

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT-V**

**I.A. No. 3878 of 2023  
In  
C.P. No. 979 of 2022**

Under Sections 60(5) read with  
Section 14 of Insolvency &  
Bankruptcy Code, 2016 And  
Regulation 32 of Insolvency and  
Bankruptcy Board of  
India (Insolvency  
Resolution Process for  
Corporate Persons)  
Regulations, 2016

**I. A. No. 3878 of 2023**

**Corob India Pvt. Ltd.**

....Applicant

vs.

**Mr. Birendra Kumar Agarwal and  
Anr.**

.....Respondents

In the matter of

**Catalyst Trusteeship Limited**

.... *Financial Creditor*

vs.

**Renaissance Indus Infra**

**Private Limited**

.... *Corporate Debtor*

**Order Dated: 01.03.2024**

**Quoram:**

Hon'ble Reeta Kohli, Member (Judicial)  
Hon'ble Madhu Sinha, Member (Technical)

**Appearance in Physical Mode:**

For the Applicant: Adv. Manas Kotak (PH)  
For the Respondent: Adv. Kunal Kanungo

**ORDER**

***Per: Madhu Sinha, Member (Technical)***

1. *The Applicant Corob India Pvt. Ltd. has sought the following reliefs from this Hon'ble Tribunal:*
  - a) *Direct Respondent No. 1 to forthwith return the original bank Guarantee bearing No. 18BG048 to the Applicant;*
  - b) *In the alternative to prayer clause (a) above, permanently restrain Respondent No. 1 from invoking the bank Guarantee bearing No. 18BG048 and the Respondent No. 2 from making payment under the Bank guarantee bearing No. 18BG048;*
  - c) *Direct Respondent no. 1 to forthwith return/refund an amount of INR 91,34,304/- being the amount of deposit to the Applicant along with an amount of INR 15,36,065/- being the amount of interest at the rate of 18% p.a. from 19.09.2022 till the date of filing of this Application;*
  - d) *Direct Respondent No 1 to pay interest at the rate of 18% p.a. on the amount of Deposit from the date of filing this Application to the date of actual return of the amount of Deposit to the Applicant;*
  - e) *In the alternative to prayer clause c above, direct Respondent No. 1 to admit the claim of the Applicant as a financial creditor filed in Form C dated 17.04.2023;*

- f) *Pending hearing and final disposal of the present Application, restrain Respondent No. 1 from invoking the Bank Guarantee bearing No. 18BG048 and Respondent No. 2 from making payment under the Bank Guarantee bearing No. 18BG048;*
- g) *Pending hearing and final disposal of this Application, restrain the respondent No. 1 from treating and/or including the Deposit as part of the assets /property of the Corporate Debtor as part of the ongoing corporate insolvency resolution process of the Corporate Debtor;*
- h) *Pending hearing and final disposal of the present application, direct respondent no. 1 to identify and set aside the funds equivalent to the amount of Deposit, viz. INR 91,34,304 along with an amount of INR 15,36,065 being the amount of interest at the rate of 18% p.a. from 19.09.2022 till the date of filing this Application and direct Respondent No. 1 that such amount cannot be utilized by Respondent No. 1 without prior permission of this Hon'ble Tribunal*
- i) *Ad-interim/ interim reliefs in terms of prayer clauses f, g and h above;*
- j) *For costs of this Application;*
- k) *Grant any other/further reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of this case.*

### **Brief Facts and Submission by the Applicant**

1. The Applicant and the Corporate Debtor executed a Lease Deed dated 12.12.2018 where under the Corporate Debtor agreed to give the Leased Premises on lease to the Applicant for a period of 10 years commencing from 12.10.2019. Unit Nos. 001 to 010 of Pre-Engineered Building no. WA-X in the Renaissance Industrial Smart City at Village Vashere, Taluka Bhiwandi in Thane District was the Leased Premises.
2. Article 3.4 of the Lease Agreement split the Security Deposit into two parts which are as follows:

