

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, COURT NO. II
KOLKATA**

**I.A. (I.B) No.1069/KB/2023
IN
C.P.(IB) No. 1340/KB/2018**

An application 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:

Jindal Steel & Power Limited, having its registered office at O.P. Jindal Marg, Hisar, Haryana-125 005.

... Financial Creditor

Verses

Bharat NRE Coke Limited, (in Liquidation)

...Corporate Debtor

And

IN THE MATTER OF:

Suraksha Asset Reconstruction Ltd., within the meaning of the Companies Act 2013, having its office at ITI House,36, 20th Floor, A-wing Naman Mid Town, Senapati Bapat Marg, Elphinstone Road, Mumbai 400013.

...Applicant

Verses

Varsha Bagri, the liquidator of **Bharat NRE Coke Limited**, appointed by this Hon'ble Tribunal having her office at P-273, Maniktala Main Road, CIT, Scheme-VI, Kolkata-700054

...Respondent

Date of Pronouncement:13.03.2024

CORAM:

Smt. Bidisha Banerjee, Member (Judicial)

Shri. Balraj Joshi, Member (Technical)

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Appearances (via Hybrid Mode):

Mr. Joy Saha, Sr. Adv.] For the Liquidator of Bharat NRE Coke Ltd.
Ms. Jayati Chowdhury, Adv.]
Mr. Tanish Gateriwala, Adv.]
Ms. Sucheta Mitra, Adv]
Ms. Varsha Bagri, Liquidator- n-Person]
Mr. Abhrajit Mitra, Sr. Adv] For the Applicant in IA (I.B.C)/1069(KB)2023
Mr. Chitransul A. Sinha, Adv.]
Mr. Jaskaran S. Bhatia, Adv.]
Mr. Rajib Ghosh, Adv.]
Ms. Sristi Barman Roy, Adv] For R-1 in IA (I.B.C)/971(KB)2022
Ms. Madhuja Barman, Adv.]
Ms. Sweta Poddar, Adv] For Jeju Metals Pvt. Ltd. in] IA (I.B.C)/971(KB)2022, IA (I.B.C)/547(KB)2023] and IA (I.B.C)/1073(KB)2021
Ms. Farnaz Nasim, Adv.] For the Applicant in IA (I.B.C)/1081(KB)2023
Mr. M.S. Tiwari, Adv.] For Arun Kumar Jagatramka
Ms. Shalini Basu, Adv.] For the Liquidator

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court is congregated through hybrid mode.
2. Ld. Senior Counsels/ Counsels were heard.
3. The applicant Suraksha Asset Reconstruction Ltd, has preferred this application to seek the following reliefs:
 - i. *Allow the present application and quash the emails dated 29.05.2023 sent by the Liquidator for being unlawful.*

- ii. *Direct that no coercive action pursuant to such emails dated 29.05.2023 and/or any emails thereafter should be taken by the Liquidator of Bharat NRE Coke Limited (hereinafter referred to as BNCL) which may be prejudicial to the interest of the Applicant as a secured financial creditor; and*
- iii. *Pass any such other order(s) and further order(s) as this Hon'ble Tribunal deems fit and proper in the facts and circumstances of the present case.*

4. Facts in a nut shell:

- a. The applicant is Suraksha Asset Reconstruction Ltd. (in short "**SARL**") aggrieved with steps taken by Ms. Varsha Bagri, the liquidator of Bharat NRE Coke Limited ("**BNCL**"). BNCL has ownership of 79.07 acres of land parcel situated at Dharwad, Karnataka out of which 47.07 acres of land is mortgaged exclusively to Suraksha Asset Reconstruction Ltd. (in short "**SARL**")
- b. Pursuant to the liquidation of Bharat NRE Coke Limited (hereinafter referred to as "**BNCL**") which commenced on 11.12.2019, on 10.01.2020, Suraksha Asset Reconstruction Ltd. (hereinafter referred to as "**SARL**") intimated the Liquidator of BNCL under Section 52(2) of the Insolvency and Bankruptcy Code, 2016 (in short "**the Code**" read with Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016 its intention to realise its security interest under the SARFAESI Act 2002.
- c. Thereafter, on 22.02.2020 a notice under Section 13(2) of SARFAESI Act was issued to the Liquidator and all Guarantors of BNCL for a total claim of Rs. 141 Crores.
- d. This Tribunal passed an order dated 07.01.2021, in the said IA's directing the Block and Land Development Officer of Dharwad to carry

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out a survey to demarcate the land hypothecated to SARL, and upon such demarcation, the Liquidator of BNCL had to hand over the land to SARL. Demarcation was carried out and report dated 7.08.2021 was submitted to the liquidator by KIADB.

