

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 650 of 2024
& I.A. No. 2325 of 2024**

[Arising out of Order dated 13.03.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench, Court No.II, Kolkata in I.A (I.B) No.1069/KB/2023 in C.P. (IB) No.1340/KB/2018]

In the matter of:

Suraksha Asset Reconstruction Ltd.

...Appellant

Vs.

**Varsha Bagri,
Liquidator of Bharat NRE Coke Ltd.**

...Respondent

For Appellant: Mr. Abhijeet Sinha, Sr. Advocate with Mr. Chitranshul A. Sinha, Ms. Pallavi, Mr. Shivam Shorewala and Ms. Rakshita Bhargava, Advocates.

For Respondent: Mr. Joy Saha, Sr. Advocate with Mr. Shamboo Nandy and Ms. Anoushka Dey, Advocates.

**J U D G M E N T
(09th December, 2024)**

Ashok Bhushan, J.

This appeal by a Financial Creditor has been filed challenging the order dated 13.03.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench, Court No.II, Kolkata in I.A (I.B) No.1069/KB/2023. By the impugned order, I.A (I.B) No.1069/KB/2023 filed by the Appellant has been disposed of refusing the prayer made in the application. Appellant aggrieved by the order has come up in this Appeal.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:-

2.1. In the CIRP process of the Corporate Debtor- Bharat NRE Coke Limited, there being no resolution, order of liquidation was passed by the Adjudicating Authority on 11.12.2019. On 10.01.2020, the Appellant- Suraksha Asset Reconstruction Ltd. informed the liquidator of its intention to realise its security interest under SARFAESI Act, 2002. On 22.02.2020, Appellant issued notice under Section 13(2) of the SARFAESI Act for total claim of Rs.141 Crores. IA No.40/KB/2021 was filed by the Appellant seeking direction to liquidator to handover the possession of 47.07 acres of land mortgaged with Suraksha Asset Reconstruction Ltd. Adjudicating Authority vide order dated 07.01.2021 directed the Block and Land Development Officer of Dharwad to carry out a survey to demarcate the land hypothecated to Appellant, and upon such demarcation, the Liquidator of BNCL had to hand over the land to Appellant. Demarcation report was filed on 07.08.2021, thereafter the Appellant issued notice under Section 13(4) of the SARFAESI Act, 2002 on 20.08.2021. The Respondent- Varsha Bagri was appointed by the NCLT as liquidator of the corporate debtor. Appellant intimated the liquidator vide e-mail dated 04.04.2023 that it has taken symbolic possession of the assets. Liquidator on 07.04.2023 wrote back to the Appellant that steps taken by the Appellant is without process of law. On 29.05.2023, liquidator sent an e-mail informing that security interest of the Appellant stood relinquished in terms of Regulation 21A (2) (a) and 21 (3) of the IBBI (Liquidation Process) Regulation, 2016 on the ground of Appellant having failed to pay liquidation costs. Appellant thereafter filed IA

No.1069 of 2023 praying for quashing the e-mail dated 29.05.2023. IA filed by the Appellant was opposed by the liquidator. Liquidator pleaded that as far back as 16.02.2023 the liquidator had demanded payment of Rs.20 lakhs towards CIRP costs and liquidation costs, till date the said amount has not been paid. Appellant's case that it has taken symbolic possession is incorrect since the actual possession was one with Jeju Metals Private Limited. Adjudicating Authority heard the parties and by impugned order dated 13.03.2024 held that the Appellant having failed to discharge its obligations under Regulation 21A within 90 days, Security interest shall become part of the liquidation estate. Aggrieved by the order dated 13.03.2024, this Appeal has been filed.

3. We have heard Shri Abhijeet Sinha, Learned Senior Counsel for the Appellant and Shri Joy Saha, Learned Senior Counsel for the Liquidator.

