

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)
KOLKATA**

I.A. No. 380/KB/2022
In
CP(IB) No. 546/KB/2019

An Application under section 76 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Tata Hitachi Construction Machinery Company Private Limited

....Operational Creditor

Versus

Earth Mover Consultancy Private Limited

.....Corporate Debtor

And

In the matter of:

Aziz Hussain

....Applicant

Versus

- 1. Tata Hitachi Construction Machinery Company Private Limited**
- 2. Earth Mover Consultancy Private Limited**

....Respondents

Date of hearing: 17 January 2023

Date of pronouncing the order: 02 August 2023

Coram:

Smt. Bidisha Banerjee : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances (via video conferencing/ physical):

For Applicant in IA 766/KB/2021

Mr. Santosh Kr. Ray, Adv.

Ms. Rituparna Sanayal, Adv.

Ms. Surnana Mukherjee, Adv.

For the Liquidator:

Mr. Arani Guha, Advocate
Ms. Madhuri Pandey, PCS
Mr. Pramod Kr. Singh, Liquidator in person

For the RRFC:

Mr. Satyendra Agarwal, Adv.
Mr. Gautam Mallick, Adv.

For Applicant in IA 380/KB/2022

Mr. Anujit Mukherjee, Adv.

For Applicant in IA 718/KB/2021

Mr. S. Chakraborty, Adv.
Mr. S. Bhattacharjee, Adv.
Mr. S. Chandra, Adv.

ORDER

Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.
2. The interlocutory application being I.A. No. 380/KB/2022 has been filed by Mr. Aziz Husain, being the erstwhile managing director of the Corporate Debtor under section 76 of the Insolvency and Bankruptcy Code, 2016 (IBC) seeking the following reliefs against the Respondents herein:
 - a) *For Recall the order dated 21 October 2019 in the present company petition being C.P.(IB) No. 546/KB/2019;*
 - b) *Initiate appropriate actions and/or proceedings in accordance with law against the Respondent No. 1, the Corporate Debtor therein, for non-disclosure of dispute raised by the Respondent No. 2, the Operational Creditor therein;*
 - c) *Pass any other order/direction as this Adjudicating Authority may deem fit and proper in the facts and circumstances of the case.*

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3. The Applicant has further sought as an interim relief, the stay of any further process of the Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor.
4. The case of the Applicant herein is that the Operational Creditor, in spite of being aware of the dispute raised by the Corporate Debtor in reply to the demand notice issued under section 8 of the Code, failed to disclose the same while filing the company petition 546/KB/2019. As a result of such non-disclosure of material facts, this Adjudicating Authority, *vide* order dated 21 October 2019, admitted the Corporate Debtor into Corporate Insolvency Resolution Process ('CIRP').
5. According to the Applicant, the Corporate Debtor was an authorized dealer of the Operational Creditor since 2008. However, in 2015 the Operational Creditor illegally terminated the dealership of the Corporate Debtor. Thereafter on 29 February 2016, the Operational Creditor issued notice to the Corporate Debtor, thereby calling upon it to pay a sum of ₹30,42,63,437/-. The Corporate Debtor issued a reply to the same *vide* letter dated 15 April 2016.
6. Thereafter, the Operational Creditor invoked the Arbitration Clause of the agreement between the parties and filed Arbitration Case No. PDA/01/2016. In spite of various irregularities in the said arbitration case, as well as objections of the Corporate Debtor to the same, an arbitral award was passed on 07 May 2018, directing the Corporate Debtor to pay to Operational Creditor a sum of ₹37,49,58,750/-.
7. Thereafter, the Corporate Debtor filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 being AS No. 172 of 2018 challenging the purported award dated 07 May, 2018 and the same was pending adjudication before the Court of LXXXII Additional City Civil and Sessions Judge (Commercial Court), Bengaluru (CCH-83). A copy of the petition of the said arbitration suit being A.S No. 172 of 2018, was duly

