



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, C-IV

IA-972/2021 IN

CP(IB)4164(MB)2019

Under Section 60(5) of the I&B Code, 2016
In the matter of:

Dhiren Shantilal Shah

...Applicant

V/s

Babyu Rajeev Chandrasekharan & Ors.

...Respondent

In the matter of:

Bank of India

Financial Creditor

V/s

Tuticorin Coal Terminal Private Limited

...Corporate Debtor

Order Dated: 19.04.2023

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) :

Mr. Vinam Gupta a/w Kunal Kanungo, Ms. Tanushree Sogani and Mr. Atishay Jain, Advocates.

For the Respondent(s) :

Mr. Nishit Dhruva a/w Ms. Meghna Arvind and Mr. Prakash Shine, Advocates for Respondent No. 4 & 5 in IA-972/2021.
(Adv. Aniruth Purusothaman, for RP present).



ORDER

Per: Prabhat Kumar, Member (Technical)

IA-972/2021

1. This Application has been filed by Mr. Dhiren Shantilal Shah, the Resolution Professional of M/s. Tuticorin Coal Terminal Pvt. Ltd., seeking

1.1. Declare the transactions mentioned at point no. 6 of this Application as Preferential and Fraudulent Transaction and order that the amount of Rs.1,39,80,000/- (Rupees One Crore Thirty-Nine Lakh Eighty Thousand Only) appropriated by the Respondent No.4 be returned and refunded back to the Corporate Debtor by the Respondent No.4 as per Section 44(1) and Section 49 66(1) of the Insolvency and Bankruptcy Code,2016, 2016 into current account of the Corporate Debtor, BOI CA A/c No. 016020110000150 with Bank of India, Mumbai, Large Corporate Branch, FORT, IFSC-BKID0000160.

1.2. Declare the transactions mentioned at point no.7 of this Application as Preferential and Fraudulent Transaction and order that the amount of Rs.4,44,95,771/- (Rupees Four Crore Forty-Four Lakhs Ninety-Five Thousand Seven Hundred Seventy-One Only) appropriated by the Respondent No.5 be returned and refunded back to the Corporate Debtor by the Respondent No.5 as per Section 44(1) and Section 49 and 66(2) of the Insolvency and Bankruptcy Code,2016, into current account of the Corporate Debtor, BOI CA A/c No. 016020110000150 with Bank of India, Mumbai, Large Corporate Branch, FORT, IFSC-BKID0000160.

2. Respondent Nos.1 to 3 are member of Suspended Board of Directors of the Corporate Debtor; Respondent No.4 is Punjab National Bank which has



appropriated balance in the margin money account of the Corporate Debtor towards credit facility dues recoverable from the Corporate Debtor; and Respondent No.5 is Bank of India which has appropriated balance in the margin money account of the Corporate Debtor towards credit facility dues recoverable from the Corporate Debtor on account of counter guarantee devolving on the Respondent.

3. The CIRP in the case of Corporate Debtor commenced on 20.02.2020 vide order passed in an Application filed under Section 7 of the Code by Bank of India on 13.12.2019.
4. The Applicant has submitted that the instant application is filed before the Tribunal seeking avoidance of certain transactions indulged by the Respondent No.4 and 5 which are preferential and fraudulent in nature as per Section 43 and 66 of the Insolvency and Bankruptcy Code, 2016. The Applicant has stated that
 - 4.1. The Tribunal passed an order dated 20.02.2020 thereby admitting the Company Petition for initiating Corporate Insolvency Resolution Process against Corporate Debtor and appointed Mr. Dhiren Shantilal Shah as an Interim Resolution Professional, who was later continued as Resolution Professional.
 - 4.2. The Respondent Nos.1 to 3 are the members of the Suspended Board of Directors of the Corporate Debtor who are the formal parties to the instant application and the Respondent Nos.4 and 5 are the members of the CoC of the Corporate Debtor who have indulged in preferential and fraudulent transactions.



