

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

**M.A. 657 OF 2020
IN
C. P. No. 2660/I&B/2018**

Under Section 60(5) of IBC, 2016.

M.A. 657 of 2020

Mr. Shailesh Bhalchandra Desai

Headway Resolution and Insolvency
Services Pvt. Ltd., 708, Raheja Centre,
7th Floor, Nariman Point, Mumbai-
400021.....

Applicant/Liquidator

Vs.

**Centre Point Premises Co-operative
Society Ltd.**

Dr. Babasaheb Ambedkar Marg,
Lalbaug, Parel, Mumbai- 400012....

Respondent

IN THE MATTER OF

Dena Bank

Operational Creditor

Vs.

EMI Transmission Limited,

Respondent/Corporate Debtor

Order delivered on: 12.05.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Shyam Babu Gautam, Member (Technical)

Appearance:

For the applicant: Mr. Ayush J Rajani (PCA)

For the respondent: Mr. Vishal Maheshwari

Per: Shri. H.V. Subba Rao, Member (Judicial)

ORDER

1. The present application is filed by Resolution Professional under the provisions of Section 60(5)(c) read with Section 14 and 238 of the Insolvency & Bankruptcy Code, 2016 seeking necessary directions from this Tribunal to quash/set-aside the "Recovery

Certificate” dated 16.01.2020 issued by Mr. Anil Devkar, Assistant Registrar, Co-operative Society F/S Ward, Mumbai.

2. The applicant states that the corporate debtor is a company which is involved in the business of providing specialized transmission company with designing and manufacturing and supplying quality hardware and accessories. The applicant further states that the company petition was filed by Financial Creditor, Dena Bank under the provisions of Section 7 of the Code. This tribunal admitted the petition vide its order dated 11.04.2019 and appointed Mr. Shailesh Bhalchandra Desai (applicant herein) as the Interim Resolution Professional (hereinafter referred as “IRP”). Further, the IRP was confirmed as Resolution Professional (RP) by the CoC in its first meeting held on 10.05.2019.
3. The applicant stated that in the 10th CoC meeting it was also decided that since the CIRP period of 270 days is expiring on 06.01.2020 and since no resolution plan could be arrived at for the Corporate Debtor, resolution for liquidation of the Corporate Debtor was put up to vote and the CoC has, by 100% majority, voted and approved the liquidation of the Corporate Debtor. The RP (Applicant herein) was also confirmed as Liquidator. Subsequently, a liquidation application was filed by the Applicant RP bearing MA no. 307 of 2020 on 05.02.2020 and is scheduled for a hearing on 25.02.2020.
4. **Submissions of the Applicant:**
 - a. During the CIRP, a public announcement of CIRP was made by the Applicant/RP on 15.04.2019 in newspaper namely, Economic Times (All Edition), Sakal (Nashik Edition), thereby inviting claims from all the creditors to be filed by 27.04.2019. Subsequently, the Applicant received a proof of claim of Respondent in Form B dated 20.04.2019 for a sum of Rs. 48,12,025/- comprising of Society Maintenance Charges inclusive of property tax, sinking fund, repair and maintenance charges etc. for a period outstanding up to 01.04.2019 including dues for the period April to June 2019. The said claim included an amount of Rs.9,47,616/8- which

relates to “Property Tax” for the period April 2019 to March 2020 i.e. beyond the insolvency commencement date i.e. 11.04.2019, in essence, the same being claimed in advance and is not due as on the date of insolvency commencement date in terms of Regulation 13 of the IBBI Regulations, 2016. Accordingly, an amount of Rs.39,33,377/- was admitted by the applicant/RP as an “Operational Debt” and the same was intimated to the Respondent.

- b. In spite of informing the Respondent about the admission of its claim and explaining the provisions of the Code and the fact that no proceedings can be instituted or continued against the corporate debtor during the period of Moratorium declared under Section 14 of the Code, the respondent approached the Assistant Registrar, Cooperative Society F/S Ward, Mumbai with an application to seek a recovery certificate towards its outstanding dues against the Cooperate Debtor in terms of Section 101 of Maharashtra Cooperative Societies Act, 1960 and bye law No. 72 of Bye Laws of Society. The applicant reiterates that the said outstanding claim of the Respondent is already admitted as part of the “Operational Debt” and the payment of the same would be in terms of the provisions of Section 53 of the Code.
- c. The Assistant Registrar of the Cooperative Society, after taking on record the submissions made by the applicant/RP proceeded to pass a Recovery Certificate dated 16.01.2020 against the Corporate Debtor for an amount of Rs. 53,45,762/- which is blatantly illegal and bad in law, without understanding the provisions of the code and its overriding powers. As mentioned above, CIRP of Corporate Debtor has already triggered since 11.04.2019 and moratorium is imposed. For this reason, any claim of a creditor ought to be verified claims as on the insolvency commencement date in terms of Regulation 13 of IBBI Regulations, 2016. Thus, the claim amount ought to be crystallized on the basis of amounts accrued and due as on insolvency commencement date i.e. 11.04.2019 and not beyond it.
- d. As far as property tax is concerned, he has admitted a sum of Rs.78,968/- (being amount for one month towards property

