IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – II, CHENNAI

IA/889/IB/2020 in CP/280/IB/2018

(Filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 Of The National Company Law Tribunal Rules, 2016)

In the matter of ***M/s. Empee Distilleries Limited***

S. Rajendran, Resolution Professional &
Head – Monitoring Committee
In the matter of M/s. Empee Distilleries Limited

.........*Applicant*

-Vs-

1. M/s. Global Coal Ventures Private Limited
No. 81, GCV House, 2nd Floor
Nungambakkam High Road
(Mahatma Gandhi Salai)
Nungambakkam, Chennai – 600 034

2. M/s. SNJ Distillers Private Limited
Old No. 47, New No. 90
Canal Bank Road, CIT Nagar
Nandanam, Chennai – 600 035

.... *Respondent*

CORAM

Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Applicant	:	*N.P. Vijaykumar, Advocate* *Savitha Devi, Advocate*
For Respondent	:	*Avinash Krishnan Ravi, Advocate* *For R1* *Vishnu Mohan, Advocate* *For R2*

Order pronounced on ***2nd May 2022***

ORDER

Per: ANIL KUMAR B, MEMBER (TECHNICAL)

The application under consideration is filed under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called as IBC, 2016) read with Rule 11 of National Company Law Tribunal Rules, 2016 by the Resolution Professional in the capacity as the Head – Monitoring Committee of implementation of Resolution Plan of M/s. Empee Distilleries Limited (hereinafter called as Corporate Debtor) seeking following reliefs:

(a) Direct the 1st Respondent to release the charge of the property belonging to the corporate debtor mortgaged with the 1st Respondent morefully described under the Schedule of Property;

(b) Direct the 1st Respondent to handover the original title deeds of the property belonging to the corporate debtor mortgaged with the 1st Respondent morefully; or in the alternate

To cancel the deed of mortgage of the property belonging to the corporate debtor entered into by the corporate debtor with the 1st respondent morefully described under the Schedule of Property.

2. The brief facts of the case is that upon filing of a Application under Section 7 of IBC, 2016, by Union Bank of India, the CIRP in respect of the Corporate Debtor was initiated by this Tribunal vide order dated 01.11.2018 passed in CP/280/IB/2018 and an Interim Resolution Professional was also appointed to manage the affairs of the Corporate Debtor. The applicant herein was appointed as

Resolution Professional of the Corporate Debtor by the Committee of Creditors (COC) in its meeting held on 27.11.2018 which was duly approved by this Tribunal vide its order dated 13.12.2018 passed in MA/654/IB/2018.At present, it was submitted that, besides Interim Resolution Professional, the Applicant is also the Head of Monitoring Committee overseeing the implementation of Resolution Plan approved by this Tribunal in the matter of the Corporate Debtor.

3. It was submitted that the 2nd Respondent herein has submitted its Resolution Plan which was placed before the 8th meeting of CoC held on 17th and 18th July 2019 and the Resolution Plan amount was Rs. 475.04 crores. The CoC has unanimously approved the Resolution Plan submitted by the 2nd Respondent herein and same was also submitted before this Tribunal vide MA/780/IB/2019 for its approval and this Adjudicating Authority vide its order dated 20.01.2020 has approved the Resolution Plan in respect of the Corporate Debtor. According to the Applicant, the Resolution Plan of the 2nd Respondent in clear terms sets out that all the liability in respect of Corporate Debtor shall be extinguished in perpetuity after the amount proposed to be paid towards the debts of the Corporate Debtor are settled.

4. The Learned Counsel for the Applicant submitted that the Corporate Debtor had purchased a land admeasuring to 13.05 acres comprised in various Survey Nos. situated at Thurapallam Village under a Sale Deed dated 15.04.2002 and same was registered before SRO, Gummidippondi under document No. 791/2002. The said landed property was part of the Information Memorandum (IM) given to the 2nd Respondent herein and also to other prospective resolution applicants shortlisted.

