

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 1562 OF 2020**

IN

COMPANY PETITION (IB) NO. 1832/MB/2017

*Application u/s 60(5) of the Insolvency and
Bankruptcy Code, 2016.*

In the matter of:

Mr. Abhijit Guhathakurta,

**On behalf of Monitoring Agency of the
Corporate Debtor**

...Applicant

v/s

Union Bank of India

.... Respondent

In the matter of

IDBI Bank Ltd.

...Financial Creditor

v/s.

M/s. EPC Constructions India Ltd

...Corporate Debtor

Order pronounced on 09.02.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in physical mode)

For the Applicant: Adv. Shriraj Khambete.

For the Respondent: Adv. Prakash Shinde i/b MDP & Partners.

ORDER

Per: Kuldip Kumar Kareer, Member Judicial.

1. This is an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) filed by the Applicant being Monitoring Agency of the Corporate Debtor seeking directions to the Respondent, *inter alia*, to deposit all the amounts earned on the subject FD from the insolvency commencement date (i.e. from 20th April, 2018) which have been wrongfully adjusted against the interest due on the working capital facility provided by the Respondent Bank, in the TRA Account of the Corporate Debtor bearing A/c No. 0004103000067111 maintained with IDBI Bank.

Case of the Applicant (in brief):

2. On 21st April 2014, the Corporate Debtor had deposited with the Respondent Bank an amount of INR 6,45,00,000/- (Rupees Six Crores and Fourty-Five Lakhs Only) in a Fixed Deposit bearing A/c No. 495803020003715 (hereinafter referred to as “subject FD”).
3. The Corporate Insolvency Resolution Process (‘CIRP’) was commenced against the Corporate Debtor vide Order of this Tribunal dated 20th April, 2018.

Thereafter, the resolution plan submitted by one Royale Partners Investment Fund Limited (being hereinafter referred to as 'RPIFL' for the sake of brevity) was approved by the CoC in its 18th meeting held on 10th January, 2019 with voting share of 73.17%. It is pertinent to note that the Respondent bank voted in favour of the plan. The aforementioned resolution plan was approved by the Hon'ble NCLT on 25.11.2019 in terms of Section 31(1) of the Code. As per the terms of the approved resolution plan, the Monitoring Agency is to maintain the Corporate Debtor as a going concern till the transfer of business of the Corporate Debtor to RPIFL. Pursuant to the Hon'ble NCLT's approval on the resolution plan, the 1st meeting of the Steering Committee occurred on 27.11.2019, wherein the Applicant was appointed as the Monitoring Professional.

4. The Respondent Union Bank of India had submitted its claim under Form C as a 'Financial Creditor' for an amount of INR 485,82,00,000/- (Rupees Four Hundred and Eighty-Five Crores and Eighty-Two Lakhs only). The Applicant in his capacity as RP admitted the entire claim of the Respondent. On 28th March 2012, the Respondent i.e. Union Bank of India had granted working capital facility to the extent of Rs. 475 crores to the Corporate Debtor. A part of the claim of the Respondent Bank was in relation to the interest outstanding on the said working capital facility extended by the Respondent Bank.

5. Prior to initiation of CIRP against the Corporate Debtor, the Respondent Bank used to credit the amount of interest earned on the subject FD to the Cash Credit Account bearing no. 495805010033028 (hereinafter referred to as “CC Account”) to set-off the interest due on the aforesaid working capital facility provided by the Respondent Bank on 28th March, 2012. The Applicant has observed that even after insolvency commencement date, the Respondent Bank had been crediting the interest earned on the subject FD to the said CC Account. Following are the details of amount credited to the CC Account from the interest earned on the subject FD from 20.04.2018 (i.e. insolvency commencement date) to 25.11.2019 (i.e. approval of the resolution plan by the Adjudicating Authority):

Sr. No.	Date	Amount (INR)
FINANCIAL YEAR 2018-19		
1.	20.04.2018	1233562.00
2.	20.07.2018	1233563.00
3.	20.10.2018	1233562.00
4.	21.01.2019	1233563.00
FINANCIAL YEAR 2019-2020		
5.	20.04.2019	1233562.00

6.	20.07.2019	1233563.00
7.	21.08.2019	419073.00
8.	21.11.2019	870750.00
	TOTAL	8691192.00

(Rupees Eighty-Six Lakhs, Ninety-One Thousand, One Hundred and Ninety-Two Only).

