

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA

I.A. (IB) No. 904/KB/2021
In
CP(IB) No. 1889 /KB/2019

In the matter of:

Under section 35(1)(n) and section 60(5) of the Insolvency and Bankruptcy Code, 2016, and regulation 21A of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016

In the matter of:

Ply Com Private Limited

....Operational Creditor

versus

Nippon Alloy Limited (Formerly Narayani Ispat Limited)

.... Corporate Debtor

And

In the matter of:

Mr. Subodh Kumar Agarwal, the liquidator of Nippon Alloy Limited
(Formerly Narayani Ispat Limited)

.....Applicant

-Versus-

South India Bank Limited

....Respondent No. 1

And

Union Bank of India

....Respondent No. 2

Date of Hearing : 30th March 2022

Date of pronouncing the order: 9th May 2022

Coram:

Shri Rajasekhar V.K., Member(Judicial)

Shri Balraj Joshi, Member(Technical)

Appearances (via video conferencing):

For the Corporate Debtor : Mr. Subodh Kumar Agrawal, CA Liquidator

For Respondent No. 1 : 1. Mr. Jishnu Saha, Sr. Advocate

2. Mr. Avishek Guha, Advocate

3. Mr. Ishaan Saha, Advocate

4. Ms. Neha Dutt Tenani, Advocate

ORDER

Per :Rajasekhar V.K., Member (Judicial):

1. This Court convened through video conferencing.

The Interlocutory Application No. 904 of 2021 has been filed by the Applicant Mr. Subodh Kumar Agarwal, being the liquidator of the Corporate Debtor under section 35(1)(n) and section 60(5) of the Insolvency and Bankruptcy Code, 2016 (Code), seeking the following reliefs:

a. Direction be issued to the respondent for handing over the possession of assets of the Corporate Debtor

b. For contributing the liquidation cost on proportionate basis incurred till date

Submissions on behalf of the Applicant:

2. Ply Com Private Limited, being the Operational Creditor filed CP (IB) No. 1889/KB/2019 under section 9 of the Code against the Corporate Debtor and the same was admitted by this Adjudicating Authority on 30 January 2020. The Applicant herein was appointed as the Interim Resolution Professional and subsequently as the resolution Professional.

3. Subsequently, the Applicant filed a liquidation application under section 33 of the Code, and this Adjudicating Authority, vide order dated 8 December 2020, ordered for liquidation of the Corporate debtor.
4. On and after the receipt of the said order, Public Announcement in Form B was published in newspapers on 11 December 2020, thereby inviting claims from the stakeholders. Accordingly, the Applicant, on 4 February 2021, constituted the Stakeholders Consultation Committee based on the claims received from the stakeholders.
5. Two Secured Financial Creditors of the Corporate debtor, named South Indian Bank (being Respondent No. 1) and Union Bank of India (being respondent No. 2) filed the Claim in Form D before the Applicant, as they did not relinquish their security interest. Accordingly, the list of claims from the stakeholders was filed with the Adjudicating Authority on 5 February 2021 and published on 6 February 2021.
6. In the first meeting of Stakeholders Consultation Committee, the Applicant consulted with the stakeholders with regard to the manner and mode of the sale as per the Regulation 32 and 33 of the IBBI (Liquidation Process) Regulations, 2016 in which the stakeholders suggested the mode of sale by way of E-auction and the manner of sale as per the regulation 32(a) to (d) of the IBBI (Liquidation Process) Regulations, 2016.
7. The Applicant published the Sale Notice in the newspaper for Sale of the Assets of the Corporate Debtor in three lots *i.e* **Lot 1** for Land & Building, **Lot – 2** for Land & Building & Fixed Assets and **Lot- 3** for Current Assets *i.e* Receivable, Loan & Advances, Creditor having debit balance. Sale Notice along with E-Auction Process Information Documents was made available in the website of the Company and also on the website of E-Auction Service Provider. The Expression of Interest (EoI) along with Bid Documents was received from the Participants and the eligibility was seen for participating in the E-auction of the Corporate Debtor as per the E-auction Process Documents Information.
8. The E-Auction was held on 24 March 2021 and the eligible bidders participated in the bidding Process and accordingly, the Applicant issued Letter of Intent to

