



**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 5996 OF 2024

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

ASL Sales and Services LLP

...Applicant

In the matter of

C.P.(IB) No. 3528/MB/2018

Punjab National Bank

...Financial Creditor

Vs.

Vadraj Cement Limited

...Corporate Debtor

Order delivered on: 18.03.2025

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)



Appearances:

For the Applicant : Mr. Pulkit Sharma, Advocate
For the Respondent : Mr. Nishant Upadhyay,
Advocate

ORDER

1. The present Application IA 5996/2024 is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules against the rejection of claim lodged by the Applicant, M/s ASL Sales & Services LLP with the Respondent being the RP of the Corporate Debtor. The Applicant has sought following reliefs:

- a. This Hon'ble Tribunal be pleased to quash and set aside the rejection of the secured financial claim of the Applicant by the Respondent vide his email dated 13th March 2024 which is annexed as Exhibit F hereinabove.;*
- b. This Hon'ble Tribunal be pleased to direct the Respondent to forthwith admit the secured financial claim filed by the Applicant as a secured financial creditor under Form C on 16th February 2024 which is annexed as Exhibit D hereinabove;*



- c. This Hon'ble Tribunal be pleased to direct the stay of the CIRP proceedings against the Corporate Debtor pending the hearing and final disposal of this present application;*
- d. Interim and ad-interim reliefs in terms of prayer clause (a), (b) & (c) hereinabove;*
2. The Applicant is stated to have filed its claim in Form C on 15th February 2024 with the Respondent with all the relevant documents and annexures. The Respondent vide his email dated 26th February 2024 rejected the said claim stating that *“We note that you have submitted the claim in ‘Form C’, which is the prescribed format for submission of claims by financial creditors. However, we understand from the agreement executed between ASL Sales and Corporate Debtor dated January 02, 2017 (“Agreement”) that the underlying transaction is in respect to the appointment of ASL Sales as the market organizer and for provision of its services to the Corporate Debtor including marketing and distribution of cement manufactured by the Corporate Debtor as mentioned in the Clause 1, Clause 8 and Clause 9 of the Agreement. Therefore, any amount outstanding to you in respect to the Agreement falls within the ambit of operational debt as per Section 5(21) of the IBC.”*



3. The Applicant is stated to be engaged in the business of providing logistics and marketing services, while the Corporate Debtor is engaged in manufacture of Cement. Being aggrieved by the decision of the Resolution Professional, the Applicant has filed this Applicant seeking admission of its claim as Financial Debt.
4. The Corporate Debtor, Vadraj Cement Limited was admitted into Corporate Insolvency Resolution Process (“CIRP”) vide order dated 2.2.2024 passed by this Tribunal and the Respondent was appointed as an Interim Resolution Professional (“IRP”) for the Corporate Debtor. Later on, the Respondent was confirmed as a Resolution Professional (“RP”) for the Corporate Debtor by the Committee of Creditors on 7th March 2024.

Applicant’s case

5. It is case of the Applicant that, the Applicant is a financial creditor as well as an operational creditor of the Corporate Debtor with respect to the Agreement dated 2nd January 2017 (“said Agreement”) entered by the Applicant and the Corporate Debtor subject to which the Corporate Debtor had engaged the Applicant as a marketing organizer for marketing and distribution of cement manufactured by the Corporate Debtor. The said Agreement remained in force



between the Applicant and the Corporate Debtor from 16th January 2017 till 31st March 2018.

6. For the operational debt of Rs.49,53,338.22/-(Rupees Forty Nine Lakhs Fifty Three Thousand Three Hundred and Thirty-Eight and Twenty Two Paisa only) in relation to the said Agreement, the Applicant as an Operational Creditor of the Corporate Debtor filed a separate Form B dated 15th February 2024 with the Respondent along with its annexures and there is no dispute in this relation.
7. Further, the Applicant claimed a sum of Rs. 9,98,65,318 (Rupees Nine Crores Nine Eight Lakhs Sixty Five Thousand Three Hundred and Eighteen only) as on 1st February, 2024 as Secured Financial Debt in Form C filed with the Respondent (after deducting a sum of Rs. 10,00,000/- towards interest paid), the break-up of which is as follows :
 - a. Refundable Deposit of Rs. 4,80,00,000/- (Rupees Four Crore Eighty Lakhs only);
 - b. Security Deposit of Rs.20,00,000/- (Rupees Twenty Lakhs only);
 - c. Interest payable on Refundable Deposit of Refundable Deposit of Rs. 4,80,00,000/- (Rupees Four Crore Eighty



