
(2020) 08 NCLT CK 0017

In the National Company Law Tribunal

Case No : Miscellaneous Application No. 3902 Of 2019 In Company Petition (IB)
No. 18/Nclt/Mb Of 2017

Sunil G. Nanal

APPELLANT

Vs

Facor Steels Limited

RESPONDENT

Date of Decision : 21-08-2020

Acts Referred:

Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulation, 2016 — Regulation 33

Insolvency And Bankruptcy Code, 2016 — Section 10, 35, 35(f), 52, 53, 53(1), 53(1)(a), 53(1)(b)(i)

Companies Act, 2013 — Section 326

Citation : (2020) 08 NCLT CK 0017

Hon'ble Judges : Suchitra Kanuparthi, J;V. Nallasenapathy, Member (Technical)

Bench : Division Bench

Advocate : Rohit Gupta

Final Decision : Disposed Of

Judgement

V. Nallasenapathy, Member (T)

1. The applicant/liquidator of the Corporate Debtor, Facor Steels Limited, has filed this application for the following reliefs:-

a) That the Assets of M/s. Facor Steels Limited, Nagpur be allowed sale as Private contract to Resolution Applicant M/s. R.C. Plasto Tanks and Pipes Private Limited, Nagpur for a total consideration of Rs. 15,00,00,000/-(Rupees Fifteen Crores Only) excluding applicable indirect taxes, stamp duty, cess, if any.

b) That this Hon'ble Tribunal be pleased allow the proceeds of the Sale be distributed by the Liquidator as per Section 53 of the Insolvency and Bankruptcy Code, 2016.

c) To provide such other relief as deemed provided.

2. The applicant submits that he was appointed as the Liquidator of the

Corporate Debtor- Facor Steels Limited by an order of this Bench dated 26.06.2018. He submits that section 35(f) subject to section 52 of the Insolvency and Bankruptcy Code, 2016 (hereinafter "the Code") empowers liquidator to sell the immovable properties and actionable claims of the Corporate Debtor in liquidation through public auction or private contract.

3. The applicant further submits that he is also acting as the Resolution Professional of another company, namely Vidarbha Iron and Steel Corporation Limited (VISCO). VISCO is a guarantor to the lenders of the Corporate Debtor. The said VISCO had mortgaged its land and building located at 46 A & B, MIDC Industrial Estate, Hingana Road, Nagpur - 440028. VISCO had leased out its land to the Corporate Debtor. The Corporate Debtor had constructed factory structure and sheds admeasuring 33,152 sq. mtrs. on the leasehold land provided by VISCO. The said factory structure and sheds are inseparable from the land without affecting its usefulness.

4. VISCO had filed a petition under Section 10 of the Code which was admitted by this Tribunal vide its order dated 12.03.2018. Further, the resolution plan submitted by R C Plasto Tanks and Pipes Private Limited (RC Plasto), Nagpur for VISCO was approved by this Tribunal by an order dated 23.08.2019 in M.A. No. 849/2019 in C.P. No. 1660/2017. It is submitted that the Resolution Plan proposed by the Resolution Applicant of VISCO is a consolidated proposal in respect of VISCO as well as the assets of the Corporate Debtor i.e. the factory structure and sheds. It is also submitted that the Committee of Creditors (COC) of VISCO consist of the entire class of secured creditors of the Corporate Debtor, who hold the first pari passu charge on all the assets of the Corporate Debtor.

5. It is submitted that it is difficult to segregate the assets of VISCO and the Corporate Debtor without causing any harm to its usefulness. It is submitted that if the assets of the Corporate Debtor are to be sold separately to different parties then most part of the building which is owned by the Corporate Debtor will have to be demolished which will substantially affect the realisable value. Further such demolition will also amount to violating the MIDC norms with respect to the percentage of construction and render the purchase of land unviable for the Resolution Applicant of VISCO.

6. It is further submitted that the secured creditors who have security interest over the assets of the Corporate Debtor and who hold exclusively pari passu charge on the assets of the Corporate Debtor have agreed for the sale of assets of the Corporate Debtor to RC Plasto, the Resolution Applicant of VISCO. It is submitted that RC Plasto is willing to purchase the structure for a sum of Rs. 15 Crores, which is over and above the liquidation value of the Corporate Debtor. The applicant submits that the following are the details of valuation of the assets of the Corporate Debtor:

Sr. No.

Name of the Valuer

Forced Liquidation value of the Assets-Rupees

1.

Hemant Ambaselkar

15,78,82,581.00

2.

Pravin Zadgaonkar

9,80,00,000.00

Average value pursuant to Regulation 35 (3) (4) of the Insolvency Bankruptcy Board of India (Liquidation Process) Regulations, 2016

12,79,41,291.00

7. It is further submitted that considering the unique situation of the Corporate Debtor, it is imperative to sell the assets of the Corporate Debtor by way of private contract to RC Plasto. Hence this application.