4. Counsel for the Appellant challenging the order submits that the Appellant immediately after liquidation commencement on 11.12.2019 has submitted Form D on 09.01.2020 asserting its security interest in the assets. It was followed by an intimation dated 10.01.2020 that the Appellant intended to enforce its security interest under SARFAESI Act, 2002. Liquidator never handed over possession of the assets to the Appellant. Demarcation exercise was completed and report was submitted on 07.08.2021 on the basis of which Appellant had issued notice under Section 13(4) of the SARFAESI Act, 2002. Parties were directed by the NCLT to file draft consent order which was although prepared, but no order could be passed on the draft consent order. In the meantime, erstwhile liquidator was

removed by the NCLT on 24.11.2022. On 16.02.2023, liquidator requested an *ad hoc* payment of Rs.20 lakhs towards the CIRP and liquidation costs. Appellant requested for a formal invoice to enable disbursement of payment which was never provided by the liquidator. On 18.02.2023, liquidator sent some unrelated sample bills. Appellant has taken symbolic possession by issuing notice under Section 13(4) which was shared with liquidator on 04.04.2024. The possession notice was objected by liquidator and by e-mail dated 29.05.2023, Appellant's security interest was sought to be relinquished under Regulation 21A due to non-payment of costs. Even though liquidator failed to raise any invoice for the same, Appellant was already ready and willing to pay liquidation cost. Appellant having already intimated intention to realise its security interest vide letter dated 10.01.2020, there is no question of relinquishment of security interest of the Appellant. Appellant has right under Section 52 of the IBC to realise its security interest. Appellant having never refused to pay CIRP/Liquidation costs, there is no question of relinquishment of its security interest. Appellant could not proceed to realise its security interest because both the erstwhile liquidator and current liquidator never handed over possession of the mortgaged land and secured assets of the corporate debtor to the Appellant despite clear direction dated 07.01.2021 of the Adjudicating Authority. Counsel for the Appellant has relied on Section 52(3) and 52(8). It is submitted that there is anomaly in Regulation 21A(2) and 21A(3) which need to be harmoniously construed with Section 52 of the Code, failing which, the Regulation 21A (2) & (3) would be rendered *ultra vires* to Section 52 of the IBC.

5. Shri Joy Saha, Learned Senior Counsel for the Respondent refuting the submissions of the Appellant submits that there is no issue that Appellant has not communicated its intention to realise its own security vide its letter dated 10.01.2020. It is, however, submitted that the Appellant has not paid the amount of CIRP costs and liquidation costs in spite of e-mail sent by the liquidator on 30.01.2020, 30.06.2020, 27.10.2020 and 16.02.2023. Appellant has admitted its liability to make payment of the estimated liquidation costs but has not made any payment. It is submitted that Suraksha Asset Reconstruction Ltd. being part of the Stakeholders' Consultation Committee (SCC) has agreed in the SCC and Joint Lenders' Meeting for joint sale of property of the corporate debtor located at Dharwad. It, at this stage, cannot contend that it shall realise its security in the assets. It is submitted that the Appellant having agreed for joint sale before the Joint Lenders' Meeting of SCC, it has no right to maintain this Appeal praying that it shall realise its security interest. It is submitted that there is issue between Bharat NRE Coke Ltd. and Gujarat NRE Coke Ltd. regarding 32 acres which was leased out to Gujarat NRE Coke Ltd. It is submitted that IA No.476 of 2021 filed by Gujarat NRE Coke Ltd. praying that liquidator of Bharat NRE Coke Ltd. to transfer 32 acres is pending. Liquidator of Bharat NRE Coke Ltd. has also filed an IA No.333 of 2021 praying that the liquidator of Gujarat NRE Coke Ltd. be directed to handover possession of 32 acres which application is also pending. The claim of Suraksha over the property in question is subject to outcome of two applications. It is submitted that the liquidator has written to the Appellant to pay the

