

**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

**I.A. No./CTB/2020
TP No. 105/CTB/2019
CP (IB) No. 646/MB/2019**

In the matter of:

Application under Sections 66,67, 68, 69, 70, 72 and 74 of the Insolvency and Bankruptcy Code, 2016 read with its Rules and Regulations, seeking appropriate directions.

And

In the matter of:

M/s. ISGEC Heavy Engineering Limited

Operational Creditor

Versus

Shree Vishnu and Energy Private Limited

Corporate Debtor

And

In the matter of:

Shikhar Chand Jain

Resolution Professional

Versus

Manoj K. Daga & Anr

. . . . Respondents

Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

Date of hearing: 13.05.2020

Order delivered on: 13.05.2020

ORDER

Per Jinan K.R. Member (Judicial)

1). This un numbered application in the **CP (IB) No. 646/MB/2019** came up for consideration on today at the instances of the resolution professional. According to the resolution professional in pursuance of the directions passed by the Hon'ble National Company Law Appellate Tribunal (NCLAT) in its final order dated 12.03.2020 passed in Company Appeal (AT) (Insolvency) No. 1113 of 2019.

2). The present application is being filed under Sections 67, 68, 69, 70, 72 and 74 of the Insolvency and Bankruptcy Code, 2016 by Mr. Shikhar Chand Jain, the Resolution Professional in the case of Shree Vishnu & Energy Private Limited (Corporate Debtor) seeking appropriate directions against the members of the suspended board of directors of the Corporate Debtors as they withdrew, during the currency of the Corporate Insolvency process (CIRP) without the knowledge and/or consent of the Applicant, an amount of Rs.6,72,12,170.22 (Rupees Six Crore Seventy Two Lakh Twelve Thousand One Hundred Seventy and Paise Twenty Two Only) from a bank account of the Corporate Debtor, out of which an amount of Rs.1,22,00,000/- (Rupees One Crore Twenty Two Lakh Only) was deposited back by the Respondents in the bank account of the Corporate Debtor, leaving a balance of Rs.5,50,12,170.22 (Rupees Five Crore Fifty Lakh Twelve Thousand One Hundred Seventy and Paise Twenty Two Only) in violation of moratorium order dated 27.09.2019 passed by the NCLT, Cuttack Bench under Section 14 of the Code, and also in violation of the order dated 23.10.2019 passed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 1113 of 2019. It is further submitted that the said amount withdrawn by the Directors of the suspended board of corporate debtor,(hereafter to be referred as directors) has not been deposited back despite giving the undertaking to the Hon'ble NCLAT which has resulted in to the said Appeal being dismissed in default vide the Final Order. Hence, the present application has been filed by the Resolution Professional Applicant seeking the following directions:-

- I. To ensure restoration of the remaining amount from the Respondents to the bank account of the Corporate Debtor,
- II. Initiating appropriate proceedings.

3). The applicant prayed for an urgent hearing of the application, because the applicant/RP apprehends that the directors may take steps so as to make him impossible to recover the illegally withdrawn amount from the two defaulting directors namely Mr. Deepak K. Daga and Mr. Manoj Daga. The urgency sett up being found satisfactory this case was listed for hearing by given advance notice from the Registry of the NCLT, Kolkata Bench to the Directors and directions were also issued to submit brief fact of defence if any.

4). This matter was originally heard on 11th May,2020. After hearing the matter, it was brought to my notice that Mr. Deepak K Daga although joined for participating the hearing through Video conference (VC), his name was inadvertently deleted by the Net Work Engineer of NCLT, Kolkata Bench. Accordingly notices were repeated to all concerned and listed on today mainly for hearing Mr. Deepak K Daga.

5). Mr. Deepak K Daga has not represented nor joined for VC hearing, when this matter was heard on 11th May 2020. The Counsel who appeared for Mr. Manoj Daga on the other hand has submitted that she was not representing for him. It was brought to my notice that Mr. Deepak K Daga although would like to join his name was inadvertently deleted by the Net Work Engineer. Accordingly notices were repeated to all concerned and today this matter was re heard.