8. Heard the counsel for the applicant and perused the pleadings and the valuation report given by the valuers. This Bench directed the applicant on 26.02.2020 to serve copies of this application to the secured creditors of the Corporate Debtor in liquidation and get NOC from the secured creditors in whose favour security interest was created over the assets of Corporate Debtor proposed to be sold by private treaty to RC Plasto for Rs. 15 Crores. The applicant has filed an affidavit stating that they have served copies of the application by E-mail as well as Registered Post with acknowledgement due on 28.02.2020 to the following secured creditors:

i. Mr. R.C. Das, Assistant General Manager of Bank of India having office at Bank of India, Visakhapatnam Main Branch, 47-11-35, Rednam Estate, 1st Lane, Warakanagar, Visakhapatnam - 530016 (A.P.).

ii. Mr. R. Kalyan Sundarm Chief Manager of India Overseas Bank, having office at 47-15-12, Station Road, Dwarka Nagar, Vishakhapatnam - 530016 (A.P.).

iii. Ms. Pooja Ashara, Manager of Invent Asset Securitization and Reconstruction Private Limited Representing Trusts - INVENT/1415/S32, INVENT/1516/S48, INVENT/1516/S4 and INVENT/1516/S53, having office at 107, 10th Floor, Jolly Maker Chambers - II, Nariman Point, Mumbai - 400 021.

9. It is submitted that two of the creditors viz. Bank of India and Invent Asset Securitization and Reconstruction Private Limited have given their consent for the sale of the property by private contract. The Bank of India, Vishakhapatnam Branch have given their consent on 29.02.2020. The Invent Asset Securitization and Reconstruction Private Limited have given their consent on 03.03.2020. The Indian Overseas Bank, Vishakhapatnam Branch has also given their consent on

04.03.2020 after the hearing in this application was concluded. The applicant by Affidavit dated 3.3.2020 stated that 91.21% (it shall be 90.21 %) of the secured creditors of the Corporate Debtor have given their consent for this sale by private contract.

10. The Liquidator further submits in his written submissions that Bank of India, Vishakhapatnam Branch, Invent Asset Securitization and Reconstruction Private Limited and Indian Overseas Bank, Vishakhapatnam Branch, constituting 41.34%, 48.87% and 9.79% respectively of the secured loan, have given their consent for the sale of the property of the Corporate Debtor by private treaty. These three creditors constitute 100% of the secured creditors in favour of whom security interest has been created by the Corporate Debtor.

11. Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, provides as below:-

"33. Mode of sale.

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-

(a) the asset is perishable;

(b) the asset is likely to deteriorate in value significantly if not sold immediately;

(c) the asset is sold at a price higher than the reserve price of a failed auction; or

(d) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(a) a related party of the corporate debtor;

(b) his related party; or

(c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties".

12. On seeing the above Regulation, it is clear that the Adjudicating Authority has the power to permit the private sale subject to certain conditions. In the case in hand since the secured creditors have already given their consent for private sale, this Adjudicating Authority is of the opinion that the request of the

Liquidator be considered. Accordingly, the sale of the property of the Corporate Debtor by private treaty is allowed and liquidator is permitted to sell the property i.e. factory structure and sheds for ` 15,00,00,000/- (Rupees Fifteen Crores Only) excluding applicable indirect taxes, stamp duty, cess, if any.

13. Further, Section 53 of the Insolvency and Bankruptcy Code, 2016 provides as below:-

"53. (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 and in such manner 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."

Therefore, in view of the above provisions of Section 53 of the I&B Code, 2016 the liquidator have to act as provided under Section 53 of the Code for which the specific direction is not required from this Adjudicating Authority.

14. Also, Section 35 of the Insolvency and Bankruptcy Code, 2016 provides as below:-

"35. (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:-

(a) to verify claims of all the creditors;

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

(c) ...

(d) ...

(e) ...

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.]

(g)...

(h)...

(i)...

(o) to perform such other functions as may be specified by the Board.

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53:

Provided that any such consultation shall not be binding on the liquidator:

Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board".

15. In view of the above provisions of Section 35 and Section 53 of the I&B Code, 2016 the liquidator is also seeking permission of this Bench to distribute the proceeds of the sale.

16. However, the liquidator has to arrive at the amount available for distribution after deducting the costs, if any, as required under section 53(1)(a). Further there are no details as to amount payable to labourers in terms of section 53(1)(b)(i). Hence no directions can be given in respect of this prayer at this stage and he has to file application providing all the details preferably by serving a copy to the security interest holders over this asset.

17. MA is partially allowed and disposed of.