

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH

C.A(IB) No. 540/KB/2017

C.P(IB) No. 73/KB/2017

In the matter of:

An application for direction to Jammu & Kashmir Bank having its branch at D-63, Basant Lok, Vasant Vihar, New Delhi - 110 057 to hand over the control & operation of the Current Account No. 0369010100000714 (Escrow Account) to the Liquidator and refund of money debited through the said account after declaration of moratorium under Section 14 of the IBC, 2016 ;

And

In the matter of:

Anil Goel, son of Late Dwarka Dass, aged 56 years, Insolvency Professional having registration number IBBI/IPA-001/IP-P00118/2017-18/10253 and residing at B-31, First Floor, Kailash Colony, New Delhi - 110 048

... Applicant/Liquidator

And

M/s. REI Agro Limited, a company incorporated under the Companies Act, 1956 having its registered Office at Everest House, 46C, Chowringhee Road, Kolkata WB 700 071

... Corporate Debtor

Coram: Mr. Jinan K.R., Member (Judicial)

For the Applicant and the Liquidator :

1. Smt. Mamta Binani, Pr. CS
2. Miss Kiran Sharma, Pr. CS

For the J& K Bank :

1. Mr. Abrojit Mitra, Senior Advocate
2. Mr. Munawar Nasseem, Advocate
3. Mr. S. Nigam, Advocate
4. Mr. Arya Chatterjee, Advocate

Date of pronouncement of the order: 09-02-2018

O R D E R

Per Shri Jinan K.R., Member(Judicial)

1. This is an application filed by the Liquidator under Section 35 of the Insolvency & Bankruptcy Code, 2016, praying for issuance of the directions to one of the Financial Creditors of the Corporate Debtor, namely, J& K Bank to take into the custody and control of the Current Account No. 0369010100000714(Escrow Account) and to vest with the Liquidator and also transfer the entire amount appropriated from the said Escrow account during the moratorium period to the Current Account and other Bank accounts in control of the Liquidator.
2. The above referred Company Petition CP(IB) No. 73/KB/2017 was filed by one Shri Surendra Kumar Joshi as against the Corporate Debtor, REI Agro Limited for initiating Corporate Insolvency Resolution Process.
3. This adjudicating authority vide its Order dated 27-02-2017, admitted the application and in order to initiate the Corporate Insolvency Resolution Process, Mr. Anil Goel a Resolution Professional was appointed.
4. However, the Resolution Professional was not succeeded in finding out a Promoter for the revival of the Corporate Debtor and thereby, vide Order dated 24-08-2017, this adjudicating Authority passed an order under Section 33 of Chapter III of the Insolvency & Bankruptcy Code, 2016, requiring the Corporate Debtor to be liquidated and appointed the very same Resolution Professional, Mr. Anil Goel as the Liquidator. He filed this application contending that the Financial Creditor, namely, J&K Bank is not acting in accordance with the instructions of the Liquidator and it is taking earnest effort in dealing with the Security interest created by the Corporate Debtor.

5. The Liquidator also contends that the J&K Bank (in short the Bank) was requested to transfer the amount recovered as term loan instalment against the revenue and other receipts credited in the said Escrow Accounts after declaration of the Moratorium and that the Bank did not comply with the directions of the Liquidator.

6. According to the Learned Counsel for the Liquidator, the Bank is duty bound to provide access and operation rights of the security interest to the Liquidator to meet the requirement of liquidation and also liable to transfer the entire amount appropriated by the Bank during the moratorium period to the current Accounts in the control of the Liquidator.

7. Upon the aforesaid contentions the Liquidator prays for issuance of the directions as refereed above.

8. The Bank filed its reply contending, in brief, is the following:

9. The Corporate Debtor who had availed the term loan facility to the tune of Rs. 24,16,00,000/- (Rupees Twenty Four Crores Sixteen lacs only) executing the Facility Agreement dated 20-03-2014 created the first ranking exclusive charge by way of assignment/hypothecation of all the Book Debts, Operating cash flows, receivables, commissions, revenues whatsoever nature and wherever arising from the Project/WTGs (both present and future of the Corporate Debtor).

