

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Ins.) No. 84 of 2021

(Arising out of Impugned Order dated 23.12.2020 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi in Interlocutory Application No 3047 of 2020 in Company Petition No. IB- 334/ND/2017)

In the matter of

- 1. SM Milkose Limited,
5-Morar Enclave, Gola Ka Mandir,
Gwalior Madhya Pradesh-474006 (Successful Resolution
Applicant)
... Appellant No.1**
- 2. M/s. Applied Electro Magnetics Pvt. Ltd.
M-10, 1st Floor,
Greater Kailash-II (Market),
South Delhi-110048. (Corporate Debtor)
... Appellant No. 2**

Versus

- 1. Parvinder Kumar Bhatt,
Deputy Zonal Manager,
Bank of India, New Delhi Zone,
Star House, 2nd Floor,
H-2, Connaught Circus,
Near PVR Plaza, New Delhi-110001
... Respondent No. 1**
- 2. Arvind Kumar, Zonal Manager,
Bank of India, New Delhi Zone
Star House, 2nd Floor,
H-2, Connaught Circus,
Near PVR Plaza, New Delhi-110001
...Respondent No. 2**

Company Appeal (AT) (Ins.) No. 84 of 2021

**3. Atanu Kumar Das,
MD & CEO,
Star House, C-5, “G” Block,
Bandra Kurla Complex,
Bandra (East), Mumbai-400051**

... Respondent No. 3

**4. Bank of India,
Through MD & CEO,
Star House, C-5, “G” Block,
Bandra Kurla Complex,
Bandra (East), Mumbai-400051.**

.... Respondent No. 4

Present

**For Appellants: Mr. Manish Kaushik, Mr. Anubhav Gupta,
Advocates.**

**For Respondents: Mr. Vadlamani Seshagiri and Mr. Siddharth
Sachar, Advocates (R-1 to R-4)**

Judgment

(Date: 27.8.2021)

{Per: Dr. Alok Srivastava, Member (T)}

1. This appeal has been preferred by the Appellant No.1, the successful Resolution Applicant who has stepped into shoes of Corporate Debtor – Appellant No. 2, aggrieved by the order dated 23.12.2020 passed by the Adjudicating Authority (NCLT, New Delhi) in IA No. 3047 of 2020 in (IB) No. 334 (ND)/2017. The Appellant No. 1 has submitted that the impugned order Company Appeal (AT) (Ins.) No. 84 of 2021

disregards the provisions of section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called IBC) according to which no accruals can be alienated from the account of the Corporate Debtor upon imposition of moratorium after the initiation of the Corporate Insolvency Resolution Process (CIRP).

2. The Appellant's case is that CIRP was initiated and moratorium was imposed on the assets of Corporate Debtor M/s. Applied Electro Magnetic Private Limited vide order dated 26.10.2017 in Company Petition No. IB-334(ND)/2017.

3. The Appellant No.1 has submitted and argued that the officers of Respondent No. 4 Bank which is 90% voting rights holder in the Committee of Creditors (COC), took a decision to keep the Corporate Debtor going concern so as to save invocation of the bank guarantees in the first meeting of the COC. Accordingly, an interim finance of Rupees 15 lakhs was sought from SM. Finlease Limited, another financial creditor of the Corporate Debtor. In the same COC meeting, the respondent Bank of India (hereinafter called the "Bank") sought and it was agreed to earmark 25% of the receipts received during such operation of the Corporate Debtor during the moratorium period

towards repayment of loan of the respondent Bank and kept in a separate current account. This action, according to the Appellant No. 1, is not in accordance with law as under no circumstances can any creditor divert to itself the receipts of the Corporate Debtor during the moratorium period as per the mandate of Section 14 of IBC, and claims that such a decision was taken under the influence of Respondent Bank which holds 90% voting rights in the COC.