- Lakhs only) at the rate of 10.50% p.a., calculated from 17th January, 2017 to 31st March, 2018;
- d. Interest payable on the Security Deposit of Rs. 20,00,000/- (Rupees Twenty Lakhs only) at the rate of 8% p.a, as decided by the Corporate Debtor, calculated from 17th January, 2017 to 31st March 2018;
- e. Interest payable on Refundable Deposit of Refundable Deposit of Rs. 4,80,00,000/- (Rupees Four Crore Eighty Lakhs only) at the rate of 10.50% p.a., calculated from 1st April 2018 till 1st February, 2024;
- f. Interest payable on the Security Deposit of Rs. 20,00,000/- (Rupees Twenty Lakhs only) at the rate of 8% p.a. as decided by the Corporate Debtor calculated from 1st April 2018 till 1st February, 2024.
8. The Applicant has claimed that, in accordance with Clause 3 of the said Agreement, the Corporate Debtor had agreed to provide post-dated cheques towards the repayment of the Refundable Deposit with interest amounts asset out in point no. b) hereinabove, however, till date, no such post-dated cheques have been issued in favour of the Applicant. Nevertheless, the post-dated cheques agreed to beheld in favour of the Applicant shall be construed as creation of security interest for the payment of the Refundable Deposit.



9. The dispute in the present case is in connection with the financial claim backed by security interest ('secured financial claim') of the Applicant as a Financial Creditor for a sum of Rs.9,88,65,318/-(Rupees Nine Crore Eight-Eight Lakhs Sixty-Five Thousand Three Hundred and Eighteen only) in relation to the said Agreement.
10. By email correspondence dated 7th March 2024, the Applicant provided relevant information regarding the validity and legality of the operational claim and secured financial claim against the Corporate Debtor. In response to the same, the Respondent addressed the email correspondence dated 13th March 2024 to the Applicant which reiterated denial to acknowledge the secured financial claim of the Applicant and direction to file fresh Form B by the Applicant as an Operational Creditor.

Respondent's Submissions

11. For the aforesaid services as set out under the Agreement, it was agreed that the Applicant would be paid Rs. 15,00,000/- (Rupees Fifteen Lakhs only) as fixed minimum monthly fee excluding taxes for the entire term of the said agreement and other service-related charges with respect to fulfilment of service. Under the Agreement the Applicant deposited with the Corporate Debtor the following:



- a. Security deposit of Rs. 20,00,000/- (Rupees Twenty Lakh only) at a rate of interest as may be decided by the Corporate Debtor (which according to the Applicant was 8% p.a.) upto the expiry of the Agreement on March 31, 2018 in terms of *Clause 2 of the Agreement*;
- b. Refundable security deposit of Rs. 4,80,00,000/- (Rupees Four Crore Eighty Lakh only) with interest amount @10.50% p.a. in equal periodic instalments upto January 31, 2018 in terms of *Clause 3 of the Agreement*.

12. Winding up proceedings under the Companies Act, 2013 were admitted against the Corporate Debtor by order of the Bombay High Court dated August 23, 2018, however, the said Order was recalled vide its subsequent order dated August 18, 2023 and the proceedings were transferred to this Tribunal for initiation of the Corporate Insolvency Resolution Process (“CIRP”) as per the provisions of the Insolvency and Bankruptcy Code, 2016 (“IBC / Code”).

13. On February 26, 2024, the RP informed the Applicant that its claim filed under Form C fell within the ambit of an operational debt as per Section 5(21) of the Code, and accordingly asked the Applicant to file its claim under Form B along with information concerning the legality and validity of the claims. [*Exhibit D, Pg. 53, Vol-I of the IA*]



14. Consequent upon mail dated 26.2.2024 informing that the applicant's claim in Form C is actually an operational debt, the Applicant submitted information to support its claim as financial debt on March 7, 2024 that while service charge and supporting charge for the fulfilment of services payable by the Corporate Debtor to the Applicant would constitute an operational debt, the amounts towards Security Deposit and Refundable Deposit which had been deposited as a pre-requisite for the due performance of the Agreement, along with interest would constitute financial debt.

15. In his email dated March 13, 2024, the Resolution Professional informed the Applicant that its debt cannot be categorized as a financial debt as there was no disbursal against the time value of money, the deposit was not a means of financing or advancing a loan but rather a means of securing the Agreement pertaining to the supply of goods and services, and accordingly the intention was to receive an amount to secure the performance of the Agreement.

Finding and Decision

16. Heard the Learned Counsel and perused the material on record.

17. The issue in the present application is (a) whether the claim of the Applicant in relation to Security Deposit of Rs.



20,00,000/- and Refundable Security Deposit of Rs. 4,80,00,000/- is a financial debt or an operational debt; and (b) whether stipulation of issuance of post dated to secure the payment thereof constitute a security interest so as to qualify as secured debt.

