

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1001 of 2024

&

I.A. No. 3637 of 2024

IN THE MATTER OF:

ICICI Bank Ltd.

...Appellant

Versus

**Resolution Professional of
Darjeeling Organic Tea Pvt. Ltd.**

...Respondent

Present:

For Appellant : Mr. Krishnendu Dutta, Sr. Advocate with Ms. Misha, Ms. Mahima Sareen, Ms. Moulshree Shukla, Ms. Kirti Gupta and Mr. Yash Tandon, Advocates.

For Respondent : Mr. Shaunak Mitra, Mr. Dripto Majumdar and Mr. Akash Agarwal, Advocates.

O R D E R
(Hybrid Mode)

31.10.2025: Heard learned Sr. counsel Mr. Krishnendu Dutta appearing for the appellant as well as learned counsel Mr. Shaunak Mitra appearing for the Resolution Professional (RP).

2. This appeal has been filed against the order dated 23.04.2024 passed by the adjudicating authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in IA (I.B.C)/548(KB)2024 and in IA (I.B.C)/2093(KB)2023 in C.P. (IB)/1382(KB)2020. IA (I.B.C)/2093(KB)2023 was filed by RP, whereas, IA (I.B.C)/548(KB)2024 was filed by the appellant, ICICI Bank. Adjudicating Authority by the impugned order allowed and disposed of both the applications. Aggrieved by the order, ICICI Bank has come up in this appeal.

3. Brief background facts necessary to be noticed for deciding the appeal are:

- i. The corporate debtor Darjeeling Organic Tea Limited approached the ICICI Bank for non-fund based facilities. The facility was extended by the Bank on the fixed deposit given by the corporate debtor.
- ii. On 31.07.2021, corporate debtor approached the Bank for overdraft facility. Overdraft facility of ₹1,00,00,000/- was extended against cash collateral of fixed deposit of ₹1,06,00,000/-.
- iii. Corporate Insolvency Resolution Process (CIRP) against the corporate debtor commenced on 28.10.2022 by order passed by NCLT Kolkata.
- iv. The appellant filed its claim on 03.01.2024 in 'Form-C' as a financial creditor. In the claim form, appellant claimed it to be a secured creditor. Claim was filed for an amount of ₹99,36,968.09/- as on 28.10.2022. Claim form mentioned the non-fund based Bank Guarantee as well as fixed deposit.
- v. The RP wrote to the Bank, requesting to the transfer of the credit balance laying in any account maintained in the Bank of the corporate debtor. Emails were exchanged between the parties. Details of the fixed deposit was provided by the bank. RP filed I.A.2093/2023 before the adjudicating authority seeking directions against the appellant to transfer the funds laying in the corporate debtor's account maintained with the Bank.

- vi. Appellant also filed an application I.A.548/2024, seeking direction against the respondent to modify the status of the appellant from an unsecured financial creditor to secured financial creditor by bringing to the attention of the adjudicating authority that treating the appellant as unsecured financial creditor is clearly incorrect.
- vii. Adjudicating authority heard both the parties and by the order impugned has allowed and disposed of the application. The prayers made by the RP in his application has been noticed in paragraph 3 of the order, which is as follows:

**“3. IA(I.B.C)/2093(KB)2023 and
IA(I.B.C)/548(KB)2024:**

a. *Ld. Counsel for the RP has preferred IA(I.B.C)/2093(KB)2023 to seek the following relief: -*

i. An order be passed by this Hon 'ble Tribunal directing the Respondent Bank to transfer the funds lying in the CD's accounts maintained with the Respondent Bank to the CIRP Designated Account of the CD;

b. *ICICI Bank has preferred IA(I.B.C)/548(KB)2024 for the following relief: -*

i. An order be passed directing the Respondent to modify the status of the Applicant from 'unsecured financial creditor' to 'secured financial creditor’

- viii. After noticing the prayers, adjudicating authority issued directions which are contained in paragraph 3 (c) (d) (e) (f), which are as follows:

“c. *We have heard Ld. Counsels for both the sides, Ld. Counsel for the ICICI Bank assures that he would provide the sanction letter asked for by the RP and Ld. Counsel for RP submits that upon verification of the sanction letter, if provided, RP would - include ICICI Bank in the list of secured financial creditors. Let the entire exercise be completed within a period of one week from the date the sanction letter is served upon*

the RP and a fresh list of secured financial creditors be furnished to this Tribunal.

