

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - I

ITEM No.304

IA 662 of 2020 in CP (IB) 453 of 2018

Order under Section 60(5) IBC

IN THE MATTER OF:

Kuresh Khambati RP for Garden Silk Mills Ltd.

.....Applicant

Vs

Bank of India

.....Respondent

Order delivered on 03/05/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)

Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

Sd/-

Sd/-

SAMEER KAKAR
MEMBER (TECHNICAL)

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – I
AHMEDABAD**

**I.A. No.662/NCLT/AHM/2020
In
CP (IB) No.453/AHM/2018**

*[Application under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016]*

*In the matter of **M/s. Garden Silk Mills Limited***

MCPI Private Limited

Having its registered office at:
Bengal Eco Intelligent Park,
3rd Floor, Tower 1, Block – EM,
Plot No. 3, Salt Lake City, Sector V,
Kolkata – 700 091

...Applicant

VERSUS

Bank of India

Through its authorized representative,
Ghodod Road Branch, Ground Floor,
Bank of India Complex, Opp.
Panjrapole, Nr. BSNL Office,
Ghodod Road, Surat, Gujarat.

...Respondent

In the matter of:

Invent Assets Securitization and Reconstruction Pvt. Ltd.

...Financial Creditor

Versus

Garden Silk Mills Limited

...Corporate Debtor

Order pronounced on 03.05.2024

CORAM:

SH. SHAMMI KHAN, MEMBER (JUDICIAL)
SH. SAMEER KAKAR, MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant :Mr. Mihir Thakore, Senior Advocate
a.w. Mr. Aaditya Joshi, Advocate
For the Respondent :Mr. Ketan Parikh, Advocate a.w. Mr.
Gaurav Matur, Chief Manager, BOI

ORDER
[Per: Bench]

1. This is an application filed U/s 60(5) of IBC, 2016 by the Applicant herein seeking the following prayers:

- a) *That this Hon'ble Tribunal be pleased to restrain the Respondent from appropriating the amounts lying in TDR No. 270045110018865 amounting to INR 4,60,00,000 (Indian Rupee Four Crore Sixty Lakhs Only) along with applicable interest thereon from the date of deposit;*
- b) *This Hon'ble Tribunal be pleased to pass an order directing the Respondent to refund/release the amounts lying in TDR No. 270045110018865 amounting to INR 4,60,00,000 (Indian Rupee Four Chore Sixty Lakhs Only) along with applicable accrued interest thereon and accordingly issue a Pay Order in favour of "Garden Silk Mills Limited" and deliver the same to Mr. Meherosh Baria/Mr Eric Bhatena (GSML officials) based at Tulsi Krupa Arcade, 1st Floor, Puna - Kumbharia Road, Dumbhal, Surat - 395010 or*

through a remittance to the below listed bank account details of the Corporate Debtor:

Bank: Bank of Baroda ("BOB")
Branch: Bhagatalao, Surat
Account No: 02590200001026
IFSC: BARB0BHAGAT

*c) Ad interim relief in terms of prayer clause (a); and
d) For any such other orders as this Hon'ble Tribunal deems fit in the facts and circumstances of the case.*

2. It is stated that the Corporate Debtor, Garden Silk Mills Limited was admitted to CIRP by order of this Tribunal dated 24.06.2020. Pursuant to the order of CIRP, the RP took over the management and business affairs of the Corporate Debtor.
3. The Applicant states that upon perusal of the books of accounts of the Corporate Debtor, it came to the knowledge of the Applicant that the Corporate Debtor entered into a loan agreement with EksportFinans ASA, Norway, vide agreement dated 28 April, 2008 ("Loan Agreement") extending ECB Loan bearing RBI Registration no. 2007929 and Loan no. 07131001 as per which, a Bank Guarantee bearing No. 2700FFIBG080002 ("Bank Guarantee") was issued by

the Respondent to be executed in favour of EksportFinans ASA, Norway, to the extent of 10% of principal amount under the Loan Agreement plus interest plus all other amount payable, in accordance with the said Loan Agreement. The said Bank guarantee was backed by the margin money deposit bearing TDR No. 270045110003808 which was further renewed to TDR No. 270045110018865 amounting to INR 4,60,00,000/- (Indian Rupee Four Crore Sixty Lakhs Only) ("TDR").

