IN THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH

CA No. 171/2019
In
CP (IB) No.102/Chd/CHD/2018
M/s Orbit Lifescience Pvt. Ltd. (Intervener)

In the matter of:-
Weather Makers Pvt. Ltd. …Petitioner-Operational Creditor

Versus

Parabolic Drugs Ltd. …Respondent-Corporate Debtor

Order dated: July 26th, 2019

Coram: HON'BLE MR M.K. SHRAWAT, MEMBER (JUDICIAL)
HON'BLE MR. PRADEEP R.SETHI, MEMBER (TECHNICAL)

Present: Mr. Anand Chhibbar, Senior Advocate, with Mr. Vaibhav Sani, Mr. Vishav Bharti Gupta and Mr. Anirudh Suresh, Advocates, for the Applicant (CA No.171/2019)
Mr. Arora Vishwas Kumar, Advocate for the Resolution Professional

Per: M.K. Shrawat, Member (Judicial)

CA No.171 of 2019

This application is an 'Intervention Application' submitted by an Intervener (supra) on 13.03.2019, seeking certain relief, primarily as under:-

> *"b) The Hon'ble Tribunal may be pleased to pass an order directing the Corporate Debtor/RP/COC to release the Intervener's raw material/stock lying at the Corporate Debtor's plant immediately.*
>
> *c) The Hon'ble Tribunal may be pleased to pass an order directing the Corporate Debtor/RP/COC to accept the Difference Amount and add the same to the admitted claim amount of the Intervener."*

2. A petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('**Code**') was submitted by the 'Operational Creditor' M/s Weather Makers Pvt. Ltd. against the 'Corporate Debtor' M/s Parabolic Drugs Ltd.,

which was **Admitted** vide an order dated **30.08.2018** by invoking the provisions of Section 9 of the Code. Thereupon, 'Moratorium' under Section 14(1) of the Code was pronounced. In the said order it is specifically directed that the supply of essential goods and services to the Corporate Debtor must not be suspended or interrupted during the 'moratorium' period.

3. The admitted factual position as narrated in this application was that a **Bailor and Bailee Agreement was executed on 01.05.2018** between Orbit Lifesciences Pvt. Ltd. (Intervener) on one hand and on the other hand, Parabolic Drugs Pvt. Ltd., (Corporate Debtor). Since the CIRP had commenced vide order dated 30.08.2018, therefore, this agreement was undisputedly executed before the commencement of CIRP. It was agreed upon between the parties that the Intervener would provide **raw material** to the Corporate Debtor to carry out manufacturing activity. Therefore, under the said bailment agreement, the **Corporate Debtor was holding the stock received from the Intervener (Bailor) purely as a 'Bailee'.** Relevant portion of the Bailment Agreement for ready reference has been reproduced in the petition as under:-

> *"…subject to the terms and conditions of this Agreement Bailor hereby entrusts the Manufacture of Product to Bailee. Until the conversion of the raw materials into Product and until the possession of the goods has been restored with Bailor, Bailee would hold the stocks received from Bailor under the terms of this agreement purely as a "Bailee" and would have no rights of ownership/property in these goods..."*

4. Pursuant to the agreement from 22.06.2018 upto 04.10.2018, raw material was delivered to the manufacturing plant of the Corporate Debtor.

At this juncture it is worth to reiterate that the commencement **date of CIRP was 23/08/2018, i.e. date of order passed U/s 9 of I&BC**. As per the Applicant/ Intervenor, the Corporate Debtor was holding the stock as a custodian in terms of the Bailment Agreement. The complete list of the raw material with inventory which was stated to be delivered is annexed and the compilation consists of challan issued time to time.

5. As stated above, an insolvency petition was filed against the Corporate Debtor (Bailee) and thereafter, petition was admitted vide order dated 23.08.2018, as a consequence, CIRP was commenced. It is also informed that the Intervener (applicant/ bailor) is also one of the Operation Creditor and a claim has been lodged on 15.11.2018 by way of Form B to the Resolution Professional. In the said claim, the Intervener had submitted a claim of ₹16,06,33,009/- out of which the Resolution Professional has admitted ₹11,01,32,696/- and rest of the amount of ₹5,05,00,313/- was not admitted and is stated to be the raw material lying as a stock at the manufacturing plant of the Corporate Debtor. It is worth to mention at this juncture that it appears to be some confusion in the figure of claim found to be admitted, because at one place in the reply (para 27) the R.P. was able to verify the of Rs. 8,08,40,571/-. Nonetheless, it is a matter of accounts/calculation, which can be corrected any time.

