IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

I.A No.399/BB/2020 &
I.A No. 25/BB/2021
IN
CP (IB) No. 189/BB/2018

IN THE MATTER OF:

I.A No. 399 of 2020 & I.A 25 of 2021
Mr. Pankaj Srivastava,
Liquidator
For M/s Samruddhi Realty Ltd.
Having his office at:
#29, 1st Floor, SN Complex,
14th Main Road,
E-Block Extension
Sahakara Nagar,
Bengaluru 560 092.

… Applicant

Versus

1. **Essel Finance Advisors and Managers LLP,**
Having Registered Office at:
A Wing, 18th Floor, Marathon Futurex,
N.M Joshi Marg, Lower Parel,
Mumbai – 400 013

… Respondent No. 1

2. **Assets Care and Reconstruction Enterprise Ltd (ACRE),**
Having registered office at:
2nd Floor, Mohan Dev Building,
13 Tolstoy Marg, New Delhi 110 001
Having Branch Office at:
B1504, One BKC, G Block,
Bandra Kurla Complex,
Mumbai 400 051.

… Respondent No.2

3. **Phoenix Arc Private Limited**
Having its office at:
No. 22, "Kotak House"
4th Floor, MG Road,
Bangalore 560 001.

… Respondent No.3

Order delivered on: 25th May, 2023

Coram: Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Applicant in I.A No. 399 of 2020 & I.A No. 25 of 2021 : Sh. Pankaj Srivastav (Liquidator)
Sh. Abishek Anand (For Liquidator)

For the Respondent No.1 in I.A No. 399 of 2020 & I.A No. 25 of 2021 : Ms.Marsha

For the Respondent No. 3 in I.A No. 399 of 2020 & I.A No. 25 OF 2021 : Sh. Manoj. K

O R D E R

Per: Manoj Kumar Dubey, Member (Technical)

I.A No. 399 of 2020

1. The present application is filed on 18.09.2020 by the Liquidator seeking for directions to the respondents to forwith defray their portion of Liquidation Process Costs in terms of Regulation 2A of the IBBI (Liquidation Process) Regulations, 2016 as already approved in the 12th meeting of the Committee of Creditors and the Liquidator fee in terms of the provisions of the Code.

2. Brief facts of the case which are relevant to the issue in question are as follows:

a. M/s Moonbean Advisory Private Limited, operational creditor, filed the insolvency petition which was admitted by this Tribunal vide order dated 16.04.2019.

b. It is submitted that in view of the rejection of the Resolution Plan by the members of the Committee of creditors and in view of the CIRP period expiring on 17.02.2020, the Resolution Professional filed I.A 116 of 2020 for liquidation of the corporate debtor which was approved by this Tribunal vide order dated 13.03.2020 and appointed the applicant as the Liquidator.

c. During the CIRP process, the Respondents were the financial creditors constituting the Committee of Creditors.

d. It is submitted that prior to the Liquidation order being passed by this Tribunal, the CoC in the 12th meeting approved an amount of Rs. 98,77,020/- (for 12 months) to be contributed to Liquidation Cost Account. Further, in terms of Regulation 2A of the IBBI (Liquidation Process) Regulation, 2016 the liquidator may call upon the financial creditors to contribute to the liquidation costs. In compliance to the above, the Liquidator vide email dated 02.04.2020 sought remittance of an amount of Rs. 78,83,441 being the share of Respondent No.1 towards the Liquidation Cost Account of the Corporate Debtor.

e. However, the Respondent No. 1 informed vide email dated 03.04.2020 that they are not liable to pay the liquidation cost as they do not fall under the category of financial institutions. It is submitted by the applicant that Respondents are financial institutions as per Section 3 (14) of the IBC, 2016. Further, it also comes under the purview of financial institutions as mentioned under section 45-I of the Reserve Bank of India Act, 1934.

f. Vide emails dated 02.04.2020 and 07.04.2020, the Applicant sought remittance towards the liquidation costs from Respondent No. 2 being the financial creditor and a financial institution of the Corporate Debtor. The respondent no. 2 informed the applicant that they have an exclusive charge/mortgage over the properties of the Corporate Debtor, which will not be relinquished to the Liquidation Estate, and they will proceed under the SARFAESI Act for sale of properties of the Corporate Debtor. Moreover, respondent No. 2 also informed the Applicant that any excess proceeds from the sale of the property of the Corporate Debtor will be paid to the Applicant, and relinquishment letter will be provided after the lockdown is lifted. The applicant informed the 2nd respondent that liquidation cost as approved during the CIRP has to be paid under Regulation 21A (2) of the Liquidation Process Regulations, 2016.

g. Respondent No.3 also informed the Applicant that they wish to opt out of the Liquidation process and being an ARC they are not liable to pay Liquidation Process Cost.

h. Further, the Applicant vide letters dated 26.08.2020 informed the respondents about their respective share of liquidation cost of Rs. 1,91,96,224/- , Rs. 35,64,024/- and Rs. 36,74,771/-. Subsequently, Respondent No. 3 has paid the pro-rata share of approved Liquidation Cost of Rs. 6,68,898/-, however, an amount of Rs. 30,05,873/- towards the Liquidator fee is still pending.

i. It is submitted that even after repeated requests and reminders by the Applicant, the respondents have completely failed to remit their portion of the Liquidation Process Costs.

