

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 558 of 2020

[Arising out of Impugned Order dated 29th April 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Chandigarh Bench, Chandigarh in CA No. 95 of 2019 in Company Petition (IB) No. 80/CHD/HRY/2018]

IN THE MATTER OF:

**Indian Overseas Bank
Through its Chief Manager
Bhagwan Lal Raigar
S/o Sh Ishwar Lal Raigar
S.C.O. No. 26, Sector – 7-C
Chandigarh**

Appellant

Versus

**Arvind Kumar
Resolution Professional/Liquidator
M/s Richa Industries Ltd
C/o 303, 3rd Floor, Plot – D190
Phase 8B, Sector 74, Industrial Area
SAS Nagar, Mohali, Punjab – 160 071**

Respondent

Present:

For Appellant : Ms Rakesh Gupta, Advocate for the Appellant

For Respondent : Mr Arun Saxena, Advocate for Respondent

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Impugned Order dated 29th April 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Chandigarh Bench, Chandigarh in CA No. 95 of 2019 in CP (IB) No.80/CHD/HRY/2018 in the matter of M/s Arvind Kumar, Resolution Professional Vs Indian Overseas Bank by which the Application filed by the Resolution Professional was partly accepted and a payment of Rs

51,27,591/- was ordered to be released to the Resolution Professional of the Corporate Debtor M/s Richa Industries Limited. The said amount was retained by the Appellant Bank, being the margin money of the irrevocable Bank Guarantee, which was already invoked during the Moratorium period, issued U/S 14 of the Code. The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case are as follows:

The Appellant, Indian Overseas Bank, is one of the Financial Creditors of the Corporate Debtor M/s Richa Industries Limited from whom the Corporate Debtor had availed various loan facilities including an irrevocable Bank Guarantee. The Corporate Debtor deposited margin money of Rs.40,50,000/- in the form of FDR to secure the said Bank Guarantee. One of the Operational Creditor M/s Tata Blue Steel Limited initiated the CIRP against the Corporate Debtor. The Application was admitted by order of the Adjudicating Authority dated 17th December 2018 and Moratorium declared under Section 14 of the I&B Code, 2016. The IRP was appointed on 21st December 2018.

3. The Bank Guarantee in question, which was issued in favour of M/s Tata Steel Processing & Distribution Limited was invoked, given the request, received vide letter dated 24th December 2018 and 26th December 2018 and the payment was made to the beneficiary to the tune of Rs.4,01,94,954/-. The margin money of the Corporate Debtor M/s Richa Industries Limited amounting to Rs.40,50,000/- accrued interest of Rs.10,77,591/-, and as such the total margin lying with the Appellant bank was Rs.51,27,591/-.

During CIRP, the Resolution Professional/Respondent demanded the aforesaid margin money from the Bank. The Appellant Bank, after the invocation of the Bank Guarantee by M/s Tata Steel Processing & Distribution Limited, adjusted the margin money amount in honouring the bank guarantee.

4. Since the bank guarantee was invoked during the moratorium period and FDR relating to margin money was broken, and margin money was adjusted in making payment of Bank Guarantee amount; thus the Interim Resolution Professional objected to this. Given the demand raised by the IRP, the margin money amount was kept by Appellant Bank in fresh FDR issued on 14th January 2019.

5. After that an Application by the Resolution Professional of M/s Richa Industries Limited, bearing CA No. 95 of 2019 in CP (IB) No. 80/CHD/HRY/2018, filed under Section 60 (5) read with Section 74(2) of the Code, seeking direction against the Appellant, i.e. Indian Overseas Bank to release all the funds of the Corporate Debtor, which were retained by the Appellant bank in violation of the Code. The Adjudicating Authority/NCLT Chandigarh Bench passed the impugned order dated 29th April 2020 and ordered the Appellant Bank to release of the margin money amount, which is under challenge before us.

6. The Appellant contends that the margin money was adjusted towards the payment on account of the invocation of the Bank Guarantee during the Moratorium. It is contended that this Appellate Tribunal in the case of Gail

(India) Limited Vs. Rajeev Manaadiar & Others, Company Appeal (AT) (Insolvency) No 319 of 2018 has held that the Moratorium order will not be applicable on the Performance Bank Guarantee given the definition of the 'security interest' under Section 3(31) of I&B Code, 2016, which excludes Performance Bank Guarantee from the purview of security interest.

