(2021) 11 NCLT CK 0039

In the National Company Law Tribunal

Case No : IA No. 977/MB/C-II/2021 In C.P (IB) No. 1832/MB/C-II/2017

IDBI Bank Limited APPELLANT

Vs

Mr. Abhijit Guhathakurta RESPONDENT

Date of Decision : 10-11-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 35, 35(j), 36, 36(3)(c), 53, 53(1)(a), 53(1)(b)(i), 60(5)
Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 — Regulation 42, 42(1)
Companies Act, 2013 — Section 230, 326

Citation : (2021) 11 NCLT CK 0039

Hon'ble Judges : Ashok Kumar Borah, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Zal Andhyarujina, Pulkit Sharma

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member (Technical)

1. The present application is moved by IDBI Bank Limited (hereinafter called as "the Applicant") against the Liquidator of the EPC Constructions India Limited (hereinafter called as the "Corporate Debtor") Mr. Abhijit Guhathakurta (hereinafter referred to as "Liquidator") Under Section 60(5) of Insolvency and Bankruptcy Code, 2016.

The Applicant has prayed for grant of following reliefs.

(a) That this Tribunal be pleased to direct the Respondent to permit the Financial Creditors of the Corporate Debtor to distribute an amount of INR 223 crore from the cash balance available with the Corporate Debtor in the proportion of their respective voting share in the erstwhile CoC;

(b) That this Tribunal be pleased to permit the Financial Creditors of the

Corporate Debtor to distribute the cash balances available with the Corporate Debtor, other than such cash which the is currently required for the operation of the Corporate Debtor as a going concern, in such manner and proportion as may be determined by the Financial Creditors;

(c) That this Tribunal may be pleased to grant interim and ad-interim reliefs in terms of prayers (a) to (b) above;

(d) That the Tribunal be pleased to pass any other Order in the interest of justice in favour of the Applicant herein.

A. Background facts and circumstances

2. The present application was filed by IDBI Bank Limited, on behalf of itself and other financial creditors of M/s EPC Constructions India Limited ("Corporate Debtor"), viz. Central Bank of India, EXIM Bank, Corporation Bank (now Union Bank of India), ICICI Bank, Laxmi Vilas Bank, Axis Bank and Union Bank of India (hereinafter collectively referred to as the "Applicant"), pending the implementation of the approved Resolution Plan filed by Royale Partners Investment Fund Limited (hereinafter, "the Resolution Applicant").

3. Under the approved Resolution Plan, the Resolution Applicant was inter alia required to make an upfront payment of Rs. 420 crores to the financial creditors. However, the Resolution Applicant failed to implement the same within the prescribed time period and therefore, by the present application, the Applicant prayed for a direction to the Respondent (then in the capacity of the Monitoring Agency) to distribute an amount of Rs. 223 crores which was available as cash balance with the Corporate Debtor to the financial creditors.

4. However, despite orders passed by this Tribunal and the NCLAT on 18th February 2020 and 25th June 2020, the Resolution Applicant failed to implement the approved Resolution Plan. In light of the aforesaid, this Tribunal, vide Order dated 7th May 2021, directed liquidation of the Corporate Debtor with effect from 18th May 2021 (hereinafter, "Liquidation Order").

5. Pursuant to the admission of the Corporate Debtor into liquidation, distribution out of the estate can only made in accordance with the provisions of the Code and therefore, in view thereof, Applicant filed an Additional Affidavit dated 16th July 2021, suitably modifying the prayers as follows -

"a. That this Hon'ble Tribunal be pleased to direct the Respondent, in his capacity as the Liquidator, to distribute the available cash balances of the Corporate Debtor, amongst the stakeholders of the Corporate Debtor in favour of whom the same are charged, including the Applicants herein, as per the waterfall mechanism set out in Section 53 of the Code; and amongst the workmen of the Corporate Debtor as required under Section 53(1)(b)(i) of the Code, after accounting for the costs/ reserving the estimated costs under Section 53(1)(a) - insolvency resolution process costs and liquidation costs;"

6. The Liquidator has, vide its Reply dated 3rd August 2021, stated that that he does not have any objection to distribution of surplus cash balance of the Corporate Debtor up to an extent of Rs. 220 crores amongst the stakeholders in accordance with the order of priority and in the manner specified under Section 53 of the I&B Code, subject to an undertaking that, if there is any shortfall in meeting the requirements of the liquidation process, the amounts shall be replenished by the financial creditors within 15 days of demand.