liquidation costs on 16.02.2023 and 06.06.2023 which having not been paid, the security interest of Suraksha is subsumed in the liquidation estate. It is submitted that the premises were in possession of 'Jeju Metals Pvt. Ltd.' and it was liquidator of Bharat NRE Coke Ltd. who filed application IA No.1073 of 2021 praying for eviction of Jeju Metals Pvt. Ltd. which was finally allowed on 20.03.2024 and Jeju Metals Pvt. Ltd. has handed over possession of factory to the liquidator on 29.05.2024. Suraksha did not take any steps to evict Jeju Metals Pvt. Ltd. It is submitted that the security interest of the Appellant has been subsumed in the liquidation estate under Regulation 21A (2) and 21A (3) and present is not a case of applicability of Regulation 21A(1). It is submitted that the Appellant has intimated that he will realise its security interest on 10.01.2020. It is further submitted that in the Joint Lenders' Meeting dated 17.11.2023, Suraksha agreed to obtain valuation for joint sale of the property by the two liquidators. Further, in the Joint Lenders' Meeting held on 22.03.2024, Suraksha agreed for joint sale of the assets of Bharat NRE Coke Ltd. and Gujarat NRE Coke Ltd. by two liquidators. Again on 12.04.2024 in the Joint Lenders Meeting, Suraksha agreed for joint sale. In view of the aforesaid, when steps for joint sale has been agreed, Appellant cannot be heard in saying that he himself realise its security interest. Submission of the Appellant that Regulation 21A(2) and 21A(3) be read down cannot be accepted and needs to be rejected outright.

6. We have considered the submissions of the Counsel for the parties and perused the record.

7. There is no dispute between the parties that after liquidation commencement on 11.12.2019, Appellant submitted Form D dated 09.01.2020 to the liquidator Bharat NRE Coke Ltd. and on 10.01.2020, it wrote letter to the liquidator intimating that Suraksha ARC which has to realise its security in the manner as specified in the Code read with Regulations. An order dated 07.01.2021 was passed by the Adjudicating Authority on the application IA No.854 of 2020 filed by the liquidator seeking direction against the Appellant to release the assets of the corporate debtor which was mortgaged to them whereas IA No.40 of 2020 was filed by Suraksha seeking direction against the liquidator to handover the property. Adjudicating Authority directed for obtaining a report from Block Land and Land Development Officer and directed the matter to be listed again on 03.02.2021. After order of the Adjudicating Authority report was submitted. A draft consent order was also to be prepared by the Appellant which was however never given effect to nor any order was passed by the Adjudicating Authority. The liquidator vide email dated 16.02.2023 asked the Appellant to make adhoc payment of Rs.20 Lakhs towards the proportionate share of the CIRP costs and estimated liquidation cost. The said email was replied by the Appellant asking invoice. Liquidator sent sample invoices. After certain correspondences between the parties, liquidator issued e-mail dated 29.05.2023 which was challenged by the Appellant before the Adjudicating Authority by filing IA No.1069 of 2023. Email dated 29.05.2023 issued by the liquidator to the Appellant is as follows:-

"From: bha6750@rediffmail.com on behalf of
 Bharat NRE Coke <bha6750@rediffmail.com>
 Sent: Monday, May 29, 2023 5:11 PM
 To: Kanhaiya Maheshwari

Subject: Deemed relinquishment of your security interest on the assets of M/s Bharat NRE Coke Limited (BNCL) in liquidation under The Insolvency and Bankruptcy Code, 2016

Sir,

1. Bharat NRE Coke Limited (BNCL) went under liquidation vide the order passed by Hon'ble NCLT on 11/12/2019. Pursuant to the order of the learned Adjudicating Authority, various public announcements were made whereon Suraksha Asset Reconstruction Limited (SARL) submitted their claim on 09/01/2020 through an email and later by registered post stating that SARL would not relinquish their security interest.

2. In reply the erstwhile liquidator through an email dated 30/01/2020 enquired about certain matters including the proportionate cost of CIRP & Liquidation cost. Subsequently, the relevant provisions of IBC were also specifically intimated and pointed out to SARL and SARL was repeatedly informed of its obligations with regard to and towards bearing the proportionate cost of CIRP & Liquidation cost (including estimates) through several mails on 30/06/2020 and 27/10/2020 sent by erstwhile liquidator.

3. The demands, requests and representations contained in the aforesaid emails were ignored and not even responded to by you and as such you failed to pay any heed towards any of these mails. Finally, the undersigned, being the present liquidator, had demanded an immediate payment of Rs. 20,00,000/- (Rupees Twenty Lacs only) towards the proportionate CIRP & liquidation cost (including estimates) through an email dated 16/02/2023 but still SARL chose not to take any steps to make any payment.

