IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IA No. 3570 of 2020 and CA/135/2019
Connected with IB-433/(ND)/2017

Section: Under Section 35(1)(n) of the Insolvency and Bankruptcy Code, 2016.

<u>In the matter of:</u>

M/S REGAL METAL & FERRO ALLOYS
versus
SPM AUTO PVT. LTD.

Vijender Sharma
Liquidator of M/s SPM Auto Pvt. Ltd.
Building No.11, 03rd floor, Hargovind Enclave,
Vikas Marg, Delhi-110092

...**Applicant/Liquidator**

VERSUS

1. Small Industries Development Bank of India (SIDBI)
02nd Floor, Atma Ram House,
1 Tolstoy Marg, New Delhi- 110001

...**Respondent No. 1**

2. Canara Bank
A-8, First Floor, Nehru Ground,
Faridabad- 121001

...**Respondent No. 2**

3. Corporation Bank
M-93, Connaught Circus,
New Delhi- 110001

...Respondent No.3

4. Mahindra & Mahindra Financial Services Limited
1st Floor, 570 PB Marg,
Mumbai- 400018

...Respondent No. 4

Coram:
SH. P.S.N. PRASAD, Hon'ble Member (Judicial)
SH. NARENDER KUMAR BHOLA, Hon'ble Member (Technical)

Counsel for Applicant: Mr. Pardeep Dahiya, Advocate and Vijender Sharma, Liquidator
Counsel for Respondent No.1: Mr. Mohd. Moonis Abbassi, Advocate
Counsel for Respondent No.2: Mr. PBA Srinivasan, Mr. Parth Tandon and Mr. Nalin Kaushik, Advocates.

ORDER

Per: P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 10.08.2021

1. This is an application filed by the Liquidator Sh. Vijender Sharma regarding the ongoing liquidation process of the corporate debtor SPM Auto Private Limited. The Liquidation order of the CD was passed by the Adjudicating Authority on 25.09.2018 and appointed the applicant as Liquidator vide order dated 12.10.2018 (modified order was received by the applicant on 26.10.2018). The applicant/Liquidator filed the present application seeking the directions in the following issues:

I. To decide the percentage of distribution of CIRP & liquidation cost, pursuant to sec 53 of IBC, 2016 read with regulation 42 of IBBI (Liquidation Process) Regulations, 2016 between the secured creditors. Whether it should charge in the percentage of claim admitted or in the percentage of realization.

II. To decide whether as per regulation 2A of IBBI (Liquidation Process) Regulations, 2016 i.e., amended on 25.07.2019 and not applicable on the liquidation proceedings of this company, as per the IBBI circular, the financial institution (unsecured creditor) who was the CoC member during the period of CIRP, is liable to pay the CIRP & Liquidation Cost u/s 53 of IBC,2016. If yes, then what should be the ratio.

III. To decide, whether the period of dispute between liquidator & secured creditor should be excluded, to calculate of percentage of fees of liquidator, dependent on such period, considering the intent of legislature under regulation 21A of IBBI (Liquidation Process) Regulations, 2016.

IV. To decide whether the secured creditor, who has realized from the property u/s 52 of IBC, 2016 is liable to pay the liquidation cost i.e., incurred after the date of realization till dissolution of CD.

The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

i. The Applicant submitted that the Respondent No. 1 i.e., SIDBI has raised the contention that the distribution of liquidation cost should be done on the percentage of voting rights of respective members of CoC during the period of CIRP of the CD instead of percentage of realization. In support, the SIDBI has referred the provision of regulation 2A of IBBI (Liquidation Process) Regulations, 2016. Further, the applicant stated that SIDBI mentioned that fees on the realization of Bawal property should be charged by the liquidator from the slab of after 1 year i.e., 1.41%, as per regulation 4 of IBBI (Liquidation Process) Regulations, 2016 (i.e., amended on 25.07.2019).

ii. The applicant submits that the Respondent No.1 was informed that the Regulation 2A is applicable to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, in proportion to the financial debts owed to Financial Institution by the corporate debtor. The Applicant/Liquidator further mentioned that this regulation is not applicable in the case of CD, as the realization from the assets are enough to cover the Liquidation cost.

