
(2023) 06 NCLT CK 0078

In the National Company Law Tribunal

Case No : IA No. 758/2020 In CP (IB) No.72/Chd/Hry/2017

Anil Kohli Vs Bimla Devi Jindal ?

Date of Decision : 16-06-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 14, 14(1), 35(1)(b)(d)(n), 35(2), 36(3)(a), 36(3)(g)
Insolvency And Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 — Regulation 9(1)(c)

Citation : (2023) 06 NCLT CK 0078

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Karan Kohli, Bharat Chada, Harsh Garg, Pulkit Goyal

Final Decision : Dismissed

Judgement

Harnam Singh Thakur, Member (Judicial)

IA No. 758/2020

1. The present application has been filed by the Resolution Professional under sections 7 & 35(1)(b)(d)(n) of the Insolvency and Bankruptcy Code, 2016, read with regulation 9(1)(c) of the IBBI (Liquidation Process) Regulations, 2016 for issuance of appropriate directions to the respondent No.4 to refund the amount of Rs.4,50,44,500/- to the liquidation bank account of the corporate debtor as the same being an asset of the corporate debtor, transferred to the bank during moratorium period commenced on 24.11.2017.

2. It is stated that an application bearing company petition number CP (IB) No.72/Chd/Hry/2017 u/s 7 of the Code was filed by the financial creditor, Bank of India, and this adjudicating authority admitted the said application and appointed Mr. Anil Kohli as the IRP and vide order dated 04.12.2017 of the liquidation of corporator by this Adjudicating Authority, Anil Kohli was further appointed as the liquidator of the corporate debtor.

3. It is averred that the applicant after perusing the Balance Sheet of the F.Y. 2018-19 and after comparing the Balance Sheet as on Liquidation Commencement i.e., 10.10.2018 observed that there is a decrease in Short Term Borrowings by an amount of Rs.4,50,44,500/-, however, no such difference was therein Balance Sheet till liquidation commencement date. The applicant in order to take into custody or control of all the assets, property, effects, and actionable claims of the corporate debtor under Section 35(2) of the Code, requested the statutory auditor to conduct statutory audit for the F.Y. 2018-19 and provide Annual Return of GST for F.Y.2017-18. Thus, the applicant wrote numerous emails and letters seeking clarifications and information from respondent No.1-3 being the suspended board of the corporate debtor about the differences and what all transactions were entered corresponding to said difference. The respondent No.2 vide letter dated 25.02.2020 provided clarifications wherein, it was informed to the Liquidator that the short-term borrowing difference of Rs. 4,50,44,500/- has been paid to respondent No.3/Punjab National Bank in the loan account.

4. Notice of this application was issued on 10.11.2021 to the respondents. An affidavit of Service has been filed vide Diary No.00361/06 dated 16.12.2021. However, none appeared on behalf of Respondent Nos.1 & 2 from the very beginning of the filing of this case nor any reply was filed, therefore, Respondent Nos.1 & 2 proceeded against ex parte vide order dated 14.06.2023 of this Adjudicating Authority. A reply has been filed on behalf of respondent No.3, wherein it has been submitted that since the corporate debtor availed the facility from the answering respondent No.3 Bank, the loan account shows the dues to be repaid by the corporate debtor or its guarantors, as the case may be. It is averred that during the liquidation process in the present matter, the guarantor of the corporate debtor approached the answering respondent bank PNB, by way of a settlement proposal dated 22.01.2019, for liquidation/release of their guarantees from the account of the corporate debtor and for release of the properties belonging to the guarantors/mortgagors, over which corporate debtor does not have ownership. The same proposal was outside the purview of the liquidation process as the settlement proposal was only in relation to the guarantees and properties of the guarantors/mortgagors, and not for the OTS of the complete account of the corporate debtor. Hence, any amount paid in the loan account by the guarantors of the corporate debtor is equally valid and legal in the eyes of law. It is further submitted that bank does not maintain separate accounts for the borrower and or guarantors, only one account has to be maintained that too in the name of the principal borrower and any amount received from the guarantor is to be credited in the account being maintained by the bank in the name of principle borrower. As such all amount paid by the guarantors towards the satisfaction of dues has to be adjusted towards the liability of the principal borrower.

5. During the course of arguments, it is contended by learned counsel for the applicant that in terms of Section 36(3)(a) and (g) of the Code, any assets over

which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest, becomes part of the liquidation estate assets of the corporate debtor. Thus, respondent No.3 being the financial creditor of the Corporate debtor had already filed a claim of Rs.18,17,55,581/- which has been admitted by the liquidator, and respondent No.3 had also relinquished its security interest to the liquidation estate of the corporate debtor. In view thereof, respondent No.3 is under a statutory obligation to refund the amount to the Liquidator received from the corporate debtor during the moratorium under Section 14 of the Code so that the same can form part of the Liquidation estate assets of the corporate debtor. According to learned counsel for the applicant, it is a breach of the moratorium imposed under Section 14(1) of the Code.

6. On the other hand, it is argued by the learned counsel for respondent No.3 that the amount has been received from guarantors does not fall under the assets of the corporate debtor. He has placed reliance upon *State Bank of India Versus V. Ramakrishnan & Anr.*, Civil Appeal No.3595 of 2018, dated 14.08.2018 passed by the Hon'ble Supreme Court of India wherein, it has been held that the Insolvency Law Committee, appointed by the Ministry of Corporate Affairs by its Report dated 26.03.2018, made certain key recommendations, one of which was:-

"(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-a-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of the moratorium imposed under the Code."

The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.

7. After hearing the learned counsel and careful perusal of the record carefully, we are of the considered view that the present application for a refund of Rs.4,50,44,500/- against respondent No.3 Bank is misconceived. A perusal of the records shows that the said amount was deposited with respondent No.3 Bank by the guarantors under the OTS proposal. Although, it is contended by learned counsel for the applicant that the said amount has been deposited during the moratorium period and that too from the Bank account of the corporate debtor, therefore, this amount forms the assets of the corporate debtor. However, this contention of learned counsel for the applicant is devoid of legal force because there is only one loan account with respondent No.3 Bank in the name of the corporate debtor. The said amount which has been deposited by the guarantors for release of their guarantors/mortgaged properties from the bank does not

amount to assets of the corporate debtor because the said properties are not owned by the corporate debtor but these are the individuals' property owned by the guarantors/mortgagors. The property of the corporate debtor mortgaged with bank-respondent No.3 has not been released so far. Moreover, in view of the judgment (supra) in the State Bank of India Versus Ramakrishnan & Anr., wherein it has been held that the scope of the moratorium may be restricted to the assets of the corporate debtor only and not against assets of guarantors to the debts of corporate debtor, it can be safely held that amount deposited by guarantors does not form the part of assets of corporate debtor.

8. As a sequel, to the discussion above, the present application is not maintainable and the same is dismissed with no order as to costs.