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- served to the Operational Creditor with the notice *dated* 16 August 2018, as per section 34(5) of the Act. Pursuant thereto, the Operational Creditor had entered appearance in Section 34 proceedings before the court in Bengaluru.
8. Thereafter, the Operational Creditor, *vide* letter dated 05 February, 2019 issued a notice under section 8(2) of the Code to the Corporate Debtor, seeking to prefer an application before this Adjudicating Authority on the basis of the purported arbitral award dated 07 May, 2018.
 9. The Corporate Debtor, *vide* letter dated 7th March, 2019 replied to the Operational Creditor's letter issued under Section 8(2) of the Code evidencing the dispute to the alleged debt. The Corporate Debtor categorically and in unequivocal terms informed the Operational Creditor that an application under section 34 of the Arbitration and Conciliation Act, 1996 being AS No. 172 of 2018 was pending adjudication before the Court of LXXXII Additional City Civil and Sessions Judge (Commercial Court), Bengaluru (CCH-83), hence the debt was disputed.
 10. Considering the above circumstances, it becomes clear that the Operational Creditor has willfully and knowingly concealed in the application under Section 9 of the Code about the aforementioned facts, in as much the Operational Creditor has suppressed gross material facts regarding the institution and pendency of the application under Section 34 of the Arbitration Act before the courts in Bengaluru.
 11. **Analysis and Findings:**
 12. Heard the Ld. Counsel for the Applicant and the Ld. Counsel on behalf of the Liquidator of the Corporate Debtor and perused the record.
 13. It is noted that upon the listing of the main company petition being CP (IB) 546/KB/2019, this Adjudicating Authority directed the Operational Creditor to issue notice to the Corporate Debtor. However, on 24th June 2019, it was

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submitted by the Ld. Counsel on behalf of the Operational Creditor that an attempt to serve the notice to the Corporate Debtor was made but the notice had been returned with the postal remark “Office is closed”. It was additionally submitted that notice by way of email had been served. As such, on 24 June 2019, the Adjudicating Authority directed that service of notice was to be made by the Operational Creditor by way of public issue in English and Vernacular newspapers.

14. On the next date of hearing *i.e* 14 August 2019, it was submitted by the Ld. Counsel on behalf of the Operational Creditor that the directed publications have been effected properly. However, due to non-appearance on part of the Corporate Debtor in spite of such publication, the Corporate Debtor was declared *ex parte*.
15. As such, only after giving the Applicant ample opportunity to present his case, the Adjudicating Authority, *vide* order dated 21 October 2019, admitted the Corporate Debtor into CIRP. Further, the letter from the Resolution Professional of the Corporate Debtor was received by the Applicant on 15 January 2020. The Applicant had sufficient time and opportunity between the admission of the Corporate Debtor into CIRP and the passing of the order for liquidation of the Corporate Debtor on 28 May 2021, yet the Applicant failed to take any legal recourse available to him and waited till 19 April 2022 to file the instant application.
16. This Adjudicating Authority is not satisfied regarding the viability of the reasons submitted by the Applicant for his delay in filing the instant application. It is clear to us that the Applicant was not vigilant of his legal rights.
17. In this context the maxim ‘*Vigilantibus Non Dormientibus Jura Subveniunt*’ aptly applies to the case on hand. The said stance has also been taken by the Hon'ble Supreme Court in the matter of ***H. Dohil Constructions Co. (P)***

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*Ltd. v. Nahar Exports Ltd.*¹, wherein the Apex Court held that Law assists those who are vigilant and not those who sleep over their rights. In view of the aforementioned judgment and the facts and circumstances of the instant matter, this Adjudicating Authority cannot come to the rescue of the Applicant, who has been sleeping over his rights.

18. Accordingly, **I.A. (I.B.C.) 380/KB/2022** shall stand *rejected*.
19. List CP No. 546/KB/2019 on **18.08.2023**.
20. 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.
21. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on this, the 2nd day of August, 2023

SM[LRA]

¹ MANU/SC/0730/2014 : (2015) 1 SCC 680