

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 1219 OF 2021

IN

COMPANY PETITION (IB) NO. 1148/MB/2017

*Application u/s 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 34 of the
N.C.L.T. Rules, 2016.*

In the matter of:

Mr. Anurag Kumar Sinha,

Liquidator of Fortune Pharma Pvt. Ltd.

...Applicant

v/s

Canara Bank, Shahganj Branch,

Aurangabad, Maharashtra.

.... Respondent

In the matter of

Fortune Pharma Private Limited

...Corporate Debtor

Order pronounced on 04.07.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in Virtual mode):

For the Applicant : Adv. Aniruth Purusothaman.

For the Respondent : Adv. C.J. Doveson a/w Adv. Poonam Utekar.

ORDER

Per: Coram.

1. This is an application filed by the Liquidator of the Corporate Debtor under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) seeking following relief:

This Bench may be pleased to direct the Respondent to transfer the amount of the fixed deposit of INR 2,03,795/- and OCC credit balance of Rs. 4,264.23/-.

Facts of the case which are necessary for adjudicating this application are briefly stated hereinbelow:

2. This Bench had passed an order u/s 33 of the Code, dated 25.11.2019, initiating liquidation of the Corporate Debtor wherein the Applicant i.e. Mr. Anurag Kumar Sinha, was appointed as the Liquidator of the Corporate Debtor. Pursuant to his appointment, the Liquidator issued a public announcement dated 29.11.2019.
3. The Corporate Debtor had a fixed deposit lying with the Respondent for an amount of INR 2,00,960/-. There was a credit balance of Rs. 4,264.23/- in the OCC account of the Corporate Debtor, which has been inoperative since long.
4. The Applicant several times asked the Respondent by emails dated 27.07.2020, 05.08.2020 and 23.10.2020 to transfer the balance amount lying in the account of the Corporate Debtor with the Respondent to the liquidation account of the Corporate Debtor. In response to the above, the Respondent sent an email dated 23.09.2020 to the Applicant stating the reasons for adjusting the fixed deposit of the Corporate Debtor. The Respondent stated that in 2010, a Cheque No. 225848 dated 02.01.2010, was issued by the Corporate Debtor to one M/s. Sandhya Industrial Chemicals for Rs. 4,68,116/-. However, due to inadvertence on the part of the Respondent, the amount of Rs.4,68,116/- was

not debited to the Corporate Debtor's account, though M/s. Sandhya Industrial Chemicals was paid the said amount. Therefore, the Respondent made adjustment as per the transaction which was carried out with M/s. Sandhya Industrial Chemicals. Furthermore, the Respondent in its email stated that they had not submitted a claim with the Applicant as per the provisions of the Code, as they have adjusted the amount from the fixed deposit of the Corporate Debtor.

5. Being aggrieved by the actions of the Respondent, the Applicant was constrained to file this application before the Tribunal.

Reply of the Respondent: The Respondent's reply has been briefly summarized below:

- i. The Respondent has not denied the fact that it has adjusted the amount of fixed deposit of Corporate Debtor against the amount allegedly due by the Corporate Debtor. However, the Respondent in its pleading claims that it had a general right of lien over the fixed deposit of the Corporate Debtor and therefore, the money lying in the fixed deposit for all practical purposes belong to the Respondent Bank. Thus, the Respondent pleads that it had every right to adjust the fixed deposit and as such there is no infirmity or illegality in the aforesaid action of the Respondent in adjusting the fixed deposit of the Corporate Debtor during liquidation.
- ii. The Respondent further states that there was no requirement to file a suit or submit any claim to the Applicant since the money due from the Corporate Debtor was already available with the Respondent Bank.
- iii. The Respondent further denies if the secured financial creditors of the Corporate Debtor would get adversely affected by a paltry sum of around Rs. 4 lakhs, which has been duly appropriated by the Respondent Bank.

FINDINGS

6. We have heard the Counsel for the parties and have gone through their pleadings and documents.

7. Counsel for the Applicant submits that no claim has been filed by the Respondent during liquidation. Counsel for the Applicant further submits that since the Applicant is not aware of any mutual dealings between the Corporate Debtor and the Respondent, the latter is not allowed to claim set-off, and if at all, the Respondent had any claim against the Corporate Debtor, they ought to have filed the same with the Applicant, which it has not done. Thus, according to the learned Counsel, the Respondent has acted in teeth of moratorium by adjusting the fixed deposit of the Corporate Debtor, which otherwise would have formed part of the Liquidation Estate of the Corporate Debtor. Learned Counsel for the Applicant contends that due to the unlawful adjustment/misappropriation by the Respondent, the secured financial creditors of the Corporate Debtor are getting adversely affected.

8. Counsel for the Respondent submits that the Respondent Bank had a lien over the fixed deposit of the Applicant and hence, the Respondent Bank had the right to adjust/set-off the said fixed deposit without filing a suit or claim in respect thereof. Counsel for the Respondent further submits that section 36 of the Code is not applicable to the present case since the appropriation is by way of set-off by mutual understanding and also the exercise of a bankers' lien as well as general lien. Counsel for the Respondent denies that there has been any misappropriation of assets of the Corporate Debtor by the Respondent Bank.