6). Mr. Deepak K Daga filed a detailed reply fairly admitting the withdrawal, but alleged that whatever funds have been withdrawn after initiation of CIRP against the Corporate Debtor, have only been used for the benefit of the

Corporate Debtor and the Resolution Professional has approved this fact. He would submit that this application is also not maintainable as per any of the provisions of the Code as shown in the application and that this application is bad for non joinder of Pack Power and Pooja Trading who are the suppliers of raw material during the CIRP . According to him the fund he withdrawn was paid to them as the cost of supply of raw materials. And prays some more time to prove the transaction to the resolution professional. He further would submit that if some more time is given he would see that the matter would be settled with the financial creditor and that he had contacted one Asset Reconstruction Company to furnish loan and enable the payout to the Corporate Debtor's account that he had availed a loan from HSBC bank in another Company viz., Giriraj Solvent Extractions Pvt. Ltd., and the sanction of the said loan has been received. Lastly he submits that a settlement proposal was submitted to the sole financial creditor State Bank of India. The last proposal was submitted on 05.05.2020 by the Respondent. The State Bank of India has itself admitted that it was unable to process the OTS proposal quickly due to lock down and limited functioning in view of Covid -19 pandemic. Upon the above said contentions he is attempting to show that the fund he was withdrawn was for genuine purposes in connection with the operation of the business of the corporate debtor. However, no materials or documents to corroborate the above said contentions brought to my notice or to the notice of the RP.

7). Today when this case was again heard through VC, the Ld. **Advocate Mr. Sandeep Bajaj** and **Ld. Advocate Ms. Aakanksha Nehra** were represented for the Resolution Professional and **Ld. Advocate Ms. Prachi Johri** represented for **Mr. Manoj K. Daga** and **Deepak Daga/Directors of Corporate debtor**. Both directors were also allowed to join in the room for virtual hearing.

8). Ld. Counsel for the RP submits that the Corporate Debtor has a running business and the RP is facing with immense difficulty due to paucity of funds as the amount illegally withdrawn by the directors was required to be used for the business of the Corporate Debtor. Despite initiating contempt proceedings by the Hon'ble NCLAT and the directors filed undertaking affidavit before the NCLAT that the amount withdrawn would be remitted back to the account the corporate debtor are not done so and therefore, this application is to be allowed by taking action under section 66 (1) and 74 of the Code. He would further submits that the amount was withdrawn from the current account of corporate debtor operated through Vijya Bank and the account details of the bank were not given to the RP and immediately ordering moratorium the directors withdrawn the amount as detailed in this application and therefore violated the order of moratorium and that the actions of the directors are fraudulent with an intention to defraud the creditors and to defeat the very objective of the Code.

9). The Ld. Counsel for the directors objected this application challenging the maintainability. According to her none of the sections quoted in the application attracts the allegations leveled against the directors and therefore this application is in limine liable to be dismissed. Secondly she submits that the directors are taking steps to settle the dispute with the original Operational Creditor as well as sole Financial Creditor - State Bank of India and will make efforts to settle with other Operational Creditors also. She also would submits that Mr. Deepak Daga has submitted a detailed reply and is to be considered. She would further submits that the directors are trying their level best to refund the money and had availed a loan from HSBC bank and a DD is yet to come from Dubai and prays time for remitting the amount. In addition to the above said submissions she would submits that what amount withdrawn by self by Mr. Deepak Daga would be remitted back if time is granted and that Rs. 2 crore withdrawn was paid to the Pack Power and

Pooja Trading as an advance during the pre CIRP period and that amount is to be adjusted for the cost of purchase of raw materials from the Pack Power and Pooja Trading. She also submits that the Ld. Counsel for the RP misrepresent the fact that there is no fund in the account of the CD so as to run the business, but as per the account details more than 3 crores is available in the account sufficient enough to run the business of the CD and there is no urgency in moving this application during the difficult time of lock down.

10). In answering to the said submissions the Id. Counsel for he RP submits that the application is perfectly maintainable that Pack Power and Pooja Trading is not at all a necessary or proper party. According to him money transferred from the current account of the CD during the period of CIRP is in violation of the order of moratorium under section 14 and the auctions of the directors comes within the purview of section 66(1) and section 74 (1) of the Code. He also submits that the Hon'ble Appellate Tribunal directed the RP to approach RP for appropriate relief and therefore, filing of this application is perfectly maintainable. Regarding the submission that the directors are attempting to avail loan from HSBC bank and because of the lock down they could not collect the DD and hence could not pay the amount is also a false submission. He would say that a copy of DD dated 19.02.2020 was shown to Appellate Tribunal and that the copy of the DD shown to RP shows that the amount was payable not to the CD but to a third party. More than two months time had been given to the directors too for settlements with the creditors, but that too was not done alleging lame excuse of lock down. Argued by the Ld. Counsel for the RP. According to him the submissions on the side of the Ld. Counsel for the directors are misleading. He would submits that no records are available with the CD to proves that the payment of Rs.2 core was paid as an advance to the Pack Power and Pooja Trading, and that the said suppliers never admit such an advance is available

with them as attempted to establish on the side of the directors. He also would submit that RP has no personal grudge toward the directors, and that RP is duty bound to see that what money unauthorisely withdrawn without his approval has to be paid back to the CD. It is in the interest of the CD he has moved this application. The Ld. Counsel submits.