6. It is also mentioned in this application that a list of Operational Creditors was published on the website and the 'status of claim' of the Intervener was reflected only as ₹8,08,40,571/-, as against the sum of Rs. 11,01,32,696/-. The difference amount of ₹2,92,92,125/- was shown as

'difference amount' as was stated to be rejected by the Resolution Professional.

7. It has also been admitted that the Intervener was able to retrieve some raw materials from the said stock for the value of ₹3,53,64,529/- (referred **pages 11 and 12 of the compilation).**

8. The main contention of the applicant is that the impugned raw material has a shelf life with an expiry date. After the expiry date, the value of the raw material got reduced, being chemical in nature. To protect the stock, the Intervener had made a request to the Resolution Professional for removal of the raw material on number of occasions, but was not allowed. No information was received giving reasons for declining the permission for removal of the raw material.

9. It has been brought to the notice of the Intervener that a stock auditor had been appointed to verify the position of the stock lying with the Corporate Debtor's plant. According to the applicant, the Resolution Professional as well as Committee of Creditors has erred in declining the lifting of the impugned raw material. The said stock is not an asset of the Corporate Debtor. It was agreed by the Corporate Debtor, which can be verified from the financial statements of the Corporate Debtor.

10. A legal argument has been raised that in a situation when the raw material does not constitute the property of the Corporate Debtor, therefore, the clauses of Moratorium has no role to play. The raw material is highly degradable, therefore, it is required to be released immediately. The

Resolution Professional had even erred in rejecting the impugned difference amount.

11. A reply has been filed by Mr. Raj Kumar Ralhan, Resolution Professional, on behalf of the Corporate Debtor, stating therein that on commencement of CIRP with effect from 23.08.2018 when a petition under Section 9 of the Code of an Operational Creditor was admitted against the Corporate Debtor namely, Parabolic Drugs Pvt. Ltd, the moratorium had commenced and the provisions of Section 14 of the Code came into operation. According to the Resolution Professional as per Section 14(1)(d) of the Code, after the commencement of the moratorium, no recovery of any property owned by a lessor, where the property is in possession of the Corporate Debtor, be allowed to be dealt with in any manner. It is prohibited, in terms of various Provisions, to return any property in possession of the Corporate Debtor, in this case, Bailee.

12. In its reply, the Resolution Professional had informed as well as admitted that there was a **Bailor-Bailee Agreement dated 01.05.2018**, according to which the Intervener was operating the plant of the Corporate Debtor on job - work basis till the end of September, 2018. Since, the period had fallen after the commencement of CIRP, therefore, the Committee of Creditors had objected for return of impugned stock. It was also passed in a Resolution that in terms of Bailor-Bailee Agreement dated 01.05.2018, **the Applicant was to pay all the running expenses including electricity dues**. Therefore, according to the members of the Committee of Creditors, the stock should not be permitted to be lifted by the Applicant. According to Committee of

Creditors, pending dues are to be cleared by the Applicant in terms of the Bailor/ Bailee Agreement. The Resolution Professional has informed that dues are amounted to ₹2.30 Crores. **So the stress was on the issue that first the outstanding dues of ₹2.30 Crores be paid before return of goods.** The Bailor M/s Orbit Lifesciences Pvt. Ltd. (Intervener) had agreed to pay all the monthly expenses to run the plant. The said amount was due to be paid by the Intervener, which were towards the operational expenses incurred for manufacturing of goods for the period from 01.05.2018 to 31.08.2018.

13. The main contention of the Resolution Professional is that the Intervener had to discharge its obligation, as committed vide Clause 11.2 of the said Agreement, before demanding the return of goods. In the absence of the discharge of liability infested upon the Intervener/applicant, the stocks being in physical possession of the Corporate Debtor need not be disturbed, vehemently pleaded.

