

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

IA (IBC)/377/KOB/2023

IN

TIBA/07/KOB/2019

*(Under Section 60(5) of the IBC, 2016 read with
Regulation 31A (2), 32 & 37(7) of IBBI (Liquidation
Process) Regulations, 2016)*

In the matter of SARGAM BUILDERS PVT LTD

MEMO OF PARTIES:

V K ABDUL RAHIM,

S/o V.M Kunjali Naina, Suspended Managing
Director of M/s Sargam Builders Pvt Ltd,
Sargam, Water land Road, Elamkulam, Kochi
682020

... Applicant

-Vs-

CA JASIN JOSE,

Resolution Professional/Liquidator of M/s
Sargam Builders (P) Ltd

... Respondent No.1

THE FEDERAL BANK LIMITED,

Federal Towers, Bank Junction, Aluva,
Ernakulam District, Kerala & Branch office at
LCRD- Ernakulam Division, Ground floor, Federal
Towers, Marine drive, Ernakulam- 682031

... Respondent No.2

MR. JOHN JOSEPH P.A,

S/o PL Antony, Kavalakkal House, Indira Gandhi
Road, Pammpai Moola, Edakochi-682010

... Respondent No.3

Order delivered on:17.4.2024

Coram:

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Shri. Shyam Babu Gautam

TMT. (Retd.) Justice T Krishna Valli

Appearances:

For the Applicant : Mr. Babu Karukapadath, Advocate

For the Respondent : Mr. Akhil Suresh, Advocate(R1)
Mr. Jasin Jose, Liquidator,
Mr. Mohan Jacob George, Advocate (R2)
Mr. MA Shaji, Advocate (R3)

ORDER

Per Coram

1. This Application is filed under Section 60(5) of the IBC, 2016 by suspended managing director cum shareholder cum unsecured creditor of Sargam Builders Pvt Ltd, the Corporate Debtor, against the RP and Federal Bank, the Financial Creditor who initiated CIRP seeking following reliefs: -

- a. *To declare that as R2 Bank has been continuing the OA No.258/2013 to enforce its security interest under the provisions of Recovery of Debts and Bankruptcy Act, 2016 before the Hon'ble Debt Recovery Tribunal, Ernakulam, in view of Regulation 37 (7) of IBBI (liquidation Process) Regulations*

2016, the provisions of IBBI (liquidation Process) Regulations ,2016 will not apply, and, accordingly, direct the 2nd respondent liquidator to desist from continuing any proceedings under the IBBI (liquidation Process) Regulations , 2016.

- b. To declare that R2 Bank, which has not relinquished its security interest under section 52 of the IBC, is not entitled to be a member of the Stakeholders Consultation Committee as per the Regulation 31 A (2) of IBBI (liquidation Process) Regulations ,2016 and consequently declare that, all the decisions taken in the SCC meetings conducted till date are void ab initio, as R2 Bank was illegally included as a member of SCC.*
- c. To direct R1 liquidator not to sell the assets of CD and not to issue further sale auction notice for sale of the assets of CD, in view of the provisions under Regulation 32 and Regulation 37 (7) of IBBI (liquidation Process) Regulations, 2016, as R2 Bank has not relinquished its security interest as envisaged under Section 52 of IBC r/w Regulations 32 and 37 (7) of IBBI (liquidation Process) Regulations, 2016*
- d. To direct R1 Liquidator to keep the claim of the Bank in abeyance till the counter claim of the Corporate Debtor pending at DRT in OA No.258/2013 is adjudicated and set— off amount is crystalized, in view of the well settled principle of law, as enunciated in the judgment of the Hon'ble NCLAT in **Anheuser Busch Inbev India Limited Vs Resolution Professional in Comp. App (AT) (CH) (INS.) No. 12 I 2023.***

e. To direct R1 to engage the same counsel, who is appearing for the applicant in OA No.258/2013 and its counter claim before the Hon'ble DRT, for and on behalf of CD also in the said case pending before the Hon'ble DRT, Ernakulam; so as to comply with his duties envisaged under section 35(1)(k) of IBC.

The Brief facts of the case are as follows: -

2. Sargam Builders Pvt Ltd (hereinafter 'CD') was admitted into CIRP by this Tribunal on 20.09.2019 on application by R2, financial creditor, and R1 was appointed as RP. Consequently, CD was put to liquidation on 16.09.2020 wherein R2 was appointed as liquidator. The CIRP order was appealed and later confirmed by Hon'ble Apex court. The order of liquidation is at present also not under appeal.
3. The applicant state R2 Bank had initiated SARFAESI proceedings and later DRT proceedings as early as in the year 2013 to enforce security interest in respect of 6 items of property mentioned in the schedule A-F of Annexure A1. It is stated that these proceedings as well as non-disbursement of further amounts by FC as requested by the CD resulted in loss to CD and consequent insolvency. Connected applications including a counter claim of CD is also pending against the DRT proceedings initiated by FC against which the FC continues to make representations before DRT as is evident from Annexure A3 proceedings. It is stated that the failure to recover sum from DRT caused FC to initiate CIRP in year 2019 violating the object of IBC as well as suppressing counter claim.

