

**THE NATIONAL COMPANY LAW TRIBUNAL  
COURT NO. IV  
AT NEW DELHI**

**IA No. 3825/ND/2020**

**IN**

**Company Petition No. (IB)-1226(ND)/2019**

*Under Section 35(1) (N) of the Insolvency and Bankruptcy Code, 2016 r/w  
Regulation 9 of IBBI (Liquidation Process Regulation, 2016*

**IN THE MATTER OF:**

**VINEET AGGARWAL**

**...APPLICANT/LIQUIDATOR**

**VERSUS**

**1. STATE BANK OF INDIA  
6<sup>TH</sup> FLOOR PALM COURT BUILDING  
NEAR MDI GURGAON  
HARYANA -122001**

**...RESPONDENT NO.1**

**2. STATE BANK OF INDIA  
VATIKA FIRST INDIA PLACE  
MG ROAD, GURGAON  
HARYANA-122001**

**...RESPONDENT NO. 2**

**3. STATE BANK OF INDIA  
WORLD TRADE CENTRE, 2<sup>ND</sup> FLOOR  
ARCADE BUILDING, CUFFE PARADDE  
MUMBAI 400005**

**...RESPONDENT NO. 3**

**4. INDIAN MERCHANTILE CO-OPERATIVE BANK LIMITED  
CAPTAIN VIJAYANT THAPPAR MARG SECTOR 15  
NAYA BASS VILLAGE SECTOR 15  
NOIDA, UTTAR PRADESH 201301**

**...RESPONDENT NO.4**

*Prag*

**AND IN THE MATTER OF:**

**ASHISH BANKAR**

**...FINANCIAL CREDITOR**

**VERSUS**

**M/S NU TEK INDIA LIMITED**

**...CORPORATE DEBTOR**

*Order delivered on: 02.08.2021*

**Coram:**

**DR. DEEPTI MUKESH  
HON'BLE MEMBER (JUDICIAL)  
SMT. SUMITA PURKAYASTHA  
HON'BLE MEMBER (TECHNICAL)**

**For the Liquidator : Mr. Rishabh Singh, Adv  
Mr. Gourav Gupta, Adv.  
Ms. Kanti Mohan Rastogi,  
Mr. Kul Bhushan Sachdev**

**For the R-4 : Mr. Alok Kumar Kuchhal, Adv.**

**MEMO OF PARTIES**

**VINEET AGGARWAL**

**...APPLICANT/LIQUIDATOR**

**VERSUS**

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6<sup>TH</sup> FLOOR PALM COURT BUILDING  
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*By*

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4. INDIAN MERCHANTILE CO-OPERATIVE BANK LIMITED  
CAPTAIN VIJAYANT THAPPAR MARG SECTOR 15  
NAYA BASS VILLAGE SECTOR 15  
NOIDA, UTTAR PRADESH 201301

...RESPONDENT NO.4

**ORDER**

**AS PER SUMITA PURKAYASTHA (TECHNICAL)**

1. This IA 3825/ND/2020 has been filed by the Liquidator under Section 35(1)(n) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the code) seeking the following prayers:
  - a. Allow the present application and direct the Respondent no.1 to 4 to release the money kept as fixed deposits against the margin money for issuance of bank guarantees and transfer the funds into the liquidation account opened by the liquidator with the Central Bank of India

*By*

b. Pass any such orders as the Hon'ble Tribunal may deem fit and proper.

2. The facts in brief are that the CIRP against the Corporate Debtor NU Tek India Limited was initiated vide order dated 23.08.2019 in the IB application filed by Ashish Bankar as the Financial Creditor under Section 7 of the code, appointing Mr. Anuj Jain as the IRP. The CoC in its first meeting resolved to replace him with the applicant Mr. Vineet Aggarwal which was confirmed by the Adjudicating Authority vide order dated 01.10.2019.
3. That the resolution applicant who had earlier shown interest in submission of the resolution plan, later withdrew their expression of interest therefore, the CoC in its 7<sup>th</sup> meeting held on 09.05.2020 decided to proceed with liquidation and an application bearing IA.NO. 2172/2020 under section 33(1) of the code was filed. The said application was allowed by the Adjudicating Authority vide order dated 22.06.2020 and the Resolution Professional was appointed as the Liquidator.
4. It is submitted by the applicant that the respondents 1 to 4 are the bankers of the Corporate Debtor. The Corporate Debtor had initially got working capital facilities sanctioned from the Respondent No. 3 State Bank of India, Overseas branch Mumbai, which was subsequently transferred to Respondent No.1 State Bank of India, Commercial Branch Gurgaon. It is further submitted that the Corporate Debtor kept



