

Counsels appeared through Video Conference:

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| 1. Mr. Anil Goel, Liquidator |] Self |
| 2. Mr. Arun Gupta, Pr. CA |] For the Liquidator |
| 3. Mr. Kanishk Khetan, Advocate |] |
| 1. Mr. Zoheb Hossain, Advocate |] For the Directorate of |
| 2. Mr. Agni Sen |] Enforcement |
| 1. Mr. Rishav Banerjee, Advocate |] For Vaarsana Employee |
| 2. Mr. Patita Paban Bishwal, Advocate |] Welfare Association |

Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

Shri Harish Chander Suri, Hon'ble Member (Technical)

Date of hearing: 22nd July, 2020.

Order pronounced on 22nd July, 2020.

ORDER

Per Shri Jinan K.R., Hon'ble Member (J)

1. Mr. Anil Goel, Liquidator of Vaarsana Ispat Limited has filed this unnumbered application being IA(IB) No. /KB/2020 in CP(IB) No.543/KB/2017 under Sections 60(5) and 32A of the Insolvency and Bankruptcy Code, 2016 (in short, 'I & B Code') for seeking permission to sale the assets of the CD which were attached by the respondent/ED in view of Section 32A inserted by Insolvency and Bankruptcy Code (Amendment) Act, 2020.

2. The Ld. Liquidator Mr. Anil Goel, submitted that he is running the Company as a going concern and endeavours to sell the Corporate Debtor as a going concern has been hampered due to the attachment as no one is willing to bid for the company in spite of several interested parties having approached him. For the said reason he filed the application for an urgent hearing before the lockdown is lifted. As lockdown was declared due to pandemic COVID-19 situation, the normal operation of NCLT Kolkata Bench is yet to be resumed, the unnumbered application was listed on today for hearing through video conferencing (VC) by giving advance notice from the Registry to the applicant as well as to the respondent directing to submit written notes of defence, if any.

3. Heard both sides. Perused the records, written note of defence submitted on the side of the respondent and the citations referred to us on both sides.

4. Brief facts for the consideration of the application are the following:

5. Corporate Insolvency Resolution Process (in short, CIRP) was initiated by this Adjudicating Authority (AA) as against the corporate debtor (CD)/ VARRSANA ISPAT LIMITED, by an order dated 16/11/2017 (Annexure 'A'). For want of a resolution plan the CD was ordered to undergo Liquidation vide order dated 06/08/2019 (Annexure 'B'). While CIRP was initiated it was reported by the RP that CBI, BS & FC has registered an FIR no. RCBD 1/2015/E0011 dated 26/10/2015 u/s 120-B, 420, 467, 468 and 471 of the IPC against one of the Corporate Debtor's group company, REI Agro Limited and its promoter/directors. Charge sheet dated 02/08/2017 was filed against REI Agro Limited and its promoter/directors wherein it was alleged that they had cheated the consortium of banks and committed offences punishable u/s 120B r/w 420, 467, 468 and 471 of the Indian Penal Code. Provisional Attachment order No. 08/2017 dated 10/07/2017 (Annexure 'C') was issued by the Respondent wherein the assets owned by the Corporate Debtor were attached alleging the assets acquired to be proceeds of crime as per Section 2(1)(u) of the Prevention of Money Laundering Act, 2002, considering that the Applicant Company was one of the group companies of REI Agro Limited. By the aforesaid order dated 10/07/2017 following assets of the Corporate Debtor were attached:

Land located in Survey No. 116/1, 116/2, 117/p/1, 117/p/2, 118, 119, 120, 121, 125, 126/1, 126/2, 127/1, 128, 129/p/2, 129/p/1, 135/p, 136, 111/p1/p1, 112/1, 112/1, 113/p1. 113/p2, 114, village Varrsana Te- Anjar Gandhidham, District-Kutch;

Building structures on the above land;

Plant and machinery on the above land.

6. The Ld. RP knowing the attachment, had filed an application before this Adjudicating Authority for de-attachment of assets of the Corporate Debtor being CA(IB) No. 399/KB/2018, which was dismissed by this Adjudicating Authority vide order dated 12/07/2018 (Annexure 'F'). Against the dismissal order of this Adjudicating Authority, an appeal was preferred before the Hon'ble NCLAT, which was also dismissed by the Hon'ble NCLAT vide order dated 02/05/2019 (Annexure 'G'). The Applicant, the then Resolution Professional, has preferred an appeal against the dismissal order passed by the Hon'ble

NCLAT before the Hon'ble Supreme Court. However, the Hon'ble Supreme Court vide order dated 22/07/2019 has dismissed the appeal also. (Annexure 'H').

