NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD

BENCH-II

IA NO. 339 of 2021

IN

C.P. NO.(IB)/184/(AHM)/2018

[An application filed under section 60 (5) of the Insolvency and Bankruptcy Code, 2016]

<u>IN THE MATTER OF:</u>

MR. AVIL MENEZES
(The Resolution Professional of
AMW Motors Limited)
Available at 416, Crystal Paradise
Co.op. Society Ltd.
Dattaji Salvi Marg, Above Pizza Express,
Off. Veera Desai Road
Andheri West
MUMBAI 400 053 ... Applicant/ Resolution Professional

ICICI Bank Limited
Laxmi Tower Branch
BKC, Bandra (East),
MUMBAI 400 051 … Respondent No. 1

The Assistant Commissioner of Customs
Bond Section
Custom House
Mundra … Respondent No. 2

IN THE MATTER BETWEEN:

INDIAN OVERSEAS BANK … Petitioner/Financial Creditor

Versus

AMW MOTORS LIMITED … Respondent/Corporate Debtor

Order Pronounced on: 07/07/2022

Coram:

Dr. DEEPTI MUKESH
MEMBER (JUDICIAL)
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

<u>Present:</u>

For the Applicant : Mr. Bishwajit Dubey, Advocate

ORDER

1 This is an application filed by the Resolution Professional of AMW Motors Limited (hereinafter referred to as "AMW/Corporate Debtor") under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") seeking urgent directions to the Respondents.

2 The applicant seeks inter alia following prayers:

(a) Direct Respondent No. 1 to immediately return the bank guarantees bearing No. 1217BGFD006217, 1217BGFD006317, 1217BGFD006417 issued by Respondent No. 1 in favour of Respondent No. 2 upon instructions from the corporate debtor, owing to the fact that the same have expired and there are no claims outstanding or possible in future in regard thereto;

(b) Direct Respondent No. 1 to immediately release the fixed deposits made by the applicant in the form of fixed deposits bearing No. 121713001625, 121713001353 and 121713001423 and held with it as margin money to the bank guarantees bearing Nos. 121BGFD006217, 1217BGFD006317, 1217BGFD006417 and credit the proceeds to the current account of the corporate debtor maintained with IDBI Bank (A/c. No. 1001103000000374) and: in the alternative

(c) Direct the Respondent No. 2 to immediately confirm and intimate the Respondent No. 1 that the bank guarantee bearing Nos. 1217BGFD006217, 1217BGFD006317, 1217BGFD006417 issued by Respondent No. 1 in its favour have expired and that the same can be released or cancelled, as may be necessary, to facilitate Respondent No. 1 to release the margin money held with it to the current account of the corporate debtor maintained with IDBI Bank (A/c. No. 1001103000000374).

(d) Pass any such other order (s) as the Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.

3. It is submitted by the applicant that application under Section 7 of the IB Code, was filed for initiating CIRP against corporate debtor for non-payment of outstanding debt towards term loan facilities due to the petitioner. Vide order dated 01.09.2020 the application was admitted and

Mr. Avil Menezes was appointed as the Interim Resolution Professional (IRP) and moratorium under Section 14 of the Code was made effective. Appointment of the applicant as Resolution Proessional (RP) was confirmed by the members of the Committee of Creditors (CoC) in the meeting held on 01.10.2020.

4. Pursuant to admission of the Insolvency petition, the applicant took over the management and business affairs of the corporate debtor, also securing and preserving the assets of the corporate debtor. In pursuance of Section 18 of the IB Code, the applicant initiated steps to realise the fixed deposits lying with Respondent No. 1 which have expired. The subject matter of the instant application are three fixed deposits maintained by the corporate debtor with Respondent No. 1 as Margin Money for three Bank Guarantees issued to Respondent No. 2. The Bank Guarantees were issued for the purpose of securing material clearance from bonded warehouse and delivery of the cargo by the corporate debtor. The documents of bank guarantees were executed by the corporate debtor in favour of Respondent No. 2. Details of Bank guarantee are as follows:

Bank Guarantee Reference No.	Date of Issuance	Date of expiry of the Bank guarantee	Amount Rs.
1217BGFD006217	09.09.2016	08.09.2017	15,00,000/-
1217BGFD006317	14.10.2016	14.10.2017	4,00,000/-

1217BGFD006417	13.01.2017	11.01.2018	11,15,000/-

5. It is submitted that as per the terms of the Bank Guarantees, the Respondent No. 1 was liable to Respondent No. 2 - beneficiary only till the time period specified in the respective bank guarantees, i.e. till the expiry date for each bank guarantee. Respondent No. 2 beneficiary had the right to invoke the said bank guarantees against the corporate debtor only till their respective expiry dates (Claim Period) and not subsequently, unless the bank guarantee is renewed by Respondent No. 1 upon receipt of written letter from Respondent No. 2 the beneficiary of the said bank guarantees, which has not been done in the instant case. Copies of the bank guarantees are annexed to the application. In lieu of Respondent No. 1 issuing above bank guarantees to Respondent No. 2, corporate debtor had secured the interest of Respondent No. 1 by making deposits vide fixed deposits Number 121713001625, 121713001353 and 121713001423 to the tune of Rs. 30.00 lakhs with Respondent No. 1.

