

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI**

Company Petition No. (IB)-840(PB)/2018

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

PEC Ltd.

Applicant/Financial Creditor

Vs

M/s. S. L. Consumer Products Ltd.

Respondent/Corporate Debtor

Judgment delivered on: 10.07.2019

CORAM:

MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT

MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)

For the Petitioner: - Mr. Aakash Sehrawat, Rajesh Gautam, Advs

For the Respondent: - Mr. Damini Bisht, Adv

ORDER

CHIEF JUSTICE (RTD.) M. M. KUMAR PRESIDENT

1. M/s PEC Limited, claiming as the financial creditors, have filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of Respondent Company M/s S. L. Consumer Products Limited referred to as the 'Corporate Debtor'.
2. The Respondent Company M/s S. L. Consumer Products Limited (CIN No. U11200DL1996PLC083850) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 16.12.1996 having its registered office at 2646, Raghunandan Naya Bazar, Delhi - 110006. Since the registered office of the Respondent Corporate Debtor is in New Delhi, this Tribunal has territorial jurisdiction over the NCT of Delhi and is also the Adjudicating Authority in relation to the prayer for initiation of Corporate



Insolvency Resolution Process in respect of Respondent Corporate Debtor under sub-section (1) of Section 60 of the Code.

3. It is appropriate to mention that Mr. Lalit Kain, Authorised Signatory of the applicant company duly authorized by General Power of Attorney dated 06.01.2017 has preferred the present application on behalf of the applicant, M/s. PEC Limited, for initiation of Corporate Insolvency Resolution Process against the respondent corporate debtor in terms of the provisions of the Code. A copy of the relevant General Power of Attorney of the applicant company held on 06.01.2017 has been placed on record.

4. The Petitioners have proposed the name of Mr. Vikram Kumar, for appointment as Interim Resolution Professional having registration number - IBBI/IPA-001/IP-P00082 /2017-18/10178 resident of J 6A, Kailash Colony, New Delhi - 110048 with email Id. vikramau@gmail.com. Mr. Vikram Kumar has agreed to accept appointment as the interim resolution professional and has signed a written



communication dated 24.01.2018 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Vikram Kumar as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

5. It is the case of the applicant that a financial facility was granted to the respondent under an Associateship Agreement dated 19.11.2011 executed between PEC Limited hereinafter referred to as @Fianncial Creditor@ and m/s K. S. Oils limited to the tune of Rs. 20 crores plus applicable interest and penal charges for purchase of mustard and soyabean seeds and for purpose of the export of the same.
6. It is further asereted that on 29.05.2013 a Tripartite understanding awas executed between the Financial Creditor. M/s K S Oils and S L consumer Products Limited (hereinafter referred to as "Corporate Debtor") for amending

the Associateship Agreement dated 19.11.2011 for including the Corporate Debtor as an Associate to the Associateship Agreement. Thereafter on 04.07.2014 an Associateship Agreement was executed between the financial Creditor and Corporate Debtor for import of edible oil. It is also the case of the applicant that the aforesaid sums were disbursed by Financial Creditor to Corporate Debtor.

7. The Amount claimed to be in default and the date on which the default occurred has been stated in Part-IV of the application which as follows:

“ Rs. 28,63,36,375.21/- together with interest @6.50% for L/C No. 720519 from 17.02.2014 to 10.04.2014 & @ 15.60% from 11.04.2014 to 23.04.2014 @14.50% for L/c No. 720164, @ 12.00% for mustard/soyabean financing (fin-4) and @ 12.00% from 10.05.2014 to 07.10.2014 + @ 01.02.2018 for mustard seed financing (Fin-5) till payment.

The debt fell due on 19.11.2016 i.e. the date on which 11 post dated cheques dated 18.10.2016 and



22.08.2016 were dishonored on 23.12.2016 i.e. the date on which 5 post dated cheques dated 18.10.2016 were dishonored.”