- e. Thereafter, SARL sent a notice on 20.08.2021 under Section 13 (4) of the SARFAESI Act to the Liquidator for possession of the secured assets in accordance with law.
- f. The liquidator of BNCL, vide email dated 16.02.2023 demanded an "adhoc payment" of INR 20,00,000 (Rupees Twenty Lakhs only) from the Applicant, purportedly towards the proportionate share of the CIRP cost and estimated liquidation cost.
- g. The Applicant, vide its email dated 16.02.2023, requested the liquidator to raise an invoice for such payment, upon which the disbursal could be processed.
- h. However, the liquidator failed to provide any such invoice(s) because of which the Applicant could not make any payment despite being willing to do so.
- i. The Applicant on 31.03.2023 in exercise of the powers conferred under Section 13(4) of the SARFAESI Act, 2002 read with rule 8 of Security Interest (Enforcement) Rules,2002 took the symbolic possession of the secured property.
- j. Thereafter, the Applicant, vide email dated 04.04.2023 informed the liquidator of the symbolic possession and also sent her the possession notice.
- k. The liquidator vide her email dated 07.04.2023 responded to the same alleging that the steps taken by the Applicant were without due process of law. Thereafter, the Applicant vide its email dated 03.05.2023 clarified the position of law in terms of the SARFAESI Act, 2002 and requested the liquidator to extend full cooperation in accordance with

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law. The Applicant, in good faith, on 25.05.2023 informed the liquidator of BNCL about a communication received from Jeju Metals Private Limited, (the authorised occupier of the Property) requesting the applicant to take physical possession of the property on 1.06.2023 and withdrawal of its security personnel from midnight of 31.05.2023.

1. Thereafter, to the utter shock and surprise of the Applicant, the liquidator of BNCL vide her email dated 29.05.2023, claimed that the security interest of the Applicant stood relinquished purportedly in terms of Regulation 21A (2) (a) and 21 (3) of the IBBI (Liquidation Process) Regulation, 2016. Further, the applicant shall be classified as an “Unsecured Financial Creditor”.
 - m. The Applicant, vide email dated 30.05.2023, responded to the emails of liquidator of BNCL calling upon her to immediately withdraw her emails and cease and desist from taking any steps which would be prejudicial to the interest of the Applicant, which is the sole secured financial creditor.
- 5.** It has been urged that the Applicant has been greatly prejudiced by the blatant violation of the Code and the Regulation, and the unjust actions of the liquidator of BNCL. Consequently, the Applicant has not been able to realise its security interest till date despite express orders of this Adjudicating Authority dated 07.01.2021. Therefore, the Applicant is constrained to file the present application seeking appropriate direction against the liquidator.
- 6.** Per Contra, the liquidator would submit as under:
- a) That the application is misconceived, bad in law, filed in gross suppression and misrepresentation of material facts warranting the

dismissal of the application and the same is liable to be dismissed in limini.

- b) With reference to paragraph IV [2(iv)] of the said application, it has been contended that: -
- i. The total area of land is 79.07 acres.
 - ii. Out of the 79.07 acres, 47.07 acres was mortgaged to the applicant SARL.
 - iii. The balance 32 acres is leased to Gujarat NRE Coke Limited. But no document of any nature whatsoever has been submitted by the applicant to demonstrate that the alleged land of 32 acres allegedly leased in favour of the Gujarat NRE Coke Ltd. is situated outside the purported mortgage of 47.07 acres of land claimed by the applicant to be its security interest.
- c) The report dated 7th August 2021 does not in any manner whatsoever indicate or specify whether the 32 acres of land allegedly mortgaged in favour of Gujarat NRE Coke Ltd. is situated outside the purported security interest of the applicant comprising 47.07 acres of land.
- d) The applicant has admitted that as far back as on 16th February 2023 the liquidator had demanded payment of a sum of Rs.20 lakhs towards CIRP costs and liquidation costs from the applicant. Till date the said payment has not been made. By reason inter alia of the refusal to make such payment the liquidator by her email dated 29th May 2023 finally declared the alleged security interest of the applicant to have been subsumed within the liquidation estate of Bharat NRE Coke Ltd.
- e) That, there is no legal requirement on the part of the liquidator to raise any separate invoice upon the applicant. Further, no section of the Code or Regulation has been referred to demonstrate any obligation on the part of the liquidator to raise any invoice. Also, the demand of the liquidator has already been articulated in the said email of 16th

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February 2023, the applicant cannot insist on any separate invoice to be raised by the liquidator.

