

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

**C.A.(IB) No. /KB/2020**

**In  
CP. (IB) NO. 201 OF 2019**

**In the matter of:-**

**An application under Sections 19, 60(5) and 74 of the Insolvency and Bankruptcy Code, 2016;**

**And**

**In the matter of:-**

**Nu Sri Shyam Pharmaceuticals Private Limited**

**.....Operational Creditor**

**-Versus-**

**Gems Care & Cure Health Centre Private Limited**

**.....Corporate Debtor**

**And**

**In the matter of:**

**Rajesh Lihala**, the Resolution Professional of Gems Care & Cure Health Centre Private Limited appointed vide order dated 29th August, 2019 passed by this Hon'ble Tribunal and having its office at 11, Crooked Lane, Kolkata – 700 069

**....Applicant**

**Versus**

- 1. Ms. Ranjana Khanna**
- 2. Mr. Sibayan Sarkar**
- 3. Mr. Saurav Mukherjee**

**...Respondents**

**HDFC Bank**, Rashbehari Branch, 112A, Rashbehari Avenue, Kolkata 700029

**....Proforma Respondent**

**Coram: Shri Jinan K.R., Hon'ble Member (Judicial)**

**Counsel Present**

1. Mr.Rishav Banerjee, ]
2. Mr.Rahul Auddy ] For the Resolution Professional

1. Mr.Anirban Ray ]
2. Mr. Pranit Bag ] For the CoC

1. Mr. Jishnu Chowdhury }
2. Mr. Arif Ali }
3. Mr. Subhojit Dey } For the Respondent No.1

**Date of hearing: 02.06.2020**

**Order delivered on: 02.06.2020**

**ORDER**

**Per Jinan K.R. Member (Judicial)**

**Statement of Facts**

1. This unnumbered application was filed by the resolution professional for an early hearing alleging that the directors of the suspended board of the corporate Debtor (CD) is unauthorisedly transferring/siphoning fund of the CD from the account of CD in HDFC Bank. The reason for an urgent hearing being satisfactorily explained by the applicant this application was listed for hearing on today after giving notice to the respondents by directing to submit brief facts of defence.
2. Gems Care & Cure Health Centre Private Limited/CD, is undergoing CIRP as per the order of Adjudicating Authority (AA) dated 29th August, 2019. It is submitted by the Ld. Counsel Mr. Rishav Banerjee for the RP that RP came to know that the CD has a bank account in HDFC Bank, Rashbehari Branch, being account number 50200013367033. The directors of the suspended board of directors (R1to R3)

allegedly not discloses the account details to the RP at the time of taking over the management of the affairs of the corporate debtor(CD).

3. On knowing the account hold by the CD with the HDFC Bank, Rashbehari Branch, the RP visited the bank on 4th September, 2019 and requested for suspension of all activities in the said bank account. The RP even submitted a letter to that effect. The Bank thereafter provided bank statement on 12th March, 2020. According to him a perusal of the said bank statement, it appears that the Bank had not adhered to the instructions of the RP given on 4th September 2019 and had kept the bank account operational for reasons best known to them.
4. He would further submit that the directors of the CD, being fully aware of the initiation of the CIRP and the onset of the moratorium under section 14 of the Code, completely violated the said moratorium and operated the bank account and made substantial transactions and payments from the said bank account without the knowledge and authorization of the RP. The Directors are also not providing the details of the persons to whom payments have been made and thus are not cooperating with the Applicant. Upon the said submissions the Id.Counsel for the RP submit that this application is to be allowed directing them to refund the amount and to cooperate with him in completing the CIRP, keeping the timeline.
5. The main allegations leveled against the R1 to R3 is that they are not cooperating with the RP and transferred fund of the CD to the tune of Rs. 5,96,381/- from the HDFC bank who is the 4th respondent herein. According to the RP he personally visited the bank and directed in writing on 4th September, 2019 and for suspension of all activities in the said bank account. However from the bank statement dated 12th March, 2020 the Bank had not adhered to the instructions of the RP given on 4th September 2019 and had kept the bank account operational for reasons best known to them. He also would submit that R1 to R3 also failed to provide the details of the persons with whom the transactions were done. It is in this background this application was filed pressing for the following relief:
  1. Necessary directions upon the Respondents under Section 19 of the Code to cooperate with the Applicant and provide the details of the persons with whom the transactions were done after the CIRP through HDFC Bank.

2. Penalty and punishment of the Respondent nos. 1 to 3 in accordance with section 74 of the Code for violation of the moratorium as laid down under Section 14, as this Hon'ble Tribunal deems fit.
3. Necessary directions upon the Respondents under Section 60(5) to refund the amount of Rs. 5,96,381/- that they have siphoned out and /or transacted with after the commencement of moratorium;
4. Directions upon the Respondent directors restricting them from dealing with the aforesaid HDFC Bank account or any other bank account of the CD.
5. Such further and/or other order or orders as this Hon'ble Court may deem fit and proper.