11). I have gone through the scanned copies of affidavit and the annexures attached along with the application. The fact of unauthorised withdrawal of the amount from the corporate debtor account without the prior approval of the RP is a proved facts brought out in the instant case. The moratorium came in force from 23.10.2019. As per the interim order dated 5.12.2019, in I.A. 3878/2019 the Hon'ble NCLAT observed: ***“If the Directors of the Corporate Debtor are unable to show prior approval with regard to any of the impugned withdrawals, the Directors should in the alternate say as to why we should not invoke provisions of Section 74 of IBC, apart from why contempt proceedings should not be initiated.”*** with the above said observation the Hon'ble NCLAT modified the interim order read as under:

We modify the order dated 23rd October, 2019 and direct that instead of sentence:

“The person who is authorized to sign the bank cheques may issue cheques but only after approval of the Interim Resolution Professional”

Which is deleted, we substituted the same by a direction that -

“The person who is authorised to sign the bank cheques may preparte and sign cheques but only after approval of the Interim Resolution Professional and the cheques can be operated/issued only through the hands of the Resolution Professional”

12). Thereafter on 5th February,2020, when the said interim application and another I.A. No. 516 of 2020 came up for consideration of the Hon'ble NCLAT, an undertaking affidavits were seen filed by Shri Deepak Daga and Manoj Daga undertaking to deposit the amount. Accepting the affidavits of the respondents/directors the Hon'ble NCLAT observed: *"The Affidavits and undertakings of both these Respondents are accepted and taken on record. These Respondents shall comply with the Undertakings given. The Ld. Counsel for IRP accepts that Rs.5,50,12,146/- (Rupees Five Crore Fifty Lakh Twelve Thousand One Hundred Forty Six Only) needs to be returned"*. It is understood that the respondents undertook to returned the money on or before 05.03.2020.

13). On 12.03.2020, the matter was again came to the consideration before the Hon'ble NCLAT. Till then the money withdrawn by the directors was not remitted back. The Hon'ble NCLAT dismissed the appeal. I am extracting para 22 to to 26, for the better understanding of the order of the Hon'ble Appellate Tribunal.

Para 22.

Taking conspectus of whole developments in the CIRP proceeding and this Appeal, we are of the view that the Directors acted wholly illegally once moratorium had been applied, in going ahead and withdrawing monies from the accounts at the back of IRP by even issuing cheque4s "self". Such acts cannot be justified in any manner. The appellant and Deepak Daga kept telling this Tribunal that they would return the money and in spite of undertaking given and time fixed, the money has not been returned and the CIRP process is seriously hampered. Consuming whole month stated in the Undertaking and without returning any money, we find no substance in the hollow statements in I.A. No. 1075 of 2020 - Application seeking timer to comply with Undertakings. The I.A. wrongly states that undertakings given were without prejudice. They were voluntarily given. There are no bonafide in seeking time. Looking to the statements made to this Tribunal by the Appellant and Deepak Daga through Ld. Counsel for the Appellant and the Affidavits and undertakings given, which have not been honored, we are of the view that, prima facie, case is made out for proceeding against both the

Directors in contempt. We are of the opinion that the Appellant and Deepak Daga since beginning were aware of nature of the acts they were committing in the illegal withdrawals. They disobeyed orders of Adjudicating Authority and this Tribunal willfully and there is willful non-compliance of undertakings given. I.A. No. 1075 of 2020 to seek time to comply undertaking is not honest and appears to have been filed to create grounds of defence to further abuse process to kill time. The I.A. is rejected. The acts of the two Directors have obstructed the proceedings of CIRP, the proceedings before Adjudicating Authority and this Tribunal. The acts prima facie disclose serious Contempt, violating mandate of law of IBC applied by Orders of Adjudicating Authority and this Tribunal and breach of undertaking given on oath, actionable as NCLT established under the Companies Act, 2013 acts as Adjudicating Authority and this Tribunal is empowered under section 425 of Companies Act, 2013 read with enabling provisions to take action.

Para 23:

At the same time, considering record which shows the Appellant violated Orders of Adjudicating Authority and this Tribunal and looking to the apparent default on record where undertakings were given and not honoured, we find that the Appeal deserves to be dismissed in default. We dismiss the Appeal in default while permitting the IRP to move the Adjudicating Authority or any other authorities including police authorities to pursue the matter with regard to money illegally withdrawn from the accounts of the Corporate Debtor so as to trace the money and get it back in the Company accounts. Prima facie, it appears to us that the illegal withdrawals can, inter alia, be treated as criminal misappropriation and criminal breach of trust.

Para 24:

The Appellant Manoj K. Daga is present. The other Respondent Deepak Daga is stated to be not present, as not well.

