

\$~26

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 31st May, 2019.

+ **O.M.P. 369/2008**

M/S HERO EXPORTS

..... Petitioner
Through: Mr. Suhail Dutt, Senior Advocate
with Mr. Nikilesh R., Advocate.
(M:9810460429)

versus

M/S TIFFINS BARYTES

..... Respondent
Through: Mr. M. A. Venkata Subramanian and
Mr. K. Moorthy, Advocates.
(M:9810239044)

Mr. E. Omprakash, Senior Advocate
with Mr. Bijoy Kumar Pradhan,
Advocate for Committee of Creditors.
(M:9810110646)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

I.A. 7004/2019 in O.M.P. 369/2008

1. The present application has been filed by the Resolution Professional ('RP') seeking release/transfer of funds of the Respondent company secured with ABN Amro /RBS Bank, pursuant to the orders dated 18th July, 2008 and 26th November, 2008 passed by this Court.

2. The background of the present application is that a Section 9 petition came to be filed being OMP 369/2008. The same related to a sale/purchase transaction between the Petitioner and the Respondent. In the said OMP, order dated 18th July, 2008 was passed by the 1d. Single Judge of this Court

wherein this Court was of the opinion that the amount, which was due to the Petitioner, was liable to be secured. The relevant portion of the said order reads as under:

“Having regard to the nature of the transaction , whereby the respondent had agreed to supply the goods and apparently obtained full consideration but was later unable to do so and that the copies of the documents placed on record show that it promised to return the amounts this Court is of the opinion that if an appropriate interim order is not made, at this stage, the remittances made by the respondent’s Foreign buyers to its bankers as sale price would in all probability be withdrawn and taken away. This would thwart the future course of dispute resolution through arbitration. The materials on record suggest prima facie, that the respondent is liable to pay the amount of Rs. 8.5 lakhs (sic Rs. 8.5 crores) to the Petitioners. The Court is also of the opinion that unless an ex-parte order is made, the petitioner would be put to grave hardship.

In the circumstances, the respondents are hereby restrained from encashing the proceeds of the sums, placed at their disposal, towards the sale consideration of iron ore which constitutes consideration for the quantity of 388 MT, for which remittances would be received by them in their bank accounts namely ICICI Bank, Chennai (A/C No.602605037810); Union Bank, Chennai (A/C No.101153 ING), Vysya Bank, Chennai (A/c. No.403011009619), CITI Bank Chennai (A/c. No.0133944443), Standard Chartered Bank, Chennai (A/c.No.42705001861) and ABN Amro Bank, Chennai (A/c.No.09844899), to the extent of Rs.8,50,00,000/- (Rupees eight crores fifty Lakhs only) till the next date of hearing.

It is open to the petitioners to serve a copy of this order to the concerned Banks.”

3. Subsequently, further orders came to be passed dated 26th November, 2008 wherein the amount lying with ABN Amro/RBS Bank was attached and was directed to be kept in the form of fixed deposit yielding maximum interest. The said order reads as under:

"The senior counsel for the respondent opposes the OMP under Section 9 off Arbitration Act on the ground that there is no arbitration agreement between the parties. the senior counsel for the petitioner has handed over a copy of the order dated 2nd September, 2008 in an Arbitration Application under Section 11 of the Arbitration Act between the same parties and relating to same transaction where also the same plea was raised by the respondent and where this Court had held that the said plea of the respondent can be adjudicated by the arbitrator. Accordingly, an arbitrator was appointed. The respondent has preferred an SLP against the said order and which is stated to be listed on 12th December, 2008 for final disposal. The senior counsel for the respondent has urged that the question can be gone into independently in these proceedings under Section 9 of the Act. However, it is deemed appropriate to await the decision in the SLP aforesaid.