6. It is submitted that subsequent to issuance of bank guarantees and during the performance of the underlying transaction (which was secured by the bank guarantees) i.e. clearance of all material and delivery of the cargo after payment of duty, no claims were ever made by Respondent No. 2 invoking the bank guarantees. Claim period for the invocation of all three

bank guarantees by Respondent No. 2 beneficiary has expired during the period from 08.09.2017 to 11.01.2018 on different dates for each bank guarantee.

7. It is further submitted that the said fixed deposits amount of Rs. 45.00 lakhs which includes interest, belongs to the corporate debtor and is considered as part of the corporate debtor's estate under the Code. That the fixed deposits which are maintained as margin money against the said bank guarantees, relates to certain transactions which are of period much prior to the commencement of Corporate Insolvency Resolution Process (CIRP) of the corporate debtor. Further, the claim period for the Respondent No. 2 beneficiary to invoke the said bank guarantees has also expired way prior to commencement of CIRP.

8. In this background, the applicant has written to both the Respondents at numerous occasions and sought the release of lien over the said margin money. However, Respondent No. 1, i.e., ICICI Bank, has informed the applicant, rather incorrectly, that the margin money amount cannot be released without the approval/discharge clearance of Respondent No. 2 beneficiary. Although, the said approval/discharge from Respondent No. 2 beneficiary is not a requirement under the terms of Bank Guarantee, the applicant in the interest of time and the objects of the Code, i.e.

maximisation of the value of assets of the corporate debtor, has written to Respondent No. 2 beneficiary multiple times and sought the clearance for release of lien and return of bank guarantee. However, all the efforts of the applicant were in vain as Respondent No.2 beneficiary has not made any effort in acknowledging, much less responding, to any of the applicant's letters. It is therefore incumbent upon the applicant to seek appropriate directions from the Tribunal to realise the assets of the corporate debtor which is already facing a severe liquidity crunch and where the release of the said margin money would immensely help in the smooth running of the corporate debtor. Hence, the applicant is filing the instant application.

9. It is submitted that considering the aforesaid position, the applicant, within its right and as per the mandate of the Code, sought release of the bank guarantees and consequent release of the deposits, which now amounts to approx. 45.00 lakhs to the account of the corporate debtor. Copy of balance confirmation certificate dated 07.10.2020 issued by Respondent No.1 to the corporate debtor is annexed. Relief of reversal of margin money to the account of the corporate debtor is being sought on the following grounds:

- the margin money ought to be reversed to the corporate debtor, in view of non-invocation of the bank guarantee, after the expiry period;
- in the instant case, since the bank gurantees were not invoked before the expiry date, the margin money ought to have been reversed in the name of the corporate debtor by Respondent No. 1, without any lien/charge.

10. The applicant has relied on the observation made by the Hon'ble Appellate Tribunal in the case of *Indian Overseas Bank vs. Arvind Kumar, Resolution Professional/Liquidator, M/s. Richa Industries Ltd. Company Appeal (AT)(Insolvency) No. 558 of 2020* which are reproduced herebelow:

> *"13. 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"*

11. It is submitted that the applicant wrote letters to the Respondent No. 1 seeking urgent release of bank guarantees. Copies of letters dated 02.12.2020, 03.02.2021 and 08.04.2021 are annexed. Respondent No. 1

has not yet released the lien over the margin money and has instead been delaying the same despite repeated requests by the applicant. Respondent No. 1 has taken the position that the approval/discharge clearance is required from Respondent No. 2 beneficiary before the lien over the margin money can be discharged. Copy of email dated 14.12.2020 sent by Respondent No. 1 to applicant is annexed. No such approval/discharge clearance is mandated as per the terms of the bank guarantee. Relevant terms of Bank Guarantee is reproduced below:

> *"The Guarantee is issued subject to the condition that the liability of the Bank under this guarantee is limited to a maximum of Rs. 15,00,000/- (Rupees fifteen lacs only) and the guarantee shall remain in force upto 08th September, 2017.*
>
> *Notwithstanding what is contained herein above, if the original bank guarantee is not returned to the bank within the stipulated period i.e. within 30 days from the expiry date of bank guarantee irrespective of the fact whatever the bank guarantee is returned to the bank in original or not bank shall stand discharged of this liability and no claim of any nature shall be entertained by the bank.*
>
> *……………….*
>
> *……………….*
>
> *The bank guarantee shall be valid upto 08th September, 2017.*
>
> *We are liable to pay guarantee amount or any part thereof under this Bank Guarantee only & only if you serve upon us a written claim or demand on or before 08th September, 2017"*

Terms of bank guarantee is clear and explicit inasmuch as it states that the bank guarantee is valid upto expiry date and that the Respondent No. 1 is liable to pay guarantee amount or any part thereof only if Respondent No. 2 serve upon them a written demand on or before the expiry date. Thus, no demand of invocation will be maintainable post the expiry date. Admittedly no such letter or directon is issued by Respondent No. 2. Respondent No. 2 has not come forward to show any document intimating the respondent No. 1 for renewal/invocation of any of the guarantees, hence, on the date of expiry the right to enforce guarantee extinguishes.

