

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

Coram

Before Shri Jinan K.R, Hon'ble Member(Judicial)

**CA(I.B.) No. 392/KB/2018 & CA(IB) No.638/KB/2018
in CP(IB) No.571/KB/2017**

IN THE MATTER OF:

Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016;

-And-

IN THE MATTER OF:

Edelweiss Asset Reconstruction Ltd., having its registered office at Edelweiss House, Off. CST Road, Kalina, Mumbai- 400 098;

... **Financial Creditor**

-Versus-

Shree Coke Manufacturing Company Private Limited, having its registered office at IISCO House, Block-B, 10th floor, Room No.40, 50 Chowringhee Road, Kolkata- 700 071;

... **Corporate Debtor**

Counsels appeared:

- | | | |
|--------------------------------------|---|----------------------------|
| 1. Mr. Ratnanko Banerji, Sr.Advocate |] | For the Financial Creditor |
| 2. Mr. Souvik Mazumdar, Advocate |] | |
| 3. Mr. Arif Ali, Advocate |] | |
| 1. Mr. Arik Banerjee, Advocate |] | Resolution Professional |
| 2. Mr. Anil Agarwal, R.P. |] | |
| 3. Mr. Arun Gupta, FCA |] | |
| 1. Mr. Saket Chaudhary, Advocate |] | For the Corporate Debtor |

Date of Pronouncement of Order : 20.07.2018

ORDER

By this common order I propose to dispose of two applications one filed by the resolution professional under section 33(1) of I&B Code and another with out quoting any section or Rules filed by the Corporate Debtor.

2. Briefly, the facts in **CA(IB) No.392/KB/2018** filed by the resolution professional is the following:

3. This company application was filed by Edelweiss Asset Reconstruction Company Ltd. under section 7 of the Insolvency & Bankruptcy Code, 2016 (in short, the I&B Code) for initiating the CIRP against the Corporate Debtor, namely Shree Coke Manufacturing Co. Pvt. Ltd.

4. Vide order dated 22nd December, 2017 the Adjudicating Authority, admitted the application by appointing Mr. Anil Agarwal as the Interim Resolution Professional. The Interim Resolution Professional, issued publication in the newspapers calling for Expression of Interest from the Resolution applicants. In the meanwhile, in the first CoC meeting held on 18.01.2018, the CoC approved the name of Mr. Anil Agarwal as the Resolution Professional and he continued with the process of resolution process. The RP, however, being failed in receiving any resolution plan another publication was issued in an attempt to invite resolution applicants again but he also was not in receipt of any resolution applicant and in the meanwhile, the CIRP period of 180 days has been expired on 19.06.2018. It is submitted by the Resolution Professional that for want of resolution applicants to take over the stressed assets of the Corporate Debtor the CoC in it 3rd meeting held on 09.04.2018 passed a resolution for liquidation of the

Corporate Debtor and hence the RP filed the application recommending the liquidation of the Corporate Debtor.

5. When this application came up for final consideration, a Chartered Accountant, Mr. Biswajit Chakrabarty, allegedly one of the authorised signatories of the Corporate Debtor filed the application **CA(IB) No.638/KB/2018** objecting the application for liquidation. The applicant contends that the deed of assignment relied upon by the Financial Creditor in the Company Petition is an illegal document and cannot be enforced against the Corporate Debtor. The Adjudicating Authority admitted the application filed by the Edelweiss Asset Reconstruction Company Ltd. on the strength assignment deed, which is void *ab initio*. Hence the order of admission is illegal and liable to be recalled.

6. The applicant further contends that the legality of execution of the deed and its registration is under challenge before the City Civil Court at Calcutta in a **Title Suit No.1680 of 2017**. The Adjudicating Authority passed the order of admission when an order of injunction as against the financial creditor was in force. According to the applicant on 22.12.2017, an order of injunction had been passed by the City Civil Court against Edelweiss Assets Reconstruction Company Ltd/ Financial Creditor. and therefore, if the initiation of CIRP is not stayed the Corporate Debtor could not proceed further with the Title Suit in which the legality of the execution of Title Deed to be entertained. Upon the said contention the applicant prays for stay of the proceedings.

7. This application was strongly opposed by the Financial Creditor as well as the Ld. Resolution Professional. It is submitted that the application is not maintainable as the Corporate Debtor has no existence as on the date of the admission of the application filed by the Financial Creditor. When the Ld. Counsel appearing for the applicant was asked to submit his argument as to the maintainability of this application, he could not succeed in convincing me

that upon admission of like application by appointing insolvency professional to manage the company the erstwhile directors who are not in the active management of the affairs of the company can represent the company and can file an application like the application in hand. In **Innoventive Industries Ltd [(2018)1 SCC 407]** the Hon'ble Supreme Court observed as "*Having heard learned Counsel for both the parties, we find substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the Appellant is not maintainable. Dr. Singhvi stated that this is a technical point and he could move an application to amend the cause title stating that the erstwhile directors do not represent the company, but are filing the appeal as persons aggrieved by the impugned order as their management right of the company has been taken away and as they are otherwise affected as shareholders of the company. According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole Appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone. Having heard both the learned Counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgement so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts". The above said proposition squarely applicable in the case in hand. The application is filed in the name of the corporate debtor allegedly by an authorised signatory. The application is therefore not maintainable as contended by the resolution professional.*