14. In the rejoinder-affidavit, the Intervener has mostly reiterated those very facts as already stated in the main petition. By referring to the provisions of Section 18 of the Code, it is pleaded that although the Interim Resolution Professional can take control and custody of the asset, but it was restricted over those assets on which the Corporate Debtor has ownership rights. It is also required that the ownership rights should also be recorded in the balance sheet of the Corporate Debtor. Further referred 'Explanation' incorporated below Sec. 18 of the I &B Code. As per the said 'Explanation' it is provided that the "assets" owned by a third party but in possession of the Corporate Debtor under Contractual Arrangement, is not to be included for the

purpose of implementation of Section 18(1)(f) of the Code. As a consequence, the Resolution Professional/Committee of Creditors has no right to withhold the stock in question, undisputedly owned by the Intervener. The Bailee/Corporate Debtor had withheld the goods merely in a fiduciary capacity, hence, admittedly had no ownership right. It is informed that the stock audit report had also confirmed the said admitted factual position.

15. It is worthwhile to mention that an affidavit dated 12.06.2019 of Resolution Professional is also on record, wherein it was stated that to identify the goods whether belonging to the Intervener, a stock-auditor was appointed for ascertaining the ownership on one hand and on the other hand to physically verify the stock in possession of the Corporate Debtor. On that basis it was expected from the Auditor to give a finding about the ownership of the third party. Hence vide Stock Audit Auditor's Report dated 04.03.2019 the earmarked stock was certified as belonging to the Intervener. As a consequence, it is pleaded in the affidavit that the raw material as earmarked in the stock audit report, was received before the commencement of the CIRP. Therefore, apart from lifting of the stock, the Intervener had also submitted **Form B as lodgement** of claim before the Resolution Professional for a sum of ₹8,08,40,571/-. Side by side, as per the Agreement dated 01.05.2019 (Clause 11.2), the Intervener was required to bear all the running expenses including electricity expenses to run the plant. Therefore, the claim is that the Intervener is liable to pay expenses amounting to ₹2,30,00,000/- from 01.05.2018. The Resolution Professional has also stated that a sum of ₹71,66,642/- and ₹36.39 Lacs, respectively, for the month of August and September towards employees

salary has also been paid from the resources of the Corporate Debtor. That salary is also required to be paid as per the terms of the agreement by the Intervener. Thus, a total sum of ₹2.60 Crores (approximately) to be cleared by the Intervener before lifting of the stock.

16. **FINDINGS :-** Heard both the sides at some length. As far as the legal question about the applicability of the 'moratorium' provisions as prescribed under Section 14 to be read along with Section 18 of the Code are concerned, it is worth to mention at the outset that this Bench has already dealt with the same in an order dated 26.04.2019 passed in ***CA No.206/2019 in CP(IB) No.102/Chd/CHD/2018 under Section 60(5) read with Section 14(1)(d) and Section 18(1)(f) of the IBC, 2016, Company Application by M/s Sun Pharmaceutical Industries Ltd.- Applicant ; in the matter*** **of Weather Makers Pvt. Ltd. Versus Parabolic Drugs Ltd.**" wherein a view was expressed that since the raw material was supplied under a contractual arrangement, therefore, the provisions of 'Explanation' annexed to Section 18 of the Code should apply. In the said case, it was ordered that the applicant was entitled to take back the property from the possession of the Resolution Professional. The findings for ready reference are reproduced below:-

> *"9. Heard the rival submission and perused the records of the case. One of the facts is not in dispute that the Applicant had supplied raw material which is in possession of the Corporate Debtor, now under insolvency, hence controlled by the appointed Ld. Resolution Professional. The Applicant has expressed an apprehension that the raw material being a chemical, is perishable in nature, hence requires to be protected before it expires or gets destroyed by any chemical reaction.*

9.1 In the light of the factual matrix narrated above, a legal question has been raised that whether the raw material in possession of the Corporate Debtor, should not be allowed to be returned on commencement of "Moratorium"? On one hand the Ld. RP has taken the shelter of the provisions of section 14(1)(d) of the IBC, but on the other hand the Applicant has placed reliance on the Explanation under section 18(1)(f) of IBC. At the outset, at this juncture, in our opinion the facts and circumstances of the case lead us to hold that the provisions of section 18 are more appropriate to address the legal issue in hand. Reasons follow herein below.

