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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH –I, CHENNAI**

IA/901/CHE/2020 in IBA/471/2019

*(Filed under Section 43, 44 read with Section 14 of the Insolvency and
Bankruptcy Code, 2016)*

In the matter of Sabri Realtors Pvt. Limited

S. Amarendran

RP of Sabri Realtors Pvt. Limited

A 401, Central Part West,

Kumarsami Nagar main Road, Shollinganllur,

Chennai-600 119

... Applicant

-Vs-

Housing Development Finance Corporation Ltd.

II Floor, ITC, Centre,

760, Anna Salai, Chennai-600003.

....Respondent

Order Pronounced on 14th December 2023

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)

VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

For Applicant : Kaushik N Sharma, Advocate

*For Respondent : Ramakrishnan Viraraghavan, Senior Counsel for
N. Ravishankar Vallatharasu, Advocate*

ORDER

(Heard through Virtual Mode)

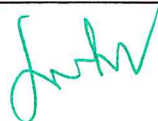
IA/901/CHE/2020 has been filed by the Applicant under Section
43, 44 read with Section 14 of the Insolvency and Bankruptcy Code,
2016 seeking reliefs as follows;

- a. *Declare that the appropriation of a sum of Rs.1,09,77,726/- by the Respondent Bank is a preferential transaction u/s 43 of IBC, 2016 ;*
- b. *Declare that the appropriation of a sum of Rs.1,09,77,726/- by the Respondent Bank is in violation of Moratorium under Section 14 of IBC, 2016.*
- c. *Reverse the appropriation of a sum of Rs.1,09,77,726/- by the Respondent Bank and further direct the Respondent Bank to contribute the above sum to the account of the Corporate Debtor.*

2. In an Application filed under Section 7 of IBC, 2016 by Mr. Rakesh P. Sheth, the CIRP of the Corporate Debtor was initiated by this Tribunal vide order dated 30.09.2019 in IBA/471/2019. Mr. Swarnamani Ramasamy was appointed as IRP. Subsequently Mrs. Geetha Sridhar was appointed as Resolution Professional (RP) by order dated 19.12.2019 in MA/1339/2019. The public notice was issued only on 15.01.2020. Thereafter, vide order dated 15.06.2020 in IA No. 343 of 2020, Applicant herein was appointed as RP.

3. It is averred that the One Time Settlement (OTS) was offered by the Respondent by way of letter dated 26.12.2019 i.e. after the insolvency commencement date. A copy of the OTS letter is placed as Annexure-A6.

4. It is stated that a sum of Rs.1,09,77,726/- was taken from the account of the CD by the Respondent pursuant to the OTS letter

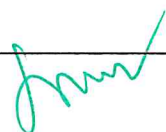


despite the order of moratorium under Section 14 of IBC, 2016 was in force.

5. It is stated that the said OTS was not in knowledge of the RP of the Corporate Debtor (CD). After the above came to the knowledge of the RP, the RP issued a notice dated 05.02.2020 to the Respondent to provide the details pertaining to the sum of Rs.4.50 Crores which was paid by the related parties to the Respondent in terms of the OTS. Further, RP asked the respondent to reverse a sum of Rs.1,09,77,726/- that was appropriated by the Respondent. A copy of the notice is attached at Annexure-A7.

6. Respondent filed counter on 06.01.2021 wherein it is stated that the Respondent is not a Bank and is different from HDFC Bank. It is a housing finance company.

7. It is stated that the Respondent is a secured financial creditor of the CD. It is stated that a loan of Rs. 14.00 Crores was sanctioned on 14.12.2011 and Master Facility Agreement was signed between the CD and Respondent on 17.12.2011. The Loan was secured by way of mortgage of properties of the CD and another third party Sabri



Foundations Pvt. Ltd. and guaranteed by Mr. RV Ramani and Mrs. Aruna Ramini.

