

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

IA 663/2023 IN

CP (IB) No. 4164/MB-IV/2019

Under **Section 60(5)** of the I&B Code, 2016

Indian Overseas Bank

... Applicant

V/s

Tuticorin Coal Terminal Private Limited

Through Dhiren Shah,

Resolution Professional of the Corporate Debtor

... Respondent

In the matter of:

Bank Of India

...Financial Creditor

V/s

Tuticorin Coal Terminal Private Limited

[CIN: U61200MH2010PTC206696]

...Corporate Debtor

Order Dated: 13.07.2023

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s)

: Mr. Siddha Pamecha i/b Thodur Law
Associates, Advocate.

For the Respondent(s) : Mr. Aniruth Purusothaman, Advocate.

Per : Prabhat Kumar, Member Technical

1. This is an Application, IA-663/2023 filed by Indian Overseas Bank on 28.01.2023 seeking directions to the Resolution Professional of Corporate Debtor to refund the amount of margin money of Rs.1,19,74,496/- paid by Applicant Bank to Corporate Debtor; or in the Alternative, to pass an order directing the Resolution Professional of Corporate Debtor to adjust the amount of margin money amounting to Rs.1,19,74,496/-, already paid by the Applicant to Resolution Professional on his demand, towards excess CIRP costs and contribution if any payable by Applicant Bank.
2. The applicant bank submits that RP, vide email dated 18.11.2020, asked the applicant bank, during CIRP proceedings, to transfer an amount of Rs.30 lakhs from the fixed deposits of the Corporate Debtor with the bank to the current account of the Corporate Debtor to meet CIRP expenses, and the money was transferred on the same date. Again on 19.12.2020, the balance amount of Rs.29,74,496/- was transferred towards CIRP expenses. Apart from this the applicant had transferred Rs.30 lakhs each on earlier two occasions i.e. 31.07.2020 and 24.09.2020. These amounts were paid out of margin money held by the Applicant bank against the performance bank guarantee issued by the Applicant Bank on behalf of the Corporate Debtor.

2.1. The Applicant Bank has further submitted, vide submission dated 26.06.2023, that the contention of the Respondent Resolution Professional is not correct in so far as he pleads that upon payment of the money by the Applicant accounts have been settled. The Applicant submitted that the money given by the applicant under a bona fide belief in an ongoing CIRP process cannot be construed as settlement of account. Further the continuous demands raised by the RP for contribution to CIRP cost shows that the accounts have not been settled. The Applicant has also cited the decision of this bench in the case of *Dhiren Shantial Shah Vs. Indian Bank (IA-148/2021 in CP(IB)4164/MB/IV/2019)* to contend that margin money is substratum of a trust created to pay to the beneficiary to whom the bank guarantee is given and are not the assets of the Corporate Debtor. The Applicant has also relied upon decision of Hon'ble NCLAT in the case of *Indian Overseas Bank vs. Arvind Kumar {CA 558 of 2020}*, wherein it was also held that the "margin money" is the contribution on the part of the borrower who seeks "Bank Guarantee". The said margin money remains with the Bank, if the Bank Guarantee is alive. If the Bank guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case, the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the corporate debtor.

3. The Resolution Professional filed written submission dated 21.06.2023 stating that the Applicant was asked to transfer the Margin Money to the account maintained by the Corporate Debtor with the Bank of India, since the same was an asset of the Corporate Debtor. The Judgment passed by the Hon'ble NCLAT in the matter of *Indian Overseas Bank Vs Arvind Kumar dated 28th September 2020* relied upon by the applicant is not applicable in the present case, as the account of the Corporate Debtor with the Applicant had closed after the voluntary transfer of the complete Margin Money by the Applicant to the Corporate Debtor. Accordingly, the Respondent contended that the Applicant is now estopped from resiling the transfer of money given which they voluntarily transferred the Margin Money of their own free will, on my request, and the same cannot now be reversed.

3.1. The Judgment dated 15.09.2008 passed by the Apex Court of India in the case of *Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange (Civil Appeal No.1171/2004)* is relevant to present Application filed by the Applicant, contending that a later decision has retrospective application in so far as it pertains to matters that have been settled in the meantime.

3.2. It was also submitted by the Respondent, that the Hon'ble NCLAT in the Judgement dated 28.09.2020 has held that the Margin Money cannot be claimed by the Corporate Debtor till the Bank Guarantee is alive. However, in the instant case, the Bank Guarantee was alive and not invoked when the

Applicant's Claim was admitted, and even when the Margin Money was transferred to the Corporate Debtor by the Applicant.

3.3. The claim inclusive of the complete value of the Margin Money has been admitted by me in full, and upon admission of claim in full, the margin money kept as security with the Applicant bank has become free of any encumbrances or lien.

3.4. It is also claimed by the Respondent that the Applicant had agreed that they do not have any lien on the fixed deposit, and hence they released the amount lying in fixed deposit which was purported to be a fixed deposit for margin money, which is now having no lien.