5. It was submitted that the former promoter/directors were not cooperating with the CIRP process and constantly trying to scuttle the process and functioning of the Applicant. Therefore, an Application under section 19(2) of IBC, 2016 had to be filed before this Tribunal for necessary directions to the former promoter/directors to cooperate with the Applicant. It was submitted that despite several directions issued to the promoter/directors by this Tribunal, vital documents and information of the Corporate Debtor were withheld by them. Thus, it was submitted that in view of their non-cooperation, several key information of the Corporate Debtor could not be accessed. It was submitted that the property situated at Thrupallam village was shown as one of the assets in the list of the assets of Corporate Debtor and it was shown as free from any charge as on that date. The Corporate Debtor being one of the key distilleries in the State

of Tamil Nadu, the CIRP of the Corporate Debtor was widely published in newspapers of wide circulation and periodically updated in the website of the Corporate Debtor.

6. It was submitted that after the approval of the Resolution Plan of the 2nd Respondent herein, a monitoring committee was formed to monitor the implementation of the Resolution Plan and at that point of time it was found that the property mentioned *supra* was mortgaged by way of executing a Memorandum of Deposit of title deeds on 11.07.2016 and registered as document No. 2687/2016 to the 1st Respondent towards a guarantee towards supply of coal for Rs. 6.50 crore to M/s. Empee Sugar and Chemicals Limited, the subsidiary of the Corporate Debtor. However, it was submitted by the Learned Counsel for the Applicant that the Charge has not been registered under Section 77 of the Companies Act, 2013. It was submitted that despite to the knowledge of CIRP of the Corporate Debtor and the property mortgaged belongs to the Corporate Debtor, the 1st Respondent failed to file its claim before the Resolution Professional.

7. The Learned Counsel for the Applicant submitted that as per the approved Resolution Plan, all charges on all the assets of the Corporate Debtor shall be extinguished irrespective of whether a claim was made or not and all assets shall vest absolutely free

from all charges and encumbrances with the Corporate Debtor. Though the 1st Respondent has not submitted any claim before the Resolution Professional, it was submitted that the Resolution Plan is binding on them and as per the tenets of the Resolution plan, the 1stRespondent ought to have released the mortgage/charge held by them and handed over the original title documents of the said property to the Resolution Applicant. It was submitted that since, the 1st Respondent has not handed over the original title deeds of the mortgaged property, the Applicant herein has issued a notice dated 25.08.2020 *inter-alia* asking the 1st Respondent to release the mortgage on the property of the Corporate Debtor and handover the original title deeds by 29.08.2020.

8. Upon receipt of the notice dated 25.08.2020, the 1st Respondent sent reply on 02.08.2020 *inter-alia* mentioning that they are not aware of the CIRP of the Corporate Debtor and they have not put on notice either through the Resolution Plan or through the order of this Tribunal dated 20.01.2020. They have also stated that the mortgage is valid under law and also sought 10 days more for detailed reply. The 1st Respondent again replied vide its reply dated 14.09.2020 wherein the contents of letter dated 28.08.2020 were reiterated.

9. The Learned Counsel for the Applicant while reiterating the above averments, submitted that the 1st Respondent has not submitted any claim before the Resolution Professional for adjudication and admission of claim. The Learned Counsel for the Applicant also bring it to the notice of this Tribunal the clauses 3.3.1v, 3.3.1 vi, 3.3.1 vii, 3.3.1 ix, 3.3.1 x, 3.3.1 xi, 3.3.1 xiii, 3.3.1 xiv, 3.3.1 xix, 3.3.1 xxviii of the Resolution Plan and submitted that withholding the original title deeds of the asset of the Corporate Debtor is against the principles of law. He further submitted that the mortgage by deposit of title deeds by the Corporate Debtor to the 1stRespondent for the supply made to M/s. Empee Sugars and Chemicals Limited is in the nature of the transactions and liabilities stated in the approved Resolution Plan and therefore shall be deemed to have been extinguished by virtue of it. It was submitted that the 1st Respondent ought to have filed the claim as other creditor whereas it has failed to do so.

