

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal(AT)(Insolvency) No. 983 of 2020

IN THE MATTER OF:

**Ramkrishna Electricals Ltd.
N-5M, I D C, Nagpur,
Maharashtra – 440 016**

...Appellant

Versus

**1. Atul Rajwadkar
47, Hindustan Colony,
Wardha Road,
Nagpur, Maharashtra – 440 015**

...Respondent No.1

**2. Madhu Kandunni Nair
The Nest, Plot No.504,
Old Ramdaspath,
Near Lendra park
Nagpur, Maharashtra – 440 010**

...Respondent No.2

**3. Sandip Madhu Nair
The Nest, Plot No.504,
Old Ramdaspath,
Near Lendra park
Nagpur, Maharashtra – 440 010**

...Respondent No.3

Present:

For Appellant : Ms. Gaurangi Patil, Ms. Anjali Shahi, Mr. Mayur Khandeparkar and Mr. Niranjan, Advocates

For Respondents : Mr. Sandeep Bajaj, Ms. Aakanksha Nehra, Ms. Aditi Gupta and Mr. Siddhartha Shukla, Advocates for Respondent No.1.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present appeal has been filed by the 'Appellant' – 'Ramkrishna Electricals Ltd' under Section 61 of the 'Insolvency and Bankruptcy Code,

2016' (in short 'Code') against the impugned order dated 11.09.2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Mumbai in I.A No. 1109 of 2020 in Company Petition (IB) No. 2925 /MB/2018.

2. The Appellant has sought the reliefs of setting aside the impugned order as stated above and also that Respondent No.2 & 3 i.e. erstwhile Directors of the Corporate Debtor in 'Corporate Insolvency Resolution Process' (CIRP) to deposit the money etc.
3. The Appellant is in the business of manufacturer and distributor of transformers, fabrications etc., for more than 3 decades. The Appellant has supplied to the Corporate Debtors (in CIRP) in the normal course of business during the Financial year 2016-17 total value of goods of Rs.13,17,98,130/- and has raised invoices for the same. The Appellant has also received the payment of Rs.11,38,77,295/-. As a result of their further supply in the Financial Year 2017-18 after getting of payment received a balance amount of Rs.2,66,75,764/- remained outstanding. All the supplies are supported by invoices. The supply by the Appellant to the Corporate Debtor – M/s. 'Enestee Engineering Limited' (EEL) (in CIRP) was earlier made when the Corporate Debtor was not in CIRP and was a proprietorship firm as it appears from the invoices. The Appellant has to go under CIRP vide the Adjudicating Authority order 17.09.2019. The Appellant has also submitted that during 2019-20 they were in a bad financial condition and were requested all the debtors to release their dues to come over the fund crunch and in the process based on the discussion to the Respondent No.2 & 3 (Suspended Directors of the Corporate Debtor

in CIRP), they received payment from 23 .07.2019 to 15.10.2019 from the bank account of CD which he was asked to refund by the order of the Adjudicating Authority, which includes some bank charges also of Rs. 360/-. The Appellant has also stated that the Respondent No.2 & 3 used to inform the Appellant when the fund is likely to come in the account and he was asked to put the cheque for clearance. The Appellant did not mistrust the Directors of the Corporate Debtor in CIRP and has accordingly collected his dues. He has also stated that he became aware of the CIRP of Corporate Debtor when IA No. 1109/2020 of was served on them and not prior to that. The Appellant also submitted that the bank account was opened on July 2019 when there is no CIRP and he was not aware about any such things. The Appellant is critical for applying Section 66 (1) of the Code wherein the language is 'defrauding creditors of the Corporate Debtor' or 'fraudulent purpose'. They are very critical that, they have not done any wrong doing and hence Section 66(1) of the Code does not apply to his case for withdrawal of the money and rather it is a case of collection of dues in the ordinary course of business and no intention to defraud would be attributed to him as he has no knowledge of the corporate debtor being under CIRP. It was also submitted by the counsel of the Appellant that the language of the Section 66 of the Code is similar to Section 339 of the Companies Act, 2013 and cited the Hon'ble Supreme Court judgment in Usha Ananthasubramaniam Vs. Union of India in Civil Appeal No. 7604 of 2019 and held that connotation "to the carrying on of the business refers to the business of the Company which is mismanaged and not to business

of another company or other *person*”. Section 339 of the Companies Act, 2013 as enumerated below:

Liability for Fraudulent Conduct of Business.