6. The Applicant also observed that the Respondent Bank continued crediting the interest earned on the subject FD to the said CC Account even after approval of resolution plan by the Hon'ble NCLT. The details of the amount so credited until 31st March, 2020 is as under:

Sr. No.	Date	Amount (INR)
FINANCIAL YEAR 2019-20		
1.	24.02.2020	870750.00

The Bank statements pertaining to FY 2020-21 have been requested by the Corporate Debtor from the Respondent Bank on 05-Aug-2020 and 11-Aug-2020 to ascertain the quantum of appropriations of interest made since April 01, 2020. However, the same has not yet been furnished. The Applicant in his

capacity as a Monitoring Agency, addressed an email to the Respondent Bank on June 18, 2020, asking it to deposit within 7 days, the amounts so realized from the interest earned on the subject FD in the TRA account maintained with the IDBI Bank. The Respondent Bank not only failed to adhere to the request of the Applicant but did not reply to the Applicant. Thereafter, the Applicant on 24.06.2020 and 26.06.2020 sent reminders to the Respondent Bank.

7. On 15 July, 2020 the Applicant had a telephonic discussion with Mr. Govind Jha (AGM) of the Respondent Bank. During the course of discussion, it was informed to the Applicant that the interest amount is being credited to the CC Account for the period post initiation of CIRP due to system related issue. The Applicant requested the Respondent Bank to resolve the system related issues with the subject FD and credit the amount of interest adjusted with CC Account to the IDBI TRA Account at the earliest. The Applicant vide its email dated 16th July, 2020 recorded the conversation that transpired telephonically on 15th July, 2020. Thereafter, the Applicant on 30.07.2020 once again sent a reminder to the Respondent Bank. However, the issue remained unresolved. Hence this application.
8. Respondent has entered appearance but not filed its reply. The Respondent has been orally heard through its Counsel on the day of oral arguments.

FINDINGS

9. We have heard the Counsel for the parties and have gone through the records.
10. By way of this Application, the Applicant has sought directions to the Respondent, *inter alia*, to deposit all the amounts earned on the subject FD from the insolvency commencement date (i.e. from 20th April, 2018) which have been wrongfully adjusted against the interest due on the working capital facility provided by the Respondent Bank, in the TRA Account of the Corporate Debtor bearing A/c No. 0004103000067111 maintained with IDBI Bank.
11. Counsel for the Applicant submits that as per Section 14 of the Code once the moratorium is imposed, no creditor can take any action to appropriate the amounts due to it from the assets of the Corporate Debtor. If at all the Respondent Bank has any claim against the Corporate Debtor, a claim may be filed for the same, which would be satisfied as per the provisions of the Code and terms of the approved resolution plan. Counsel for the Applicant further submits that the interest earned on the subject FD after the insolvency commencement date till passing of the resolution plan is an asset of the Corporate Debtor, which could not have been appropriated in utter disregard of the moratorium u/s 14 of the Code. Therefore, according to the Counsel for the Applicant, the Respondent Bank had no authority to appropriate and credit the amounts earned on the subject FD to the said CC Account during the CIRP

period, and the same amounts to a breach of the provisions of the Code. Lastly, Counsel for the Applicant submits that the resolution plan approved by the Adjudicating Authority is binding upon all stakeholders of the Corporate Debtor including the creditors and the action of the Respondent to appropriate amounts after approval of the resolution plan by the Adjudicating Authority u/s 31 of the Code is in complete violation of the terms of the approved resolution plan and this amounts to grave prejudice to the CIRP of the Corporate Debtor. Hence, the Ld. Counsel for the Applicant has prayed that the application of the Applicant be allowed.

