



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

In the matter of
IA-148/2021 IN
CP (IB) No.4164/MB-IV/2019

Dhiren Shantilal Shah

... Applicant/Resolution Professional

V/s.

Indian Bank

... Respondents

IN

CP (IB) No.4164/MB-IV/2019

In the matter of
Under Section 7 of the IBC, 2016

Bank of India

... Financial Creditor

V/s.

Tuticorin Coal Terminal Private Limited

...Corporate Debtor

Order Pronounced on: **06.06.2023**

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant/RP:

Mr. Aniruth G. Purusothaman, Adv.

For the Corporate Debtor/Respondent:

None present.



ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. The present Application is filed by Mr. Dhiren Shantilal Shah, the Resolution Professional (“RP”) in the case of M/s Tuticorin Coal Terminal Private Limited (“Corporate Debtor”) seeking transfer of the amount of Rs. 60,00,000/- kept as Fixed Deposit with the Respondent Bank i.e. Indian Bank on the ground that such Fixed Deposit is wrongly appropriated and/or marked lien towards the Bank Guarantee issued by the Respondent Bank on behalf of the Corporate Debtor as well as against Respondent's claim against the Corporate Debtor arising from the encashment of one of the bank guarantee by the beneficiary during CIRP period.
2. The Corporate Insolvency Resolution Process (“CIRP”) commenced on 20.02.2020 in the case of the Corporate Debtor pursuant to application u/s 7 of Insolvency & Bankruptcy Code, 2016 (“IBC”) filed by the Bank of India.
3. The Applicant submits that the Respondent is one of the members of the CoC of the Corporate Debtor and had submitted its claim of Rs. 52,55,25,548.17 (Rupees Fifty-Two Crores Fifty-Five Lakhs Twenty- Five Thousand Five hundred and forty-eight only) against the Corporate Debtor in Form- C dated 5 March 2020 to the Interim Resolution Professional.
 - 3.1. The Applicant submits that he had sent a letter vide email dated 224 December 2020 to the Respondent seeking transfer of the monies of Rs 60,00,000/- (Rupees Sixty Lakhs Only) belonging to the Corporate Debtor which are lying as Fixed Deposits with the Indian Bank. The Applicant further reminded the Respondent vide email dated 24.12.2020 to transfer the funds. It is further stated that the internal emails exchanged between the officers of the Respondent dated 24th December 2020 and 28th December



2020 clearly suggest that the Respondent had marked hold on the funds of the Corporate Debtor due to 10% of the Margin Money held by virtue of Bank Guarantee which is in force, however it can be clearly gleaned that officers were willing to release the hold and transfer the monies to the Applicant, forthwith

- 3.2. The Applicant submits that he was shocked and surprised that whilst giving him a false hope of transferring the monies, the Respondent resiled from their stated stand at the last moment vide email dated 29/12/2020 and 30/12/2020. Further the Applicant called upon the Respondent vide email dated 29th December 2020 to transfer the margin monies to the Corporate Debtor.
- 3.3. The Applicant submits that Respondent in the said email dated 29/12/2020 and 30/12/2020 further contended that the provision under Section 14(1)(c) relating to moratorium does not cover the adjustment of margin money of the Corporate Debtor and had wrongly refused to transfer the monies of Rs 60,00,000/- (Rupees Sixty Lakhs Only) as requested by the Applicant, which are lying in the form of fixed Deposit with the Respondent.
- 3.4. The Applicant further submits that in the present application, the Respondent have violated the provisions of Section 14(1) of the IBC 2016 relating to Moratorium and hence is liable to transfer the amount of the said Fixed Deposit wrongfully appropriated into the account of the Corporate Debtor.
4. The Respondent filed affidavit in reply dated 23.02.2021 and a written submission dated 15.09.2021 stating that vide Sanction Letters dated 11th January, 2011, 17th December, 2013 and 8th September, 2016, the Respondent had granted a Term Loan Facility to Tuticorin Coal Terminal Private Limited ("Corporate Debtor") to carry on certain works as mentioned in the Loan Agreement. Additionally, at the instance of the Corporate Debtor, the



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Respondent had issued 3 Bank Guarantees entailing total obligation of Rs. 11,19,50,000/- and held amounts in three fixed deposits ("FDRs") totalling to a sum of Rs.1,11,95,000/-, being 10% margin money. The said FDRs were made in favour of the Respondent and maintained by the Respondent as Fixed Deposits Receipts ("FDR"). Out the aforementioned Bank Guarantees, two were issued in favor of Commissioner of Customs, Customs House and one was issued as a Counter Guarantee/Letter of Undertaking in favor of Bank of India ("Beneficiaries"). the Bank Guarantee Nos. IG140000068, IG130000063 and IG170000001 are still alive. However, the Respondent is contractually liable to honor the same as and when claimed by the respective beneficiaries till its validity and as per respective terms and conditions. The said Guarantees were backed by an auto renewal clause and the details of said outstanding bank guarantees are herein below:

