IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

(IB)-378(PB)/2017

IN THE MATTER OF:

Alchemist Asset Reconstruction Co. Ltd. .... **APPLICANT / PETITIONE**

And

Moser Baer India Limited .... **RESPONDENT**

SECTION:
Under Section 7 of Insolvency & Bankruptcy Code, 2016

Order delivered on 25.04.2018

Coram:
CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

Sh. S. K. MOHAPATRA,
Hon'ble Member (Technical)

PRESENTS:

For the APPLICANT-RP :- Mr. Krishnendu Dutta, Mr. Karan Kanwal, Advs. for Resolution Professional
Mr. Devendra Singh, Resolution Professional Of MBIL

Mr. Roshan Kumar, Mr. Saran Suri, Advs.
Ms. Seema Jangid, Company Secretary for the OBC in CA No. 247/2018

For the RESPONDENT :- Mr. Roshan Kumar, Mr. Saran Suri, Advs.
Ms. Seema Jangid, Company Secretary for the OBC in CA No. 207/2018

ORDER

CA No. 207(PB)/2018
&
CA No. 247(PB)/2018

This order shall dispose of CA-207(PB)/2018 filed by the Resolution Professional (for brevity, 'RP') and CA No.247(PB)/2018 filed by the Oriental Bank of Commerce. In the application filed by the RP, a prayer has been made that Oriental Bank of Commerce may be directed to prematurely cancel the Fixed Deposit Receipt No.06193031032707, 06193031032714, 06193031032721, 06193021014928 and 06193031032691 lying with it in the name of Corporate Debtor and transfer the proceeds of the Fixed Deposit Receipts into the account known as the Trust and Retention Account No.3230811629 with the Central Bank of India, Jeevan Tara Building, Parliament Street, New Delhi, IFSC: CBIN0283464 along with upto date interest. A further prayer has been made for issuance of direction to the Oriental Bank of Commerce to remit the balance in the Current Account No.6191011000852 which is lying deposited with the name of Corporate Debtor in to the Trust and Retention Account No.32308111629 with the Central Bank of India at the same Branch.

In the application filed by the Oriental Bank of Commerce, a prayer has been made that order of the IRP be set aside whereby the claim of the Oriental Bank of Commerce to the tune of Rs.849,94,18,669.25 as on 14.11.2017 has been rejected. It is also prayed that a direction be issued to the IRP to accept the claim of the Oriental Bank of Commerce and allow OBC to be a member of COC.

Brief facts of the case may first be noticed in order to appreciate the rival contentions of the parties. It is pertinent to notice at the outset that Corporate Debtor had furnished 'Bank Guarantee' to the loan amount taken by M/s. Hellios Photo Voltaic Ltd. from the OBC. In the matter of Moser Baer India Limited-Corporate Debtor, CIR process was initiated on 14.11.2017 when the petition under Section 7 was admitted. A copy of the order has been placed on record in CA No.207(PB)/2018 (pgs.39 to 55). In para 13(c), clear directions were issued inter alia, prohibiting 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The order makes it clear that the aforesaid directions were being issued in pursuance of moratorium envisaged by Section 14 of the Insolvency and Bankruptcy Code. It was also made clear that the Resolution Professional was to perform all his functions religiously as contemplated by Sections 15, 17, 18, 19, 20 & 21 of the Code. It is appropriate to mention that under Section 17(1)(d), there is a specific duty cast on the Interim Resolution Professional which read as under:

> 17(1) *From the date of appointment of the interim resolution professional-*
> *(a)* ---
> *(b)* ---
> *(c)* ---
> *(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.*

At the time of admission of petition on 14.11.2017, there were five fixed deposits and the IRP on 18.11.2017 wrote a letter to OBC to discontinue the fixed deposit and cash amount of the fixed deposit be deposited in the Trust and Retention Account of the Corporate Debtor. He continued writing these letters on 03.12.2017, 19.12.2017 and

27.12.2017. In the meanwhile, on 13.12.2017, first COC meeting took place and IRP was confirmed as RP and it was decided by the COC to encash the aforesaid five fixed deposits and the amount was required to be deposited in the Trust and Retention account. It is also appropriate to mention that OBC participated at this stage in the proceedings of the COC as it was considered a creditor and had voted in favour of the aforesaid Resolution. On 11.01.2018, the OBC made enquiries from the RP as to how he could seek discontinuation of the FDs and ask to deposit the same into the Trust and Retention account. The RP on his turn sent his reply stating that under Section 17(1)(d), he has been performing his duties and a copy of the reply has been placed on record (Annexure P-16).