of repaying the working capital loan availed by it resulting into reduction of amount of loan. Consequently, the account of the Corporate Debtor was again transferred from State Bank of India Commercial Branch, Gurgaon to Respondent No. 2 State Bank of India SME Branch M G Road, Gurgaon. It is averred that the Corporate Debtor has cleared each and every amount of Respondent no. 1 to 3.

5. The Applicant submits that the Corporate Debtor prior to initiation of the CIRP had requested the Respondent banks to issue different bank guarantees. The aforesaid bank guarantees have expired and the Respondent 1 to 3 has not received any claim against any of the bank guarantees till date. The Respondent 1 to 3 have opened different fixed deposit in the name of the Corporate debtor for keeping it as margin money against the issuance of the aforesaid bank guarantees. The Applicant after he took control of the Corporate Debtor had written to Respondent No. 1 to 3 for closure of all the fixed deposits and transfer the same to the aforesaid liquidation account of the Corporate Debtor.
6. The Applicant had sent email dated 28.08.2020 for release of the fixed deposits to the Overseas Branch of the State Bank of India, Mumbai. The Applicant had also written to Respondent No.4 Indian Merchantile Co-operative Bank Limited, Noida, to release the fixed deposits kept as margin money for issuance of bank guarantee however, the request was refused, stating the reason that they have received a claim from the Indian Oil Corporation (IOCL) in the year 2018 against the said bank



guarantee. The fact is that the Corporate Debtor has executed a contract with IOCL in the year 2012-2013 and the Respondent No 4 issued a bank guarantee bond no. 105/2021 dated 07.05.2012 against the fixed deposits LOA no. 10014941 in favour of the IOCL against a fixed deposit for an amount of Rs.25,66,023/-. The Bank Guarantee was valid from 07.05.2012 to 03.04.2015, which was further extended till 31.11.2015 and then extended till 30.09.2018. There was no extension of the said bank guarantee no.105/2012 thereafter.

7. The IOCL lodged claim against the bank guarantee on 26.02 2018 however, PCR review restrictions were imposed by the RBI against the Respondent no.4 IMCBL under the provisions of section 35A (2) read with 56 of the Banking Regulations Act, 1949, thus under force majeure the Respondent no. 4 did not make the payment. That it is also submitted that invocation of the bank guarantee by the ICOL was only to create undue pressure against the corporate debtor as till today the IOCL has not reconciled the accounts with the corporate debtor. The Liquidator then acting as RP had written a letter to the IOCL in January, 2020 stating there in that if IOCL has any claim they should file the same before the RP but the IOCL never filed any claim either during CIRP or during liquidation. It is also being submitted that the RP also wrote to the IOCL, Bangalore demanding Rs 51,88.5041-, IOCL Kochi demanding Rs 29,99.655/- and IOCL. Chennai demanding Rs.3,66,427/- vide his letters dated 15.01.2020 against which the IOCL did not give any response.