10. The Bank further contends that by way of mortgage of all the immovable properties owned by the Corporate Debtor, leased out in favour of the Corporate Debtor including the immovable properties, being utilised for the Project i.e. the land on which the WTGs, are installed and that in pursuance of the execution of the facility agreement, the Corporate Debtor also entered into an Escrow Agreement towards the term loan facility for the purpose of depositing of the proceeds, revenue and earning of the

Projects including but not limited to the insurance proceeds and lease rentals in the Escrow Account.

11. The Bank further alleged that the Corporate Debtor had failed in the repayment of the instalments upon due dates and had become unable to or admitted in writing its inability to pay its debts as they mature and files Petition for suspension of payments or other relief of debtors in respect of or affecting all or any part of its debt.

12. Accordingly, the term loan facility has been recalled by the Bank on 20-02-2015 and upon recalling the loan, the Corporate Debtor was not permitted to withdraw any amount from the escrow account until all amounts due and payable by the Corporate Debtor to the Creditor in terms of the Facility Agreement.

13. The Bank further alleged that the above referred assets have been charged to the Bank exclusively. It has got every right to deal with it and it has got absolute right over and control of the Escrow Account vested with the Creditor and the vesting was prior to the initiation of the Corporate Insolvency resolution Process and thereby the moratorium under Section 14 of the Code does not apply.

14. The Bank also contends that the Liquidator has no right over the Escrow Account and since in order to see that the windmill (WTG) is in operation, the Bank is paying the charges towards the operation, maintenance of the WTGs and that payments were made after receiving the confirmation from the Liquidator and that the Liquidator did not take any steps to maintain the WTGs which has been exclusively charged to the Bank as a Creditor and therefore, the application is not at all maintainable and no direction can be issued as against the Bank as requested by the Liquidator. Upon the said contentions, the Bank prays for dismissal of the Application.

15. Heard the Ld. Counsel on behalf of the Liquidator as well as the Ld. Counsel appearing on behalf of the Bank at length and perused the record.

16. Upon hearing the argument and going through the documents annexed to the reply submitted by the Bank, the point that has to be answered in the Application is whether this adjudicating authority can issue a direction to the Bank for handing over the control of its secured assets which includes operation of WTGs. (Wind Turbine Generator, in short Windmill) and the Escrow Account to which the revenue derived by way of operation of windmill is credited, to the Liquidator?

17. Smt. Mamta Binani, a Pr. CS, appearing on behalf of the applicant and the Liquidator, drew my attention to Section 35(1)(b) of the Insolvency & Bankruptcy Code, 2016, for highlighting an argument that the liquidator is empowered to take custody and control of the assets of the corporate debtor and since the bank who is in the custody of the assets of the corporate debtor, has, in no manner of right, to continue control of the assets which mainly includes the windmill and also has no right to appropriate the proceedings derived out of the operation of the windmill. According to her, this Adjudicating authority is competent to issue directions in order to take into his custody or control of all the assets of the corporate debtor including the secured assets of the Bank subject to Section 52 of the Insolvency & Bankruptcy Code, 2016. She also would submit that since the moratorium becomes applicable as on 27-02-2017, the operation of the Account and appropriating any amount from the accounts by the Bank is illegal and the Bank is liable to revert back the amount appropriated by the Bank so as to restore original status of the account. According to her, the Bank is liable to repay the amount transferred from the Escrow accounts at least during the period of moratorium and also has no right to deal with the secured assets without prior permission of the Liquidator and therefore, this application is liable to be allowed.

