

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.308
IA/440(AHM) 2023
in
CP(IB)/137(AHM)2018

Order under An application under Section 60(5)(C) of the Insolvency and Bankruptcy Code, 2016 R/W Regulation 32(E) and 32A of IBBI (Liquidation Process) Regulations, 2016 R/W Rule 11 of NCLT Rules

IN THE MATTER OF:

Consortium of GSEC Ltd.
and Mr. Rakesh Shah
V/s

.....Applicant

Indian Overseas Bank and Ors

.....Respondent

Order delivered on: 24.04.2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-

SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH - I, AHMEDABAD**

**IA/440(AHM) 2023
in
CP(IB)/137(AHM)2018**

An application under Section 60(5)(C) of the Insolvency and Bankruptcy Code, 2016 R/W Regulation 32(E) and 32A of IBBI (Liquidation Process) Regulations, 2016 R/W Rule 11 of NCLT Rules

In the matter of Diamond Power & Infrastructure Ltd.

CONSORTIUM OF GSEC LTD.

AND MR. RAKESH SHAH

Through Authorised Signatory

Mr. Rakesh Ramanlal Shah,

2nd Floor, Gujarat Chambers Building,

Ashram Road, Ahmedabad- Gujarat-380009

... Applicant

VERSUS

1. INDIAN OVERSEAS BANK

ARM Branch, Sharad Shopping Center,

Chinubhai Tower, Opp. Handloom House,

Ashram Road, Ahmedabad- Gujarat-380009

2. PRASANT JAIN

(IBBI/IPA-001/IP-P01368/2018-2019/12131)

Erstwhile RP of Diamond Power & Infrastructure Ltd.

A501, Shanti Heights, Plot No. 2,3,9B/10 ,

Sector 11, Koparkharine, Thane, Navi Mumbai,

Maharashtra , 400709

... Respondents

Order Pronounced on 24.04.2023

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

For Applicant(s): Mr. Malek Bhatt, Advocate a/w. Mr.
Munjaal Bhatt, Advocate

For Respondent: Mr. Maheen Golibar, Proxy Advocate

O R D E R

Per: Bench.

1. The present application is filed under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 R/W Regulation 32(E) and 32A of IBBI (Liquidation Process) Regulations, 2016 R/W Rule 11 of NCLT Rules in CP(IB) No. 377 of 2018 seeking certain the reliefs and concessions with following prayers: -

(a) Pass an order directing Respondent No. 1 Bank to reverse the amount of Rs.1,58,59,294/- to the account of DPIL which was wrongfully deducted by the bank post commencement of CIRP;

(b) To pass any order that this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.

2. It is stated by the applicant that this Tribunal vide order dated 24.08.2018 admitted the petition and initiated

Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. Thereafter, this Tribunal approved the Resolution Plan submitted by GSEC Limited in consortium with Mr. Rakesh Shah [‘Resolution Applicant’] vide Order dated 20.06.2022.

3. Thereafter, to implement the Approved Resolution Plan, the Resolution Applicant transferred the upfront consideration to the lenders and took over the management of DPIL. The change-over of management of DPIL took place on 17.09.2022 [‘Trigger Date’]. The RA is now allowed a clean handover of assets of DPIL as per the Code and the law laid down by the Hon'ble Supreme Court by way of judicial pronouncements in the following cases:

Manish Kumar Vs. Union of India / (2021) 5 SCC 1/, Committee of Creditors of Essar Steel Limited Vs. Satishkumar Gupta 1(2020) 8 SCC 531], Ghanshyam Mishra & Sons Pvt. Ltd. Through authorised Signatory Vs. Edelweiss Asset Reconstruction Company Ltd. Through the Director and others [(2021) 9 SCC 657].

4. The new management of DPIL was in the process of reconciliation of the books of accounts and requested IOB

to share the bank statements and details of fixed deposits of the accounts held by DPIL and provide the margin money balance as on 31st March, 2018, 31st March, 2022 and 17th September, 2022 vide emails dated 14.10.2022 & 28.10.2022 to which IOB vide its email dated 28.10.2022 intimated to DPIL that CC A/C No. 010502000010443 was closed on 19.10.2012 and the proceeds were transferred to new account bearing No. 2926000000008. IOB stated that it will provide the bank statements for all term deposits for the bank accounts of DPIL from 31.03.2018 till 31.03.2022 and 17.09.2022 and that balance in accounts was NIL and presently, no term deposit accounts are available in accounts of DPIL. Thereafter, on 24.01.2023 vide email IOB shared the bank statement of DPIL.