3. The respondent No 1 in its objection submits that as per the provisions of Regulation 2A of the Liquidation Process Regulations, it is only the financial creditors who are financial institutions who have to contribute to the excess of the Liquidation costs over the liquid assets of the Corporate Debtor in proportion to the financial debts owed to them by the Corporate Debtor. It is submitted that respondent no. 1 is not a financial institution as per Section 3 (14) of the IBC and is not liable to contribute towards Liquidation costs in terms of Regulation 2A of the Liquidation Process Regulations.

4. Further, for an entity to fall within the definition of 'financial institution' under Section 45-I of the RBI Act, it should be a 'non-banking institution' and should carry on as its business or part of its business any of the various activities specified in Section 45-I. It is submitted that this respondent is an LLP set up under the provisions of the Limited Liability Partnerships Act, 2008, therefore, cannot by any stretch of imagination be construed to be "non-banking institution" as defined under Section 45-I of the RBI Act.

5. It is submitted by respondent No. 3 that, it had informed the applicant its intention to opt out of the Liquidation Proceedings vide E- Mail dated 11.05.2020. The applicant requested this respondent to submit its intention in requisite prescribed Form- D of Schedule II. Accordingly, on 19.06.2020 respondent filed the Form – D.

6. It is stated that the applicant issued letter dated 26.08.2020 in which this respondent was asked to pay its share of contribution to the Liquidation Cost of Rs. 6,68,898/- and also demanded the 3rd respondents share of contribution with respect to Liquidator's fee of Rs. 30,05,873/-. It was submitted that since the respondent no.3 had expressed its intention to opt out of the Liquidation Process and also filed Form-D, the applicant was unjustified in demanding the sum of Rs. 1,98,56.302/-. Hence, this respondent paid only Rs.6,68,898/- made under protest in a letter dated 09.09.2020.

7. Respondent No.3 in its written submission reiterated that it has informed its intention to opt out of the Liquidation Process and deposited Rs. 6,68,898/- under protest being the Liquidation cost and further submits that they have filed writ petition No. 4859/2021 challenging Regulation 2A and 21A of Liquidation Regulation as the same is unconstitutional.

8. The Learned counsel for Applicant filed his rejoinder vide diary No. 1315 and 434 dated 15.04.2021 and 03.02.2022 and the same is taken on record.

9. Heard both the Counsels and perused the records available.

10. The instant I.A has been filed by the Liquidator of M/s Samruddhi Realty Ltd, interalia seeking for issuing directions to the respondents to forthwith defray their portion of Liquidation Process Costs.

11. It is seen from the objection that the main contention raised by Respondent No. 1 is that it does not fall with the category of Financial institution. As per the provisions of Regulation 2A of the Liquidation Process Regulations, the Liquidator shall call upon the financial creditors, being financial institutions, to contribute the excess of the Liquidation costs over the liquid assets of the corporate debtor, in proportion to the financial debts owed to them by the corporate debtor. However, it is seen from the rejoinder filed by the Liquidator that, pursuant to the Public Announcement in Form –B of Schedule –II on 17.03.2020, the respondent No. 1 filed its claim in the prescribed form; Form –D: Proof of claim by Financial Creditors of the Corporate Debtor. It is further contented by the Liquidator that respondent No. 1 filed its claim on behalf of India Asset Growth Fund –I, India Asset Growth Fund-II, Eduskill Realtors LLP and Elegant Marbles and Grani Industries Limited, acting through their Investment Manager- Essel

Finance Advisors and Managers LLP, in Form –D on 17.04.2020 of Schedule – II claiming a total amount of Rs. 1,23,57,40,625/-.

12. Moreover on perusal of the relationship note sent by the Respondent No.1 to Liquidator which is attached along with the rejoinder it is seen that Respondent No. 1 had invested up to Rs. 55 crores by subscribing to 5500 redeemable secured non-convertible debentures of Rs. 1,00,000/- each. Accordingly, respondent No. 1 falls within the purview of ' financial institution' as mandated under section 45 (i) (c)(i) and 45 (I)(c) (ii) of Reserve Bank of India Act, 1934.

13. It is pertinent to point out that there has been no objection filed on behalf of respondent No. 2, and accordingly this Tribunal forfeited the right to file objection on 25.08.2022. Further, on perusal of the documents submitted by the Liquidator it is seen that respondent No. 2 vide email dated 17.04.2020 has informed that the charge over the properties of the Corporate Debtor will not be relinquished to the Liquidation Estate and it will proceed under the SARFAESI Act for the sale of properties of the Corporate Debtor. Further, vide email dated 18.06.2020 respondent No. 2 gave assurance to the Liquidator to pay the Liquidation Process costs of the Corporate Debtor. The said email has been found attached along with the petition.