d. *Ld. Counsel for the RP has drawn attention to page no. 67 of **IA(I.B.C)/2093(KB)2023** whereby the RP has requested the ICICI Bank to release the following amounts:*

i. FD Account No. 018713007341 : INR 6.52 Lacs;

ii. FD Ale No. 694713013846: INR 108.65 Lacs;

iii. FD Ale No. 018713007339: INR 14.40 Lacs and

iv. Amount received in Overdraft Ale No. 018705009903 post CIRP commencement date of 28.10.2022: INR 67424.80

e. *Ld. Counsel for the ICICI Bank requests to the Adjudicating Authority to allow it to retain the item mentioned at (iii) against the bank guarantee that has been issued. Therefore, we feel that the funds should be released in terms of (i), (ii) and (iv) above, immediately.*

f. *In view of the Order passed in this matter, it is directed that the bank will release the deposits lying with them against serial no. (i), (ii) and (iv).*

g. *Accordingly, **IA(I.B.C)/2093(KB)2023** and **IA(I.B.C)/548(KB)2024** are **allowed** and **disposed of** to the extent mentioned above.”*

4. Learned counsel for the appellant challenging the order submits that the fund based facility which was extended by the Bank was on the basis of fixed deposit given by the corporate debtor, and in the claim form details of all fixed deposit and other securities were mentioned and there was no occasion for not accepting the appellant as secured financial creditor. It is submitted that the application which was filed by the corporate debtor for fund based facilities itself mentioned fund based facilities backed by fixed deposit dated 15.07.2021 which is part of the record. It is submitted that the appellant has pleaded before the adjudicating authority that RP was asking the Bank to release the security amount in fixed deposit to the corporate

debtor. In the application which was filed by the Bank relevant details were given seeking a direction to treat the appellant as secured financial creditor. It is further submitted that the adjudicating authority has in paragraph 3 of the impugned order has purportedly noticed the submission that only mentioned item No. 3 in paragraph 3 be retained, however, the adjudicating authority issued direction to release the amount in item Nos. 1, 2 & 4 which was not consented or conceded by the appellant. It is submitted that the security which was received from the corporate debtor was to be maintained and was to be treated in the final resolution of the CIRP and cannot be released as prayed by the RP.

5. Learned counsel for the RP refuting the submissions of the counsel for the appellant submits that despite the request made by the RP, appellant has not provided sanction letter to the RP, hence RP was unable to declare the appellant as secured financial creditor. It is submitted that after the impugned order, RP has not yet taken any decision regarding status of the appellant. Learned counsel for the RP referring to the application filed by the Bank submits that in paragraph 10, the bank has clearly stated that they will give of their securities provided they are retained as secured financial creditor. It is submitted that Bank having made the said statement in the application has clearly conceded before the adjudicating authority for release of the security as item No. 1, 2 & 4. It is submitted that appellant cannot challenge that part of the order, which was based on consent given by the appellant.

6. We have considered the submissions of the counsel for the parties and perused the records.

7. We need to first notice the claim form filed by the appellant dated 03.01.2024 however, item No. 4 of the claim form give the details of the amount of the claim and facilities extended by the bank. Item No. 4 of the 'Form-C' is as follows:

<i>Relevant Particulars</i>		
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
4.	<i>Details of claim, if it is made against corporate debtor as principal borrower:</i> <i>(i) Amount of claim</i> <i>(ii) Amount of claim covered by security interest, if any</i> <i>(Please provide details of security interest, the value of the security, and the date it was given)</i> <i>(iii) Amount of claim covered by guarantee, if any</i> <i>(Please provide details of guarantee held, the value of the guarantee, and the date it was given)</i> <i>(iv) Name and address of the guarantor(s)</i>	<i>Overdraft (OD) facility with outstanding of Rs.99,36,968.09</i> <i>(Rupees Ninety Nine Lakh Thirty Six Thousand Nine Hundred Sixty Eight and Nine Paisa) as on October 28, 2022.</i> <i>The Overdraft facility is secured by cash collateral, as detailed below:</i> <i>FD A/c no.- 694713013846 dated July 26, 2021 for Rs.1,00,00,000/-</i> <i>FD A/c no- 018713007341 dated July 30, 2021 for Rs.6,00,000/-,</i> <i>Amount of claim: Rs.99,36,968.09</i> <i>(Rupees Ninety Nine Lakh Thirty Six Thousand Nine Hundred Sixty Eight and Nine Paisa) as on October 28, 2022.</i> <i>In addition to above there is a Non Fund Based Bank Guarantee (BG) no. 6947NDDG00004122 dated July 08, 2021 issued on behalf of the CD in favour of beneficiary - The</i>