10. Further it was submitted that the 1st Respondent cannot be treated as a Financial Creditor of the Corporate Debtor on the basis of the mortgage of the asset of the Corporate Debtor as there was no disbursal to the Corporate Debtor against consideration for time value of money. It was also submitted that as on today the mortgage is a debt but not a financial debt under the Code. The Learned Counsel for the Applicant has also submitted that if the

claim is submitted before the Resolution Professional, the same would have been included in the Resolution Plan and the said failure has deprived it of an opportunity to get any amount under the Resolution Plan. In alternate, if the charge is created as required under Section 77 of the Companies Act, 2013, it would been to the knowledge of the Resolution Professional who would have intimated the 1st Respondent to submit its claim. It was submitted that the non- cooperation of the former promoter/director had prevented the Applicant to discover the status of the said asset. Thus, while concluding his submissions, the Learned Counsel for the Applicant submitted that it is imperative that the 1st Respondent does not create any encumbrance to the said property and hence prayed to allow the application and grant the reliefs.

11. In support of his contention, the Learned Counsel for the Applicant relied on the following judgments:

- **The judgment of Hon'ble Supreme Court In the matter of Anuj Jain Vs Axis Bank (Civil appeal Nos. 8512-8527 of 2019)**- for the proposition that a person who holds a debt in furtherance to a mortgage made by a corporate debtor, ought to file a claim in respect of the said mortgage as other creditor and being a creditor to a subsidiary cannot claim to be a financial creditor of the Corporate Debtor on the sold basis of the mortgage created by the Corporate Debtor.

If a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of debt under section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a financial debt within the meaning of section 5(8) of the Code.

- **The judgment of Hon'ble Supreme Court in the matter of Swiss Ribbons Vs Union of India** – for the proposition that a financial creditor includes a person who has direct engagement in the functioning of the corporate debtor right from the beginning, while assessing the viability of the corporate debtor, and who would also engage in restructuring of debts and reorganizing the corporate business in case of a financial stress.

- **The judgment of the Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta and Ors**– for the proposition that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This is successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove.

12. The 1st Respondent filed its reply to the application. While reiterating the submissions made in the reply statement, the Learned Counsel for the 1st Respondent submitted that the application is to be dismissed *in liminie* since it is a gross abuse of process, misusing the provisions of IBC, 2016 to seek a remedy that is purely within the realm of a Civil Court. It was also submitted that the 1st Respondent supplied Coal to M/s. Empee Sugar and Chemicals Limited, the subsidiary of the Corporate Debtor which was completed in the month of November, 2016. Since, the subsidiary of the Corporate Debtor was unable to pay its debt amounting to Rs.3,79,47,945/- along with interest at 12% p.a., the subsidiary procured security by way of the said mortgage in favour of the 1st Respondent. It was submitted that since the said subsidiary was unable to pay its debt due to the 1st Respondent, the 1stRespondent invoked the provisions of IBC, 2016 and filed a petition under Section 9 of IBC, 2016 before NCLT, Hyderabad. Therefore, the claim against the subsidiary is already a subject matter before NCLT, Hyderabad.

13. The Learned Counsel for the 1st Respondent further submitted that the Resolution Plan approved by the Adjudicating

Authority in the matter of the Corporate Debtor has not been brought to the notice of the 1st Respondent. Moreover, if a third party mortgages were to be considered as a financial debt of a Corporate Debtor, then the said party/mortgagee would have the benefit of being considered as a creditor in the committee of creditors as per the books, which would bring with it the protections available to such creditors. In the present case, it was submitted that the Resolution Professional has not made any provision in spite of being aware of the subject mortgage. He also submitted that by way of creating valid mortgage in favour of the 1st Respondent, it has acquired legal right by way of charge and right over the property which cannot be a taken away without proper notice and by proper recourse to a civil court. This specific mortgage is not part of the approved Resolution Plan and to that extent any matter that is not part of the and specifically referred to in the Resolution Plan cannot be sought to be enforced by the Applicant herein. The Learned Counsel for the 1st Respondent submitted that the application itself is a abuse of process of law and prayed to dismiss the same.

14. Heard the submissions made by the Learned Counsel for both the parties and also perused the pleadings. After hearing the submissions, the question fell for our consideration is that whether the 1st Respondent is required to be directed to cancel the

mortgage created in its favour and also to handover the original title documents to the Applicant after the approval of the Resolution Plan in respect of the Corporate Debtor.