That in terms of order dated 18th July, 2008, money to the extent of Rs. 8.5 crores in the several bank accounts of the respondent was ordered to be secured. One of the banks being ABN Amro Bank has informed that they are holding a sum of Rs. 5.89 crores in the bank account (A/c No. 09844899) of the respondent subject to the further orders of this Court. The senior counsel for the respondent has stated that the other banks mentioned in the order dated 18th July, 2008 are not permitting any transactions in the bank accounts of the respondent owing to the said order.

In the circumstances, it is clarified that the ICICI Bank, Chennai, (A/C No. 602605037810); Union Bank, Chennai (A/c. No. 101153 ING), Vysya Bank, Chennai (A/c No. 403011009619) and CITI Bank Chennai (A/c No. 0133944443) shall secure the balance sum of Rs. 2.61 crores only of the respondent in the bank accounts with them. If the respondent informs the other banks that the said sum has been secured in any other bank along with proof and files an affidavit to the said effect before the Court, the other banks shall permit the respondent to operate the accounts of the respondent with them beyond the said amount.

ABN Amro Bank to continue to hold the aforesaid sum of Rs. 5.89 crores as stated in their application No. 12959/2008 subject to further orders of this Court. The amount be kept in a fixed deposit yielding maximum interest.

List on 9th January, 2009 along with all the pending applications.

Interim orders to continue till further orders.”

The Section 9 petition was disposed of by appointing a Ld. Sole Arbitrator to adjudicate the disputes. The arbitration continued to remain pending for the last 11 years.

4. The present application has been moved on the ground that the Respondent is now going through the insolvency resolution process and a moratorium has been directed under Section 14 of the Insolvency and Bankruptcy Code, 2016 ('IBC') by the National Company Law Tribunal ('NCLT') vide order dated 12th March, 2018. Interim Resolution Professional ('IRP') has been appointed, who has now been converted into the Resolution Professional ('RP').

5. The submission of ld. counsel appearing for the RP is that the amount

lying with ABN Amro/RBS Bank is an asset of the company under Section 18 (1) (f) of the IBC. Accordingly, the control of all these assets ought to be vested with the RP. It is further submitted by ld. counsel that under Section 63 read with Section 60 (5), the NCLT has the exclusive jurisdiction to deal with the application filed by the RP and the Civil Court's jurisdiction is barred. The further submission of the ld. counsel for the RP is that the RP has stepped into the shoes of the board of the company and has to run the company, and the Petitioner herein, who may at best be treated as one of the creditors, cannot get a priority over other creditors, who may be standing in line. Accordingly, the prayer in this application is as under:

“a) Allow the instant application of the Applicant and direct M/s. Royal Bank of Scotland to release and/or transfer the amount of Rs.11,22,00,281.51/- along with further interest accrued thereon lying in the form of Term Deposit bearing No.3180938 held by it to the CIRP Current Account having No. 004802000002996 and maintained by the Applicant with Indian Overseas Bank, Esplanade Branch, Chennai;”

6. The application was listed on 13th May, 2019 on which date notice was issued to the bank and the amount lying in the Fixed deposit was directed to be brought before this Court. On 22nd May, 2019, further directions were passed in respect of the amounts to be deposited which read as under:

I.A. 7004/2019 (for direction)

1. Ld. counsel for the ABN Amro Bank/RBS Bank has appeared and has filed an affidavit stating that the money lying in the account of the Respondent - M/s Tiffins Barytes which was frozen in view of the order dated 18th July, 2008 is Rs.11,22,06,703/- as on 30th January, 2018 (FDR Account No. 3180938). It is

noticed by the Court that until that date, the rates of interest that had been given on the said deposit of Rs.5.89 crores were 7.75%, 8.25% and 7.75%. However, for the remaining period from 30th January, 2018 it is the submission of Ld. counsel as is also borne out from the statement placed on record that only interest of 3.5% is being paid. Ld. counsel seeks support of an RBI Circular to state that the Bank is free to fix its own interest rate. The Bank is unable to show any letter written to the Respondent or to this Court in respect of the attached bank account that the rate of interest is going to be reduced in any manner.