4. In view of the facts as stated above and as provided by regulation 21A (2) (a) and 21 (3) of IBBI (Liquidation Process) Regulation 2016, you are

hereby informed that all the assets, immovable and/or movable, comprising the security interest of SARL as security shall be deemed to be relinquished and shall now be and form a part of the liquidation estate of BNCL, in liquidation.

5. I acknowledge the receipt of your email dated 25/05/2023 whereby the undersigned was informed that SARL has received a communication through email from JMPL (unauthorised occupier of the property) on 22/05/2023. SARL further stated that JMPL has requested SARL to take physical possession of the property and also intends to remove its security guards from the midnight of 31/05/2023. Upon receiving the said email dated 25/05/2023 the undersigned has requested you to share the email dated 22/05/2023 received from Jeju as stated by you. However, I have not yet received by you from JMPL. However, I have not yet received any reply from your end.

6. Having regard to the fact that your security interest has been subsumed to form a part of the liquidation estate of BNCL you are advised not to take any physical possession of the assets and the properties (both movable and immovable) of BNCL. You are also put to notice that all efforts and arrangements are being made by me in order to obtain physical possession of the assets and properties of BNCL from JMPL

7. In light of the facts stated as above, SARL shall henceforth be recognized as an Unsecured Financial Creditor in the list of Stakeholders of BNCL, in liquidation. The relevant steps towards the regrouping of the list of Stakeholders would be done by the undersigned in the due course and the fresh list of Stakeholders would be available on the website of IBBI.

8. In the circumstances, SARL is requested to forbear and refrain from taking any steps to assert any security interest or take possession or to sell any of the movable and immovable assets and properties of BNCL failing which I shall take necessary and appropriate steps against you before the learned Adjudicating Authority in which event you will be responsible and liable for all costs and consequences arising there from.

Regards,

*Varsha Bagri
Bharat NRE Coke Limited
Liquidator*

*Insolvency Professional
FCA, CS, CMA*

*P-273 Maniktala Main Road,
Kolkata-700054
(M) 9339239644"*

8. It was after issuance of the aforesaid e-mail, Appellant filed the application challenging the said e-mail. Prayers made in the IA No.1069 of 2023 are as follows:-

- "i. Allow the present application and quash the emails dated 29.05.2023 sent by the Liquidator for being unlawful;*
- ii. Direct that no coercive action pursuant to such emails dated 29.05.2023 and/or any emails thereafter should be taken by the Liquidator of BNCL which may be prejudicial to the interest of the Applicant as a secured financial creditor; and*
- iii. Pass any such other order(s) and further order(s) as this Hon'ble Tribunal deems fit and proper in the facts and circumstances of the present case."*

9. Section 52 of the IBC empowers secured creditors to relinquish its security interest to the liquidation estates or to realise its security interest in the manner as specified in Section. Section 52(1) is as follows:-

“52. Secured creditor in liquidation proceedings.

- (1) A secured creditor in the liquidation proceedings may-

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.”

10. Regulations have been framed under the IBC including under Section 52 namely— ‘Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016’. Regulation 21A was inserted w.e.f. 25.07.2019 which is as follows:-

“21A. Presumption of security interest. (1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

(2) Where a secured creditor proceeds to realise its security interest, it shall pay –

(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the

liquidator within ninety days from the liquidation commencement date; and

(b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this subregulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

[Explanation.- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.]”

