

**SNATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1027 of 2021

In the matter of:

Small Industries Development Bank of India
(SIDBI)
New Delhi Regional Office
IInd Floor, Atma Ram House,
1, Tolstoy Marg,
New Delhi-110001.

...Financial Creditor/Appellant

Versus

**Shri Vijender Sharma,
Building No.11, IIIrd Floor,
Hargovind Enclave, Vikas Marg,
Delhi-110092.**

... Respondent/Liquidator

Present

**For Applicant : Mr. S.S. Ahluwalia and Mr. Mohit
Bargwal, Advocates**

For Respondent: Mr. Pardeep Dahiya, Advocate

JUDGMENT
(Date: 02.11.2022)

[Per.: Dr. Alok Srivastava, Member (Technical)]

1. The present appeal has been filed under section 61 of the Insolvency and Bankruptcy Code (in short 'IBC') by the Appellant who is aggrieved by the order passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) in IA No. 3570/2021

Company Appeal (AT) (Insolvency) No. 1027 of 2021

under Company Petition IB-433/(ND)/ 2017 dated 10.8.2021 (in short the 'Impugned Order).

2. The Appellant Small Industries Development Bank of India (in short 'SIDBI') is aggrieved by the part of the Impugned Order that allows exclusion of a period of approximately 15 months from 30.11.2018 to 24.2.2020 while calculating the fee of the Liquidator under Regulation 4 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (in short 'Liquidation Process Regulations').

3. In brief, the case of Appellant is that consequent to the passing of the Liquidation Order dated 12.10.2018 in IB No. 433/(ND)/2016 in the matter of M/s Regal Metals and Ferro Alloys versus SPM Auto Private Limited, claims were invited by the Liquidator and the Appellant submitted his claim on 20.11.2018, and thereafter on 30.11.2018 he communicated to the liquidator his intention to realize the security interest in the property viz. a parcel of land admeasuring 3933.84 sq. meters bearing Industrial Property No. 25 situated at Sector-3, Growth Centre Bawal, HSIIDC, Rewari, Haryana (in short "HSIIDC Bawal property") along with submission of Form D as required. The Appellant has further stated that after almost three months, the liquidator did a public announcement by publication in newspapers on 15.2.2019
Company Appeal (AT) (Insolvency) No. 1027 of 2021

to put the HSIIDC Bawal Property and two other properties for auction. The Appellant has stated that instead of contacting the Appellant and advise him regarding the details required in compliance of section 52 (1)(b) of the IBC, the Respondent published a notice for e-auction of the said property. The Appellant thereafter, vide e-mail dated 25.2.2019, requested the Respondent to cancel the e-auction, but instead of cancelling the e-auction the Respondent sent an e-mail in reply on 27.2.2019 asking the Appellant to communicate the price at which it proposes to realize its security interest under regulation 37 of the Liquidation Process Regulations. The Appellant states that he communicated the estimated price of the said property as Rs. 3.60 crores on 8.3.2019 but Respondent on some pretext or the other did not hand over possession of the property to the Appellant to enable it to realise its security interest.

4. The Appellant has, therefore, stated there was a delay in carrying forward the liquidation process which was due to the liquidator, and hence the period from 30.11.2018 to 24.2.2020 is on account of the liquidator and therefore this period of approximately 15 months should not be excluded from the liquidation process for calculating the slab of liquidator's fee.

5. The issue that arises for consideration in the present appeal is that whether the period from 30.11.2018 to 24.2.2020, which is the period when various issues arose in the liquidation process, particularly in relation to the HSIIDC Bawal property in which the Appellant has security interest, and whether the liquidator is responsible for this delay.

6. We heard the argument of the Learned Counsels for both the parties and perused the record.

7. The Learned Counsel for Appellant has submitted that the only issue he is aggrieved by the Impugned Order relating to point No. 3 which is about inclusion of 15 months period calculated from 30.11.2018 to 24.2.2020 while calculating the liquidator's fee slab under regulation 4 of the Liquidation Process Regulations. He has referred to his letter dated 30.11.2018 addressed to the liquidator by which he stated his intention to realize the security interest in the HSIIDC Bawal property of the Corporate Debtor which was mortgaged to SIDBI and also requested the liquidator to advise him about the formalities involved in the process of realisation of security interest under section 52 of the IBC. He has argued that instead of handing over possession of the said property to the Appellant to enable him to sell the property, the *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