- a. Deposit of Rs. 91,34,304/- which is equal to rent for a period of 4 months.
  - b. Conditional Bank Guarantee for Security Deposit of Rs. 45,67,152/- which is equal to rent for a period of 2 months.
3. As per the Lease Deed, invocation of Bank Guarantee or forfeiture of Deposit Amount could be done only on the following two grounds:
    - a. In the event of the Applicant defaulting in making payment of monthly lease rent.
    - b. For recovering any damage to the property caused by the Applicant in respect of the Leased Premises.
  4. The Bank Guarantee itself expressly provides that its invocation could be done on the above stated two grounds only.
  5. The Corporate Debtor should have handed over the possession of the Leased Premises to the Applicant on 12.10.2019, it being the lease commencement date however despite execution of the lease deed, payment of Deposit and submission of Bank Guarantee the possession was not handed over.
  6. The Applicant on 08.04.2019 visited the office of the Corporate Debtor to discuss the status of the construction work for handover of Leased Premises and to highlight that compliance/adherence to agreed timelines for the handover which is extremely crucial to the Applicant. Thereafter, the Applicant repeatedly followed up with the Corporate Debtor and enquired as to why timelines for the handover were not being met through its emails dated 11.04.2019 and 11.10.2019.
  7. However, the Corporate Debtor eventually failed to meet the timelines and did not handover the Leased Premises to the Applicant. On 27.12.2019, the Corporate Debtor also addressed a letter to the Applicant to inform him about a penalty of rent free period of 1.5 days for each day of delay which would be applicable from 12.10.2019 and further continued to follow up with the Corporate Debtor in relation to the progress of the construction work on the Leased Premises.

8. On 16.06.2021 and 16.07.2021 the Corporate Debtor informed the Applicant that poor financial health and lockdown due to Covid-19 was the cause of delay in handover of the leased premises. The Corporate Debtor further confirmed that the handover would take place by the deadline of 30.09.2021 and considering monsoon conditions, a grace period of maximum one month to be added to the date of deadline, making the final deadline as 30.10.2021.
9. On 29.06.2021, when the Applicant visited the site, it was found that construction work on Leased Premises was slow and even basic work was pending. In such circumstances, handover as per the above stated deadline appeared unlikely to the Applicant.
10. Ultimately the deadline was not met and a meeting was held between the Corporate Debtor and Applicant on 10.02.2022 wherein the Corporate Debtor claimed a rent free period of 1278 days on account of delay in handing over of possession of Leased Premises by 852 days. The Corporate Debtor agreed to furnish its final proposal regarding the handover of the Premises latest by 24.02.2022.
11. On 22.02.2022, the Corporate Debtor, vide an email to the Applicant, informed that 15 to 16 months of rent free period can be availed by the Applicant only if it pays the balance construction cost of Rs. 3.45 crores to the vendors directly in order to facilitate the handover of Leased Premises within 3-4 months of such payment. This email again showed there was no concrete timeline with respect to the handover of the Leased Premises.
12. Since the Corporate Debtor was in breach of the Lease Deed therefore the Applicant was constrained to issue Notice of Default dated 30.06.2022 calling upon to remedy and rectify breach in relation to handing over the Leased Premises and providing rent free period among others within 15 working days from the receipt of the Default Notice.
13. When the Notice of Default and Final Reminder Notice were not acted upon favourably by the Corporate Debtor, the Applicant had

to proceed with the final step of sending the Termination Notice dated 12.08.2022. The Applicant according to this notice sought refund of deposit amount and return the bank guarantee. The Corporate Debtor did not reply to the Termination Notice also.

14. A meeting was held between the Applicant and the Corporate Debtor on 07.12.2022 wherein the Corporate Debtor categorically agreed to return the Deposit amount and the Bank Guarantee.
15. Thereafter, this Hon'ble Tribunal vide order dated 31.03.2023 initiated Corporate Insolvency Resolution Process against the Corporate Debtor on the basis of the Petition filed by Catalyst Trusteeship Limited and Respondent no. 1 was appointed as the Resolution Professional of the Corporate Debtor.
16. Without prejudice to the fact that the Deposit amount is an asset of the Applicant and not of the Corporate Debtor, the Applicant lodged its claim in Form C for admission of deposit as financial debt. Additionally, the Applicant also lodged a claim in Form F for refund of expenses and losses incurred by it on account of failure on the part of the Corporate Debtor to perform its obligations under the Lease Deed.
17. By email dated 02.05.2023, Respondent No. 1 sought the following information from the Applicant which was duly provided to it by the Applicant by its email dated 05.05.2023:-
  - a. An excel file containing interest calculation of claim lodged by the Applicant;
  - b. Ledger Account of the Corporate Debtor in the books of the applicant as on 31.03.2023 and
  - c. Copy of the PAN and Aadhar Card of the Directors signing Form C.
18. Vide letter dated 02.05.2023, the Applicant sought cancellation of the Bank Guarantee as the primary purpose for which it had been furnished had become frustrated. In response to the aforementioned, on the same day, Respondent No. 2 called upon the Applicant to furnish the original Bank Guarantee. However,

