

SL. No.1

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH  
COURT HALL NO: II**

**Hearing Through: VC and Physical (Hybrid) Mode**

**CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)**

**CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
HYDERABAD BENCH, HELD ON 08.01.2024 AT 10:30 AM**

<b>TRANSFER PETITION NO.</b>	
<b>COMPANY PETITION/APPLICATION NO.</b>	<b>IA (IBC)/217/2020 in CP (IB)No.420/7/HDB/2018</b>
<b>NAME OF THE COMPANY</b>	<b>Lanco Amarkantak Power Ltd</b>
<b>NAME OF THE PETITIONER(S)</b>	<b>Axis Bank Ltd</b>
<b>NAME OF THE RESPONDENT(S)</b>	<b>Lanco Amarkantak Power Ltd</b>
<b>UNDER SECTION</b>	<b>7 of IBC</b>

**ORDER**

**IA (IBC)/217/2020**

Orders pronounced, recorded vide separate sheets. In the result, this application is dismissed.

**Sd/-**  
**MEMBER (T)**

**Sd/-**  
**MEMBER (J)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**HYDERABAD BENCH – II**

**IA No.217 of 2020 in**  
**CP(IB) No.420/07/HDB/2018**

**In the matter of:**

Axis Bank,  
Trishul, 3<sup>rd</sup> Floor,  
Opp: Samrtheshwar Temple,  
Law Garden, Ellis Bridge,  
Ahmedabad – 380 006.

....Financial Creditor

Vs.

M/s. Lanco Amarkantak Power Limited,  
Plot No.4, Software Units Layout,  
HITEC City, Madhapur,  
Hyderabad – 500 081.

....Corporate debtor

**Between:**

Mr. Saurabh Kumar Tikmani,  
Resolution Professional of  
M/s. Lanco Amarkantak Power Limited,  
KPMG Restructuring Services LLP,  
First Floor, Lodha Excelus Apollo,  
Mills Compound, N M Joshi Marg,  
Mahalaxmi, Mumbai – 400 011.

....Applicant

And

South East Central Railway

....Respondent

**Date of order: 08.01.2024**

**CORAM:**

Hon'ble Sri Rajeev Bhardwaj, Member (Judicial)

Hon'ble Sri Sanjay Puri, Member (Technical)

**Counsels present:**

For the Applicant : Ms. Rubaina Khatoon, Advocate  
For the Respondent : Ms. Ch. Lakshmi Kumari, Advocate  
Heard on : 07.11.2023

**Per : Sanjay Puri, Member (Technical)**

**ORDER**

1. This Application is filed by the Resolution Professional (**RP**) of Corporate Debtor (**CD**) M/s. Lanco Amarkantak Power Limited against the Respondent South East Central Railway (**SECR**). The RP has prayed for declaring that the deductions made by the Respondent from the Railway Freight (**RF**) Account of CD are in violation of the provisions of the Insolvency and Bankruptcy Code (**IBC**). The RP also seeks a directive for the Respondent to stop making any deductions and refund the amount representing the deductions made so far towards Engine Hire Charges (**ENHC**) from the Railway Freight account of the CD.

**The Application:**

2. On 26.11.2009, a Tripartite Agreement was executed between the Respondent (SECR), the CD and the State Bank of India (**SBI**), establishing the framework for the creation of an E-payment account. The primary purpose of this account was to facilitate the payment of railway freight charges arising from the supply of rakes to CD by the Respondent. Consequently, RF Account No. 30971282113 was established with SBI, dedicated exclusively to the deduction of railway freight charges owed to the Respondent by the CD.

3. Disputes arose between the Respondent and the previous management of CD regarding outstanding dues related to ENHC covering the period from January 2010 to February 2018, i.e. predating the

commencement of insolvency<sup>1</sup>. Letters<sup>2</sup> dated 1 March 2019 and 26 March 2019 were sent by CD to the Respondent in that regard.

