In the National Company Law Tribunal,
“Chandigarh Bench, Chandigarh”
(Exercising the powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

CA No.142/2017
IN
CP (IB) No.42/Chd/Hry/2017

Under Sections 14, 17 (1) (d) read with Section 18, 20 & 74 of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016 for appropriate directions.

In the matter of:

Corporation Bank. ….Petitioner/Financial Creditor.

Versus.

Amtek Auto Limited. ….Respondent/Corporate Debtor.

And

In the matter of:

MR.DINKAR T.VENKATSUBRAMANIAN
RESOLUTION PROFESSIONAL
FOR AMTEK AUTO LTD.
HAVING ITS REGISTERED OFFICE AT
PLOT NO.16, INDUSTRIAL AREA
ROZKA MEO (SOHNA)
GURGAON

AND HAVING ITS CORPORATE OFFICE AT:
3, LOCAL SHOPPING CENTRE
PAMPOSH ENCLAVE
GREATER KAILASH – 1
NEW DELHI – 110048

….Applicant.

Versus.

INDIAN OVERSEAS BANK
HOSUR INDUSTRIAL COMPLEX BRANCH
PLOT NO.130, SIPCOT
HOSUR
KRISHNAGIRI DISTRICT – 635126
TAMIL NADU

….Respondent.

Order delivered on 13.10.2017.

Coram: HON'BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL).

For Resolution Professional: Mr.Sanjay Bhatt, Advocate

For Indian Overseas Bank: Mr.Rakesh Gupta, Advocate

Order

Petition under Section 7 of the Insolvency & Bankruptcy Code, 2016 (for short to be referred here-in-after as the 'Code') filed by the Corporation Bank (Financial Creditor) was admitted against the Corporate Debtor on 24.07.2017 and Mr.Dinkar Tiruvannadapuram Venkatsubramanian, Registration No.IBBI/IPA-001/IP-P00003/2016-2-17/10011 was appointed as Interim Resolution Professional (IRP) on 27.07.2017 with necessary directions. While admitting the petition, the moratorium was declared in terms of Section 14 (1) of the Code as under:-

"*a)* *the institution of suits or continuation or pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

b) *transferring, encumbering, alienating or disposing of 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."*

2. The Interim Resolution Professional appointed is now functioning as Resolution Professional as decided by the committee of creditors in the first meeting held on 22.08.2017.

3. It is averred that under Section 17 (1) (d) of the Code, the financial institutions maintaining the accounts of the corporate debtor have to act on the instructions of the IRP in relation to such accounts and furnish all information relating to the corporate debtor available with them to him. The respondent i.e. Indian Overseas Bank, Hosur Branch is one of the financial creditor of the corporate debtor and constitutes 4.08% of the total value of the financial debt. The applicant vide emails dated 31.07.2017 and 05.08.2017 intimated the respondent bank with regard to the commencement of corporate insolvency resolution process (CIRP) and the orders passed by the Adjudicating Authority and issued the instructions in terms of Section 17 (d) of the Code to the respondent to freeze all debit

transactions until further communication and further instructed the bank not to allow payment of any cheque without the instructions of the applicant. Copy of the emails dated 31.07.2017 and 05.08.2017 are at Annexure A-5 (Colly).

4. Thereafter the applicant requested the respondent bank on 08.08.2017 for registering change in the signatory of all the bank accounts maintained by the respondent bank and instructed the bank to operate the bank accounts in accordance with the instructions contained therein. Copy of the letter is at Annexure A-6. On 09.08.2017, the applicant instructed the respondent to transfer all the funds as available with it in the bank account of the corporate debtor to the account of the corporate debtor and copy of the said email is at Annexure A-7. The respondent bank neither transferred the funds nor issue any response to the said email.

5. Subsequent to that the applicant sent another letter dated 22.08.2017 instructing the respondent to transfer all the funds from the bank account of the corporate debtor lying with it to the operative account of the corporate debtor maintained with HDFC and instructed to make a daily sweep of the funds to the HDFC Bank account by leaving an amount of ₹60,000/- in the account maintained by the respondent bank. It was further directed not to allow presentation of any cheque without instruction/direction of the applicant. Copy of the said letter is at Annexure A-8. This letter was also not responded.

6. The applicant then sent another letter dated 30.08.2017 reiterating the instructions issued in the letter dated 22.08.2017 and copy of that letter is at Annexure A-9. In this letter, it was instructed that

presentation of any cheque should not be allowed by the respondent bank without the instructions/directions of the Applicant.

