

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 614 of 2020

[Arising out of order dated 29.05.2020 in MA/136/2020 in IBA/307/IB/2019 passed by National Company Law Tribunal, Special Bench, Chennai]

IN THE MATTER OF:

Punjab National Bank

Asset Recovery Management Branch,
2nd Floor 20 Sneh Nagar, Indore-452001,
Madhya Pradesh.

E-mail: bo0699@pnb.co.in,

Rakesh.pandey2@pnb.co.in

...Appellant

Versus

Mr. Subrata M Maity,

Resolution Professional of Corporate Debtor i.e.
Bhatia Coke and Energy Limited

Address: Shop No 28 & 29, Plot No 25

Greenscape Royale CHS Ltd

Sector 7, Kamothe, Navi Mumbai-410209.

E-mail: subrata.m@hotmail.com

...Respondent

**For Appellant: Mr. Sumesh Dhawan and
Ms. Vatsala Kak, Advocates.**

For Respondent: Mr. V. Venkata Sivakumar, RP.

J U D G M E N T

Justice Anant Bijay Singh,

The instant Appeal has been filed by the Appellant – Punjab National Bank one of the ‘Financial Creditor’ aggrieved and dissatisfied by the order dated 29.05.2020 in MA/136/2020 in IBA/307/IB/2019 passed by National Company Law Tribunal, Special Bench, Chennai whereby and where under the Application filed on behalf of the ‘Corporate Debtor’ – Respondent (herein) was allowed and the Appellant –Punjab National Bank which is holding voting share of 0.58% in the ‘Committee of Creditors’ (for short CoC) was directed to credit to the Corporate Debtor’s (Respondent) account amount of Rs. 17,95,04,271.79 (Rs. 1,87,39,588.90 presently operated by the Resolution Professional, Rs. 14,57,64,682,89 from the LC honoured before ‘Corporate Insolvency Resolution Process’ (for short CIRP) and appropriated after CIRP and also GST refund of Rs. 1,50,000/- received during the CIRP period) which were meant to settle the liability on account of the LCs opened during pre-CIRP period.

2. The facts giving rise to the instant Appeal is as follows;

a) That one Bhatia Coke & Energy Ltd. (BCEL) (hereinafter referred to as the “Corporate Debtor”- Respondent) incorporated under Companies Act, 1956 with the objective to manufacture coke and thereby generated power by captive utilization of all types of coal, coke, charcoal, coal tar, lignite, minerals, metals and their by-products and particularly by waste heat generated during the manufacture of the coke.

b) The Corporate Debtor (Respondent herein) had been availing various credit facilities like Term loan, Cash Credit, Bank Guarantee including Letter of Credit (LC) facilities from the Manoramaganj Branch, Indore of the Appellant in consortium. In 2015, the account was restructured and the Appellant came out of consortium.

c) It is pertinent to mention that the Appellant was issuing the LCs regularly to the Corporate Debtor and were making payment to the concerned parties by debiting the Cash Credit account of the Corporate Debtor.

d) In the meanwhile, the State bank of India filed an Application being IBA/307/2019 under Section 7 of the Insolvency and Bankruptcy Code (for short IBC) to initiate CIRP against the Corporate Debtor. The Adjudicating Authority vide its order dated 22.05.2019 initiated CIRP against the Corporate Debtor and appointed one Mr. Motappa Thimmaraya Swamy as Interim Resolution Professional (for short IRP).

e) Further case is that the due date of the LCs was informed by the Appellant to the IRP namely Mr. Motappa Thimmaraya Swamy and the IRP vide several e-mails dated 29.05.2019, 31.05.2019, 15.06.2019 and 17.06.2019 categorically permitted to the Appellant to keep the Corporate Debtor as a going concern. The copy of the aforesaid emails is annexed as Annexure-2 (Colly) at page 46 of the Appeal Paper Book.

f) Further case is that the Appellant had also issued one new LC for Rs. 2,38,46,467 on 1st June, 2019 after approval obtained from the aforesaid IRP

vide an email dated 30.05.2019 as Annexure -3 at page 56 to 58 of the Appeal Paper Book.

g) Further case is that the Appellant had specifically written to the IRP prior to make the payment of the LCs while referring to order dated 22.05.2019 passed by the Adjudicating Authority, wherein Application under Section 7 of the IBC was admitted and moratorium order was passed.

h) Further case is that the Appellant is only on the instruction with the prior approval of the IRP payment of LCs were made by debiting the Cash Credit Account and therefore, the adjustment of the amount of Rs. 17,95,04,271.79 by the Appellant cannot be said to the violation of Section 14 of the IBC.

i) The CoC members and its 3rd meeting held on 01.11.2019 passed resolution to replace the IRP namely Mr. Mottappa Thimmaray Swamy with Mr. Subrata M Maity (herein Respondent/RP) for which an Application bearing MA/1379/2019 was moved before the Adjudicating Authority and which was allowed vide an order dated 30.12.2019 (Annexure-5 at page 72 to 73 of the Appeal Paper Book).