iii. The Applicant mentioned that he has charged the fees as per the regulation 4 of IBBI (Liquidation Process) Regulations, 2016 (i.e., applicable prior to amendment of 25.07.2019) considering the realization for the company as a whole not specific to the property. As earlier the payment has been distributed to the other stakeholders as interim, now the liquidator will move to dissolve the company, therefore, the final calculation to be done.

iv. The applicant further submitted that the matter to sell the Bawal property got delayed due to issues remained pending with SIDBI and for which the liquidator filed the application and it took some time in deciding the issues by this Hon'ble' Tribunal and therefore, keeping in view of intent of legislature, the regulations 21A of IBBI(Liquidation Process) Regulations, 2016, he has charged the percentage of realization & distribution on the Bawal property considering it as realized & distributed within 6 months i.e. 08.03.2018, the date of intimation of price under regulation 37(1) of IBBI (Liquidation Process) Regulations, 2016 by SIDBI by excluding the period during which the issues between liquidator and SIDBI remained pending and were finally decided by this Hon'ble Tribunal.

v. The subject matter of the First issue on which the applicant has filed the application for, is to decide the percentage of distribution of CIRP & liquidation cost, pursuant to sec 53 of IBC, 2016 read with regulation 42 of IBBI (Liquidation Process) Regulations, 2016 between the secured creditors. Whether it should charge in the percentage of claim admitted or in the percentage of realization. For the above said issue the applicant has submitted that there is no specific provision to take the base of amount for calculation for distribution of CIRP & Liquidation Cost under the provision of IBC, 2016 and regulations made thereunder. The respondent no. 1 has only raised the objection to take the base of percentage for distribution of CIRP & Liquidation Cost on the bases of realization. However, the other respondents no. 2 & 3 being secured creditors are agreeable to the calculation done by the applicant, for distribution of CIRP & Liquidation Cost, by taking the base of realization. Further, the respondent no. 2 also agreed during the hearing with the calculation done by the liquidator by taking the base of percentage of realization for distribution of CIRP & liquidation cost, in view of the language used in Section 53 of IBC, 2016 read with regulation 42 of IBBI (Liquidation Process) Regulations, 2016 between the secured creditors, which provides that the Insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made from the proceeds from realization.

vi. Further the applicant submitted that whatever amount has been realized from the liquidation of CD, first insolvency resolution process costs and the liquidation costs have to be deducted and then distribution will happen and therefore, once insolvency resolution process costs and the liquidation costs are taken from the realized amount from liquidation, the distribution will then happen on the left out amount as per the water fall mechanism provided under Section 53 of IBC. It is further submitted by the applicant that the calculation cannot be done on different basis for one secured creditor and the others.

vii. The second issue relates to whether as per regulation 2A of IBBI (Liquidation Process) Regulations, 2016 i.e., amended on 25.07.2019 and not applicable on the liquidation proceedings of this company, as per the IBBI circular, the financial institution (unsecured creditor) who was the CoC member during the period of CIRP, is liable to pay the CIRP & Liquidation Cost u/s 53 of IBC,2016. If yes, then what should be the ratio.

viii. Regarding the abovesaid issue the applicant submitted that the provision of amended regulations is not applicable to the liquidation processes, which had commenced before coming into force of the said amendment regulations and they are applicable only to the liquidation processes, which commenced on or after 25th July, 2019. Further, the applicant submitted that during the hearing held on 20.11.2020, the counsel of the Respondent no.1 also agreed during the hearing that provision of regulation 2A shall not be applicable in the present case.

ix. The third issue as specified by the applicant relates to whether the period of dispute between liquidator & secured creditor should be excluded, to calculate of percentage of fees of liquidator, dependent on such period, considering the intent of legislature under regulation 21A of IBBI (Liquidation Process) Regulations, 2016.