14. It is seen from the submissions made by the Liquidator that he had vide letter dated 26.08.2020 informed respondent No. 3 to pay the their share of Liquidation Cost of Rs. 36,74,771/- , which included the approved liquidation cost of Rs. 6,68,898/- and Liquidator's Fee of Rs. 30,05,873/-. However, it is seen that respondent No. 3 has submitted its intention to opt out of the Liquidation process and to deal with the secured assets as per Section 52 of Insolvency and Bankruptcy Code. It is pertinent to note that both the Liquidator and 3rd respondent admit regarding the payment of Liquidation Cost of Rs. 6,68,898/-. However, the Liquidator contented that an amount of Rs. 30,05,873/- towards the Liquidator's fee is still pending. In this connection it is relevant to mention here that in the written submission, the respondent No. 3 has explained that they have filed a Writ Petition challenging the constitutional validity of Regulation 2A and 21A of The Insolvency and

Bankruptcy Board of India (Liquidation Process) Regulations, 2016. However, the same is not relevant here, and the Respondent No. 3 are directed to pay the portion of the Liquidator's fees which is pending against them.

15. The Hon'ble NCLAT, New Delhi, in the case of " *State Bank of India v. Navjit Singh", dated 16.03.2022 Company Appeal (AT) (Insolvency) No. 151 of 2022* held that, even if the secured creditor proceeds to realise its security interest it is liable to pay fee as contemplated under Regulation 21 A (2)(a). Further, Hon'ble NCLAT in the case of *"Small Industries Development Bank of India v. Shri Vijender Sharma" dated 02.11.2022, in Company Appeal (AT) (Insolvency) No. 1027 of 2021,* held that compliance of regulations 2(ea), 2-A, 21-a and 37 of the Liquidation Process Regulations and Section 52/53 of the IBC are absolutely necessary even if the secured creditor proceeds to realise its security interest.

16. Accordingly considering the facts and circumstance of the case and in light of the judgment cited supra this tribunal is of the considered opinion that the Respondent 1,2, and 3 have to defray their portion of Liquidation Process Costs in terms of Regulation 2A of the IBBI (Liquidation Process) Regulations, 2016.

17. Hence, **I.A 399 of 2022** is accordingly disposed off.

I.A 25 OF 2021

1. This present application is filed by the Liquidator of M/s Samruddhi Realty Ltd. (Corporate debtor) interalia praying for a direction for modification of List of Stakeholders of the Corporate Debtor.
2. The submissions made by the Liquidator is that Respondents 1, 2 and 3 even after repeated reminders sent by the Applicant, have failed to defray their portion of the CIRP Costs and the Liquidation Cost within the prescribed period of time under the Code and the underlying Regulations. The liquidator further submits that in terms of Regulations 21A(3) of the Liquidation Process Regulations upon failure on part of the Respondents to comply with the requirement of Regulation 31A (1), the asset which is

subject to the security interest shall become part of the Liquidation estate as defined under section 36 of the Code.

3. It is submitted by the Liquidator that respondents had earlier not relinquished the "security interest" to the Liquidation Estate, and accordingly the Liquidator had filed the List of Stakeholders in compliance of Regulation 31 of the Liquidation Process Regulations, 2016 before this Tribunal. However, the Stakeholders Committee will have to be modified keeping in view the fact that the "security interest" of the respondent has now become part of the Liquidation estate.
4. It is pertinent to point out that I.A 399 of 2020 is filed by the Liquidator interalia seeking for a direction from this Tribunal to the respondents to forthwith defray their portion of Liquidation Process Costs in terms of Regulations 2A of the IBBI (Liquidation Process) Regulations, 2016 and this Tribunal has today disposed of the said I.A by directing Respondent 1, 2 and 3 to defray their portion of Liquidation Process Costs. It is seen that the parties in both the I.As are similar.
5. The Liquidator vide I.A 25 of 2021 has interalia prayed for modification of list of stakeholders contenting that since the respondents have failed to defray their portion of Liquidation Process Cost, the security interest which earlier was not relinquished at the time of preparing list of stakeholders now forms part of Liquidation Estate as mandated under Regulation 21 (A)(3) and hence modification of list of stakeholders are sought for.
6. However, this tribunal today in I.A 399 of 2020 has directed the respondents to defray their portion of the Liquidation Process Cost and hence it is observed that I.A 25 of 2021 for modification of list of stakeholders on failure of the respondents to pay the Liquidation Cost becomes infructuous.
7. However, this Tribunal grants liberty to the Applicant to file fresh application in accordance with law, if the respondents failed to comply with the directions passed in I.A 399 of 2020.
8. Hence, **I.A 25 Of 2021** is dismissed as Infructuous.

-Sd-
(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

-Sd-
(T. KRISHNAVALLI)
MEMBER (JUDICIAL)