4. It is stated the RP did not consider the counter claim of CD to tune of 17.14 crore, and admitted whole claim of 4.4 crore without adjudication. It is stated applicant vide several emails requested RP to consider counter claim. It is stated that RP's intent was to put CD into liquidation. During liquidation process again applicant requested liquidator to consider counter claim and prosecute it before DRT which was rejected. It is stated that R1 is duty bound by section 35(1)(k) to take steps regarding counter claim and set off amount. Applicant relies on **Anheuser Busch Inbev India Limited vs Resolution Professional** where Hon'ble NCLAT upheld the action of RP to keep claim of FC in abeyance in view of counter claim.
5. It is stated that 2 applications, MA(IBC)/207/KOB/2020 and IA(IBC)/161/KOB/2021 on issue of adjudication of claims and connected reliefs were dismissed by this Tribunal. It is stated that liquidator published e auction sale notice to sell CD assets for reserve price of 5.4 crore and thereafter at 4.85 crore when total CD value is Rs. 21.46 crore. Aggrieved by this applicant preferred petition before Hon'ble Kerala High court to continue OA proceedings. Simultaneously another petition was preferred by FC to continue DRT proceedings, wherein the Annexure A15 common order to dispose DRT proceedings expeditiously was passed. It is stated that the FC intends to concurrently proceed with recovery by DRT process while liquidation process is ongoing which is against regulation 37(7) of IBBI liquidation regulations. It is stated that R2 FC by continuing DRT proceedings and not relinquishing

his security interest as is evident from Column 8A of Annexure A22(a) Form D submitted by FC to R1, shall not exercise any rights in SCC or become a member as per regulation 31A of IBBI liquidation regulations. It is submitted that R1 is not empowered to sell the CD assets unless security is not relinquished by FC and without leave of Tribunal as per section 35(1)(n) IBC. It is further stated that the FORM D of FC is not modified till date and the proceedings of R2 in SCC is hence illegal. It is further stated that no report filed by R1 before this Tribunal has intimated of the relinquishment of security by FC. It is stated that by virtue of **Hon'ble SC in P Chengalvaraya Naidu V. Jagannath & Ors.**, the action of R1 in not producing all documents relevant to litigation is guilty of fraud. It is stated that R1 has concluded 13 SCC meetings with R2 illegally even failed to keep CD as going concern. It is further submitted that applicant had submitted multiple requests to R1 to supply Form D but failed to provide due to which he had to approach another Homebuyer to access the document. It is stated that applicant on multiple occasions objected to R2 FC participation in SCC and his vote share. It is also learned that R3 SCC member being homebuyer has also objected to R2's position in SCC. R1 has therefore illegally conducted SCC meetings and taken decisions. It is further stated that R2 in the latest DRT proceedings has moved another application to implead R1 as party which show that R2 FC intends to continue enforcement of security and aims to defeat the claim of CD.

6. R1 in reply states that MA(IBC)/207/KOB/2020 filed by applicant to assail liquidation order as well as seeking relief (a) and (c) of this application was dismissed by this Tribunal and later by Hon'ble NCLAT and Hon'ble Apex court in appeal. Thereafter in IA(IBC)/161/KOB/2021 by applicant sought to adjudicate upon the disputed claim of R2 FC was also dismissed by this Tribunal. For these reasons the application is hit by res judicata.
7. As to whether R2 FC has relinquished its security interest in respect of the Schedule A to F properties, it is stated that despite inadvertent error in Form D, the conduct of FC was to remain as part of liquidation process and actively participated in SCC and shown no interest to sell the assets otherwise as was confirmed in the 1st SCC meeting. It is stated that the said fact was assured to liquidator and sworn by affidavit before this Tribunal. Further it is stated that as per section 52(2) and (3), had security interest not relinquished, the R2 FC had to inform about the sale, the price, manner of sale, and comply with the provisions as per regulation 21A. It is again stated that practically, the security comprised of 66 cent land and 2 shops of which was part of an 88-cent land and to alienate the secured asset for sale out of this was impossible. Further if FC had sold this asset, liquidator had only 2 cars and furniture for sale which will be a meagre amount. Further it is stated that 9 e auctions took place with support of SCC. It is further stated that as per regulation 21A, if FC does not complete sale within 90 days of liquidation commencement, the asset

automatically becomes part of liquidation estate. It is stated that the object of applicant is to stall the liquidation.