since this document was in the possession of the Corporate Debtor who in turn in control of Respondent No. 1 therefore, the Applicant was unable to comply with this requisition.

19. The Applicant thereafter again addressed a letter dated 16.05.2023 to Respondent No. 1 asking for refund of Deposit and return of Bank Guarantee.
20. Respondent No. 1 addressed an email dated 18.05.2023 informing the Applicant that the Applicant had been admitted as “other creditors” to the extent of Rs. 1,00,44,231/- as the amount claimed by the Applicant is with respect to payment towards Leased Premises and Article 6 of the Lease Deed does not state that Deposit shall take the form of a loan.
21. Through the letter dated 29.05.2023, the Applicant called upon Respondent No. 1 to re-consider the claim of the Applicant as a Financial Creditor for the following reasons:
  - a) The amount of Security Deposit is not towards payment of Leased Premises but is a refundable security deposit and
  - b) Upon the Corporate Debtor’s failure to perform its obligations under the Lease Deed, pursuant to Article 6 of the Leased Deed, the Security Deposit takes the form of a financial debt.
22. The Applicant relies on the judgement of the Hon’ble Supreme Court in **Embassy Property Developments Private Limited v. State of Karnataka and Ors. (2020) 13 SCC 308** wherein it was held that imposition of moratorium under Section 14 of the Code cannot and does not create any new rights in favour of the Corporate Debtor over and above the rights as existing prior to the initiation of CIRP. In the facts of the present case, the position prior to Corporate Debtor’s admission into CIRP was that the Deposit is an asset of the Applicant and as envisaged in the Minutes, the Corporate Debtor undertook to return the Deposit. In view of the foregoing, Respondent No. 1 is duty bound to honour the obligations and rights which existed prior to Moratorium and the amount of Deposit ought to be returned to the Applicant forthwith.

Furthermore, Section 18 of the code also provides that assets owned by a third party and in possession of the Corporate Debtor under contractual arrangement cannot be considered as Corporate Assets.

23. It is categorically submitted by the Applicant that the Deposit provided to the Corporate Debtor was 10 months prior to the intended handover of the Leased Premises. This was because the Corporate Debtor wanted to use the Deposit for construction of Leased Premises. Such intention of the Corporate Debtor is further made clear by the specific demand by the Corporate Debtor on 22.02.2022 for a further advance of Rs. 3.45 crores which was expressly intended to be used for construction of the Leased Premises. Since the Deposit provided by the Applicant had been utilised by the Corporate Debtor for construction of the Leased Premises, the Deposit constitutes an amount disbursed against time value of money and will constitute a financial debt.

**Submission by the Respondent 1**

24. It is the case of Respondent No. 1 that claim of the applicant for an amount of Rs. 1,01,25,303/- comprising principal amount of Rs. 91,34,304/- and interest amount of Rs. 9,91,009/- charged at the rate of 18% p.a. from 11.09.2022 till 17.04.2023 is with respect to the immovable property which was to be given on lease. Further, it is also the case of Respondent No. 1 that the Lease Deed nowhere specifies that the Security Deposit would be construed as loan. Additionally, the aforementioned principal amount has been advanced by the Applicant to the Corporate Debtor as interest free security deposit. Therefore, the commercial effect of borrowing was absent and thus, the present case is not the one involving Financial Debt and the Applicant cannot be classified as Financial Creditor.
25. It was submitted that the Corporate Debtor failed to provide possession of the premises forming subject matter of the Lease deed and in the interim, CIRP was initiated against the Corporate Debtor.

