

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT – I, MUMBAI BENCH

IA No. 1043 of 2020
in
CP (IB) No. 490/MB/2018
(Under Section 14 of the IBC, 2016)

Sundaresh Bhat
Resolution Professional of Sterling Biotech Limited
... Applicant

V/s

1. Assistant Commissioner of State Tax
State Goods and Service Tax Unit – 55,
Behind Traffic Police Station,
Panchbatti Circle, Station Road,
Bharuch – 392 001, Gujarat.

... Respondent No. 1

2. State Bank of India
Atladara District, Baroda
Gujarat – 390 012.

... Respondent No. 2

IN THE MATTER OF:

Andhra Bank

... Financial Creditor

V/s

Sterling Biotech Limited

... Corporate Debtor

Order Dated: 22.09.2020

Coram:

Hon'ble Member (Judicial), Janab Mohammed Ajmal

Hon'ble Member (Technical), Shri V. Nallasenapathy

For the Applicant: Mr Ayush J. Rajani
For the Respondent: Mr Dilipbhai K Patel (State Tax Officer) for R1
and Mr Rituraj Meena for R2 (State Bank of India)

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. The Applicant/Resolution Professional (RP) of Sterling Biotech Limited (Corporate Debtor) filed this Application under Section 14 of the Insolvency and Bankruptcy Code, 2016 (the Code) read with Section 18(1)(f) and Section 238 of thereof, praying for the following reliefs:
 - i. *Direct R1 to immediately refund/deposit the sum of Rs.1,23,93,968/- back to the account maintained by the Corporate Debtor with R2;*
 - ii. *Direct R2 to strictly adhere to the provisions of Section 17(1)(d) and henceforth only consider instructions of the Applicant RP for any “debts” to the account of the Corporate Debtor maintained with R2.*
 - iii. *Pass necessary directions requiring R1 to file an Affidavit confirming that it would refrain from taking any further adverse actions either against the Corporate Debtor or its assets during the “Moratorium” period.*
2. The Applicant submits that he is the RP of the Corporate Debtor which was put under Corporate Insolvency Resolution Process (CIRP) by an order of this Tribunal dated 11.06.2018. The grievance of the Applicant is that during the period of CIRP R1 on 09.06.2020 directed R2 to pay to it a sum of Rs. 1,23,93,968/- from the account of the Corporate Debtor towards the State Tax dues and accordingly R2 on 10.06.2020 made the payment to R1.
3. The Applicant submits that consequent upon public announcement inviting claims from the creditors of the Corporate Debtor, R1 filed claim for a sum of Rs.3,43,51,895/- with regard to Gujarat Value Added Tax Liability of the Corporate Debtor for the period from 2001-2002 to 2003-04 and the same was admitted by the Applicant. The CIRP period of the Corporate Debtor expired on 08.12.2018 and on an application by this Applicant, this Bench by an order dated 28.11.2018 extended the CIRP by 90 days and the CIRP came to an end on 08.03.2019.

4. It is submitted that this Bench by an order dated 08.05.2019 dismissed the withdrawal Application filed by CoC/Financial Creditors under Section 12A of the Code and passed an order of liquidation of the Corporate Debtor. The said order of Liquidation was stayed by Hon'ble NCLAT by an order dated 30.05.2019 and the Hon'ble NCLAT ordered as below:

“Till the terms and conditions under Section 12A is complied, the Resolution Professional will manage the company and ensure that company remains a going concern and protects its assets.”

The Applicant submits that in effect, the CIRP is continuing and the Applicant is keeping the Corporate Debtor as a going concern as ordered by the Hon'ble NCLAT.