4. While the ENHC claims raised by the Respondent were pending reconciliation, another letter<sup>3</sup> dated 23 August 2019 was sent to the CD by the Respondent, demanding payment of ENHC. The letter further stated that the railway administration would initiate the recovery of ENHC dues from the Respondent's RF Account, along with freight. It is submitted that, at this juncture, the Respondent was well aware that making deductions towards Historical ENHC would be well beyond the scope of the Tripartite Agreement.
5. Moreover, in a letter<sup>4</sup> dated 02.09.2019, the Respondent specifically asked the CD to furnish details regarding errors in the raised dues. The intention was to facilitate the reporting of the matter to the Respondent's Traffic Accounts Department for the purpose of reconciliation. It was responded by CD by letter<sup>5</sup> dated 10.10.2019, enclosing therewith a detailed sheet of errors and requested the Respondent to deploy relevant personnel from Traffic Accounts Department to undertake the reconciliation of amounts.
6. Despite having received this formal request for cooperation and the detailed error sheet, the Respondent did not take any action to initiate the reconciliation process for Historical Engine Hire Charges (ENHC). This lack of response occurred in direct contradiction to the ongoing efforts made by CD to reconcile the amounts. Furthermore, and in disregard of these reconciliation efforts, the Respondent unilaterally proceeded to deduct Historical ENHC from CD's Railway Freight (RF) Account.

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<sup>1</sup> CIRP commenced by NCLT Order dt. 5<sup>th</sup> September 2019

<sup>2</sup> Pg 23-25 of the Application (Annexure-A1)

<sup>3</sup> Pg 26 of the Application (Annexure-A2)

<sup>4</sup> Pg 27 of the Application (Annexure-A3)

<sup>5</sup> Pg 28 -31 of the Application (Annexure-A3)

7. While the dispute on purported pending dues was yet to be resolved, Corporate Insolvency Resolution Process (CIRP) was initiated against CD vide Order of this Tribunal dated 05.09.2019. In a letter<sup>6</sup> dated 16.09.2019, the Applicant/RP informed the Respondent about the commencement of CIRP against CD and requested cooperation. When the RP took over the management and affairs of CD, it is claimed that the Respondent, acting beyond the scope of Tripartite Agreement, had unilaterally debited an aggregate amount of approximately Rs 3.47Crores<sup>7</sup> (inclusive of GST of Rs 25,000 per rake on 66 rakes) from the RF Account of CD towards Historical ENHC during the period from 18.10.2019 to 21.01.2020, i.e., after the commencement of CIRP.
8. Thereafter, against the supply of railway rakes being used by CD during CIRP period, the Applicant has been making payments to the Respondent by way of Demand Drafts issued by the Canara Bank from time-to-time. The Approval Notes issued by the Applicant to Canara Bank contains as "Demand Drafts for Rail Freight."<sup>8</sup> It is claimed that the Respondent has been unilaterally apportioning a portion of the railway freight paid during this period towards Historical ENHC.
9. It is stated that on various occasions, both in personal meetings and through written correspondence, the Applicant apprised the Respondent that the deductions of Historical ENHC made from the Railway Freight (**RF**) Account were in violation of the ongoing moratorium during CIRP of CD. The Applicant requested the Respondent to refund the same and refrain from making any further deductions from the RF Account. Further, the Applicant advised the Respondent to file a claim in respect of the outstanding amounts of Historical ENHC, as appropriate under the provisions of IBC. The Applicant assured that any costs incurred towards ENHC for CD during the CIRP of CD would be treated as "Insolvency Resolution

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<sup>6</sup> Pg 32-33 of the Application (Annexure-A4)

<sup>7</sup> Pg 34-133 of the Application (Annexure-A5) - Railway Receipts and the excerpts of bank statement of CD

<sup>8</sup> Pg 134-164 of the Application (Annexure-A6)

Process costs," in terms of Section 5(13)e) of IBC.<sup>9</sup> Despite repeated requests,<sup>10</sup> the Respondent failed to refund the debited amount towards Historical ENHC.