x. The applicant stated that the Respondent No.1 had not timely intimated the price pursuant to regulation 37 of IBBI (Liquidation Process) Regulations, 2016, hence not allowed the applicant to sell the assets at per the price intimated by Respondent No.1 via mail dated 08.03.2019, not agreed to pay the contribution towards the CIRP & Liquidation Cost, neither timely responded to the mails of the applicant. The applicant further submitted that the respondent No.1 agreed to pay the CIRP & Liquidation Cost only after the applicant has approached to this Hon'ble Bench. Therefore, the applicant submitted that under Regulation 21A of IBBI (Liquidation Process) Regulations, 2016 the applicant is eligible to get the fees within the slab of six months period as per table given in Regulation 4 of IBBI (Liquidation Process) Regulations, 2016, by excluding the period spent in the proceedings between the applicant and SIDBI.

xi. The fourth issue to be decided by the Hon'ble Tribunal is whether the secured creditor, who has realized from the property u/s 52 of IBC, 2016 is liable to pay the liquidation cost i.e., incurred after the date of realization till dissolution of Corporate Debtor.

xii. The applicant submitted that the respondent no. 3-Corporation Bank also raised objection to bear the liquidation cost incurred after the date of realization of their property u/s 52 of IBC, 2016. That the respondent no. 3- Corporation Bank has realized from its security interest u/s 52 of IBC, 2016 on 16.01.2020 and the amount has been distributed to them by the applicant on 22.01.2020. Therefore, the Corporation Bank also raised objection to bear the cost incurred after the date of realization of their property u/s 52 of IBC, 2016. The applicant further submitted that almost two years have been passed for the liquidation proceedings of the CD and

SIDBI, respondent no 1, has not paid contribution towards the CIRP & Liquidation Cost except Rs. 60,359/- (paid on 12.04.2018 & 29.10.2018), till date. That the entire liquidation cost incurred during the proceedings of the CD, has been charged from the realized amount of the properties, which were under the charge of the Canara Bank & Corporation Bank, respectively.

2. Consequent to the Notice issued by the Tribunal the Respondent No.1 has filed its reply. The Respondent No.1 has made the following averments in the said reply:

i. That the claim of SIDBI (Respondent No.1) is Rs. 11.45 crores (Rs. 3.12 Crores for financing the loan to the Corporate Debtor and Rs. 8.33 Crores to Corporate Debtor against Corporate Guarantee for financial assistance availed by M/s Sandeep Axles Pvt. Ltd & common Security) which was filed by SIDBI on 20.11.2018 with Liquidator.

ii. The Respondent No.1 submitted that it was a Secured Creditor of the following property comprising of Land & Building situated at Plot No. 25, Sector-3, Bawal Industrial Area, HSIDC, Haryana; and had sent its letter dt. 30.11.2018 to the Applicant/Liquidator thereby clearly indicating its intention u/s 52 of IBC, 2016 to seek the release of the aforesaid Secured Property from Applicant/Liquidator, and sought the Liquidator's advice in further compliance thereof with the statutory requirements.

iii. The Respondent No.1 further submitted that the Applicant/Liquidator carried out verification of the claim of SIDBI as Secured creditor and was also admittedly satisfied with the proof of Security Interest submitted by SIDBI for the aforesaid property; the Respondent No.1 alleges that instead of releasing the secured property to SIDBI; the Liquidator chose to illegally mandate upon SIDBI a pre-condition of submitting an illegal Undertaking in order to realize its Secured Property.

iv. The Respondent No. 2 states that there was no delay on the part of Respondent to realize its secured assets. Further, the Respondent states that the Liquidator had not realized the secured property in question on time until the Hon'ble Tribunal ordered to do so on 24.02.2020 during the course of hearing of CA/135/2019 filed by Liquidator.

v. The Respondent No.1 further submitted that the Liquidator had made unsuccessful attempt earlier to sell the said secured property by way of e-Auction directly, despite SIDBI's objection. Therefore, whatever delay has occurred, has occurred due to applicant's acts or omissions and SIDBI cannot be blamed for it. The Respondent submitted that there is no legal basis under the code to claim any exclusion of time for the period of legal proceedings in order to calculate the percentage of fees of liquidator dependent on such period.

vi. The Respondent No.1 stated that the slab of Liquidator fee as indicated by Liquidator in table format in the present CA is neither valid nor the present case nor legally justifiable. SIDBI is willing to bear the liquidator fee in terms of provisions of Reg. 4 of IBBI (Liquidation Process) Regulations, 2016, which falls in the third bracket/slab as specified at 1.88% on the Amount of realization and 0.94% Amount distributed to stakeholders as per table provided in regulations prior to amendment dated

25.07.2019. The Respondent contended that sharing of CIRP and Liquidation Cost should be on the basis of percentage share voting/claim of each secured creditor and other members of CoC and not on the basis of percentage of realization.