liquidator published an auction notice in the newspaper for auctioning of the asset on 15.2.2019 whereupon the Appellant requested the Respondent to cancel the e-auction vide his letter dated 25.2.2019 whereafter he communicated the price at which he (Appellant) wanted to dispose of the said Bawal property. He has further submitted that the liquidator first asked for an undertaking from the appellant and later filed an application before the Adjudicating Authority bearing CA No. 618 of 2019 seeking directions to the Respondent to submit an undertaking to the liquidator and also requiring the Appellant to intimate the time by which he will be able to sell the said property to enable the Respondent to bring closure to the liquidation process. He has argued that there was no reason for the liquidator to ask for an undertaking from SIDBI and clarification on this issue was given by the Adjudicating Authority vide order dated 5.8.2019, but the liquidator still did not hand over the said property to SIDBI for realization of its security interest.

8. The Learned Counsel for Appellant has argued that thus there was a delay in completing the liquidation process which attributable to the liquidator and his actions/inactions therein, and therefore the benefit of exclusion of approximately 15 months as requested by the liquidator through his application bearing CA *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

No. 3570 of 2021 should not have been granted. The Learned Counsel for Appellant has referred to multiple e-mails and letters sent by the Appellant in order to bring early closure to the liquidation process but for want of co-operation from the liquidator it could not be done.

9. The Learned Counsel for Respondent has submitted his arguments bringing to our attention the list of dates and events filed by the liquidator vide Dy. No. 34149 dated 8.3.2022, to show how the liquidator has been diligent and careful about following the process of liquidation, and in particular, the disposal of HSIIDC Bawal Property, but due to multiple issues being raised by SIDBI from time to time he had to approach the NCLT after due discussions in the Stakeholders Consultation Committee for necessary directions to carry the liquidation process forward. Elaborating on the events, he has submitted that after the Appellant had informed him that it intended to realize its security interest in the property at HSIIDC Bawal on 30.11.2018 he sent an e-mail on 27.2.2019 apprising the Appellant that in order to realize its security interest in terms of section 52 of the IBC, the Appellant has to intimate the price at which it proposes to realize the secured asset in terms of regulation 37 of the Liquidation Process Regulations. He has argued that reminder the Appellant intimated *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

the reserve price as Rs. 3.60 crores on 8.3.2019 whereafter the liquidator asked for an undertaking from the Appellant that it would provide the property to the buyer in case a person willing to purchase the property for an amount more than the reserve price is identified by the liquidator. He has further argued that the Appellant refused to submit the said undertaking, maintaining that no such undertaking is necessary in terms of the provisions of IBC and the Liquidation Process Regulations and since there was a stalemate the liquidator filed an application under section 60(5) of the IBC being CA No. 618 of 2019 on 9.5.2019 seeking directions to the Appellant to submit the requisite undertaking. He has further submitted that after the Appellant SIDBI submitted its reply on affidavit before the Adjudicating Authority an order came to be passed on 5.8.2019 that in view of the reply of the Appellant, no specific undertaking is necessary. He has stated that thereafter the liquidator sought a meeting with the Appellant to finalize certain issues to maintain transparency and governance standards in accordance with Liquidation Process Regulations, mainly regarding finding a buyer who may be willing to pay a price more than the reserve price. The Learned Counsel for Appellant has submitted that despite several reminders no such cooperation was forthcoming from the Appellant and he was again constrained to file an application *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

bearing CA No. 135 of 2019 seeking directions with respect to the undertaking sought by him and also a commitment about the time period by which the said property would be sold by SIDBI. He has submitted that in respect of the liquidation cost and fees, for which the Appellant had to pay his share details showing the fees and costs regarding the liquidator's fee and liquidation process's costs was submitted to the Appellant on 5.3.2020 as directed by the Adjudicating Authority.

10. The Learned Counsel for Respondent has submitted that in accordance with the order dated 24.2.2020 passed by the Adjudicating Authority in CA No. 135 of 2019, he handed over the possession of HSIIDC Bawal property to the Appellant wherein the Appellant was given a time period of 60 days from 24.2.2020 to sell the said property. He has claimed that the Appellant could not dispose of the said property within the stipulated time limit of 60 days and finally could do so in July, 2020 after a lapse of approximately 5 months. He has further submitted that to bring the liquidation process to closure he sought the consent of SIDBI towards payment of pending CIRP and liquidation process costs which was not forthcoming, and therefore he again filed IA No. 3570 of 2020 seeking reliefs relating to CIRP and liquidation costs as per section 53 of IBC and Regulations 42 and 2A of Liquidation *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

Process Regulations, whereupon vide the impugned order dated 10.8.2021 came to be passed by the Adjudicating Authority and aggrieved by the said order, in particular the issue about exclusion of 15 months' period the Appellant has filed this appeal, which deserves to be rejected.