8. The Applicant as the Liquidator is obligated under section 36 of the IBC, 2016 to create liquidation estate and to consolidate all assets/funds/amounts in the liquidation opened under Regulation 41 of the IBBI (Liquidation Process) Regulations, 2016. That also it is being submitted by the applicant that in case of Respondent no 1 to 3 there is no claim against any of the bank guarantee issued by them. In case of Respondent no.4 the claim was filed in year 2018, when there were restrictions imposed by the RBI against the Respondent no.4 and before the restrictions were removed by RBI against Respondent no 4 the CIRP commenced with effect from 23.08.2019. It is further submitted that once CIRP commenced and moratorium under section 14 is imposed the Respondent are restrained to hold or pay the amount kept under fixed deposits to any of the creditor/party as the same would amount to preferential payments, which is specifically barred by the IBC, 2016. That also it is being submitted that none of the creditors in whose favour the bank guarantees have been issued by the respondents have filed any claim either during CIRP or during Liquidation.
9. The Applicant has referred to the judgement of Hon`ble NCLT Mumbai Bench in the case of **Chetan T Shah Vs. Federal Bank and Ors MA.147/2018 in CP. No. 1069/2017** it was held that *“all these reversals as mentioned above have taken place after CIRP has been commenced on 12.06.2017. Since, it has to be considered that the monies lying in the name of corporate debtor shall not be taken out even by the*



*creditors soon after commencement of CIRP as mentioned under section 14 of the Code.” The applicant has also placed its reliance on the judgement of Hon'ble NCLAT in case of **Bank of Baroda Vs Sundaresh Bhatt Company Appeal (AT) (Insolvency) no.635/2019** wherein it was held that 'Considering the submission made by both the sides, looking into the documents and keeping in view the reasons recoded by the Adjudicating Authority, it does appear that money which was lying with the bank as margin money in the form of 3 FDs in the name of corporate debtor were appropriated after CIRP was initiated and thus the same could not have been done under section 14 of the IBC."*

10. That vide order dated 22.09.2020, the Adjudicating Authority directed issued notice to the Respondent no. 1 to 4. The Applicant has filed affidavit dated 28.09.2020 in compliance to the order dated 22.09.2020 annexing the copy of the email sent by the counsel of the Applicant/Liquidator and the receipt of the speed post. Further vide order dated 06.10.2020 the Adjudicating Authority issued another notice to Respondent No. 3 and 4 as the Counsel for the Applicant submitted before the Adjudicating Authority that Respondent No. 1 and 2 have released the margin money held by them in the account of Corporate Debtor. Hence, this application is no more pressed against respondents No. 1 and 2 as it stands satisfied against Respondent no. 1 and Respondent 2. The order dated 06.10.2020 has been reproduced here below:

*“Application filed by the liquidator seeking direction against four banks for releasing of margin money which is not release in the account of the Corporate Debtor and still held with the banks. None appears for any respondents. Learned Counsel Mr. Sanjay Kumar Singh appearing for liquidator states that, as per the instructions, respondent No.1 State Bank of India, Palm Court Building, Gurgaon and respondent No. 2 State Bank of India, MG Road Gurgaon have released the margin money held by them in the account of Corporate Debtor. Hence, this application is not pressed against respondents No. 1 and 2 as it stands satisfied. Let another notice be issued to respondent No. 3 State Bank of India, Cuffe Parade, Mumbai and respondent No. 4 Indian Mercantile Cooperation Bank Limited. Learned Counsel for liquidator undertakes to serve again respondents No. 3 and 4 through all modes.”*

11. Further vide order dated 28.10.2020 the Adjudicating Authority discharged Respondents No. 1, 2 & 3 on submission made by the Applicant that directions sought against respondents No. 1, 2 & 3 stands satisfied, hence, the application is not pressed against them and they may be discharged.
12. The Respondent No. 4 Indian Merchantile Co-operative Bank Limited filed its reply dated 24.11.2020 and submitted that the Indian Oil Corporation Limited awarded certain work to design, manufacture, supply, transportation, installation and commissioning of the complete



High mast signage, display panels including civil foundation work etc at the Indian Oil retail outlets across the country to the Corporate Debtor and for the above mentioned work, the Corporate Debtor has provided continuous Bank Guarantee to the IOCL having B G. No. 105/2012 and issue date 07.05.2012, for Rs. 25,66,023/- which was initially valid up to 03.04.2015. After issuance of the Bank Guarantee, the IOCL has issued Letter of Acceptance having no. 10014941 dated 03.05.2012 and allotted the work to the Corporate Debtor. The Respondent No.4 submits that the Bank Guarantee has the clause that Respondent No. 4 shall extend the Bank Guarantee upon written request of IOCL for further 6 months from time to time and vide Deed of Extension of Guarantee Bond dated 20.08.2014 having Ref. No. IMCB/2014-2015/152 and accordingly the Bank Guarantee Bond were further extended upto 30.11.2015. Further on 26.11.2015 the Bank Guarantee was extended upto 31.03.2017 and again extended upto 30.09.2018.