8. It is stated that the Corporate Debtor was not regular in repayment of the loan. The respondent however admitted that it had received a sum of Rs.1,09,77,726/-. At page 4 of the reply it has provided details of the payments received which is tabulated below:-

S. NO.	DATE	AMOUNT (₹)	REMARKS
1	03.06.2016	35,00,000	Paid by CD through electronic means
2	30.08.2017	5,77,016	Loan disbursal of a flat buyer and received by the Respondent
3	15.11.2017	6,00,710	Ditto
4	04.04.2018	45,00,000	Paid by Guarantor through electronic means
5	04.04.2018	15,00,000	Paid by Guarantor through electronic means
6	25.04.2019	3,00,000	Loan disbursal of a flat buyer and received by the Respondent
TOTAL		1,09,77,726	

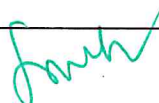
9. It is stated that CIRP commenced on 30.09.2019, the Respondent received the aforesaid payments between 03.06.2016 and 25.04.2019. It is stated that the payments were not received during the moratorium period and were received before the commencement of

CIRP and as such there is no violation of the moratorium under section 14 of the Code.

10. Similarly, the aforesaid payments are not the preferential transactions u/s 43 of IBC, 2016, since only one payment was made by the CD and all other payments were made by the third parties who are either the guarantors or the buyer. It is stated that all such payments made by the buyer are in ordinary course of business of the Corporate Debtor, except payment of Rs.3 Lakh on 25.4.2019. It is stated that the Respondent as secured creditor had filed claim before the RP for 20.6 Crores which has been admitted for Rs.5.16 Crores.

11. As regards Escrow account referred by the Applicant, it is stated that none of the aforesaid payments are reflected in the Escrow Account. All the payments at Sl. No. 1, 4 and 5 were credited in the current account of HDFC (Respondent) which is maintained with HDFC Bank. (The statement of which is attached from page number 61 to 115).

12. It is stated that the Respondent had issued notice u/s 13 (2) SARFAESI Act on the Corporate Debtor post which OTS offers were



received. OTS was conveyed on 26.3.2018, however the same was not accepted by the CD. Thereafter another letter was sent on 26.12.2019 which too was not accepted.

13. It is stated that as per the Master facility Agreement the respondent was entitled to appropriate payments received first against costs and charges, interest dues and towards principal. It is stated that in view of exchange of proposals and counter offers for OTS, the Respondent was awaiting internal approvals as to appropriation of the payments of the above amounts as it will not be possible to undo the appropriation even if proposal for OTS was accepted. All amounts were unconditionally paid towards the Loan account and received towards the loan account by the Respondent. RP cannot brush away the above facts and claim that the aforesaid payments violates Section 14 of IBC, 2016

14. Rejoinder was filed on 16.02.2021 placing reliance on the order of this Tribunal dated 3.11.2020 in the matter of **UCO Bank V/s Mr. G. Ramchandran, Resolution Professional, M/s Sai Regency Power**

Corporation (MA 39 of 2020) which was upheld in *Company Appeal (AT) (INSOLVENCY) No. 761 of 2020* by the Hon'ble NCLAT.

15. Per contra, the Respondent has relied on judgment of Hon'ble Supreme Court in *State Bank of India V/s V. Ramakrishnan and Another; (2018) 17 SCC 394*.

16. Heard both the parties. Under dispute is an amount of Rs.1,09,77,726/- as detailed in para 8 above which comprises 6 payments. Payments mentioned at Sl. No. 4 and 5 in the table under para 8, were made on 4.4.2018 by the guarantors. Since they were not made by the CD, they are clearly out of purview of S. 43 and 44 of the IBC, 2016. The provisions of Section 43 of IBC, 2016 is extracted hereunder;

43. Preferential transactions and relevant time. –

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if–

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53

(3) For the purposes of sub-section (2), a preference shall not include the following transfers–

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that –

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does

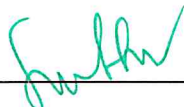
not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if –

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

17. Perusal of Section 43 of IBC, 2016 contemplates that where the liquidator or the resolution professional is of the opinion that the corporate debtor has at a relevant time given a preference in such transaction and in such manner as laid down in sub – section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transaction and for, one or more of the orders referred to in Section 44. Thus, the preliminary enquiry which this Adjudicating Authority is required to do is to first ascertain as to whether the Corporate Debtor has given any preference and whether the preference has happened during the relevant time.



18. As regards payments mentioned at Sl. No. 1 to 3 in table given under para 8, they were made by the Corporate Debtor /for and on behalf of the Corporate Debtor and are beyond the look back period of 1 year as contemplated u/s 43 & 44 of IBC, 2016.

19. As regards payment mentioned at Sl. No. 6 in table given under para 8, it was done only on 25.04.2019 for and on behalf of the Corporate Debtor where a home buyer had taken loan from the respondent prior to initiation of the CIRP which was on 30.09.2019, in the usual course of business of the Corporate Debtor. Thus, the relief (a) as prayed by the Applicant cannot be granted and stands **rejected**.