7. For the first time, the respondent bank on 31.08.2017 informed the applicant that the amount available in the current account of the corporate debtor is not an asset of the corporate debtor inasmuch as the dues of the corporate debtor in the books of respondent bank exceeds the amount available in the balance in the current account and therefore, they exercised the rights of set off and appropriated the amount towards the dues payable to the bank. They also requested to the applicant that the revised claim would be submitted by Rajiv Circle branch, New Delhi of the respondent bank. Copy of the said email is at Annexure A-10.

8. In view of the above, the applicant sent a letter dated 01.09.2017 to the respondent bank to transfer the amount of ₹6,65,13,958/- through RTGS to the bank account of the corporate debtor maintained with the Corporation Bank and cheque No.870093, dated 01.09.2017 was enclosed with the said letter Annexure A-11. Thereafter the respondent again sent another letter dated 31.8.2017 as an afterthought that the company is maintaining the current account with the Hosur Branch, which was never brought to the notice of the bank, even though the account was opened and operative from October, 2013 in which the balance as on date was ₹6.63 crores. On scrutiny of the record, it was observed by the bank that the corporate debtor had given a false declaration while opening the aforesaid account in the Hosur branch that they are not enjoying any credit facility with any other bank/any other branch of the respondent bank. The corporate debtor has routed about

₹27.07 crores through that account after the account became NPA from 29.05.2016. These proceeds should have been routed through the cash credit account of the respondent bank to regularise the overdues and also ad-hoc CC limit sanctioned by the bank. This letter Annexure A-12 was sent by the Rajiv Circle branch being the central office of the respondent located at Chennai. The central office of the respondent bank also recorded that they have taken serious note of the breach of trust committed by the corporate debtor, which was un-acceptable to the bank.

9. Having narrated the aforesaid facts, the applicant has stated that the action of the bank in setting off the dues from the operational collections violates the declaration of moratorium issued by the Adjudicating Authority.

10. Prayer, thus, was made in the application to issue the necessary directions to the respondent bank to refund the amount appropriated/set-off towards its dues from the corporate debtor with a further direction to follow the instructions of the applicant and for initiation of action under Section 74 (2) of the Code against the concerned officials of the bank for deliberate and wilful violation of Section 14 thereof.

11. The respondent bank has opposed the application stating in the reply that it has neither filed any suit against the corporate debtor nor took any steps 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 Security Interest Act, 2002, therefore, there is no violation of the moratorium.

12. It is stated that infact the corporate debtor had been enjoying the credit limits from the Rajiv Circle Branch in New Delhi ever since the year 2002. Reiterating the stand which the respondent bank has taken in the letter dated 31.08.2017, it is averred that the corporate debtor without the knowledge of the bank and in utter financial indiscipline opened a current account with the Hosur branch of the respondent bank, which is an opposite zone of the country with mala fide intention to divert the funds. The very existence of such account came to be known to the respondent only upon receipt of information from IRP vide letter dated 29.07.2017 addressed to Hosur branch of the respondent and received on 05.08.2017 at the branch office. The corporate debtor opened the account with a false declaration that it was not enjoying any credit facility with any other bank or any other branch of the respondent bank. This fact was not known to the respondent before receiving email from the applicant. Under the account opening form filled by the corporate debtor, when the current account was opened in the year 2002, it was undertaken that Corporate Debtor would inform the respondent Bank in writing, as soon as any other credit facility was availed from any other bank or any other branch of the bank. The current account at Hosur branch was opened with a different customer Id and with introduction of the local small trader on 17.10.2013 concealing and suppressing the facts. The respondent has already obtained the explanation from the company for such violation.

13. Otherwise, it is stated that the amount available in the current account of the corporate debtor at Hosur branch of the respondent was neither a security interest nor an asset of the corporate debtor. Since the

corporate debtor is liable to pay huge amount to the respondent, the amount available in the said current account was appropriated towards the said dues and amended claim was filed on 08.09.2017.

14. It is stated that the respondent has not committed violation of any of the provisions of Sections 14, 17, 18 and 20 of the Code. The respondent is one of the secured financial creditor and member of the committee of creditors.

15. Regarding the allegation that the respondent bank through Hosur branch is a member of the committee of creditors, it has been clarified that Hosur branch had no exposure to the corporate debtor. It is Rajiv Circle branch of the bank which has the creditor exposure to the corporate debtor.

16. The allegations of facts with regard to sending of various letters/emails are not denied. It is stated that there are instructions by the applicant to the respondent to freeze the account in compliance whereof, the account has been frozen. The amount of ₹6.67 crores was available in the current account of the corporate debtor and adjusted towards the ad-hoc limit of ₹8 crores sanctioned exclusively by the respondent.

