

**NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

M.A 1489/2018

in

C.P. 1677/ 2018

Under Section 60 (5) of the IBC, 2016

In the matter of

Andhra Bank

... Petitioner

v/s.

Provogue (India) Limited

.. Corporate Debtor

M.A. No. 1489/2018

Amit Gupta

... Resolution Professional/ Applicant

v/s.

SREI Infrastructure Finance Limited

...Respondent

Order delivered on: 08.03.2019

Coram: Hon'ble Bhaskara Pantula Mohan, Member (J)

Hon'ble V. Nallasenapathy, Member (T)

For the Applicant: Mr. Aayush Singhvi i/b Arihant Associates, Advocate.

Respondent: Mr. Durga Prasad Halwai i/b Singhi & Co., Advocate.

*Per: V. Nallasenapathy, Member (Technical)*

**ORDER**

1. This is an Application filed by the Resolution Professional for direction against Respondent to refund Rs. 11,56,396/- and another sum of RS. 11,01,590/-, on account of encashment of post dated cheques by the Respondent during the Corporate Insolvency Resolution Period (CIRP) which were issued before the admission of Petition for CIRP.
2. The Applicant submits that the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor by an order of this Tribunal dated 25.07.2018 and consequently one Mr. Jitendra Kumar R. Yadav was appointed as Interim Resolution Professional (IRP) and subsequently the applicant herein was appointed as the Resolution Professional (RP) by this Tribunal on 26.09.2018.

3. The Applicant submits that the Respondent is a Financial Creditor of the Corporate Debtor and filed a claim before IRP claiming a sum of Rs. 1,11,79,880/- as a Financial Creditor and the IRP admitted the claim for Rs. 89,21,906/-. Previously, the Corporate Debtor executed a settlement agreement dated 27.07.2015 with the Respondent Company for a sum of RS. 1,78,43,804/-, wherein the Corporate Debtor issued 16 post dated cheques to the Respondent on 27.07.2015 itself. The RP submits that on 09.08.2018 a sum of RS. 11,56,396/- and another sum of RS. 11,01,590/- were debited to the account of the Corporate Debtor with Andhra Bank and the said sums were credited to the account of the Respondent. The above two said payments were out of the post dated cheques issued to the Respondent. The RP submits that these payments were made after initiation of CIRP which was on 25.07.2018 and hence these payments being made to the Creditor is hit by the provisions of Section 14 of the Code which imposes moratorium.
4. The RP has sent a letter on 18.10.2018 asking for the refund of the said amounts from the Respondent but the Respondent replied that the IRP has acknowledged the encashment of two post dated cheques and adjusted the amount realized through those two post dated cheques and admitted the claim for Rs. 82,21,606/- and failed to return the amount to the Corporate Debtor.
5. The RP relied on the provisions of the Section 14 of the Code which imposes moratorium on the recovery by the Creditors and also relied on the following judgments of Hon'ble NCLAT to strengthen his case;

- a. ICICI Bank Ltd. vs. IRP for Ruchi Soya Industries (Company Appeal (AT) No. 390/2018 ) wherein it was held that:

*"In the present case we do not intend to go into question as to when the order of moratorium was received by the Bank. Even if it is assumed that it was received by the Bank on 19.12.2017, it was not open to them to debit any amount from the account of the Corporate Debtor subsequent to order of moratorium. Further, as the order of moratorium came into its effect immediately i.e. on 15.12.2017, the date of receipt of order has no relevancy with the same."*

- b. State Bank of India vs. Mr. V. Ramakrishnan, Company Appeal (AT) (Insolvency) No. 213/2017 wherein it was held that;

*"On bare perusal of the aforesaid provisions, it is clear that not only institution of suits or continuation of pending suits or proceedings against the Corporate Debtor are prohibited from proceedings, in terms of clause (b) of subsection 1 of Section 14 of the I&B Code, transfer, encumbrance, alienation or disposal of any of its assets of the Corporate Debtor and/or any legal right or beneficial interest*