4. Appellant No. 1 has further stated that it submitted a resolution plan dated 4.4.2018 which proposed to give 15% of the total amount claimed by the Respondent No. 4 Bank of India, being a secured financial creditor, equal to Rs.6.22 crores. This amount of Rs.6.22 crores was considered inadequate and unacceptable to the Bank of India and its officials put forward a condition to the Resolution Applicant for retention of the monies received by the Bank prior to 1.4.2018, over and above Rs.6.22 crores offered under the Resolution Plan, whereupon the Bank would agree to approve the Resolution Plan. Thus a revised Resolution Plan was drawn up by the Resolution Applicant, wherein the Respondent Bank was permitted to retain amounts received by the Corporate Debtor and kept in the separate

account in the same bank (Bank of India) prior to 1.4.2018 during the currency of moratorium. This arrangement was specifically mentioned in the revised Resolution Plan submitted on 4.5.2018 to the COC.

5. The Appellant No. 1 has further claimed that since the Respondent Bank wanted a still larger amount from the resolution of the Corporate Debtor, the officials of the Bank sent an email dated 29.6.2018 seeking resolution amount of Rs. 9 crores. The Resolution Applicant in the 8th meeting of the COC accepted the resolution amount of Rs. 9 crores proposed by the Respondent Bank. In the final version of the Resolution Plan which was approved by the COC and thereafter by the Adjudicating Authority, there was no mention of any retention of the amount received during the moratorium period by the Bank which was kept in the separate current account of the Bank of India.

6. The Appellant No. 1 has stated that the Respondent Bank received a total sum of Rs. 1,68,23,462 in the separate bank account, which includes Rs. 88,16,071 received during the period 23.1.2018 to 3.3.2018 and Rs. 80,07,391 received during the

period 3.4.2018 to 23.8.2018. Appellant No. 1 has further stated that while the Bank has taken Rs. 80,07,391 from this account as part of the resolution amount of Rs. 9 crores, it is refusing to part with Rs. 88,16,071 and has dishonest intention of appropriating this amount over and above the sum of Rs. 9 crores which is the share of the Respondent Bank in the successful Resolution Plan. Hence Appellant No. 1 along with the erstwhile Resolution Professional requested that the Respondent Bank be directed to give Rs. 88,16,071 to the Appellant No. 1 who is the successful Resolution Applicant. The Appellant No. 1 has also sought NOC for removal of charge from the Respondent Bank which is not being given on one pretext or the other and which is being used to armtwist the successful Resolution Applicant to pay amounts over and above what is approved in the Successful Resolution Plan.

7. Continuing his arguments, the Learned Counsel for Appellant No. 1 has urged that CIRP was initiated against the corporate debtor Applied Electro Magnetics Private Limited vide order of the Adjudicating Authority (NCLT, New Delhi) order dated 26.10.2017 and Navin Kumar Jain was appointed as the Interim Resolution Professional. Later the financial creditors including

the respondent Bank (Bank of India) proposed the name of Vinay Talwar as Resolution Professional which was confirmed by the Adjudicating Authority vide order dated 29.1.2018. After issuing of Expression of Interest, a resolution plan that sought to provide Rs. 6.22 crores to the Respondent Bank was submitted by the Appellant. This amount was considered inadequate by the Respondent Bank which asked for a larger share, and therefore the resolution plan was revised and submitted on 4.5.2018 which provided an amount of Rs. 6.22 crores to the Respondent Bank along with certain stipulations regarding the retention of amount by Bank of India which had accrued in the separate bank account prior to 1.4.2018 in compliance of a decision in the first meeting of COC. The respondent Bank again sought an increase in its share and a resolution plan; revised a second time was submitted which provided Rs. 9 crore to the respondent Bank. This last version of Resolution Plan was approved unanimously in the 8th meeting of COC held on 19.7.2018 and finally approved by the Adjudicating Authority.

8. Elucidating his arguments, the Learned Counsel for Appellant No. 1 has invited our attention to the discussions and decisions taken in the first COC meeting held on 22.12.2017 (