339. (1) *If in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator, or the Company Liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any person, who is or has been a director, manager, or officer of the company or any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct:*

Provided that on the hearing of an application under this sub-section, the Official Liquidator or the Company Liquidator, as the case may be, may himself give evidence or call witnesses.

(2) *Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration and, in particular,—*

(a) *make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf;*
(b) *make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.*

(3) *Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be liable for action under [section 447](#).*

(4) *This section shall apply, notwithstanding that the person concerned may be punishable under any other law for the time being in force in respect of the matters on the ground of which the declaration is to be made.*

Explanation.—For the purposes of this section,—
(a) the expression “assignee” includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made;
(b) the expression “officer” includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

Accordingly, he has prayed for the reliefs as stated above.

4. The Respondent No.2&3 are the suspended Directors of the Corporate Debtor in CIRP and despite of serving notice on them, has not appeared on 17.12.2020 and on 28.01.2021 and accordingly, the 3 members bench of this Tribunal set them as ex parte.
5. The Respondent No.1- Mr. Atul Rajwadkar is the ‘Liquidator’ for Corporate Debtor- ‘EEL’ as substantiated the order passed by the Adjudicating Authority. He has also stated that it is an admitted position that funds were withdrawn during the CIRP of Corporate Debtor by the Appellant. He has also cited that during CIRP no fund can be withdrawn from the Corporate Debtor’s bank account and to supplement this he has cited the following judgments:
 - a. *UCO bank Vs. Ramachandran in CA(AT) (Ins) No. 761 of 2020 dated 03.11.2020 in IA No. 2038 of 2020*
 - b. *Tata Motors Finance Vs. Jadoun International Pvt. Ltd & Ors. In CA(AT)(Ins) No. 1149 of 2019 dated 06.11.2019*
 - c. *SREI Equipment Finance Ltd. Amit Gupta 2019SCC On Line nclat693*
 - d. *Indian Overseas Bank Vs. Mr. Dinkar T. Venkatasubramaniam in Company Appeal (AT)(Ins) No. 267 of 2017 dated 15.11.2017*

All these judgments in one way or the other bans withdrawal of money from the bank accounts of the Corporate Debtor during the CIRP under Section 14 of the Code. He has also presented the movement of funds of the Corporate Debtor's Cooperative Bank account from which the Appellant has withdrawn the money and the same is reproduced below:

SL No.	Date	Particulars	Amount	
			Payment	Receipt
a.	23.07.2019	Bank Charges - payments	142.0	
B	20.09.2019	Yutika Sales Corporation		36,00,000.00
c.	20.09.2019	R-3-Cheque 29341	35,95,000.00	
d.	01.10.2019	Vishwaraj Infrastructure Ltd		99,81,790.00
e.	01.10.2019	R-3-Cheque-29342	99,80,000.00	
f.	03.10.2019	ADCC Infracon Ltd		20,00,000.00
g.	03.10.2019	R-3-Cheque-29343	20,00,000.00	
h.	04.10.2019	ADCC Infracon Ltd.		30,00,000.00
i.	04.10.2019	R-3-Cheque-29344	30,00,000.00	
j.	04.10.2019	Yutika Sales Corporation		10,37,891.00
k.	04.10.2019	R-3-Cheque-29345	10,40,000.00	
l.	04.10.2019	Shri Krishna Ferro Alloy		42,99,800.00
m.	05.10.2019	Shri Krishna Ferro Alloy		3,30,000.00
n.	05.10.2019	R-3-Cheque29346	46,30,000.00	
o.	14.10.2019	Bank Charges-Payment	100.00	
p.	15.10.2019	Bank charges-payment	118.00	
q.	15.10.2019	Cash(self)-Cheque-29348	9,121.00	
Total			2,42,54,481.	2,42,54,481/-