12. On the other hand, the Counsel for the Respondent apprised the Court of the following facts:
- a. Union Bank of India ('Respondent') advanced a Working Capital Facility to the extent of Rs.475crores to M/s. EPC Constructions India Ltd. ("Corporate Debtor") on 28th March 2012 ("Working Capital").
 - b. Somewhere in February 2014, the Corporate Debtor along with its Joint Venture partner M/s. JSIW Infrastructure Pvt. Ltd., entered into a contract with the Narmada Water Resources, Water Supply & Kalpsar Department, Gujarat ("NWRWS&KD"). On the request of the Corporate Debtor, the

Respondent has issued a Fixed Deposit in favour of 'NWRWS&KD' ("said Fixed Deposit").

- c. As agreed by the Corporate Debtor, interest on the said Fixed Deposit was credited to the Cash Credit Account to set-off the FD interest due against the outstanding dues under the Working Capital Facility.
- d. It is an admitted fact that prior to the initiation of CIRP against the Corporate Debtor, the Respondent Bank used to credit the amount of interest earned on the said Fixed Deposit to the Cash Credit Account bearing No.485805010033028 ("CC Account") to set-off the interest due on the said Working Capital Facility.

13. Counsel for the Respondent has further submitted that the Respondent has filed the Form 'D' in which Respondent have already declared Rs. 6.45 crores in point No. 7 of the said Form D which may be set-off against the claim. Further, it has been declared that Fixed deposit receipt is given to a government entity. The Fixed deposit is already declared in Form D and is not relinquished by the Respondent. Thus, Respondent bank had reserved the right over principal amount as well and interest accrued on the same under right to set-off and has set-off and adjusted the claim accordingly. It is relevant to submit that Section 173 of the IBC permits set-off. Regulation 29 of the Insolvency and

Bankruptcy Board of India (Liquidation Process) Regulations, provides for mutual credits and setoff.

14. Counsel for the Respondent has further raised a preliminary objection to the maintainability of the above-captioned Interlocutory Application on the ground that this Tribunal has already passed an Order dated 07th May 2021 directing liquidation of the Corporate Debtor as the Resolution Applicant failed to implement the Resolution Plan. This Interlocutory Application was filed by the Monitoring Agency after the approval of resolution plan. Once the order of liquidation is passed by the Tribunal u/s 33 of the Code, the role of Monitoring Agency comes to an end and all powers are vested upon the Liquidator u/s 35 of the Code. Therefore, the present application cannot be prosecuted by the Monitoring Agency as it has become functus officio.

15. Counsel for the Respondent further submits that the Respondent Bank has not violated any provisions and/or Regulations under the IB Code, as alleged or otherwise. In the present case, the Fixed Deposit is in the name of the Government undertaking Narmada Water Resources, Water Supply & Kalpsar Department, Gujarat (“NWRWS&KD”), and the interest accrued on the said Fixed Deposit has been set-off and adjusted in liquidation and the same is evident from the Claim accepted and admitted by the Liquidator in terms of

'Form D' filed by the Respondent. Counsel for the Respondent has relied upon the judgment of Hon'ble Supreme Court of India in Bharti Airtel Ltd & Anr. v/s. Vijaykumar V. Iyer (Civil Appeal Nos. 3088-3089 of 2020) to assert the right to claim set-off during liquidation and in CIRP in certain exceptional cases, as laid down in the aforesaid judgment.

16. We have heard the Counsel for the Applicant, we have gone through the records and we have also given our thoughtful consideration to the aforesaid submissions.
17. The Corporate Debtor was admitted into CIRP vide Order of this Tribunal dated 20th April, 2018. This Tribunal passed an Order dated 07th May, 2021 and directed liquidation of the Corporate Debtor on account of the failure of Successful Resolution Applicant to implement the Resolution Plan. With liquidation order, the role of monitoring agency comes to an end and the powers and duties in relation to the affairs of the Corporate Debtor post liquidation are vested upon the Liquidator as per section 35 of the Code. Therefore, we are of the considered view that the Monitoring Agency has no locus anymore in prosecuting this application as it has become functus officio. Thus, the present application has become infructuous and at the stage of liquidation, it is only the prerogative of the Liquidator to move such an application.