2. In view of the order dated 18th July, 2008, the bank account stood attached. However, since ABN Amro Bank has thereafter changed to RBS Bank which is now in the process of winding down its operations, an application was moved by the Bank before the Arbitral Tribunal that the amounts be shifted to some other account. However, there was no reference in the said application to the fact that the interest rate would only be 3.5%. It is accordingly directed that ABN Amro Bank/RBS Bank shall deposit the entire sum which is shown in the account statement at page 39. The interest that shall be payable for the period from 30th January 2018 till date, shall be the average of the last three years' interest rates i.e., 7.75%, 8.25% and 7.75%. The amount be remitted to the Registrar General's account within a week with the entire interest accrued on the said deposit of Rs.5.89 crores, as per the present order.

3. Ld. counsel appearing for the Resolution Professional (RP) submits that the amount needs to be made available to the RP in view of Section 18 r/w Section 14 of the Insolvency and Bankruptcy Code, 2016.

4. A perusal of the order dated 18th July, 2008 shows that the purpose for which this Court had directed the attachment of the said account was because the

amounts had to be secured for the petitioner. The observations in the said order are set out herein below:

“.....

Learned senior counsel for the petitioner urges that unless the respondents are appropriately injunctioned from withdrawing the proceeds of the remittances, from maintained by them with their bankers, the proceeds of the sale which has now been shifted to the Chinese Port, under the contract, would in all likelihood be withdrawn and taken away from Indian jurisdiction. In these circumstances, it is urged that refusal to grant ex-parte relief would result in irreversible damage.

The Court has considered the materials on record. The respondent had, in its contract/MOU dated 8.7.2008, acknowledged its liability to pay Rs.9.5 crores in settlement of the outstanding disputes with the petitioner. The materials on record also show that the cheques for the said amount were also issued of which all but one were returned as dishonoured. Separate criminal proceedings are pending in that regard. The respondent, it is contended, is facing a financial crunch and also been proceeded against by its creditors.

Having regard to the nature of the transaction, whereby the respondent had agreed to supply the goods and apparently obtained full consideration but was later unable to do so and that the copies of the documents placed on record

show that it promised to return the amounts this Court is of the opinion that if an appropriate interim order is not made, at this stage, the remittances made by the respondent's Foreign buyers to its bankers as sale price would in all probability be withdrawn and taken away. This would thwart the future course of dispute resolution through arbitration. The materials on record suggest prima facie, that the respondent is liable to pay the amount of Rs.8.5 lakhs to the Petitioners. The Court is also of the opinion that unless an ex parte order is made, the petitioner would be put to grave hardship.

In the circumstances, the respondents are hereby restrained from encashing the proceeds of the sums, placed at their disposal, towards the sale consideration of iron ore which constitutes consideration for the quantity of 388 MT, for which remittances would be received by them in their bank accounts namely ICICI Bank, Chennai (A/c.No.602605037810); Union Bank, Chennai (A/c.No.101153 ING), Vysya Bank, Chennai (A/c.No.403011009619), CITI Bank Chennai (A/c.No.0133944443), Standard Chartered Bank, Chennai (A/c.No.42705001861) and ABN Amro Bank, Chennai (A/c.No.09844899), to the extent of Rs.8,50,00,000/- (Rupees eight crores fifty Lakhs only)till the next date of hearing.”

5. List the application for further hearing on 30th

May, 2019

Yesterday, ld. counsel for the ABN Amro/RBS Bank had brought the demand draft and further directions were passed in the following terms:

***“IA No. 7004/2019 (for release of funds) in O.M.P.
369/2008***

Ld. counsel appearing for ABN Amro Bank (RBS) has handed over the DD No. 427289 for a sum of Rs. 116,837,055.51 (Rupees One Hundred Sixteen Million Eight Hundred Thirty-Seven Thousand Fifty-Five and 51/100 Only) issued by Standard Chartered Bank, Mumbai-400001 dated 28th May, 2019.