j) The 4th CoC meeting held on 07.01.2020 (Annexure-6 at page 74 to 77 of the Appeal paper Book), the replaced RP/Respondent de hors the facts and circumstances as well as the directions of this Hon'ble Appellate Tribunal passed in Company Appeal (AT) (Insolvency) No. 610 of 2019, insisted on the refund of aforesaid Rs. 17,95,04,271.79 by the Appellant.

k) Further case is that on 28.01.2020 the RP/Respondent sent an email to the Appellant seeking refund of the aforesaid amount wrongly recovered from the Corporate Debtor.

l) Further case is that the Respondent had filed an Application against the Appellant under Section 60(5) of the IBC bearing MA/136/2020 for seeking directions to reverse the amount of Rs. 17,95,04,271.79 lying with the Appellant and also to remit the balance in the account of the Corporate Debtor.

m) The Ld. Adjudicating Authority after hearing the parties allowed the Application filed by the RP/Respondent (herein) under order dated 29.05.2020 and hence this Appeal.

Submissions on behalf of the Appellant

3. The Learned Counsel for the Appellant during the course of argument, in memo of Appeal and his Written Submissions have submitted that the Ld. Adjudicating Authority had erroneously directed the Appellant to credit to the Corporate Debtor's Account an amount of Rs. 17,95,04,271.79, which was debited to the Corporate Debtor's Account during CIRP for having honoured pre-CIRP LCs opened by the Corporate Debtor.

4. The Learned Counsel for the Appellant further submitted that the bare perusal of the impugned order dated 29.05.2020 reveals that the Ld. Adjudicating Authority failed to appreciate that the RP/Respondent was misleading deliberately by causing confusion and the confusion was created in

respect to the credit received in the Corporate Debtor's Account on an amount of Rs. 17.95.04,271.79.

5. It is further submitted that the confusion was created by terming the Appellant's act of settling the devolved LCs by debiting the Corporate Debtor's Account during CIRP.

6. It is further submitted that the Ld. Adjudicating Authority have failed to appreciate the fact that the Appellant had debited the Corporate Debtor's Account towards honouring the LCs opened by the Corporate Debtor to keep the Corporate Debtor as a going concern.

7. It is further submitted that the Ld. Adjudicating Authority failed to appreciate that the altogether 8 LCs, 7 LCs were issued prior to the commencement of CIRP i.e. 22.05.2019 and one LC of Rs. 2,38,46,467 was issued after the initiation of CIRP and the Appellant had made the LCs payment on the request of erstwhile IRP.

8. It is further submitted that the erstwhile IRP vide his emails dated 29.05.2019, 31.05.2019, 15.06.2019 and 17.06.2019 had approved the further payments of the LCs and accordingly payment of devolved LCs was made by debiting cash credit account of the Corporate Debtor in order to keep it as a going concern.

9. It is further submitted that the Ld. Adjudicating Authority have not considered the facts in his true perspective. In view of the aforesaid facts and

circumstances the impugned order cannot be sustained and the Appeal be allowed. The impugned order is set aside.

Submissions on behalf of the Respondent

10. Learned Counsel for the Respondent during the course of the argument and also written submissions submitted that the Corporate Debtor was admitted to CIRP on 25.05.2019 when the moratorium as per Section 14 of the IBC came into force.

11. Learned Counsel for the Respondent further referred to Form 'C' wherein the total claim which included the appropriations which are the subject matter of the dispute as under:

FORM C SUBMISSION OF CLAIM BY FINANCIAL CREDITORS (Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) From Punjab National Bank, Registered Head Office: Plot no 4, Dwarka Sector 10, New Delhi -110075 Branch Office: Manoramganj, 2 AB Road Indore, MP] To The Interim Resolution Professional / Resolution Professional, Mr. M Thimmarayaswamy Date 03.06.2019
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Relevant Particulars	
1. Name of the financial creditor	Punjab National Bank
2. Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)	Nationalized Bank
3. Address and email address of the financial creditor for correspondence	Punjab National Bank, Manoramaganj 2 AB Road, Indore, 452001 Email Id; bo0699@pnb.co.in
4. Total amount of claim (including any interest as at the insolvency commencement date) i.e. 22.05.2019	SECURED Principal: Term Loan : Rs. 6,69,99,022.81 Cash Credit : Rs. 1,86,76,748.30 Bank Guarantee : Rs. 10,99,72,290.00 ILC : Rs. 14,77,91,727.00 Interest (upto 22.05.2019) : Rs. 5,98,127.57 <hr/> TOTAL : Rs. 34,40,37,915.68 Rupees Thirty Four Crores Forty Lacs Thirty Seven Thousand Nine Hundred Fifteen And Sixty Eight Paise Only
5. Details of documents by reference to which the debt can be substantiated	Joint Term Loan Agreement dated 08.02.2011 Working Capital Agreement dated 08.02.2011

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12. It was further submitted that the Appellant did not disputed the following amounts appropriated. The appellant is liable for repayment with interest as under:

Cash balance to the credit of the CD in Appellant bank's account	Rs. 187.39 Lakhs
Amount of GST credit belonging to the CD received by the appellant bank	Rs. 150.00 Lakhs
Total	Rs. 337.39 Lakhs

13. It is further submitted that the LC amount of Rs. 14,57,64,682,89 which the appellant claims to have sought the permission of the erstwhile IRP namely

Mr. Motappa Thimmaraya Swamy is not maintainable as it is against the principle of Moratorium.