4. In order to release the fixed deposit of INR 4.60 Crores for the operations of the Corporate Debtor, the no objection certificate was obtained from the sole financial creditor for the premature payment of loan outstanding of only INR 1.16 Crores. Upon premature payment of the said loan outstanding of approximately INR 1.16 Crores by the Corporate Debtor in full during the month of March, 2020 (before CIRP), in terms of the aforesaid Loan Agreement, the Original Bank Guarantee along with No Dues Certificate has been returned by EksportFinans to the Corporate Debtor A copy of the No-

Dues Certificate from EksportFinans is annexed hereto and marked as "Exhibit-A".

5. Subsequently, the Corporate Debtor returned the Original Bank Guarantee to the Respondent on 15th June, 2020 and requested the Respondent to cancel the said Bank Guarantee and to liquidate the TDR lying with the Respondent, vide letters dated 15th June, 2020 and 17th June, 2020 respectively. A copy of the letter dated 15th June, 2020 is annexed to application and marked as "Exhibit-B" and a copy of the letter dated 17 June, 2020 is at Exhibit A hereto.

6. Thereafter, upon no affirmative action or response from the Respondent, the Applicant was constrained to address a letter dated 20th July, 2020 to the Respondent, reiterating the same requests. These requests were followed up by two emails dated 17th August, 2020 and 19th August, 2020, addressed by the Applicant and a letter dated 05th September, 2020 addressed by the Corporate Debtor. A copy of the follow-up communications dated 20th July, 2020, 17th August,

2020, 19th August, 2020 and 05th September 2020 is annexed hereto and marked as "Exhibit-C" collectively.

7. Despite repeated communications, the Respondent did not respond to the requests of the Applicant, thereby constraining the Applicant to issue a legal notice dated 11th September, 2020, calling upon the Respondent cancel the Bank Guarantee No. 2700FFIBG080002 and liquidate the TDR No. 270045110018865 amounting to INR 4,60,00,000 (Indian Rupee Four Crore Sixty Lakhs Only) with interest till date. A copy of the legal notice dated 11th September, 2020 is annexed hereto and marked as "Exhibit-D".

8. In response to the legal notice dated 11th September, 2020, the Respondent filed a Form C under regulation 8 of the CIRP Regulations dated 22nd September, 2020 posing as a financial creditor on absolutely frivolous grounds, stating that the Applicant either accept the Form C or revoke its legal notice dated 11th September, 2020. A copy of the Form C dated 22nd September, 2020 filed by the Respondent with the Applicant is annexed hereto and marked as "Exhibit-E".

9. It is pertinent to note the following facts that shed light on the illegality and baselessness of the Respondent's actions:

- i) The Respondent has by a duly executed and registered deed of Assignment of Debt dated 4th February, 2020 ("Assignment Deed") assigned the total loan outstanding amount from the Corporate Debtor including interest to the Financial Creditor/Original Applicant. A copy of the registered deed of Assignment of Debt dated 4th February, 2020 is annexed hereto and marked as "Exhibit-F"
- ii) It is pertinent to note that by the Respondent's own admission in the balance confirmation certificate dated August 25th, 2020, a sum of INR 4,73,73,571.00 (Four Crore Seventy Three Lakh Seventy Three Thousand Five Hundred Seventy One Only) is due as on June 30th, 2020 from the Respondent to the Corporate Debtor. A copy of the balance confirmation certificate dated August 25th, the Respondent is annexed hereto and marked as "Exhibit-G".

10. It is stated that the RP has rejected the claim of the Respondent vide letter dated 24.09.2020.

11. It is stated that a Nil outstanding certificate was issued

by the Respondent on 16.03.2020.