7. As on today the CD is undergoing liquidation, and its valuable assets referred to above are under attachment. The Ld. Liquidator Mr. Anil Goel, submitted that he is running the Company as a going concern but unable to proceed with the sale of the CD or its business due to the pending attachment. According to him no one is willing to bid for the company in spite of several interested parties having approached him. In the meanwhile on 28/12/2019 Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promulgated which was converted into the Insolvency and Bankruptcy Code (Amendment) Act, 2020 on 13/03/2020. After promulgation of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, Section 32A has been inserted to the Code by giving much clarity in regards the assets under attachment and accordingly he filed this Application under newly inserted Section 32A of the 'I & B Code' seeking permission to sell the assets of the CD which were attached by the respondent/ED.

8. The respondent / ED appeared through its Counsel Mr. Zoheb Hossain, and Mr. Agni Sen. A written notes of defence also submitted. The Ld.Counsel Mr. Zoheb Hossain objected to this application mainly on three grounds. Firstly he submitted that only after the liquidation process is over or resolution plan is approved then alone an application u/s. 32A can be made. Secondly he submitted that no Application can be filed by the liquidator u/s. 32A and according to him such an application can be filed only by the successful resolution applicant. Thirdly he submitted that proceedings are going on before the PMLA Appellate Authority which is attended by the Ld. Liquidator and the challenge against the attachment became final and therefore, even if the provisions of Code are amended if the right of the parties had already been crystallized then, subsequent change in law would not take away such rights which had attained finality.

9. Coming to the first and second objection the Ld.counsel for the respondent submitted that 32-A is not applicable to the liquidation proceedings and that only in a case where a resolution plan is passed this provision would apply. To stress his said submission he

relied upon a judgement of the Coordinating Bench of NCLT, Hyderabad in the case of Leo Meridian Infrastructure Project Vs. Andhra Bank [IA No. 138 & 139/ 2020 and IA 323 of 2020; In Company Petition (IB) No. 43/7/HDB of 2018], where it has been found that s. 32A is applicable only upon resolution plan having been finally approved – once the resolution plan has been finally approved and then protection granted. We have gone through the order cited by the Ld. Counsel. The relevant para 10 to 12 highlighted in the order read as below:

Par.10. The attachment is on the assets of the Corporate Debtor Company. The attachment does not prohibit in any way, the CIRP to continue. It is for the Resolution Applicants either to continue with their resolution plans or to withdraw their resolution plans in the light of attachment over the assets of the Corporate Debtor Company. It is their will and pleasure to continue with the resolution plans for consideration by the CoC or in the alternative to withdraw from the Resolution Plan. However, the Resolution Professional to explain the latest development to the Resolution Applicants in respect of the attachment and also the orders passed in IA/54/2020

11. We make it clear that the CIRP to be continued as per the provisions of the Code and attachment over the assets of the Corporate Debtor effected by the Enforcement Directorate is not at all an impediment to continue the CIRP against the Corporate Debtor.

12. With this observation, IA 323 /2020 is disposed of.

10. We have gone through the order in its entirety. The observations of the Hon'ble NCLT are the above. It is self explanatory. No ratio has been set up by the Hon'ble NCLT, Hyderabad declaring that the 32-A is only applicable to in a matter where a resolution plan is passed. The facts in the said case is entirely different in the instant case. Here in this case the CD is undergoing liquidation and the Liquidator seek permission to sell the assets already under order of attachment by the respondent in view of the application of amended provision of the Code. Considering the first objection our endeavor is to see whether section 32-A is not applicable to the sale of assets of the CD which is under order of attachment and the proceedings of the respondent is under challenge and pending before the Appellate Authority, PMLA against confirmation of Provisional Attachment order, of the Adjudicating Authority, PMLA. What is prayed for in the case at hand is not for releasing the attachment. According to the Ld. Liquidator, deattachment is not at all necessary

because 32-A provide immunity against prosecution of the corporate debtor and preventing action against the property of such corporate debtor undergoing CIRP or Liquidation. According to him the effect of attachment of the properties of the CD is to be nullified upon applying section 32-A and de attachment if any is to be asked for by the buyer and not by the liquidator. We find some force in the said argument advanced by the Ld. Liquidator. In order see the application of 32-A in the instant case let us read the section as such. It is reproduced below:

“32A. Liability for prior offences etc.

(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not -

A promoter or in the management or control of the corporate debtor or a related party of such a person; or

(a) A person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor’s liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under

section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(i) A promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) A person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.—for the purposes of this sub-section, it is hereby clarified that,—

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfills the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in subsections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.”