Para 25:

Copy of this judgment and record of Appeal will be treated as Contempt Case to be registered as 'State vs. Manoj K. Daga and Deepak Daga' as these Directors who will face the contempt case. The Registry will give it a Contempt case number and the same is listed on 7th April, 2020. Counsel for the Appellant states that on that date, Manoj K Daga and Deepak Daga would both attend this Tribunal.

Para 26:

The CIRP proceedings will continue in terms of provisions of IBC. The IRP would be at liberty to examine the accounts and evidence and may

place before the Adjudicating Authority all particulars and facts including evidence showing violation of Sections 14, 17 and 19 of IBC, after impugned Order dated 27.09.2019 was passed and during pendency of the Appeal, for Adjudicating Authority to consider and take actions under Sections 70 and 74 of IBC, or other provisions as may be.

The Appeal and I.A.s are disposed accordingly. No costs.

14). The above quoted order of Hon'ble NCLAT is self explanatory. The directors were unable to raise any explanation as to why not the amount withdrawn was not remitted back. The explanations offered on the side of the directors are not at all satisfactory. A deliberate disobedience of the direction was taken judicial notice by the Hon'ble NCLAT and an action under section 425 of the Companies Act,2013 by initiating contempt against the directors also was taken by the Appellate Tribunal.

15). The contention that this application is not maintainable is found devoid of any merit. As per section 66(1) of the Code, if the AA is satisfied that during the corporate insolvency process the directors of the CD withdrawn money from the bank account of the CD with an intent to defraud creditors or for any fraudulent purposes, pass an order against the person liable to make such contributions to the assets of the CD. As per section 74 (1) if the AA is satisfied that the CD or any of its officer violates the provisions of section 14, any such officer who knowingly or willfully committed such contravention shall be punishable with fine not exceeding 3 lack or with imprisonment not exceeding 3 years or with both. The allegations leveled by the RP as against the directors are perfectly falls under these provisions. Therefore, contentions of the directors that this application is not at all maintainable is devoid of any merit.

16). It is contended in the reply that this application is also bad for non joinder of Pack Power and Pooja Trading. Since the payment of Rs.2 crore was mad by Mr.Deeapak Daga, the said company is a necessary party is the

contention raised in the reply. But when the matter was heard that objection was not argued on his side. More so it is a submission without supporting evidence that the payment was made to the said supplier by Mr. Deepak Daga. So the said supplier is neither a necessary party nor a formal party. So this ground also found unsustainable under law.

17). Despite the above said proved facts, the directors are not shown any respect to the order. A prudent law obedient man never expected to do this kind of disobedience and breach of their own undertaking. What is attempted on the side of the directors is that they are willing to pay back the amount less Rs.2 crore allegedly paid to the suppliers of raw materials as stated above and that for payment they need some more time due to disruption of bank transactions due to lock down. Neither the proposals discussed above seems to have genuine nor it would be workable. The conduct and approach of the directors indicates that they were willfully evading repayment on lame excuse under the guise of the lock down due to COVID-19. None of the submissions seen corroborated with any reliable materials on their sides.

18). So the directors are persons neither has any regard for the prices of law nor for the orders issued by the Hon'ble NCLAT. Repeated directions were disobeyed. Breached there own undertakings. Not even cared to refund the money despite receipt of notice asking why action for contempt of Tribunal should not be taken against them. The directors are aware of violation of moratorium ordered under section 14 of the Code. The above said facts proved that the directors were guilty of willful disobedience of the orders of the appellate Tribunal. The ingredients to be satisfied under section 74(1) of the Code stand proved.

19). Being found guilty of violating the moratorium under section 14 of the code, the directors are punishable with imprisonment for a term which shall

not be less than three years, but may extend to five years or with fine which shall not be less than one Lakh rupees, but may extend to three lakh rupees, or with both. However, this Adjudicating Authority has no power to impose sentence/imprisonment. So it is left to the RP to move application before the IBBI or to file criminal complaint before the police for trial of complaint cases by the designated special court under section 435 of the Companies Act,2013. Being this AA can impose fine, and being found that the directors are guilty of violating the moratorium under section 14 of the Code, I am of the opinion that this application is liable to be allowed upon the following orders:

- I. The directors/ Mr. Manoj Daga and Mr. Deepak Daga are directed to refund an amount of Rs.5,50,12,170.22 (Rupees Five Crore Fifty Lakh Twelve Thousand One Hundred Seventy and Paise Twenty Two Only) to the account of the CD with in two weeks from the date of receipt of an email copy of this order;
- II. **Failing which both directors are liable to pay a fine of 1 lack each.**
- III. **The registry is directed send email copies of the order forthwith to all parties inclusive of the counsel.**

I A is disposed of accordingly. No cost.

(Jinan K.R)
Member (Judicial)

Signed on this the 13th day of May, 2020.