11. In the present case, there are ample materials to indicate that Appellant has informed the liquidator of its decision to relinquish its security interest. Letter dated 10.01.2020 relied by the Appellant is referred, thus, there is no applicability of Section 21A(1) in the present case. Reliance

which has been placed by the liquidator is on sub-regulations (2) and (3) of Regulation 21A. In the present case, the Appellant after informing the liquidator on 10.01.2020 proceeded to realise its security interest by issuing notice under Section 13(2) on 20.08.2021 which was already intimated to the liquidator on 10.01.2020. Present is a case where liquidator has communicated the Appellant twice for payment of proportionate share of the liquidation costs on 16.02.2023 and 29.05.2023 although communication was sent in response to the said letter by the Appellant but fact remains that no payment was made by the Appellant towards liquidation costs. Submission of the Counsel for the Appellant that Appellant is ready and has never denied to make the payment shall not make the sub-regulation (3) of Regulation 21A inapplicable. When Appellant has proceeded to realise its security interest it was required to pay the amount as referred to in Regulation 21A (2)(a). The Adjudicating Authority thus, has rightly referred to and relied on Regulation 21A (2) & (3). In paragraph 8.5, following was observed:-

“8.5 The liquidator admittedly estimated the value at Rs. 20 lakhs and demanded the sum of Rs 20 lakhs on 16.02.2023 towards CIRP costs. Since it was not paid, the liquidator on 29th May 2023 has rightly declared the alleged security interest to have subsumed into the liquidation estate of Bharat NRE Coke Limited.”

12. We however, agree with the submission of the Counsel for the Appellant as well as Counsel for the Respondent that present is a case

where Appellant has communicated its intention to realise its security interest, hence, there is no applicability of Regulation 21A(1).

13. The second submission which has been much pressed by the Counsel for the Respondent is that Appellant in Joint Lenders Meeting has agreed for joint sale of the assets by both the liquidators. In Joint Lenders Meeting, the Appellant was represented and has agreed for joint sale of the assets. It is not open for the Appellant to now contend that it shall realise its security. Counsel for the Respondent has referred to Joint Lenders Meeting held on 22.03.2024 in which Joint Lenders Meeting representatives of Suraksha were also present. Counsel for the Respondent has referred to Minutes of Joint Lenders Meeting held on 22.03.2024 filed as Annexure R-5 to the reply filed by the Respondent which indicates that at Serial Nos.11 and 12 of virtual attendees, two representatives of Suraksha are present. In the minutes, following was noticed:-

“Under the above situation, the participants present were of the view that both the liquidators should fast track the process of Joint sale of the above assets of the coke plants of both the Corporate Debtors. The representative of SARC also agreed that given the intermingling of assets and absence of physical demarcation of factories of both the Corporate Debtors at Dharwad, a joint sale for the purpose of value maximization is inevitable. Upon further enquiry by SARC, the liquidator of BNCL clarified that the distribution of the proceeds of the joint sale of assets as aforesaid shall be carried out in accordance with the provisions of Section 53 of the Code.”

14. In the above meeting, all the stakeholders agreed to the suggestion of the liquidator towards joint sale of the assets. Another Joint Lenders Meeting relied by the Counsel for the Respondent is the Joint Lenders Meeting dated 12.04.2024 where again two representatives of Suraksha were present which is reflected from Annexure R-6 of the reply. In the minutes, it was noted that Suraksha although having agreed in the Joint Lenders Meeting held on 12.04.2024 for joint sale has filed the appeal against the order passed in IA No.1069 of 2023. The representatives of Appellant intimated that they have no instructions from the apposite parties so they are unable to comment on the matter. In the said meeting, even the modalities of the joint sale and appropriation of proceeds to the liquidation estates was mentioned. Suraksha has pleaded in the meeting that the above decision be put to vote, however, other lenders took the view that all having been consented separate voting is not required.

15. We have also noticed the submission of the Counsel for the Respondent that certain issues regarding 32 acres of land claimed by Gujarat NRE Coke Ltd. is pending consideration before the Adjudicating Authority. Suraksha has not paid the CIRP costs or the liquidation costs.

16. In the facts of the above case, we are of the view that the liquidator did not commit any error in communicating decision dated 29.05.2023 to the Appellant that on account of non-payment of liquidation costs, security interest of the Appellant stood relinquished in terms of Regulation 21A (2) &(3) of the Liquidation Regulations. Adjudicating Authority after considering

the submissions of the parties has rightly refused to grant any relief to the Appellant in IA No.1069 of 2023.

17. In view of the facts and circumstances, as noticed above, we do not find that it is fit case to exercise our Appellate jurisdiction in interfering with the impugned order passed by the Adjudicating Authority. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi

Anjali