BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 1123/2018 in
CP No.172/IBC/NCLT/MB/MAH/2017

Under Section 60(5)(c) r/w S. 52(1)(b) of the Insolvency and Bankruptcy Code, 2016

In the Application of
Anuj Bajpai (Liquidator)
.....Applicant

V.

State Bank of India
…..Respondent

In the matter of

SBI Global Factors Ltd.
…Financial Creditor

v.

Sanaa Syntex Private Limited
….Corporate Debtor

Date of hearing: 26.02.2019
Date of Pronouncement: 08.04.2019

Coram :
Hon'ble M.K. Shrawat, Member (J)

For the Applicant :
Adv. Khushboo Shah Rajani a/w Ayush J. Rajani a/w Anuj Bajpai, Liquidator.

For the Respondent :
Mr. Shailendra Joshi.

Per: M. K. Shrawat, Member (J)

ORDER

1. The Corporate Insolvency Resolution Process of Sanaa Syntex Private Limited (the **Corporate Debtor**) began on 22.08.2017, pursuant to admission of Section 7 application (CP 172/I&BP/NCLT/MB/2017) filed by a **Financial Creditor** State Bank of India. The Corporate Debtor could not be revived and **Liquidation order** was passed on 19.07.2018. Consequently, **Mr. Anuj Bajpai** was appointed as the **Liquidator.**
2. The present **Miscellaneous Application** has been preferred under section 60(5)(c) of I&BC **by the said Liquidator,** seeking necessary directions of this Tribunal on decision of **Secured Financial Creditor, State Bank of India to keep its**

mortgaged assets out of liquidation of the Corporate Debtor. The reliefs sought under this application are as under:

i. Directions to SBI that in case they want to opt out of liquidation, no contravention of Section 35(1)(f) takes place.

ii. The Respondent Bank to give an undertaking to the liquidator that it shall not sell the mortgaged property to any person who is not eligible to be a Resolution Applicant, in case they realise their security interest on their own;

iii. SBI to ensure all sums due to any workman or employee from the provident fund, pension fund and gratuity fund be paid first out of monies realised from selling mortgaged assets by SBI in terms of Section 36(4)(a)(iii), when SBI exercises its rights U/s 52 of the Code and such dues should not be made a part of the liquidation estate U/s 53.

3. The liquidator submits that SBI, the Respondent **Bank wishes to stay out of liquidation U/s 52 of the Code** and realise its security interest on its own. Hence, the mortgaged properties shall not be a part of the Liquidation estate. The Applicant further submits that there is a suspicion that the Respondent bank **may sell** the secured assets to the erstwhile promoters/directors which is **in contravention of S. 29A and S. 35(1)(f).** It is stated that the provisions of the Code cannot be construed or misinterpreted in such a way that the defaulting promoters get a back-door entry to buy their own assets and defeat the very spirit of the Code of not allowing defaulting promoters and connected persons to participate in the liquidation process.

4. Further, the applicant seeks that since the EPF dues do not form part of the liquidation estate, therefore, SBI to undertake that the payment of EPF dues will be made first in terms of provisions of section 36(4)(a)(iii) of the Code from the monies realised by SBI from selling its mortgaged assets of Corporate Debtor.

5. On perusal of the prayers made in this application, three pertinent questions come up for consideration of this Bench:

i. Whether SBI, the Financial Creditor is legally entitled to stay out of liquidation?

ii. Whether there is any bar on the Secured Creditor to sell the assets to erstwhile promoters/directors of the Corporate Debtor, if the secured creditor opts out of liquidation?

Or

Whether S. 29A is applicable to liquidation proceedings in a situation when the Secured creditor realises the security interest on its own?

iii. Whether the Secured Creditor exercising his right U/s 52(1)(b) of the Code has to make payment of workmen's dues out of the amount realised from the sale

of such secured assets as the EPF/workmen's dues, which do not form part of the liquidation estate?

6. To answer these questions, it is worth to examine Section 52 , hence reproduced herein below:-

"52. ***Secured creditor in liquidation proceedings****:*

(1) A secured creditor in the liquidation proceedings may—

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53."