5. However, on the basis of the bank statement received by IOB on 24.01.2023, it came to light that an amount of Rs. 1,58,59,294/- was wrongfully deducted from the account of DPIL bearing account No. 2926000000008 by IOB on 27.09.2018 as an adjustment to the claim of IOB towards DPIL, post commencement of CIRP on 24.08.2018. In utter

shock of the wrongful deduction by IOB, DPIL addressed an email dated 27.01.2023 seeking an explanation for the unauthorized and wrongful deduction made by IOB from the account of DPIL and requested for the financial claim forms filed With the Resolution Professional, revisions made to the claim amount during CIRP and claim working files along with the supporting documents submitted to all three Resolution Professionals of DPIL. It is pertinent to note that IOB vide email dated 27.01.2023 provided an underwhelming reply to DPIL disregarding the wrongful deduction made by IOB stating that IOB has submitted its claim to the Resolution Professional and any request for verification of claim forms shall be made to the Resolution Professional.

6. Subsequently, when IOB failed/refused to provide any cooperation or explanation towards the wrongful deductions made by it, the Resolution Applicant addressed email dated 24.01.2023 to the erstwhile Resolution Professional Prashant Jain intimating him about the deduction made by IOB and seeking assistance in getting the claim documents. However, no response was received

by him. Furthermore, DPIL addressed follow up emails dated 28.01.2023 and 02.02.2023 on the same subject matter to all three erstwhile Resolution Professionals & Interim Resolution Professionals i.e., Prashant Jain, Bhuvan Madan and Ramchandra Dallaram Chaudhary. Surprisingly, again no response was received to the email communications.

7. Finally, after exhausting all options of amicably resolving the issue, DPIL was construed to send a Legal Notice dated 13.02.2023 calling upon IOB to reverse the amount of Rs. 1,58,59,294/- to the account of DPIL. However, IOB yet again failed/refused to issue a reply to the Legal Notice or take an appropriate action regarding the wrongful deduction made by it.
8. It is pertinent to highlight that the wrongful deduction from the account of DPIL by IOB is a clear contravention of Section 14 of the Code and IOB has blatantly breached its duty as a member of CoC and acted in a manner which is detrimental to the other stakeholders of DPIL. Thus,

causing hindrance in the implementation of the Resolution Plan in the interest of all stakeholders.

9. Moreover, IOB is in breach of Clause 8.1(x) of the Approved Resolution Plan which states that with effect from the Trigger Date, for the purposes of utilization towards the operations of the Corporate Debtor, all cash and bank balances (including term deposits) of the Corporate Debtor, shall remain available with the Corporate Debtor. The relevant clause has been produced herein under:

“Clause 8.1(x):- With effect from the Trigger Date, for the purposes of utilisation towards the operations of the Corporate Debtor, all cash and bank balances (including term deposits) of the Corporate Debtor, shall remain available with the Corporate Debtor.”

10. Therefore, the Applicant is filing the present Application seeking a direction to IOB to reverse the amount of Rs. 1,58,59,294/- which was wrongly deducted from the account of DPIL as an adjustment to the claim of IOB. IOB has failed/refused to take an action towards amicably resolving the issue and reverse the amount it has wrongfully deducted from the account of DPIL, despite numerous attempts made by DPIL. Further, nor has IOB

given any satisfactory reply to any email communication or the Legal Notice addressed to it.