3. Consequent to the Notice issued by the Tribunal the Respondent No. 2 has filed its reply. The Respondent No. 2 has made the following averments in the said reply:

i. The Respondent No. 2 submitted that it allowed the applicant to sell the property i.e., Behror Plant (B-169 and 170) situated at Behror, Rajasthan during the Liquidation process of the Corporate Debtor. That the applicant sold the property through e-auction conducted on 15.04.2019 and on 10.06.2019 and the property was successfully sold out for total consideration of Rs. 6,25,41,122/-

ii. The Respondent No. 2 submitted that the Applicant through e-mail dated 27.06.2019 further informed to the Respondent No. 2 that out of total consideration of Rs. 6,25,41,122/- received after selling the secured property of the Respondent No. 2, Rs. 5,50,00,000/- has been deposited with the Respondent No. 2 as the part of interim distribution. The Respondent No. 2 further submitted that the balance amount of Rs. 75,41,122/- is still lying with the Applicant.

iii. The Respondent No. 2 further submitted that the secured property of the Respondent No. 2 was sold under the liquidation process by the Applicant on 10.06.2019 i.e., before the Regulation 2A of IBBI (Liquidation Process) Regulations, 2016 came into effect. That as the Regulation 2A of IBBI (Liquidation Process) Regulations, 2016 came into the effect on 25.07.2019 i.e., on the date of its publication in the Official Gazette. The Respondent No. 2 submitted the Regulation 2A does not have retrospective effect with respect to the liquidation of the property secured to the Respondent No. 2. further it was submitted by the Respondent No. 2 that the Respondent No. 1 caused unnecessary delay in the successful liquidation of the corporate Debtor by causing delay in selling its secured assets.

iv. The Respondent No. 2 stated that it should not be overburdened with the Liquidation cost on the part of the delay caused by the Respondent No. 1 in realizing its security interest.

4. We have gone through the documents filed by the applicant and the Respondents and heard the arguments advanced by the Learned counsels for the applicant as well as the Respondents. The applicant/Liquidator has prayed for seeking the directions mainly in the four issues. The first issue was to decide the percentage of distribution of CIRP & liquidation cost, pursuant to sec 53 of IBC, 2016 read with regulation 42 of IBBI (Liquidation Process) Regulations, 2016 between the secured creditors. Whether it should be charge in the percentage of claim admitted or in the percentage of realization. From the perusal of the application and the replies filed by the Respondents it is clear that the said direction is prayed pursuant to section 53 of IBC, 2016 read with regulation 42 of IBBI (Liquidation Process) Regulations, 2016 for brevity, section 53 has been reproduced below:

"53. Distribution of assets. –

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely: -

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following: -

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be."

Regulation 42 of IBBI (Liquidation Process) Regulations, 2016 reads as under:

"42. Distribution.
(1) Subject to the provisions of section 53, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.
(2) The liquidator shall distribute the proceeds from realization within ninety days from the receipt of the amount to the stakeholders.
(3) The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made."

It is evident from the bare perusal of the section 53 of the IBC, 2016 that the proceeds from the sale of the Liquidation assets shall be distributed in such an order that the Insolvency resolution process cost and Liquidation cost to be paid in full in the first and the foremost priority, along with that the Regulation 42 of IBBI (Liquidation Process) Regulations, 2016 clearly specifies that the Liquidation cost shall be deducted before the distribution is made. Whereas, in the present case in hand the applicant submits that the Respondent No.1 i.e., SIDBI has not paid the contribution towards the CIRP and Liquidation cost except Rs. 60,000/-. The applicant further submitted that the Respondent No. 2 and Respondent No. 3 have not raised any objection to the calculation shared by the applicant in regard to the share of liquidator fee. The Liquidator fee as specified in section 53(3) of IBC, 2016 states that:

> "(3) *The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction."*

Thus, it is specifically stated in the above stated section that the Liquidators fees shall be deducted proportionately from the proceeds payable to the recipients. Thus, in the present case in hand the Applicant/Liquidator's prayer as to whether to charge in the percentage of claim admitted or in the percentage of realization stands answered that the applicant/Liquidator shall calculate the fees proportionately on the basis of realization. The Respondent No.