He has also stated that since no claim has been filed by the Appellant with the Resolution Professional in the capacity of the Operational Creditor clearly convinces the fact that there exists no claim of the Appellant against the Corporate Debtor and hence transactions are fraudulent transactions. Hence, as per the Respondent No.1 the order passed by the Adjudicating Authority is in order and requested the Appellant Tribunal to stand by the same.

6. The Adjudicating Authority has rightly considered the movement of funds of the Corporate Debtor in the said cooperative bank which was opened for the limited period from 19.07.2019 to 15.10.2019. The Adjudicating Authority has elaborately explained the process of CIRP and the operation of the Ex-Director of the Company allowing withdrawal of money by the operational creditor (Appellant) and has passed the order in terms of the Section 66(1) of the Code in respect of Directors and the Appellant and has asked the appellant to refund the amount drawn by them in the corporate debtor's account during CIRP.
7. We have gone through the submissions made by the parties including the order passed by the Adjudicating Authority and has following observations:
 - a. The Operational Creditor (Appellant) is a public incorporated Company since 09.04.1986. (web Search)
 - b. It is not in dispute that they have not supplied the material and the amount were not due for collection.
 - c. What wrong has been done by the Operational Creditor is violation of Section 14 of the Code.

d. For ease of convenience Section 14 of the Code is reproduced below:

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be

- e. No doubt certain fund flow reflects that as soon as the money received by the Corporate Debtor in that cooperative bank immediately cheque used to be presented to the same bank, this is a grey area for generating a doubt and also involving connivance by the suspended directors of the Corporate Debtor.
- f. In the changing world business scenario, the time has come when we should accept that “smiling with a vendor is always not a corrupt practice”.
- g. For ease of convenience Section 66 & 67 of the Code is reproduced herein below:

Section 66. (1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Section 67. (1) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of section 66, as the case may be, it may give such further directions as it may deem appropriate for giving effect to the order, and in particular, the Adjudicating Authority may—

(a) provide for the liability of any person under the order to be a charge on any debt or obligation due from the corporate debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the corporate debtor held by or vested in him, or any

person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and

(b) from time to time, make such further directions as may be necessary for enforcing any charge imposed under this section.

Explanation.—For the purposes of this section, "assignee" includes a person to whom or in whose favour, by the directions of the person held liable under clause (a) the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the directions have been made.

(2) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of section 66, as the case may be, in relation to a person who is a creditor of the corporate debtor, it may, by an order, direct that the whole or any part of any debt owed by the corporate debtor to that person and any interest thereon shall rank in the order of priority of payment under section 53 after all other debts owed by the corporate debtor.

- h. It is pertinent to mention here that the Operational Creditor has collected all its dues and, therefore, has not filed claimed before the Insolvency Professional.
- i. The wrong done by the Operational Creditor - Appellant is that they have withdrawn the money when the CIRP was on and hence violated provisions of Section 14 of the Code and accordingly, the directions of the Adjudicating Authority to

deposit Rs. 2,42, 54,121/- to the account of the Corporate Debtor at the specified bank is in order.

Accordingly, we are in agreement with the order passed by the Adjudicating Authority to the extent of refund of money and the same is in order. Accordingly, we do not feel any need to interfere with the order of the Adjudicating Authority and the appeal is dismissed.

However, he is at liberty to file the claim before Liquidator & Liquidator may consider the same as per provisions of the Code and related Regulations.

Pending IAs, if any stands disposed of. Interim order, if any, passed by this Appellate Tribunal stands vacated. No orders as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

2nd September, 2021

New Delhi

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