17. I have heard the learned counsel for the parties and carefully perused the record.

18. There is total violation of the mandate of law by the key managerial persons of the corporate debtor in this case. Petition under Section 7 of the Code was admitted on 24.07.2017 and the Interim Resolution Professional was appointed on 27.07.2017. Moratorium was,

however, declared in terms of Section 14 (1) of the Code in the order of admission dated 24.07.2017.

19. Under Section 17 (1) of the Code, from the date of appointment of interim resolution professional, the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the Board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional. Under sub clause (c) of Section 17 (1) of the Code, the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

20. The statement of current account of the corporate debtor Annexure A-13 filed by the applicant-resolution professional for the period from 21.07.2017 to 30.08.2017 shows that despite the order of appointment of interim resolution professional, the corporate debtor has withdrawn by cheques the total amount of about ₹2,89,00,000/- from 28.07.2017 to 05.08.2017, which the corporate debtor, in whose presence the orders were passed for admission and appointment of the interim resolution professional, has apparently withdrawn the huge amount despite such appointment and prohibition contained in the Code. How could the bank account of corporate debtor be operated without any authority from the interim resolution professional after his appointment?

21. Learned counsel for respondent bank, however, submits that the letter written by the applicant as interim resolution professional on

29.07.2017 was received by the Hosur branch of the bank on 05.08.2017 and thereafter no withdrawals were permitted. In any case, on 28.07.2017, there was a balance in the current account of the corporate debtor to the tune of ₹2,29,78,750.22 and not much of the damage was done because of deposits from different customers to whom the goods were sold by the corporate debtor to the tune of ₹5.24 crores (approx.) for the period from 16.08.2017 to 29.08.2017 as evident from the statement of account Annexure A-13.

22. However, learned counsel for respondent bank submits that the bank has rightly appropriated the amount lying in the current account of the corporate debtor by way of set off and this cannot be said to be a recovery or any of the actions, which are prohibited by the moratorium as per Section 14 (1) of the Code.

23. Learned counsel for applicant referred to email Annexure A-5 at page 38, written to the respondent bank directing it to debit freeze all accounts held in the name of corporate debtor on the basis of email already sent on 31.07.2017. Therefore, the respondent Bank could not adjust or set off the amount towards its ad hoc credit limit granted for the current account.

24. Under clause (d) of Section 17 (2) of the Code, the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional. When there was a clear instruction from the interim resolution professional to debit freeze

all the accounts, how could the bank adjust the amount lying in the credit of the account of the corporate debtor towards the ad hoc credit limit granted for the current account, which is allegedly to the tune of ₹8 crores.

25. Learned counsel for respondent, however, submitted that under Section 14 (1) (c), the moratorium relates to 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) and it was contended that such a set off is not covered within the aforesaid prohibition. Learned counsel made specific reference to sub-section (31) of Section 3 of the Code, which reads as under:

> *" "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."*

26. It is not required to discuss the matter so minutely in the present case because any amount lying in the current account of the corporate debtor has to be placed at the disposal of the resolution professional without any scope of an adjustment in the manner, the respondent has tried to do.

27. With regard to the opening of the current account in the Hosur branch, which was not to the knowledge of the bank itself, especially the Rajiv Circle Branch, New Delhi because of the mischief committed by the corporate debtor, it is contended that the corporate debtor added the word **M/S.** before its name while opening the current account in the Hosur branch and provided different Id code with the introduction of a local trader and that is why the current account could be opened in the Hosur branch, which otherwise could not have been done. For the aforesaid mystery, it is for the bank to take appropriate action by holding an enquiry, but from the current account, which the bank itself says that it had no prior knowledge, there was no scope of set off after appointment of the interim resolution professional.

28. In view of the above, the application filed by the resolution professional is partly allowed and the respondent bank is directed to deposit the amount, which was lying in the credit of the current account of corporate debtor in Hosur branch as on 29.08.2017 in the account of the corporate debtor maintained in the Corporation Bank after leaving an amount of ₹60,000/- in the account of the corporate debtor as per letter dated 01.09.2017 Annexure A-11 (Colly) already sent by the applicant to the respondent.

29. The applicant/resolution professional is further at liberty to take appropriate proceedings against the key managerial persons, who had issued the cheques for withdrawal of the huge amount even after the appointment of the resolution professional and the respondent to hold an

enquiry into the alleged mischief committed by the Corporate Debtor and take further steps as may be necessary.

30. Let compliance of this be made by the respondent bank within a period of fifteen days from the date of receipt of the certified copy of this order. Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)
Adjudicating Authority

October 13, 2017.
Ashwani