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CORPORATE LAWS

Case Law Update

1. Companies Act, 2013

Dr. Rajesh Kumar Yaduvanshi (Petitioner) V. Serious Fraud Investigation Office (SFIO) & Anr. (Respondent) – Delhi HC order dated 21st September, 2020

Facts of the case

- Investigation was carried out by SFIO into the affairs of Bhushan Steel Ltd. (**BSL**) and other companies
- In Complaint case SFIO V. Bhushan Steel Limited & Ors. against the petitioner and other 286 persons/ entities, the learned trial court found that there was a sufficient material placed on record against the petitioner for him to face prosecution in respect of offences u/s 128, 129, 448 r/w 447 of the Companies Act, 2013
- Therefore, summoning order was issued by the learned Additional Session Judge in the said Complaint case against the petitioner and other 286 persons/entities
- Aggrieved by the summoning order, the petitioner filed a petition against it in the Delhi High Court
- The petitioner was Punjab National Bank Limited's Nominee on the Board of Directors of BSL
- Principal issue that arose for consideration before the Delhi High court was "Whether the **petitioner can be prosecuted for the alleged fraud** committed by BSL and/or promoters **solely for the reason that the petitioner was a director of BSL** and whether, there is any material on record to indicate that the petitioner was complicit in the commission of the alleged offence."

Arguments by Petitioners

Ld. senior counsel appearing for the petitioner submitted that:

- Complaint filed by the **SFIO sets out the specific allegations against the accused person under various heads** viz. fraudulent routing of funds, concealment of books of accounts, manipulation in stock in transit, inducing lender banks to grant facilities to BSL etc. **but no culpable act is attributable to the petitioner.**
- Some of the paragraphs of the complaint sets out **allegations against different individuals** allegedly involved in falsification of accounts and non-discharge of duties by audit committees, however **petitioner's name was not mentioned** in these paragraphs.

- However, one of the paragraph which mentions the name of persons who are **allegedly liable to be prosecuted u/s 128, 129, 448 read with section 447** of Companies Act, 2013 **includes the name of petitioner.**
- Merely mentioning petitioner's name as being one of the person **without ascribing any specific role or pointing out any culpable conduct** would not constitute sufficient material to persuade any court to issue summons.
- Further contended that petitioner could not be prosecuted under Companies Act in view of specific provisions of **Sec. 16A** of Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 which **clearly provides immunity to a Nominee director** from any such prosecution i.e. from the prosecution solely on the ground that he was director on the board of BSL.
- He further submitted that petitioner is sought to be prosecuted solely on the ground that he was a director on the board of BSL. However petitioner **could not be held vicariously liable for any offence committed by Company** and **unless** there is **material to show** that he had **individually committed any culpable act or had not acted in good faith,** therefore there was no question of prosecuting the petitioner
- Further referred to a letter dated 19.01.2015 issued by Dept. of Financial Services, Ministry of Finance whereby it was confirmed that the provisions of Sec. 2(60) and 161(3) of Companies Act, 2013 are inapplicable to Nominee Directors of Public Sector Banks
- Further submitted office memorandum dated 16.07.2020 issued by Govt. of India, Ministry of Finance, Dept. of Financial Services. The said **office memorandum accepted that the petitioner and other Nominee Directors of BSL were not responsible for the fraud committed by BSL.**

Arguments on the part of Respondent

Learned ASG appearing on behalf of SFIO submitted that

- Petitioner was a Nominee Director appointed by PNB on the board of BSL and was **expected to be independent, vigilant and cautious against any fraudulent acts committed by BSL**.
- Petitioner was **required to raise red flags** and inform PNB of any fraudulent activity. Petitioner had specialized knowledge which **ought to have benefitted BSL as well as PNB in protecting their interest**
- However the **purpose for which petitioner was appointed** as Nominee Director **was not served and fraud had been committed on a massive scale** over a course of time.
- Further submitted that the petitioner **had access to financial statements and other critical information** including various reports of forensic audit, stock audit and concurrent audits instituted by the lenders and therefore, it could not be stated that he did not have any opportunity to analyze the financial statements at the Board Meeting
- Further submitted that figures relating to stock in transit were inflated to avail loan facilities from banks and true position was concealed only to reflect that the financial condition of BSL was healthy. The said statement wherein figures related to stock in transit were reflected had been approved

by the board of Directors of BSL and the **petitioner was a party to approving the said financial statements.** The said financial statements were **not only not in compliance with Ind-AS but also did not reflect the true and fair view of the affairs of BSL**. Thus the petitioner also had a key role in the fraud by BSL.