9.2 First we shall deal with the provisions of section 14(1)(d), wherein the terminology used is "Property" and not "Asset". This section says that on commencement of insolvency by an order of Adjudicating Authority prohibition is to be imposed in respect of recovery of any property by an Owner or a Lessor where such property is occupied by or in possession of the Corporate Debtor. In this section the reference is in respect of a "Property" which is duly defined u/s 3(27) of IBC, means money, goods, land, actionable claim, etc. As far as the CoC is concerned, it was resolved by 100% voting not to release the goods belonging to Sun Pharmaceutical Industries Ltd. The said decision of CoC was declared in a routine manner although the question was that whether it was a case of "Recovery" by an owner of the property.

In strict sense, the claim of the Applicant is not for recovery of money/goods.

10. The statute has mandated vide section 18(1)(f) that the Interim Resolution Professional shall perform several duties such as 'take control and custody of any asset over which the Corporate Debtor has ownership rights as recorded in the Balance Sheet of the Corporate Debtor'. Tangible assets whether movable or immovable is within the category of "Assets" as defined in this section vide insertion of an Explanation. Through this explanation an exception is carved out that

for the purpose of this section i.e. section 18(1)(f) the followings shall not constitute an Asset and therefore, an Asset owned by a third party, however, in possession of the Corporate Debtor, held under trust or under contractual arrangement. In short, an Asset belonging to an Operational Creditor, however, in possession of a Corporate Debtor shall not be treated as an Asset, therefore, the RP shall not be allowed to take control and custody over the said Asset. In the light of this provision if we examine the facts of this case, it is not in dispute that the Operational Creditor M/s. Sun Pharmaceutical Ltd. has supplied the raw material which is in possession of the Corporate Debtor i.e. Parabolic Drugs Ltd. should be released without delay being perishable in nature, following section 18(1)(f) r/w Explanation.

11. A question is to be answered that what are the areas of operation of Sec. 14 vis-a-vis Sec. 18 of IBC. A fine distinction is available between these two enactments. The area of operation of Sec. 14 is in respect of property which is occupied or in possession of the Corporate Debtor. The property as defined U/s 3(27) of the Code includes money, goods, land, actionable claims etc. If the property as defined in Sec. 3 is in possession of the Corporate Debtor, then such property cannot be recovered from the Corporate Debtor by the owner of the property on commencement of Moratorium. This is the general rule through which the Corporate Insolvency Resolution Process proceedings are being triggered on admission of an insolvency petition. Under the insolvency Code, later on an exception is provided U/s 18 (Explanation) against this general rule. However, the area of operation of Sec. 18 is distinct from Sec. 14. There is a fine distinction as appearing in Sec. 18 r/w explanation that for the purpose of this section the term "asset" shall not include an asset owned by third party in possession of Corporate Debtor, either (i) under trust, or under (ii) contractual arrangements including bailment. Therefore, it is clear that the ambit of application of this explanation is confined to these two types of assets, i.e. either a trust asset or an asset in possession owing

to contractual arrangement. Hence, a conclusion can be drawn that the exception as carved out through this explanation against the general rule of S. 14, which is limited in its operation in respect of these two types of assets only, although as per the main provision, an asset owned by a third party but in possession of the Corporate Debtor shall not be included U/s 18(1)(f) which prescribes taking control over the properties as described therein. Next is the question that whether the raw material which is supplied by the applicant for manufacturing of a drug in possession of the Corporate Debtor can be an asset to be held as a trust property or under contractual arrangement. Our concern is limited to an arrangement which is undisputedly a contractual arrangement, which in general prescribes the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed off according to the directions of the person delivering them.

Since, the raw material was supplied under a contractual arrangement, terms already reproduced above therefore, the provisions of Explanation to Sec. 18 are squarely applicable. The applicant is entitled to take back the property from the possession of the RP."

17. On pronouncement of the legal position, as reproduced supra, there is no ambiguity that once the stock-auditor had earmarked and affirmed the 'ownership' of the Applicant, then, the 'Explanation' annexed to Section 18 IBC is to be applied in this case as well. As far as the basis for demanding Rs.2.30 Crore, a calculation chart is available as an Annexure of a pleading wherein offered the details of **expenses incurred** for the month of May, June, July and August 2019 amounted to Rs.3,57,87,366/- and total **receipts** on this account amounted to Rs. 1,34,60,644/-, thus the **balance of Rs.2,23,26,722/-** is the amount for claim by the Resolution Professional. These details are

annexed on Page 17 and 18 of the Affidavit filed by the Resolution Professional.