tax for Financial Year 2019-20), thereby not admitting a sum of Rs.8,68,648/- towards property tax of unit 101. Therefore, the amount of claim admitted for petitioner in regard to facts and circumstances of the case stands to Rs.39,43,377/-. The balance amount of Rs.8,68,648/- is relating to the property tax applicable pertaining to the Corporate Insolvency and Resolution Process period and has been considered as part of “Insolvency Resolution Process costs” in terms of the provisions of Section 5(13)(e) of the code read with Regulation 31 of the IBBI Regulations, 2016. While the same would be paid in terms of the provisions of section 53 of the Code.

- e. The applicant would like to highlight that in light of the provision of Section 14, no proceedings whatsoever could be made against a company under Insolvency.
- f. Further, considering that Liquidation Application is already pending filed against the corporate debtor, though moratorium under Section 14 cease to take effect but subsection (5) to Section 33 makes it clear that “*Subject to Section 52, when a liquidation order is passed, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor except if instituted by Liquidator with prior approval of the Adjudicating Authority*”.
- g. Further, Section 238 of the Code has given Insolvency and Bankruptcy Code, 2016 overriding powers over other laws, the said position of law being settled by the various judgments of Hon’ble Supreme Court. The Hon’ble Supreme Court in case of *Innoventive Industries Ltd Vs. ICICI Bank* in SLP (C) No. 6583 of 2018 reiterated the statement of object and reasons of the Code which convey that “*there was no one law in India to deal with insolvency and bankruptcy and that the existing framework consisting of a plethora of legislations was inadequate, ineffective and resulted in inordinate delay for resolution. Hence, it can be concluded that the Code is a complete code in itself.*”

5. Submissions of respondent:

- a. The respondent in his reply has submitted that the respondent society, on 20.04.2019 submitted their claim

with the applicant under form B as contemplated under regulation 7 of the IBBI Regulations, 2016 with the declaration of the respondent through its authorized representative. Subsequently, after the demand of the applicant, the respondent society under its letter dated 22.04.2019 submitted the copies of bills/invoices, supplementary demand note, account statement of the receivable from the corporate debtor. It is also the matter of record that subsequent thereto in view of the queries raised by the applicant, the respondent society by its email communication dated 29.04.2019 put forth the clarification to that effect. However, inspite of aforesaid exercise even though claims of the respondent society being the operational debt, the clearance and payment of which came to neglected by the applicant/resolution professional.

- b. It is admitted position of the fact that the applicant failed to admit the entire claim of the respondent society, wherein respondent society in form B dated 20.04.2019 submitted their verified claim of Rs.48,12,025/- (Rs. Forty Eight Lacs Twelve Thousand Twenty Five Only) comprising of society maintenance charges inclusive of property tax, sinking fund, repair and maintenance charges as been and payable on 1.04.2019 including dues for the April to June 2019, with regards to which the IRP/applicant taking escape and protection about moratorium being imposed since 11th April 2019 only admitted part of claim thereby admitting the sum of Rs.39,43,377/-, wherein the other remained sum of Rs.8,68,648/- were not been admitted towards property tax of the unit no. 101 of corporate debtor in the said society.
- c. The respondent society by its advocate's letter dated 07.05.2019, 23.05.2019 and 10.06.2019 requested the applicant to settle the claim of the respondent as expeditiously as possible being the debt of the Respondent as Operational Debt, however instead of settlement of the claim, the applicant by its advisers/legal consultant's letter dated 1st July 2019 found seeking protection under the recourse of declaration of moratorium and further tried to put forth understanding that "*the determination of liability and*

recovery of the same stand on a different footing and RP can admitted claims as exists as on insolvency commencement date.”

