

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 2876 OF 2023

Under Section 60 (5) of Insolvency &
Bankruptcy Code, 2016 r/w Regulation
10(1) & (2) of IBBI (Liquidation Process)
Regulations 2016

Mr. V. Vijay Kumar Iyer,
Liquidator of M/s Bharati Defence and
Infrastructure Ltd.

...Applicant

V/s

Bhoir Dredging Company Private Limited

...Respondent

and

I.A. 3743 OF 2023

Under Section 60 (5) of Insolvency &
Bankruptcy Code, 2016 r/w Regulation
10(1) & (2) of IBBI (Liquidation Process)
Regulations 2016

Bhoir Dredging Company Private Limited

...Applicant

Vs.

Mr. V. Vijay Kumar Iyer,
Liquidator of M/s Bharati Defence and
Infrastructure Ltd.

...Respondent

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 3743 OF 2023
I.A. 2876 OF 2023

In the matter of

C.P.(IB) No. 292/MB/2017

Edelweiss Asset and Reconstruction

Company Limited

.... **Financial Creditor**

Vs.

M/s Bharati Defence and Infrastructure

Ltd.

...**Corporate Debtor**

Order delivered on: 14.02.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Liquidator : Mr. Pulkit Sharma, Advocate

For the Bhoir : Mr. Shyam Kapadia, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application IA 2876/2023 is filed by Sh. V. Vijaykumar Iyer, the Liquidator ("Liquidator") in the Liquidation Proceedings ("Liquidation") in the matter of M/s Bharati Defence and Infrastructure

Limited [In Liquidation] (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs –

- a. Condone the delay of 333 days in filing the present Application, on account of the facts and circumstances highlighted in the present Application; and
 - b. Approve the disclaimer of the Subject Properties owned by the Corporate Debtor and presently stored at the Premises owned by the Respondent, under Regulation 10 (1) (c) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, as disclaimed on and by the notice dated 20.05.2023 sent by the Liquidator to the Respondent, being a person interested in the Subject Properties, under Regulation 10 (3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016;
 - c. Set-off the liquidation value of the Subject Properties, as appearing in the valuation report submitted by the valuers of the Corporate Debtor, after discounting in various rounds of e-auctions, amounting to INR 7,40,00,000/-, against the CIRP and liquidation cost payable to the Respondent until the date of disclaimer of the Subject Properties, i.e., 20.05.2023, at the rate of INR 14,00,000/- per month, which stands at INR 11,80,82,473/- (inclusive of GST) as on the date of the disclaimer of the Subject Properties, of which INR 1,49,21,290/- (inclusive of GST) has already been paid by the liquidator to the Respondent on 10.06.2022.
2. Another Application IA 3743/2023 is filed by Bhoir Dredging Company Private Limited ("Landlord" or "Bhoir") in the Liquidation Proceedings ("Liquidation") in the matter of M/s Bharati Defence and Infrastructure Limited [In Liquidation] (Corporate Debtor) under

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Section 60(5) of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs :

- a. Direct the Liquidator to admit the claim of the Applicant as per the Lease Rentals agreed in the registered Leave and License Agreements dated November 4, 2009, October 29, 2009 and January 4, 2010 (Exhibit - C1 to C3) and as per the Claim Form dated July 8, 2017 and February 9, 2019 (Exhibit - F & G) submitted to the IRP and Liquidator respectively;
 - b. Direct the Liquidator to compute and pay the Applicant, the Lease Rentals of Rs. 55 lakhs per months as in accordance with the Lease Rentals agreed in the registered Leave and License Agreements dated November 4, 2009, October 29, 2009 and January 4, 2010 (Exhibit - C1 to C3);
 - c. Direct the Liquidator to release an amount of Rs. 41,76,96,210/- which is payable as Liquidation Cost towards Lease Rentals due and pending as per the calculation annexed at Exhibit - P:
 - d. In the alternative to prayer clause (a) and (b), direct the Liquidator to forthwith release the Lease Rentals at the rate of Rs. 19/- per sq. ft. as indicated in the independent Valuation Report dated June 21, 2023 (Exhibit - O) to the account of the Applicant as per the calculation at Exhibit P. or at whatever rate that this Hon'ble Tribunal deems appropriate:
3. The IA 2876/2023 is filed under Regulation 10 of Insolvency and N Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Code") and Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 ("Code") read with Rule 11 of the National Company Law Tribunal Rules, 2016, seeking leave of this Tribunal to disclaim certain assets of the Corporate Debtor ("Subject Properties") lying at

the premises owned by Bhoir and situated at C.S. 20, Village Versova, Post. Ghodbunder, District Thane, Maharashtra ("Premises").

