

ODC-1

IA No. GA/3/2022

In CS/54/2019

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

COMMERCIAL DIVISION

ALLIANCE BROADBAND SERVICES PRIVATE LIMITED

-VS-

MANTHAN BROADBAND SERVICES PRIVATE LIMITED (IN LIQN.)

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On : 13.12.2022 & 14.12.2022

Order On : 19.12.2022

Appearance:

Mr. Ratnanko Banerjee, Sr. Adv.

Ms. Swapna Choubey, Adv.

Mr. K. Kejriwal, Adv.

Ms. Ashika Daya, Adv.

Ms. Deepti Priya, Adv.

... for the petitioner/plaintiff

Mr. Jayanta Sengupta, Adv.

Mr. Rahul Auddy, Adv.

Mr. Aditya Gupta, Adv.

...for the defendant/respondent

ORDER

Petitioner has filed the instant application for grant of ad interim order restraining the respondent company who is in liquidation from taking possession or control of the pledge shares or to interfere with the possession of the physical share certificates of the petitioner.

The petitioner has filed suit against the respondent for a decree for a sum of Rs. 11,06,15,68/- and for declaration that 77,500 equity shares of and in the plaintiff company and other reliefs.

The petitioner disbursed an amount of Rs. 6.30 crores to the respondent between April 2017 and July, 2017 as accommodation loan with an interest @ 9.75% per annum and was secured by pledge of original share certificates of 77,500 equity shares in the petitioner's company held in the name of the respondent. The principal amount of Rs. 6.30 crores has repaid by the respondent on 31.03.2018 and subsequently again in the month of April, 2018, the respondent had availed loan of Rs. 10.20 crores with an agreement that the said loan amount shall be repaid within 3 months with an interest of 9.75 % and the pledged shares shall continue with the petitioner as security and further security in the form of mortgage by deposit of title deeds of certain immovable properties by the respondent. The respondent had paid Rs. 25 lacs to the petitioner as part payment towards the interest on the earlier loan of Rs. 6.30 crores. In the month of June, 2018, the respondent handed over original title deeds of three lands parcels, admeasuring 10.08 acres of non-agricultural

lands of Tajpur to the petitioner as additional security against the loan of Rs. 10.20 crore along with the accrued interest.

In the month of December, 2018, the petitioner has filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 before the Learned National Company Law Tribunal Kolkata for initiation of Corporate Insolvency Resolution Process against the respondent. On 18.09.2019, the NCLT has appointed an Insolvency Professional to take charge of affairs of the respondent as the Interim Resolution Professional. Due to the moratorium imposed by the order of NCLT dt. 18.09.2019, the petitioner could not proceed for lodging of writ of summons or taking other steps in the instant suit to enforce the security interest over the pledged shares.

One of the suspended Directors of the respondent had preferred an appeal before the Learned National Company Law Appellate Tribunal, New Delhi against the order of the NCLT dt. 18.09.2019 wherein the said suspended Director submitted that he is ready to pay the total amount of the petitioner but subsequently vide e-mail dt. 20.10.2019, the suspended Director of the respondent had offered the petitioner to pay Rs. 11,06,15,268/- being the entire claim and the petitioner had to returned the pledge shares and original title deeds of Tajpur land mortgage against the loan. The petitioner agreed to the offer of the suspended Director and due to the intervention of the other creditors having a cumulative claim of about 118 crore, the NCLAT has disposed of the appeal directing the IRP to constitute a committee of creditors

and to consider any applications made by the promoters of the respondent under Section 12A of the IBC Code, 2016. By an order dt. 06.04.2022, the NCLT had initiated a liquidation proceeding against the respondent and appointed one Shri Kuldeep Verma, Insolvency Professional as Liquidator by lifting the moratorium under Section 14 of the IPC. On 06.05.2022, the petitioner has filed its claim of Rs. 14,47,32,521/- against the respondent before the liquidator which are as follows :

- “i) 77,500 equity shares in the petitioner’s company held in the name of the respondent – the pledged shares.*
- ii) 10.08 acres of non agricultural land situated at Tajpur, Purba Medinipur, West Bengal.”*

After lodging the claim, the petitioner has requested the Liquidator to release the above mentioned securities in satisfaction of the claim in accordance with law as applicable to the security interest being realized, as the pledged shares and the Tajpur land cannot be part of liquidation estate of the respondent.

By an email dt. 06.06.2022, the Liquidator had denied the security interest of the petitioner over the pledged shares as well as the Tajpur land.

After the appointment of the Liquidator, the petitioner has filed an application being GA 2 of 2022 praying for amendment in the cause title in CS 54 of 2019 for bringing the Liquidator as defendant in place of the respondent for the purpose of proceeding with the said suit as well as for service of writ of

summons upon the Liquidator. Vide order dt. 29.07.2022, this Court has allowed the application filed by the petitioner. The erstwhile promoters of the respondent who are also the suspended Director of the respondent had preferred an appeal before the NCLAT against the order dt. 06.04.2022 passed by the NCLT but the said appeal was dismissed and accordingly the promoters of the respondent are claiming that they have preferred an SLP before the Hon'ble Supreme Court.