- f) That Regulation 21A empowers the liquidator to ask for an estimated amount. In the circumstances, the liquidator was well within his rights to claim an estimated/ad-hoc contribution from the applicant.
- g) That on or about 10th June 2023, the liquidator personally visited the said land at Dharwad and found the same to be under the possession of one Jeju Metals Private Limited.
- h) The allegation of the applicant that the applicant has taken possession on 31st March 2023 is ex-facie, incorrect having regard to the facts that Jeju Metals Private Limited was found to be in possession on 10th June 2023 during the visit of the liquidator.
- i) That neither the applicant nor Jeju Metals Private Limited has any right to remain in possession of the said properties and as such it is just proper and necessary that appropriate orders be passed directing the said Jeju Metals Private Limited and the applicant herein to make over peaceful possession of the said properties together with assets situated thereon to the liquidator.
- j) Vide paragraph 7 of the application the applicant admits having received a demand for payment of a sum of Rs.20 lakhs on 16th February 2023 and admittedly such amount was not paid and consequently, the applicant cannot claim to exercise any right under section 52 of the Code.
- k) Annexure A-18 to the application which is purportedly claimed as a consent order agreed to by the erstwhile liquidator.
- l) It is alleged that the applicant was fully aware of its obligations under section 52 of the Code and section 21A of the Liquidation Process Regulation, yet the applicant never bothered to follow the mandatory timelines specified.

7. We have noted the rival contentions.

8. Regulation 21A of the Liquidation Regulation says that if the secured creditor has not discharged its obligations within 30 days from liquidation commencement date 11.12.2019, the asset shall become a part of the Liquidation Estate.

8.1 The options available to the secured creditors in liquidation proceedings are the following:

- Relinquish its security interest to the liquidation estate and realise proceeds from the sale of assets by the Liquidator in the manner specified in Section 33; or
- Realize its security interest under section 52(1)(b)
- Realise its security under SARFAESI Act etc.

8.2 Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 clearly envisages the following: -

*"21A- **Presumption of security interest-(1)** A secured creditor **shall inform the liquidator of its decision** to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:
Provided that, where a secured creditor does not intimate its decision within **thirty** days from the liquidation commencement date, the assets covered under the security interest **will be presumed to be part of the liquidation estate**".*

It is explicit therefrom that the decision to realise its security interest shall have to be intimated within 30 days of Liquidation commencement date, or else it **will be** presumed to be a part of the Liquidation estate.

8.3 Further 21A (2) reads as under:

“Where a secured creditor proceeds to realise its security interest, it shall pay-

- a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator **within ninety days from the liquidation commencement date; and***
- b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:*

*Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, **as estimated by the liquidator**”:*

8.4 Again 21A (3) reads as under:

*“Where a secured creditor fails to comply with sub-regulation (2), **the asset, which is subject to security interest, will become part of the liquidation estate**”.*

8.5 The liquidator admittedly estimated the value at Rs. 20 lakhs and demanded the sum of Rs 20 lakhs on 16.02.2023 towards CIRP costs. Since it was not paid, the liquidator on 29th May 2023 has rightly declared the alleged security interest to have subsumed into the liquidation estate of Bharat NRE Coke Limited.

8.6 In the present case, the Liquidation commencement date is 11.12.2019. SARL having evidently and admittedly failed to

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intimate its intention to realise its security interest, within 90 days thereafter and thereby having failed to discharge its obligation under Regulation 21 A (1) and (2) within the prescribed period, cannot be permitted to retain the property held as security. Having failed to comply with the provision, it cannot seek the prayer, as by the operation of law, after 30 days from the date of commencement of liquidation, upon failure of a secured creditor to intimate about its decision of realise its security interest or pay towards CIRP costs, it shall be **“deemed”** to have become and after 90 days of liquidation commencement date it **“shall”** become a part of liquidation estate.

9. No provision or authority has been placed on record to show that the timelines prescribed under Section 21 (1) and (2a) are not mandatory or that the timeline as in 21A (2)(b) will apply.
10. Accordingly, the prayer fails and thus **I.A. (I.B) No.1069/KB/2023** is **disposed of.**
11. Urgent Certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Order Signed on the 13th Day of March 2024

A.S. LRA