attached at pp. 305–310, Appeal Paperbook, Volume II) wherein in the section *‘Discussions on the Amount, Terms of Usage of Interim Finance being raised to M/s. SM Finlease Limited’* appearing after paragraph 10 the decision that ‘25% of the net receipts from all the debtors shall be earmarked for payment to the Bank of India Loan Accounts and only subsequent to which the payments to the SM Finlease shall be made’ is recorded. He has also brought to our attention the ‘Written Synopsis’ filed by the Resolution Professional Vinay Talwar before the Adjudicating Authority in IA No. 3047 of 2020 (attached at pp. 365-369, Appeal Paperbook, Volume II) wherein in para 4, the Resolution Professional Vinay Talwar raised the issue as to how 25% of all receivables could be allowed to be kept for the Bank of India keeping in mind the moratorium provisions of Section 14 of IBC. Again, in the same Written Synopsis, on page 369/appeal paper book, volume II, paragraph 11, the Resolution Professional Vinay Talwar has stated that *“as per my understanding this money amounting to Rs. 1.68 crores belongs to the Corporate Debtor as the same was realized by it from its debtors during the CIRP period and as no payment could have been made during the said CIRP period to any creditor, in preference to other creditors, the said money was earmarked and kept outside for payment to Bank of*

India.” By referring to the Written Synopsis of the Resolution Professional submitted to the Adjudicating Authority, the Learned Counsel has contended that the Resolution Professional Vinay Talwar had made it clear that this amount which accrued due to the operations of the Corporate Debtor during the CIRP was kept in a separate account, but was not to be appropriated by the Respondent Bank of India.

9. The Ld. Counsel for Appellant No. 1 has shown the share of the respondent Bank of India in the approved Resolution Plan (attached on pp. 204 – 246 of the Appeal Paperbook, Volume II) wherein in paragraph 2.3.1.1 it is stated: -

“2.3 Secured Financial Creditors: the claims of the secured financial creditors shall be satisfied in the manner set out below.

2.3.1 amount:

2.3.1.1. Bank of India amount:: the bank shall be paid an amount of INR 9,00,00,000 (Indian ₹9 crores only) towards full and final settlement of all dues, including any default

interest or any other charges pertaining to the outstanding amount.”

10. The Learned Counsel for Appellant No. 1 has contrasted the above provision for the Respondent Bank's share in the Resolution Plan referring to the provision in the earlier resolution plan (which was later revised after request by the respondent Bank) wherein a condition about the appropriation of the amount received by the corporate debtor to the Bank of India during the moratorium period was specifically included. He has clarified that with the revision of respondent Bank's share to Rs. 9 crores in the Successful Resolution Plan, this condition does not find mention.

11. The Ld. Counsel of Appellant No. 1 has claimed that the Respondent Bank is trying to take advantage of the fact that the said separate bank account is in the Bank of India and hence it is not releasing the amount which does not belong to it. He has cited judgment in the case of **UCO Bank versus G. Ramachandran (CA (AT)(Ins) No. 761 of 2020 and IA No. 203 of 2020, decided on 3.11.2020)** wherein the Hon'ble Appellate Tribunal has held that during the currency of moratorium

enforced under Section 14, no business majority in the COC can take advantage of its position.

12. Arguing on behalf of all the respondents, the Learned Counsel has contended that this appeal is not maintainable because the party that has filed the appeal is the Successful Resolution Applicant and not the Corporate Debtor or the erstwhile Resolution Professional. He has added that the Successful Resolution Applicant is not the erstwhile Corporate Debtor but he has only stepped into the shoes of the Corporate Debtor. He has further stated that this appeal has been filed when the Resolution Plan stands approved and is under implementation.

13. The Learning Counsel for Respondents has argued that the decision in the first COC meeting (which allows appropriation of the monies kept in the separate bank account by the Bank of India) can't be challenged now as it should have been challenged at the time the minutes of the COC meeting were issued. He has also pointed out that Resolution Plan which was approved by the Adjudicating Authority, is still awaiting full implementation as no monitoring committee is in place to oversee its implementation.

He has referred to para 8 in the impugned order of Adjudicating Authority (attached at page 247/Appeal Paperbook, Volume II) wherein the Adjudicating Authority has been pleased to direct that the Resolution Applicant and Resolution Professional shall ensure implementation of the successful Resolution Plan. The Learned Counsel for respondents has maintained that the Successful Resolution Applicant cannot play hot and cold, as earlier in his role as financial creditor in the COC he had accepted the condition enumerated in the minutes of the first COC meeting, but now as Successful Resolution Applicant he is raising the legality of such a condition.

