

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT No. – I, SPECIAL BENCH, MUMBAI

I. A. No. 123 OF 2020

in

C.P. (IB) No. 3568/(MB)/2019

Dharit Kishorbhai Shah,
Resolution Professional of
Jailaxmi Sugar Products (Nitali) Pvt. Ltd.
C/o Bipin & Co. Chartered Accountants,
302, centre point, R.C. Dutt Road, Alkapuri,
Vadodara-390007.

... Applicant

V/s

The Deputy Commissioner,
Goods & Service Tax Department,
Nashik VAT Office,
VAT-E-003, Room No. 303,
Prashant Nagar, PathardiPhata,
Nashik, Maharashtra – 422010.

... Respondent

IN THE MATTER OF:

Punjab National Bank

... Financial Creditor

V/s

Jailaxmi Sugar Products (Nitali) Pvt Ltd.

... Corporate Debtor

Order Dated: 13.01.2021

Coram:

Hon'ble Member (Judicial), Shri H. P. Chaturvedi

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

Appearances (via videoconference):

For the Applicant : Mr. Amey Hadwale, with Ms. Geeta Lundwani and Ms. Vidhi
Shardha, Advocates.

For the Respondent : Mr. Amar Mishra with Mr. Tejas P. Kasar, Advocates.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. The matter is taken up on videoconference.
2. This is an Application filed by the Resolution Professional seeking the following reliefs: -
 - “a. Declare the letter dated 03/12/2019 bearing reference No. 2018/Tax/Recovery/Kavi-151 issued by Collector of Usmanabad and the withdrawal of Rs. 76,75,000/- done by Respondent as illegal / non-est in law;*
 - b. Direct the Respondent (GST Department, Nashik) to forthwith refund the amount of Rs. 76,75000/- along with an interest @18% p.a. to the Bank Account of the Corporate Debtor.”*
3. The Counsel for the Applicant submits that:-

- a. The Corporate Debtor was put under Corporate Insolvency Resolution Process (CIRP) by an order of this Bench dated 06/11/2019.
- b. The Respondent is the goods and services tax department who is an operational creditor in the CIRP.
- c. On 16/11/2019, the Applicant informed various statutory authorities like GST, EPFO etc. about the on going CIRP.
- d. On 19/12/2019, the Applicant informed the Axis Bank, Usmanabad about the on going CIRP and requested to freeze the debit transactions in the Corporate Debtor's Account.
- e. During the CIRP Period i.e. on 04/12/2019, a sum of Rs. 76,75,000/- was debited from the bank account of the Corporate Debtor and the same has been credited to the Respondent.
- f. It is learnt that the Respondent approached the Collector of Usmanabad for recovery of arrears of tax and on the instructions of the Collector of Usmanabad to Axis Bank, Usmanabad Branch, a sum of Rs. 76,75,000/- was transferred from the current account of the corporate debtor to the current account of Respondent.
- g. Section 14 of the Insolvency and Bankruptcy Code, 2016 provides:
“(1) Subject to provisions of sub section 2 & 3, on insolvency commencement date the Adjudicating authority shall by order declare moratorium for prohibiting all of the following, namely;
 - a)....*
 - b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein.*
 - c)....*
 -”*

4. The transfer of above said amount from the Corporate debtor to the Respondent on the intervention of the Collector of Usmanabad is hit by the provisions of section 14 of the Code. The Respondent was requested to reverse the transaction by transferring the said amount back to the Corporate Debtor's account and also advised to file the claim before the Applicant.
5. The letter dated 03/12/2019 issued by the Collector of Usmanabad reveals that the said amount was debited to the Account of the Corporate Debtor and adjusted towards the tax liability of a completely different entity namely Sheelatul Sugar Tech Private Limited.
6. Hence this Application.
7. The Respondent in its reply contended as below:
 - a. M/s Sheelatul Sugar Tech Private Limited is a defaulter for payment of GST dues for which a notice was issued.
 - b. The Corporate Debtor by letter dated 05/08/2019, stated that they have given on lease, one of the sugar plants i.e. M/s Sheelaatul Sugar Tech Private Limited and further they undertook to pay the entire GST dues within 15-20 days.
 - c. On 26/08/2019, the Corporate debtor submitted to the Respondent that the GST dues of M/s Sheelaatul Sugar Tech Private Limited will be paid by the Corporate Debtor and also issued cheque dated 03/09/2019 for Rs. 76,75,000/- in favour of the Respondent, drawn on Axis Bank, Usmanabad Branch.
 - d. On the failure of the M/s Sheelatul Sugar Tech Private Limited to pay the GST dues, the Respondent was constrained to issue third party notice

under Section 79(1)(c) of GST Act to the Corporate Debtor. Thereafter, the local Tahsildar was approached for collecting the tax due.