The Liquidator has refused to recognize the petitioner as secured creditor or to allow the petitioner to sell the pledged shares towards the partial satisfaction of the claim of the petitioner against the respondent. As per the submission of the petitioner, the pledged shares and Tajpur land cannot be made part of the liquidation estate of the respondent and the Liquidator has wrongfully tried to take the properties from the petitioner.

Counsel for the respondent Liquidator submits that the communication as relied by the petitioner is made by the suspended Director and not the Liquidator and thus the said communication cannot be treated as admission on the part of the respondent.

Counsel for the respondent further submits that in terms of Clause 52 (5) of the IBC, 2016, the petitioner has to make an application to the adjudicating authority to facilitate the secured creditor to realize such security interest in accordance with law and thus the petitioner cannot claim any injunction before this Court during pendency of the Liquidation proceeding.

Learned Counsel for the respondent Liquidator submits that the Liquidator vide communication dt. 06.06.2022 had informed the petitioner the entire claim amount of Rs. 14, 47,32,521/- is pending adjudication before the NCLT and the Liquidator is not in a position to verify the security interest claimed by the petitioner and accordingly the Liquidator has not permitted the petitioner to realize any security interest in the assets of Corporate Debtor as per IB Code, 2016.

The Counsel for the Liquidator further submits that the petitioner is not entitled to get any ad interim injunction from this Court.

Heard the Learned Counsel for the respective parties, perused the documents available on record.

To decide the issue whether the petitioner is entitled to get an ad interim injunction, the following provision is required to be looked into :

“33. Initiation of liquidation.-

*(1) ****

*(2) ****

*(3) ****

*(4) ****

(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.

*(6) ****

(7) ***

36. Liquidation Estate.-

(1) ***

(2) ***

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

(a) ***

(b) ***

(c) ***

(d) ***

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

(f) ***

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

(h) ***

(i) ***

(4) ***

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.*

(2) ***

(3) ***

(4) ***

(5) ***

(6) ***

(7) ***

(8) ***

(9) ***

60. Adjudicating Authority for corporate persons. – (1) *The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.*

(2) *Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.*

(3) *An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.*

(4) *The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).*

(5) *Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*

- (a) *any application or proceeding by or against the corporate debtor or corporate person;*
- (b) *any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*

(c) *any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.*

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”

By a letter dt. 12.04.2017, the Director of the respondent company had confirmed that the respondent company has pledged the original share certificates totalling 77,500 shares with the petitioner against the loan amount of Rs. 5.3 crores. The application filed by the petitioner under Section 7 (1) of the IBC, 2016 was admitted by the NCLT on 18.09.2019 and subsequently on 23.09.2019, the petitioner has submitted the claim before the Interim Resolution Professional being the Principal amount of Rs. 10.20 crore along with interest @ 9.75%. Total amounting to Rs. 11.9393206/- in the said claim, the details of the security held by the petitioner is mentioned as follows :

8.	<i>Details of any security held, the value of the security, and the date it was given</i>	<p><i>a) 77,500 equity shares of Rs. 10 each of Alliance Broadband Services Private Limited held by Corporate Debtor pledged with Financial Creditor on 12th April, 2017.</i></p> <p><i>b) The Corporate Debtor has deposited the original title deeds of land parcels, ad measuring 10.8 acres of non-agricultural land situated at Mouza Tajpur, P.S Ramnagar, Dist. Purba Medinipur, WB on June, 2018.</i></p>
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Vide Order dated 06.04.2022, the NCLT has appointed Mr. Kuldeep Verma as Liquidator of Manthan Broadband Services Private Limited the respondent company herein. On 06.05.2022, the petitioner had submitted the proof of claim to the Liquidator wherein the petitioner has claimed the total liquidation amount of Rs. 14,47,32,521/- and the details of the security is mentioned as mentioned in para above.

The judgment referred by the Counsel for the petitioner reported in **(2020) 13 SCC 308 (Embassy Property Developments Pvt. Ltd. -vs- State of Karnataka & Ors.)**, the Hon'ble Supreme Court held that the duties of the resolution professional are entirely different from the jurisdiction and power of NCLT. It is further held that if NCLT has conferred with jurisdiction to decide all types of claims to property of the Corporate Debtor, Section 18 (1) (f) (vi) would not have made the task of interim resolution professional in taking control in custody of an asset over which the Corporate Debtor has ownership rights, subject to the determination of ownership by a Court or other authority. The Hon'ble Supreme Court further held that the statutory scheme as culled out from the various provisions of the IBC, 2016, it is clear that whenever the Corporate Debtor has to exercise a right that falls outside the purview of the IBC, 2016 specifically in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