14. The Learned Counsel for Respondents has urged that the Successful Resolution Applicant is twisting facts for its own benefit, which is not in accordance with the provisions of IBC. He has cited the decision in **Kalparaj Dharamshi versus Kotak Advisories Limited (2021 SCC online SC 204)** wherein the Hon'ble Supreme Court has held that the court ought to respect the commercial wisdom of the COC of approving the resolution plan:

150. *“It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by COC of approving the resolution plan or rejecting the same.*

155. *This court observed, that the court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.*

156. *It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Section 30 and 31 of the I&B Code”*

15. In response to the arguments made on behalf of the respondents, the Ld. Counsel for Appellant No. 1 in rejoinder has

Company Appeal (AT) (Ins.) No. 84 of 2021

reiterated that the final resolution plan as recommended by the COC with the respondent Bank as its majority voting rights holder, was approved by the Adjudicating Authority. Hence the Respondent Bank is bound to comply with it. He has stated that in case the Respondent Bank is allowed to keep all the monies generated during the CIRP period through the operations of the Corporate Debtor it will receive a total of Rs. 9.88 crores, instead of Rs. 9 crores as is stipulated in the approved resolution plan.

16. We have considered the detailed arguments of both the parties and also perused the relevant records and documents submitted by the parties. The basic issue that is relevant in this case is that whether the COC can take a decision regarding payments to a particular financial creditor during the CIRP and whether any amounts that belong to the corporate debtor can be adjusted towards the claim of any particular financial creditor during the moratorium period imposed under Section 14 of the IBC.

17. The COC, in its first meeting took a decision regarding interim finance of Rs. 50 lakhs from SM Finlease Private Limited for keeping the corporate debtor as a 'going concern'. The relevant

extract from the said minutes (attached at pp. 109-114 of Appeal Paperbook, Vol. I) is reproduced below:

“MINUTES OF FIRST COC MEETING HELD ON 22.12.2017 AT THIRD FLOOR, BANK OF INDIA STAR HOUSE, H-2, CONNAUGHT CIRCUS, NEW DELHI FROM 11 AM TO 13.30 PM.

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Discussions on the amount, terms & usage of Interim Finance being raised through M/s SM Finlease Ltd.

Mr. Sharad Maheshwari of M/s SM Finlease Limited has agreed to advance as loan Rs. 50 lacs to the company with the condition that ~ Rs.27.50 lacs will be utilized for salaries of the employees and ~ Rs. 16 lacs will be utilized for raw material and remaining for essential cost of the CIRP.RP expressed that an agreement to this effect can be executed today itself and the amount be disbursed at the earliest possible. To facilitate the terms of Interim Finance wherein it was agreed in the meeting held on December 14, 2017 that, 25% of the net receipts from all the Debtors shall be earmarked for payment to the Bank of India Loan Accounts and only subsequent to which the repayments to the SM Finlease shall be made, Bank of India representatives indicated the need of opening a separate Current Account of the Corporate Debtor with the Bank of India to facilitate the above term. Mr. Jain approved the opening of the said Current Account with the Bank of India.”

(emphasis supplied)

18. In the first resolution plan dated 4.4.2018 (attached at pp.115-154, Appeal paperbook Vol.-I of CA No. 800/2020), the relevant para 2.3 in ‘Schedule 8: Financial Plan’ shows Rs. 6.22

crores included as the share of the Respondent Bank of India. It is reproduced below:

“2.3 Secured Financial Creditors: *The Claims of the Secured Financial Creditors shall be satisfied in the manner set out below:*

2.3.1. Amount:

2.3.1.1. Bank of India Amount: The Bank shall be paid an amount of INR 6,22,00,000 (Indian Rupees Six crores and Twenty two lakhs) towards full and final settlement of all dues including any default interest or any other charges pertaining to the outstandings.

2.3.1.2. Open Bank guarantees of the bank shall be honoured to the Resolution Applicant and the deficit margins, if any, shall be made good by the resolution Applicant within 9 months of the effective date.”