In reply to the application of the RP, the OBC has taken a stand that the corporate guarantee executed by the Corporate Debtor in 2008 in fact was invoked and, in that regard, reliance has been placed on letters dated 22.07.2014 and 01.12.2015. The aforesaid letters have been placed on record as Annexure 'A' and 'B' of the reply. It has also been pointed out that after invocation, the OBC has appropriated the amount of the FDs equivalent to the Bank guarantee on 30.11.2017 and information in that regard was sent on 17.12.2017 to the Corporate Debtor.

Mr.K.Dutta, learned counsel for the RP has vehemently argued that letters dated 22.07.2014 and 01.12.2015 by no stretch of imagination could be regarded as invocation of bank guarantee. He has drawn our attention to the endorsement on these two letters whereby copies of letters have been forwarded to the Corporate Debtor and reliance on the endorsement is stated to be wholly misplaced. According to the learned counsel, there is nothing to infer from the letters that the corporate guarantee was invoked by the aforesaid two letters. Our attention was then drawn to the legal notice dated 30.11.2017, where attempt was made by the OBC again to misconstrue the aforesaid two letters by saying that the bank guarantees of the Corporate debtor were invoked in 2015. Our attention was further drawn to paragraphs (i) and (j) which indicate that on 30.11.2017, the OBC wanted to appropriate the amount of the FDRs towards the bank guarantees.

Mr.K.Dutta, learned counsel has argued that after triggering CIRP there is complete bar to withdraw any cash from the accounts of the Corporate Debtor. In support of his submission learned counsel has placed reliance on the judgement of the National Company Law Appellate Tribunal rendered in the case of *Indian Overseas Bank v. Mr.DinkarT.Venkatsubramaniam (Company Appear (AT) (Insolvency) No.267 of 2017* decided on 15.11.2017 and has argued that once CIR process has been triggered, then no amount from the account of the Corporate Debtor could be appropriated by the bank. Reliance has also been placed on the judgement of the Principal Bench rendered in the case of *Axis Bank Ltd. &Anr. v. Edu Smart Services Private Limited (IB)-102(PB)/2017* decided on 27.10.2017.

Mr. Suri, learned counsel for Oriental Bank of Commerce has however, argued that the endorsement in the letters dated 21.12.2015 and 24.12.2015 would clearly amount to invoking the Bank guarantees and therefore, once the bank guarantees have been invoked, its appropriation letter is only consequential act. According to the learned counsel, there is no bar on the OBC to appropriate the amount which has already been invoked even after the triggering of CIR process. Pressing his application, learned counsel has argued that claim made by the OBC on the basis of the bank guarantee merits acceptance as the invocation was made much earlier in the year 2015 than the date of admission of the petition, i.e. 14.11.2017.

Having heard learned counsel for the parties, we are of the considered view that the application filed by the Resolution Professional merits acceptance and the one filed by the Oriental Bank of Commerce (OBC) is liable to be dismissed. It remains undisputed that there were 5 Fixed Deposits in the name of Corporate Debtor. The Resolution Professional as well as the Committee of Creditors (COC) desired and issued instructions to OBC to discontinue the Fixed Deposits and the amount realized from the Fixed Deposits was to be credited in the Trust and Retention Account of the Corporate Debtor. The OBC has placed reliance on letters dated 22.07.2014 and 01.02.2015 to argue that the guarantees were invoked by the aforesaid letters and thereafter, the amounts of the FDRs have been appropriated on 30.11.2017. It would be pertinent to read the letters dated 22.07.2014 and 01.12.2015 along with endorsements. The letter dated 22.07.2014 which is addressed to M/s Helios Photo Voltaic Limited in whose favour the bank guarantees were furnished by the Corporate Debtor reads as under :-