7. The Learned Counsel for the Respondent submits that Performance Bank Guarantee is not included in the definition of 'security interest' for the benefit of the beneficiary of such Performance Bank Guarantee. The payment of such Performance Guarantee does not entitle the banker, making such payment, to adjust the margin money lying with it, against payment of Bank Guarantee. Such adjustment is barred under Section 14(1)(c) of the Code. The remedy of the Appellant is to file its claim with the Respondent which could have been dealt with the provisions of the Code. It is further contended by the Respondent that margin money was the asset of the Corporate Debtor and no charge on the said margin money was created by the Appellant in its favour. Therefore, any adjustment made by the Appellant violates Section 77 of the Companies Act, 2013 and Section 14(1)(c) of the Code. It is also argued that Section 77 of the Companies Act, 2013 categorically states that no charge created by the Company shall be taken into account by the Liquidator unless the same has been duly registered under sub-section (1) of Section 77 of the Companies Act, 2013, with the Registrar of Companies. Thus, it is contended that the adjustment of margin money, against payments made on the invocation of Bank

Guarantee, was blatantly illegal and against the explicit provisions of the Code.

8. We have heard the arguments of the Learned Counsel for the parties and perused the records.

9. Admittedly, Rs.51,27,591/- was the margin money, while was deposited by the Corporate Debtor to secure Bank Guarantee in favour of M/s Tata Steel Processing & Distribution Limited for an amount of Rs.4,01,94,954/-. The said Bank Guarantee was invoked during the moratorium period, i.e. on 27th December 2018. Given Section 14(3) of the I&B Code, 2016 invocation of the said guarantee could not be stopped by the Bank.

10. This Appellate Tribunal in the case of Gail (India) Limited (supra) has held that:

“4. Section 14 of the Insolvency and Bankruptcy Code, 2016 (for short ‘I&B Code’) relates to ‘Moratorium’. Clause (c) of sub-section (1) of Section 14 empowers the Adjudicating Authority to declare ‘Moratorium’ for prohibiting any action to foreclose, recover or enforce any security interest created by the ‘Corporate Debtor’ in respect of its property etc., which reads as follows:

“14. Moratorium. – (1) Subject to provisions of subsections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare Moratorium for prohibiting all of the following, namely: —

Xxx xxx xxx

(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”

5. The expression ‘security interest’ has been defined in sub-section (31) of Section 3 of the ‘I&B Code’, which reads as follows:

“3. Definitions.— xxx xxx xxx

(31) "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”

6. From sub-section (31) of Section 3, it is clear that the ‘security interest’ do not include the ‘Performance Bank Guarantee’, therefore, we hold that the ‘security interest’ mentioned in clause (c) of Section 14(1) do not include the ‘Performance Bank Guarantee’. **Thereby the ‘Performance Bank Guarantee’ given by the ‘Corporate Debtor’ in favour of the Appellant- ‘GAIL (India) Ltd.’ is not covered by Section 14.** The Appellant- ‘GAIL (India) Ltd.’ is entitled to invoke its ‘Performance Bank Guarantee’ in full or in part.”

(emphasis supplied)

11. Thus, it is clear that 'Security Interest' does not include the 'Performance Bank Guarantee'. The Performance Bank Guarantee is not covered by Section 14 of the Code.

12. It is pertinent to mention that the 'margin money' is not a security as has been argued by the Respondent and does not require any registration of charge. Only the assets given by the Company as securities are required to be registered under Section 77 of the Companies Act, 2013.

13. The 'margin money' is the contribution on 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 reverses 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.

14. In this case, Bank Guarantee was invoked on 27th December 2018 by the beneficiary M/s Tata Steel Processing & Distribution Limited, and the margin money amount was used towards the payment of the Bank Guarantee. Once this margin money was used to honour the bank guarantee, nothing remained with the Bank, and as such, the Respondent Resolution Professional cannot demand that amount.

15. The Resolution Professional/IRP is only entitled to those payments to which the Corporate Debtor is entitled if no orders of Moratorium would

have been passed under Section 14 of the Code. The Corporate Debtor had no right to claim the margin money after the invocation of Bank Guarantee.

16. In the circumstances, as stated above, we are the considered opinion that Appeal deserves to be partly allowed and the direction of the Adjudicating Authority 'to release the margin money, i.e. Rs.51,27,591/- kept in fixed deposit for issuance of Bank Guarantee, which was utilized by the invocation of bank guarantee on 27th December 2018 by the beneficiary' is set aside. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr Balvinder Singh]
Member (Technical)

[Mr V. P. Singh]
Member (Technical)

NEW DELHI
28th SEPTEMBER, 2020

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