13. Further it is submitted that the Respondent No.4 received a request by IOCL to invoke Bank Guarantee having BG No. 105/2012 dated 07.05.2012 for Rs. 25,66,023/- vide letter dated 26.02.2018. However, due to directive of the Reserve Bank of India under Section 35A read with Section 56 of the Banking Regulation Act, 1949, the Respondent No. 4 was not permitted to encash the Bank Guarantee.

14. That in response to letter received from the IOCL dated 26.02.2018, the Respondent No.4 vide its letter) dated 16.12.2019 intimated to

Chief General Manager (Engineering) of the IOCL Marketing Division Karnataka regarding withdrawal of restriction under sub section (2) of section 35A of Banking Regulation Act. 1949 and informed that in pursuance of initiation of CIRP against Corporate Debtor M/S NU TEK INDIA LIMITED the Resolution Professional has informed the Respondent No. 4 to act as per provision of the Code to deal with Bank Account of the Corporate Debtor. The copy of letter dated 16.12.2019 is annexed.

15. The Respondent No. 4 submits that IOCL has already submitted the original bank guarantee to the Respondent No. 4 and requested on multiple occasions including 26.02.2018 and 31.12.2019 and advised to invoke the subject Bank guarantee and deposit the amount Rs.25,66.023/- by way of DD/RTGS to the bank account of the IOCL as the Corporate Debtor has not fulfilled the terms and conditions of the LOA dated 03.05.2012. The copy of letter dated 26.02.2018 and 31.12.2019 is annexed.

16. That the Respondent No.4 again received a letter dated 26.02.2018 from Mr. V. Karnesh Kumar, Chief General Manager of the Indian Oil Corporation Limited in reference to the Bank Guarantee issued by Respondent No. 4 submitted by the Corporate Debtor in lieu of Security Deposit for the LOA No. 10014941 dated 03.05.2012 for Rs.25.66.023/- and intimated that the Corporate Debtor has not fulfilled the terms and conditions of the above LOA and not completed



the work and further added to invoke the above-mentioned bank guarantee for its entire value and encash the same. That IOCL requested Respondent No. 4 to consider the claim to invoke and release the amount of and pay the above Bank Guarantee. The copy of letter dated 26.02.2018 is annexed.

17. The Respondent No. 4 submits that the Bank Guarantee also has a clause that, *"The amount stated by the Corporation in any demand claim or notice made with reference to this guarantee shall in between the Bank and the Corporation for the purpose of these presents be conclusive of the amount payable by the Bank to the Corporation hereunder"* and as adumbrated in the above clause of the Bank Guarantee, the IOCL has requested Respondent No.4 to release the Bank Guarantee.

18. Respondent No.4 submits that again vide letter dated 08.09.2020 in reference to letter issued by the Respondent No. 4 dated 01.09.2020, made it clear that their stand on invoking Bank Guarantee remains unchanged and advised to deposit the claim amount in the Bank Amount of the IOCL. The copy of letter dated 08.09.2020 is annexed herewith. That the Respondent No.4 was unable to appropriate the Fixed Deposit as pursuant to the Bank Guarantee, the liability of the Respondent No.4 to the IOCL is full notwithstanding the existence of any difference or dispute between any parties. It is further mentioned in the Bank Guarantee that the Respondent No. 4 shall be liable to make



payment to the IOCL in all notwithstanding the existence of difference between the parties or dispute or instruction.