6. Upon hearing the arguments on both sides and upon perusal of application, documents and the written submission on the side of the respondent other than HDFC, it is certain that the respondents are not at all giving any respect to the order of admission dated 23rd August, 2019. According to them they were unrepresented while the order of admission was passed. However they admit that they were in receipt of order of admission and came to know the initiation of the CIRP on 4th September, 2019. Despite knowing the initiation of CIRP the management of the affairs of the CD was not surrendered by them. Only upon intervention by the RP through the Tribunal, the RP was managed to takeover the affairs of the CD that too in the month of November,2019.

7. The attempt of the Id.Counsel Mr. Jishnu Chowdury who is representing the R1 is that the CD has not deliberately done anything against the direction of the AA, but attempted to settle with the Operational Creditor who moved the application for initiating the CIRP. However the RP being illegally constituted the CoC the 12 A application was dismissed. He argued. Regarding the allegations of transfer of funds, he would submit that Rs. 5,97,000/- has been paid, as salaries of Doctors, purchase of equipment, cost of medicine and Oxygen etc. But cannot give any details to strengthen his said argument. All payments were spent for the purpose of running the hospital, and not for personal purposes. He argued. He prays for one week time for filing an affidavit affirming the payment. However, he was unsuccessful in placing any materials for convincing me that such post CIRP withdrawal of funds from CD accounts maintained in the HDFC bank was for the purpose of managing the functioning of the CD. One other submission of the Ld.Counsel is that the CoC had been constituted illegally as the CoC consists of only one member, the LIC

Housing Finance Limited. According to him HDFC and other creditors were not included in the CoC.

8. Ld. Counsel for the RP. Mr. Rishav Banerjee submits that there is no illegality in the Constitution of the CoC. According to him no claim from any financial creditors other than LIC Housing Finance Ltd, so far received by the RP and therefore, the constitution of the COC is perfectly legal and proper. He further would submit that the doctors salary was paid by the RP, and therefore no question of payment of salary to them by the respondents arose. So also any amount paid to the creditors post CIRP is illegal and that none of the payment seen proved by producing any material document on the side of the respondents. According to him the respondents admit after CIRP they have made a transaction which is a clear cut violation. They said they have made it wrongly hence should pay back. He also would submit that HDFC has acted against the directions given to by the RP on 4<sup>th</sup> September and therefore an order of injunction is to be passed against it. He also prayed for issuing necessary directions upon the Respondent directors not to carry out any transactions from the said HDFC Bank account or any bank account of the CD Respondents; to cooperate with the Applicant and provide the details of the persons with whom the transactions were done after the CIRP and further punitive action in the form of imprisonment as well as penalty for the Respondents and also necessary directions upon the Respondents to refund the amount of Rs. 5,96,381/- which they have siphoned out/transacted with after the commencement of CIRP. So also he prayed for issuing directions to the respondents not to operate any of the accounts of the CD.

9. This is an application seen filed praying for multiple reliefs under various provisions of the Code. From the matters discussed above, it is certain that the respondents have violated section 14 of the Code. The main relief sought for is under section 74 of the Code. In order to have a finding as to whether the respondents are prima facie guilty of the allegations leveled against them an investigation into the commission of the alleged offence under section 74(2) has to be conducted as per the proposition laid down in the **Lagadapati Ramesh v. Mrs. Ramanathan Bhuvaneshwari, [2020] 114 taxmann.com 348 (NCL-AT). Company Appeal (AT) (Insolvency)No. 574 of 2019 and Company Appeal (AT) (Insolvency)No. 592 of 2019.** In order to have a determination as to whether a reference is to be made for conducting investigation under section 213(b) of the Companies Act, the respondents are to be heard at length. An opportunity also to be given to them for filing reply affidavit by all the respondents inconclusive of HDFC,

10. However, being satisfied that till November the possession of the CD was with the respondents and that the management of the affairs of the CD was taken over by the RP only in the month of November, 2019, it appears to me that an interim direction is to be issued to R1 to R3 directing them to refund the amount less the amount spent post CIRP till the date of handing over possession of the CD to the RP subject to satisfying the payment with supporting proof. Accordingly, this application is liable to be allowed under section 19 of the Code in part upon the following directions:

1. The R1 to R3 are hereby directed to refund the amount of Rs. 5,96,381/- they have withdrawn from the account of the CD less the amount spent by them till the date of handing over possession of the CD to the RP after the commencement of moratorium provided the payments are supported with proof to the satisfaction of the RP;
2. The Respondents 1 to 3 are directed to cooperate with the RP and provide the details of the persons with whom the transactions were done after the CIRP through HDFC Bank and details of all accounts of the CD if not brought to the notice of the RP;
3. R1 to R3 are hereby restrained from dealing with the aforesaid HDFC Bank account or any other bank account of the CD;
4. HDFC, the bank is directed to follow the directive of the RP.
5. The application is to be listed along with the CP, for further consideration after the lifting of the lock down. Respondents are directed to file reply affidavit by serving copy to the applicant within 3 weeks from today and applicant shall file rejoinder within one week of the receipt of the reply affidavit.
6. Registry is directed to serve email copy to the parties forthwith.

**(Jinan K.R)**

**Member (Judicial)**

*Signed on this, the 2nd day of June, 2020.*