18. The secured assets in dispute in the application includes windmills which require day to day maintenance for its smooth running and operation. About 51 windmill originally owned by the corporate debtor. Admittedly, it is the secured assets of the Bank. While ordering liquidation process of the corporate debtor this adjudicating authority observed that **"The WTGs are non-operational due to non-payment of operational and maintenance charges. It was further reported by Resolution Professional that Committee of Creditors(CoC) approved that to facilitate restart of generation of electricity and earning of Revenue amount of outstanding dues may be paid to O&M Agencies and the O&M Agencies shall be paid out of the bank balance available with the current account maintained with Jammu & Kashmir Bank."** The above said facts are revealed from the various progress report submitted by the liquidator. Thus the operation of the Escrow Account by the Bank even during the period of moratorium was with the Bank with in the knowledge of the liquidator and no application seems to have filed by the liquidator during the period of moratorium was in force for preventing the operation and maintenance of the windmills by the Bank.

19. The Ld. Sr. Counsel, Mr. Abrojit Mitra, appearing for the Bank submits that since the windmills had to be maintained and to see that these are in operation, the Bank is liable to pay the maintenance charges towards O&M agencies and the O&M Agencies shall be paid out of the Bank balance available with the current account maintained with the Bank and that the Liquidator has been informed vide letter dated 02-11-2017, expressing the Bank's intention to realise the securities held by it, as the Secured creditors outside the liquidation proceedings, in accordance with Section 52(1)(b) and Section 52(2) of the Insolvency & Bankruptcy Code, 2016.

20. According to the Ld. Sr. Counsel for the Bank, the Bank is interested to enforce its security interests under the SARFAESI Act and that fact is

known to the Liquidator and Section 52 does not prohibit the Bank from realising its security interest, outside the liquidation process and hence no directions as prayed for by the liquidator is to be allowed.

21. Admittedly, the secured assets on which the Liquidator requires to take control over, has been exclusively charged to the Bank. The Bank has been given exclusive charge of the secured assets in dispute by way of a Facility Agreement. The right of the Bank to deal with the secured assets, certainly comes under the purview of Section 52 (4) of the Insolvency & Bankruptcy Code, 2016. It is good to read Section 52(4) of the Insolvency & Bankruptcy Code, 2016. It read as follows:

Section 52(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."

22. A reading of sub-section(4) of Section 52 of the Insolvency & Bankruptcy Code, 2016 above referred, no doubt, a proceeding already initiated by the Bank under the SARFAESI Act, 2002 squarely fall within the purview of Section 52(4) of the Insolvency & Bankruptcy Code, 2016. Therefore, the question is whether the Liquidator can impose any condition on the Creditor against realisation of Security assets which has been exclusively charged to the Bank?.

23. It appears to me that imposition of conditions on the creditors of its rights to initiate the appropriate legal action on the secured assets cannot be done in view of Section 52(4) of the Insolvency & Bankruptcy Code, 2016 read with section 13 of the SARFAESI Act. The Ld. Sr. Counsel for the Bank also drawn my attention to Section 53(1) (b) (i) of the Insolvency &

Bankruptcy Code, 2016, for stressing an argument that the rights to realise the debt covered to a secured assets is equal with the right of the Workmen to realise their dues as per sub-section (i) of Sub Section (1 b) of Section 53 of the Code. It is also good to read Section 53(1) (b) (i) and (ii) of the Insolvency & Bankruptcy Code, 2016. It reads as follows:

Section 53(1) (b):

"(i) Workmen's dues for the period of twenty four months preceding the liquidation commencement date; and

(ii) debts owned to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52".

24. On reading of sub-section(b) (i) and (ii) of Section 53 of the code what I understood is that in a case the secured creditor relinquish the security then alone the creditor can claim equality in regards distribution of assets of the corporate debtor.

25. Here, in the instant case, the Secured Creditor, the Bank herein, does not wish to participate in the liquidation process and not intending to relinquish the security interest and wish to stay outside the liquidation process in regard to the security interests which had admittedly charged to the Bank exclusively.