19. Also, as per restrictions imposed by the RBI against the Respondent No 4, the said Respondent No.4 cannot appropriate the Fixed Deposits and before the restrictions were removed by RBI against Respondent No 4 the CIRP commenced with effect from 23.08.2019 and due to imposition of the moratorium under section 14 of the Code, Respondent No.4 is restrained to withhold the amount kept under fixed deposits to any of the creditor

20. The Respondent No. 4 submits that in the present matter the liabilities are already crystallized and the obligation to pay already arose before the initiation of the Corporate Insolvency Resolution Process and payment was not made due to restrictions imposed by the RBI against the Respondent No 4. Also, the money lying in the fixed deposits in the name of Corporate Debtor have not been appropriated till date hence, the case laws stated by the Applicant is not applicable and there is no violation of the section 14 of the Code.

21. The Applicant filed a rejoinder dated 01.12.2020 and submitted that the clause mentioned by the Respondent No.4 in its reply (*"The amount stated by the Corporation in any demand claim or notice made with reference to this guarantee shall in between the Bank and the Corporation for the purpose of these presents be conclusive of the amount payable by the Bank to the Corporation hereunder"*) is a standard

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clause of the bank guarantee, which does not have any bearing on the proceedings under the I&B code as the Code has an overriding effect on all other statutes. It is submitted that the terms of the bank guarantee clearly indicates that the bank guarantee was provided in lieu of cash deposit of the initial security deposit by the Corporate Debtor as per the general condition of the contract between the Corporate Debtor and the Indian Oil Corporation Limited (IOCL).

22. The Applicant submits that the IOCL has submitted that the original bank guarantee to the Respondent No.4 was for realization of the amount however, it is denied that the Corporate Debtor has not fulfilled the terms and conditions of the contract with the IOCL. The Corporate Debtor has still an outstanding of more than Rs. 85 lakhs from IOCL and the applicant while working as Resolution Professional as well as liquidator had sent several letters to IOCL for release of the outstanding amount to Corporate Debtor and also to share the reconciliation of accounts but IOCL has never responded to letters of the applicant liquidator and has tried to realize the bank guarantee, which was provided as security deposit to the IOCL. It is a deliberate attempt by the IOCL to realize the security deposit as it is in the form of a bank guarantee. Copy of the letters sent to IOCL by the RP as well as Liquidator is annexed.

23. The Applicant further submits that while there is a clause in the bank guarantee that the demand, claim or notice with respect to guarantee



would be between the respondent bank and IOCL but the same does not entitle the respondent bank to appropriate the fixed deposits kept by the respondent bank in the name of the Corporate Debtor as margin money after the commencement of CIRP.

24. The Applicant submits that any asset lying in the name of the Corporate Debtor on the commencement of liquidation shall be forming part of the liquidation estate and the same shall be distributed as per the provision of Section 53 of the Code. The respondent bank is under an obligation to release the amount to the Corporate Debtor in its liquidation account as the same is forming a part of the liquidation asset. Further it is submitted that as per section 36 of the Code, the liquidator has to form Liquidation estate which shall include every asset of the corporate debtor whether in possession of corporate debtor or in possession of any third party. Section 36(3)(b) specifically provides that encumbered assets of the corporate debtor shall also be part of liquidation estate. Further section 36(3)(h) provides that any property belonging to or vested in the corporate debtor at the insolvency commencement date shall form part of the liquidation estate. In this case, it has been admitted that the fixed deposit is still lying with the respondent bank and as per section 36 of the Code it shall be considered part of the liquidation estate.

25. The Applicant in its written submissions has relied on ***Bank of Baroda Vs Sundaresh Bhatt Company Appeal (AT) (Insolvency)***