B. Submissions made on behalf of the Applicant

7. It is submitted that, in the facts of the present case, the Applicant is seeking that the "cash balance" forming part of the "liquidation estate" available with the Corporate Debtor be distributed to the stakeholders. Under Section 36(3)(c) and (i) of the Code, the cash balances available with the Corporate Debtor form part of the liquidation estate. The relevant extract of Section 36 of the Code is as follows -

"36. Liquidation estate. -

(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

....

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

(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 workmen 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;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

8. Under Section 35(j) of the Code, the Liquidator has the power to settle claims of creditors and to distribute the "proceeds". The relevant portion of Section 35 reads as follows -

"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: -

.....

(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code; ....."

9. Further, Section 53 of the Code provides that the "proceeds from the sale of the liquidation assets shall be distributed" as per the order of priority set out therein. Section 53 does not expressly provide that a distribution from the liquidation estate cannot take place till such time as there is a sale of the

liquidation assets. Section 53 is extracted as follows -

53. Distribution of assets. -

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely: -

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:

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

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation. - For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

10. By the present Applicant, the Applicant volunteers that the cash balance may be distributed in the priority as set out in Section 53 of the Code. As such, all CIRP costs and estimated liquidation costs as well as workmen dues are being accounted for by the Applicant.

11. Further, Regulation 42(1) of the IBBI (Liquidation Process) Regulations, 2016 stipulate that subject to Section 53 of the Code, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority. In the present case, we verily believe that the above requirements have already been fulfilled. From a literal reading of Regulation 42, it is relevant that distribution can commence once the list of stakeholders and the asset memorandum has been filed and that, such distribution shall follow the distribution mechanism set out in Section 53. Regulation 42 is as follows -

"42. Distribution.

(1) Subject to the provisions of section 53, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.

(2) The liquidator shall distribute the proceeds from realization within ninety days from the receipt of the amount to the stakeholders.

(3) The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made."

12. The Applicant submits that the Order passed by NCLT, Kolkata Bench in Varsana Employee Welfare Association vs Anil Goel [IA (IB) No. 1546 in C.P. (IB) No. 543 of 2017] dated 26th June 2020, is not applicable to the present case, for the following reasons -

12.1. The Applicant respectfully submits that at the outset, the order and judgment is not binding upon this Tribunal.

12.2. The facts of the order are distinguishable; the workmen dues were not accounted for by liquidator and the salaries of employees were reduced.

12.3. An application under Section 230 of the Companies Act, 2013 for compromise and arrangement was pending for consideration and therefore, in that case the NCLT held that the Corporate Debtor could be revived. There is in the present case, no such possibility of revival of the Corporate Debtor; proceeding with liquidation is the only option available to the Liquidator.

12.4. The distribution had taken place in contravention of Regulation 42(1) of the

Liquidation Regulations i.e. the distribution had taken place before the Liquidator had followed the procedure of submitting the list of creditors and asset memorandum. In the present matter, the Applicant verily believes that the same has been filed before this Tribunal on 17th July 2021 and 3rd August 2021 respectively.

13. Further, in the present case, the Liquidator vide its Reply has stated that, the Corporate Debtor has a balance of approximately Rs. 300 crores in its bank accounts, which includes funds received from invocation of performance bank guarantee of Rs. 42 crores. In addition, there is additional margin money of approx. Rs. 13 crores also available. The Corporate Debtor further also generates approximately Rs. 6 - 7 crores in cash every month. The Respondent submits that therefore, out of the balance of Rs. 300 crores and taking into account the estimates costs and expenses, the amount of Rs. 220 crores ought to be distributed to the stakeholders, in accordance with provisions of the Code.

