

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

**Under Section 14(1) r/w Sections 17, 18,
74 and 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11
of the National Company Law Tribunal
Rules, 2016**

I.A. NO. 1484 OF 2020

Filed by

Mr. Vishal Ghisulal Jain

Office No. 502, G-Square Business Park,
Opp. Sanpada Station, Sector 30A, Vashi,
Navi Mumbai-400703

...Applicant

versus

Bank of Baroda

Mantri Court, 1st Floor, Ramabai Ambedkar
Road, Pune 411001

...Respondent

In the matter of

C.P. (IB) No. 1852 OF 2019

American Express Banking Corp.

One Indiabulls Centre, Tower-2,
B-Wing, 8th Floor, Jupitar Mills Compound,
S.B. Marg, Elphinstone Road, Mumbai-400
013

...Financial Creditor

versus

Pratibha Krushi Prakriya Limited

Office No. 110, West Wing,
Aurora Towers, Camp, Pune-411001

...Corporate Debtor

Order Pronounced on: 12.05.2021

Coram:

Shri. Venkata Subba Rao Hari, Member (Judicial)

Shri. Shyam Babu Gautam (Member Technical)

Appearance:

For the Applicant: Mr. Aniruth Purushothman, a/w Peter Kezhake, Advocates

For the Respondent: M.V. Kini Law Firm

Per: Shri. Shyam Babu Gautam, Member

ORDER

1. This is an Interlocutory Application filed by Mr. Vishal Ghisulal Jain (hereinafter called as the “Applicant”) under Section 14(1)(b), 17, 18, 74 and 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called as the “Code”). The applicant is the Resolution Professional of Pratibha Krushi Prakriya Limited (hereinafter called as the “Corporate Debtor”).
2. The counsel for the applicant mentioned that the petition filed by Dena Bank (Financial Creditor) under Section 7 against the Corporate Debtor was admitted vide an order of this Tribunal on 02.08.2019 and Ms. Jovita Reena Mathias was appointed as the Interim Resolution Professional (IRP) who was later replaced by the applicant during the 1st meeting of the Committee of Creditors (CoC) 04.10.2019. by an order of this Tribunal dated 22.10.2019, the applicant was confirmed as the Resolution Professional (RP) of the Corporate Debtor.
3. The applicant has filed this application seeking reversal of the amount of Margin Money as Fixed Deposit wrongly appropriated by the respondent towards its claim against the Corporate Debtor. The counsel for the applicant submitted that the applicant had sent an email dated 15.04.2020 to the Respondent seeking confirmation of the receipt of amounts from the Corporate Debtor as there was a reduction in claim amount from

Rs.8,99,99,900/- as per the statement provided by the Respondent along with claim form to Rs.8,71,20,264/- as per information submitted by the Respondent on the website of National E-Governance Services Limited (NeSL).

4. He further submitted that the Respondent had sent an email dated 24.02.2020 to the applicant stating that the Corporate Debtor had not paid any amount to the Respondent. The Respondent further stated that it had appropriated the margin money kept in the form of fixed deposit with the respondent on 06.09.2019 towards its claim against the Corporate Debtor.
5. He further submitted that the applicant vide email dated 03.05.2020 informed the respondent regarding the fiscal issues in running the CIRP of the Corporate Debtor and also stated regarding non-payment of CIRP cost of Rs.3,81,197/- by the respondent. In the present the respondent has violated the provisions of Section 14(1) of the Code relating to moratorium and hence is liable to reverse the amount of the said fixed deposit wrongfully appropriated towards its claim into the account of the Corporate Debtor.
6. The counsel for the applicant further submitted that in the 2nd CoC meeting held on 21.11.2019, he had apprised the members of the CoC including the respondent regarding the imposition of moratorium u/s 14(1) of the Code and requested them to not to initiate any recovery proceedings against the Corporate Debtor. He further submits that the respondent has recovered the property of the Corporate Debtor which in gross violation of Section 14(1) of the Code.

7. The counsel for the applicant submitted several requests were made by the applicant to the respondent to transfer the money and despite of it, the respondent is has till date not returned back the misappropriated amount of Margin Money into the account of the corporate debtor and this failure on the part of the respondent in transferring the amount of the said Fixed Deposit into the bank account of the corporate debtor is causing severe hardships to the applicant in taking the control and custody of the assets of the corporate debtor.

8. The prayers of the application are reproduced hereinbelow:

“In the aforesaid facts and circumstances, it is most humbly and respectfully prayed that this Hon’ble Bench may graciously:

A. Be pleased to declare the amount of the said Fixed Deposit wrongfully appropriated by the Respondent towards its claim against the Corporate Debtor during the subsistence of Moratorium as Null and Void and to transfer the same into the fixed deposit account of the Corporate Debtor as it existed before appropriation, and then to encash the same with eligible interest, including for the period during which it was wrongfully appropriated, and transfer into the bank account no. 050020110001140 held with Bank of India, Pune main branch of the Corporate Debtor.