18. It is further seen from the records that during the CIRP, the Respondent had lodged its claim of Rs. 485,82,15,227/- claiming a set-off of fixed deposit worth Rs. 6.45 crores as against the loan liabilities due by the Corporate Debtor to the Respondent. The aforesaid claim had been fully admitted by the Applicant in his capacity as IRP/RP of the Corporate Debtor. Therefore, the Applicant is now estopped from raising a plea that such set-off is not permissible. If at all the set-off of the fixed deposit of Rs. 6.45 crores were impermissible at the stage of CIRP, the Applicant, in his capacity as IRP/RP, should have partially rejected the claim of the Respondent disallowing such set-off as aforesaid. Instead, the Applicant is now questioning his own actions before this Court. The Applicant cannot be allowed to approbate and reprobate. Once the set-off of fixed deposit was permitted by the Applicant at the stage of CIRP, then the interest accrued thereon can be adjusted towards the dues in the Cash Credit account and such adjustment would not be hit by the moratorium u/s 14 of the Code as the fixed deposit is not a part of the assets of the Corporate Debtor.

19. It is not in dispute that prior to the initiation of CIRP against the Corporate Debtor, the Respondent Bank used to credit the amount of interest earned on the subject FD to the CC Account to set-off the interest due on the working capital facility provided by the Respondent Bank on 28th March, 2012.

Therefore, the set-off in the instant case is neither a statutory set-off nor the insolvency set-off, both of which are not permissible during the CIRP. The set-off in the instant case is that of a transactional or equitable set-off, which is permissible during the CIRP. The Hon'ble Supreme Court of India in *Bharti Airtel Ltd & Anr. v/s Vijaykumar V. Iyer and Ors.* (vide Judgment dated January 03, 2024 in Civil Appeal Nos. 3088-3089 of 2020) has held at Para 32 of its judgment as follows:

“32. The second exception will be in the case of 'equitable set-off' when the claim and counter claim in the form of set-off are linked and connected on account of one or more transactions that can be treated as one. The set-off should be genuine and clearly established on facts and in law, so as to make it inequitable and unfair that the debtor be asked to pay money; without adjustment sought that is fully justified and legal. The amount to be adjusted should be a quantifiable and unquestionable monetary claim, as the Corporate Insolvency Resolution Process is a time-bound summary procedure. It is not a civil suit where disputed questions of law and facts are adjudicated after recording evidence. Set-off of this nature does not require legal proceedings. Further, set-off of money is to be given against money alone. It will not apply to assets. Lastly, being an equitable right, it can be denied when grant of relief will defeat equity and justice.”

In the present case, the claim and counter-claim of the parties herein are linked and connected on account of more than one transaction which can be treated

as one. The set-off of interest accrued on the subject FD against the interest due on the working capital loan in the CC Account is genuine and clearly established on facts. Further, the amount of FD interest adjusted against the interest on working capital facility in the CC Account is quantifiable and undisputed. Also, the set-off of money is being given against the money alone as the fixed deposit (including the interest accrued thereon) has been set-off against the dues of the working capital facility and this adjustment does not take away or apply to any other assets of the Corporate Debtor. Hence, we are of the opinion that even on merits, the Applicant has a bad case, as the set-off of the subject FD (including interest due thereon) against the arrears of working capital loan in the CC Account squarely falls under the concept of “Transactional Set-Off” or “Equitable Set-Off” which has been carved out as an exception by the Hon’ble Supreme Court to the general rule that set-off permitted by Regulation 29 of the Liquidation Regulations cannot be applied to the Corporate Insolvency Resolution Process.

20. In view of the above findings and discussions, we find that this application is meritless and we, therefore, dismiss I.A. No. 1562/2020 with no order as to costs. This I.A. accordingly stands disposed of on above terms.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)