IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT – 1

ITEM No.304
IA/258(AHM)2022 in
CP (IB) 487 of 2018

Order under 19(2) r/w 34(3) of IBC,2016

IN THE MATTER OF:

Dushyant Dave
Liquidator of Shirpur Power Pvt Ltd **.....Applicant**
V/s
Bijaya Kushasan Behera & Ors

.....Respondent

Order delivered on: 07/02/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-

SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH - I, AHMEDABAD

IA/258(AHM)2022
in CP(IB)/487(AHM)2018

An Application under Section 19(2) r/w section 34(3) of the IBC, 2016

In the matter of

Dushyant Dave,
Liquidator of
Shirpur Power Pvt. Ltd.
(IBBI Registration No. IBBI/IPS-003/IP-N00061/
2017-18/10502)
1101 Dalamal Towers, Nariman Point,
Mumbai- 400021

... Applicant

Vs

1. BIJAYA KUSHASAN BEHERA,
B-7, Rudraksh Bunglows, Pratik Mall Road,
Randesan, Gandhinagar, Gujarat- 382007

2. Dhiren Bharat Parikh
B-4, Shaivalsoham Park,
Opp. Vastrapur lake,
Nehrupark, Vastrapur,
Ahmedabad, Gujarat- 380015

3. Ashoke Kumar Maitra

B/11. Swastik Park, Opp. Judges Bunglows,

Bodakdev, Ahmedabad, GUJARAT- 380015.

4. Samir Prabodhchandra Joshipura

H. NO. 642, I Block

BRS Nagar, Ludhiyana, Punjab-141012

5. Vidyut Sheth Anubha

103, Shraddha Flat, Parijat Society,

Fatehpura, Paldi, Ahmedabad,

GUJARAT- 380007.

6. Manven Shivprasad Dubey

2, Siddartha Appartment, 17-B

Suryodaya Colony Station Road,

Naranpura, Ahmedabad-380013, GUJARAT

7. Nikunj Chotala Shah

4, Bal Gayatri Society, Ambawadi,

Ahmedabad

8. Saurabh Jayswal

A/20, Nigamnagar, B/H Shyamal Flats,

New C.G. Road, Chandkheda, Ahmedabad

9. Uday Anand Samant

6, Shiv-Vastu, Tejpal Scheme Road No. 5,

Vile Parle, Mumbai 400 057

10. Vikram Vithal Rajadhyaksha

6121, Huntley Road, Columbus,
OHIO, USA

11. Prem Somaji Paunikar
604, 6TH Floor, Simran, Off Tejpal
Scheme RD No. 5, V. B. P. Deshpande Marg,
Vile Parle (EAST), Mumbai- 400057

12. Nilay Pravinchandra Modi
536, Parabadi Ni Pole, Navowas,
Opp. Ahmedabad Municipal Corporation
Danapith, Ahmedabad 380001

13. Satyanarayan Banwarilal Dang
Bunglow No. 3, Ashwamegh-7
NR. Hasubhai Park, Satellite Road
Ahmedabad- 380015

14. Sunil Kumar Kanojia
B-8, Royal Enclave, Thaltej,
Ahmedabad- 380059

15. Nikul Manubhai Patel
B-18, Mahavir Krupa, Ghatlodia,
Ahmedabad

16. Amit Patel

Vrindavan, Near Manali Apartment,

Behind Apang Manav Mandal Work Shop,

DR. V.S. Road, Vastrapur, Ahmedabad-380015

17. Rahul Patel

112, Sunrise Park, Opp. Drive-In-Cinema,

Thaltej Road, Ahmedabad-380054, GUJARAT.

18. Pranav Shah

D-2, 104, Fortune Empire,

Opp. Kashiram Party Plot,

Beside Shivam Plaza, Kalol (N.G.) 382721.

... Respondents

Order Pronounced on 07.02.2024

CORAM:

SHAMMI KHAN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant(s) : Ms. Prachiti Shah, Ld. Advocate
For the Respondents : Mr. Aalok Jagga, Adv a/w Mr. Arjun Sheth, Ld. Adv. for R-16.

O R D E R

Per: Bench.