- Further submitted that the circular dated 19.01.2015 issued by Ministry of Finance could not override the provisions of the Companies Act and the said letter would have no relevance while examining the applicability of provisions of Sec. 447 and 448 of Companies Act which related to fraud.
- Although there was no specific allegation in the complaint that the **petitioner was complicit and had acted in connivance with BSL**, the complaints expressly stated that the roles played by various individuals had been set out in the investigation report furnished by SFIO and therefore, the same was required to be read as a part of complaint.

Held

- Principal issue that arose for consideration was "Whether the petitioner can be prosecuted for the alleged fraud committed by BSL and/or promoters solely for the reason that the petitioner was a director of BSL and whether, there is any material on record to indicate that the petitioner was complicit in the commission of the alleged offence."
- Therefore, the court referred to sec. 128, 129 of Companies Act, 2013. After referring to these sections, it was inferred that plain language of Sec. 128(6) and 129(7) indicated that only the executives of the Company or any other person charged by the BOD to comply with the provisions of the said sections would be liable for punishment, if the same are contravened. It is well settled that a **Nominee director is not obliged to carry out any executive functions and cannot be charged with performance of any executive function of the Company**. Reference was brought from judgment[1] of Kerala HC explaining role of Nominee director.
- Further held that it is clear from the plain language of Sec. 16A(2)(b) of Banking Companies (Acquisition and Transfer of Undertakings) Act that a nominee director would **not incur any obligation or any liability by reason only of his being director** or for anything done or omitted to be done in good faith in discharge of his duties as director or anything in relation thereto.
- It is also well settled that a **Director cannot be vicariously held responsible** for any offence committed by the company **unless the relevant statute itself so indicates or there is material to indicate that the particular individual is responsible for perpetrating** the said offence.
- Further referred **Sec. 447 and 448** of Companies Act, 2013, wherein it is inferred that **knowledge that the statement is false or fails to disclose material fact(s) is an essential ingredient** of an offence u/s 448 of Companies Act, 2013.
- In SFIO's contention that **all members of the BOD of BSL can be prosecuted**

1. *Subramony vs. The Official Liquidator (supra), the Kerela High Court*

for violating sec. 128 and 129 of the CA, 2013, because **no other officer had been charged for maintaining the accounts does not have any merit.**

- The key question to be addressed is whether there is **any allegation in the Investigation Report or any material on record which would indicate that the petitioner has connived or has been complicit** with the promoters and/or other entities in perpetuating the fraud by approving financial statements, which he knew to be not fairly and truly reflecting the affairs of BSL.
- It is material to note that although the learned Trial Court had reasoned that the petitioner had connived and had not raised valid concerns, which resulted in manipulation of the stock-in-transit leading to adjustment under the guise of IndAS; **however, there is no such allegation in the complaint that the petitioner had connived or was otherwise complicit with the Promoters.**
- **In view of the above, the impugned summons issued to the petitioner and the impugned order, to the limited extent that it directed issuance of summons to the petitioner, were set aside.**

2. SEBI

Ruling of Securities and Exchange Board of India ('SEBI') – Adjudicating Officer

Name of the Case: In the matter of Kirloskar Brothers Limited ('KBL')
Facts of the case:

1. SEBI received various complaints alleging insider trading and bad corporate governance practices in the context of KBL. SEBI conducted investigation during the period from March 1, 2010 to April 30, 2011 ("investigation period")
2. During investigation SEBI found that there were two types of Unpublished Price Sensitive Information (UPSI):
   a. Capital loss of ₹ 53 crore to Rs 58 crore as the investment/advances given to Kirloskar Constructions and Engineers Ltd. (**KCEL**) wholly owned subsidiary of KBL would not be recoverable if KCEL was sold. This was considered as UPSI **[("UPSI -1')].** This UPSI-1 would amount to 45% to 50% of PAT of FY 2009-10 of KBL. Also UPSI-1 would result in write off of the investment/advances given by KBL to the tune of Rs. 67.47 crore (i.e. 57.42% of PAT for FY 2009-10 of KBL). This UPSI-1 came into existence on March 8, 2010 when agenda note was circulated in the Board meeting of KBL titled "Performance and Strategic Options of KCEL" and remained unpublished till April 26, 2011 when financial results for FY 2010-11 were published. Gautam Kulkarni, Rahul Kirloskar and A.N. Alwani had attended the board meeting of KBL on March 8, 2010 so were aware of UPSI-1.
   b. **Financial results for the quarter July-September 2010 ('UPSI-2'):** Financial position of KBL in September 2010 had deteriorated both on monthly and quarterly basis in comparison to previous year and quarter respectively. Financial results for quarter ended September 2010 were published by KBL on October 28, 2010. This UPSI-2 came into existence on August 6, 2010 when interim