10. Citing Section 14 of the IBC, it is argued that the moratorium is introduced to preserve the value of the CD by ensuring that it continues to operate as a 'going concern.' It is asserted that the moratorium applies to all debt recovery actions that could endanger, diminish, dissipate, or impact the assets of the CD in any manner whatsoever. Judgements in the cases of *Indian Overseas Bank vs. Mr. Dinkar T. Venkatsubramanian RP for Amtek Auto Ltd*<sup>11</sup>, *Union of India & Anr. Vs. Videocon Industries Limited & Ors*<sup>12</sup>, *Chitra Sharma Vs. Union of India*<sup>13</sup> and *Ved Prakash Abbot v. Kishore K. Avarsekar and Ors*<sup>14</sup> have been cited to emphasize that once a moratorium is imposed concerning a Corporate Debtor, neither a Financial Creditor nor an Operational Creditor can appropriate any amount from any account of the Corporate Debtor towards claims that existed prior to the declaration of the moratorium.
11. Further claiming that by its actions the Respondent has gained unjust priority over other creditors of CD it is stressed that the actions of the Respondent warrant a declaration of illegality, as they not only contravene the objectives of the Insolvency and Bankruptcy Code (IBC) but also stand in violation of Article 14 of the Constitution of India. Consequently, this application is being filed.

**Respondent's Counter:**

12. The Respondent, in their Counter, refuted the assertions presented in the Petition. They further indicated that they were not apprised of the public announcement made by the Corporate Debtor (CD) on

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<sup>9</sup> Pg 165-158 of the Application (Annexure-A7)

<sup>10</sup> Pg 169-187 of the Application (Annexures-A8 to A12)

<sup>11</sup> Hon'ble NCLAT Order dated 15 November 2017 in Company Appeal (AT) (Ins) No. 267 of 2017

<sup>12</sup> Hon'ble NCLAT Order dated 30.08.2019 in CA (AT) 408/2019

<sup>13</sup> (2018) 18 SCC 575

<sup>14</sup> (2019) SCC Online Del 9570

16.09.2019, inviting all creditors to submit their claims. Additionally, the Respondent claimed being unaware of the Creditors' Committee (**CoC**) meeting held on 11.10.2019.

13. The Respondent acknowledged the existence of a Tripartite Agreement executed on 26.11.2009 between the Respondent, CD, and SBI. They clarified that the Railway Freight (RF) account was set up for the purpose of deducting charges related to railway freight payments payable by CD to the Respondent. It is stated that they had not accused CD of non-payment of pending dues on account of Engine Hire Charges (ENHC) and asserted that the deduction of Rs 2,94,00,000 from CD's RF Account for ENHC during the moratorium was in accordance with the terms of the Tripartite Agreement and did not violate the ongoing moratorium under IBC.
14. The Respondent asserts that there is no violation of Section 14 of the IBC since the section does not prohibit the performance of contracts and agreements. They argue that the debited amount from the RF account was for services rendered to the CD and the performance of the contract before the initiation of the Corporate Insolvency Resolution Process (CIRP). The deduction of the amount from the RF account aligns with the Tripartite Agreement executed by the Respondent and the CD. The Respondent highlights that the deductions were regular and continuous, made in accordance with the Tripartite Agreement whenever the amount was due for railway freight. The CD consistently maintained an amount in the RF account and never issued stop payment instructions to the bank. The Applicant, having accepted the services and deductions without objection, is deemed by the Respondent to be unable to raise objections at this stage.
15. In response to the judicial precedents referred by the Applicant, the Respondent contends that they are not a Financial Creditor and were unaware of the Corporate Insolvency Resolution Process (CIRP) of the

- CD. They emphasize that the deducted amount was for service charges and not personal dues.
16. Addressing Section 14 of the Insolvency and Bankruptcy Code (IBC), the Respondent clarifies that they did not terminate, suspend, or interrupt services during the moratorium. Essential services for the production of thermal power were continued.
17. The Respondent explains their role as a service provider to the Applicant that, to collect freight and charges as per the agreement dated 17-12-2008. As per the Demand Note<sup>15</sup> dated 21-02-2018 sent to the Applicant, there was a demand for Rs 5,92,50,378 for the period January 2010 to December 2013, but the CD did not pay the amount. Subsequently, vide letter<sup>16</sup> dated 19-02-2019 demanded Rs.9,56,98,207, the CD then paid Rs 50,00,000 by way of Demand Draft to the Respondent vide letter<sup>17</sup> No.LAPL/PWR/FUEL/INT/L3 /10M/SECR/18-19/262 dated 27-03- 2019. After reconciliation, at the CD's request an amount of Rs 89,80,184 was waived and a balance of Rs 7,75,03,344 was demanded vide letter<sup>18</sup> dated 15-04-2019.
18. In response to the letter dated 15-04-2019, the CD once again requested a waiver of charges for the usage of the railway engine beyond the free time and appealed to consider that the tiles policy is not applicable for levying Engine Hire Charges. After considering the said letter, the Respondent (SECR) issued a letter dated 23-08-2019, requesting payment of the amount due for Engine Hire Charges by 15-09-2019, failing this, the Respondent would be bound to collect the amount from the payment account along with freight.