- 8.** It is claimed in the petition that the amount claimed as detailed above is still to be paid by the respondent corporate debtor.
- 9.** The respondent corporate debtor has filed its reply and raised various objections against the claim of the petitioner.
- 10.** It is submitted that the present claim is barred by the provisions of Limitation as stated under Section 238-A of the Insolvency & Bankruptcy Code, 2016. It is stated that the alleged claims are raised pertaining to the period of 2013.-14 which is time barred under the Section 238A of the Code and the present Application is filed raising the alleged grievance in relation to the period 2013-14. It is pointed out that the said grievance is arising out of the postdated cheques which were provided by the Respondent. It is stated that the petitioner is trying to claim a debt which the Respondent is not liable to pay as per the terms of Agreement.



11. The respondent further denied any existence of financial debt which is to paid by respondent to the petitioner. It is stated that in pursuance of the associateship agreement dated 19.11.2011 and Tri-Partite understanding dated 29.05.2013, the Respondent was nominated by KSO for the purposes of the performance under the said Agreement. Furthermore, vide Clause 5 of the Tripartite understanding, KSO explicitly agreed to indemnify the Applicant for all the liabilities. In addition to the above, KSO vide letter dated 28.05.2013 had undertook that purchase of Mustard Seed by the Respondent was crushed in the plant operated by KSO and Sales proceeds was to be then transferred from the account of KSO after being credited in their account.

12. It is asserted that pursuant to Tri-Partite Understanding dated 29.05.2013 entered into between KSO, Applicant and the Respondent, no financial liability. That as per the understanding entered into between the parties, it was in specie agreed that the credit limits of KSO which were extended to the Respondent, were already repaid. Therefore,



it is amply clear that there exists no liability qua the Respondent.

13. The petitioner has filed its rejoinder and submitted that the date on which the cheques has bounced cannot be taken as the date on which the cause of action had occurred. It is submitted that even otherwise the Respondent admitted its liability to pay the outstanding dues by two undertakings dated 14.10.2016 and 17.08.2016 which are the letters dated 17.10.2016 which have not been denied by the Respondent in its reply to the petition filed by the petitioner. Therefore, the claim of the petitioner is not barred by the limitation.

14. It is further stated in the rejoinder that the stand of the respondent in its reply that the respondent is not liable to pay any amount under the associateship agreement dated 19.11.2011 is devoid of any merit as the respondent gave two identical undertakings dated 14.10.2016 and 17.08.2016 alongwith the 16 post dated cheques for its liability to pay under the Associateship agreement.

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15. We have heard learned counsel for the parties and have perused the case records including the counter affidavit of respondent.

16. The scheme of the Code provides for triggering the insolvency resolution process in respect of three categories of entities namely,

- a) Financial creditor
- b) Operational creditor, and
- c) Corporate debtor itself.

17. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the “Financial Creditor” is delineated under Section 7 of the Code, wherein only “Financial Creditor” / “Financial Creditors” can file an application. As per Section 7(1) of the Code an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors. Section 7 of the Code thus mandates that only the applicant “Financial Creditor” has to prove the default. In other words, even if there is a clear default, the application under Section 7 of the



Code may not be maintainable in case the applicant is not a financial creditor. Therefore, in order to maintain the present application filed under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor, the present applicant has to satisfy the definition of "*Financial Creditor*".

18. Besides in the reply and counter affidavit, one of the main objection raised by respondent is that the applicant does not come under the definition of '*Financial Creditor*' and the debt claimed is not a '*financial debt*'.

19. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5 (7) and 5 (8) of the Code, which are reproduced below:

" 5. In this part, unless the context otherwise requires, -

.....

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;



(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- a) money borrowed against the payment of interest;*
- b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- e) receivables sold or discounted other than any receivables sold on non-recourse basis;*



f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the effect of a borrowing;

Explanation – For the purposes of this sub-clause-

(I) Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and

(II) The expressions, “allottee” and real estate project shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016)

g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative



transaction, only the market value of such transaction shall be taken into account;

h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) and (h) of this clause.”

20. In the present case the applicant had invested the amount in pursuance of Tri-partite Agreement duly executed between the parties. Since the amount has been raised by petitioner under a tripartite agreement for funding a business job, not only the debt has a commercial effect of borrowings and come within the scope of ‘financial debt’ but also the petitioner comes within the definition of ‘financial creditor’. Therefore, petitioner being a financial creditor is qualified to invoke Corporate Insolvency Resolution Process under Section 7 of



the code against the respondent corporate debtor in case of default in repayment of financial debt.