18. The Respondent has submitted that once the debt has some nexus with the provision of goods, it has to be treated as operational debt only. In the present case, the debt admittedly was in relation to supply of services related to the marketing and distribution of cement. Further, the disbursal (of Security Deposit and Refundable Deposit) was not made against the consideration for the time value of money, but was made to secure the performance of the contract, as the deposit was a pre-requisite for securing the contract related to the supply of goods (distribution of cement) and services (marketing of cement), which was supposed to in turn secure the performance of the Agreement by the Applicant. The Respondent, for this purpose, has placed reliance on the Recital clause in the Agreement, which reads as under –

“Whereas the Marketing Organizer has approached the Company to get itself associated with and undertake to organize the marketing and distribution of the Company’s product and to help select, approve and appoint Authorised Stockists/ Authorised



Retailers/ Authorised Distributors serviced by them to the extent of their security deposit or credit limit decided mutually.

AND

Whereas the parties have agreed to reduce to writing the terms and conditions of the Agreement on which the Marketing Organizer shall work;”

19. In terms of the Agreement dated 2.1.2017, the Applicant was to deposit two sums i.e. (a) Rs. 20,00,000/- as Security Deposit for its due performance in terms of clause 2 and the same was refundable, after appropriations of dues, on expiry or termination; (b) Rs. 4,80,00,000/- as refundable Security Deposit, in terms of clause 3, which was to be refunded back in monthly instalment of Rs. 40,00,000/- each starting from February 2017 payable on last day of month by way of post-dated cheques. While interest rate in relation to security deposit was to be decided by the Corporate Debtor (which is claimed to have been decided @ 8% p.a.), the interest rate in relation to refundable security deposit is 10.5% p.a. expressly provided in the Agreement. The appointment of the Applicant as MO was upto 31.3.2018, however the said



period was extendable upon periodic review of satisfactory performance.

20. Clause 2 of the Agreement in relation to Security Deposit clearly states that *“The Company will be entitled to appropriate the amount of security deposit towards any amount/claim becoming due / payable by MO / the stockist /customers under this Agreement or other use howsoever”*, and the said Security deposit is mandated explicitly for due performance of this Agreement.

21. Clause 8(X) provides that MO shall be responsible for the following:

- i) *To achieve sale of cement as per annexure C.*
- ii) *MO shall be responsible to create required Manpower/Office and infrastructure to achieve target sale at his own cost.*
- iii) *In-case MO is not able to achieve target sale than Vadraj Cement shall have option to appoint another MO in the particular marketing area. Such area and deposit amount of the new MO shall be reduced to that extent. A triparty agreement shall be signed along with new MO.*
- iv) *Development and promotion of VADRAJ Cement and increase retail reach and market share in MO area.*



- v) *Order booking, order execution and after sales service.*
- vi) *To ensure that targeted quantities fixed by the Company for MO as well as the stockists under MO control are not only achieved but MO always surpass it.*
- vii) *Collection of payments from the stockists as per the Company's norms.*
- viii) *Monitoring and intimation of outstanding (if any) of the stockists.*
- ix) *To inform RTGS/NEFT payment, submission of cheques to the Company's office as soon as it is collected.*
- x) *As mutually agreed, credit limit shall be extended to dealer to an extent of deposit amount. Any further limit shall be given to stockist /party only after approval by company representative. MO shall be responsible for any further facility given beyond company norms or without seeking necessary approval.*
- xi) *For the purpose of acting as our MO and making the sales of the cement, MO/the stockists will obtain. and keep valid / renewed all the required licences, permits and authorizations from the Municipal,*



Government, Local and all other concerned authorities and shall comply with the terms and conditions thereof. Any actual & out of pocket expense incurred for the same shall be reimbursed by company.

22. Clause 16 of the Agreement provides for remuneration payable to the Applicant for services rendered under the Agreement. It provides for monthly minimum remuneration of Rs. 15,00,000/- for sale upto 15,000 MT is consolidated remuneration of Rs. 15.00 Lakhs, whereafter, the remuneration is payable on per MT of sale at the rate provided for different quantity buckets over 15,000 MT. The first bucket stipulates payment of remuneration @ Rs. 100/- per MT beyond 15,000 MT but upto 30,000 MT. From the remuneration structure, it can be inferred that the initial lump sum minimum guarantee is to take care of cost of *required Manpower/Office and infrastructure to maintained by the applicant at his own cost {clause 8(x)(ii)}* and provision of support *Infra-structure at Vasai and/or Bandra to Company employee posted to support MO in day to day sales /Marketing Services activities (clause 7).*

23. Section 5(21) of the Code defines Operational Debt to mean “*a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of*



*dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority". The Hon'ble Supreme Court in the case of **Global Credit Capital Limited & Anr Vs SACH Marketing Pvt. Ltd & Anr (2024) ibclaw.in 125 SC** held that*

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- c. While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing; and*
- d. Where one party owes a debt to another and when the creditor is claiming under a written agreement/ arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co relation with the 'service' subject matter of the transaction."*

24. In the present case, there is no dispute that the services under the Agreement were provided by the Applicant. The security deposit under Clause 2 was required for due performance under the agreement, and the Corporate Debtor is entitled to appropriate the amount of security deposit towards any amount/claim becoming due / payable by MO / the stockist /customers under this Agreement or other use howsoever.