monthly financial information ('KG-MOB') was shared with Gautam Achyut Kulkarni, Promoter/ Vice-Chairman/Director of KBL ('Noticee no. 6), Rahul Chandrakant Kirloskar, Promoter/Director of KBL (Noticee no. 4), Atul C Kirloskar, Promoter of KBL ('Noticee no. 5), Jyotsna Kulkarni, Promoter of KBL (Noticee no. 3), Arti Kirloskar, Promoter (Noticee no. 2) Alpana Kirloskar, Promoter (Noticee no. 1), Nihal Kulkarni, Director (Noticee no.7), A.N. Alwani, Director (Noticee no.9) and Mr A. R. Sathe, Vice President - Finance (Noticee no. 8). This information was unpublished till October 28, 2010. None of Noticees have denied receipt of this information. Both UPSI 1 and UPSI 2 was considered as UPSI by SEBI under Regulation 2(ha) of SEBI (Prohibition of Insider Trading) Regulations, 1992 ('PIT Regulations").

c. Further SEBI noted that on October 06, 2010, there was an inter-se transfer of 1,07,18,400 shares through block deal on stock exchange platform among 7 promoter entities of KBL. During investigation SEBI observed that individual promoters of KBL sold shares of KBL to KIL. These individual promoters were also promoters of KIL. Noticee No. 1, 3 (wife of Noticee 6) and 4 (wife of Noticee 4) were in possession of UPSI-1 and UPSI-2 when they had applied for pre-clearances on September 28, 2010 i.e. prior to the transaction dated October 06, 2010. SEBI alleged that Noticee no. 1 to 6 had decided to trade in shares of KBL when in possession of UPSI-1 and had sold shares of KBL when in possession of UPSI-2. So the undertaking given was false.

d. SEBI further noted that Noticee No. 9, who was the common director between KIL and KBL was present in the Board Meeting of KBL held on July 27, 2010 ('For financial results approval and where concerns were raised with respect to working of KCEL'). KIL in its Board Meeting held on July 28, 2010 (immediately on next day of Board meeting of KBL), resolved and decided to buy the shares of KBL from the promoters of KBL. SEBI further noted that Noticee no. 5 informed the Board of Directors of KIL that KIL had surplus funds to the extent of ₹ 300 crores and he proposed to gainfully employ it in equity shares of KBL. Noticee no.5 and Noticee no.7 being interested in the business did not participate in the business and rest of the Board of Directors (viz, Mr A R Sathe, Mr A N Alwani and Mr Vijay Bajhal all being Independent Directors) finally approved the proposal to invest ₹ 275 crores in KBL equity shares.

e. SEBI stated that 4 out of 5 directors of KIL who attended the board meeting of KIL dated July 28, 2010 were aware of the deteriorating financial position of KBL. Noticee no. 9 and Noticee no, 8 who deliberated and actively participated on the agenda to invest in the shares of KBL were aware of deteriorating financial position as Noticee no. 9 was in receipt of KG-MOB and Noticee no.8 as he was Vice-President – Finance. It is alleged that they induced KIL to

deal in securities of KBL utmost beneficiary of which were going to be 6 individual promoters of KBL (i.e. Noticee no. 1 to 6)

Charges levied/Appeal filed: Noticee 1 to 6 together with Noticee 7 to 9 were charged with violation of Section 12A(d) and (e) of SEBI Act, 1992, Regulation 3(i) read with Regulation 2(ha) of PIT Regulations, 1992 read with Regulation 12 of PIT Regulations, 2015. They were also charged with violation of Section 12A (a), (b), (c) of SEBI Act, 1992 read with Regulations 3 (a), (b), (c), (d) and 4(1) of PFUTP Regulations. Noticee 1, 3 and 4 were charged with Part A, of clause 3.3 of Schedule 1 i.e. Model Code of Conduct for Prevention of Insider Trading, specified in Regulation 12(1) of PIT Regulations 1992 by giving incorrect declarations.