4. The Bhoir is the Lessor of the Corporate Debtor and IA 3743/2023 is filed seeking to admit the claim of the Bhoir in its entirety in full and in priority as and by way of liquidation costs & CIRP costs and also seeking a direction from this Tribunal to the Liquidator to pay the outstanding lease rental dues along-with other ancillary reliefs. Bhoir states that the above Company Petition filed by the Financial Creditor was admitted against the Corporate Debtor on June 6, 2017 and an Interim Resolution Professional was appointed. Ultimately, as the Resolution Plan did not fructify and a Liquidation Order was passed in the matter of the Corporate Debtor appointing the Respondent as the Liquidator of the Corporate Debtor on January 14, 2019.
5. The subject matter of both the applications is the Subject Properties. One application is for disclaiming the subject properties in the Liquidation Proceedings and appropriation of said properties towards dues of Bhoir and the other Application is filed by Bhoir for direction to admit its claim and not to allow set off of its claim against the properties sought to be disclaimed in IA 2876/2023.

Submissions of Bhoir

6. Bhoir is owners of large pieces and parcel of Land spread out across several survey numbers in and around the Coast of Vasai Creek at Ghodbunder in Thane District spreading across several surveys, which had been leased to the Corporate Debtor vide the registered Leave and License Agreements dated October 29, 2009, November 4, 2009 and January 4, 2010 entered into by and between Bhoir Offshore Pvt. Ltd. (later amalgamated with the Landlord Company herein) and the Corporate Debtor.

7. In and around 2013, Bhoir was informed by the Corporate Debtor that due to the global turmoil in the Ship Building Industry, they were facing liquidity crunch and the Applicant was called upon by the Corporate Debtor to provide temporary support during the crisis period. Accordingly, at their request, one single Agreement (unregistered) was executed on March 25, 2014 for the period between 1st April 2015 till 28th February 2015 and thereafter, subsequently renewed upto May 2017. It is the case of Bhoir that such unregistered agreement was entered as a temporary and interim measure, while the Liquidator denies so and has placed reliance upon these unregistered Agreements, entered into after expiry of registered agreement, so as to arrive at a computation of amounts payable to the Applicant at much lower rate (ie Rs. 14 lakhs per month) than was agreed by and between the Applicant and the Corporate Debtor in terms of registered agreement entered prior to unregistered agreement, even though both the registered and unregistered agreements have come to an end due to efflux of time, and also much lower than the existing rental income receivable.
8. In the year 2017, after financial turmoil faced by the Corporate Debtor and accommodation provided by Bhoir for payment of Lease Rentals, the Corporate Debtor issued a Possession Receipt dated May 1, 2017 whereby it was inter-alia agreed between Bhoir and the Corporate Debtor that possession of entire stretch of land admeasuring total area of 55,759 sq. mts licensed under three registered Leave and License Agreements dated October 29, 2009, November 4, 2009 and January 4, 2010 would be handed over by the Corporate Debtor back to Bhoir, Rental bills due to the Applicant along with other relevant adjustments between the Corporate Debtor and Bhoir will be prepared and signed by both parties and a list detailing assets and stocks will be prepared

and subsequently signed by both the parties. However, these statement of rental bills due and stocks were ultimately neither prepared nor signed by both parties.

9. Bhoir has submitted that the aforestated arrangement as spelt out in the possession receipt, was in fact, never acted upon and implemented by the parties since the Corporate Debtor was admitted into CIRP. Further, despite purportedly handing over symbolic possession of the Property in 2017 through the Possession Receipt dated May 1, 2017, the Corporate Debtor, IRP and the Liquidator have remained in actual de-facto possession of the Property till date, and the said Property owned by Bhoir could not be utilized for any other purpose. It is pertinent to note that both the registered and unregistered agreements executed between Bhoir and the Corporate Debtor had expired prior to admission of the IBC Petition against the Corporate Debtor.
10. Bhoir has further submitted either the IRP or the Liquidator ought to have taken active steps to crystallize and arrive at the unpaid rental value and also ought to have taken active steps to pay the same. Unfortunately, this was not done for a period of 5 years in the manner as desired. Further, the passage of time resulted in deterioration and depreciation of value of assets lying on the said Pieces and Parcels of Land belonging to Bhoir herein.
11. Upon admission of the Company Petition against the Corporate Debtor, Bhoir submitted a proof of claim was submitted to the Interim Resolution Professional on July 8, 2017 in Form B along with the necessary documents. The total amount of claim (principal) was determined by Bhoir to be Rs. 62,62,31,651/- (Rupees Sixty-Two Crore Sixty-Two Lakh Thirty-One Thousand Six Hundred Thirty-One Only) and submitted along with the necessary computation, ledger and documents. At no point in time, Bhoir has calculated and/or submitted