21. Initiation of Corporate Insolvency Resolution Process by Financial Creditor is regulated by the provision engrafted in Section 7 of I&B Code, which reads as under:

“7. Initiation of corporate insolvency resolution process by financial creditor. —

(1) *A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

Explanation.— For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) *The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*



(3) *The financial creditor shall, along with the application furnish—*

(a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

(b) *the name of the resolution professional proposed to act as an interim resolution professional; and*

(c) *any other information as may be specified by the Board.* (4) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*

(5) *Where the Adjudicating Authority is satisfied that—*

(a) *a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

(b) *default has not occurred or the application under sub-section (2) is incomplete or any disciplinary -6- Company Appeal (AT) (Insolvency) No. 428 of 2018 proceeding is pending against the*



proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”

22. The present application under Section 7 of the Code for initiative Corporate Resolution Insolvency Process has been filed by petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with



required information, documents and records as prescribed under the Rules.

23. The next question comes for consideration is whether respondent corporate debtor has committed default in payment of the financial debt.

24. In this connection respondent corporate debtor has taken a stand that the claim of the petitioner is not valid as the repayment of loan is a liability of the KSO.

25. In this regard the petitioner in its rejoinder has submitted that the respondent vide its undertaking dated 17.10.2016 has itself acknowledged to pay the outstanding debt within 90 days. The relevant part of the undertaking has been reproduced below for ready reference:

“ S.L Consumer Products Limited that PEC for the extension of its financial assistance to us. As you are aware, SLPCL had been trying to repay the outstanding amount against Mustard Financing. Due to abrupt discontinuation of financing and lack funds SLCPL has been unable to pay the outstanding.



In view of the above we request for the extension of PDC period for further 90 days to enable us to repay the outstanding amount to PEC.”

26. On a bare perusal of the undertaking above it is quite evident that the respondent itself had acknowledged the default committed and undertook to repay the same to the applicant. The undertaking dated 17.10.2016 itself is a proof that the claim of the applicant is not time barred.

27. In the present case the amount of default exceeds more than Rs. 1 lakh. In view of Section 4 of the Code, the moment default is Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable. There is sufficient material on record to conclude that respondent corporate debtor has committed default in repayment of the financial debt.

28. Under sub-section 5 (a) of Section 7 of the code, the application filed by the applicant financial creditor has to be admitted on satisfaction that:

1. *Default has occurred.*
2. *Application is complete, and*



3. *No disciplinary proceeding against the proposed IRP is pending.*

29. It is seen that the applicant clearly comes within the definition of Financial Creditor. The material placed on record further confirms that applicant financial creditor had invested its money which has commercial effect of borrowings. Though considerable long period has since lapsed even the principal amount of debt disbursed has not been repaid by the respondent corporate debtor. It is accordingly reiterated that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one Lakh. Besides it is also seen that the application filed in Form – I under Section 7 of the Code read with Rule 4 of the Rules is complete and there is no infirmity in the same. Moreover the material on record reveals that there is no disciplinary proceeding pending against the proposed IRP. In the facts of the present case we are satisfied that the present application is complete and there has been a default in payment of the financial debt and therefore, the applicant financial creditor



is entitled to initiate Corporate Insolvency Resolution Process under Section 7 of the Code

30. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

31. Mr. Vikram Kumar, having registration number - IBBI/IPA-001/IP-P00082 /2017-18/10178 resident of J 6A, Kailash Colony, New Delhi - 110048 with email Id. vikramau@gmail.com is appointed as an Interim Resolution Professional.

32. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by the IBBI Regulations) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

33. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are

imposed:



“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

34. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the



Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

- 35.** The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the 'Code', Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any



violation, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

- 36.** There is a general complaint received against the financial creditors, banks, NBFCs and Asset Reconstruction Companies that the amount claimed by them is far more than what is owed by the corporate debtor to them. Many a times the rate of interest is alleged to be exorbitant and allegations are levelled that a penal interest compounded monthly has been charged. We have no mechanism of rectification of claims made. However, the RPs ordinarily have professionals & experts at their disposal and in case the ex-management raises any such issue then the RP must get it settled in order to avoid any injustice to the corporate debtor.



37. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.

Sd/-

(M.M.KUMAR) 10.07.19
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)