B. Be pleased to direct the Respondent to revise the adjustment of amount of the said Fixed Deposit from its claim submitted in Form-C.

C. Be pleased to levy a fine of Rupees One Crore on the Respondent as per Section 74(2) of the Insolvency and Bankruptcy Code, 2016.

D. Pass ad-interim and interim reliefs in terms of Clause A, B and C.

E. Pass such other order/directions as this Hon'ble Bench may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE APPLICANT AS IN DUTY BOUND SHALL EVER PRAY."

9. The respondent has on the other hand denied all the contentions, averments made and stated that this application is misconceived and is infested with unilateral reading of correspondence and blatant and bald allegations against the respondent. The respondent has prayed for the dismissal of this application by stating the below mentioned reasons.

10. The counsel for the respondent stated that the respondent had sanctioned a Credit Facility of INR 9 crores to the corporate debtor in the form of "Suppliers Bill Finance" to purchase milk to produce other dairy products at their Milk Processing Plant. This facility was availed by the corporate debtor for almost a year till the declaration of their account as Non-Performing Asset (NPA) i.e. on 31.03.2019. Out of the total 96 Bills, paid by the respondent during this period, drawn on the corporate debtor by various suppliers, a total of 76 Bills were cleared by the corporate debtor on the respective due dates and the balance 20 bills amounting to Rs.9,37,80,703 were kept pending for payment by the corporate debtor to the respondent. However, upon payment of the said 20 bills by the bank, the corporate debtor had made a upfront payment of Rs.98,13,983/- being its contribution towards the Bill Finance. The said upfront payment in accordance with the scheme was retained by the respondent in the form of fixed deposit to be released upon receipt of the full repayment of Rs.9,37,80,703/- by the corporate debtor to the bank. At the time of crystallization of the aforesaid unpaid

liability i.e. on 06.09.2019, the upfront payment made by the corporate debtor (borrower contribution) were adjusted in corporate debtor's account along with the accrued interest.

11. The counsel for the respondent further stated that the adjustment of the upfront payment flows from the terms of finance under the scheme-the Suppliers Bill Finance as per the sanction terms, the respondent could release maximum of 90% bills amount. In case, the respondent does not consider the upfront payment portion, it would result in 100% finance which would be contrary to the sanction terms and additional exposure of the respondent without any security or sanction.
12. The counsel for the respondent further submitted that the said adjustment was done on 06.09.2019 when the respondent was unaware of the moratorium being imposed on the corporate debtor. It came to know about the moratorium only on 12.09.2019 vide the letter of the Interim Resolution Professional dated 10.09.2019. Even the paper publication in this regard was made by the IRP only on 07.09.2019 and 08.09.2019. Therefore, the question of any ill will does not arise.
13. He further stated that pursuant to the letter dated 10.09.2019 received on 12.09.2019, the respondent submitted its claim worth Rs.9,96,34,145/- in Form C with the IRP on 18.09.2019. This amount was till 04.09.2019 as the cut-off date was shown in the letter of the IRP itself and therefore, the amount was shown outstanding as on 04.09.2019 without reckoning the adjustment of upfront payment made on 06.09.2019.
14. The counsel for the respondent further stated that the Sanction letter expressly provided for mortgage of immovable property of

the corporate debtor in favour of respondent to secure the credit facility granted by the respondent. Therefore, the underlying security for the finance granted by the respondent is a collateral charge over the immovable property and not the upfront payment made by the corporate debtor towards its contribution for payment of bills. Therefore, *in arguendo*, if the respondent has in any way alienated the underlying security by way of transfer, incumbrance or disposal of the immovable property, the same could have been construed as violation of moratorium imposed by this Tribunal in respect of the corporate debtor. However, adjustment of upfront payment cannot be construed as violation of the moratorium as alleged by the applicant. Further, the upfront payment of a portion of the suppliers bills cannot also be construed as property of the corporate debtor.

15. The counsel for the respondent submitted that the corporate debtor was enjoying working capital credit limits under multiple banking arrangement, there are many Financial Creditors in the Committee of Creditors (CoC) including the respondent who contributed its respective share in the CIRP of the corporate debtor as and when demanded by the RP and insofar as the record speaks, the respondent has contributed Rs.14,87,587/- out of the total demanded amount of Rs.14,93,587/-, the last payment of which was done on 20.10.2020.
16. The counsel for the respondent alleged that the CoC is raising concerns about Rs.203 Crores worth of debt that has been outstanding in the books of the corporate debtor and impressing upon the application for realization of such huge outstanding debt. The CoC has also written letters expressing their dissatisfaction over the performance of the applicant in conducting the affairs of the corporate debtor.