7. On careful reading of the above provisions, it is implicit that the rights of a secured financial creditor are protected by giving him an option to take away the assets secured with him out of liquidation. In such a scenario, the secured creditor has a liberty to realise its security interest on its own. All that has to be seen by the liquidator at this juncture is that whether the secured creditor is complying with the provisions of above subsection 3 of section 52 i.e. ***the records of such security interest maintained by an information utility*** and ***whether the Secured Creditor is complying with Regulation 37 of the IBBI (Liquidation Process), Regulations, 2016:***

"37. Realization of security interest by secured creditor

(1) A secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset.

(2) The liquidator shall inform the secured creditor within twenty one days of receipt of the intimation under sub-regulation (1) if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation under sub-regulation (1), at a price higher than the price intimated under sub-regulation (1).

(3) Where the liquidator informs the secured creditor of a person willing to buy the secured asset under sub-regulation (2), the secured creditor shall sell the asset to such person.

(4) If the liquidator does not inform the secured creditor in accordance with sub-regulation (2), or the person does not buy the secured asset in accordance with sub-regulation (2), the secured creditor may realize the secured asset in the manner it deems fit, but at least at the price intimated under sub-regulation (1).

(5) Where the secured asset is realized under sub-regulation (3), the secured creditor shall bear the cost of identification of the buyer under sub-regulation (2).

(6) Where the secured asset is realized under sub-regulation (4), the liquidator shall bear the cost of incurred to identify the buyer under sub-regulation (2).

(7) ***The provisions of this Regulation shall not apply if the secured creditor enforces his security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) or the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993)."***

8. However, Sub-regulation (7) of the above said Regulation 37 (Liquidation Process) mentions that the provisions of regulation 37 shall not apply if the secured creditor enforces his security interest under SARFAESI Act, 2002 or RDDB Act, 1993. In the present case, SARFAESI proceedings are already initiated, hence, the Secured Creditor SBI is not even under an obligation to tell the liquidator the estimate of the amount that can be realized from sale of secured assets as per Regulation 37 stated above. Therefore, all SBI has to prove to the liquidator is that there was some property which was secured with itself against the loan granted.

9. Section 52(4) IBC releases the secured creditor from the clutches of the insolvency code and gives liberty to recover its security interest as per any other law which may be applicable. **So the question is that if a person (secured financial creditor) persists or insist upon to exercise his legal rights , may or may not cause prejudice to others, can be denied by A.A. under the Code ? Whether the move of secured creditor to opt out of liquidation is fairly legal ?**

10. Reliance can be placed on the decision in the matter of *International Coach Builders Ltd. V. Karnataka State Financial corporation, order dated 05.03.2003,* passed by the Hon'ble Supreme Court *[MANU/SC/0189/2003],* wherein the question was not very similar to the present question in hand, but has some bearing in deciding the present application. It was held that the consent of the official liquidator has to be taken by the secured creditor in order to realise the mortgaged properties, and if he does not consent, the secured creditor may move the company court for appropriate directions to the official liquidator. Therefore, the option of opting out of the liquidation estate was always given and open to the secured creditors. For the sake of completeness the relevant observation and the verdict of the Hon'ble Court are reproduced below:

> *"Finally, counsel for the SFCs urge that the view we are to take would obliterate the difference between a creditor opting to stay outside up and one who opts to prove his debts in winding up. We are unable to accept it. As a result of the amendments made by the Act of 1985 in the Companies Act, 1956, the SFCs as secured creditors, must seek leave of the Company Court for the limited purpose of ensuring that the pari passu charge in favour of the workmen is safeguarded by imposition of suitable conditions under the supervision of the Company Court. If this amount to impeding their hitherto unimpeded rights, so be it. Such is the Parliamentary intendment, according to us. This impediment is of a limited nature for the specific purpose of protecting the pari passu charge of the workmen's dues and subject thereto, SFCs can continue to exercise their statutory rights as secured creditors without being reduced to the status of unsecured creditors required to prove their debts in insolvency and stand in line with other unsecured creditors. Neither is the apprehension expressed justified, nor the contention sound. We, therefore, hold as under :*
>
> *1. The right unilaterally exercisable under section 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up ;*

2. The SFCs cannot unilaterally act to realise the mortgaged properties without the consent of the official liquidator representing workmen for the pari passu charge in their favour under the proviso to section 529 of the Companies Act, 1956.