the computation at Rs. 14 lakhs per month. After the Liquidation of the Corporate Debtor was ordered in January 2019, a proof of claim was submitted by Bhoir to the Liquidator on February 9, 2019 in Form C under Regulation 17 of I&B (Liquidation Process) Regulations, 2017 along with the necessary documents. The total amount of claim (principal) was determined by Bhoir to be Rs. 62,62,31,651/- (Rupees Sixty-Two Crore Sixty-Two Lakh Thirty- One Thousand Six Hundred Thirty-One Only) and submitted along with the necessary computation, ledger and documents. At no point in time even after appointment of the Liquidator, the Applicant has calculated and/or submitted the computation at Rs. 14 lakhs per month..

12. Bhoir and Liquidator of the Corporate Debtor have exchanged various emails and correspondences from 2019 till 2023, in relation to various aspects including the amount payable to Bhoir, sale/auction process of the assets of the Corporate Debtor lying at the said Premises etc. However, due to lapse of more than 6 years since admission of the Corporate Debtor into CIRP, the value of the assets of the Corporate Debtor lying at the said premises depreciated whereas, the amount of lease rentals payable to the Applicants kept increasing. However, it is pertinent to note that the assets of the Corporate Debtor lying at the said Premises is not related to the lease rentals payable to Bhoir herein, since the lease rentals is payable for possession of the pieces and parcels of the land and not related to the individual assets lying thereon.
13. Thereafter, a Notice under Regulation 10(3) of the I&B (Liquidation Process) Regulations, 2016 was served on behalf of the Corporate Debtor to Bhoir by the Liquidator purportedly raising contentions of Bhoir having frustrated the sale of assets and holding Bhoir purportedly responsible for misappropriating goods forming part of the assets of the Corporate Debtor. Bhoir in response have addressed a

Reply dated May 26, 2023 categorically denying the said contentions in the Notice addressed by the Liquidator under Regulation 10(3) of the IBBI (Liquidation Process) Regulation, 2017.

Submissions of Liquidator

14. It is the case of the Liquidator that there was no subsisting leave & license agreement as on date of commencement of CIRP and the last leave & license agreement contemplated payment of rent of Rs. 14,00,000/- per month as against Rs. 52,50,000/- per month as per last registered Leave & License Agreement subsisting prior to such unregistered Leave & License Agreement. The Liquidator has also vehemently denied that the unregistered leave & license agreement was entered merely for the purpose of compliance aspect and has asserted that such unregistered leave & license agreement duly recorded the last agreed arrangement with Bhoir in relation to lease of premises.
15. It is further stated that the Liquidator vide his email dated 3.6.2022 had informed Bhoir that an amount of INR 6,37,35,226/- was payable for the liquidation period commencing from 14.1.2019 till 31.3.2022 at the rate of INR 14,00,000/- per month. Since the proceeds were insufficient to meet the debts in full, 23.43% of INR 6,37,35,226/- due to Bhoir as part of the liquidation cost could be offered to be paid by the Liquidator and Bhoir was requested to share invoices and bank account details to facilitate the said payment.
16. In response, Bhoir by email dated 8.6.2022 shared its bank details with the Liquidator along with an invoice dated 7.6.2022 for an amount of INR 1,49,21,290/0 for the period between 14.1.2019 till 14.10.2019 at the rate of INR 14,00,000/- per month and referred to the leave and license agreement dated 13.4.2015. This invoice was duly paid after

deducting the tax at source on 10.6.2022 and fact of payment was communicated vide email dated 17.6.2022.

17. Bhoir had duly acknowledged the receipt of said payment vide email dated 6.7.2022 and also stated the rent amount of Rs. 14,00,000/- per month by stating that “*kindly acknowledge our continued rental for the period from April, 2022 to June, 2022 of Rs. 49,56,000/- (Rs. 14,00,000/- plus GST @ 18% p.m.)..*”
18. It is further stated that Bhoir continued to write several emails to the Liquidator (from August 2022 – February 2023), bringing to his attention, the rent payable to it at the rate of INR 14,00,000/- per month along with applicable taxes. In none of these seven (7) communications did the Applicant dispute the amount of monthly rent payable and clearly acknowledged and accepted INR 14,00,000/- per month as the amount of monthly rent payable.
19. It has further been stated that the auction sale of assets of the Corporate Debtor lying in the premises owned by Bhoir was completed by issuance of sale certificate on 17.2.2023, however the same could not be completed due to hinderance caused by Bhoir and this ultimately led to failure of sale of such properties to the Successful Bidder, who was denied the entry into the premises by the Applicant.
20. Bhoir demanded the payment of entire past dues as a precondition to enter the premises. After extensive persuasion, the successful bidder was only allowed to inspect the properties lying in such premises, whereupon it was found that certain assets of the Subject properties sold to the Successful Bidder were untraceable, though they were present at the Premises when the Successful Bidder conducted its due diligence on 19.10.2021 before the e-auction held on 26.10.2021. In view of this, the Successful Bidder requested the Liquidator to not