Sr	Guarantee No.	BG Amount	Issue Date	Maturity date	FDR	FDR Amt	Int accrued on 10.02.2021	Total Amount 10.02.2021
1	IG140000068	3,40,50,00	16.05.2014	12.05.2021	622019749	5092497	214836	5307333
2	IG130000063	16,00,000	06.08.2013	04.08.2022	6150543076	247131	25190	272321
3	IG170000001	7,63,00,000	14.02.17	15.02.2021	6503877997	9105215	574577	9679792
	Total Amt	111950000				14444843		15259446

4.1. It is further stated by the Respondent that in view of the order passed by the Hon'ble Tribunal, the Respondent filed its proof of claim for an amount of Rs.52,55,25,548.17/- before the Interim Resolution Professional on 5th March, 2020 in respect of the Term Loan and the Bank Guarantee by the Respondent to the Corporate Debtor.



- 4.2. It is also submitted that though the margin money deposited with the Respondent is deposited as FDRs, it was towards the bank guarantee issued by the Respondent in favor of the beneficiary and is not refundable to the Corporate Debtor unless the bank is discharged. It is further submitted that the Applicant cannot seek refund of the amount lying with the Respondent claiming the same to be excess margin money without appreciating the fact that the Respondent is holding the said amount in trust and therefore the said sum cannot be released as alleged or otherwise.
- 4.3. It is further submitted that the cash margin as such cannot be termed as an asset of the Corporate Debtor as alleged or otherwise. It is pertinent to mention that the Bank Guarantee is an independent contract between the beneficiary and the Bank, though these are held in the form of FDR, they are given as margin money towards the Bank Guarantee issued by the Respondent in favor of the Beneficiary. It cannot be the case of the Applicant that the said amount is refundable to the Corporate Debtor unless the Bank is discharged.
- 4.4. It is further submitted that it is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and it is not dependent on the actions of the Corporate Debtor at whose instance the bank guarantee was given. It was also submitted that the question of beneficiary making claim against the default will not arise because in the event of default, the beneficiary would realize its monies through bank guarantee given by the bank and not from the Corporate Debtor. The cash margin as such cannot be termed as an asset of the Corporate Debtor as alleged or otherwise.
- 4.5. The Applicant has misinterpreted and misconstrued the provisions and has made an attempt to twist the facts of the issue for his own benefit. The FDRs were given towards the margin money against the bank guarantees given to



the beneficiary and not as FDRs to be realized by Corporate Debtor and the margin money is construed as substratum of a Trust created to pay to the beneficiary to whom Bank Guarantee is given and this proposition is laid down in the case of **Phonix Arc ltd vs Anush Finlease & Constructions Pvt Ltd. {CP(IB) 1705 (PB) 2018}** by the Principal Bench of NCLT, New Delhi.

4.6. The Respondent is not in violation of Section 14 (1) of the Insolvency and Bankruptcy Code, as *the moratorium is not applicable to performance bank guarantee(s)* as held in **Indian Overseas Bank vs. Arvind Kumar {CA 558 of 2020}** by Hon'ble NCLAT, wherein it was also held that the "*margin money*" is the contribution on the part of the borrower who seeks "Bank Guarantee". *The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case, the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the corporate debtor.*

5. We have heard the counsel and perused the material available on record.

5.1. This bench finds that the Hon'ble NCLAT in the case of *IDBI Bank Ltd. Vs. Indian Oil Corporation Ltd. (2023) ibclaw.in 35 NCLAT* held that Bank Guarantees are outside the scope of the moratorium under Section 14 of the Code and Section 3 (31) specifically excludes Performance Bank Guarantees (PBGs). It is not the case of the applicant that the bank guarantee(s), against which the respondent bank is holding fixed deposits as margin money, are not live. This Bench further finds that the applicant has submitted incorrect facts in stating that the respondent bank is holding the FDRs wrongfully and has marked a lien, whereas these FDRs were purchased by the Corporate



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IA-148/2021 IN
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Debtor as margin money to the Bank Guarantee in accordance with the terms of sanction of such non fund-based facility.

- 5.2. This Bench notices that the Hon'ble NCLAT in the case of Arvind Kumar (Supra) has categorically held that the monies held as margin towards the live bank guarantee reverts to the Corporate Debtor only in case where the corresponding Bank Guarantee has expired and in no other case. Further, it is settled legal proposition that the bank guarantee(s) do not expire with the commencement of moratorium in case of corporate debtor. The applicant has also not filed any evidence to suggest that such bank guarantee(s) have expired.
6. In view of the above, this Bench does not find any merit in the present application and is of considered view that the present application (IA-148/2021) deserve to be **dismissed**.

Sd/-

Prabhat Kumar
Member (Technical)

06.06.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)