Arguments made by Appellant

1. **Trade was not executed in personal capacity:** Noticee No. 9 submitted that he had been authorized to execute the above transaction on behalf of KIL and he had not traded in the shares of KBL

2. **Reorganisation of internal family holding:** The entire transaction was to reorganise the Kirloskar family holdings in the group companies, whereby the Selling Promoters (Noticee No. 1 to 6) sold shares to another promoter (KIL) and then consolidated their holdings in KIL by increasing their stake therein from 15% to 72% (by or on 23.4.2014).

3. **Investment is the main object of KIL:** Noticee 1 to 6 submitted that Investment in group companies was one of the main objects of KIL and KIL had been investing in the shares of group companies as long term investment. The decision taken at the July 28, 2010 board meeting of KIL states that the transaction would be at the prevailing market price as on the date of acquisition. They further submitted that the transaction was consummated on October 6, 2010 only because during that time Noticee No. 6 had just been diagnosed with cancer and hence the promoters were unclear as to when they would be in a position to sell their shareholding in KBL to KIL (since the promoters had indicated their preference to sell their shares in KBL to KIL together on the same date and at the same price).

4. **Trade Pattern is not matching UPSI-1 an d UPSI-2:** The UPSI-1 and UPSI-2 alleged in the SCN, is alleged to be negative, yet the Noticee No. 9 is alleged to have dealt in the shares by voting to buy the shares, which is the exact opposite of what would have been the trade if Noticee No. 9 had traded "on the basis of" the alleged UPSI. They relied on Manoj Gaur case and Chandrakala case.

5. **Compliance was done with Section 372A:** Noticee argued that in the present case, Section 372A of the Companies Act, 1956 permits the company to use 60% of its paid capital and free reserves or 100% of its free reserves, whichever is more, to acquire the shares of any other body corporate. So we are in compliance with law and hence there is no fraud.

6. **Interested Director did not participate in Board Meeting:** Noticee No. 5 and 7 did not participate or vote in the decision of KIL to buy shares of KBL from Noticee No. 1 to 6 while Noticee No. 9 participated in the meeting and Noticee No. 8 had chaired the said board meeting of KIL.

Arguments made by SEBI

1. **Trade was not personal but authority to execute:** SEBI stated that at the time of trading on behalf of KIL, Noticee no. 9 was having UPSI-1. Noticee no. 9 was trading as an authorized agent for and on behalf of company. SEBI further stated that the decision to trade in this case was that of the Board of KIL and as director of KIL, Noticee no.9 just executed it. SEBI further stated that Regulation 2(d) of PIT Regulations state that *"dealing in securities means an act of subscribing, buying, selling or agreeing to subscribe, buy, sell or deal in any securities by any person either as principal or agent"*. In current context it means an act of buying KBL shares by Noticee No. 9 as an agent of KIL. Further, as per Regulation 3(i) of PIT Regulations, 1992, it is necessary to note that no insider (Noticee No.9), on behalf of any other person (person also includes company i.e. KIL), shall deal in securities of a listed company (KBL) when in possession of any UPSI. Thus, it can be seen that as per the Regulation 2(d) read with Regulation 3(i) of PIT Regulations Noticee No. 9 an insider who was in possession of UPSI-1 at the time of transaction dated October 06, 2010 dealt in KBL shares as an agent of KIL.

2. **Reorganisation of Internal Family holdings: SEBI submitted that a**s regards the consolidation of family holdings, despite being given the opportunity, Noticee No. 1 to 6 have failed to furnish any direct evidence/details of the family arrangement indicating the parties to, the timelines or the quantity of consolidation by the parties to the family arrangement. It further noted that even though there is no documentary evidence of this family arrangement of consolidation, on a preponderance of probability basis, there appears to be such an intent to consolidate family holdings and the decision to trade (taken on or before July 28, 2010) and the trades themselves on October 06, 2010, were done on this basis. Thus, I am of the view that benefit of doubt needs to be given to Noticee No. 1 to 6.

3. **Investment is the main object of KIL:** SEBI stated that KIL disclosed in its annual report of FY 2011 that it was qualified as a core investment company as per RBI Regulations. So even if, one were to accept this thesis, that it was the mandate of KIL to make investments in Kirloskar Group Companies, nothing prevented the directors of KIL to act in the interest of its shareholders (including minority shareholders) and decide that the investment in KBL shares would be done only after all price sensitive information relating to KBL is made public and the impact of such UPSI is fully reflected on share price of KBL. Instead, directors of KIL chose to leave the timing of the transaction to the promoters of KBL and the said promoters effected the transaction before making the UPSI public, which was 'accepted' by the directors of KIL. Investment by KIL in KBL had provided an exit to Noticee No. 1 to 6 (promoter/director of KBL as well as of KIL) from KBL at the cost of minority shareholders of KIL. Thus, by leaving the timing of the transaction to the promoters and not insisting on all UPSI to be disclosed before executing the trade, the directors of KIL acted in the interest of Noticee No. 1 to 6 but not in the interest of KIL. Therefore, SEBI held that such action/decision taken by KIL was not taken in good faith.