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<sup>15</sup> Pg 45-87 of the Counter (Annexure-3)

<sup>16</sup> Pg 88 of the Counter (Annexure-4)

<sup>17</sup> Pg 89 of the Counter (Annexure-5)

<sup>18</sup> Pg 90 of the Counter (Annexure-6)

19. In light of this, the Respondent collected an amount of Rs 5,00,000 on every rake, along with regular freight charges, from the e-payment account from October 2019 to March 2020. As of the current date, there are no dues pending on account of Engine Hire Charges for the period mentioned in the Respondent's letter dated 23-08-2019,<sup>19</sup> relating to the usage of Engine beyond the free time, which predates the Adjudicating Authority's order dated 5-9-2019.
20. Clause 34 of the Agreement dated 17-12-2008 stipulates that the matter has to be resolved through arbitration. Since the payments were recovered as per the letter dated 23-08-2019, arbitration was not invoked. Given that there are no dues towards the above Engine Hire Charges and they were recovered well before the orders of the Adjudicating Authority dated September 2019, the relief claimed by the Applicant herein is not tenable. Therefore, the IA may be dismissed.

**Petitioner's Rejoinder:**

21. The Petitioner submitted the rejoinder wherein reiterated the contents of the Application, and also denied all the contents of the Counter filed by the Respondent.

**The Decision:**

22. Heard both the Counsel and perused the records of either side. Upon reviewing the records, it was noted that the 'Tripartite Agreement' mentioned in the application, involving SECR, the Corporate Debtor (CD), and SBI, was not included in the pleadings. Consequently, on 08.12.2023, the Applicant was instructed to submit a copy of the 'Tripartite Agreement' dated 26.11.2009, to ensure a comprehensive understanding of the facts. In response, the Applicant submitted a copy of the said agreement on 19.12.2023 through IA No. 2024/2023, which was taken on record.

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<sup>19</sup> Pg 94 of the Counter (Annexure-8)

23. The CD is a power generation company, which has been using the services of Respondent (SECR) for transportation of coal used for its operations. To facilitate utilisation of railway services and payment thereof, a Tripartite Agreement was entered into between the CD, SECR and SBI. The terms of this Tripartite Agreement are most relevant in the instant case.
24. The agreement provides for an elaborate mechanism for collection of the freight charges. Some of the relevant terms of that agreement are extracted below:

WHEREAS

- i. The railway transport goods from one railway station to another railway station.
- ii. Consignee utilize the services offered by Railway **for transportation of its Coal & any other permissible commodity from one Railway station to another Railway station.**
- iii. For the purpose of availing said services of transportation the **Consignee is required to pay freight to the Railway at the originating station.**
- iv. It is agreed that said **payment of freight shall be made by the consignee to the railway by utilizing the services/infrastructures of Bank by means of electronic mode through FOIS so that immediate payment can be received by the Railway.**
- v. ....
  - a. This agreement will cover freight charges payable by the consignee from the date of this agreement or a mutually agreed date.
  - b. **The freight payment will be drawn by the Railway form Consignee bank of utilizing its Freight Operation Information System (FOIS), which has connectivity with the Bank's server/system through the Centre for Railway Information System (CRIS).**
  - c. ....
    1. (i) Regular Payment Mechanism:-
      - a) Flow of funds to South East Central Railway will be arranged from a **dedicated account which will be opened** by M/s. Lanco Amarkantak Power Limited at SBI, Uрга Barnch, Dist: Korba (Bank/Branch), **with an allocated credit limit equivalent to 5 days freight i.e., Rs. 0.10 Crores approximately.**

b) .....