- d. It is admitted position of fact that under the entire claim made by the respondent for Rs.48,12,025/-, the applicant admitting the part claim of Rs.39,43,377/- wherein the other remained sum of Rs.8,68,648/- were not been admitted towards property tax of the unit no. 101 of corporate debtor in the said society, however even though the aforesaid part claim of Rs.39,43,377/- were been admitted by the applicant being operational debt of the respondent, even though the applicant/resolution professional has not taken any pain to settle the claims of the society, which includes the charges towards the maintenance (essential services used by the applicant) and property tax of the said premises under which entire activities of the applicant were ongoing during the course of his appointment as resolution professional.
- e. The premises of the corporate debtor under the respondent society is being entirely throughout used, occupied and controlled by the applicant during the course of its appointment for performing activities for corporate debtor, wherein the entire concern employees of the corporate debtor since after the appointment of applicant were also been put to render services to perform the acts has monitored and controlled by applicant under the premises of the corporate director under the respondent society, during which period the all facilities, services including access and such other common facilities were been fully used and enjoyed by the applicant in all respect, to which the respondent society showing utmost respect being the officer appointed by the NCLT, never rendered any obstruction to the usage of the facilities and enjoyment of the services of the respondent society therein.
- f. The respondent further contended in reply that the applicant deliberately and wantonly avoided settlement of the claims of the respondent society although the same were been admitted as operational debt; wherein during the aforesaid acts of the applicant the respondent society is running to

financial crises, which ultimately lead to situation of causing liquidation to the society in the near future as the legitimate dues of the society also includes charges towards the property tax and as such due to the default committed by the applicant even the property of the respondent is running through apprehension of being attached by the MCGM through its assessment and collection Department dated a serious and heavy pendency of the dues over the respondent society, wherein even for functioning of the society the concerned staff maintained by the society requires frequent payment even the non-settlement of which shall lead to Oppression and Mismanagement so also Depletion of the Assets of the Respondent Society, hence the present Miscellaneous application taken out by the applicant be dismissed with compensatory cost.

FINDINGS

6. We have heard both the parties and taken their submissions into account. We have also perused the documents and papers submitted by them. Both the parties have made allegations and counter allegations against each other. It is the case of the applicant that the respondent is in complete violation of the provisions of Section 14 and 238 of the Code by proceeding before the Assistant Registrar, Co-Operative Society F/S Ward, Mumbai and obtained a recovery certificate dated 16.01.2021.

7. The respondent has accepted that the RP has admitted his claim but has alleged that the same is not yet paid. The respondent's claim is an 'operational debt' as classified by the RP and the distribution of it would be done according to the waterfall mechanism provided under Section 53 of the Code. But ignoring this settled principle of law, the respondent has proceeded for recovering its dues. Here, Section 14 of the Code needs to be understood. Section 14 prohibits/restrains any creditor from proceeding to take any recovery action or institution of suits against the corporate debtor towards its

dues against the corporate debtor undergoing CIRP. Section 14 is reproduced here for ready reference:

“14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of

corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

A bare perusal of this provision makes it clear that the action of the respondent in initiating a proceeding against the corporate debtor after the moratorium being imposed is wrongful and therefore, is contrary to the provisions of Section 14(1) of the Code. It is the Resolution Professional who takes the control of the corporate debtor and the creditors have to submit their claims to the RP who then distributes them according to the waterfall mechanism as specified in Section 53 of the Code.

8. Further, it is also to be understood that the Insolvency and Bankruptcy Code, 2016 is a specialized and complete Code and supersedes other laws in case of inconsistencies. This is provided in Section 238 of the Code. Here, in this matter, the reference to the Maharashtra Cooperative Societies Act, 1960 for seeking “recovery certificate” against the corporate debtor during the subsistence of “Moratorium” does not hold good. Also this act was done by the respondent when the claim was already admitted by the RP.
9. The respondent had also raised concerns stating that the claim was only partially admitted by the applicant RP. But the RP has in his affidavit in rejoinder stated that when the claim was admitted, the unadmitted amount was not due and payable being “future in time” whereas now, after the lapse of time, the amount of Rs.8,68,648/- forms a part of the CIRP as it is required under the Code which shall be paid to the respondent in terms of the provisions of Section 53 of the Code. Therefore, we believe that the RP has acted according to the provisions of the Code and the respondent has wrongfully approached the Assistant Registrar, Co-Operative Society F/S Ward, Mumbai for recovering the said outstanding debt amount when the CIRP of the corporate debtor is in progress.

10. Considering the above discussion and circumstance, we have no option but to quash the recovery certificate dated 16.01.2020 issued by the Assistant Registrar, Co-Operative Society F/S Ward, Mumbai being in contravention to the provision of Section 14 of the Code. We also direct the respondent to not take any coercive action for recovery of its outstanding claim against the corporate debtor in light of the provisions of Section 14 of the Code r/w Section 238 of the Code. The respondent is further directed to file its claim before the RP in terms of the Liquidation Regulations, after the liquidation of the corporate debtor is allowed.

11. With these observations and directions, this application is allowed.

Sd/-

**SHYAM BABU GAUTAM
MEMBER (TECHNICAL)**

Sd/-

**H.V. SUBBA RAO
MEMBER (JUDICIAL)**