

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins.) No. 309 of 2020

IN THE MATTER OF:

Slipco Constructions Pvt. Ltd.

U-1, Green Park Extension,

New Delhi – 110016

...Appellant

Versus

Mr. Yogesh Gupta, Liquidator

on behalf of Kohinoor Power Pvt. Ltd.

S Jaykishan, Chartered Accountants,

2nd Floor, Suit no 2D, Kolkata - 700071

...Respondent

Present:

For Appellant: Mr. Kuljeet Singh Sachdeva, Advocate.

For Respondent: Mr. Abhay Anand, Advocate.

O R D E R
(Virtual Mode)

23.11.2020 This Appeal has been filed against Impugned Order dated 15th January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in CA (IB) 19/KB/2019 in CP (IB) No. 602/KB/2018.

2. It is stated that one Operational Creditor S.K. Construction filed proceedings against Respondent/Kohinoor Power Pvt. Ltd. the Corporate Debtor which was admitted and later the matter reached the stage of Liquidation. The Applicant filed Application in Liquidation. The Appellant claims to be Operational Creditor of the Corporate Debtor. The Appellant prayed to allow the Appellant to remove its construction equipments and other materials lying at the site of the Corporate Debtor.

3. The Learned Counsel submits that the Appellant had issued work order to one M/s. Techpro Infra Project Ltd. for construction of 110 meter RCC Chimney for the Corporate Debtor. The Corporate Debtor took possession of site from Techpro Infra due to deficiency and directed the Appellant to continue with the work. It is stated that subsequently the Corporate Debtor illegally threw out the labour and staff of the Appellant from the site and detained belongings, machinery, equipments and material of Appellant. The Corporate Debtor failed to release the payments of Appellant. Then the Respondent/Corporate Debtor filed Title Suit No. 11 of 2013 before Civil Judge (Senior Division), Alipor, Kolkata, for declaration of its title and right to continue work at the site and to stop men and labour of the Appellant from creating disturbances. The Civil Court initially dismissed request for ad interim injunction and Appeal was filed before Civil Judge (Senior Division), Alipor which passed ad interim injunction on 1st October, 2013 directing maintaining of status quo and permitted the Corporate Debtor to continue work for the project. Learned Counsel for the Appellant states that the Appellant also filed Money Suit No. 05 of 2013 before Civil Judge against the Corporate Debtor along with an Application for injunction. The Appellant sought appointment of Court Commissioner in Money Suit No. 5 of 2013. It is stated that Corporate Debtor filed Application under Section 10 of CPC to stay the suit of Appellant and that Application came to be dismissed because of which the Corporate Debtor went in Appeal to the Hon'ble Jharkhand High Court in Writ Petition Civil No. 4142 of 2015. It is stated that Civil Judge, Seraikella appointed one Mr. U.K. Singh pleader as Commissioner on application by Appellant to make inventory of the equipments at the site and the said Commissioner submitted

Company Appeal (AT) (Ins.) No. 309 of 2020

his Report dated 02nd May, 2017 with the list of equipments kept at site and stored in the container of the Appellant which is at the site and that it was locked. According to the Appellant, the High Court dismissed the petition of Corporate Debtor and upheld that status quo order is not hindrance to the suit of the Appellant and for prayer of damages and equipments from the Corporate Debtor. It is stated that thereafter the Insolvency Proceedings started on 03rd August, 2018 and moratorium was applied. The Appellant requested IRP for the equipments and machineries but the IRP denied. Thereafter Liquidation Order came to be passed and when the present Application was filed, the same came to be dismissed.

4. The Learned Counsel for Respondent/Liquidator submits that the liquidator has filed Reply in this Appeal. The Learned Counsel for the Liquidator submits that the litigation as stated by the Learned Counsel for the Appellant and pointed out in the Appeal has taken place and that the litigation by way of two suits started before CIRP was initiated. The Learned Counsel for the Respondent referred to Reply Paragraph 3 (e) and (f) which read as under:

“e. The Appellant herein thereafter had filed a suit being Money Suit No. 05 of 2013 before the Court of 1st Civil Judge (Sr. Div.) at Seraikella, Jharkhand against the Corporate Debtor and M/s. Tecpro Infra Projects Ltd. By way of an order dated 28.03.2017 a Commissioner was appointed in the said money suit with a direction to inter alia prepare an inventory of the plants and equipment’s of the Appellant lying at the project site of the Corporate Debtor. Complying with the said directions the Commissioner made an inventory of the project site and filed a report before the Ld. Court of 1st Civil Judge (Sr. Div.) Seraikella on 02.05.2017. The

Commissioner thereafter locked the said equipment's in a container and handed over the keys to the Ld. Court in terms of its directions.

f. Under the said circumstances the release of the equipment's being sought by the Appellant herein have been locked and kept in a container keys of which were deposited by the Commissioner before the Ld. Civil Judge, Seraikella and further there being a status quo order passed by the Ld. Civil Judge, Alipore it was submitted before the NCLT that the hands of the resolution professional was tied as the Resolution Professional was not in a position to alienate with or deal equipment's in any manner till the time the said orders were not vacated."