18. The question of such **set- off** has been decided in one of the latest case of Bharti Airtel Limited and Bharti Hexacom Limited Vs. Vijaykumar V. Iyer Resolution Professional, in the matters of **Dishnet Wireless Limited [CP 302/2018**] & **Aircel Limited [CP 298/2018] Corporate Debtors MA 230/2019 in CPNo.302/IBC/NCLT/MB/MAH/2018** & **MA 219/2019 in CP No. 298/IBC/NCLT/MB/MAH/2018** Order dated 01.05.2019. Although this decision could not be confronted to the parties and discussed while deciding this Miscellaneous Application but referred herein only for the purpose of citing the ***ratio decidendi*** laid down therein as follows:-

> *"22. In the foregoing paragraphs, the basic principles of set-off as per prevalent accounting principles are discussed and noticed that the Hon'ble Courts have almost unanimously taken a view that in mutual dealings among the same parties it is fair and reasonable to allow for netting off or set-off of the mutual debts and credits with each other so as to arrive at a net figure for settlement of accounts. In the light of this background it is now pertinent to examine the provisions of Insolvency Code to determine whether an embargo has been imposed under The Code.*
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> *22.1. From the side of the Respondent to this Application/ Corporate Debtor as well as on behalf of the Resolution Professional, a legal question has been raised that once on commencement of Insolvency Proceedings Section 14 of IBC came into operation by declaring 'Moratorium" in respect of certain transactions, therefore, the impugned transaction of set-off is prohibited. To buttress this argument reliance was placed on Section 14 (1) (d) of The Code for*

the legal proposition that the Adjudicating Authority shall prohibit the recovery of any property by an owner where such property is occupied or in the possession of the Corporate Debtor. In this regard, my attention was drawn on the definition of "Property" as defined under Section 3(27) of The Code means money, actionable claim, goods, land etc. So it is submitted that the impugned set-off of ₹112 Crore although a property of Airtel Entities cannot be allowed to be recovered in the guise of set-off while discharging the Debt belonging to Aircel recoverable from Airtel Entities. This Bench is not agreeable to this argument because Section 14(1)(d) has taken into consideration only one type of situation when a Creditor has to recover any property which is in possession of the Corporate Debtor. In this case, the position is somewhat reverse because the major amount i.e. ₹453 Crores is to be recovered from the Operational Creditor by the Corporate Debtor, however, as against that only sum of ₹112 Crores is the property of the said Operational Creditor, that too, not in possession of the Corporate Debtor. The intent of introduction of Section 14(1)(d) appears to be on the ground that the Corporate Debtor be not put in an inconvenient situation that as soon as he is declared insolvent, all the Creditors may come rushing, demanding their property back under possession of the said Corporate Debtor.

Let us frame an example that what will happen if there is an existence of a reverse position of accounts in which the Corporate Debtor is supposed to owe a huge liability, but against that the said Corporate Debtor is to recover an amount from its Debtor. If set-off is not granted in this reverse situation then the Resolution Applicant may or may not propose a correct Resolution Plan after seeing the said huge liability without analysing the benefit of set-off of credit amounts. To make myself clear it is necessary that a Resolution Applicant must be aware of the correct outstanding balances appearing on the date of commencement of Insolvency in the Balance Sheet of a Corporate

Debtor. It is necessary to communicate to Resolution Applicant a true and correct picture of outstanding balances in the Balance Sheet, ought to be net balances and not the gross balances. Only then a Resolution Applicant can be sure about his money position that the proposed plan is economically viable to him. Rather, it is required to make the law clear and unambiguous that there ought not to be any controversy whether a gross or a net amount is to be taken into account for submission of a Resolution Plan. While deciding this type of issue if the Tribunal leave a scope of indecisiveness the same shall mar the effective and quick implementation of the provisions of this Code.