5. The Applicant submits that on 10.04.2019, R1 conducted tax assessment for the year 2014-15 and passed assessment order against the Corporate Debtor, wherein the Corporate Debtor was ordered to pay a sum of Rs. 1,03,90,443/-. The Applicant filed an Appeal against the Assessment Order before Gujarat Value Added Tax Tribunal (GVAT) on 11.10.2019 and the Hon'ble GVAT Tribunal by an order dated 11.10.2019 directed R1 not to take any coercive action and adjourned the matter to 10.12.2019. However, the matter was not heard on 10.12.2019 and the next date of hearing was also not fixed. R1 issued a notice to R2 on 09.06.2020 under Section 44 of the GVAT Act and directed R2 to make a payment of Rs. 1,23,93,968/- towards the pre-CIRP dues of the Corporate Debtor. Accordingly, R2 transferred a sum of Rs. 1,23,93,968/- on 10.06.2020 from the account of the Corporate Debtor maintained with R2.
6. The Applicant submits that CIRP is still continuing and during this period, the action of R1 by exercise of powers under Section 44 of GVAT Act, is in violation of Section 14 of the Code, in directing R2 to make payment of Rs. 1,23,93,968/-. Since this amount has been transferred in violation of Section 14 of the Code, the Applicant seeks direction against R1 to refund the said amount.
7. During the hearing on 21.08.2020, the Asst. Commissioner of State Sales Tax appeared before this Bench through video-conferencing and took time to file reply.

However, for the hearing on 11.09.2020 another officer of R1 appeared before this Bench and submitted a one-page reply which was not even signed by a responsible person. Hence, we did not take the said reply on record. However, the said officer has stated that since the order passed by the GVAT Tribunal on 11.10.2019 had not been extended, they in exercise of powers under Section 44, gave directions to R2 to transfer a sum of Rs. 1,23,93,968/- to R1. Accordingly, R2 transferred the said amount.

8. Section 14 of the code reads as below:

“14. Moratorium. –

(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 judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off 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 (54 of 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.

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;]

(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.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

[(3) The provisions of sub-section (1) shall not apply to —

[(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

[(b) a surety in a contract of guarantee to a corporate debtor.]

(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.”

9. Section 238 of the code reads as below:

“238. Provisions of this Code to override other laws. –

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

10. A conjoint reading of Section 14(1)(a) and Section 238 of the Code, clearly shows that the Code overrides Section 44 of the GVAT Act, as the same is inconsistent with the provisions of the Code. Thus the action of R1 is clearly barred by provisions of Section 14(1)(a).

11. The RP relied on the following judicial pronouncements to buttress his contention that the Corporate Debtor is still under CIRP and Section 14 moratorium is in force and further considering the fact that the provisions of the Code has overriding effect over the GVAT Act by virtue of section 238 of the Code, the action of R1 is not in consonance with the Code:

- a. *Pr. Commissioner of Income Tax vs Monnet Ispat and Energy Limited* (SLP No.6483/2018/ 2018 SCC Online Supreme Court 984;
- b. *Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. & Ors. (2000)* 5 SCC 694;
- c. *Stock Exchange, Bombay vs. V. S. Kandalgaonkar & Ors. (Civil Appeal No.4354 of 2003)*
- d. *Dishnet Wireless Limited vs. Aircel Limited (WP) No. 24097 and 24098 of 2018)*

12. The RP further submits that since the claim of R1 had already been admitted by the RP as an operational creditor, R1 cannot take away the money in this manner which is against the provisions of the waterfall mechanism provided under Section 53 of the Code.
13. Even though the CIRP period was over and the liquidation order passed by this Bench was stayed by the Hon'ble Appellate Tribunal and the direction was given that the RP will manage the company and ensures that the company will remain as a going concern, we are of the considered opinion that CIRP is still continuing. Thus the Moratorium provided u/s 14 is in operation and the action of R1 is hit by Section 14(1)(a) of the Code.
14. In view of the above discussion we direct R1 to refund the sum of Rs. 1,23,93,968/- to the account of the Corporate Debtor maintained with R2.
15. As far as *prayer ii. & iii. (supra)* are concerned, no relief can be given since the prayers are in the nature of advance ruling. The Applicant is at liberty to approach this bench for necessary directions as and when need arises. Accordingly, the Application is partially allowed and disposed of.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
MOHAMMED AJMAL
Member (Judicial)