1. The present Application is filed under Section 19(2) read with Section 34(3) of the Insolvency & Bankruptcy Code, 2016 and Regulation 9(1) of the Insolvency and bankruptcy board of India (Liquidation Process) Regulation, 2016 seeking direction against the suspended management for providing assistance and cooperation during liquidation period.

2. The Appellant filed the present Appeal seeking the following relief(s):

   i. *This Hon'ble Tribunal may be pleased to allow the present Application.*

   ii. *This Hon'ble tribunal may be pleased to pass an order under Section 19(2) read with Section 34(3) of the Code directing the Respondents to comply with the instruction of the applicant herein and to co-operate with him in the collection of information and documents as required by the transaction auditors for conducting transaction audit for the review period of 01.4.2011 to 31.03.2018.*

   iii. *This Hon'ble Court may be pleased to pass an order under Section 19(2) of the Code directing the Respondent to supply copies of the relevant documents/ details/ information as annexed in Annexure E.*

iv. *This Hon'ble Court may be pleased to grant other and further relief as may be deemed fit and proper in the interest of justice.*

3. **<u>Facts of the Case are as follows</u>**:

I. It is submitted by the applicant that The applicant submits that the erstwhile Resolution Professional of the Company Mr. Savan Godiawala, in discharge of his duties as provided under The Code, had appointed the Transaction Auditors viz. BDO LLP to conduct the review of the Company for a period of 05.03.2018 and 04.03.2020. The auditors in the audit report dated 28.06.2021 had majorly made two observations:

a) that pertaining to adjustment made with related party (Sintex Infra Projects Limited). The said observation was qualified under section 43 of The Code. An Application being IA NO. 161 of 2022 is already filed and pending before this Tribunal in this regard.

b) that the observations of the Transaction auditors pertaining to adjustments made by the

Company with other vendors' payable balance. The company had entered into various questionable transactions with other vendors during the review period between 05.03.2018 and 04.03.2020.

II. It is stated that in light of the observations made by the auditors for the review period between 05.03.2018 and 04.03.2020 it was decided in the 5thSCC meeting, dated 16.11.2021 for conducting transaction audit with respect to Section 66 of the Code for an extended review period between 01.04.2011 to 31.03.2018. The liquidator/liquidator's team had therefore requested for the documents that shall be requisite to conduct the audit for a period between 01.04.2011 to 31.03.2018 from Respondent No.18, as a response to which some photos that prove custody of the required documents was with the aforementioned Respondent was sent by him. Respondent No. 18 also provided an approximate amount of Rs. 25,000

towards printing/copying of the required documents. The available chats with Respondent No. 18 is placed at ANNEXURE "C" of the Application. It is hereby submitted that Respondent No. 18 now claims he has no knowledge of the location of the said documents.

III. It is stated that Despite providing the photos of the required documents and approximate amount towards printing charges, when the Liquidator instructed the Respondents to provide the documents, the same was not provided.

IV. It is further stated by the applicant that the Liquidator had decided to engage the transaction auditor of the Company viz. BDO LLP to conduct the transaction audit of the Company for the review period between 01.04.2011 to 31.03.2018. The copy of the engagement letter for conducting transaction audit with respect to Section 66 of the Code for the said review period is placed at "ANNEXURE-D" of the Application. The scope of work for the Transaction Audit are mentioned hereunder for ready reference:

1. Identification of fraudulent transactions involving the Corporate Debtor during the Review Period.

2. Review of these transactions, including the antecedents, genuineness, proposed and actual end uses of the transactions, including whether such transactions are with related parties or not and whether requisite approvals were obtained. Review of onward project related transactions of the project contractor and related party "Sintex Infra" to the extent data is provided.

3. Conduct background checks on the select entities involved in the transactions mentioned in (a) and (b) above and identify if such entities are "related parties" of the Corporate Debtor as defined under the Code and identify the promoters and current directors of such entities.

4. Provide proof as may be required by Liquidator or under the IBC to establish that the identified transactions are fraudulent transactions involving

the Corporate Debtor and provide relevant details of the entities identified in (a) and (b) above.