2 and Respondent No. 3 as stated by applicant in the application do not have any objection to the same. Whereas, the reply filed by the Respondent No. 1 contains no valid contention in respect to calculation of fees Proportionately from the proceeds.

5. The Second issue for which the Applicant/Liquidator seeks the Tribunal's direction is whether as per regulation 2A of IBBI (Liquidation Process) Regulations, 2016 i.e., amended on 25.07.2019, the financial institution (unsecured creditor) who was the CoC member during the period of CIRP, is liable to pay the CIRP & Liquidation Cost u/s 53 of IBC, 2016. Herein, the Regulation 2A of IBBI (Liquidation Process) Regulations, 2016 which came into force on 25.07.2019 whereas, the Liquidation process in the present matter started on 25.09.2018 which is way before the Regulation 2A of IBBI (Liquidation Process) Regulations, 2016 came into force. For brevity the Regulation has been reproduced below:

> ***"2A. Contributions to liquidation costs***
> *(1) Where the committee of creditors did not approve a plan under sub-regulations (3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, 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, as estimated by him, in proportion to the financial debts owed to them by the corporate debtor."*

It is clearly evident that the above said regulation is not applicable on the Liquidation proceedings of the present matter in hand. Further, as submitted by the applicant/Liquidator the realization from assets is enough to cover the Liquidation cost. Hence, the Respondent No. 1 i.e., SIDBI contention that financial creditors to contribute excess of the financial costs over the Liquid assets of the Corporate Debtor as stated in Regulation 2A of IBBI (Liquidation Process) Regulations, 2016 does not stand any merit.

6. The third issue for which the Applicant/Liquidator seeks the Tribunal's directions is, whether the period of dispute between liquidator & secured creditor should be excluded, to calculate of percentage of fees of liquidator. Since, the Applicant/liquidator successfully listed out the circumstances due to which the delay in completion of Liquidation process has taken place along with the Directions which the Applicant/Liquidator sought from the Adjudicating Authority in respect to the disputes arisen with the Respondent No. 1 i.e., SIDBI hence, the period of dispute between the secured Creditor and the Liquidator is excluded as the

applicant successfully shown his bona fide for the delay in completion of Liquidation Process.

7. Lastly, the Applicant/Liquidator seeks the Tribunal's direction, whether the secured creditor, who has realized from the property u/s 52 of IBC, 2016 is liable to pay the liquidation cost. In the present matter in hand the applicant/Liquidator submitted that the Respondent No. 3 i.e., Corporation Bank raised the objection to bear the Liquidation cost incurred after the date i.e., 16.01.2020 of realization of their property u/s 52 of IBC, 2016 since, the Respondent No. 3 has already realized from the property thus, it may not be proper to direct the Respondent No. 2 and Respondent No. 3 to bear their part of the Liquidation cost for the delay caused due to dispute between the Applicant/Liquidator and Respondent No.1. Hence, in this peculiar situation this tribunal directs the Liquidator to meet the Liquidation cost as a priority from the funds realised in liquidation.

8. Another application bearing **CA/135/2019** filed by the Applicant/Liquidator under section 35(1)(n) of the IBC, 2016

seeking the directions to be issued to the Respondent No. 1 i.e., SIDBI to respond to the mail of the applicant sent on 27.08.2019. the Respondent No.1 has submitted in the present application that the above-mentioned email has already been replied to on 21.09.2019. It is evident that the above-mentioned application i.e., CA/135/2019 contains same averments as raised in the **IA/3570 of 2020**. Hence, in light of the above, after giving careful consideration of both the applications and hearing the arguments advanced by the Learned counsel for the applicant/Liquidator and Respondents, the present applications i.e., **CA/135/2019** and **IA/3570 of 2020** stands disposed of accordingly.

—Sd—

(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)

—Sd—

(P.S.N. PRASAD)
MEMBER (JUDICIAL)

RDS