11. The Learned Counsel for Respondent/Liquidator has further referred to the order dated 20.7.2020 passed by the Adjudicating Authority in IA NO. 433/ND/2017 that SIDBI had not paid its share of the liquidator's fee and the estimated liquidation cost which should have been done within 90 days of the liquidation commencement date as is required under Regulation 212-A of the Liquidation Process Regulations and had rather requested clarifications on various items of the amount estimated and claimed by the liquidator. He has lastly referred to the order of this tribunal in CA AT (Ins) No. 151 of 2022, whereby the Hon'ble Tribunal has held that Regulations 2(ea), 2-A, 21-A and 37 of the Liquidation Regulations Process and Sections 52/53 of IBC are to be complied with regard to the payment of liquidator's fee and liquidation costs. Further, the same order makes it clear that even if a secured creditor wants to realize its security interest, it is liable to pay fee as contemplated under the Liquidation Process Regulations. He has finally argued that the delay in liquidation of *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

the secured asset of SIDBI is not due to the liquidator, but due to many doubts raised by the Appellant and misinterpretations of provisions of IBC and Liquidation Process Regulations by the Appellant and therefore, the Adjudicating Authority has correctly excluded the period of about 15 months in deciding the correct slab for payment of liquidator's fees.

12. We note that the Appellant sent a letter dated 20.11.2018 as intimation to the liquidator of its intention to release its security interest in HSIIDC Bawal Property after passing of liquidation order and further sent a letter dated 30.11.2018 along with Form D, as is required in the Liquidation Process Regulations. In reply to this communication, the liquidator sent an e-mail dated 20.11.2019 to SIDBI (attached at pp. 62-63 of the reply of the liquidator) to explain, the process for realization of security interest as laid down in the Liquidation Process Regulations and seeking an undertaking from the Appellant. In the e-mail, the liquidator stated the requirement of Regulation 37(1) of Liquidation Process Regulations whereby SIDBI had to inform to the liquidator the highest price at which it intends to realize its security interest in the said HSIIDC Bawal Property. The liquidator further informed SIDBI by this e-mail that as per regulation 37 (2) *"The liquidator shall inform the secured creditor within twenty one days of receipt Company Appeal (AT) (Insolvency) No. 1027 of 2021"*

of the intimation under sub-regulation (1) if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation under sub-regulation (1), at a price higher than the price intimated under sub-regulation (1).” The liquidator also informed SIDBI by this e-mail that there was no need for cancellation of e-auction process because no bidder had come forward to buy the property against the public announcement, and therefore, if SIDBI wants to exercise its right under section 52 of IBC to realize its security interest, it should intimate the price at which it proposes to realize the security interest.

13. We reproduce the relevant portion of Regulation 37 of the Liquidation Process Regulations, 2016 hereunder for better appreciation of the matter:-

“37. Realization of security interest by secured creditor.

(1) A secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset.

(2) The liquidator shall inform the secured creditor within twenty one days of receipt of the intimation under sub-regulation (1) if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation under sub-regulation (1), at a price higher than the price intimated under sub-regulation (1).”

xx xx xx xx xx

14. After receipt of this e-mail, SIDBI communicated to the liquidator the estimated price of Rs. 3.60 crores at which it wished to realize its security interest in HSIIDC Bawal Property vide e-mail dated 8.3.2019.

15. We now examine the contention of the Learned Counsel for liquidator that SIDBI could not understand and/or interpret Regulation 21-A, which is regarding presumption of security interest. The relevant portion of Regulation 21-A of Liquidation Process Regulations is reproduced below:-

“21-A. Presumption of security interest.- (1) *A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:*

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

(2) Where a secured creditor proceeds to realise its security interest, it shall pay

(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and

(b) the excess of the realised 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:

Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.”

16. It is clear from Regulation 21-A of the Liquidation Process Regulations, 2016 that after presumption of security interest by secured creditor, the secured creditor shall pay as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date. Quite obviously this was not done by the appellant as is evident from the order dated 8.7.2020 in CA No.135/2019 by which the Appellant was directed at a much later date to pay its share of liquidation fees and cost after detailed calculations have been provided to it by the liquidator.