3. If the official liquidator does not consent, the SFCs have to move the Company Court for appropriate directions to the official liquidator who is the pari passu charge holder on behalf of the workmen. In any event, the official liquidator cannot act without seeking directions from the Company Court and under its supervision."

11. Therefore, it is an undisputed assertion that the secured creditor's rights have to be protected and respected. They must have the choice of taking their collateral and selling it on their own. Hence, **the first question** with respect to the secured creditor opting out of the liquidation estate, stands **answered in affirmative**.

12. Coming on the second question, whether the bar U/s 29A not to sell the secured assets to the erstwhile promoters/directors can be imposed on a secured creditor who exercises option U/s 52(1)(b) of the Code. It is worth to examine S. 35(1)(f) of the Code, which says that:

"35. Powers and duties of liquidator:

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

……..

……..(f) ***subject to section 52****, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;*

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."

13. To answer the question that whether the restriction of disqualification imposed U/s 29A be applied not only on the liquidator as prescribed under the First Proviso of S. 35(1)(f) but also when a Financial Creditor is exercising its right U/s 52(1)(b) to realise its security interest by dealing with the secured assets, a Co-joint reading of all these sections is required.

The expression used in S. 35(1)(f) is that the Liquidator shall have the powers to sell the immovable property by public auction in the manner as specified. This is the general rule that a liquidator has the power to liquidate an asset of a Corporate

Debtor. However, an exception is carved out by introducing a clause i.e. "*subject to section 52".* Therefore, the intention of the legislation is unambiguous that if a secured creditor is exercising its rights U/s 52 to liquidate an asset of the Corporate Debtor independently by opting out of the liquidation process, then in that situation the liquidator is debarred not to exercise his power of sale as provided U/s 35(1)(f) of the Code. This restriction is definitely limited to the scope and ambits of S. 52 of the Code wherein Secured Creditor is provided with certain exclusive rights and options during the commencement of liquidation proceedings. S. 52 is silent about a restriction as per the proviso annexed to S. 35(1)(f) according to which a liquidator is not applied to sell an immovable property to any person not eligible to be a resolution applicant. S. 29A has given a long list of disqualification of such persons demarcated as "disqualified persons" for submission of a resolution plan. The intent of the introduction of S. 29A is not to give benefit to defaulters. The defaulters disqualified U/s 29A should not get any benefit under this code. This is a clear message conveyed through S. 29A. A defaulter must not be benefitted by entering into those very assets through side doors, otherwise not permitted to enter from the front doors, for e.g. by submission of resolution plan. Therefore, it is logical as well as legally justifiable to extend the scope of S. 29A while dealing with the liquidation of the assets a debtor company. The Hon'ble legislatures were very much aware about this attempt of the defaulters to indirectly take control of the stressed assets, therefore, restriction was imposed in the Proviso annexed to sub-section f of S. 35(1). As far as s. 52 is concerned, the scope is limited to grant rights to a Financial Creditor for sale of a property. Naturally, that right should not give permission to a Financial Creditor to sell that property to a defaulter/promoter/director. Therefore, it is necessary as well as need of the hour to read the rights enshrined U/s 52 along with the proviso of sub-section (f) of S. 35(1) as well as S. 29A of the Code.

14. The above view expressed by this Bench can also be judged in the light of the decision of the Hon'ble Supreme court in *Swiss Ribbons Pvt. Ltd. & Ors V. Union Of India & Ors. [W.P. (Civil) 99 of 2018] Order dated 25.01.2019*, wherein made an observation as under:

> "*According to the learned counsel for the petitioners, when immovable and movable property is sold in liquidation, it ought to be sold to any person, including persons who are not eligible to be resolution applicants as, often, it is the erstwhile promoter who alone may purchase such properties piecemeal by public auction or by private contract. The same rationale that has been provided earlier in this judgment will apply to this proviso as well – there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of*

the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected."

This verdict of the Hon'ble Supreme Court has strictly dealt with the defaulters and therefore held that the provisions of S.29A continues to apply not merely to Resolution Applicants but to Liquidation also. S.52, therefore, is not out of Chapter III i.e. Liquidation Process, but within this chapter, hence ought to apply to the secured Financial Creditors if they exercise their option to liquidate an asset independently.