5. The Learned Counsel for Liquidator states that the articles which have been locked and kept, belong to the Appellant is not disputed by the Liquidator. It is stated that because of legal proceedings the Liquidator is handicapped in handing over articles of Appellant to Appellant.

6. We have perused the Impugned Order. By the impugned Order, the Adjudicating Authority after considering the suits pending asked the Appellant to go and get the order of injunction passed by Civil Judge (Senior Division), vacated and then to approach the Adjudicating Authority.

7. Copy of the Judgment passed by the Civil Judge (Senior Division), is at Annexure A5 which was passed in Misc. Appeal No. 466 of 2013. The Operative Order is at Page 83 which reads as under:

“Ordered

That the appeal is allowed ex parte against the respondent but without costs.

The order No. 2 dated 24.09.2013 passed by Ld. Civil Judge (Jr. Div.), 4th Court, Alipore, in Title Suit No. 144/2013 is set aside.

Both parties are directed to maintain status quo in respect of the usage of the schedule property and defendant is hereby restrained by an order of injunction from causing any disturbances, obstruction or hindrance to the construction of power project by the appellant company in and around of the power plant project as well as the office of the appellant-company till the disposal of the petition for injunction under order 39 Rule 1 and 2 of CPC.

Ld. Lower Court below is requested to dispose of the petition for temporary injunction as expeditiously as possible.

Let a copy of this judgment along with the Lower Court Record if called for be sent down to the Ld. Court below at once.”

8. As the suits were pending before CIRP was initiated, Section 33 (5) of IBC does not appear to apply as the same reads as under:

“33(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”

9. What would be relevant is Section 35 (k) of IBC which shows the following as one of the power and duty of Liquidator:-

“35. (k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of and on behalf of the corporate debtor;”

10. It is apparent that at the stage of Liquidation, the Liquidator has powers and duties to institute or defend any suit, proceeding or other legal proceedings, civil or criminal in the name of and on behalf of Corporate Debtor. As such if the suits are pending since before the Civil Courts, it is duty of the Liquidator to defend or take a stand in the suits concerned. The Liquidator fairly accepts that the machinery and equipments etc. concerned are not the property of the Corporate Debtor and Learned Counsel for the Liquidator states that those equipments will not be forming part of the liquidation estate in view of the Section 36 (4) of IBC. The Commissioner made List and put the equipments etc. under lock, and key kept with Civil Court. When this is so, it would be more appropriate for the parties to move the Civil Court concerned for further directions. Learned Counsel for the Liquidator submitted that the Liquidator is ready to return those articles which are belonging to the Respondents. The Learned Counsel for Appellant states that the Money Suit No. 5 of 2013 is still pending before Civil Judge (Senior Division) at Seraikela.

11. It is stated that the said suit is kept *sine die* by the concerned Court because of the Liquidation Orders. Looking to the facts of the present matter and the legal provisions referred and discussed above in interest of Justice, it appears appropriate for us to give liberty to the Appellant to move the Civil Court for appropriate Directions with regard to the construction equipments, inventory of which is stated to be at page 123 -127 of the Appeal Paper Book. It is stated that the List was prepared by the Commissioner and it was part of the Report of the Commissioner.

12. The Learned Counsel for the Liquidator submits that he will give suitable advice to the liquidator to respond to the request which Appellant may make

before the Civil Court so as to let the Appellant get back his equipments, machinery etc.

13. For the above reasons, we modify directions given by Adjudicating Authority in Impugned Order. We dispose this Appeal with liberty to the Appellant to approach the Civil Court for return of the disputed equipments, machinery etc. although Liquidation Proceedings are pending, as there is no dispute that the equipments, machinery etc. concerned are belonging to the Appellant and not property of the Corporate Debtor. The Respondent/Liquidator is requested to appropriately respond to the Application Appellant may move before the Civil Court. The Appeal is disposed with directions as above. No orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

Basant B./nn/