

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH III
NEW DELHI

CA-66/C-III/(ND)/2018

SECTION: Under Section 43(1) read with Section 43(2)(a) & (b) and Section 44(d) and Section 19(2) of Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:

INDUSIND BANK LIMITED,
2401, GEN. THIMMAYYA ROAD,
CAMP, PUNE-411001.
NEW DELHI

....Financial Creditor/Petitioner

And

Gallium Industries Limited,
At 3488, Gali No.81,Block E-2,
Molar Band Ext. Badarpur,
New Delhi-110044.

..... Corporate Debtor

AND IN THE MATTER OF:

Mr. Vijender Sharma, Resolution Professional

.....Applicant

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Coram:

R.VARADHARAJAN
Hon'ble Member (Judicial)

V.K.SUBBURAJ
Hon'ble Member (Technical)

For the Petitioner : Mr. Pranab Kumar Mullick, Ms. Soma Mullick
Advocates

For the Respondent : -

Delivered on : 13/04/2018

ORDER

This is an application which has been filed by the Resolution Professional in relation to the Corporate Debtor (CD) appointed by this Tribunal vide order dated 19.07.2017, based on the fact that the Key Management Person (KMP) of the CD namely Mr. Rajesh Meena, KMP has withdrawn funds of the CD to the extent of Rs.31, 44,000/- from the bank account of the CD maintained

with HDFC bank bearing account No. 50200009104805 and has transferred the said funds to his personal bank account during the period of moratorium and after the commencement of Corporate Insolvency Resolution Process (CIRP). It is also averred in the application by RP that the maintenance of the bank account with HDFC by the CD for the first time was informed to him vide email dated 28.8.2017 i.e. after a period of 10 days after which the RP took over the charge of CD and the statements of account in relation to the said HDFC Bank was made available upto 21.07.2017. However, upon the information obtained from the said KMP, the RP it is stated, approached the HDFC Bank and obtained the bank statements of the CD and upon verification it came to transpire that the above sum of Rs.31,44,000/- have been withdrawn by the said Mr. Rajesh Meena, KMP in the intervening period (i.e.) subsequent to 21.07.2017. The RP further states that the above fact was also brought to the notice of the Committee of Creditors (CoC) in its second meeting held on 12.10.2017 and based on the recommendations of CoC mails were sent to the said Mr. Rajesh Meena, KMP on several dates

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and that in response Mr. Rajesh Meena vide a mail dated 31.10.2017 stated that the amount was withdrawn in good faith from CD's bank account against the unsecured loan extended by him to the CD and that efforts were being made by him to refund the money to the account of the CD. However, RP further avers that the said promise was not abided by Mr. Rajesh Meena, KMP and in the meeting of CoC held on 12.10.2017, Mr. Rajesh Meena was confronted by the Members of CoC in relation to the withdrawal of Rs.31,44,000/- from the CD's bank account. Even though a promise was made by Mr. Rajesh Meena, KMP that the entire amount will be deposited within a period of 10 days by 10.12.2017 in the account of the CD opened by RP with Yes Bank and cheques were issued as per the details furnished in the application for the sum of Rs.31,44,000/- and that the same was also reported to the CoC as well as to this Tribunal vide status report dated 12.12.2017.

2. The RP further avers that due to reasons stated in the application the said three cheques were not immediately



deposited due to freeze put on transactions by the Income Tax Department of Yes Bank and subsequent to the unfreezing of the account, the three cheques were deposited. However, on deposit, all the three cheques got bounced and the same was reported to the CoC in its 4th meeting held on 04.01.2018 and the CoC directed Mr. Rajesh Meena, KMP to deposit the amount at the earliest. Even though Mr. Rajesh Meena, KMP assured and subsequent consistent efforts on the part of the RP, had deposited only Rs.10.44 lakhs out of Rs.31.44 lakhs and in the circumstances Rs.21.00 lakhs is yet to be remitted by Mr. Rajesh Meena, KMP. In view of the same, the application has come to be moved by the RP seeking for necessary directions to the said Mr. Rajesh Meena, KMP for depositing a sum of Rs.21.00 lakhs to the account of the CD and also to extend cooperation to the RP.

3. From the perusal of the application it is seen that the same has been moved under sub-section (1) of Section 43 read with Section 43(2)(a)(b) and Section 44(d) of Insolvency and Bankruptcy Code, 2016 (IBC,2016) dealing with preferential

transactions. The provisions as cited above clearly vest with this Tribunal the power to require any person to pay such sums in respect of benefits received by him from the CD. Further as per Section 43(2), the CD shall be deemed to have given preference if there has been transfer of property or an interest thereof of the CD for the benefit of a creditor during the period of 2 years preceding the insolvency commencement date in case if the same is to a related party instead of a period of 1 year, in relation to others preceding the insolvency commencement.


4. In the instant case, it is seen that the commencement of insolvency proceedings has been mooted by virtue of an order passed by this Tribunal on 19.7.2017. However, the funds have been withdrawn on 17.08.2017 and 19.08.2017 as per the application and not prior to the insolvency commencement date as evidenced by facts disclosed in the application and the subsequent to the said date and in the circumstances the applicability of Section 43 read with Section 44 to the instant case is a moot point.

5. However, under Section 17 of IBC,2016 it is seen that from the date of appointment of the IRP, the management of the affairs of the CD shall rest in the IRP and that in addition the powers of the Board of Directors shall stand suspended and to be exercised by the IRP and the bankers are required to act in accordance with the instructions of the said IRP in relation to the such accounts maintained by the CD and not as per the direction of erstwhile management including Mr. Rajesh Meena. Obviously, on and from the initiation of the CIRP as well as appointment of IRP, Mr. Rajesh Meena, KMP, could not have withdrawn the funds from HDFC Bank where the account of the CD was maintained particularly when the CD is under the moratorium, as envisaged under Section 14 of IBC,2016 and more specifically under Section 14(b) in relation to transferring, encumbering, alienating or depositing of by the CD any of its assets is prohibited. Hence, in the circumstances, this Tribunal is of the view that the amount which has been withdrawn by Mr. Rajesh Meena, KMP claiming that he has made available unsecured loan to CD to the extent



of Rs.31.44 lakhs is obviously to the detriment of general body of creditors and this Tribunal even though the RP has come out with application under the erroneous provisions of IBC,2016 and considering the provisions of Section 60(5) and also taking into consideration that this application has been moved by RP in the interest of the creditors and other stakeholders of CD allows the application and the said Mr. Rajesh Meena is directed to forthwith refund the sum of Rs.21.00 lakhs retained by him of the CD. A copy of this order shall be served upon Mr. Rajesh Meena, KMP for necessary compliance failing which the provisions of IBC,2016 in relation to willful disobedience of the orders of this Tribunal and more particularly by virtue of Section 74 of IBC,2016 shall apply.

Copy of the order be given Dasti to the Petitioner.


(V.K.SUBBURAJ)
MEMBER (Technical)

13/4/2018


(R.VARADHARAJAN)
MEMBER(JUDICIAL)

13/4/2018

U.D.Mehta
13/04/2018