4. **Trade Pattern is not matching UPSI-1 and UPSI-2:** SEBI noted that no trading in the shares of KBL has been done by the Noticee No. 1 to 6 prior to or after the UPSI-1 becoming public. Noticee 1 to 6 did not traded regularly in the shares of KBL. They were not in the business of trading in shares. Hence their trading is not in the normal course of their business. The transactions dated October 06, 2010 by the said Noticees in KBL shares were one-of transactions in the shares of KBL. Thus, in view of facts and circumstance of present matter, I am of the view that the decision of Hon'ble SAT in the matter of Chandrakala and Manoj Gaur is not applicable in the present case.

5. **Compliance was done with Section 372A:** SEBI argued it is settled law that if the law permits a particular thing to be done in a particular manner, then if such a thing is done in that manner, the same cannot be fraudulent. What is permissible by law cannot therefore, be a device, scheme or artifice which is fraudulent within the meaning of Regulation 2(1)(c) of PFUTP Regulations. The argument of the Noticee in this regard cannot be accepted.

6. **Interested Director did not participate in Board Meeting:** At the time of KIL board meeting held on July 28, 2010, SEBI stated that UPSI-1 was available with 4 out of 5 directors of KIL i.e. only director Mr. Vijay K. Bajhal was not aware of the UPSI-1. Further SEBI stated that Noticee No. 5 & 7 had recused themselves from participation/ discussion on said proposal. Noticee No. 8 & 9 while discharging their duty as directors of KIL, despite knowing about UPSI-1 induced KIL (in which minority shareholders held approximately 35%) to decide to buy the shares of KBL from Noticee No.1 to 6 at a time when it was detrimental to the interest of shareholders of KIL. In this manner, minority shareholders were treated unfairly in a fraudulent manner.

Held by SEBI

Directors of KIL i.e. Noticee No. 5, 7, 8, & 9 had through act of omission and commission, induced KIL to buy shares from Noticee No. 1 to 6, and thereby aided Noticee 1 to 6 to sell the shares of KBL to KIL to the detriment of KIL at least in terms of timing of the trade in KBL shares (before public disclosure of UPSI). Thus, Noticee No. 1 to 9 had caused unfair treatment to the minority shareholders of KIL in a fraudulent manner and violated the provisions of Section 12A (a), (b), (c) of SEBI Act, 1992 read with Regulations 3 (a), (b), (c), (d) and 4(1) PFUTP Regulations as alleged in the respective SCN.

Penalty

Noticee 1 to 9 were penalised for ₹ 31,21,35,200 (comprising of ₹ 16,61,35,200 as disgorgement of profits + 15,00,000 for fraudulent undertaking during preclearance + 14,45,000 for violation of PFUTPA regulations)

Cases referred

Appellant

Chandrakala vs. SEBI January 31, 2012, Manoj Gaur vs. SEBI October 3, 2012, Pooja Menghani vs. SEBI (2017 15 SCC), S.P. Chengalvaraya Naidu vs. Jagannath [(1994) 1 SCC 1], Kanaiyalal Baldev Bhai Patel v. SEBI [(2017) 143 SCL 124 (SC)], Kalya Singh vs. Gendalal [(1976) SCC 3041]

Respondent

Poonam Garg vs SEBI SAT Order March 22, 2018, Mahavirsingh Chauhan vs SEBI, October 18, 2019, Karvy Stock Broking vs SEBI March 5, 2008, Adjudicating Officer, SEBI vs Bhavesh Pabari, Supreme

Court February 28, 2019, N Narayanan vs Adjudicating Officer, Sebi dated April 26, 2013, The Chairman, Sebi vs Shriram Mutual Fund & Anr decided on 23 May, 2006

3. IBC

Indian Overseas Bank (Appellant) vs. Arvind Kumar Resolution Professional (Respondent) – in the order dated 28 September 2020 passed by the National Company Law Appellate Tribunal, (NCLAT) New Delhi