15. **Hence, this prayer of the applicant/Liquidator, that the secured creditor availing its option U/s 52 of the Code should not sell the assets to the erstwhile promoters/directors, is hereby accepted. The answer to question No. (ii) is in affirmative.**

16. The last question (iii) to be addressed is that whether the secured creditor is liable to pay the EPF dues in priority out of the proceeds of sale of secured assets in view of Section 326 of the Companies act, 2013. Section 326(4) states that

"(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;"

17. On this point, the point of view of the Liquidator is considered, however, at the outset, it is noticed by this Bench that due to the commencement of the Insolvency Code, few parallel provisions are not required under Companies act, therefore, S. 326 as reproduced above and relied upon by the Liquidator was substituted by the Insolvency & Bankruptcy Code, 2016 vide Notification No. S.O. 3453(E) dated 15.12.2016. Even otherwise, the above provision clarifies that EPF dues are not to be included in the liquidation estate.

The present position is that Sec **53 of the Code gives the waterfall mechanism for distribution of proceeds from the sale of assets of the Corporate Debtor.** S. 53 (1)(b) states that after meeting the CIRP and liquidation cost, second priority will be given equally to (i.) workmen's dues for the period of two years preceding the liquidation commencement date and,(ii). the debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52(1)(a). Therefore, workmen's dues or EPF dues are placed in the waterfall mechanism and are not to be paid as per S. 326 of the Companies Act, 2013 because of S. 238 of the Code which gives overriding provisions to the insolvency Code and secondly, S. 326 as of now stood de-notified.

While drafting Sec 53 of the Code the Hon'ble legislatures have taken due care by acknowledging the existence of Sec 52 in the code, hence, in Sec 53(1)(b)(ii) it is prescribed that although the debts shall rank equally between workmen's dues and secured creditors only in a situation when the secured creditors have relinquished security and do not opt for liquidation of an asset u/s 52 of the Code. To make it more clear the interpretation of Sec 53(1)(b)(ii) of the Code is that if the secured creditors do not relinquish the charge over the secured assets but exercise their option to liquidate a secured asset by exercising option U/s 52 , then it is mandated that the workmen's dues and the debt of secured creditor shall not rank equally.

Although the applicant/Liquidator has placed reliance on the judgement dated 12.09.2018 in the matter of *Precision Fasteners V. EPF,* passed by NCLT Mumbai in MA 576&752 of 2018 in CP No.1339/2017, wherein it was held that "*All sums due to any workman or employee from the provident fund, pension fund and gratuity fund, shall not be a part of the liquidation estate and shall not be used for recovery in liquidation".* But this decision is in context of rights of the employees and not in context of the restriction imposed U/s 53(1)(b)(ii). This judgement is therefore, not applicable in the present context because of a common understanding that **the EPF dues are not being treated as the assets to be covered in the liquidation estate, however, the same are the liability of the Corporate Debtor which has to be paid by the liquidator as per S. 53 of the Code, and not by the secured creditor out of the proceeds from the sale of secured assets if exercised their option U/s 52(1)(b) of the Code. Hence, this prayer of the applicant is rejected on above findings. Question (iii) is answered in negative.**

18. An important observation is made in the present case that once the secured creditor is out of liquidation U/s 52(1)(b) of the Code, it is relieved from all the clutches of the insolvency code or the liquidation process. To move under SARFAESI Act, or any

other act, to sell the assets to any party, is all the prerogative of the secured creditor because his rights are given a specific protection by the code. However, it has to be kept in mind that the intent of the code cannot be hampered with by allowing the promoters/directors a back door entry in the liquidation process. One such example is that a secured creditor who does not realise its security interest in full, is given a place in the waterfall mechanism, but much below the secured creditor who has relinquished security in liquidation.

19. Hence, the intent of the legislature is quite clear and what is allowed by law or what is debarred by the law must not be misconstrued and interfered with. Therefore, MA 1123 of 2018 submitted by the liquidator is **Partly Allowed by granting permission to the Secured Creditors to opt out of the Liquidation process, however, hereby imposing a bar on the secured creditors to sell the assets of the Corporate Debtor to disqualified persons U/s 29A**. A**s far as the question of EPF dues to be paid by secured creditor moving out of liquidation is concerned**, the same is out of the ambits of Sec 53 of the Code, hence, **rejected.**

20. Ordered Accordingly.

SD/-

Dated : 08.04.2019 **M. K. SHRAWAT**
MEMBER (JUDICIAL)

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