22.2 The above view is also to be examined in the light of few other provisions of The Code which are in operation during Corporate Insolvency Resolution Process. One of such Section is 18(1)(f) of The Insolvency Code wherein it is prescribed the duties of IRP and one of them is to take control and custody of any asset over which the Corporate Debtor has ownership rights as recorded in the Balance Sheet of the Corporate Debtor, whether that asset may or may not be in possession of the Corporate Debtor. So the general rule is that the IRP is supposed to take control over all the assets of a Corporate Debtor having ownership rights. This is only one part of the coin and naturally the other part of the coin ought not to be ignored. Both the facets of a coin are equally important. Rather, one face coin is of no value. Likewise, a Balance Sheet is incomplete if not demonstrating assets as well as liabilities. Likewise, an account cannot be settled without accounting the credit entry as well as the debit entry. Therefore, an exception is carved out in Section 18(1)(f) that certain assets shall not be included while taking action U/s.18(1)(f) of The Code. The Explanation below section 18 reads as follows:-

(a) *"assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;*

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

The purpose of insertion of this explanation is obvious that assets of any nature must not be forced to put under control of the Resolution Professional. An asset owned by a Third party in possession of a Corporate Debtor held under trust or under contractual arrangement shall not be affected by Sub-Section (f). Therefore, the Resolution Professional can take control/ custody over an asset belonging to or in possession of the Corporate Debtor but the exception is that if an asset, although in possession of the Corporate Debtor but held under trust or under contractual arrangement shall not be taken over by the Resolution Professional. This provision of the Code is squarely applicable on the present situation that a sum of ₹112 Crores, although said to be under ownership of the Corporate Debtor, but the right is arising out of a contractual arrangement. Unpaid invoices are nothing but in the nature of a contractual obligation emerging from the services provided. The unpaid invoices are the asset of the Operational Creditor i.e. Airtel Entities, although not in direct control/ possession of the Corporate Debtor but out of the ambits of Section 18(1)(f), being an asset under contractual obligation of payment by the Corporate Debtor to the Operational Creditor. Interestingly, the language of Explanation (a) and the language of Section 14(1)(d) are very much identical. On co-joint reading of these two sections a message is conveyed that if an asset is in possession of the Corporate Debtor then in spite of the applicability of "Moratorium", if that asset came into existence out of a contractual obligation then set-off or adjustment is required to be allowed so that the Resolution Professional be not entitled to take control over such an asset. In the recent past a problem was posed to NCLT, Chandigarh Bench in the

case of Weather Makers Pvt. Ltd. v/s. Parabolic Drugs Ltd. [CA 206/2019in CP 102/CHD/2018], order dated 26.04.2019, that a perishable stock is supplied to the Corporate Debtor hence in possession of the Resolution Professional, who has denied to return the said stock back to the claimant on the ground of commencement of "Moratorium" but the NCLT Bench, Chandigarh has taken a view that an adjustment has to be allowed because the said stock was under 'contractual arrangement' in possession of the Corporate Debtor, therefore, out of the ambits of 'Moratorium' so that the said stock be returned to its actual owner. Therefore, a conclusion can be drawn that even during CIRP a question of set-off or netting off or adjustment can be raised either by the Creditor or by the Debtor which is permissible and to be adjudicated upon.

23. A serious argument has been raised that by allowing set-off a preferential treatment is given to an Operational Creditor i.e. Airtel Entities. It is elaborated that by way of set-off, this Operational Creditor is in fact recovering its Debt by jumping the queue of other Creditors. The Operational Creditor therefore be treated a preferred creditor over the claims of other creditors. In this connection what is to be seen is the correct position of law as well as the accurate position of accounts. This argument is nothing but an innovative reasoning because otherwise neither the RP nor the Corporate Debtor is acting in such manner which could be alleged to be a preferential treatment. Rather, the true picture is that before disbursement of the claim amount of the Corporate Debtor, the Operational Creditor has retained its money over which on merits there was no controversy. It is pleaded from the side of the RP/ Respondent that the said Operational Creditor (Airtel Entities) has lodged their respective claims on Form No. B which is required to be treated at par with other claimants. If this method is permitted, then there was no use of submission of Form No. B as the same shall stood paid as an

adjustment leaving behind no outstanding claim to be received from Aircel Entities. At this juncture, it is worth to mention that in the case of Swiss Ribbons Pvt. Ltd. Versus Union of India [Writ Petition (Civil) No. 99 of 2018] Order dated 25.01.2019 although it is noted that a Corporate Debtor is required to be preserved as a going concern, however, it has also been observed that set-off may be considered at the stage of filing of proof of claims during the Resolution Process. Otherwise also, while lodging Form No. B it is obvious that inter se mutual debit and credit entries are supposed to be reflected in the Statement of Accounts to arrive at a figure of claim amount. Therefore, it is wrong to say that a preference is given to a particular Operational Creditor. This method of inter se adjustment ought to be available to all other Creditors (Financial/ Operational), naturally if an amount is available for mutual adjustment.