V. It is stated that soon after their appointment, the transaction auditors had sought for a consolidated list of documents required by them to conduct the transactions audit for the said review period. The said list of documents was shared by the auditors with Respondent No. 7 and Respondent No. 18 vide email dated 15.12.2021. It is stated that no reasonable or satisfactory answer was provided by Respondent No. 7 and Respondent No. 18 as a result of which the documents as required by the transaction auditors were not provided by them. The email communication dated 15.12.2021 as addressed by the auditors to the Respondent No. 7 and Respondent No. 18 and the reply provided by them both dated 15.12.2021 are attached hereto and marked as "ANNEXURE-E (Colly.)". The list of documents as required by the auditors as shared

vide email dated 15.12.2021 is placed at "ANNEXURE-F" of the Application.

VI. It is stated that to provide the required documents to the transaction auditors as requested by them, the liquidator/liquidator's team visited the registered office of the Company on 20.12.2021. It is stated that the liquidator/liquidator's team was not allowed entry initially and then later was told that the required documents are not available at the registered office of the company. Thereafter, it was informed to the liquidator/liquidator's team that the required documents relating to the company shall be available at a different location i.e. the Kalol office of Sintex Group of Companies, following which the liquidator/liquidator's team had visited the said Kalol office. It is stated that the liquidator/liquidator's team was once again thwarted and not provided the required documents at the said office as well. It is stated that the Respondent No. 16, had promised to provide full support and co-

operation to the liquidator and confirmed that all the requested documents shall be provided either by him or by Respondent No. 7 or Respondent No. 18 within a period of one week from 20.12.2021. It is stated that when the liquidator/liquidator's team approached Respondent No. 7, he redirected them to the Respondent No. 16 due to which the Liquidator approached him to which no satisfactory response was provided by him. It is stated that whenever the liquidator/liquidator's team tried to contact Respondent No. 18, he informed that he shall work only under the instructions of Respondent No. 7 who, as mentioned here, has now stated that the satisfactory response may be expected from Respondent No. 16.

VII. It is stated that the liquidator of the Company had also addressed various emails requesting for information, and records as required by the transaction auditors of the Company. The said Email communication as addressed by the Liquidator of the

Company dated 04.01.22 and 06.01.2022 is placed at "ANNEXURE-G" of the IA. It is stated that the required response was not provided by the Respondents to the said requests of the liquidator.

VIII. Despite such repeated efforts, no co-operation and/or requisite documents and or details and/or information is received by the liquidator from the Respondents herein till date.

IX. It is submitted that the aforementioned facts pertaining to the non-cooperation from the end of suspended management were put forward before the SCC meeting on January 07, 2022 and the SSC had taken a serious note of the same. That after due discussion, it was decided that an Application under Section 19 of the Code be preferred before this Adjudicating Authority.

X. It is submitted by the Applicant that to the best of the knowledge of the Applicant the Respondents are in possession of all or substantial documents which the Applicant has been repeatedly asking for but the

Respondents herein have repeatedly failed to provide the requisite essential documents and or details and/or information to the liquidator herein thereby creating hindrance in the liquidation process and thereby have failed to adhere to the provisions of Section 19 of the Code.

XI. It is further submitted that the aforementioned documents and/or details and/or information is vital for valuation of the assets of the company in Liquidation and for completion of the Liquidation process in a time bound manner.

XII. It is stated that in view of the aforementioned facts and circumstances of the case, it is clear that the liquidator/liquidator's teams have fulfilled the prerequisite as mentioned in Regulation 9(2) Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 by making all the efforts for obtaining essential information and documents from the suspended management but

have failed to obtain due to non-cooperation of the respondents.

XIII. It is stated that the applicant was constrained to prefer the present Application before this Adjudicating Authority seeking an order/direction under Section 19(2) of The Code against the Respondent to comply with the instructions of the Applicant and to co-operate with him in collecting the required information.