19. This amount of Rs. 6.22 crores as its share in the resolution plan was not found adequate by the Bank of India, and hence the Resolution Applicant amended the resolution plan. The revised Resolution Plan dated 4.5.2018 (attached at pp. 155-198 of Appeal Paperbook, Vol-I) had the following as Bank of India's share, which is included in para 2.3 of **“Schedule 8: Financial Plan”** at page 185:

“2.3 Secured Financial Creditors: *The claims of the Secured Financial Creditors shall be satisfied in the manner set out below.*

2.3.3. Amount:

2.3.1.1. *Bank of India Amount: The Bank shall be paid an amount of INR 6,22,00,000 (Indian Rupees Six crores and Twenty two lakhs) towards full and final settlement of all dues including any default interest or any other charges pertaining to the outstanding. On the request of the Bank, it is further clarified and committed that the amount of Rs. 6.22 crores is reckoned effective 01.04.2018 (any payment made to the bank prior to 01.04.2018 shall not be deducted from this amount). Any payment made on or after 01.04.2018 shall be deemed to be part of this offered amount of Rs. 6.22 Cr.”*

20. However, this amount of Rs. 6.22. crores with the condition mentioned in commitment to the Bank of India to keep amounts accrued in the separate bank account before 01.04.2018 was also not found to its satisfaction by the Bank of India. Hence, the officer of the Recovery Department of the Respondent Bank of India vide email dated 29 June 2018 (attached at pg. 199 of Appeal Paperbook, Vol-I), which is reproduced below, sought increase of the resolution amount to the level of Rs. 9 crores:

Company Appeal (AT) (Ins.) No. 84 of 2021

From: Asset Recovery Department- New Delhi [mailto:NewDelhi.ARD@bankofindia.co.in]
Sent: 29 June 2018 13:57
To: Vinay Talwar <vinay@turnaroundllp.com>
Cc: Rahul Khanna <Rahul.Khanna@bankofindia.co.in>
Subject: Applied Electero- Clarifications Sought on Resolution Plan
Importance: High

महोदय / महोदया,

This is for your kind information that, resolution plan submitted by SM Milkose was put up to our Head Office for approval. However the HO has raised certain observations as given below.

1. Resolution amount to be improved substantially at least to the level of Rs.9 crores.
2. Locus standii of the ex-employee in filing the application before the NCLT and whether his claims have been verified by the RP.
3. Whether the said applicant is a beneficiary of the flat/accommodation allotted by the company.

We request RP to go through this observation and revert us on priority.

सादर,
नीमापीवी, प्रबंधक
वसूलीविभाग / Recovery Department,
नईदिल्लीअंचल / New Delhi Zone,
दूरभाष / Phone : 011-28844099
ईमेल / Email : NewDelhi.ARD@bankofindia.co.in

बैंक ऑफ इंडिया
Bank of India

BOI



21. Thereafter the Resolution Plan was again revised (attached at pp. 204.246 of Appeal Paperbook, Vol – II) which made a Company Appeal (AT) (Ins.) No. 84 of 2021

specific provision of payment of Rs. 9 crores to the Respondent Bank of India 'as full and final payment of its total admitted claim of Rs.41.50 crores This resolution plan was approved by the COC in its 8th meeting held on 22.12.2017. The relevant extract from the minutes of the 8th COC meeting is as hereunder:

“MINUTES OF THE 8TH MEETING OF THE COMMITTEE OF CREDITORS OF APPLIED ELECTRO MAGNETICS PRIVATE LIMITED (THE “COMPANY”) HELD ON THURSDAY, JULY 19, 2018 AT BANK OF INDIA, ZONAL OFFICE, MEETING R400M, 3RD FLOOR, H-2, STAR HOUSE, MIDDLE CIRCLE, CONNAUGHT PLACE, DELHI - 110001.

ITEM No.4: TO CONSIDER AND DECIDE UPON THE RESOLUTION PLAN SUBMITTED BY THE RESOLUTION APPLICANT.

The Chairman informed the members that he has received an amended Resolution Plan from the Resolution Applicant today afternoon. The RA submitted physical copies of the same during the meeting. The Chairman then enquired from the BOI team as well as the Resolution Applicant w.r.t the status of their discussions and the decision taken on the Resolution Plan. The BOI team member informed the members that their Head Office has rejected the amended proposal given by the Resolution Applicant. On hearing this the Resolution Applicant, through its representative, Mr. Sharad Maheshwari, immediately gave his unconditional acceptance of the earlier minimum figure of Rs. 9 crores suggested by the H.O. and requested the Bank to now accept and close the matter. He cited the e-mail dated 29.08.2018 sent by the Bank to the RP mentioning the figure of Rs. 9

crores, who had in turn informed the RA of the said suggestion.”