*therein are prohibited. Clauses c and d of subsection 1 of section 14 of I&B Code prohibits recovery or enforcement of any security interest created by the Corporate Debtor in respect of its property including the property occupied by it or in the possession of the Corporate Debtor."*

- c. State Bank of India vs. Debashish Nanda, Company Appeal (AT) (Insolvency) No. 49/2018 wherein it was held that:

*"Bank cannot debit any amount from the Corporate Debtor's account after the order of moratorium, as it amounts to recovery of amount after the order of moratorium."*

- d. Indian Overseas Bank vs. Dinkar T. Venkatasubramanian (RP for Amtek Auto Ltd.) Company Appeal (AT) (insolvency) no. 267/2017 wherein it was held that:

*"Once moratorium is declared, it is not open to any person including 'Financial Creditor' and the appellant bank to recover any amount from the account of the Corporate Debtor, not it can appropriate any amount towards its own dues."*

6. The Respondent filed reply and written submissions to this Application and their contentions were as below:

- a. The two payments received by them on 09.08.2018 after the initiation of CIRP on 25.07.2018, is consequent to the settlement agreement dated 27.07.2015, wherein the Corporate Debtor is liable to pay equated quarterly installment of Rs. 11,01,519/- from 08.05.2017 to 08.02.2019 towards principal outstanding and four quarterly installments of Rs. 11,01,518/- from 08.05.2019 to 08.02.2020, etc. The Corporate Debtor issued post dated cheques in the year 2015 to the Respondent herein.
- b. The Respondent has filed a claim of RS. 1,11,79,818/- and since these two post dated cheques were encashed the IRP reduced the claim of the Respondent to the extent of the post dated cheques and admitted the claim for Rs. 82,21,606/-.
- c. The respondent submits that, for the purpose of law, the payment is received by them on 27.07.2015, when the post dated cheques were handed over to them on 27.07.2015. What the Respondent wants to convey is that, 27.07.2015 should be taken as date of payment and not the encashment of the post dated cheques which is on 09.08.2018. Hence these transactions are not hit by Section 14 moratorium and RP cannot ask back these amounts. The respondent relied on the judgement of the Hon'ble Supreme Court in the case of *K. Saraswathy Alias K. Kalpana (Dead) by L.R.S. V/s. P.S.S. Somasundaram Chettiar reported in (1989) 4 Supreme Court Cases 527*

wherein paras 4 & 5 it is laid down by the Hon'ble Supreme Court that the payment of a cheque relates back to date of delivery of the Cheque. Paras 4 & 5 in the judgment is observed as below:

*"..4. The only question decided against the appellant by the High Court in C.M.P. No. 2875 of 1980 was with regard to the deposit of the amount stipulated in the first condition of the order of this Court dated November 29, 1979. The crucial issue was whether the payment made by the appellant on May 29, 1980 by cheque of the amount of Rs. 6,02,009 together with the amount deposited earlier on April 11, 1980 was in due compliance of the first condition of this Court's order dated November 29, 1979. The High Court found that the simple delivery of the cheque on May 29, 1980 could not be deemed to be deposit of the specified sum on May 29, 1980 in satisfaction of the order of this Court when the amount of the cheque had been realized only on June 16, 1980. The High Court held that the appellant was bound to comply with the original side rules of the High Court which prescribed the procedure to be followed in depositing the money in Court and, in particular, Order 31, Rule 1 to 6 thereof which were aimed at securing the deposit of the money in the Reserve Bank of India to the credit of a particular proceeding on or before the specified date. Accordingly, the High Court refused to grant the declaration that the appellant had complied with the order of this Court dated November 29, 1979.*