Further clause 19E(6) also specifically provides that “*The Company can adjust the amount of the Security Deposit plus interest if any approved their on against amount due by mutual consent...*” The consideration for services payable to the Applicant has been paid for services actually having been rendered by the Applicant. This amount is refundable only upon expiry or termination of the agreement and not before that. Accordingly, the security deposit of Rs. 20,00,000/- is explicitly connected to the service agreement to secure due performance of services. Hence, we do not find any reason to interfere with the decision of respondent Resolution Professional in relation to the amount of Rs. 20,00,000/-.

25. As regards the refundable security deposit of Rs. 4,80,00,000/-, it is relevant to note that the said security deposit was refundable during the currency of the agreement immediately from February, 2017 in 12 monthly instalments, while the agreement was entered into on 2.1.2017 effective from 16.1.2017. The Corporate Debtor had undertaken to issue post dated cheques for such repayment. There is no averment in the agreement which connects or relates said refundable security deposit to rendition of services. The reliance of Respondent Resolution professional on clause 19E(6) is misplaced in this regard, as that clause deals with adjustment with the Security Deposit only, while this



agreement has employs two terms i.e. ‘Security Deposit’ and ‘Refundable Security Deposit’ in clause 2 and 3 respectively. Accordingly, both the terms cannot be used inter-changeably as is sought to be done by the Respondent Resolution Professional. It is relevant to note clause 19B providing that “*B. In the event of termination of MO services the Company shall refund the deposit amount as referred to in **Clause 03: REFUNDABLE DEPOSIT, after taking into consideration the performance of all obligations, undertakings given by the MO under this agreement.***” In our view, this clause has been inserted out of abundant caution so as to enable the company to appropriate any sum, remaining due after appropriation of security deposit under clause 2 at the time of termination, from such refundable security deposit. It is relevant to note the said refundable security deposit is refundable de hors *consideration the performance of all obligations, undertakings given by the MO under this agreement* at the first instance in terms of clause 3 itself. In our considered view, the agreement dated 2.1.2017 contemplates two independent understanding i.e. (i) engagement of applicant as MO against payment of security deposit in terms of clause 2; and (ii) raising of temporary loan of Rs. 4,80,00,000/- from the applicant to tide over short fund needs. Since, the refundable security deposit has been



disbursed for time value of money and has commercial effect of borrowing, we are of considered view that the amount of refundable security deposit is a financial debt and ought to be admitted as such.

26. As regards claim of the Applicant to consider these debts as Secured debt on the ground that such debt are secured against Post Dated Cheques, required to be issued by the Corporate Debtor, it is relevant to note that there is no stipulation for issuance of post dated cheques in relation to security deposit in terms of clause 2. As regards refundable security deposit in terms of clause 3 is concerned, even though there is a stipulation for issuance of post dated cheques, however, no such cheques were ever issued. Section 3(31) of the Code defines Security Interest to mean *“right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person”*. The term “Property” is defined u/s 3(21) of the Code to include *“money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent*



interest arising out of, or incidental to, property”. Nonetheless, a post dated cheque is a negotiable instrument which promises to pay the specified sum to the payee upon presentation to the drawer’s bank. It does not fall under any of limb of the definition of property. Further, issuance of post dated cheque neither creates any mortgage, charge, hypothecation, assignment or encumbrance on any of the property. Accordingly, we are of considered view that the post-dated cheques cannot be considered as security interest. Nonetheless, in the present case, these cheques have not be issued. It is also relevant to note that, at the time of filing its claim before the Official Liquidator in earlier winding up proceedings, the Applicant by its affidavit dated December 19, 2018 filed before the Hon’ble Bombay High Court submitted that no security has been created in its favour for payment of its dues and accordingly requested the Official Liquidator to consider and satisfy its claim.

27. In view of the foregoing, we hold as under :

- a. The amount of security deposit amounting to Rs. 20,00,000/- including interest thereon is an operational debt;
- b. The amount of refundable security deposit amounting to Rs. 4,80,00,000/- including interest thereon is a financial debt;



- c. The refundable security deposit is an unsecured debt.
28. The Resolution Professional shall update the list of creditors accordingly without requiring the applicant to submit fresh claim in form B in relation to security deposit in view of CIRP in case of Corporate Debtor being at advanced stage.
29. In view of the above, IA 5996 of 2024 is partly allowed and disposed of accordingly.

Sd

Prabhat Kumar
Member (Technical)

Sd

Justice V.G. Bisht
Member (Judicial)