12. It is stated that the Respondent has issued the balance confirmation certificate which is dated 30.06.2020.
13. This application was originally filed by the RP of the Corporate Debtor. The Resolution Plan with respect to the Corporate Debtor was approved by this Tribunal vide order dated 01.01.2021. Subsequent to which IA No. 142 of 2021 was filed by Successful Resolution Applicant seeking substitution of its name in place of RP which was allowed vide order dated 01.03.2021.
14. Reply was filed by way of affidavit dated 04.08.2021, affirmed by one Mr. Sunil Kumar Sharma, Assistant General Manager (AGM). The summary of the reply is as under:-
 - i) The relief prayed is beyond the scope of the Section 60 (5) of the IB Code, 2016.
 - ii) The Respondent aggrieved to have issued the Bank Guarantee [FBG] bearing No. 2700FFIBG080002 against 100% margin which was said deposited in the form of Term Deposit.
 - iii) The said fixed deposit was closed on 24.09.2019

and was credited to repayment account and this amount was not assigned.

- iv) The Respondent states that the other loan accounts of the Corporate Debtor were assigned vide Assignment Agreement dated 04.02.2020.
- v) The Respondent has attached New Fund Account No.270045110018865, which is in shape of a TDR.
- vi) It is stated that the Respondent Bank has assigned the outstanding amount (principal outstanding + Interest) as on 12.01.2020, after appropriating the aforesaid premature closure proceeds of TDR amounting to Rs.5,59,55,910.49/- and the Foreign Bank Guarantee Facility was not assigned.
- vii) It is submitted that neither the Resolution Professional nor the Resolution Applicant can claim refund or release of any amount which is not an asset or receivable of the Corporate Debtor.

15. Additional Documents were filed by the Respondent Bank under Diary No. D 1661 on 30.03.2022, the same have been considered.

16. Additional Documents have been filed by the Applicant under Diary No. D 3647 dated 19.09.2023. A perusal of the same reveals that a Balance Confirmation has been issued by the Respondent according to which a sum of

Rs.5,20,16,405.00/- is lying in the credit in a Fixed Deposit. Further, to this Interest Certificate dated 25.04.2023 has been issued by the Respondent which shows a sum of Rs.21,07,145.00/- was paid as interest on which TDS of Rs.2,10,715.00/- was deducted for which the Applicant has filed the Annual Tax Statement issued in favour of the Applicant herein at Page No. 3. Similarly, a Balance Confirmation Certificate Dated 20.04.2023 issued by the Respondent is annexed on Page No. 4 which shows the Applicant is having a credit balance of Rs. 5,36,43,169.00/- as on 31.03.2023. An Interest Certificate dated 25.04.2023 is issued by the Respondent which shows a sum of Rs.18,07,516.00/- has been paid as interest on which TDS amounting to Rs.1,80,752.00/- has been deducted for which the Annual Tax Statement is also filed by the Applicant.

17. Additional reply was filed by the Respondent Bank under Diary No. D 2958 dated 05.04.2024 affirmed by Mr. Mayanka Prabh, Assistant General Manager (AGM). The Respondent has reiterated the similar facts as there has been recorded earlier in their reply dated

06.08.2021. Further, the Respondent Bank states that they have exercised their right of set off and general lien and thereby, Respondent Bank had closed the said F.Ds. of the Corporate Debtor on 24.09.2019 prematurely and as such in view of the Respondent the FDs cannot be treated as term deposit and the same has lost its character as term deposit.

18. It is stated that the exposure of the said Foreign Bank Guarantee remained contingent with a view to safeguard its interest and for operational convenience only **“Funding A/c” bearing No. 270045110018865 for Rs.4.60 Crores on 24.09.2019 in the name of the Corporate Debtor.** As such the said term deposit cannot be coloured as asset/property of Corporate Debtor.
19. It is stated that the original TDR was prematurely closed much prior to the said Assignment agreement dated 04.02.2020 and the order of CIRP dated 24.06.2020.
20. It is further submitted that Respondent Bank do agree that during CIRP, such rights cannot be exercised, but, in the instant case, Respondent Bank had already

exercised its general lien and right of set off, which was exercised by Respondent Bank much prior to the CIRP order and, therefore, the said Fixed Deposit stands appropriated by Respondent Bank against the default made by the Corporate Debtor. This aspect of appropriation of said FDR amount by Respondent Bank on 24.09.2019 was never questioned and challenged by Corporate Debtor at any point of time in any proceedings even prior to commencement of CIRP before Hon'ble Adjudication Authority.