4. It is stated that pursuant to filing of Application by Applicant, Respondent No. 16 appeared and filed their Reply dated 22.03.2022. However, no other respondents appeared in the matter despite advance service made upon them by the Applicant/ Liquidator. The Contents of the Replies are as follows:

a. It is stated that the respondents are not cooperating with the applicant in providing any information or documents. That, the documents which were in the possession or knowledge of the respondents have

already been handed over to the Resolution Professional.

b. It is stated that this Hon'ble Adjudicating Authority had admitted the Corporate Debtor into CIRP vide order dated 04.03.2020 and thereafter under liquidation vide order dated 10.03.2021 which is annexed with the captioned application at Annexure-A and B respectively.

c. It is stated that the captioned application u/s 19(2) of the Insolvency and Bankruptcy Code, 2016 ("Code") a/w other relevant provisions have been filed for the first time after two years of initiation of CIRP and one year after initiation of liquidation. That, the application seeking direction under section 19(2) of the Code was not filed at any point of time since the commencement of the CIRP which shows that the suspended management and all the concerned personnel have always cooperated with the Resolution Professional and the Liquidator.

d. It is stated that Pursuant to Section 17 of the code, Resolution Professional has taken over the management of affairs of Corporate Debtor w.e.f. 04.03.2020 (date of initiation of CIRP) and pursuant to Section 18 of the code Resolution Professional performed his duties. During the entire 330 days of CIRP period, Resolution Professional has not filed application u/s 19 of the Code which shows that the suspended management and all the concerned personnel have always cooperated with the Resolution Professional.

e. It is stated that the documents which are sought by the applicant is for conducting the transaction audit of the corporate debtor. That, the time duration for which the transaction audit is to be conducted i.e., from 01.04.2011 to 31.03.2018, a forensic audit for the same period has already been conducted by the banks who are also a part of the Stakeholders Consultation Committee ("SCC").

f. It is stated that the applicant has appointed BDO LLP as the transaction auditor for conducting the transaction audit for the period from 01.04.2011 to 31.03.2018, however, it is worthwhile to note that the forensic auditor which was appointed by the Banks for conducting the forensic audit of the corporate debtor for the same period was Haribhakti & Co. LLP. That, it would not be out of place to mention that Haribhakti & Co. LLP and BDO LLP had joint venture and were jointly working at that point of time and that, the team of BDO LLP which is now conducting the transaction audit of the corporate debtor is same as that was in Haribhakti & Co. LLP which conducted forensic audit of Corporate Debtor. Therefore, the Applicant can very well ask the Banks (members of the SCC) to share the said forensic audit report with the applicant.

g. It is stated that the applicant has only targeted and raised allegations against respondent no. 7, 16 and 18 with respect to non-cooperation and there are no

allegations raised against other respondents. Further, the allegations in the captioned interlocutory application are baseless and without any merit. It may be noted that the applicant has annexed with the application only the email communications which were done with respondent no. 7 and 18 and not with any other respondents. That, the other respondents have been roped in only with the intention to harass them and/or with some ulterior motive.

h. It is stated that as per the application, the respondent no. 7 had been shown as the erstwhile Director and CFO, however, it is pertinent to note that respondent no. 7 was never a director of the corporate debtor and was only the CFO. Further, as per the email communication dated 19.01.2022 made by respondent no. 7 to the applicant herein, which is at Page No. 60-61 of the application, the respondent no. 7 has categorically stated that he is an ex-employee of the corporate debtor and his

employment and services have been terminated with the Corporate Debtor w.e.f. 01.03.2018 and in spite of the same, he has provided all due cooperation and documents to the extent available with him as an ex-employee in order to assist the lenders, Valuers, Resolution Professional and the Liquidator for smooth conduct of CIRP and Liquidation Process.

i. It is stated that the respondent no. 18 is also an ex-employee of the corporate debtor and his employment and services have been terminated with the corporate debtor w.e.f. 01.03.2018 and in spite of the same, he has provided all due cooperation and documents to the extent available with him as an ex-employee in order to assist the lenders, Valuers, Resolution Professional and the Liquidator for smooth conduct of CIRP and Liquidation Process.

j. It is stated by R16 that the applicant has relied upon the WhatsApp communication dated 29.04.2021 and 30.04.2021 with respondent no. 18 which is annexed at Annexure- C, Page No. 47-48 of the application.