20. In relation to relief (b) and (c), it is noted that the sum of Rs.1,09,77,726/- came into the coffers of the Respondent on behalf of the Corporate Debtor before the commencement of CIRP. However, the Respondent appropriated these sum of Rs.1,09,77,726/- post initiation of CIRP. Under these circumstances, we are required to examine whether the appropriation of Rs. 1,09,77,726/- by the Respondent is violation of moratorium under Section 14 of IBC, 2016.



21. In this regard, we find it apt to refer to the Judgment of Hon'ble NCLAT in the matter of **Bank of India & 3 Ors. -Vs- Mr. Bhuvan Madan Resolution Professional of Ferroy Alloys Corporation Limited in Company Appeal (AT) (Insolvency) No. 590 of 2020, wherein it is held as under;**

12. As per Section 17(1)(d) of the I&B Code, the Financial Institutions maintaining the accounts of the 'Corporate Debtor' have to act on the instructions of the Interim Resolution Professional in relation to such accounts and furnish all information relating to the 'Corporate Debtor'. This Tribunal in a catena of Judgements has held that Banks cannot debit any amounts from the account of the 'Corporate Debtor Company' after the Order of moratorium, as it amounts to recovery of amount.

13. It was also held that the Banks cannot freeze accounts nor can they prohibit the 'Corporate Debtor' from withdrawing the amount as available on the date of moratorium for its day-to-day functioning. Section 14 of the I&B Code overrides any other provision contrary to the same and any amount due prior to the date of CIRP cannot be appropriated during the moratorium period. It is seen from the record that payments due under the LCs have been made out of the funds of the 'Corporate Debtor' as is established from the reduction of liabilities under non-fund based facilities.

14. This Tribunal in Company Appeal (AT) No. 267 of 2017 in 'Indian Overseas Bank' V/s. 'Mr. Dinakar T. Venkatsubramaniam Resolution Professional for Ambtek Auto Ltd.' held as follows:-

"... Once Moratorium has been 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', nor it can appropriate any amount towards its own dues"...

15. It is also noted that the amounts were honored partly by margin held as FDR and partly by funds of the 'Corporate Debtor' deposited in its Cash Credit Accounts. We are of the view that merely because the 'Corporate Debtor' had enough liquidity to run the Company as a going concern, the act of the Appellant Banks to adjust the credit balance in the Cash Credit Account towards the debit balance after CIRP commenced, cannot be justified. If the Appellant's argument is accepted, then the act of recovering receivables, under the garb of normal course of business will change the status of all the claims which would be in complete violation of Section 14 of the Code.

16. The Case of 'Andhra Bank' (Supra) has no applicability to the facts of the attendant case as it is seen from the record that the Banks have already included the value of non-fund based in their 'Claim' before the IRP. The Code provides that 'Claims' filed by the Creditors during the CIRP shall stand crystallized and will not be settled during the CIRP in preference over other Creditors. We hold that as 'Claims' were already preferred by the Appellant Banks and filed before the RP, they are not entitled to recover the amounts otherwise available in the Credit Accounts or Working Capital Accounts of the 'Corporate Debtor'. We are of the considered view that adjusting of the 'Claims' by the Appellant Banks during the CIRP out of the funds of the 'Corporate Debtor' results in unjust enrichment of the Banks and further, crediting amounts towards non-fund and fund based accounts during the moratorium period is against the provisions of Section 14 of the Code.

(emphasis supplied)

22. In the present case, eventhough the amount was deposited and has been lying in the account of the Respondent prior to the Insolvency Commencement date, ^{but} the Respondent appropriated the

amount after the Insolvency Commencement date, which is in violation of Section 14 of IBC, 2016.

23. Thus, as per the Judgment of the Hon'ble NCLAT in the matter referred *supra*, we are of the view that the appropriation of the funds by the Respondent during the CIRP amounts to unjust enrichment of the Respondent and also it is in violation of Section 14 of IBC, 2016. Under these circumstances, the relief (b) and (c) as prayed for stands **allowed.**

24. As a result thereof, the Respondent is directed to reverse the amount of Rs.1,09,77,726/- to the account of the Corporate Debtor which is maintained by the Applicant / RP, within a period of 7 days from the date of this order.

25. With the above said directions, this Application stands **partly allowed.**

- sd -

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

- sd -

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond