



THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 1833 OF 2019

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Section 14, 74 of
the I&B Code

Mr. Ashish Arjunkumar Rathi

The Resolution Professional

...Applicant

V/s

Mr. Sunil Gutte & 5 others

...Respondents

In the matter of

C.P.(IB) No. 2295/MB/2018

American Express Banking Corp.

...Financial Creditor

Vs.

Sunil Hitech Engineers Limited

...Corporate Debtor

Order delivered on: 04.02.2025

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant

: Ms. Nandita Bajpai a/w Mr.
Dhrupad Vaghani, Advocates



For the Respondent 1 & 2 : Mr. Nausher Kohli, Advocate
For the Respondent 3 to 6 : None

ORDER

1. That, the present application is being filed by the Applicant, namely. Sunil Hitech Engineers Ltd. through its resolution professional Mr. Ashish Arjunker Rathi (having IP registration no. IBBI/IPA-001/IP-P00568/2017-18/11010) seeking, inter alia, directions for refund of certain amounts by the Respondents, for making contribution to the assets of the Corporate Debtor and for imposing punishment upon the Respondents for breach of moratorium by them and for fraudulently transferring the property of the Corporate Debtor. The Applicant has made following prayers:

- 1.1. *To direct the Respondents No 1 and 2 in terms of Section 60(5) of the Code to immediately refund, severally as well as jointly, the amount of the Vendors unauthorised Payments amount to Rs. 11,01,80,000/- to the Corporate Debtor along with such interest as the Hon'ble Tribunal may deem fit; and*
- 1.2. *To pass orders under section 74(1) of the Code as the Hon'ble Tribunal may think fit upon the Respondents No. 1 and 2 for making the Payments in breach of the moratorium as provided in Section 14 of the Code; and*
- 1.3. *To direct the Respondents No. 3 to 6 in terms of Section 60(5) of the Code to immediately refund the amount of Vendors Unauthorised Payments to the Corporate Debtor along with such interest as the Hon'ble Tribunal may deem fit as per the following details:*

<i>Name of Respondent</i>	<i>Amount (in Rs.)</i>
<i>Respondent No. 3 (DPRS Infra Developers Pvt. Ltd.)</i>	<i>1,07,32,154/-</i>
<i>Respondent No. 4</i>	<i>4,20,67,846/-</i>



<i>(Rayon Infrastructure Pvt. Ltd.)</i>	
<i>Respondent No. 5 Navneesh Traders Pvt. Ltd.</i>	<i>3,81,80,000/-</i>
<i>Respondent No. 6 Shreehari Associates Pvt. Ltd.</i>	<i>1,92,00,000/-</i>
<i>Total</i>	<i>11,01,80,000/-</i>

1.4. To pass Orders under Section 74(2) of the Code as the Hon'ble Tribunal may think fit upon the Respondents No. 3 & 6 in respect of the Vendors Unauthorised Payments to them in breach of the moratorium as provided in Section 14 of the Code; and

1.5. To pass orders for imposing cost upon the Respondents.

2. An application for initiation of the corporate insolvency resolution process ("CIRP") of the Corporate Debtor, i.e., Sunil Hitech Engineers Limited was filed by American Express Banking Corporation, a financial creditor, under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The said application was admitted by this Tribunal's Mumbai Bench vide order dated 07.09.2018 (pronounced on that day, however, delivered on 10.09.2018) ("CIRP Order"). Vide the CIRP Order, Mr. Harshad Shamkant Deshpande (having IP registration no. IBBI/IPA- 001/IP-P00166/2017-2018/10335) was appointed as the Interim Resolution Professional ("IRP"). Subsequently Mr. Ashish Arjinkumar Rathi was confirmed as the "Resolution Professional" (RP) of the Corporate Debtor vide order dated 27.11.2018.

2.1. In terms of statutory framework provided in the Code, once the CIRP of a corporate debtor commences, all powers of management



of affairs of the corporate debtor gets vested in the IRP and it is the IRP who is responsible to carry out its business as a going concern. Section 17 of the Code provides that from the date of appointment of the interim resolution professional the management of the affairs of the corporate debtor shall vest in the interim resolution professional; powers of the board of directors of the corporate debtor shall stand suspended and be exercised by the interim resolution professional; the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional,

- 2.2. In terms of Section 18 of the Code, the IRP is duty bound, inter-alia, 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, or with information utility or the depository of securities or any other registry that records the ownership of assets, as well assets which were in possession of the Corporate Debtor though not owned by it.
- 2.3. Section 20 of the Code provides that the interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern and for this purpose, he enjoys the power, inter alia, to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern, to take all such actions as are necessary to keep the corporate debtor as a going concern.
- 2.4. Section 25 of the Code provides for duties of the Resolution Professional, and one of such duty is to take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor.



- 2.5. The payments are stated to be made from the account of the Corporate Debtor after commencement of CIRP at the instance of the Respondent No. 1 & Respondent No.2, without the approval of the IRP. These payments were made in two phases in the first phase the unauthorised payments amounting to Rs. 9,54,50,084/- (Rupees Nine Crores Fifty-Four Lakhs Fifty Thousands and Eighty-Four only) were made during 10.09.2018 to 14.09.2018 (details of these payments are annexed herewith and marked as Annexure - A4 (Pg. Nos. 31 to 42), and in the second phase the unauthorised payments amounting to Rs. 6,80,92,628/- (Rupees Six Crores Eighty Lakhs Ninety-Two Thousands Six Hundreds and Twenty-Eight only) were made through cheques from 27.09.2018 to 10.10.2018 (details of these payments are annexed herewith and marked as Annexure – A5 (Pg. Nos. 43). So, in aggregate, the unauthorised payments amounting to Rs. 16,35,42,712/- (Rupees Sixteen Crores Thirty-Five Lakhs Forty-Two Thousands Seven Hundreds and Twelve only) ("Payments") were made in both the phases after the initiation of CIRP of the Company and appointment of the IRP by this Tribunal.
3. The Respondent No. 1 has filed the Reply and has stated as under:
- 3.1. As on the date of initiation of the CIRP for the Corporate Debtor, the Corporate Debtor had approximately 800 employees, 1500 contract labourers, 150 active vendors, 25 running projects. Furthermore, the average expenditure of the Corporate Debtor on running these sites amounted to approximately Rs. 200 Crores quarterly. The project list of the Corporate Debtor for the period 2017-2018 is annexed to the Affidavit in Reply filed by the Respondent on 09.03.2024.
- 3.2. The effective date of takeover of the Corporate Debtor by the erstwhile IRP was 14.09.2018 in light of the fact that the IRP notified



the Corporate Debtor about taking over the charge of the Corporate Debtor only on 14.09.2018 by way of Take – Over Notice, and therefore, vide email dt. 14.09.2018, the Corporate Debtor directed all its officers not to release any further payments without the permissions of the IRP.

3.3. Thus, taking into consideration the fact that the Corporate Debtor had to be handed over as a going concern to the IRP, the specified payments were made in the interests of the Corporate Debtor.

3.4. The Applicant on Page No. 7 of the captioned Application has divided the questioned transactions in two phases viz. First Phase being the allegedly unauthorised payments amounting to Rs. 9,54,50,084/- made during 10.09.2018 to 14.09.2018 and the Second Phase being the allegedly the unauthorised payments amounting to Rs. 6,80,92,628/- made through cheques from 27.09.2018 to 10.10.2018.

3.5. The payment made in First Phase were approved prior to initiation of CIRP by the erstwhile management and both of these parties i.e. the Respondent No. 5 & 6 are long term service provider.

3.6. As regards cheque issued prior to initiation of moratorium and encashed by Respondent Parties after the commencement of Moratorium, these cheques were issued in ordinary course of business and IRP ought to have instructed the Bankers not to honour any cheques after the commencement of CIRP.

3.7. T

4. Respondent No. 6 has filed the Reply stating that a sub contract was executed between M/s Sunil Hitech Engineer Pvt. Ltd. And M/s Shreehari Associates Pvt. Ltd on 14.05.2017. As per the agreement the answer being respondent had agreed to execute the development, construction and the up gradation of the Mehkar to Ajispur Section NH 548 & C (Km) 0.000 to km. to 18.276) in the State of Maharashtra to 2 lane with paved shoulder on EPC mode for an amount of Rs. 75.57 Cr., (Contract Price”) + escalation + maintenance + all other payment as per

n

d

e



the EPC contract and as admissible in the contract between SHEL (JV) and Ministry of Road Transport and Highways through Chief Engineer (MSRDC). It is further stated that the Respondent herein had performed their part of the duty by executing the above-mentioned work. The corporate debtor was supposed to pay an amount of Rs. 1,96,07,395.20. Further, out of the outstanding amount, the Corporate Debtor made a payment of Rs. 1.92 Cr. and outstanding amount of Rs. 4,07,395.20 is still payable. It has also been averred that it is for the Corporate Debtor and their director to clarify as to why the payment were made after the initiation of the CIRP of the Company and the appointment of the IRP by this Tribunal.

5. Respondent Nos. 3 to 5 have not filed the Reply in the present Application.
6. Heard the Counsel and perused the material on record.
 - 6.1. We note that the on the date of pronouncement of the CIRP order on 07.9.2018, the Corporate Debtor was represented by Mr. Shraddhanand Bhutada and Mr. Mohit Rao Jadhav. The said Order *vide* para I, has instituted the moratorium in terms of Section 14 of the Code and it is stated that the said Order was pronounced on 07.09.2018, accordingly, we proceed on a proposition that moratorium came to be in force on 07.09.2018 and the IRP was also appointed from that day as held by the Hon'ble Appellate Court in the case of **Rishi Kapoor...vs...Kashi Vishwanathan Sivaraman RP of Kindle Developers Pvt. Ltd. (2022) ibclaw.in 20 NCLAT**. The IRP is stated to have communicated to the Respondent No. 1 about taking over the management and affairs of the Corporate Debtor on 14.09.2018.
 - 6.2. On perusal of Annexure A4, we find number of Transactions had taken place in the bank account of the Corporate Debtor from 10.09.2018 through NEFTs and RTGSs, for payment of Salary, Wages, House Rents, Vendors' Payments, including the payment to the Respondents Nos. 3 to 6 herein. Though the total payment of Rs.



16,35,42,712/-, were made from 10.09.2018 onwards, as alleged in the Application, the Applicant herein has only sought to set aside the payments made to Respondent Nos. 3 to 6 amounting to Rs. 11,01,80,000/-. Accordingly, the payments made on account of salary wages, house rents, Vendors' other than Respondent Nos. 3 to 6 have not been challenged in this Application. Accordingly, the contention of Respondent Nos. 1 and 2 that the payments were necessitated to keep the Corporate Debtor as a going concern in the absence of IRP taking charge on 14.09.2018, has no merit. The following payments have been sought to be reversed in the present Application

- 6.3. The Hon'ble NCLAT in the case of *Vikas Jeph v. Anoop Bhatia RP (2023) ibclaw.in 785 NCLAT* rejected the contention of the Suspended Directors that the payments have been made to discharge statutory liabilities that too within a short period from the date of admission and upheld the order passed by this Tribunal directing the Suspended Board of Directors to deposit the amount withdrawn from the bank account of the Corporate Debtor after the commencement of CIRP, holding that *"once the order of admission was passed and moratorium is imposed under Section 14 of the Code, the powers of the Board got suspended and management and the affairs of the CD vests with the IRP. Counsel for the Appellant also could not cite any precedent in his favour for the purpose of setting aside the impugned order"*.
- 6.4. The Respondent No. 1 and 2 have contended that the payments, by way of RTGS, though were made after the commencement of CIRP, however, the Approval for payment thereof was already in place before the commencement of CIRP. Further, the cheques to the Respondent Nos. 3 and 4 were issued on 30.08.2018 and these cheques were encashed between 06.10.2018 to 08.10.2018 and the details of cheques had been provided to the IRP by the Directors and Officials as soon as IRP took actual control of the Corporate Debtor.