24. While reading the judgment of Swiss Ribbons we have noticed that at the time of filing of Resolution Plan, the Resolution Applicant is to take into account the amount of set-off in terms of Section 30(2)(b) of The Code, which provides that:

for the repayments of the debts of operational creditor shall not be less than the amount to be paid to the operational creditor in the event of liquidation of the Corporate Debtor U/s 53 of the Code. Interestingly, it is made clear in Section 30(2) that the Resolution Professional shall examine Resolution Plan and confirm that such Resolution Plan wherein made a provision for the payment of the debts of Operational Creditors which shall not be less than the amount to be paid to the Operational Creditors in the event of a Liquidation of the Corporate Debtor u/s 53 of the Insolvency Code. Therefore, the argument of the Respondents (Aircel) that set off is the subject matter at the stage of Liquidation and not at this stage, is not sustainable. This argument is required to be turned down because of the simple reason that even at the CIRP stage a resolution plan is to be examined keeping in mind the provisions of section 53

i.e. Distribution of assets on Liquidation. At that stage of Liquidation the Ld. Counsel of Aircel entities are in agreement that netting off is permissible. If that be so, that the Aircel entities are in agreement that under Liquidation process only net amount is to be squared up, then a Resolution Applicant while submitting a Resolution Plan is duly authorised to keep in mind the net values for which a provision is to be made as prescribed u/s 30(2)(b) of The Code, while submitting a Resolution Plan. Therefore, my humble opinion, whatever is the stage, either CIRP or Liquidation, a true and correct position of account should emerge from the records of both the sides. I am also of the strong view that if there is no restriction or prohibition in the statute, then a fair and reasonable approach is always is to be adopted. There is no specific bar or barrier in the Insolvency Code that up to CIRP process only gross amount/ claims are to be taken into account and the netting is permissible only in case of start of Liquidation. In the absence of any such restriction this Bench obviously has a liberty to take an independent view which is not at variance with the provisions of The Code, rather remove the ambiguity between a gross claim or net claim, that too at what stage.

25. -----

26. There was argument and counter argument in respect of the term "mutual dealings" used in regulation 29 of IBBI (Liquidation Process Regulation). This terminology has also been thoroughly examined by the Hon'ble Courts and in one such case of Gokul Chit Funds and Trades Pvt. Ltd. Thoundasseri Kochu Ouseph Vareed and Others (supra), it was made clear that several distinct or independent transactions entered into between the same parties are enough to permit adjustment so as to arrive at a net figure of payment, either to the Creditor or to the Debtor. It is not necessary that set off is permissible in respect of same nature of transaction. This conservative or strict condition has a limited scope of its application, such as Income Tax laws where set off of Loss is allowed against the

same nature of transaction. In my humble opinion, the terminology "mutual dealings" is a conscious Legislation. While deciding such disputes revolving around claim or counter claim or set off, it is expected to give due regards to this term "mutual dealings". The scope of this terminology is wide, which must not be applied in restrictive manner.

27. Before I part with, it is necessary to place an important feature as appearing in Form B which is meant for submission of claim by operational creditor wherein as per ***clause 8 of the Form "the details of mutual credit, mutual debit between the Corporate Debtor and creditor are required to be informed which may be arrived by set off against the claim. The amount of claim in Form B is not the gross amount to be furnished by Operational Creditor but only the amount after set off against respective claims.*** *As a result, a conclusion can be drawn that the submission of Form B by Airtel Entity has given an entitlement of netting off the amount." Emphasis given.*

19. The *summum bonum* is that whenever the issue of set off or cross-claims is to be settled the first step expected to be examined is the nexus between the two rival claims. As far the facts of the present case are concerned, the nexus between the goods supplied and expenditure directly incurred in respect of those very goods supplied can only be appropriate for adjustment against each other. Although the calculation is on record, as also referred supra, but both the sides are at liberty to verify the nexus and can revise the figures of cross-claims. Needless to mention again, to carry out the swapping of stock versus payment a direction is already incorporated in this Order.