- e. The tax due from the Applicant is a statutory due which has been categorised as operational debt under Section 5(21) of the Code.
 - f. Waiving of statutory dues will constitute breach of the relevant statute. The statutory creditor, who was not even provided an opportunity to participate in the meeting of creditors while considering the Resolution Plan, cannot be excluded in entirety and denied the right to be paid. A resolution plan framed under one statute cannot prevail over another statute.
 - g. Operational Creditors and Financial Creditors shall be treated on equal footing and to support this argument the respondent relied on the Judgment of Hon'ble NCLAT in the case of *Binani Industries Limited & Ors....V/s.... Bank of Baroda and Ors. (MANU/NL/0284/2018)* and the Judgement of Hon'ble Supreme Court in the case of *Swiss Ribbons Private Limited and others....V/s... Union of India and Others (MANU/SC/0079/2019)*.
8. On hearing both the sides, this bench is of the view that the liability towards Sales Tax due is not towards the Corporate Debtor but it is the due payable by M/s Sheelaatul Sugar Tech Private Limited. Even assuming that the Corporate Debtor is liable to pay that amount, the collection of due by the Respondent during CIRP is prohibited by moratorium under Section 14 of the Code. The Judgments referred by the Respondents is not relating to the issue involved in this Application and will not come to the aid of the Respondent.
9. The submission of the counsel for the Respondent that previously the Corporate Debtors agreed to pay the Sales Tax due of M/s Sheelaatul Sugar Tech Private Limited, from and out of the Sales Tax refund receivable by the Corporate Debtor

is unenforceable during CIRP. Hence, the submission of the Counsel for the Respondent that the Corporate Debtor has received refund of Rs. 80,00,000/- from the sales tax department and from the said amount only this recovery is made cannot be accepted.

10. The submission that this is a statutory due and hence it can be collected in this manner is against the provisions of section 14 of the Code.
11. It is beneficial to refer the following Judgments wherein it was held that Section 14 of the Code enforces moratorium on the recovery by creditors.

- a. ICICI Bank Ltd. vs. IRP for Ruchi Soya Industries (Company Appeal (AT) No. 390/2018)dated 24/07/2018 wherein it was held that:

“In the present case we do not intend to go into question as to when the order of moratorium was received by the Bank. Even if it is assumed that it was received by the Bank on 19.12.2017, it was not open to them to debit any amount from the account of the Corporate Debtor subsequent to order of moratorium. Further, as the order of moratorium came into its effect immediately i.e. on 15.12.2017, the date of receipt of order has no relevancy with the same.”

- b. State Bank of India vs. Mr. V. Ramakrishnan, Company Appeal (AT) (Insolvency) No. 213/2017 (MANU/NL/0025/2018) wherein it was held that;

“On bare perusal of the aforesaid provisions, it is clear that not only institution of suits or continuation of pending suits or proceedings against the Corporate Debtor are prohibited from proceedings, in terms of clause (b) of subsection 1 of Section 14 of the I&B Code, transfer, encumbrance,

alienation or disposal of any of its assets of the Corporate Debtor and/or any legal right or beneficial interest therein are prohibited. Clauses (c) and (d) of subsection 1 of section 14 of I&B Code prohibits recovery or enforcement of any security interest created by the Corporate Debtor in respect of its property including the property occupied by it or in the possession of the Corporate Debtor.”

- c. State Bank of India vs. Debashish Nanda, Company Appeal (AT) (Insolvency) No. 49/2018 (MANU/NL/0081/2018) wherein it was held that:-

“Bank cannot debit any amount from the Corporate Debtor’s account after the order of moratorium, as it amounts to recovery of amount after the order of moratorium.”

- d. Indian Overseas Bank vs. Dinkar T. Venkatasubramanian (RP for Amtek Auto Ltd.) Company Appeal (AT) (insolvency) no. 267/2017 (2017 SCC OnLine NCLAT 608) wherein it was held that:

“Once moratorium is declared, it is not open to any person including ‘Financial Creditor’ and the appellant bank to recover any amount from the account of the Corporate Debtor, not it can appropriate any amount towards its own dues.”

12. In view of the fact that the amount has been debited when the CIRP is in progress and the same is hit by the provisions of Section 14 of the Code. The Respondent is liable to repay the amount to the Corporate Debtor and accordingly the Respondent is directed to refund the amount of Rs. 76,75,000/- to the Applicant within 30 days of this order.

13. Accordingly, this Application is allowed.

SD/-

V. NALLASENAPATHY
Member (Technical)

Steno: -Vedant Kedare

SD/-

H. P. CHATURVEDI
Member (Judicial)

NATIONAL COMPANY LAW TRIBUNAL
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Punjab National Bank

V/s

Jailaxmi Sugar Products (Nitali) Pvt Ltd

*** **

Dated 13th January, 2021

ORDER

8. The matter is taken up on VC.

The Application is allowed vide separate orders.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

H.P. CHATURVEDI
Member (Judicial)

Steno: -Vedant Kedare