*5. It is contended before us on behalf of the appellant that the cheque for Rs.6,02,000 was tendered in Court on May 29, 1980 and that it was duly honoured by the Bank and money was realized under the cheque, and therefore it must be taken that payment had been effected by the appellant on May 29, 1980 within the time stipulated by this Court in its order dated November 29, 1979. In commissioner of Income Tax, Bombay South, Bombay v. Messrs Ogale Glass Works Ltd. Ogale Wadi, A.I.R.1954 S.C. 429: (1955)\_ ISCR 185: (1954) 25 ITR 529 it was laid down by this Court that payment by cheque realized subsequently on the cheque being honoured and encashed relates back to the date of payment is the date of delivery of the cheque. Payment by cheque is an ordinary incident of present day life, whether commercial or private, and unless it is specifically mentioned that payment must be in cash there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course. There is nothing in the order of this Court providing that the deposit by the appellant was to be in cash. The terms of the order dated November 29, 1979 are conclusive in this respect and it*

*is the intent of that order which will determine whether payment by cheque within the period stipulated in that order was excluded as a mode in satisfaction of the terms of that order. The time for payment is governed by the order of this Court....”*

- d. By citing the above judgment the Respondent says that the payment was made in the year 2015 and the moratorium imposed on admission of CIRP in the year 2018 will not bind them.
- e. The Respondent further submits that the NCLAT judgments cited supra by the Applicant are distinguishable and will not be applicable to the facts of the present case.

## 7. Discussion:

- A. Section 14 (1) of the Code provides that subject to provisions of sub-section (2) and (3), on the Insolvency commencement date the Adjudicating Authority shall declared moratorium for prohibiting all of the following namely:
  - a. ---
  - b. ---
  - c. *Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
  - d. ---
- B. The payment made by the Corporate Debtor by post dated cheque which was sent for collection after the admission of CIRP is a clear case of recovery which is prohibited under the moratorium as per Section 14 (1) (c) of the Code. Here the crucial thing is that the date of debit of the account of the Corporate Debtor by the Bank and by no stretch of imagination it can be taken as a payment made in the year 2015. It is not the case of the Respondent that the said amounts were credited in the year 2015 itself but they have received only the cheques in the year 2015 and account of the Corporate Debtor was debited after initiation of the CIRP. Hence the payment is hit by the moratorium.
- C. The Respondent submits that, this payment should be taken as a payment made in the year 2015 on account of issue of post dated cheques at the point of time while arriving at the settlement, for which, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of *K. Saraswathy Alias K. Kalpana (Dead) by L.R.S. V/s. P.S.S. Somasundaram Chettiar supra*. This is a case which deals with an issue whether the payment made on 29.05.1980 through cheque, with cash deposited earlier in the account satisfies the

compliance of the condition imposed in the Court order. The issue in this case was whether the payment made by the appellant on May 29, 1980 by cheque of the amount of Rs. 6,02,009/- together with the amount deposited earlier on April 11, 1980 was in due compliance of the first condition of the order of the Court dated November 29, 1979. When the Hon'ble High Court had held that the payment was not made in time, the Hon'ble Supreme Court held that payment by cheque is an ordinary incident of present day life and unless it is specifically mentioned that payment must be in cash there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course. There is nothing in the order of the Court providing that the deposit by the appellant was to be in cash. Here in the case on hand we are dealing with an issue of post dated cheque, by a debtor to the creditor, which was given in the year 2015 and encashed in 2018. The facts of the above said case are clearly distinguishable from the facts of the case on hand and the ratio therein is not applicable to the facts of the case on hand.

D. The contention of the Respondent that the judgments of the Hon'ble NCLAT cited supra by the Applicant are not applicable in view of the fact that in those cases the facts are completely different from the facts in this case is totally unacceptable. These case laws are directly applicable to the facts of the present case and hence the contention of the Respondent is rejected.

8. In view of the above discussion, this Bench holds that the payment received by the Respondent from the Corporate Debtor by issue of the post dated cheques in the year 2015 and debited in the Bank account of the Corporate Debtor during CIRP is hit by Section 14 moratorium and the Respondent is hereby directed to refund the said amount of Rs. 11,56,396/- and another sum of Rs. 11,01,590/- to the Applicant within 15 days of receipt of this order. Consequently, on submission of additional claim by the respondent for above said amounts the RP can admit the additional claim. Accordingly this Application is allowed.

SD/-  
V. Nallasenapathy  
Member (T)

SD/-  
Bhaskara Pantula Mohan  
Member (J)