21. Written submission was filed by the Applicant under Diary No. D 982 on 30.09.2021, the same has been considered.
22. We have heard and perused the documents as on placed before us. The following are undisputed facts in the matter:
 - I. The Applicant has obtained ECB from Eksport Finans ASA, Norway vide agreement dated 28th April, 2008 against Bank Guarantee issued by the Respondent Bank.
 - II. The Applicant has placed a sum of Rs.4.60 Crores

with the Respondent under Fixed Deposit as margin money.

- III. Before commencement of CIRP sometime in March, 2020 the entire ECB Loan was repaid by the Corporate Debtor and no objection certificate was obtained and submitted to the Respondent Bank and closure of the FD was sought by the Applicant.
- IV. Original Bank Guarantee issued by Respondent was submitted by the Corporate Debtor on 15.06.2020 for cancellation. Despite follow up the Respondent Bank has not refunded the margin money.
- V. The Corporate Debtor was admitted to CIRP vide order dated 24.06.2020 and vide order dated 01.01.2021 a Resolution Plan was approved for the Corporate Debtor and the present Applicant herein was the Successful Resolution Applicant.

23. The limited issue for consideration before us is whether the FD and Interest accrued on the FD continue to be the asset of the Corporate Debtor and whether the Successful Resolution Applicant is entitled to the interest and the principal amount, as the Original Bank Guarantee was returned to the Respondent Bank for cancellation prior to commencement of CIRP.

24. On perusal of the Additional Document submitted by the

Applicant herein under Diary No. D 3647 which are the Balance Confirmation Certificate, the Interest Certificate and the Annual Tax Statement etc. which go on to prove that the amount of the margin money is held by the Respondent Bank as term deposit in name of the Corporate Debtor on which yearly interest accrued and TDS is deducted and deposited with the Government by the Respondent Bank.

25. The Respondent Bank has raised the defense that they have suffered losses in the other loan accounts of the Corporate Debtor and exercised general lien of the deposit and, hence, has appropriated the amount.
26. We are of the view that, if at all, the Bank has appropriated the amounts no question of issuing Balance Confirmation, Interest Certificate and Depositing of TDS should arise. On the contrary, the above three go on to prove that the money continues to be held by the Bank in the name of the Corporate Debtor.
27. The Respondent Bank has not placed any documents before us to establish their defense that money lying in the Fixed Deposit has since been appropriated and

nothing is due and payable to the Corporate Debtor. The existence of the Balance Confirmation, Interest Certificate and Annual Tax Statement have never been denied by the Respondent Bank.

28. In view of the evidence placed before us by the Applicant which is not being denied by the Respondent Bank. We hereby hold that the Respondent Bank is holding deposit bearing TDR No. 270045110018865 in the name of the Corporate Debtor. These amounts are on behalf of the Corporate Debtor which were given as margin money for a guarantee issued by the Respondent Bank which has since been extinguished in full. We further hold that these amounts belong to the Resolution Applicant and the Respondent has no right to continue to hold these amounts any further.

29. In view of the above, we hereby direct the Respondent/Bank of India to *refund/release the amount of TDR No.270045110018865 amounting to INR 4,60,00,000/- along-with applicable accrued interest thereon* as prayed to the Applicant. Accordingly, **Prayer-B** is allowed.

30. The Respondent Bank is directed to release the payment within a period of 15 days from date of this order.

31. Accordingly, this application is allowed and disposed of.

Sd/-

SAMEER KAKAR
MEMBER (TECHNICAL)

Sd/-

SHAMMI KHAN
MEMBER (JUDICIAL)

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