22. The resolution plan which was revised a second time, stipulated that Rs. 9 crores in total shall be paid to the Bank of India. It did not mention any specific condition about the receipts in the separate Current Account which was maintained in the Bank of India with accruals during the functioning of the corporate debtor. The relevant portion in **‘Schedule 8: Financial Plan’** of the Final Resolution Plan, which was approved by the Adjudicating Authority vide order dated 23.12.2020 in IA No. 3047 of 2020 in (IB) 334 (ND)/2017 (attached at pp. 204-246 of Appeal Paperbook, Vol-II) is as hereunder:

***“RESOLUTION PLAN UNDER THE INSOLVENCY AND
BANKRUPTCY CODE, 2016***

***IN THE MATTER OF APPLIED ELECTROC MAGNETICS
PRIVATE LIMIED***

SUBMITTED BY

SM MILKOSE LIMITED

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2.9. Summary of proposed settlement

(All figures are rounded off to nearest Rs. crores)

	<i>Verified</i>	<i>Proposed</i>	<i>Amount</i>	<i>Amount to be</i>
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	<i>claims</i>	<i>settlement</i>	<i>before the expiry of 30 days of the effective date</i>	<i>paid within 9 months of the effective date</i>
	<i>Rs. Cr.</i>	<i>Rs. Cr.</i>	<i>Rs. Cr.</i>	<i>Rs. Cr.</i>
<i>IRP Costs (approx.)</i>	-	0.18	0.18	-
<i>Secured Financial Creditors</i>	41.50	9.00	2.25	6.75
<i>Bank of India</i>	41.50	9.00	2.25	6.75

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B. This revised resolution plan is based on the request of the bank to substantially increase the resolution amount to Rs. 9.00 crores. In this revised plan, the resolution applicant has accepted the entire amount as required by the bank.”

23. The share of Bank of India is also included in Schedule 8: Financial Plan of the finally Approved Resolution Plan (attached at pp. 204-246 of Appeal Paperbook, Vol - II) in para 2.3. It is as hereunder:

“2.3 Secured Financial Creditors: *The Claims of the Secured Financial Creditors shall be satisfied in the manner set out below:*

2.3.1. Amount:

2.3.1.1. Bank of India Amount: The Bank shall be paid an amount of INR 9,00,00,000 (Indian Rupees Nine crores only) towards full and final

Company Appeal (AT) (Ins.) No. 84 of 2021

settlement of all dues including any default interest or any other charges pertaining to the outstanding.”

24. In view of this last and final version of the Resolution Plan, which included the share of Bank of India as Rupees 9 crores only, the Adjudicating Authority has observed in Paras 33 and 34 of the impugned order as follows:

”33. In view of the discussion made above, we are of the considered view that *the Resolution Applicant is liable to pay an amount as per the approved Resolution Plan and they can not go beyond the approved Resolution Plan. Accordingly, we hold that the resolution Applicant is liable to pay an amount as per the approved Resolution Plan and they can not go beyond the approved Resolution Plan. Hence point no. 1 is decided in the manner stated above.*

34. So far as point no. 2 is concerned, for the reasons discussed above, the amount paid prior to the approval of the Resolution Plan to the Respondent Bank during moratorium period will not be treated as an amount/part of the Resolution Plan as per the terms of the plan.”

25. Section 14 of the IBC, particularly sub-section (b) of section 14(1) prohibits “transferring, encumbering, alienating or disposing of by the Corporate Debtor, any of its assets or any legal right or beneficial interest therein”. It is quite clear about how accruals to the corporate debtor are to be treated during the

currency of CIRP. This provision prohibits the corporate debtor, and the resolution professional who is managing the affairs of the corporate debtor during CIRP, from transferring any of the corporate debtor's assets to creditors. The amounts received by the corporate debtor during the currency of the CIRP are assets of the corporate debtor whose transfer to chosen creditor in priority without the process of Resolution Plan would be prohibited. Therefore, such a condition as was prescribed in the first COC meeting regarding apportioning of the accruals in the separate bank account of corporate debtor to the Bank of India would not be legal and against the provision in sub-section 3 of section 14, which allows only such transactions which may be notified by the central government, in consultation with any financial regulator, to be exempted from the rigour of moratorium. The accruals in the separate bank account in the Bank of India during the CIRP are not notified by the Central Government and hence they are the assets of the corporate debtor.