Learned Counsel for the petitioner further relied upon the Judgment passed by the National Company Law Appellate Tribunal reported in **(2020) SCC OnLine NCLAT 27 (Sun Pharmaceutical Industries Limited & Anr. -vs- Sumit Binani As Liquidator of Gujarat NRE Coke Limited & Anr.)** wherein it was held that the question is yet to be decided by the Hon'ble High Court at Calcutta whether the title of the windmill asset has been passed to the appellants. At this juncture, it is not clear that windmill asset is owned by the appellant or the Corporate Debtor. The said Judgment was challenged before the Hon'ble Supreme Court in Civil Appeal No. 3673 of 2022 and before the Hon'ble Supreme Court the appellant has withdrawn the said appeal to raise all the questions of law and facts before the Civil Court in the Civil Suit for recovery of amounts paid towards sell consideration.

Learned Counsel for the plaintiff has further relied upon the judgment reported in **(2022) 2 SCC 583 (Tata Consultancy Services Limited vs. S.K. Wheel Private Limited Resolution Professional)** wherein the Hon'ble Supreme Court had held that the NCLT does not have any residuary jurisdiction to entertain to present contractual dispute which has arisen dehors the insolvency of Corporate Debtor. In the absence of the jurisdiction over the dispute, NCLT could not have imposed an ad interim stay on the termination notice.

Learned Counsel for the Liquidator has relied upon the unreported Judgment passed by this Court in the case of C. Surendra Trading and

Investment Private Limited vs. Aditi E-Oil Private Limited & Anr. dt. 24.11.2022 wherein this Court held that the suit filed by the plaintiff cannot be proceeded further and the suit was dismissed.

Though the petitioner has filed the suit prior to the appointment of Liquidator but after the appointment of Liquidator, the petitioner has filed his claim of Rs. 14,47,32,521/- against the respondent before the Liquidator in the form prescribed under the I&B Code, 2016.

In the present application, the petitioner is apprehending that the respondent will wrest the control and possession of the pledged shares of the petitioner which is subject-matter of the suit.

NCLT and NCLAT are constituted under Section 408 and 410 of the Companies Act, 2013 but without specifically defining the power and functions of NCLT. Section 408 of the Companies Act states that the Central Government shall constitute a National Company Law Tribunal to exercise and discharge such powers and functions as are or may be conferred on it by or under the Companies Act or any other law for the time being in force. The matters fall within the jurisdiction of the NCLT, under the Companies Act, 2013 lie scattered all over the Companies Act, therefore, Section 420 and 424 of the Companies Act, 2013 indicates in brought terms, merely the procedure to be followed by the NCLT before passing any order. There is no separate provision in the Companies Act exclusively dealing with the jurisdiction and powers of NCLT.

In Sub-Sections (4) and (5) of Section 60 of the IBC, 2016 give an indication respectively about the powers and jurisdiction of the NCLT. Sub-Section 4 of Section 60 of IBC, 2016 states that the NCLT will have the powers of DRT as contemplated under part III of the Code for the purpose of sub Section (2). Sub Section (2) deals with situation where the Insolvency Resolution or Liquidation of Bankruptcy of the corporate guarantor or personal guarantor of a Corporate Debtor is already pending before the NCLT.

The object of sub section (2) is to group together (A), the CIRP or liquidation proceedings of a Corporate Debtor, and (B) the Insolvency Resolution or Liquidation or bankruptcy of a corporate guarantor or personal guarantor of a very same Corporate Debtor so that a single forum may deal with both. This is to ensure that the CRIP of the Corporate Debtor and the Insolvency Resolution of the individual guarantors of the very same Corporate Debtor do not proceed on different tracks, before different forum, leading to conflict of interest, situations or decisions.

In the present case, the petitioner though had filed the civil suit praying for decree as well as the declaration with respect of the equity shares of the respondent and subsequently the petitioner has invoked the provisions of Section 7 of IBC which was duly admitted by the NCLT and the petitioner has filed the similar claim before the Liquidator.

Now, the petitioner is apprehending that the Liquidator will take the control and possession of the shares of the respondent which is in possession

of the petitioner and accordingly has filed the instant application but as per the provisions of 60 (5) of IBC, 2016, the petitioner can approach the NCLT instead of filing the instant application before this Court.

As per Section 238 of the IBC, 2016 is having override effect in any other law for the time being in force. In view of my *prima facie* findings that this Court cannot pass any interim order at this stage. This Court is of the view that the matter in issue in the suit can be more appropriately and effectively decided and adjudicated by the NCLT. In the present case, Section 430 of the Companies Act, 2013 itself provides an additional bar by stating that no injunction shall be granted by any civil court in respect of any action taken or to be taken in pursuance of any power conferred on the NCLT by the Companies Act, 2013.

In view of the above, this Court finds that the petitioner is not entitled to get an ad interim order as prayed for.

(KRISHNA RAO, J.)

p.d/