the Successful Applicant and executed the Sale Notice and Assignment Agreement in favour of Successful Bidders. On the basis of the proceeds received from the said Successful Bidders, the Applicant distributed the proceeds to the Stakeholders as per the section 53 of the Code and applicable regulations.

9. The applicant communicated to Respondents No. 1 & 2 via several mails to handover the assets as the 180 days had elapsed on 5 June 2021 and as per regulation 21A of the IBBI (Liquidation Process) Regulations 2016, the Respondents were required to pay the liquidation process cost and also handover the possession of the property given to them as security to the Liquidator.
10. The Applicant convened the Stakeholders Consultation Committee Meeting from time to time to consult with the Stakeholders and also intimated to them about the progress of the Liquidation and also the position of the assets which are not handed over by Respondents No. 1 & 2.
11. The Applicant communicated to the respondents that more than 9 months had elapsed and the respondents had not handed over the possession of the assets of the Corporate Debtor, thereby totally ignoring the express provisions and the spirit of the Code.
12. The Liquidation Process is a time bound process and under regulation 44(1) it is to be completed within one year from the commencement of the liquidation process. The period of one year expired on 7 December 2021. However, due to non-cooperation from the respondents and non-compliance of Regulations by the Respondents, the liquidation process is getting delayed.

Submissions on behalf of Respondent No. 1:

13. The Respondent No. 1 submits that it had extended credit facilities to the Corporate Debtor, to the tune of ₹12,00,00,000. Such facilities were secured by an exclusive charge in favour of Respondent No. 1, created by registered memorandum of deposit of title deeds dated **6 May 2019**, over immovable properties belonging to the Corporate Debtor, particulars of which are set out in section 13(2) notice, possession notice and section 13(8) notice issued under the provisions of the SARFAESI Act, 2002.

14. From the proof of claim dated 29 December 2020 submitted to the Applicant in Form D, it is clear that Respondent No. 1 disclosed its security interest over the said property belonging to the Corporate Debtor and stated that Respondent No. 1 chose not to relinquish its security interest over the said property. The said disclosure was made well within the period of 30 days from the liquidation commencement date being 8 December 2020. Respondent No. 1 has not acted in derogation of the provisions of regulation 21A of the IBBI (Liquidation Process) Regulations 2016, in any manner.
15. The Respondent No. 1 submits that since the Corporate Debtor had defaulted in repayment of the credit facilities obtained from the Respondent No. 1, with a amount of ₹13,67,39,575.47 remaining due and owed to the respondent No. 1, the respondent No. 1 proceeded to declare the account of the Corporate Debtor a Non- Performing Asset on 30 June 2020. Thereafter, the Respondent No. 1, with due intimation to the applicant, vide letter dated 12 January, 2021 proceeded to enforce its security interest in respect of the said properties.
16. The Applicant vide email dated 5 January 2021 acknowledged that the respondent No. 1 had not relinquished its security interest over the property and stated that the respondent No. 1 was at liberty to enforce its security interest in terms of section 52 of the Code. The Applicant did not raise any objection to the said enforcement by the Respondent No. 1, but merely stated that in terms of regulation 21A, the Respondent No. 1 would be required to pay the liquidation cost and to remit any excess value realized from the sale of the secured asset, to the liquidator within the time frame as envisaged in the said regulation.
17. Having apprised the Applicant, the Respondent No. 1 proceeded to enforce its security interest over the said property. Accordingly, the said property was sold vide public auction under the aegis of SARFAESI Act, 2002, wherein Sri Lakshmi Auto Enterprises India Primate Limited was declared the successful bidder. As per the terms of the bid acceptance letter date 6 November 2021, issued by the respondent No. 1 to the Successful Bidder, the Successful bidder has paid 25% of the sale consideration in respect of the said property, amounting to ₹2,07,55,000 to the Respondent No. 1.