**no.635/2019** which were earlier relied in the application and the decision has not been reproduced again for brevity of facts. The Applicant has further relied on **IA No. 2069(PB) 2020 IN CP (IB)170(PB)2018 passed by the Hon`ble Principle Bench, New Delhi** wherein it an application was filed by the Resolution Professional for closure of the Fixed Deposit on the ground that CIRP had been initiated against the Corporate Debtor and whatever assets belonging to the Corporate Debtor were to come under the control of the Resolution Professional. It was held that *“As per section 14 of the Code, after triggering CIRP, no one can initiate any process or continue any process for lawful appropriation of the assets of the Corporate Debtor except to the extent mentioned under the Code. The Only exemption provided under the Code is liberty to appropriate performance guarantee as mentioned under section 3(31) of the Code.”* The Applicant has also relied on the judgement **Company Appeal (AT) no. 761/2020, UCO Bank Vs. Mr. G Ramachandran** *“ It is apparent that the CIRP was initiated on 27.03.2019 and later on the Respondent found that the Appellant bank had adjusted certain amount which it could not, considering Section 14 of IBC, Once the CIRP was initiated and Section 14 of IBC is applied, such adjustment by the Appellant bank cannot be maintained.”*

26. The Respondent No.4 in its written submission submits that IOCL has requested on multiple occasion including 26.02.2018 and 31.12.2019 and advised to invoke the subject Bank Guarantee and deposit the

amount of Rs.25,66,023/- to the bank account of the IOCL as the Corporate Debtor have not fulfilled the terms and conditions of the LOA dated 03.05.2012 and not completed the work assigned. The Respondent No.4 was acting as a facilitation agent and was unable to appropriate the FDs pursuant to the Bank Guarantee, the liability of the Respondent No.4 to the IOCL is full notwithstanding the existence of any difference or dispute between any parties. As per the restriction imposed by the RBI on the Respondent No.4 the FDs could not be appropriated and before the restrictions could be removed CIRP was initiated.

27. Upon perusal of the facts aforementioned and legal preposition raised by either side ***the point for consideration is, whether a Bank guarantee be invoked and encashed after the CIRP has been initiated?***

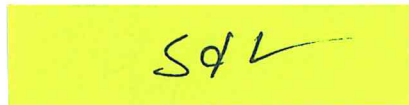
In ***IA No. 2069(PB) 2020 IN CP (IB)170(PB)2018 passed by the Hon`ble Principle Bench, New Delhi*** and the Hon`ble NCLAT in ***Company Appeal (AT) no. 761/2020, UCO Bank Vs. Mr. G Ramachandran*** it was held that as per section 14 of the Code, after triggering CIRP, no one can initiate any process or continue any process for lawful appropriation of the assets of the Corporate Debtor except to the extent mentioned under the Code The only exemption provided under the Code is liberty to appropriate performance guarantee as mentioned under section 3(31) of the Code.



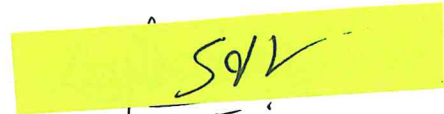
28. We have observed in the present case that IOCL has requested on 26.02.2018 and 31.12.2019 to invoke the subject Bank Guarantee and deposit the amount of Rs.25,66,023/- to the bank account of the IOCL. As per the restriction imposed by the RBI on the Respondent No.4 the FDs could not be appropriated and before the restrictions could be removed CIRP against the Corporate Debtor was initiated vide order dated 23.08.2019. While considering the above mentioned judgement passed by the Hon`ble NCLAT, We are of the view that as per section 14 of the Code, after triggering CIRP, no one can initiate any process or continue any process for lawful appropriation of the assets of the Corporate Debtor. The exemption with respect to the performance guarantee as mentioned under section 3(31) of the Code is not applicable in the present case as it is a Bank Guarantee and the Respondent has not contested the same being a Performance Guarantee. Further any asset lying in the name of the Corporate Debtor on the commencement of liquidation shall form as a part of the liquidation estate and the same shall be distributed as per the provision of Section 53 of the Code hence, We hereby direct the Respondent no.4 to release the money kept as fixed deposits against the margin money for issuance of bank guarantees and transfer the funds into the liquidation account opened by the liquidator with the Central Bank of India.

29. Application IA No. 3825/ND/2020 is allowed and disposed of in terms of above order.

30. Let the copy of the order be served to both the parties



**Sumita Purkayastha**  
**Member (T)**



**Dr. Deepti Mukesh**  
**Member (J)**