> *"M/s Helios Photo Voltaic Limited*
> *22.07.2014*
> *(Formerly Moser Baer Photo Voltaic Limited)*
> *42B, Okhla Industrial Estate,*
> *(Phase-II)*
> *New Delhi-11020.*
>
> *Sir,*
>
> ***REG: Recall Notice a/c – M/s Helios Photo Voltaic Limited***
> *Total C/s Rs.574,00, 88,439.25 (Rs.Five Hundred Seventy Four Crore Eighty Eight Lacs Four Hundred Thirty Nine and paisa Twenty Five only)*
> *(Interest charged up 30/08/2014)*
>
> *Your various loan accounts have been running unsatisfactory for quite some time and you are, therefore, in default as you have failed to take steps to regularize /adjust your account in respect of such debt as stated herein above. In view of the said default, your account was classified as a non-performing asset by the Bank on 31.03.2013 and you also failed to comply conditions of CDR. In the circumstances, the Bank has decided to recall the advance granted to you. You are, therefore, now required to discharge in full the bank's liabilities with upto date interest as per the details mentioned above within a period of 30 days from the date of the notice failing which the bank shall initiate necessary action for recovery of bank dues.*
>
> *Yours faithfully,*
>
> *Asst.Gen.Manager*
>
> *Copy to – The Managing Director, M/s Moser Baer India Limited, 43-A, Okhla Industrial Estate, New Delhi-110020. Your company has given Corporate Guarantee to secure the credit facilities sanctioned in subject account. You are advised to get the account adjusted, failing which the bank will initiate legal action.*

Copy to – Mr.DeepakPuri, Building No.60, Ground Floor, Okhla Industrial Estate, Phase-III, New Delhi-110020. Yo have given personal guarantee to secure the credit facilities sanctioined in subject account. You are advised to get the account adjusted, failing which the bank will initiate legal action.

Asst.General Manager."

The letter dated 01.12.2015 differ in any material particulars and in terms, is similar. Therefore, the necessity to reproduce the same is obviated.

When we have examined the endorsements sent to the Corporate Debtor M/s Moser Baer India Limited, it becomes evident that the OBC has indicated to the Corporate Debtor that it had given Corporate Guarantee to secure the credit facilities sanctioned to M/s Halio Photo Voltaic Limited and they were advised to get the account adjusted failing which the OBC was to initiate legal action. Similarly, endorsement has been made in the letter dated 01.12.2015. It has been rightly contended by Mr. K.Dutta, learned counsel for the Resolution Professional that these endorsements cannot be regarded as invocation of Corporate Guarantee. We entirely agree with the submission made by the learned counsel and do not feel persuaded to accept the contention advanced by Mr.Suri on behalf of the OBC.

We are further of the view that the Corporate Insolvency Resolution Process in this case was triggered on 14.11.2017 and the amount from the FDRs has been appropriated after the aforesaid date on 30.11.2017 and intimation was sent on 17.12.2017. In any case this was barred by Section 14 of the Code and the directions issued by us in the order dated 14.11.2017. In the case of AXIS Bank Limited (supra), the Principal Bench has taken the view that in accordance with the provisions of Regulation 13 of the Insolvency and Bankruptcy Board of India (Corporate Resolution Process for Corporate Persons) Regulations, 2016, the Interim Resolution Professional / Resolution Professional has to verify every claim as on the insolvency commencement date. Therefore, as per the books of account, on 14.11.2017 the amount in Fixed Deposits stood in the name of the Corporate Debtor. Any withdrawal from the account/FDR by appropriation by OBC has to be regarded as violative of Regulation 19 also. In the absence of such a bar, it will not be possible for the Resolution Professional to verify the claim and the object of moratorium as contemplated under Section 14(1) (c) would stand defeated. The Appellate Tribunal in the **Indian Overseas Bank vs. Mr.DinkarT.Venkatsubramaniam(supra)**has also taken the same view in para 5 of its judgement which reads as under :-

> *"Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the appellant in view of the fact that after admission of an application under Section 7 of the "I&B Code", once moratorium has been declarerd it is not open to any person including 'Financial Creditors' and the appellant bank to recover any amount from the account of the 'Corporate Debtor', nor it can appropriate any amount towards its own dues."*

We are further constrained to observe that the OBC has unnecessarily contested this litigation and the Interim Resolution

Professional / Resolution Professional was merely performing his duties imposed on him by Section 17(1)(d) of the Insolvency and Bankruptcy Code, 2016. Therefore, the claim made by the OBC in its application No.247(PB)/2018 is devoidany merit.

As a sequel to the above discussion, CA No.207(PB)/2018 filed by the Resolution Professional is allowed and CA No.247(PB)/2018 filed by OBC is dismissed. The Resolution Professional shall be entitled to his costs which are assessed at ₹10,000/-. The amount of costs shall be deposited by OBC in the account of the Corporate Debtor. The applications stand disposed of.

Sd/-

(M.M.KUMAR)
PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (TECHNICAL)

25.04.2018
V.Sethi

FIT FOR INDEXING.