The said amount is not as per the order dated 22nd May, 2019. The DD only takes into consideration the rate of interest of 3.5% instead of the average rate as directed by the Court. The short fall is of Rs.71,19,697/- . The bank shall deposit the same within 10 working days with the Registrar General of this Court. Both the amounts shall be encashed and shall be kept in a Fixed Deposit on auto renewal mode.

Ld. counsel for the bank submits that the said deposit shall be made by him subject to outcome of any appeal impugning the order dated 22nd May, 2019.”

Thus, the bank has to deposit with the Registrar General of this court the shortfall of Rs. 71,19,697/- within ten days and both the amounts have to be kept in an FDR.

7. Ld. Senior counsel for the Petitioner Mr. Suhail Dutt submits that the amounts, which are lying in the bank account of ABN Amro/RBS Bank, cannot be treated as the assets of the company, as the balance sheet has not been produced and in any event, the said amount was meant for securing the interest of the Petitioner, as per the orders passed in this Petition. It is further submitted that the RP does not have the powers to overrule the orders that

may have passed by this Court.

8. The Court has heard the parties. The scheme of the Insolvency and Bankruptcy Code, 2016 is clear i.e. once a company is under insolvency resolution process, Section 63 of the IBC is clearly triggered. Section 63 reads as under:

“63. Civil court not to have jurisdiction. - No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code.”

9. As per the said provision, the Civil Court's jurisdiction is barred provided the NCLT or NCLAT has jurisdiction on the subject matter. A perusal of Section 60 (5) of the IBC shows that any application by or against the corporate debtor has to be heard only by the NCLT and not by any other forum which is reiterated by the Supreme Court in the cases of ***ArcelorMittal India Private Limited v. Satish Kumar Gupta & Ors., (2019) 2 SCC 1*** and ***Chitra Sharma & Ors. v. Union of India (UOI) & Ors., 2018(9) SCALE 490***. Relevant portions of the said judgments are set out herein below:

ArcelorMittal India Private Limited v. Satish Kumar Gupta & Ors., (2019) 2 SCC 1

“83.The non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.”

Chitra Sharma & Ors. v. Union of India (UOI) & Ors., 2018(9) SCALE 490.

“40. As we have stated earlier, an amount of Rs. 750 crores is lying in deposit before this Court pursuant to the interim directions, on which interest has accrued. The home buyers have earnestly sought the issuance of interim directions to facilitate a pro-rata disbursement of this amount to those of the home buyers who seek a refund. We are keenly conscious of the fact that the claim of the home buyers who seek a refund of monies deserves to be considered with empathy. Yet, having given our anxious consideration to the plea and on the balance, we are not inclined to accede to it for more than one reason. Firstly, during the pendency of the CIRP, it would as a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured.

.....”

10. The amounts which have been deposited with ABN Amro/RBS Bank and the further amounts that are to be deposited towards the interest component, were directed to be attached only in order to secure the interest of the Petitioner company. Even if the Petitioner is successful in the arbitration proceedings, the amounts recoverable, if any, by the Petitioner as per the award which may be passed, when the company is going through insolvency resolution process, would be subject to the jurisdiction of the NCLT.

11. In view of the above, the amount deposited by ABN Amro/RBS Bank shall remain deposited with the Registrar General of this Court. However, the NCLT shall have jurisdiction to decide the application filed by the RP as

to the manner in which the said amount is to be dealt with and whether the same is to be put at the disposal of the RP. The NCLT shall, however, take into consideration any orders that have been passed by this Court previously and hear the Petitioner's objections, as per the provisions of IBC. All the objections of the Petitioner are left open. Parties are permitted to approach the Registrar General for release of amounts, if any, in compliance with any orders that may be passed by the NCLT.

12. I.A. is disposed of. *Dasti* under signature of the Court Master.

**PRATHIBA M. SINGH
JUDGE**

MAY 31, 2019/dk /Agastya