issue the sale certificate prior to the issue of untraceable goods being resolved.

21. At this, the Liquidator vide email dated 11.2.2023 sought the assistance of Bhoir to locate Parcel 8 assets, however, Bhoir vide email dated 15.2.2023 stated that it had not received any handover or custody of any list / assets / items left by the Corporate Debtor at its Premises and made incorrect allegations in relation to monthly rentals by demanding INR 72,00,000/- per month instead of INR 14,00,000/, citing the current market rates, without any basis or evidence.
22. By his response dated 22.2.2023 to the Applicant, the Liquidator submitted that the Corporate Debtor had vacated the larger area of the Premises in May 2017 and only certain assets ' goods were lying on the Premises, thereby occupying only limited area of the Premises, which was also intimated by the Corporate debtor through the Possession Letter dated 1.5.2017.
23. However, the completion of sale of Parcel 8 Properties could not take place due to adamant attitude of Bhoir in not locating the missing the assets & dismantling of few sheds by the Applicant. The consideration received from the successful buyer was refunded back after the having left with no choice in the matter and permission of the Tribunal permitting the cancellation of said sale vide Order dated 28.6.2023 was also obtained in this relation.
24. A joint inspection with the Applicant was carried out and it was found the certain goods of the Corporate Debtor along with steel plates which were part of the boundary wall of the Premises, were not traceable and electrical assets such as Transformer – 1250 KVA – 11KV/440 V, LT Switch Board, Main Switch Board and other electrical wires belonging to the Corporate Debtor along with certain sheds had been deliberately withheld by Bhoir, in lieu of the payment of rental dues. Accordingly,

the Applicant was put on notice vide email dated 11.4.2023 regarding such illegal and mala fide actions which had been causing immense prejudice to the sale and liquidation process of the Corporate Debtor. In response, Bhoir refuted the contentions of the Liquidator by even dated mail and offered to immediately hand over the assets of the Corporate Debtor on '*as is where is what is basis*', provided the monthly rental of the INR 52,50,000/- + taxes was accepted by the Liquidator and also disowning the responsibility in relation to missing goods.

25. It is the case of the Liquidator that these properties do not continue to be readily saleable and have become onerous to the Corporate Debtor, on account of the obstructions and mala fide actions undertaken by the Applicant. Accordingly, on 20.5.2023 the Liquidator issued a notice to the Applicant under Regulation 10(3) of the Liquidation Regulations disclaiming the said Properties of the Corporate Debtor lying at the Premises owned by the Applicant in terms of the Regulation 10(1)© of the Liquidation Regulations.
26. It is further submitted that the action of issuing notice under Regulation 10(3) of the Liquidation regulations for disclaiming the said Properties and filing of application for the same before the Tribunal were taken by the Liquidation only pursuant to discussion and consultation with the members of the Stakeholder's Consultation Committee.
27. Heard the Learned Counsel and perused the material available on record.
28. In this case the liquidator has sought approval of this Tribunal to disclaim the parcel 8 assets referred as the said property on the ground that part of such assets has been stolen from the leased premises owned by Bhoir and such act has led to the cancellation of already concluded auction sale. The Liquidator has further stated

that the 'sheds' constructed by the Corporate Debtor on the piece of land leased to it were dismantled by Bhoir and Bhoir refused to return the material comprised in such shed stating that property tax on such shed was paid and borne by Bhoir, accordingly, Corporate Debtor does not have any right over the assets comprised as shed. It is the case of the liquidator that these assets have become onerous assets and offered and issue notice to Bhoir in terms of Regulation 10 (3) of the IBBI (Liquidation Process) Regulations, 2016.