After perusing the Lease Deed, it is clear that on failure to refund security deposit, the Corporate Debtor was liable to pay to the Applicant interest at the rate of 18% p.a. on account of the deposit from the date such refund is due up to the date of actual payment/realization. Further, it was agreed between the parties that the applicant would have the right to continue using the leased premises without having to pay any direct lease rent till the time the security deposit with interest at the rate of 18% p.a. is returned to the Applicant by way of cheque/DD/RTGS. This means that the said security deposit was to be treated as the payment towards the Lease Rent and was never disbursed or deposited against the consideration for the time value of money. Therefore, disbursal against consideration for time value of money was also absent and thus, the present case is not the one involving Financial Debt and the Applicant cannot be classified as Financial Creditor.

26. The Respondent also imperatively points out that even the Balance Sheet of the Corporate Debtor shows that the above stated amount of security deposit is treated as “non-current” liabilities, therefore the said amount was in fact never treated as long term loan and advance by the Corporate Debtor.
27. The Respondent submitted that once it is proved that interest free security deposit was made towards the Lease Rent equivalent to 4 months’ period and was in the nature of Operational Debt, it cannot change its colour to ‘Financial Debt’ even if it is stipulated under the Lease Deed that an interest charged at 18% would be charged till the date of realization of this amount because an Operational Debt can also carry interest rate as is in the case of invoices raised by Operational Creditors. The Respondent thereby submitted that on the directions of this Hon’ble Tribunal it is ready to classify the Applicant’s claim under the category of “Operational Creditors”.
28. Respondent No. 1 stated that vide email dated 30.08.2023, the suspended director of the Corporate Debtor had handed over the

said Bank Guarantee to Respondent No. 1 on 01.09.2023. The Respondent at the time of hearing on 30.08.2023 as well as on 11.12.2023 had submitted he would refrain from invoking Bank Guarantee. Therefore, it is submitted that he shall take appropriate steps with respect to the said Bank Guarantee as per the directions of this Hon'ble Tribunal.

### **Findings**

1. The main contention of the Applicant is that since the Security Deposit, although given on the basis of a Lease Agreement, is supposedly used for carrying out construction work in the Leased Premises, given the fact that it was demanded 10 months prior to the date of commencement of lease, it deserves to be treated as a Financial Debt. The Bench is however of the considered opinion that this is not akin to a case of an underlying Sale Agreement which confers the status of a Financial Creditor on the Home Buyer. Moreover, interest @ 18% p.a. payable on the amount of Deposit is to be charged from the date the refund is due up to the date of actual payment/realisation and not earlier. Thus it is evident that the time value of money and commercial effect of borrowing both of which are essential ingredients to constitute a Financial Debt is lacking in the present case. Therefore, the Applicant cannot be classified as a Financial Creditor.
2. The next question to be answered by this Bench is whether the Applicant is fit to be classified as an Operational Creditor. In order, to answer this reliance is placed on the case of **Jindal Steel & Power Ltd. v. DCM International Ltd.** (2017 SCC OnLine NCLAT 441) wherein it was held that tenants do not come within the meaning of "operational creditor" as defined under Sections 5(20) and (21), IB Code. In this case, the tenant sought to recover the security deposit on account of the termination of the lease agreement with the landlord. The NCLAT upheld the order of the NCLT rejecting the application filed under Section 9 by the tenant holding that the tenant does not come within the meaning of the term "operational creditor". Thus in light of

the above cited case law it is clearly established that the Applicant is not fit to be classified as an Operational Creditor.

3. In light of the facts and circumstances of the present case and the settled law it is established that the Applicant is neither fit to be classified as a Financial Creditor nor as Operational Creditor. Respondent no. 1, therefore, has rightly classified the claim under the heading "Other Creditors".
4. It is further pertinent to note that the possession of the Leased Premises was never transferred to the Applicant. Respondent No. 1 has categorically refrained from invoking the Bank Guarantee which was handed over to him on 01.09.2023 and has also agreed to take appropriate steps with respect to the said Bank Guarantee as per the directions of this Hon'ble Tribunal. In light of the above stated this Tribunal directs Respondent No. 1 to forthwith return the original bank Guarantee bearing No. 18BG048 to the Applicant.
5. Therefore, in conclusion, apart from allowing Prayer (a), all other prayers are rejected and this I.A. is dismissed.

**Sd/-**

**MADHU SINHA  
MEMBER (TECHNICAL)**

**Sd/-**

**REETA KOHLI  
MEMBER (JUDICIAL)**

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