2. Default Payment Mechanism:

- (i) **Consignee shall open an irrevocable inland revolving Bank Guarantee (BG) in favour of the South East Central Railway through SBI, main Branch, Bilaspur to be advised by the Banker of South East Central Railway, SBI Main Branch, Near High Court, Bilaspur, Chhattisgarh for an amount equivalent to 5 (five) days of average freight paid by consignee to the Railway during busy season in the last financial year subject to minimum of 5 rakes freight for the locations and mutually as decided by Railway and consignee which comes to Rs. 0.10 Crores for 7 loading points to ensure assured transfer of funds.** This BG should be valid for 12 months from the date of commissioning of the e-payment facility with a provision permitting its encashment up to 15 days after the validity period of BC. The amount of BG would be converted into number of rakes (called E-RR limit) for which E-RR can be issued by the system without receiving any positive confirmation from the bank regarding collection of the funds from the customer. Consignee will have to provide fresh BG or arrange to extend the validity of the existing BG before the expiry of the 12 months period. (The validity of BG shall be for 12 months). The BG will be standby BG.

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- (iv) The transaction of freight charges made through this system will be "Paid" and "To Pay".

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3. Procedure in the field office

TMS location will maintain a "Payment Pending List" to indicate the on line account of number of rakes for which ERR have been issued without receipt of a positive confirmation of collection of freight charges from the bank.

- i. For this E-payment scheme the **goods clerk will give a command to the system to prompt the bank for collection of freight charges through e-banking. The Bank on receipt of such an advice through TMS will automatically collect fund from customer's account and electronically credit the same to Railway's account immediately** – during business hours and at the start of the next business day if such a transaction takes place after close of business hours, except communication failure. In case the waiting period exceeds thirty minutes the procedure outlined under exigences will be invoked.

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**4. Accounting Procedure**

- i. Cash office shall **treat the payment advice in the form of earmarked copy of E-RR as TR Note for the purposes of accounting and reporting**

[Emphasis supplied]

25. From the terms of the Tripartite agreement, it is apparent that the CD was to maintain a certain balance in SBI “*equivalent to 5 days freight*” at all times which could “*drawn by the Railways*” from SBI “*utilizing its Freight Operation Information System (FOIS), which has connectivity with the Bank’s server/system through the Centre for Railway Information System (CRIS)*”. To ensure adequate balance in SBI, the CD was also to provide an “*irrevocable inland revolving Bank Guarantee*” to “*ensure assured transfer of funds*” to Railways towards freight payment.
26. The amounts available in the CD’s account in SBI, therefore, was the money lying there which could be collected by SECR “*at the originating station*”. In other words, payment towards freight charges was to be recovered before the service of transportation of “*Coal & any other permissible commodity from one railway station to another Railway station*” out of the balance maintained in SBI “*by means of electronic mode through FOIS so that immediate payment can be received by the Railways*”. The “*payment advice in the form of earmarked copy of E-RR*”<sup>20</sup> was to be treated by the Railway Cash office “*as TR*”<sup>21</sup> Note for the purposes accounting and reporting”. This payment was to be realised against the invoices raised for the services rendered.
27. The funds held in the CD’s account at SBI, as per the Tripartite Agreement, were akin to the money put at the disposal of SECR, to be collected for the services provided beforehand, “*at the originating station*”.
28. On 15.04.2019 (before CIRP) SECR informed<sup>22</sup> CD about the amounts outstanding in respect of ENHC, which were to be debited on account of ENHC under Freight Marketing Policy of the Railways. This was

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<sup>20</sup> Electronic Railway Receipt

<sup>21</sup> Treasury Receipt

<sup>22</sup> Pg 90 of the Counter

followed up by another letter<sup>23</sup> of 23.08.2019 (again before CIRP) where it was specifically requested to the CD "...to pay all Engine Hire Charges .... otherwise, railway administration shall be bound to recover the amount from your E-payment A/c along with freight".