8. In the case in hand the application filed under section 7 of the I&B Code was admitted on 22.12.2017 and thereby CIRP process was initiated against the Corporate Debtor and the assets of the Corporate Debtor company has been taken over by the RP. It is significant to note that during the CIRP process, there was no fair co-operation or support from the side of the Corporate Debtor and despite several directions have been issued, Resolution Professional was unable to prepare memorandum of assets for want of required document and support from the Corporate Debtor. Even on merits, the contention on the side of the applicant cannot be entertained at the late stage of approval of liquidation process for the reason of failure to have a resolution of the stressed assets of the corporate debtor.

9. The very same objections seen raised by the applicant in the reply affidavit filed in the main company petition. It was contended that the assignment deed relied upon by the financial creditor is not legal and cannot be taken as a proof to prove that the financial creditor can claim the amount from the corporate debtor. The said application was heard at length and the Adjudicating Authority passed an order of admission overruling the objections. The very same allegation seen raised in the application and the Ld. Counsel for the applicant reiterated his submission that the assignment deed is void and the order of admission is illegal.

10. The Ld. Sr. Counsel appearing for the Financial Creditor at this juncture submits that the Directors of the Corporate Debtor as well as the Corporate Debtor was aware of the assignment deed executed by the bank of India in favour of the Financial Creditor and that the applicant approached the financial creditor subsequent of the assignment for settling on the OTS amount. According to Ld. Counsel for the Applicant, he is unaware of the proposal. The Ld. Resolution Professional submits that the contention raised by the applicant is frivolous and the application deserve dismissal with cost.

The Ld. Counsel for the applicant was unable to convince me that the order of admission is illegal as he attempted to establish. The order of injunction in the civil suit is not binding on the Adjudicating Authority because taking jurisdiction by a civil court in respect of a matter in which the Adjudicating Authority is empowered by the Code is illegal as per section 231 of I&B Code. Since none of the grounds raised by the applicant is sustainable under law and the application being not maintainable, it requires no consideration. The application deserves dismissal. This is a fit case to dismiss the application with exemplary cost. However, I am dismissing the application without cost since the Ld Counsel for the applicant begged for mercy.

11. Coming to the application filed by the R.P., it is understood that the R.P. has taken his earnest efforts in issuing repeated publications inviting resolution applicants, however failed in identifying any resolution applicant so as to take over the assets of the Corporate Debtor. Finally, in the CoC meeting held on 9th April, 2018, the CoC unanimously has taken a decision to proceed with the liquidation process against the Corporate Debtor. According to the Ld. Counsel for the Financial Creditor as well as the Ld. R.P the Corporate Debtor has no scope of business and that it is not an ongoing concern and no employees currently working in the company and therefore, the scope of revival of the Corporate Debtor is insignificant. According to the R.P., it is thereby the CoC recommended for liquidation of the Corporate Debtor. The CIRP period was already expired on 19.06.2018. The CoC does not receive any resolution plans under sub-section (6) of section 30 of the Code. That being so, the Adjudicating Authority has no alternative other than to pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down in the Chapter III of Part II of I&B Code. The power of the Adjudicating Authority under section 33(1) of the Code being so, I hereby order liquidation upon the following orders:

ORDER

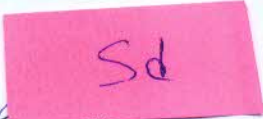
1. Mr. Anil Agarwal is appointed as the Liquidator ;
2. Mr. Anil Agarwal is directed to issue Public Announcement stating that the corporate debtor is in liquidation, in terms of Regulation 12 of the IBBI(Liquidation Process) Regulations, 2016 ;
3. The Registry is directed to communicate this order to the Registrar of Companies, West Bengal and to the Insolvency and Bankruptcy Board of India (IBBI), New Delhi.
4. The Order of Moratorium passed under Section 14 of the I&B Code, 2016 shall cease to have effects and a fresh moratorium under Section 33 (5) shall commence.
5. This order is deemed to be a notice of discharge to the officers, employees and the workmen of the Corporate Debtor as per Section 33 (7) of I&B Code, 2016.
6. The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of the Insolvency and Bankruptcy Code, 2016.
7. Upon proceeding with the liquidation the Liquidator shall file a **preliminary report** as per regulation 5 read with Reg.13 of the IBBI(Liquidation) Regulations, 2016 at the registry within 75 days from the liquidation commencement date and continue to file **progress reports** as per Reg.15(1) within 15 days after the end of the quarter in which he is appointed.

8. The fee payable to the Liquidator shall form part of the liquidation cost as provided under Reg. 4(1) of the IBBI (Liquidation Process) Regulations,2016.

9. CP is disposed off accordingly.

10. CA(IB) No.638/KB/2018 is dismissed. However no order as to cost.

Copy of this order is to be sent to the Liquidator, financial creditor and corporate debtor for information and for taking necessary steps. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.


20/7/18
(Jinan K.R.)
Member(J)

Signed on this, the 20th day of July, 2018