12. It is submitted that despite the terms of the bank guarantees being clear and explicit, Respondent No. 1 has stalled the realisation of assets of the corporate debtor in breach of the terms of guarantee. This led to severe liquidity crunch with the corporate debtor despite it having adequate resources.

13. When the matter was listed on 17.12.2021, none appeared, nor any reply was filed. It was directed to effect one more service through email, and if they do not appear on the next date, application be heard. Inspite of notice, on 31.03.2022, nobody appeared on behalf of respondent No. 1 and Respondent No. 2 i.e. ICICI Bank and Customs Department. As none appeared for both the respondents nor any reply has been filed, they have been proceeded ex-parte vide order dated 31.03.2022.

14. Heard submission and perused record. 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 stands reversed to the borrower. It is pertinent to mention that all the three bank guarantees issued by Respondent No. 1 expired in the year 2017 and 2018 and none of the bank guarantees have been invoked by the beneficiary, Respondent No. 2.

We are also supported by the Judgements of Hon'ble NCLAT passed in the following cases:

(i) *Indian Overseas Bank vs. Arvind Kumar, Company Appeal (AT) (Insolvency) No. 558 of 2020, Judgement dated 28.09.2020*

"13. The 'margin money' is the contribution on the part of the borrower who seeks 'Bank Guarantee'. <u>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</u>, 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 towards payment of bank guarantee to the beneficiary and nothing remains with the financial institutions, which can be reversed to the corporate debtor"

(ii) *Monitoring Agency of Anush Finlease & Constructions Private Limited vs.State Bank of India & Ors. Company*

Appeal (AT) (Insolvency) No. 902 of 2020, Judgement dated 04.10.2021.

Here, the Hon'ble NCLAT upheld the Hon'ble NCLT, New Delhi Principal Bench decision dated 04.08.2020 wherein Hon'ble NCLT Principal Bench had held:

"21. These FDRs are given towards margin money against the bank guarantees given to the beneficiary, not as FDRs to be realised by the corporate debtor as and when it wishes. We must say that as per RBI guidelines and also as per the ratio decided in various judgements, margin money is construed as substratum of a Trust created to pay to the beneficiary to whom bank guarantee is given. Once any asset goes into trust by documentation for the benefit of beneficiary, the original owner will not have any right over the said asset unless is it is free from the trust. In this case, <u>the bank guarantee being given to Government authority, 100% margin money is deposited in the form of FDRs. In the event the margin money is free from the Bank Guarantee either by discharge or by efflux of time, then the corporate debtor is entitled for release of FDRs.</u>

*"34 In my judgment, the facts of this case clearly indicate that the **margin money** in question were undoubtedly impressed with **trust** and the bank held the same as trustee for the benefit of the depositor to the extent of unutilised amount. In view of the background of the Reserve Bank guidelines and segregation of the amounts from the current account of the applicant for a specific purpose, it must be held and it is held that the amounts deposited by the applicant were impressed with the trust and are refundable to the applicant in full to the extent of the unutilised."*

15. In view of the above discussions, the instant IA is allowed with following directions:

(i) Respondent No. 2, The Assistant Commissioner of Customs to confirm and intimate forthwith Respondent No. 1 that the bank guarantee bearing Nos. 1217BGFD006217, 1217BGFD006317, 1217BGFD006417 issued by Respondent No. 1 in its favour, have expired and that the same be released or cancelled, as may be necessary, to facilitate Respondent No. 1 to release the margin money held with it to the current account of the corporate debtor maintained with IDBI Bank (A/c. No. 1001103000000374).

(ii) Respondent No. 1, ICICI Bank to return the amount of bank guarantees bearing No. 1217BGFD006217, 1217BGFD006317, 1217BGFD006417 issued by it in favour of Respondent No. 2 considering the fact that the said bank guarantees have expired on 08.09.2017, 14.10.2017 and 11.01.2018 and there are no claims outstanding.

(iii) Respondent No. 1, ICICI Bank to immediately release the fixed deposits made by the corporate debtor in the form of fixed deposits bearing No. 121713001625, 121713001353 and 121713001423 and held with it as margin money to the bank guarantees bearing Nos. 1217BGFD006217, 1217BGFD006317, 1217BGFD006417 and credit the proceeds to the current account of the corporate debtor maintained by RP, applicant, with IDBI Bank (A/c. No. 1001103000000374)

(iv) Respondent No. 1 to release the total amount of all three bank guarantees within two weeks and file compliance affidavit. Let RP also file report of compliance by the Respondent No. 1 within one week from receiving the said amounts of Bank Gurantees, in the account of corporate debtor as mentioned above.

16. The application is allowed and disposed of on above terms.

17. A copy of the order shall be communicated to all parties concerned.

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

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Abhishek LRA