We do not find any substance in the contention of the Respondent Nos. 1 and 2 as no explanation has been provided as to why the Respondent Nos. 3 and 4 had not tendered the cheque immediately or within reasonable period of time after its handing over to them. It is pertinent to note that more than majority of payments have been made through NEFT/RTGS as it revealed from the perusal of Annexure A4 i.e. Transaction stated to be taken place from 10.09.2018 to 14.09.2018. However, the transaction listed under Annexure A5 i.e. Transaction stated to be taken place from 27.09.2018 to 10.10.2018 have been made through Cheques. Accordingly, we are of the considered view that the cheques were only handed over to Respondent Nos. 3 & 4 after the commencement of CIRP and were ante-dated to make it a payment made prior to commencement of CIRP. Accordingly, these payments are liable to be set aside as having been made in the contravention of Moratorium and Respondent Nos. 3 and 4 are liable to refund back to the Corporate Debtor. However, the Liquidator shall Admit the claim of Respondent Nos. 3 and 4 upon receipt of these amounts from them.

6.5. As regards payment made to Respondent Nos. 5 during the period 10.09.2018 to 14.09.2018, it is contended that these payments were made against the invoices raised by these parties and who are long term service provider and their services were required after the commencement of CIRP as well. We note that out of Five payments made to Respondent No. 5, three payments aggregating to Rs. 3,23,00,000/-, were made through RTGS Transfer. As regards payment of Two Cheques to Respondent No. 5, we note that the payment made on 10.09.2018 and 11.09.2018 are in fact through NEFT and RTGS and not through cheques. Accordingly, it cannot be said that the payments had already taken place prior to the commencement of CIRP. Accordingly, these payments are liable to be set aside as having been made in the contravention of Moratorium



and Respondent Nos. 5 are liable to refund back to the Corporate Debtor. However, the Liquidator shall Admit the claim of Respondent Nos. 5 upon receipt of these amounts from them.

6.6. As regards payment made to Respondent Nos. 6 during the period 10.09.2018 to 14.09.2018, it is contended that these payments were made against the invoices raised by these parties and who are long term service provider and their services were required after the commencement of CIRP as well. We note that all Four payments have been made through NEFT, as seen from Vendor detail Ledger Account, placed by Respondent Nos. 1 and 2 in their Reply at pg. no. 42. It is further noticed therefrom these amounts have been debited to the ledger account of Respondent No. 6 in the books of CD, on or after 10.09.2018. Accordingly, it cannot be said that these payments were released prior to the commencement of CIRP and moratorium. Accordingly, it cannot be said that the payments had already taken place prior to the commencement of CIRP. Accordingly, these payments are liable to be set aside as having been made in the contravention of Moratorium and Respondent Nos. 6 are liable to refund back to the Corporate Debtor. However, the Liquidator shall Admit the claim of Respondent Nos. 5 upon receipt of these amounts from them.

6.7. In the case of *Pratim Bayal Vs. Tata Motors Finance Solutions Ltd. (2023) ibclaw.in 701 NCLAT*, it was held that “*The law is well settled that on the date when cheque is handed over the payment shall be treated to have been made*”. However, this decision is distinguishable in the facts and does not support the case of Respondents.

6.8. In view of the forgoing, we set aside the transactions impugned in the present Application and direct Respondent Nos. 3, 4, 5 & 6 to refund amount of Rs. 1,07,32,154/-, 4,20,67,846/-, 3,81,80,000/- and 1,92,00,000/-, respectively within 30 days. Further, the Respondent Nos. 1 and 2 shall also be jointly or severally pay these amounts to the Corporate Debtor in addition to Respondent Nos. 3



to 6, within 30 days. It is made clear that the liability of Respondent Nos. 1 and 2 shall be reduced by the amount paid by Respondent Nos. 3 to 6.

7. The Liquidator is directed to inform IBBI to initiate proceedings in terms of Section 74(1) of the Code. Accordingly, the MA 1833 of 2019, is disposed of as Allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)