3.5. The Resolution Professional has relied upon the decision of Hon'ble NCLAT in the case of *Bank of India Vs Bhuban Madan 2021 SCC Online NCLAT 189* to contend that the case of Andhra Bank has no applicability to the facts of the attendant case as it is seen from the records that the banks have already included the value of non-fund-based credit facilities in their claim before the IRP.

4. This Bench heard the Counsels and perused the material on record.

4.1. It is undisputed fact that the bank guarantees, against which the said deposits are being claimed as margin money by the Applicant Bank, were alive when the Resolution Professional made demand to the Applicant Bank to make payments out of the fixed deposits. It is also not disputed by the Respondent, that the said fixed deposits were held as margin money by the

Applicant Bank. This Bench finds that the Respondent's case is that the Applicant is now estopped from resiling the transfer of money given which they voluntarily transferred the Margin Money of their own free will, on my request, and the same cannot now be reversed, and that the Applicant Bank's claim, including the amount of such margin money, has been admitted by the Respondent.

4.2. Hon'ble NCLAT in the case of *Indian Overseas Bank vs. Arvind Kumar* {CA 558 of 2020} held that the "margin money" is the contribution on the part of the borrower who seeks "Bank Guarantee". The said margin money remains with the Bank, if the Bank Guarantee is alive. Accordingly, the amounts held in fixed deposits against Bank Guarantee cannot be said to be assets of the Corporate Debtor, in respect of which the Respondent Resolution Professional can claim its right to take control and custody.

4.3. On perusal of the email dated 12.11.2020, this bench finds that the RP has asked the banker to remit Rs.30 lakhs out of fixed deposits of the Corporate Debtor, and it is further notices from email dated 19.11.2020 that the applicant bank had advised the RP that "*the balance amount of the FD of Rs.29,74,496/- have been kept as new FD*". This bench further finds that this amount was transferred on 29.12.2020.

4.4. The applicant bank, vide email dated 02.01.2021, had categorically stated that "*Please note that the said payment is to be treated as CIRP cost and to be paid on priority basis to us in the resolution plan*", which, in unequivocal terms,

clarifies that the remittance of said payments to the Respondent Resolution Professional, even if purported to be out of fixed deposits held as margin money, cannot be termed as payment of money belonging to Corporate Debtor, which did not belong to it in view of Bank Guarantees being alive.

4.5. It is further noticed that the applicant bank vide email dated 28.01.2021 informed the resolution professional that *“the bank guarantee against which margin money held by us is still alive. Since the moratorium under Sec 14 (3) of IBC is not applicable to performance bank guarantee, The BG issued by us may be invoked anytime, in which event, we will have to honour the payment.”*

4.6. Further, on perusal of the minutes of the meeting of CoC held on 29.05.2021, it is also noticed that Mr. Vipin Mishra from Indian Overseas bank put forth his views that since the Margin Money against Bank Guarantees issued by IOB was utilized by the RP towards CIRP cost and not permitted to be adjusted against their outstanding liabilities, as done by BOI and PNB, the margin money should be returned back to IOB or be treated as CIRP cost. It is seen from the minutes that the Resolution Professional rejected the contention of the representative of the Bank based on ill-founded proposition that NCLT had confirmed this stand in an order that margin money of the Corporate Debtor could be used towards CIRP cost. We find that the order dated 08.02.2021, passed in the case of Indian Bank by this Bench, had allowed appropriation of such amount, which was in excess of stipulated margin, to meet CIRP expenses for the period.

Further, it is noticed that The RP informed Mr. Vipin Mishra of Applicant Bank that the jurisprudence of the NCLT in the Indian Bank matter would be followed in case of IOB.

- 4.7. In view of these facts, this Bench is of the considered view that the money paid by the Applicant Bank to the Resolution Professional cannot be claimed by the Resolution Professional as amount belonging to the Corporate Debtor, and having been rightfully claimed by him from the Bank. Further, this Bench finds that the reliance of the Respondent on the decision of Apex Court of India in the case of Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange is misplaced in view of fact that that decision was rendered in relation to Income Tax proceeding having been finalised prior to the decision of superior court interpreting the law against the view held by the Income Tax department. To this, the Hon'ble Supreme Court held that completed assessments cannot be unsettled under Section 154 of the Income Tax Act, 1961 pursuant to a subsequent decision taking a contrary view. In the present case, we have held that this money did not belong to the corporate debtor because of Bank Guarantees being alive. This Bench considers that the money was released by the Bank in good faith and without relinquishing its right to hold that money as margin money.
5. In view of aforesaid finding, this Bench is of considered view that the Resolution Professional of Corporate Debtor be directed to adjust the amount of margin

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money amounting to Rs.1,19,74,496/- towards excess CIRP costs and contribution if any payable by Applicant Bank. The amount of claim of the Applicant Bank shall be revised accordingly.

6. The IA 663/2023 in CP (IB) No. 4164/MB-IV/2019 is allowed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)
13.07.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)