That, it can be seen from the communication that the respondent no. 18 was ready and willing to provide/handover the documents to the applicant. However, it seems that due to the issue with respect to cost of the photocopy of the said documents, the applicant did not take charge of the said documents. It can also be seen that no response was given by the applicant on 29.04.2021 and it was respondent no. 18 who again reminded the applicant about the same on 30.04.2021.

k. It is stated by R16 that the photos of the documents which were shared by respondent no. 18 were lying at the Kalol office during April 2021 whose premises are shared by other group companies of the Corporate Debtor out of which, few are now undergoing CIRP and are in control of the respective Resolution Professionals (RP). That, the Applicant can very well enter the said premises with the due permission of other RPs. Further, as on current date i.e., after 11 months from April 2021, respondents

are not aware whether documents are lying at Kalol office or not as, the premises of such office are now under the control of respective Resolution Professionals of group companies.

l. It is stated that though Respondent No. 7 and 18 are ex-employees of the Corporate Debtor they have all the time cooperated with the Resolution Professional and now with the Liquidator to the extent possible.

5. After the Reply filed by the R-16, the Applicant filed a Rejoinder as an Additional Affidavit on 16.08.2022. The Applicant in his Rejoinder denied and all the contentions made by Respondent No. 16 in his reply.

6. The Applicant submits a compilation of judgments on 01.08.2023 which are as follows:

a) Amit Dineshchandra Patel V. Chandra Prakash Jain, RP of Sintex Prefab & Infra L:td. NCLT(AHM) IA No. 652 of 2021 in CP(IB) No. 321 of 2020.

b) Abhishek Nagori (Liquidator) V. Asian natural Resources (India) Limited NCLT Indore Bench at Ahmedabad IA No. 458 of 2018 in CP(IB) 19 of 2017.

c) Amardeep Singh Bhatia V. Abhishek Nagori & Ors. NCLAT, Principal Bench New Delhi, Company Appeal (AT) (Insolvency) No. 671 of 2020.

d) Aditya Kumar Tbrewala V. Om Prakash Pandey & Ors. 2022 SCC Online NCLAT 142.

e) Mr. Thomas George V. K. Eswara Pillai & Ors. NCLAT Chennai Bench Company Appeal (AT) (SH) (Insolvency) No. 293 of 2021.

7. The Respondent No.16 then filed a purshish on 02.08.2023 to place on record that the present Application had become infructuous by the virtue of an order dated 19.07.2023 passed by this Tribunal in IA No. 523 of 2023 wherein the CD had been sold as a going concern. It is stated that Forensic Audit for period 2011 onwards was already conducted by the banks who were part of SCC and clean chit was already given in such report and such report was in the possession of the said banks.

8. It is further stated that Applicant filed an additional affidavit on 24.01.2024 under diary no. D642 in compliance of order dated 02.08.023 and 01.12.2023 to place on record

Forensic Audit Report for the period 2011-2018. It is further stated that it was wrongly contended by the respondents that no adverse report had been given by the auditors. In fact, the auditors clearly reported limitation, data inadequate documentation and non-availability of required details in the Audit Report which is also the submission of the Applicant in the captioned application. Hence, it was erroneous to say that the respondents were given clean chit by the auditors as was submitted on behalf of the Respondent on 02.08.2023 when the matter was taken up.

9. It is submitted that both Applicant and Respondent No. 16 have filed Written Submissions on 01.02.2024 under diary no. D880 and 01.02.2024 under diary no. D865 in compliance of the order dated 25.01.2024.

10. We have heard both the Counsel and on perusal of the documents submitted we have observed the following:

- That Applicant has filed the Application during the period of liquidation which does not bar the limitation under section 34(3) of Insolvency & Bankruptcy Code,

2016, and Rule 9 of IBBI (Liquidation Process) Regulations, 2016.

- That the Applicant has provided a Forensic Audit Report of the Corporate Debtor for the period 01.04.2011 to 31.03.2018.
- That Respondent No. 16 had submitted that the documents sought by the liquidator and auditors were destroyed due to a fire accident at a plant for which an FIR was also registered but the said FIR is not placed on the record.

11. In view of the above findings and observations, the Reliefs sought in prayer II and III of the Interlocutory Application No. 258 are allowed. Respondents are directed to provide the information sought to the extent available to the liquidation within 15 days from the date of order.

12. Accordingly, the present IA No. 258 of 2021 in CP(IB) No. 487 of 2018 is disposed off.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

Shubhanshu/LRA