Company Appeal (AT) (Insolvency) No. 1027 of 2021

17. We also look at the issue of the liquidator seeking an undertaking from the Appellant. A perusal of the e-mail sent by the liquidator dated 9.3.2019 asking for an undertaking prior to release of secured asset, namely, HSIIDC Bawal property and a reminder e-mail dated 18.3.2019 (attached at pp.68-69 of the reply of liquidator), makes it clear that the undertaking was sought by the liquidator only in keeping with the requirement of Liquidation Process Regulations regarding SIDBI's acceptance to sell said property to the person who is willing to buy secured assets at a price higher than of the price of Rs. 3.60 crores, who may be identified by the liquidator, and also for depositing the excess amount over and above its claim amount within 15 days from the date of undertaking. It is clear from record that the Appellant did not provide such an undertaking and the issue of undertaking was resolved only after the Adjudicating Authority's directions vide order dated 5.8.2019, which were given after the Adjudicating Authority considered the reply filed by the Appellant. We, therefore, find that SIDBI refused to provide an undertaking to the liquidator as sought by it vide e-mail dated 9.3.2019, but do so much later in its reply before the Adjudicating Authority.

18. We further note that the liquidator filed IA 618 of 2019 (attached at pp.77-106 of the reply of liquidator), wherein he had sought directions to SIDBI for submission of requisite undertaking. The liquidator again filed application CA No. 135 of 2019 (attached at pp. 126-145 of the reply of liquidator) whereby the liquidator sought directions of the Adjudicating Authority to SIDBI to respond to the e-mail of liquidator dated 27.8.2019 (attached at page 110 of the reply of liquidator) which was for the Appellant to deposit the proportionate share of SIDBI towards CIRP cost and liquidation cost of Rs.19,22,922.40 in the corporate debtor's account. It is clear that the liquidator, on facing resistance from SIDBI, had to approach the Adjudicating Authority for issuance of necessary directions to SIDBI through IA 618/2019 and CA 135/2019 to carry the process of liquidation of corporate debtor forward, as was required of him under the law and which had to be completed in the stipulated time frame.

19. On the basis of detailed discussion in the aforementioned paragraphs, it becomes abundantly clear that the Resolution Professional was following the procedure as set out in the Liquidation Process Regulations with regard to the disposal of secured assets, including the HSIIDC Bawal Property in which SIDBI has expressed its intent to realise its security interest. It *Company Appeal (AT) (Insolvency) No. 1027 of 2021*

also becomes clear that due to misinterpretation and lack of proper understanding of the procedure, SIDBI was unable to follow the requirements as was being communicated to him by the liquidator and, hence the liquidator had to approach the Adjudicating Authority thrice in the course of liquidation to seek necessary directions qua the Appellant. We also find that such difficulties being faced by the liquidator were being brought to the knowledge of the Stakeholders' Consultation Committee and necessary directions for further actions were being obtained by the liquidator.

20. We note that this tribunal, in CA (AT) Ins) 151 of 2022 vide order dated 16.3.2022, has held as follows:-

“6. In so far as the payment of Liquidator's Fee in in paragraph 13 as noted above, Adjudicating Authority has disposed of the application with the direction to make payment of Liquidator's Fee and ensure compliance of Regulations 2(ea), 2A, 21A, 37 of the Liquidation Regulations and Section 52/53 of the Code. The order passed by the Adjudicating Authority does not warrant any interference. What was directed was as per Liquidation Regulation 21A as extracted in Paragraph 10 of the Judgment from which it is clear, even if the secured creditor proceeds to realise its security interest it is liable to pay fee as contemplated under regulation 21A (20(a). the Adjudicating authority has only directed the Applicant to follow the regulations as noted in paragraph 13.”

21. It thus becomes quite clear that compliance of regulations 2(ea), 2-A, 21-A and 37 of the Liquidation Process Regulations and

Company Appeal (AT) (Insolvency) No. 1027 of 2021

Section 52/53 of the IBC are absolutely necessary even if the secured creditor proceeds to realise its security interest.

22. We thus, find that the liquidator has carried out his responsibility with due diligence and without any prejudice to Appellant or any other stakeholder, and therefore, cannot be held responsible for delay that has taken place in pursuing the liquidation of the corporate debtor. Therefore, we come to the conclusion that the Adjudicating Authority has not committed any error in excluding period from 30.11.2018 to 24.2.2020 from the liquidation process for calculation of liquidator's fees slab under Regulation 4 of the Liquidation Process Regulations. Being devoid of merit, the appeal is dismissed.

23. There is no order as to costs.

(Justice Rakesh Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi.

2nd November, 2022.

/aks/

Company Appeal (AT) (Insolvency) No. 1027 of 2021