- 4.3. As per the books of accounts of the Corporate Debtor, the Corporate Debtor holds a fixed deposit of Rs.1,39,80,000/- (Rupees One Crore Thirty-Nine Lakhs Eighty Thousand Only) towards the margin money with the Respondent No.4 i.e. Punjab National bank for Counter Guarantee given to the Bank of India as on 14.02.2017.
- 4.4. He, vide email dated 10.02.2021, sought clarification with respect to holding of any Fixed Deposit by the Corporate Debtor with the Respondent No.4.
- 4.5. The Respondent No.4 replied to the Applicant by email dated 12.02.2021 informing the Applicant that the amount of said fixed deposit was appropriated by the Respondent No.4 on 05.12.2019 against the dues payable by the Corporate Debtor to the Respondent No.4.
- 4.6. The Respondent No.4 after appropriating the amount of said Fixed Deposit had submitted its claim form in Form C to the Applicant.
- 4.7. The Respondent No.5 had encashed the fixed deposits of the Corporate Debtor on 13.12.2019 along with accrued interest to the tune of Rs.4,44,95,771/- which was laying as the margin money against bank Guarantee.
- 4.8. The Applicant submitted that the Fixed Deposit were appropriated by the Respondent No.5 against the outstanding amount of loan payable to the Respondent No.5 by the Corporate Debtor, unilaterally.
- 4.9. The Applicant submitted that in the 15th meeting of the CoC held on 17.02.2021, wherein the Respondent No.5 informed the Applicant in a cavalier manner that the Bank has a general power to adjust the money



available with them once account is declared as 'Non-Performing Asset' account.

- 4.10. The Applicant stated that the Fixed Deposits held by the Corporate Debtor with the Respondent Nos.4 and 5 forms part of the property of the Corporate Debtor being the assets of the Corporate Debtor.
- 4.11. It is of pertinence to note the margin monies held as Fixed Deposits were appropriated during the tenure of the Bank Guarantee which is not in ordinary course of business.
- 4.12. The Applicant has relied upon decision of Hon'ble NCLAT New Delhi in the case of Indian Overseas Bank Vs. Arvind Kumar {Company Appeal (A) (Insolvency) No. 558 of 2020}, wherein the NCLAT has held that

"the 'margin money' is the contribution of the part of the borrower who seeks 'Bank Guarantee'. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the Corporate Debtor."

5. Respondent No.4 i.e. Punjab National Bank has filed its reply vide affidavit dated 17.01.2022 is stating that *the appropriation done by Respondent No.4 was done in accordance with the law as the appropriation was done on 25th December, 2019 under the Bank's right of set-off. Moreover it was done by the Respondent No.4*



much before admission of the Corporate Debtor for insolvency and application of moratorium i.e. with effect from 20th February, 2020. It has further stated vide affidavit dated 14.03.2023 that an amount of Rs.40,34,68,863.43 was due and payable on 5th December, 2019 before appropriation of the amount lying in FDR and the account of the Corporate Debtor was classified in NPA on 01.01.2016. It is further stated that upon Non-payment of dues by Corporate Debtor as per sanction terms, bank has used its right of set off and the credit balances/FDR to the extent of Rs.159,60,331.00 was adjusted on 05.12.2019, which was prior to the commencement of CIRP of the Corporate Debtor. It is also stated that a claim was filed before the Resolution Professional in respect of outstanding after deducting the amount appropriated. It is also stated that the said appropriation was in ordinary course of business.

6. The Respondent No.5 i.e. Bank of India has stated vide reply dated 17.01.2022, that *the moratorium with respect to the Corporate Debtor commences from the date of insolvency commencement date. The Respondent No.5 in the present case has encashed the fixed deposit amount on 13th December, 2019 and the CIRP of the Corporate Debtor commenced on 20th February, 2020 which is almost after 2 months of the encashment of the fixed deposit. It is also stated that the Bank has right to appropriate any credit balance toward the payment of dues in the event of customer not making payment as per the sanction terms accepted by the borrower, which reads as "So long as any monies are due to us from you under any of the facilities, we shall have a lien/charge for such amounts on all your credit balances, deposits, securities or other assets with, any of the branches of Bank of India or of its subsidiaries anywhere in the world and upon the happening*