FINDINGS

17. Heard both the sides at length. We have also perused the documents submitted by them. Both the parties have raised various allegations and counter allegations against each other. Basing on the arguments of both the sides, the following observations are made:
18. In this matter, the main issue is whether the amount of the fixed deposit is wrongfully appropriated by the respondent towards its claim against the corporate debtor during the subsistence of moratorium and thus, to declare the said transaction as null and void. On the other hand, it is the case of the respondent that the upfront money retained in the form of fixed deposit cannot be construed as an asset of the corporate debtor and therefore, the respondent has done no wrong in transferring the same.
19. First of all, we would like to make it very clear that Section 14 of the Code prohibits certain actions after the moratorium has been imposed. Here, we would like to reproduce Section 14 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 amount of the said Fixed Deposit, in this matter, cannot be appropriated by the Respondent after the imposition of moratorium and therefore, the said action 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.

20. To further elaborate, we would refer to the order passed by the National Company Law Tribunal, New-Delhi Bench on 22.02.2019 in CA No. 169/C-IV/ND/2018 CP C-IV (IB)-275/(ND)/2018 in the matter of **Pankaj Khaitan, RP versus Allahabad Bank, Lajpat Nagar Branch** wherein it was held as follows:

“...Bank is directed not to adjust the FDR in the claim after discharge of bank guarantee and transfer the said amount of FDR to lie in the bank account of corporate debtor for the purpose of continuing the CIRP”

21. Also, the decision of the National Company Law Tribunal, Chandigarh Bench on 13.10.2017 in CA No. 142/2017 in CP No. 42/Chd/Hry/2017 in the matter of **Dinkar T. Venkatsubramanian vs. Indian Overseas Bank** can be referred here. This order was passed in the CIRP of Amtek Auto Limited and the following was held:

“It is not required to discuss the matter so minutely in the present case because any amount lying in the current account of the corporate debtor has to be placed at the disposal of the resolution professional without any scope of an adjustment in the manner, the respondent has tried to do.”

22. We would now like to rely on the judgment of the Hon'ble NCLAT in the matter of **State Bank of India v. Debashish Nanda Company Appeal (AT) (Insolvency) No. 49 of 2018**, wherein the appellant had argued the following:

“3. ... However, it is not in dispute that the margin money belongs to the ‘Corporate Debtor’ which was kept in the FD account of the ‘Corporate Debtor’ and therefore, we are of the view that the said account could not have been debited during the period of Moratorium.”

The Hon’ble Court in this matter has held the following:

“7. We make it clear that it will be open to the ‘Resolution Professional’ to utilise the money for the purpose of ‘Resolution Costs’ to keep ‘Corporate Debtor’ a going concern and in such case, the State Bank of India’ may ask for appropriate relief from the ‘Resolution Professional’.

Therefore, from the above, it can be concluded that the Hon’ble Appellate Tribunal has also taken a view that the amount cannot be transferred during the moratorium and the respondent herein has to approach the RP for admission of his claim and after such admission, the amount will be disbursed according to Section 53 of the Code.

23. Also, the respondent has shown dissatisfaction in performance of the applicant as RP and has also stated that the CoC is not satisfied with the RP. At this juncture, we find this argument irrelevant and it is the CoC who has to take a call if it is dissatisfied with the performance RP in any manner.
24. Further, we would also like to state that it was wrong on the part of the Respondent in failing to transfer the amount of the said FDR into the bank account of the corporate debtor. We direct the respondent to encash the said amount in the account of the corporate debtor. We have taken the submission of the respondent into account that when it appropriated the said amount, it was unaware of the moratorium that kicked in on

20.08.2019 as the public announcement was only made on 07.09.2019 whereas the amount was already appropriated on 06.09.2019. Here, we would like to make clear that the moratorium comes into effect on the insolvency commencement date. The term "insolvency commencement date" is defined under Section 5(12) of the Code which reads as follows:

Section 5(12): *"insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;*

Therefore, it is clear that the moratorium kicks in as soon as the petition is admitted. Also, the Hon'ble Supreme Court in the matter of **Vidya Drolia and Others v. Durga Trading Corporation (2021 2 SCC 1)** has clarified that the Insolvency and Bankruptcy Code proceedings are to be considered in rem after its admission. Thus, it is clear from this explanation that the respondent cannot take a defence that he was unaware of the moratorium.

Thus, with these observations and directions, Prayer 'a' is allowed. Prayer 'b' which seeks for revision in the claim submitted in Form C is granted. Prayer clause 'c' is dismissed and no cost/fine is imposed on the respondent. Nothing survives in Prayers 'd' and 'e'.

25. With the above observations and directions, this application is partially allowed.

Sd/-

SHYAM BABU GAUTAM
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)