18. Respondent No. 1, after taking symbolic possession of the said property and issuing a notice dated 14 June 2021 discovered a sign board erected on the said premises by the Government of Andhra Pradesh, Home (ARMS & SPF) Department dated 20 February 2015, to caution the public that the said property is subject to an order of attachment issued by the Government of Andhra Pradesh.
19. The Corporate Debtor has purchased the said property over which Respondent No. 1 enjoys a security interest, from one Agri Gold Farms and Estates Private Limited, by a registered deed of conveyance dated 18 August 2014.
20. Upon inquiries, Respondent No. 1 came to learn that subsequent to acquisition of the said property by the Corporate Debtor, but prior to creation of charge in favour of Respondent No. 1, the Government of Andhra Pradesh had proceeded to issue an order of attachment dated 20 February 2015 under section 3 of the Andhra Pradesh Protection of Depositors of Financial Institutions Establishment Act, 1999.
21. It is stated that such order of attachment dated 20 February 2015, issued by the government of Andhra Pradesh is wrongful and unlawful insofar as, the said order of attachment over the said property was issued pursuant to an investigation against Agri Gold Farms & Estates India Pvt. Ltd., was issued subsequent to the purchase of the said property by the Corporate Debtor, by a registered deed of 18 August 2014.
22. It is further stated that Respondent No.1 has instituted a writ petition being W.P. No. 27270 of 2021 before the Hon'ble High Court of Andhra Pradesh, *inter alia* challenging the erection of the caution board on the said property by the government of Andhra Pradesh. The Respondent No. 1 craves leave to refer to and rely upon a copy of W.P. No. 27270 of 2021 filed before the hon'ble High Court of Andhra Pradesh, at the time of hearing of the instant application, if necessary.
23. It is stated that upon completion of the sale of the said property, by a public auction under the provisions of the SARFAESI Act, 2002, in favour of the successful bidder, the Respondent No. 1 has realized its security interest over

the said property. The Respondent No. 1 is, however, unable to demand payment of the balance 75% sale consideration as stipulate in the bid acceptance letter dated 6 November 2021, from the successful bidder or to issue the sale certificate in favour of the successful bidder upon handing over possession of the said property, until the writ petition pending before the Hon'ble Andhra Pradesh High Court is disposed of and the order of attachment dated 20 February 2015 is set aside.

24. The Respondent No. 1 has apprised the Applicant of the sale of the said property and undertakes to pay the excess value realized from the said property to the applicant immediately upon recovering the same from the successful bidder.
25. According to the Respondent No. 1, in the light of the admission in the application itself that the Respondent No. 1 had clearly intimated the applicant of its decision not to relinquish its security interest over the said property, within the time stipulated in regulation 21A of the IBBI (Liquidation Process) Regulations 2016, it is clear that the said property does not constitute a part of the liquidation estate and accordingly, there can be no question of the applicant calling upon the Respondent No. 1 to handover possession of the said property to the applicant.
26. It is further stated that despite being fully aware that the said property had been sold in a public auction, the Applicant has continued to write to the Respondent No. 1 repeatedly, calling upon it to handover the said property to the Applicant. Such demand is contrary to the provisions of the Code and said regulation and is entirely devoid of any legal basis.

Analysis and Findings:

27. Heard the Ld. Counsel for the Applicant and the Ld. Counsel for Respondent No. 1 and perused the records.
28. Regulation 21A of the IBBI (Liquidation Process) Regulations 2016 provides that a secured creditor is required to intimate its decision of not relinquishing the security interest within thirty days from the liquidation commencement date, failing which, the assets covered under the security interest shall be presumed to be part of the liquidation estate. In the instant application, Form D was

submitted by Respondents No. 1 & 2 on 29 December 2020 and 06 January 2021 respectively. In both cases, the Form D was submitted within 30 days from the liquidation commencement date.