20. However, one more issue is about the period during which the goods were supplied. Facts have revealed that part of which was prior to the commencement of the CIRP and rest part was after the commencement of CIRP i.e. on declaration of moratorium. Before we proceed to analyze the applicability of Section 18(1)(f), we deem it expedient to revisit the provisions of Section 14 and thereupon, came to know that sub-section (4) of Section 14 has specified that the order of 'moratorium' shall have effect from the date of such order of Admission i.e. called as date of commencement of CIRP , till the completion of the CIRP. Hence, in this case from the date of the **order dated 23.08.2018** the CIRP period started. Since the agreement was executed before the commencement of CIRP and the goods have also been dispatched from 01.05.2018, and admittedly continued up-to the commencement of CIRP, therefore, that period is to be termed as 'pre-moratorium period'. Therefore, we have to give our finding that what will be the position in case of return of goods supplied prior to the commencement of the Insolvency period. Consequently, what will be the position of reimbursement of the expenditure for the said period ? It is also an admitted fact that the Intervener had lodged a claim for the value of the goods supplied. Had it been a normal course where raw material is supplied for manufacturing of finished goods and that raw material is in possession of the Resolution Professional/corporate Debtor, which is not in utilizing to run the business of the Corporate Debtor as a going concern, then the supplier is to be treated none other than 'Operational Creditor'. In that situation a claim is to be lodged and the supplier shall be included in the list of rest of the Operational Creditors. But in this case a slight departure is that although the **Intervener is an Operational Creditor**, but its

demand is that neither the goods supplied are used for the manufacturing purpose by the Resolution Professional nor being returned, And that being perishable in nature may perish being a chemical having expiry date. We think that the Resolution Professional is also aware of this situation, hence, not seriously objected to return the goods. The main objection of the Resolution Professional is that the expenditure incurred for protection of goods whtether to be borne by intervener or to be treated as a CIRP cost. At this juncture, it is also worth to place on record that none of the party has made out a case that the goods in question be declared as essential goods or services. Therefore, we cannot hold that the intervener should not stop or terminate or suspend the supply of raw material.

21. In the light of the discussion made above, next is the applicability of Section 18(1)(f). This issue is now settled by our order dated 26.04.2019 (supra). Following the ratio laid down and considering the evidence on record as well as the pleadings of the respective parties, **we hereby hold that the explanation annexed to Section 18(1) is to be applied.** The impugned asset shall not be treated as a property of the Corporate Debtor. The asset in question being owned by a third party but in possession of the R.P., that too due to a Contractual Arrangement, must not be retained but to be returned. So we hereby hold that the stock in question, being undisputedly perishable, is to be returned to the Intervener urgently. Side by side, **we hold that** the Intervener is required to reimburse to the Resolution Professional the Pre-CIRP cost incurred amounting to ₹2.30 Crores(apx.) being an expenditure agreed upon as per Clause 11.2 of the said Agreement. On one hand the said

payment be transferred by the Intervener to the account of the Corporate Debtor, on the other hand, the Resolution Professional is hereby directed that the delivery of stock be executed by handing over to Intervener or its representative. Expenditure of transportation etc., if any, be borne by the Intervener. It appears that there should not be any misunderstanding among the parties about the impugned stock, because the same is claimed to have been earmarked by the stock auditor.

Before we part with, it is advisable to direct Resolution Professional to further take into account the position of stock and if possible segregate between pre and post moratorium. If the expenditure has nexus with pre-moratorium, the same is to be excluded out of the CIRP cost. The adjustment/set-off is to be made only for those expenditure which has relation to the stock supplied pre commencement of CIRP.

22. In the light of the aforesaid directions, the instant application filed by the Intervener is partly allowed.

Pronounced.

Sd/-
(M.K. Shrawat)
Member (Judicial)

Sd/-
(Pradeep R.Sethi)
Member (Technical)

July 26th ,2019
Mohit Kumar