9. We have carefully examined the aforesaid submissions.

10. On perusal of the pleadings, it is evident that the Respondent Bank has not denied the fact that it has adjusted an amount of INR 4,68,116.00/- against the Fixed Deposit of the Corporate Debtor to the tune of Rs. 2,03,795.00/-. On perusal of records at Exhibit 'E' to the application, we find that the Respondent Bank on 10th August, 2020 has debited the Open Cash Credit Account of the Corporate Debtor with an amount of INR 4,68,116/- and on the same date, it credited the aforesaid account of the Corporate Debtor with INR 2,03,795/-, which is nothing but an appropriation of money from the fixed deposit account of the Corporate Debtor with the Respondent Bank. We find that the said adjustment/appropriation was done by the Respondent Bank while the Corporate Debtor was under liquidation in pursuance of the Order passed by this Tribunal on 25th November, 2019 of the Code.
11. The reason as to why the Respondent Bank debited the account of the Corporate Debtor during the liquidation is that the Corporate Debtor had issued a Cheque No. 225848 dated 02.01.2010, to one M/s. Sandhya Industrial Chemicals for a sum of Rs. 4,68,116/-, which was credited to account of the payee above-named, but inadvertently the said amount was not debited to the account of the Corporate Debtor. Hence, to rectify its mistake and recover the money, the Respondent Bank not only debited the Open Cash Credit Account, but also partly recovered the debt by adjusting from the Fixed Deposit Account of the Corporate Debtor with the Respondent Bank.
12. Admittedly, the Respondent Bank neither filed any claim before the Applicant-Liquidator, nor any suit or proceedings were initiated by it for recovery of arrears allegedly due by the Corporate Debtor. The Respondent Bank has

claimed that it has a right of lien over the fixed deposit of the Corporate Debtor since the credit facilities were extended to the Corporate Debtor on the strength of the fixed deposit and therefore, it was justified on the part of the Respondent Bank on the ground of mutual understanding to adjust such fixed deposit against the arrears of the Corporate Debtor in open cash credit account maintained with the Respondent Bank. However, we find that the Respondent Bank has merely pleaded, but not substantiated its right of lien with any documentary evidence. We also find that the Respondent Bank has failed to substantiate its assertion that there was a mutual understanding between the Corporate Debtor and the Respondent Bank to set-off the arrears of open cash credit account against the fixed deposit of the Corporate Debtor. Hence, the contention of the learned Counsel for the Respondent that the Respondent Bank had a lien and right to set-off are devoid of any merit.

13. No doubt that under Section 36(4)(e) of the Code, the assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation. Further, Regulation 29 of the IBBI (Liquidation Process) Regulations, 2016 states as follows: *“Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party.”* The Hon’ble Supreme Court of India in *Bharti Airtel Limited & Anr. v/s. Vijaykumar V. Iyer* [vide Judgment dated January 03, 2024 in Civil Appeal Nos. 3088-3089 of 2020] has observed at Para 22 as follows: *“In light of the aforesaid discussion, the expression ‘mutual dealings’ for the purpose of Regulation 29 of the Liquidation Regulations, is wider than the statutory set-off postulated under Order VIII Rule 6 of CPC, as well as, equitable set-*

off under the common law as applicable in India. Insolvency set-off applies when demands are between the same parties. There must be commonality of identity between the person who has made the claim and the person against whom the claim exists. Even when there are several distinct and independent transactions, mutuality can exist between the same parties functioning in the same right or capacity. Mutual dealings are not so much concerned with the nature of the claims, but with the relationship and apposite identity of the parties giving rise to the respective claims, such that it would offend one's sense of fairness or justice to allow one to be enforced without regard to the other." (Emphasis Supplied)

14. However, in the present case, since the Respondent Bank has failed to establish mutual dealings between the Respondent and the Corporate Debtor, we are of the considered view that the right to set-off could not have been exercised by the Respondent Bank and therefore, the Fixed Deposit of the Corporate Debtor cannot be excluded from the liquidation estate of the Corporate Debtor. As discussed above, the Respondent Bank has failed to prove that it had a lien over the fixed deposit of the Corporate Debtor. Even if for the sake of argument, it is assumed that the open cash credit account was secured by the fixed deposit of the Corporate Debtor in question, then too, the Respondent Bank ought to have informed the Liquidator (i.e. the Applicant) of its decision to relinquish its security interest to the liquidation estate or to realise the security interest, as the case may be, in Form C or Form D of Schedule II of the IBBI (Liquidation Process) Regulations, 2016 within 30 days of the liquidation commencement date. However, the same has also not been done by the Respondent Bank in the instant case. Therefore, as per the provisions of Regulation 21-A of the Liquidation Process Regulations, 2016 (supra), the assets covered under the

security interest (i.e. the fixed deposit in question in the instant case) shall be presumed to be part of the liquidation estate.

15. In view of the foregoing findings and discussion, we pass the following orders:
- i. I.A. No. 1219 of 2021 is **allowed**;
 - ii. The Respondent is directed to transfer the amount of INR 2,03,795/- (Rupees Two Lakhs, Three Thousand, Seven Hundred and Ninety-Five only) pertaining to the fixed deposit and also transfer a sum of INR 4,264.23/- (Rupees Four Thousand, Two Hundred and Sixty-Four, and Twenty-Three Paise only) pertaining to the Open Cash Credit account, to the Applicant/Liquidator within 30 days from the date of this order;
 - iii. After returning the aforesaid amounts, the Respondent shall be at liberty to lodge its claim, if any, against the Corporate Debtor with the Applicant/Liquidator in accordance with law;
 - iv. Accordingly, the I.A. No. 1219 of 2021 stands disposed of on above terms.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)