29. Regulation 10 of Insolvency and Bankruptcy Board Of India (Liquidation Process) REGULATIONS, 2016, reads as under:

10. Disclaimer of onerous property.

(1) Where any part of the property of a corporate debtor consists of-

(a) land of any tenure, burdened with onerous covenants;

(b) shares or stocks in companies;

(c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or

(d) unprofitable contracts;

the liquidator may, notwithstanding that he has endeavored to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, make an application to the Adjudicating Authority within six months from the liquidation commencement date, or such 10 extended period as may be allowed by the Adjudicating Authority, to disclaim the property or contract.

(2) The liquidator shall not make an application under sub-regulation (1) if a person interested in the property or contract inquired in writing whether he will make an application to have such property disclaimed, and he did not communicate his intention to do so within one month from receipt of such inquiry.

(3) The liquidator shall serve a notice to persons interested in the onerous property or contract at least seven days before making an application for disclaimer to the Adjudicating Authority:

Explanation: A person is interested in the onerous property or contract if he-

(a) is entitled to the benefit or subject to the burden of the contract;
or

(b) claims an interest in a disclaimed property or is under a liability not discharged in respect of a disclaimed property.

(4) Subject to the order of the Adjudicating Authority approving such disclaimer, the disclaimer shall operate to determine, from the date of disclaimer, the rights, interest and liabilities of the corporate debtor in or in respect of the property or contract disclaimed, but shall not, except so far as is necessary for the purpose of releasing the corporate debtor and the property of the corporate from liability, affect the rights, interest or liabilities of any other person.

(5) A person affected by the disclaimer under this Regulation shall be deemed to be a creditor of the corporate debtor for the amount of the compensation or damages payable in respect of such effect, and may accordingly be payable as a debt in liquidation under section 53(1)(f).”

30. In the present case, we note that completed auction sale got cancelled in view of non-cooperation of Bhoir in whose custody these assets were lying. We find that Bhoir has been approbating and reprobating in relation to the amount of rent payable by the Corporate Debtor after the expiry of registered documents. It is an undisputed fact that Bhoir accepted part of rent offered by the Liquidator, which was determined at the rate of Rs. 14 Lakhs per month. Even after acceptance of part rent @ Rs.14 lakhs per month Bhoir had again sought to contend that the rent payable in fact is Rs.52.50 lakhs per month and demanding the same as a pre-condition to release the said assets lying in the leased premises which is under the custody and in control of Bhoir.
31. Regulation 10 (3) notice has been given by the liquidator and Bhoir has filed another Application No. 3743/2023 to seek order from this Tribunal to restrain the liquidator from disclaiming the assets and claiming the set-off of dues against such disclaimed assets. We find from the pleadings that Bhoir is holding those assets which makes it interested in the said property to ensure realisation of its dues. We further find that Bhoir has not been cooperating with the liquidator in relation to said assets even though the liquidator has always considered the claim of Bhoir for payment @ Rs.14.00 Lakh per month till the assets of the Corporate Debtor were lying in the premises of Bhoir. This clearly indicates that Bhoir has been holding these assets, part of which is allegedly misappropriated, to secure the payment of its dues.
32. Since, the Stakeholder Consultation Committee (SCC) has passed necessary resolution to disclaim the said properties, we permit the liquidator to disclaim these properties more particularly known as parcel 8 assets lying in the leased premises owned by Bhoir. Since this disclaimer has arisen on account of non-cooperative attitude of Bhoir which was not known to the liquidator during the initial period of

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liquidation commencement, we are of considered view that there exist sufficient cause for not filing application within 6 months from the liquidation commencement date to disclaim the said property. Accordingly, we condone the delay in filing the application in terms of Regulation 10 of IBBI(Liquidation Process) Regulation, 2016.

33. Having held so, we now come to the prayer for lying set of disclaimed assets against the dues of Bhoir and prayer of Bhoir contrary to that.

34. The scheme of Code for liquidation process clearly lays down procedure for settlement of dues of the creditors and the manner in which the assets in possession of such creditor is to be dealt with. It is an undisputed fact that Bhoir was in control and custody of the said properties of the Corporate Debtor lying in leased premises. Despite clear rules embodied in the Code to deal with such property and the creditors claim, Bhoir obstructed the process of conclusion of auction sale. Bhoir also destroyed part of the asset in the form of shed and failed to safeguard the assets which resulted into theft of some portion of it. Accordingly, we are of considered view that such disclaimed assets shall be vested in Bhoir and the value of such assets shall be adjusted against the claim of Bhoir, pending in the liquidation proceedings. The claim of the Applicant shall be determined @Rs.14.00 lakhs per month till the end of the month in which the SCC resolved to disclaim these assets.

35. In view therefore, I.A. 2876/2023 is allowed and I.A. 3743/2023 is dismissed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)