29. Clearly, the stipulation about appropriating money from the E-payment account at SBI was conveyed to the CD before CIRP commenced. The right of SECR to collect the amount for services provided from the E-payment account at SBI was a pre-existing right established under the Tripartite Agreement well before the commencement of the CIRP. Not only was this right safeguarded by requiring the CD to maintain a specified minimum balance in the bank account, but it was also fortified through the presence of an irrevocable revolving bank guarantee.
30. The scenario in this case parallels a situation where an amount was placed at the disposal of a party for the provision of goods or services, and upon supplying the corresponding goods or services, the dues were communicated. However, before the necessary accounting entries could be made to account the said amount against the outstanding dues, the initiation of the Corporate Insolvency Resolution Process (CIRP) occurred. The amount realised and accounted for never a part of the CD's assets. Under the Tripartite agreement, it was meant to and always belonged to SECR, the Respondent.
31. This situation differs from that of an operational creditor who, having provided goods or services while holding an advance, offsets it against the outstanding dues. In such a case, the creditor lacks the right to the advance until invoices are issued for the supplied goods or services and acknowledged by the CD. In these circumstances, the creditor, despite holding an advance, may not be able set it off it against the unpaid dues once CIRP commences. The case-laws cited on behalf of the Applicant address this situation and do not apply in the present

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<sup>23</sup> Pg 94 of the Counter

case, which has a different factual matrix, and where price for the services rendered is deemed to have been recovered before the train leaves the originating station.

32. It is useful here to refer to the recent judgment of Hon'ble Supreme Court in the case of **Bharti Airtel**<sup>24</sup> where it observed that”

*“The Corporate Insolvency Resolution Process does not preclude application of contractual set-off. During the moratorium period with initiation of the Corporate Insolvency Resolution Process, recovery, legal proceedings etc. cannot be initiated, enforced or remain in abeyance. Besides the moratorium effect, the terms of the contract remain binding and are not altered or modified.”*

Therefore, while during CIRP and its moratorium period, legal actions and recovery efforts are restricted, the terms of the contract stay unchanged and continue to be binding without any alterations. Consequently, the contractual terms, as envisaged in the Tripartite Agreement, remaining binding do not get affected by the moratorium that comes into effect on commencement of CIRP.

33. In the instant case, ENHC was charged by the Railways under its Freight Marketing Policy, specifically related to the 'Engine on Load (EOL) Scheme,' as outlined in a circular<sup>25</sup> dated 7.3.2013. This policy incorporated provisions for a designated free time for loading and unloading, with charges applicable for engine usage beyond that period. The determination of Engine Hire Charges was carried out under the framework of this freight marketing policy. It is evident therefore that charges for Engine Hire being part of carriage came

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<sup>24</sup> CIVIL APPEAL NOS. 3088-3089 OF 2020 in BHARTI AIRTEL LIMITED AND ANOTHER vs VIJAYKUMAR V. IYER AND OTHERS in Order dated 03.01.2024 (Para 30 of the Order)

<sup>25</sup> Available at [https://indianrailways.gov.in/railwayboard/uploads/directorate/traffic\\_comm/Freight-Mktg-2k13/FM\\_05.pdf](https://indianrailways.gov.in/railwayboard/uploads/directorate/traffic_comm/Freight-Mktg-2k13/FM_05.pdf)

under the definition of 'freight' as per the Railway Act<sup>26</sup> and could have been realized under the Tripartite Agreement.

34. It is also noteworthy that the RP did not contest the realisation by SECR on account of ENHC from the time of his appointment until the amount was mostly realised and collected. It appears that when credit notes for the amounts so accounted were being issued by SECR to CD, the RP seized an opportunity to access that sum of money, even though it did not originally belong to the Corporate Debtor (CD). This amount had already been designated for payment to SECR against pre-existing dues predating the initiation of CIRP through the E-Payment Scheme agreed through the Tripartite Contract of 26.11.2009.
35. Given the Respondent's (SECR's) pre-existing right under the Tripartite Agreement of 26.11.2009, to realise the amount of freight from the bank account held at SBI, for the pre-CIRP period, and with such realisation being communicated to the CD prior to the initiation of CIRP, the moratorium under Section 14 of the Insolvency and Bankruptcy Code (IBC) does not apply in this case.

Consequently, the Application is dismissed.

**Sd/-**  
**(SANJAY PURI)**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**(RAJEEV BHARDWAJ)**  
**MEMBER (JUDICIAL)**

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<sup>26</sup> Railways Act 1989: Section 2(17)- 'freight' means the charge levied for the carriage of goods including transshipment charges, if any;