Facts of the Case

- The Indian Overseas Bank, the Appellant, is one of the Financial Creditors of M/s Richa Industries Limited, the Corporate Debtor, from whom the Corporate Debtor has availed various loan facilities including an irrevocable bank guarantee. The Corporate Debtor deposited margin money of ₹ 40,50,000/- in the form of FDR to secure the said bank guarantee
- M/s Tata Blue Steel Limited initiated the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. The application was admitted by order of the National Company Law Tribunal (NCLT) dated 17 December 2018 and moratorium was declared under section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code)
- The bank guarantee in question, which was issued in favour of Tata Steel Processing & Distribution Limited (TATA) was invoked, on request, received vide letter dated 24 December 2018 and 26 December 2018 and the payment was made to the beneficiary to the tune of ₹ 4,01,94,954/-
- The margin money of the Corporate Debtor amounting to ₹ 40,50,000/- along with accrued interest of ₹ 10,77,591/- was lying with the Appellant bank amounting to ₹ 51,27,591/-
- During CIRP, the respondent, the Resolution Professional (RP), demanded the aforesaid margin money from the Bank. The bank after the invocation of the Bank Guarantee by TATA, adjusted the margin money amount in honouring the bank guarantee.
- After that an application was filed by the RP u/s 60 (5) r/w 74(2) of the IBC, seeking direction against the appellant, i.e. Indian Overseas Bank to release all the funds of the Corporate Debtor, which were retained by the appellant bank in violation of the Code.
- The NCLT Chandigarh Bench passed the order dated 29 April 2020 and ordered the appellant to release of the margin money amount.
- An application was filed by the appellant at NCLAT challenging the order of NCLT

Arguments by the Appellant

- The margin money was adjusted towards the payment on account of the invocation of the bank guarantee during the Moratorium.
- Relied on the order passed by the NCLAT in the case of ***Gail (India) Limited vs. Rajeev Manaadiar & Others*** in which it was held that the Moratorium order will not be applicable on the performance bank guarantee given the definition of the 'security interest' u/s 3(31) of the IBC which excludes performance bank guarantee from the purview of security interest.

Arguments by the Respondent

- The learned counsel submitted that Performance Bank Guarantee is not included in the definition of 'security interest' for the benefit of

the beneficiary of such Performance Bank Guarantee. The payment of such performance guarantee does not entitle the banker, making such payment, to adjust the margin money lying with it, against payment of Bank Guarantee. That adjustment would be barred u/s 14(1)(c) of the IBC

- The appellant should have filed its claim with the respondent which would have been dealt with the provisions of the IBC
- It was further contended that margin money was the asset of the Corporate Debtor and no charge was created by the appellant in its favour. Therefore, any adjustment made by the appellant violates Section 77 of the Companies Act, 2013 (the Act) and Section 14(1)(c) of the IBC
- Further, pursuant to Section 77 of the Act also provides that no charge created by the company shall be taken into account by the Liquidator unless the same has been duly registered with the Registrar of Companies
- The adjustment of margin money against payments made on the invocation of Bank Guarantee, was blatantly illegal and against the explicit provisions of the IBC

Held

- The margin money was deposited by the Corporate Debtor to secure Bank Guarantee in favour of TATA. The said Bank Guarantee was invoked during the moratorium period, i.e. on 27 December 2018. As per section 14(3) of IBC, invocation of the said guarantee could not be stopped by the ***Bank (Replied on Gail (India) Limited vs. Rajeev Manaadiar & Others)***.
- The margin money is not a security and does not require any registration of charge. Only the assets given by the Company as securities are required to be registered u/s 77 of the Act
- The margin money is the contribution on the part of the borrower who seeks 'Bank Guarantee'. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the bank guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the Corporate Debtor
- In this case, Bank Guarantee was invoked on 27 December 2018 by the beneficiary ie., operational creditor, and the margin money amount was used towards the payment of the bank guarantee. Once this margin money was used to honour the bank guarantee, nothing remained with the bank, and as such, the Respondent cannot demand that amount
- The Resolution Professional is only entitled to those payments to which the Corporate Debtor is entitled; if no orders of moratorium would have been passed u/s 14 of the IBC. The Corporate Debtor had no right to claim the margin money after the invocation of bank guarantee
- NCLAT partially set aside the order passed by the NCLT and held that in the circumstances, as stated above, the direction of the NCLT to release the margin money, which was utilized by the invocation of bank guarantee by the operational creditor

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