of any of the events of default referred herein, we shall be entitled to exercise a right of set off between the amounts due and payable to us and the said credit balances, deposits, securities and other assets.” It has further stated vide affidavit dated 14.03.2023 that an amount of Rs. 71,53,07,723.99 was due and payable on 13th December, 2019 before appropriation of the amount lying in FDR and the account of the Corporate Debtor was classified in NPA on 05.01.2019. It is further stated that *upon Non-payment of dues by Corporate Debtor as per sanction terms, bank has used its right of set off and the credit balances/FDR to the extent of Rs.4,44,95,771.22 was adjusted on 13.12.2019, which was prior to the commencement of CIRP of the Corporate Debtor.* It is also stated that a claim was filed before the Resolution Professional in respect of outstanding after deducting the amount appropriated. It is also stated that the said appropriation was in ordinary course of business.

Findings

7. We have heard the Counsel(s) for the Parties and perused the material available on record.
8. We find that the present application has alleged the appropriation of fixed deposits lying with Respondent No. 4 & 5 as Margin Money towards bank guarantee extended by each of them is not in their ordinary course of business and result into giving preference to them over other creditors in relation to antecedent debt, hence it is a preferential transaction u/s 43 of the Code having taken place within one year from the commencement of CIRP. It is further argued that said the appropriation is also a fraud upon other Creditors, hence, it is also a fraudulent transaction. It is not disputed that



appropriation of margin money deposit in form of FDR along with accrued interest thereon took place prior to commencement of CIRP and the concerned bank guarantee(s) were operative till the date of such appropriation.

9. Section 43(2), (3), & (4) of the Code contains the provisions defining the Preferential transaction as under –

(2) A corporate debtor shall be deemed to have given a preference, if–

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers–

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that –

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of



such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if –

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

10. On bare reading of the aforesaid provision, it follows that the section stipulates that it encompasses transactions whereby a preference is given by Corporate Debtor to a creditor putting such creditor in advantageous position. This is further confirmed from provisions of Sub-Section (4), where also, the preference is to be given. Further, the provision excludes transfer



made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee. In the present case, it is case of R4 & R5 that they had right of set-off of balances lying to the credit of the Corporate Debtor against any outstanding due from it and they had exercised such right of set off prior to commencement of CIRP in the ordinary course of business, accordingly, this transaction does not partake the character of preferential transaction. We find that Hon'ble NCLAT in case of Indian Overseas Bank Vs. Arvind Kumar(supra) held that the margin money revert back to the corporate debtor in case guarantee expires without having being invoked and in other cases, it goes towards payment of claim against the guarantee. The guarantee(s) in the present case were alive at the commencement of CIRP period and were invoked in full in case of R4 and part in case of R5. The corporate debtor has not brought any record to suggest that the R4 & R5 didn't have right of set off or right to release margin money under live guarantee(s) prior to CIRP commencement date. We feel that it is Bank's prerogative to release the margin held for issuance of the guarantees at any time, as such margin is retained for its own security. Further, the Corporate debtor has not given any preference in this regard. If we accept the contention of the applicant that such appropriation by the creditor prior to commencement date results into giving of preference over other creditors, it would place all recoveries effected by creditors within one year of CIRP commencement under ambit of Preferential transactions. We feel that the R4 & R5 have exercised their right to release the margin money and have it appropriated under the ordinary course of business of recovery



of its outstanding. Hence, we are not inclined to hold these transactions as Preferential transactions u/s 43 of the Code.

11. Section 66(1) of the Code defines Fraudulent Transaction as under –

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

12. On bare reading of the provision contained in section 66(1) of the Code, we find that the activities of corporate debtor only are classifiable as Fraudulent transactions and not the activity of its creditors. It is not the case of the Applicant that the Corporate Debtor allowed R4 & R5 to have margin money balances appropriated in wrongful manner, more so where the corporate debtor had no say in such transaction except to abide by the conduct of the R4 & R5. Further, we find sub-section (2) of Section 66 provides for recovery from the directors and management of the corporate debtor and not from the creditor. Accordingly, we feel that the transaction of appropriation can not be held to be fraudulent so as to defraud other creditors.

13. In view of foregoing discussion, we feel that the present application deserves to be **dismissed**.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Kishore Vemulapalli
Member (Judicial)



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