11. Certain Reliefs were sought by the Applicant against which the Reply was filed on 26.07.2023 under Diary No. D2803 by the Respondent No. 1 through an Affidavit stating as under:

- a) It is submitted that the Corporate Debtor was enjoying several credit facilities including Non fund based facilities in the form of Bank Guarantee Limit. As per the terms of the sanction, the Corporate Debtor maintained consolidated cash margin in the form of term deposits.
- b) It is submitted that, as per loan agreements made between the Corporate Debtor and Respondent No. 1 for availment of credit facilities such as bank guarantee where the Corporate Debtor had maintained cash margin in the form of Term Deposits as one of the conditions for sanctioning the said bank guarantee facility. The Respondent No. 1 had issued following bank guarantees to the beneficiary on behalf of the Corporate Debtor and undertook to make payment in case of their invocation, thus the said term deposits were lying with the Respondent No. 1 towards cash margin for such Bank guarantees. The list of Bank Guarantees invoked prior to initiation of CIRP is as below:

S. No	Issuance of Bank Guarantee	Invocation of Bank Guarantee	Amount of Bank Guarantee
1.	010571112000024 Open Date: 29.02.2012 Last Amended: 27.02.2018	21.04.2018	Rs.80,76,200/-
2.	010571112000038 Open Date: 23.04.2012 Last Amended: 31.05.2016	23.05.2018	Rs.85,79,576/-
3.	010571112000039 Open Date: 23.04.2012 Last Amended: 22.02.2017	23.05.2018	Rs.55,62,393/-
4.	010571112000040 Open Date: 23.04.2012 Last Amended: 30.08.2017	23.05.2018	Rs.30,57,333/-
5.	010571112000041 Open Date: 23.04.2012 Last Amended: 31.05.2016	23.05.2018	Rs.96,67,529/-
6.	010571112000048 Open Date: 23.04.2012 Last Amended: 31.05.2016	23.05.2018	Rs.42,89,788/-
7.	010571112000050 Open Date: 23.04.2012 Last Amended: 06.10.2017	23.05.2018	Rs.81,32,875/-
8.	010571112000051 Open Date: 23.04.2012 Last Amended: 22.02.2017	23.05.2018	Rs.27,81,197/-
9.	010571112000052 Open Date: 23.04.2012 Last Amended: 31.05.2016	23.05.2018	Rs.48,33,765/-
10.	010571112000053 Open Date: 23.04.2012 Last Amended: 30.08.2017	23.05.2018	Rs.15,28,666/-
11.	292671214000005 Open Date: 29.01.2014 Last Amended: 06.10.2017	23.05.2018	Rs.1,62,65,750/-
12.	292671214000027 Open Date: 23.09.2014 Last Amended: 30.08.2017	23.05.2018	Rs.23,28,725/-

- c) It is submitted that it is an admitted position of fact that the Hon'ble Tribunal had initiated the process of Corporate Insolvency Resolution Process on 24th August 2018 against the Corporate Debtor and that the beneficiaries of the aforesaid Bank Guarantees had invoked such Bank Guarantees prior to initiation of the Corporate Insolvency Resolution Process. It is submitted such Margin Money (Cash margin in

the form of Term Deposits) is to be construed as a Substratum of a Trust created to pay the beneficiaries in whose favour the Bank Guarantees were issued. Therefore, the Margin Money (Cash margin in the form of Term Deposits) does not form a part of the asset corpus of the Corporate Debtor.

- d) It is submitted that section 18 of the Insolvency and Bankruptcy Code, 2016 specifically excludes assets owned by a third party from being a part of the "asset" of the Corporate Debtor. The extract of Section 18 of Insolvency and Bankruptcy Code, 2016 is reproduced herein under: -

"18. Explanation. - For the purposes of this 1[section], the term "assets" shall not include the following, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator. "

- e) In light of the Section 18 of the Code, 2016, the Margin Money (Cash margin in the form of Term Deposits) is to be construed as an asset being held under Trust in favour of a third party i.e. the Beneficiaries of the Bank Guarantees even though it being in possession of the Corporate Debtor and therefore the Applicant cannot claim it as a matter

of right when such asset does not form a part of its estate.

- f) It is submitted that Section 126 of the Indian Contract, 1872 defines a Contract of Guarantee as:

"A contract to perform the promise, or discharge the liability, of a third person in case of his default".

By bare perusal of the definition it can be interpreted that a contract of guarantee is nothing but a right created on a third party. In the present case the Corporate Debtor had deposited the Margin Money (Cash margin in the form of Term Deposits) with the Respondent No. 1 to secure the interest of the Beneficiaries of the Bank Guarantees. Accordingly, by conjoint reading of Section 126 of the Indian Contract Act, 1872 and Section 18 of the Insolvency and Bankruptcy Code, 2016 it can be understood that Margin Money (Cash margin in the form of Term Deposits) were deposited for the benefit of a third party and therefore, cannot form a part of the assets of the Corporate Debtor.