26. In Pegasus ARC v. Haryana Concast, [(2016) 4 SCC 47] the Hon'ble Supreme Court has held that the secured creditors can exercise such rights of enforcement under the SARFAESI Act and company court or official liquidator cannot interfere in the proceedings under the Act because its provisions are harmonised in respect of dues of workmen and their protection, with Companies Act, 1956, under section 529A. It is good to read Para 30 of the above Judgement. It reads as follows:-

"Thus, it is evident that the required provisions of the Companies Act have been incorporated in the SARFAESI Act for harmonising this Act with the Companies Act in respect of dues of workmen and their protection under Sec.529-A of the Companies Act. In view of such exercise already done by the legislature, there is no plausible reason as to take recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the company judge or the liquidator. As noted earlier, the Official Liquidator, as a representative of the borrower company under winding up has to be associated, not for supplying in omission in the SARFAESI Act but because of express provision therein as well as in the roles. Hence, the exercise of harmonising the act, the Supreme Court has to undertake in the context of the SFC Act or the RDB Act is no longer warranted in respect of the SARFAESI Act vis-à-vis the Companies Act"

27. However, the rights of secured creditors have been modified by the Insolvency and Bankruptcy Code, 2016. As per the code in a case, a Resolution Professional did not submit any resolution plan approved by the Committee of Creditors (COC), and order of liquidation to be passed, in such case, no suit or proceedings can be filed against the Company, except the enforcement of security by the secured Creditors. In the case in hand the assets in dispute is a secured asset of the Bank. Admittedly, the Bank herein, already initiated the proceedings under the SARFAESI Act.

28. Section 14 of the Insolvency & Bankruptcy Code, 2016 provides that, on commencement of the Insolvency Resolution Process, the Adjudicating authority, shall, by order, declare moratorium for prohibiting final or continuation of any pending suit or proceedings and any action for enforcement of security under the SARFAESI Act. However, order of moratorium shall be effective only till the Insolvency Resolution Process is completed.

29. Here, in the instant application, the Insolvency Resolution Process is completed and a Liquidator has been appointed and the Corporate Debtor is undergoing the liquidation process. Therefore, the question of secured creditors' right to deal with the secured assets, cannot be questioned by the Liquidator on account of application of moratorium, for the period, which has been already expired. But the Liquidator has got every right to have verification of security interests and the account. Here, in this application, the Bank does not interfere the right of the Liquidator regarding the verification of the security interests held by the Bank.

30. Upon the above said discussion it appears to me that the option is with the secured Creditors to remain outside the liquidation proceedings and they can enforce the securities at their option. But, in such a case, their claim is not given the priority over other claimants, including the Government dues, as per the provisions of the Insolvency & Bankruptcy Code, 2016. If the secured Creditors join the liquidation proceedings and relinquish the security interests to liquidation assets, their claims along with the workmen dues for 24 months are given the priority over all other claims in accordance with section 53 of the code. As per section 36 (3) (g) of the code formation of Liquidation Estate of the assets of the corporate debtor in case of an assets secured to a creditor is also outside the scope of inclusion. Section 36(3) (g) of the code read as follows.

" any asset of the corporate debtor in respect of which secured creditor has relinquished security interest"

31. So only in case of relinquishment an asset secured to the creditors can be included in the estate to be formed by the liquidator. Therefore, in order to claim priority as laid down in the code then alone a Bank need to relinquish the securities. As per section 52(5) the secured creditor can have its own recourse of realisation of a secured assets and can approach before

this Adjudicating Authority if any resistance from anybody. Section 52(5) read as follows :

"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."

32. Thus, a reading of above refereed provisions of the Insolvency & Bankruptcy Code, 2016 what I understood is that subject to section 52(7) of the code the secured creditor can proceed with the remedy available to have recourse with the secured assets in accordance with Law for the time being in force. That being so, no directions interfering the right of a secured creditor can be passed in a case of this nature. Since the secured creditor already initiated action under section 13 of the SARFAESI Act, this Adjudicating Authority Cannot issue direction against the Bank holding that the Liquidator can have any manner of control over the assets secured to the Bank. However, the liquidator's right to verify the account and participation in the sale proceedings if any to be initiated by the Bank so as to see the interest of workmen dues is to be safeguarded and to see whether any surplus comes out of the sale cannot be interfered by the Bank. Upon the above said observation this application is liable to be dismissed. Accordingly, it is dismissed. No order as to cost.

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(Jināh K.R.)

Member(Judicial)

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