respondent being a Financial Corporation comes under the purview of Section 3 of the State Financial Corporation Act, 1951 (hereinafter referred to as the “SFC”) and had

powers/rights to take over the management or possession or both of the Corporate Debtors by virtue of Section 29 of the SPC Act, 1951. But as a Resolution Professional of the Corporate Debtor, the applicant has right and power to take over the possession of the immovable and movable assets or properties the Corporate Debtor and by virtue of Section 19 and Section of the Code to take custody and control of all the assets of the Corporate Debtor, whereas the SFC has not handed over the possession of the RP.

iv. The Respondent has also filed an interim Application before this Tribunal to restrain the Applicant from taking possession of the factory cum registered office of the Corporate Debtor.

7. Having considered various statutory provisions including section 19(2), section 25, section 238 of the Code and section 29 and section 46B of the SFC Act, 1951 as well as the extent of operation of the non obstante clause in IBC –vs- SFC Act, and several judicial precedents, this Tribunal, by its order dated 01.09.2023 has already held as under:

“ C. **IBC vs. SFC**

IBC, 2016 is indubitably and indisputably a Special Statute as also a later statute vis-a-vis the SFC Act of 1951, both having non obstante clause.

We have already reproduced the non obstante clause of both the IBC and SFC, Act.

The reach of non obstante clause of SFC Act is limited by Section 46 B of the Act, whereas non obstante clause of IBC shows that it prevails in all situations.

Thus, IBC as a Special statute has a non obstante clause which does not have a limited reach unlike SFC Act.

D. **Conclusion**

In view of above enumerations, for all purposes, provisions of IBC, 2016 should prevail over SFC Act, 1951.

9 In view of the foregoing analysis, the application being IA (IB) No. 1267/KB/2022 is allowed

10. the RP is directed to act in accordance with the provisions of the Code“

8. In view of the order supra, passed in of IA 1267 of 2022, this application filed by the Applicant WBIDC pertaining to the same factory premises of the Corporate Debtor, cannot be allowed.
9. In view of the above, the prayers in ‘a & b’ fails, (c) is **allowed** to a limited extent that the applicant will put up a claim before the R P which will be considered on its own merits. I.A. is thus disposed of.
10. Urgent Certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 25th day of January, 2024

SM(LRA)