29. Further, Regulation 21A of the IBBI (Liquidation Process) Regulations 2016 provides that where a secured creditor does not relinquish security interest and proceeds to realise its security interest, it shall, within ninety days from the liquidation commencement date, pay to the liquidator-

- a) Insolvency resolution process costs and liquidation costs in full;
- b) Workmen's dues for the period of twenty-four months preceding the liquidation commencement date,

as it would have shared in case it had relinquished the security interest.

As such, both Respondents No. 1 & 2 are bound to pay to the liquidator the abovementioned sums.

30. Further, Regulation 21A also provides that where a secured creditor proceeds to realise its security interest, it shall pay 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. This indicates that the realization of assets needs to be completed within 180 days. In the instant application, wherein the liquidation commencement date was 8 December 2020, the realization of assets was to be completed within 6 June 2021.

31. In the instant application, there are two Respondents having charge over two different sets of assets of the Corporate Debtor. Respondent No. 1, after submitting Form D on 29 December 2020, took symbolic possession of the assets under its charge on 14 June 2021 and sold the said assets by public auction. Respondent No. 1 invited bids by issuing an auction sale notice dated 28 September 2021 and declared the successful bidder on 6 November 2021. Meanwhile on 30 September 2021, the Applicant filed the instant application. In this case, the respondent No. 1 failed to realise the security interest within 180 days. However, due to an order of attachment dated 20 February 2015 having been issued by the Government of Andhra Pradesh on the said assets, a

writ petition being W.P. No. 27270 of 2021 has been instituted by the Respondent No. 1, on 17 November 2021, before the Hon'ble High Court of Andhra Pradesh. In light of the said writ petition being sub judice, no action can be taken by the Adjudicating Authority in this regard till the disposal of the said writ petition.

32. On the other hand, Respondent No. 2, in spite of having been given ample opportunity to file a reply- affidavit, has failed to do so. However, the communication that took place between the Applicant and Respondent No. 2 on 28 June 2021 indicates that Respondent No. 2 sold one of the four properties of the Corporate Debtor but failed to sell the rest even after six months from commencement of liquidation. As such, the rest of the assets under the charge of the Respondent No. 2 should become a part of the liquidation estate.
33. In view of the above facts and circumstances, this Bench, hereby orders as follows: -
- a) Respondents No. 1 and 2 are directed to pay to the liquidator the liquidation costs and Workmen's dues for the period of twenty-four months preceding the liquidation commencement date, if not already paid.
 - b) The application, to the extent of the Applicant taking possession of the assets forming part of the security interest for Respondent No. 1, is hereby dismissed. The dismissal of the present application shall not stand in the way of any other remedy pursued by the Applicant in a manner known to law.
 - c) Respondent No. 2 is directed to handover the possession of the assets forming part of the security interest that have not been sold yet, to the Applicant immediately.
 - d) Further, regarding the property that has been sold by Respondent No. 2 in realisation of their security interest, Respondent No. 2 is directed to provide to the Applicant, an account of the sale details and to pay to him the excess of the realized value of the said asset.
34. With these directions, **I.A. No. 904/KB/2021** shall stand **disposed of**.

35. List main **CP. No. 1889/KB/2019** for reporting progress.
36. 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.
37. Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

**BALRAJ
JOSHI** Digitally signed by
BALRAJ JOSHI
Date: 2022.05.09
15:46:30 +05'30'
Balraj Joshi
Member (Technical)

**Rajasekhar
V K** Digitally signed by
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Date: 2022.05.09
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Rajasekhar V.K.
Member (Judicial)

Signed on this, the 9th day of May, 2022

Suman M(LRA)