		Regional PF Commissioner, Employees' Provident Fund Organisation, against 100% cash margin in form of Fixed Deposit account no. 018713007339 dated July 07, 2021: Rs. 13,30,035/-.
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8. The copy of the application which was given by the corporate debtor dated 15.07.2021 for fund based facilities back by fixed deposit has been brought on the record which in Clause 12 clearly notices as follows:

“(12) I/We the Depositors, hereby: (a) create security Interest and charge over the aforesaid FD(s) and all underlying amounts in favour of ICICI Bank to secure the Facilities; (b) expressly waive all rights possessed by me/us in relation to the aforesaid FD(s) and the underlying amounts; (c) expressly discharge ICICI Bank of all its obligations in relation the aforesaid FD(s); (d) expressly authorize ICICI Bank to set off such monies due from me/us/the Borrower against any or all of the aforesaid FD(s); (e) confirm that there are no subsisting security Interests /encumbrances on /assignments of the aforesaid FD(s) (other than in favour of ICICI Bank) and I/We agree not to create security Interest on/assign/dispose of /encumber such FD(s) to any other person; (f) undertake to and shall ensure that the details of the security created in favour of ICICI Bank over the aforesaid FD(s) shall be expressly mentioned in each of my/our financial statements at all points of time until the release of such security by ICICI Bank; (g) declare and confirm that ICICI Bank shall be entitled to hold the aforesaid FD receipt(s) and I/we shall not be entitled to demand or receive the same; (h) declare and confirm that the security Interest created in favour of ICICI Bank is valid and enforceable in all respects; (i) agree to comply with and abide by the Terms and Conditions, to the extent applicable to me/us;

The aforesaid shall remain applicable until all amounts as may be outstanding in respect of the Facilities,

together with all interest, costs, charges, expenses and monies whatsoever stipulated in, or payable in respect of the Facilities, actual or contingent, are fully paid to the satisfaction of ICICI Bank, Nothing herein contained shall prejudice or adversely affect any general or special lien or right to set-off to which ICICI Bank is or may by law or otherwise be entitled or any rights or remedies of ICICI Bank including in respect of any present or future security, guarantee, obligations of the Borrower/Depositor.”

9. The claim form having clearly mentioned the overdraft facility against the fixed deposit, fixed deposit given by the corporate debtor, which are maintained in different account is a security of the Bank. In event, the amount which was secured deposit, the RP has filed the application without deciding the status of the appellant as secured creditor and was praying for release of the said amount maintained in the fixed deposit in the account of corporate debtor by its application, which has been partly allowed by the adjudicating authority.

10. Learned counsel for the RP has relied on the application filed by the ICICI Bank especially paragraph 10. We need to notice paragraphs 9 and 10 of the application, which is as follows:

“9. It is submitted that the applicant is a financial creditor, and a Secured overdraft facility availed by the corporate debtor was secured by way of cash collateral in the form of Fixed Deposits of Rs. 1,00,00,000/- and Rs. 6,00,000/- been duly discharged in favour of Bank and kept under lien of Bank having clause that the ICICI Bank shall have paramount lien over the FD and the proceeds there under at all times and as per the terms and condition of the discharge of FD mentioned in Fixed Deposit discharge "This Fixed/Term Deposit Receipt cannot be assigned transferred, pledged or given as security (for any loan/credit facility) in favour of any party except ICICI Bank". The applicant has also issued one bank guarantee with 100% cash Margin to the Regional PF Commissioner, Employees' Provident

Fund Organisation to the tune of Rs. 13,30,035/-, against which another security in the nature of cash collateral has been provided by the Corporate Debtor which is kept in the form of a fixed deposit. The respondent is forcing the applicant to give up the cash collateral and the sum of money against which bank guarantee is given to the Regional PF Commissioner and on the other hand is changing the nature of the Financial Creditor from 'secured' to 'unsecured'. The respondent has blatantly ignored the claim form of the applicant wherein it was clearly mentioned that the applicant is a Secured Financial Creditor, and the e-mail dated 05.01.2024 wherein the applicant had specifically reiterated that the said overdraft facility availed by the corporate debtor are secured by cash collateral by way of Fixed Deposits. The decision of the respondent of changing the status of the applicant from 'secured' to 'unsecured' is completely illegal and contrary to law.