15. It is the contention of the Applicant that the said property on which the mortgage was created in favour of the 1st Respondent was one of the assets in the list of the assets of the Corporate Debtor and as on that date it was free from any charge and encumbrance. It is also the contention of the Applicant that the fact of creating mortgages was found only when monitoring the implementation of the approved Resolution Plan. According to the Applicant, the 1st Respondent being aware of the CIRP of the Corporate Debtor has not submitted any claim before the Resolution Professional and if it is filed it would have been added to the Resolution Plan so that the entitled amount ought to have been paid to the 1st Respondent. Since, the amount has not been included in the plan, the 1st Respondent is an 'other creditor' and the mortgage created on the property of the Corporate Debtor is extinguished and the 1st Respondent is to cancel the mortgage and to handover the original title documents to the Applicant. It is also the contention of the Applicant that the Resolution Plan cannot be frustrated by way of introducing new claims when all the dues of the Corporate Debtor were cleared by the Resolution Applicant.

16. *Per contra*, it is the contention of the 1st Respondent that the CIRP of the Corporate Debtor was not brought to the knowledge of the 1st Respondent and it has not been issued with any notice either at the time calling for the claims or at the stage of approval of the Resolution Plan. Further, it is not provided in the Resolution Plan that any creditor or charge holder is required to return the Title Deeds or such other security. The 1st Respondent had already invoked the provisions of section 9 of the Code, 2016 before NCLT, Hyderabad against the said subsidiary and it is pending as on date and it is sub-judice. Furthermore, the relief sought can only be agitated before an appropriate civil court, if at all, since it pertains to a proprietary right of mortgage which cannot be taken away in a manner unknown to law.

17. It is a fact borne on record that this Tribunal has initiated the CIRP in respect of the Corporate Debtor vide order dated 01.11.2018and the Resolution Professional was also appointed vide order dated 13.12.2018. There is no doubt that the Resolution Professional has called for the claims and there is no dispute in the fact that the 1st Respondent has not filed its claim before the Resolution Professional. It is also required to be noted that due to the non -submission of the claim by the 1st Respondent, the due to the 1st Respondent was not included in the Resolution Plan. Further the Resolution Plan is being implemented and the dues to the

secured creditors and the operational creditors have been settled in accordance with the terms and conditions of the Resolution Plan. It is also not disputed by the 1st Respondent that the charge has not been registered as required under Section 77 of the Companies Act, 2013. The contention that the 1st Respondent does not know about the CIRP of the Corporate Debtor cannot be accepted, as the 1st Respondent being the creditor of its subsidiary who has filed a petition under section 9 of the Code, 2016 against the subsidiary before NCLT, Hyderabad. Further, once a public announcement is being made in terms of IBC, 2016 it is an information to the public at large and the 1st Respondent cannot claim that they have not been put on notice.

18. It is well settled principle of law that a person who holds a debt in furtherance to a mortgage made by a Corporate Debtor, ought to file a claim in respect of the said mortgage as other creditor and that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would amount to a *hydra head* popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. As per the provision of IBC, 2016 all claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows

exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This is the principle laid down by the Hon'ble Supreme Court of India in the matter of **Anuj Jain Vs Axis Bank** *(Civil appeal Nos. 8512-8527 of 2019)* and in the matter of **Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta and Ors** which is squarely applicable to the case in hand.

19. In view of the said judgements, this Tribunal comes to an irresistible conclusion that the 1st Respondent cannot hold the mortgage in its favour and also hold the original title documents. Hence the prayer as sought for by the Applicant stands allowed. The 1st Respondent is hereby directed to cancel the mortgage created on the scheduled mentioned properties of the Corporate Debtor and to handover the original title documents to the 2nd Respondent who is the successful Resolution Applicant within 30 days from the date of this order.

20. With the above directions the application stands **allowed.**

-Sd-	-Sd-
B. ANIL KUMAR	**Justice (Retd.) S. RAMATHILAGAM**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Raymond