- g) As observed by the Supreme Court of India in the case of Ansal Engineering Projects Limited v. Tehri Hydro Development Corporation Limited [(1996) 5 SCC 450], "It is settled law that the bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not

qualified by the person at whose instance the bank guarantee was given and the beneficiary ...". Therefore, assets that are held under trust cannot be considered as the asset of the corporate debtor.

- h) It is submitted that Insolvency and Bankruptcy Code, 2016 defines "security interest" under section 3(31) as :

"security interest means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a Performance guarantee"

It is clearly evident that Bank Guarantee does not form a part of the security interest and the period of moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 does not create a bar, in any form, upon the Respondent No. 1 to withdraw the money. Hence, the Respondent No. 1 has not caused any error or breach of law in withdrawing such deposit i.e. liquidating the Cash margin in the form of Term Deposits kept towards the Bank Guarantees which were invoked prior to initiation of CIRP.

- i) It is also submitted that once the Resolution Plan has been approved by the Adjudicating Authority no modification or changes can be done to the same. As stated in Section 31 of IBC, 2016 that once the Resolution Plan is approved by the Adjudicating Authority, after it is satisfied, that the Resolution Plan approved by the Committee of Creditors meets the requirements as referred to in Section 30(2) of IBC, 2016. The Supreme Court of India in Ghanshyam Mishra And Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited & Ors. [(2021) 9 SCC 657] held that, "Thus, it is held that once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding upon the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan."

In the present circumstances the Resolution Plan was approved by the Adjudicating Authority on 20th June 2022. It is an admitted position that the claim as raised by the Applicant herein does not form a part of its Resolution Plan. When the claim itself does not form a part of the resolution plan then such claim stands extinguished and no person shall have any right to initiate any proceedings in respect of such claim. In view of such circumstances the Application is liable to be dismissed.

12. The Applicant filed compliance affidavit on 02.06.2023 under Diary No. D1966 to place on record the information memorandum dated 17.09.2021 and Approved Resolution Plan.
13. Applicant and Respondent No. 1 had filed their Written Submissions on 30.01.2024 and 01.04.2024 respectively.
14. We have heard the Counsels for the Applicant and respondent and have perused the documents placed before us. The observation of this Tribunal are as follows:

IOB made the wrongful deduction in 2018 after commencement of the CIRP.

- iv. This Tribunal approved the Resolution Plan submitted by SRA on 20.06.2022 and the principle of clean slate is applicable based on Ghanshaym Mishra and Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd. & ors. (2021) 9 SCC 657.
- v. The contention of the Respondent No.1 that is the Bank Guarantee does not form part of the Security Interest. Therefore the Moratorium under Section 14 does not bar in any form. It can be negated in terms of the Judgment passed by the Hon'ble NCLAT in the matters of Bank of India Vs Bhuban Madan and Bank of India Vs. Sundaresh Bhatt wherein the NCLAT directed the financial creditor to reverse the entry of withdrawal from the corporate debtor after the commencement of CIRP.
- vi. The relevant portion of the Bank of India Vs. Sundaresh Bhatt is reproduced as under :

“6. Considering the submission made by both the sides, looking into the documents and keeping in view the reasons recorded by the Adjudicating Authority, it does appear that money which was lying with the Bank as margin money in the Form of 3 FDs in the name of Corporate Debtor were appropriated after the CIRP was initiated and thus the same could not have been done under Section 14 of IBC. What internal instructions Bank gave on 01.08.2017 is not relevant. Admittedly, F.D. Accounts were closed on 02.08.2017 when Moratorium was in force. We do not find any error in the Impugned Order passed by the Adjudicating Authority.”

- vii. In view of the above, We direct the Respondent No. 1 to make the payment of Rs.1,58,59,294/- to the Successful Resolution Applicant within 15 days from pronouncement of this order.

15. The Application is **allowed** and disposed of.

-SD-

SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)

SP