10. It is further submitted that the respondent has failed to consider the fact that if the applicant transfers its cash collateral which is in the form of Fixed Deposits to the CIRP bank account of the Corporate Debtor, then the respondent will lose its security interest over the said fixed deposits and at the same time changing the nature and status of the applicant financial creditor. For the resolution of the corporate debtor, the applicant financial creditor can give up its security, provided that it retains its status as a Secured Financial Creditor.”

11. The averments made by the Bank clearly indicate that Bank had secured overdraft facility against by the corporate debtor which was secured by cash collateral in the form of fixed deposit. Paragraph 10 on which much reliance has been placed, Bank never agreed to release the account in the security to the corporate debtor, rather the statement was that applicant financial creditor can give up its security provided that it retain its status of secured financial creditor and that for the resolution of the corporate debtor. It is settled position that all security interest maintained which are possessed by the financial creditor can be dealt in the resolution plan in accordance with the CIRP Regulations, 2016. Hence the statement made in paragraph 10
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cannot be treated to be any admission or concession that the amount which are laying in the fixed deposit of the corporate debtor in the bank be released to the corporate debtor on an application filed by the RP.

12. The submission of the counsel for the RP that there was concession given by the counsel for the appellant before the adjudicating authority for release of item Nos. 1, 2 & 4 also does not appeal to us. In paragraph (e) as noted above counsel for the Bank requested the adjudicating authority allowed to retain item mentioned at No. 3 against the bank guarantee that has been issued.

13. Counsel for the appellant submitted that item Nos. 1 & 2 are the fixed deposit amount which were cash collateral for over draft facilities. The direction to release the amount as item Nos. 1 & 2 thus cannot automatically followed from submission which was noted in paragraph (e). Appellant clearly before the adjudicating authority has been claiming that the said deposits are security of the Bank and the RP asking them to release the amount.

14. We thus are of the view that direction of the adjudicating authority to release the amount which was in deposit with the Bank, which were security of the ICICI Bank could not be sustained. Further from the facts which has been brought on the record, it is clear that the non-fund based facility extended on basis of cash collateral by way of fixed deposit, which are part of the record. We have already noted the application of the corporate debtor for sanction of the non-fund based facility. In the present case, when facilities was extended on fixed deposit and the counsel for the Bank submits that there is no separate sanction order, we are of the view that insistence of RP

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to submit several sanction order was not necessary. The details of the fixed deposit were already provided to the RP. All fixed deposit contained the endorsement of lien in favour of the Bank. We thus are of the view that Bank has fully proved that it is secured financial creditor of the corporate debtor and RP was required to classify the appellant as secured financial creditor.

15. Learned counsel for the respondent has also placed reliance on the judgment of the Hon'ble Supreme Court in the matter of '**Galada Power & Telecommunication Ltd.**' Vs. '**United India Insurance Co. Ltd. & Anr.**', reported in **[(2016) 14 SCC 161]**. The above was a case which arose from the complaint submitted to insurer with regard to insurance claim, where the question of estoppel, acquiescence and waiver was examined. While examining the question of waiver, following was observed in paragraph 16:

"16. Yet again, in *Krishna Bahadur v. Purna Theatre* [*Krishna Bahadur v. Purna Theatre*, (2004) 8 SCC 229 : 2004 SCC (L&S) 1086] , it has been ruled that: (SCC p. 233, para 10)

"10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

(emphasis supplied)"

16. We are of the view that there is no applicability of the said judgement in the present case. From the materials on the record, no waiver can be inferred on the part of the Bank with regard to release of the amount which

are kept in the fixed deposit of the bank which are security of the Bank for non-fund based facility extended to the corporate debtor. We thus are of the view that order impugned is unsustainable.

17. In result, appeal is allowed. Order dated 23.04.2024 is set aside. The application I.A.2093/KB/2023 filed by the RP is dismissed and I.A.548/KB/2024 filed by the ICICI Bank is allowed. ICICI Bank is directed to be treated as secured financial creditor. Appeal is disposed of accordingly.

Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

himanshu/md