14. It is further submitted that erstwhile IRP is exposed to the proceedings of the disciplinary committee in a similar case refer to IBBI/CD/24/2020 wherein the IRP was punished with a fine of Rs. 34 Lakhs.

15. It is further submitted that there is no illegality in the impugned order passed by the Ld. Adjudicating Authority, there is no merit in the Appeal. The Appeal is to be dismissed.

FINDING

16. After hearing the Learned Counsel for the parties and perused the records of the case, considered the arguments advanced on behalf of the parties and gone through the written submissions filed on behalf of Appellant and Respondent.

- We are of the view that the 4th meeting of CoC was held on 07.01.2020. The copy of the minutes of the 4th meeting of the CoC as Annexure-6 (at page 74 to 76 of the Appeal Paper Book) agenda item No. 11 reads as under;

“ xi. Transferring balance wrongly recovered by PNB during Moratorium

RP pointed that an amount of Appx 14.57 Crs on account of devolvement of LC was recovered by PNB during Moratorium.

Member of PNB agitated on the issue. Copy of NCLAT

Judgment reproduced below was provided to members representing PNB

In the matter of Company Appeal No. 267 of 2017 before NCLAT, Delhi between Indian Overseas Bank Vs. Mr. Dinkar T. Venkatsubramaniam Resolution Professional Amtek Auto Ltd it was observed by the bench that

“Section 7 of the ‘I&B Code’, once moratorium has been declared it is not open to any person including ‘Financial Creditors’ and the appellant bank to recover any amount from the account of the ‘Corporate Debtor, nor it can appropriate any amount towards its own dues.”

It was decided that RP will provide date to PNB in next 2-3 days thereafter PNB will revert within seven days on their decision. It was also pointed out that GST refund of 1.87 lakhs received during Moratorium was held by PNB in CC account. Member from PNB informed that this being a system issue cannot be reversed. Members from SBI pointed out that this being a accounting treatment can be reversed with approval of appropriate authority. Member from PNB said he will revert.”

The agenda reveals that the Members of the PNB (Appellant herein) has agreed to revert the aforesaid amount.

- That the CoC took decision and it was resolved that the Appellant will reverts within seven days on their decision an amount of Rs. 17,95,04,271.79 by this, resolution was never carried by the Appellant.
- Hence leading the Respondent RP of Corporate Debtor –Bhatia Cock and

Energy Limited to file M.A. No. 136 of 2020 before the NCLT, Special Company Appeal (AT) (Insolvency) No. 614 of 2020

Bench, Chennai which directed the Appellant (herein) to deposit the amount of Rs. 17,95,04,271.79 to the Corporate Debtor Account.

- The appellant is one of the Financial Creditor having voting share of 0.58% in the CoC.
- The members of the SBI (Consortium of Banks) having voting share of 32.59%.
- The Appellant is only on the instruction with the prior approval of the IRP namely Mr. Motappa Thimmaraya Swamy, payment of LCs was made by debiting the Cash Credit Account. From the perusal of the record it appears that the IRP namely Mr. Motappa Thimmaraya Swamy was removed.
- The order dated 30.12.2019 passed by the NCLT, Division Bench-II, Chennai is as under;

“ On the confirmation coming from IBBI appointing Mr. Subrata Mohindranath Maity [Regn. No: IBBI/IPA-001/IP-P00884/2017-2018/11481] as Resolution Professional, the application MA/1379/2019 is hereby allowed.”

- The erstwhile IRP is exposed to the proceedings of the disciplinary committee in a similar case refer to IBBI/CD/24/2020 wherein the IRP was punished with a fine of Rs. 34 Lakhs.
- We are of the further view that the Learned Counsel for the Appellant have failed to make out any ground and the finding recorded by Ld. Adjudicating Authority, so we are affirmed the finding recorded in the impugned order

dated 29.05.2020 in MA/136/2020 in IBA/307/IB/2019 passed by National Company Law Tribunal, Special Bench, Chennai.

ORDER

17. Having regard to the foregoing discussion, we are of the view that no illegality in the impugned order dated 29.05.2020 in MA/136/2020 in IBA/307/IB/2019 passed by Ld. Adjudicating Authority, National Company Law Tribunal, Special Bench, Chennai. The appeal is dismissed. No order as to costs.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

7th June, 2021

NEW DELHI
R. N.