8. It is further stated that the issues pertaining to counter claim and its adjudication was considered by Hon'ble NCLAT which observed that mere filing of counter claim on account of loss of profit due to non-selling of apartments and refund of money to allottees has to be decided by DRT and does not form part of CIRP. Further prayers sought to reassess the claims, reconstitute COC was also dismissed vide the appeal. It is stated that the applicant is interested to continue DRT proceeding and not the FC. With regard to management of CD as going concern, the issue was dealt by this Tribunal in MA(IBC)/207/KOB/2020 and also the liquidator on the situation assessed that it is impractical to sell CD as going concern. The fact that Directors report pertaining to FY 2018-19 also acknowledges same. The project of 21 storey twin tower had not been completed except piling work inspite of 10 years since its commencement. Further it is contended that the decision in **Anheuser Busch Inbev India Limited vs Resolution Professional** does not apply in this case as it was rendered during CIRP and was on account of arbitration claim unlike the present counter claim which is on account of damages. Again, in IA/64/KOB/2023, the same issue was raised which was dismissed by this Tribunal.
9. The R2, FC stated that the FC has not procured any recovery certificate from DRT to continue with security enforcement.

Further it is the choice of the FC to proceed with security enforcement and that cannot be a valid reason for keeping liquidation in abeyance. In IA/64/KOB/2023 which was dismissed by this Tribunal, the FC had categorically stated that it relinquished the security interest and any fact contrary to above is incorrect. Further it stated that in DRT, moratorium imposed had effected in sine die adjournment of proceedings and it is the applicant which approached Hon'ble Kerala High court to reopen the DRT proceedings. The counter claim in nature of damages is again unsustainable and is not a valid ground to seek exclusion from liability. It is stated that the applicant and R3, homebuyer is colluding with each other to defeat liquidation process.

10. R3 in its reply stated that it had raised serious concerns against conduct of R1 in liquidation. It is stated that the application dismissed on these issues is pending before Hon'ble NCLAT in appeal. It is stated that Form D of FC had not relinquished security interest and was not modified till date.

11. In rejoinder the applicant relied on Hon'ble Kerala HC in **Jayaprakashan K v State of Kerala(2023 KHC 327)** to state that when law state a certain procedure it is to be done exactly and not any other way. The applicant compared the prayers in each MA(IBC)/207/KOB/2020 and IA(IBC)/161/KOB/2021 and present application to state that this application is not hit by res judicata. With regard to IA/64/KOB/2023 it is stated the said application was filed by a homebuyer and this applicant was a

respondent. Besides for res judicata, the application should be “*heard and finally decided*”. It is stated that it is because of FC that the counter claim is still undecided by DRT and it is necessary to adjudicate and set off claim.

12. Heard the submissions and perused the documents on record. The applicant in the course of argument informed that the prayer(e) is not pressed. Grounds in support of prayer (a) to (c) of this application concerns solely with regard to relinquishment of security interest by R2 FC in the liquidation process which as per the applicant is not carried out by the FC to RP within the model timeline of liquidation and in the Form D as required under law. For these reasons, the R2 FC should be not part of SCC and all the proceedings should be void and the claim of creditors should be reassessed. In this respect, we are inclined to look at Regulation 21A of the IBBI (Liquidation Process) Regulations 2016 which provides that a secured creditor is required to intimate its decision of not relinquishing the security interest within 30 days from the liquidation commencement date, failing which, the assets covered under the security interest shall be presumed to be part of the liquidation estate. Further, steps are to be taken by the FC who proposes to not relinquish his security interest such as pay CIRP/liquidation cost in full to RP, pay the excess of the realized value of the asset, pay the share of Workmen’s dues which is realisable from security if such creditor decides to proceed with security enforcement. In the present application as well as throughout the liquidation process pertaining to this CD, it is

noticed that the statement in Form D is nothing short of an inadvertent error., Nothing shows us that the FC had any intent or taken any steps to enforce its security interest or recover the money outside IBC process. Hence the presumption as to the relinquishment in regard to the security interest on assets created in favour of FC is automatic and the same asset is undoubtedly deemed as part of the liquidation estate. Hence what appears plainly is that there exists no such issue as to whether an error in terms of a mere procedural formality or the action of R2 FC representing in the DRT proceeding will render a contrary intention of R2 FC to this Tribunal.

13. Further question that arises is whether the liquidator ought to have contested the counter claim of CD. In this matter it is clear by the averments and records that CD had fallen to insolvency out of its bad business decisions. The counter claim before DRT based out of damages on account of loss of profit to CD for non-sanction of timely loans is clearly not yet adjudicated on merits. Be that as it is, the viability of carrying out such counter claim proceeding is the decision of SCC on advice from RP. Ultimately it is the creditors who are affected by these decisions and applicant being a suspended director has no role to play in the same. It cannot be left acknowledged of the fact that the decisions of RP/liquidator should necessarily be viewed giving due regard to the time bound nature of the IBC process. Lastly taking note of fact that this Tribunal had considered these questions and issues in prior applications also, we find no merit in this application which is liable to be rejected.

14. In result, **IA (IBC)/377/KOB/2023** is, **dismissed** and disposed of, accordingly.
15. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
16. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.
17. File be consigned to records.

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this, the 17th day of April, 2024.

Rohit/LRA