26. Hon'ble Supreme Court, in **Kalparaj Dharmashi versus Kotak Advisories Ltd.** has made it very clear that any commercial decision of the COC of approving the resolution plan or rejecting the same has to be respected and the statute has not

invested jurisdiction or authority, either with NCLT or NCLAT regarding same. Thus the approval of the Resolution Plan in the 8th COC meeting and thereafter by the Adjudicating Authority assumes finality and cannot be tinkered with.

27. We also note the judgment rendered by this tribunal in **UCO Bank versus G Ramachandran case** (referred supra) wherein it has been held that during CIRP no business majority in the COC can take advantage of its position in apportioning any part of the receipts to the corporate debtor to itself.

28. In the present case, the Resolution Plan, which was approved by the Adjudicating Authority, included Bank of India's share as Rs. 9 crores only as full and final settlement with no conditions attached. Therefore, the condition stipulated by the COC in its first meeting regarding the receipts by the corporate debtor during the CIRP period and apportioning of 25% of the accruals due to the operations of corporate debtor are not part of the final resolution plan and this has no legs to stand on *vis a vis* the approved resolution plan and the share of Bank of India contained therein.

29. An important issue that has become evident in this case is the absence of monitoring of the implementation of the successful resolution plan. Regulation 38 sub-regulation 2 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is quite clear about the implementation aspect of a resolution plan. This provision reads as hereunder:-

“38. Mandatory contents of the resolution plan

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

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(2) A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

(3) A resolution plan shall demonstrate that –

- (a) it addresses the cause of default;*
- (b) it is feasible and viable;*
- (c) it has provisions for its effective implementation;*
- (d) it has provisions for approvals required and the timeline for the same; and*
- (e) the resolution applicant has the capability to implement the resolution plan.”*

30. Therefore, we consider it necessary that the erstwhile Resolution Professional be made responsible for proper monitoring of the implementation of the successful resolution plan to ensure its complete and proper implementation and to ensure that issues such as the one raised in this appeal do not cause unnecessary delays and obstructions in the implementation of the resolution plan. The erstwhile Resolution Professional shall oversee the Successful Resolution Plan's implementation in accordance with the provisions of IBC and the order we propose to pass.

31. In view of aforesaid discussion and for the above reasons cited in preceding paragraphs, we hold that the amounts received

towards interim finance during pendency of CIRP for which account was opened in the branch of Respondent No.4- Bank have to be held as amounts received by the Corporate Debtor during CIRP and are to be utilised as per the provisions of IBC, Rules and Regulations and the Resolution Professional is responsible for due utilisation of the same, strictly as per the provisions of IBC, Rules and Regulations and the Resolution Plan which was approved by the Adjudicating Authority.

32. For the above reasons, the impugned order cannot be maintained. We pass the following order:-

ORDER

The impugned order is quashed and set aside. The Resolution Professional is directed to take account of the amounts received by Corporate Debtor during CIRP in the account opened with Respondent No.4- Bank, which decision to open the account was taken in the first CoC meeting. The Resolution Professional will ensure that all receipts of Corporate Debtor during CIRP are duly accounted for and applied as per provisions of IBC and Approved Resolution Plan. The Resolution Professional will take steps to ensure utilisation of the amounts received in the account keeping in view provisions of the IBC,

Rules and Regulations and the approved Resolution Plan to ensure proper utilisation and dispensation of the amounts. Balance, if any, shall enure to the benefit of the Successful Resolution Applicant who has stepped into the shoes of the Corporate Debtor.

33. The Resolution Professional will ensure completion of this process within one month of this order. Resolution Professional shall be at liberty to move Adjudicating Authority for further directions and orders for due enforcement of this Order.

34. Registry to convey copy of this order to the Resolution Professional- Mr. Vinay Talwar.

35. There is no order as to costs.

(Justice A I S Cheema)
The Officiating Chairperson

(Dr. Alok Srivastava)
Member(Technical)

New Delhi
27th August, 2021

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