14. Without prejudice to the aforesaid, the Applicant undertakes that in the event of any shortfall in meeting the requirements involved in the liquidation process, the Applicant (including itself and all other lenders) agree and undertake to replenish the deficit amount within fifteen (15) days from the receipt of the demand by the Respondent / Liquidator.

15. In view of the aforesaid, the Applicant prays that the Respondent / Liquidator be directed to distribute the available cash balance amongst the stakeholders in the order of priority stipulated in Section 53 of the Code.

Submissions by Respondent/ Liquidator:

16. The present application has been filed by IDBI Bank in its capacity as a financial creditor and lead lender of EPC Construction India ("Corporate Debtor") as well as a representative of all other lenders of the Corporate Debtor forming part of the Joint Lenders meeting held on 18.03.2021, inter-alia, seeking a direction against the Respondent / Liquidator to distribute the available cash balance of the Corporate Debtor, amongst the stakeholders of the Corporate Debtor in favour of whom the same are charged, including the Applicants herein, as per the waterfall mechanism set out in Section 53 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code"), and amongst the workmen of the Corporate Debtor as required under Section 53 (1) (b) (i) of the Code after accounting for the costs/ reserving the estimated costs under Section 53(1) (a) towards Insolvency Resolution Process costs and the liquidation costs.

17. The consolidated reply filed by the Respondent on 03.08.2021 in response to this application and the additional affidavit filed by the Applicant is deemed to be incorporated herein by reference, and the contents of the same are not repeated herein for sake of brevity.

18. Subject to the order and / or directions of this Tribunal, the Answering Respondent does not have any objection to distribution of surplus cash balance

of the Corporate Debtor upto an extent of INR 220 Crores amongst the stakeholders in accordance with the order of priority and in the manner specified under Section 53 of the I&B Code, However, the said distribution may be made subject to either an undertaking from, or, a direction to the financial creditors that, if there is any shortfall in meeting the requirements involved in the liquidation process, then the said amount shall be replenished by the financial creditors within a period of fifteen (15) days, from the date of demand by the Answering Respondent. It is submitted that the financial creditors have already communicated their willingness to the condition during the course of hearing on 07.09.2021 before this Tribunal.

19. The rationale / reason, basis which the Respondent / Liquidator herein has arrived at the aforementioned conclusion are, inter alia, as under -

a. As per records, Corporate Debtor has a balance of approximately INR 300 (three hundred) crores in its bank accounts - which includes funds received from invocation of performance bank guarantee of INR 42 (forty-two) crores. In addition, there is additional margin money of approx. INR 13 (thirteen) crores also available. The Corporate Debtor further also generates approximately INR 6-7 crores in cash every month.

b. Most of the business of the Corporate Debtor is non-functional. Only the equipment leasing division of the Corporate Debtor is operational. All the other division of the Corporate Debtor are being utilized for recovery of dues. The Corporate Debtor at present has a total 109 employees along with 14 employees serving notice period and superannuation. The Respondent estimates that, the process of liquidation, in all likelihood, subject to other external factors should be completed within a year. Therefore, as per the estimate of the liquidator, the cost of the liquidation process may not exceed INR 80 crores approximately - which has been computed by factoring in the receipts during liquidation period minus expenses incurred during the said period and CIRP costs.

c. Per Clause 1.11.1(n) of the Request for Resolution Plan ("RFRP") dated 04.10.2018, inter alia, provided that the available cash balance in the books of the Corporate Debtor up to the date of implementation of the resolution plan was to accrue to the benefit of the financial creditors.

Findings:

20. Having considered the facts stated as aforesaid and totality of the circumstances this Bench is the view that this application is premature at this juncture. Implementation of approved Resolution Plan failed consequently the Company has been put in the Liquidation, but the company is still working and therefore distribution of its cash balance will derogate the value of company which will meager the possibility of achieving maximization of value of assets. Hence this application is rejected.

The Liquidator is directed to submit progress report along with revised list of stakeholders of the Corporate Debtor. Further, Liquidator also directed to take steps towards completion liquidation of the Corporate Debtor in time bound manner then start distribution in one go.

21. With the aforesaid observation the present IA No. 977 of 2021 In C.P (IB) No. 1832/MB/C-II/2017 stands disposed of.