11. To have a better understanding of the section let us read the object behind the insertion of section 32-A. The relevant para in the ordinance published on 28th December, 2019 is extracted below:

WHEREAS a need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency in case the company goes into corporate insolvency resolution process or liquidation, to provide immunity against prosecution of the corporate debtor, to prevent action against the property of such corporate debtor and the successful resolution applicant subject to fulfillment of certain conditions and to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016;

12. A reading of section subsection (2) of section 32-A with the object behind the introduction we are of the considered opinion that 32-A is also applicable to liquidation proceedings. Under the object as well as under section it is specifically dealt with that

the section is applicable to prevent insolvency in case the company goes into CIRP or liquidation. We are stressing the wording CIRP or Liquidation in the object behind insertion of this section and the following words under subsection (2) of Section 32-A. “where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—“. The above said discussion no doubt enables us to hold that the 32-A is also applicable to the assets of the CD undergoing liquidation and a liquidator can file an application like the one in hand. That being so we do not find any merit in the first and second objections on the side of the respondent.

13. Coming to the third objection, the Id.Counsel for the respondent submitted that proceedings are going on before the PMLA Appellate Authority which is attended by the Ld. Liquidator and the challenge against the attachment became final and therefore, even if the provisions of Code are amended, if the right of the parties had already been crystallized then, subsequent change in law would not take away such rights which had attained finality. To stress his said argument he relied upon a judgment of the Hon’ble Supreme Court in Lekh Raj (dead) through legal representatives .. Appellants; Versus. Ranjit Singh and Others ... Respondents; (2018) 12 Supreme Court Cases 750.

14. It is true that the Liquidation who was the then RP preferred an application for de attachment of the assets of the CD issued by the respondent on the ground of violation of moratorium declared under section 14 of the Code. The CA(IB) No. 399/KB/2018, which was filed by the RP was dismissed for the reason that the attachment was prior to the declaration of moratorium. Aggrieved by the order of dismissal of the application the RP preferred an appeal before Hon’ble NCLAT, which was also dismissed by the Hon’ble NCLAT vide order dated 02/05/2019. The RP again preferred an appeal against the dismissal order passed by the Hon’ble NCLAT before the Hon’ble Supreme Court. However, the Hon’ble Supreme Court vide order dated 22/07/2019 has dismissed the appeal also. Citing these orders the attempt on the side of the Ld.Counsel for the respondent is that the order of attachment attained finality and therefore subsequent

amendment cannot reopen the already settled right of the applicant and therefore this application is not maintainable. He stressed para 20 and 21 of the judgment of the Hon'ble Supreme Court for stressing the said argument. The Para 20 and 21 is extracted for a better understanding of the ratio laid down in the said case.

20. In our considered view, in order to take benefit of the amendment, it was necessary for the appellants (judgment-debtors) to have filed the second appeal against the decree of the first appellate court and if the second appeal had been decided after 1973, the impact of the amendment on the rights of the parties could have been considered in the context of the amendment in the light of law laid down by this Court in Kesar Singh case³. It was however, not done because, as mentioned above, the decree in question had already attained the finality in 1965.

21. If the rights of the parties had already been crystallized then, in our opinion, subsequent change in law would not take away such rights which had attained finality due to lis coming to an end inter se the parties prior to such change.

15. Here in this application, though multiple reliefs are sought for by the applicant the Ld. Liquidator has not pressed for passing an order for deattachment. What he pressed for is a relief to proceed with the sale of the assets which were under attachment in view of the non obstante clause as provided under section 32-A. According to him the respondents are prevented from taking any action against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor and therefore he can proceed with the sale of the property under attachment and upon confirmation of the sale the buyer can seek appropriate relief for deattachment in accordance with section 32-A.

16. Having gone through the judgments cited by the Ld. Counsel for the respondents and upon hearing on both sides at length what we understood is that section 32-A prohibits any action to be taken by the respondent as against properties of the CD undergoing CIRP or undergoing liquidation. But it would not have any application to the designated partner or an officer who is in default or was in any manner in-charge of or responsible to CD for conduct of its business or associated in any manner who was directly or indirectly involved in commission of such offence. To sum up the properties of a CD under liquidation is also to be exempted from the purview of the commission of such

offence. In view of the above said position of law we are of the considered opinion that a liquidator can proceed with the sale of the assets even if it is under attachment by the respondent, to continue the time bound process of liquidation under the provisions of the Code and upon completion of the sale proceedings the buyer can take appropriate steps to release the attachment. It appears to us that the attachment and confiscation of properties of a CD undergoing CIRP or liquidation become void under section 32-A of the Code.

In the result we are inclined to allow this application upon the following orders:

i). The liquidator is permitted to sell the assets of the CD as per the provisions of the Code and Regulation which were attached by the respondent/ED subject to the right of the buyer to apply for deattachment in accordance with section 32-A of the Code from the appropriate authority.

ii). The respondents are directed to render as much co-operation to the liquidator to proceed with the sale of the assets as described above.

IA (IB) No. /KB/2020 is disposed of accordingly.No order as to cost.

The Registry is directed to send e-mail copies of the order forthwith to all the parties.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Jinan K.R.)
Member (J)

Signed on this, the 22nd day of July, 2020.

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