

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No.1076/I&BP/2017

Under section 7 of the IBC, 2016

In the matter of
HDFC Bank Ltd.
HDFC Bank House, Senapati Bapat Marg
Lower Parel (W), Mumbai – 13.
....Applicant

v/s.

Esskay Motors Pvt. Ltd.
Ground Floor, Motilal Oswal Tower
Junction of Ghokhale & Sayani Rd.,
Prabhadevi, Mumbai – 25.
....Respondent

Heard and Pronounced on: 29.06.2017.

Coram:

Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Sankalp A., Advocate
For the Respondent : Ms. Vrinda Daga, Advocate

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

It is a Company Petition filed u/s 7 of The Insolvency and Bankruptcy Code by the Financial Creditor namely **HDFC Bank Ltd.** against the Corporate Debtor namely **Esskay Motors Pvt. Ltd.** for initiating of Insolvency Resolution Process (IRP) for this Corporate Debtor availed ₹3 crores facility advance under Channel Finance Facility through an agreement dated 12.07.2014 and thereafter when this Petitioner filed CP 34/2017, this Corporate Debtor entered into Consent Terms to pay due amount in installments by tendering post-dated cheques to each of the installments agreed by this Corporate Debtor, in pursuance thereof, that CP was also dismissed as withdrawn. Thereafter, when

this Corporate Debtor defaulted to make payment, this Petitioner was forced to file another CP 595/2017 before this Bench under this same section of law for initiating of Insolvency Resolution Process, then again this Corporate Debtor entered into another Consent Terms on 24.04.2017 repeating the same, this time agreeing to provide demand drafts to each of the instalments as entered in the Consent Terms, basing on these consent terms, second CP was also withdrawn. When second time also this Corporate Debtor failed to honor the Consent Terms entered into, this Petitioner filed this third Company Petition against this Corporate Debtor for initiating Insolvency Resolution Process for he failed to pay Rs. 1,32,27,784.63.

2. Looking at the documents filed by the Petitioner, it appears that this Corporate Debtor entered into Loan Agreement on 12.07.2014 to avail revolving loan facility to pay ₹3 crores as Inventory Funding for the purpose of purchasing vehicles and spare parts by the borrower from the manufacturer for sale of the same during the course of its business. Since this Petitioner was doing Fiat Car Dealership business, he entered into this agreement with the creditor bank solely to facilitate the manufacturer to get remittances to the vehicle provided to the Corporate Debtor by filing invoices raised by the manufacturer. In relation to this arrangement, in Clause No. 1.4, the borrower agreed and acknowledged that the receipt issued by the manufacturer shall be deemed to be issued by the borrower and shall be an effectual receipt and to be discharged by HDFC Bank Ltd. i.e., Financial Creditor herein.

3. Now the allegation of the Corporate Debtor is that since the manufacturer i.e. FCA India Automobiles Pvt. Ltd. filed invoices for ₹1,54,17,448.95 on 19.07.2014 claiming to the cars delivered 21 days before the date of agreement and the applicant bank disbursed a sum of ₹1,54,17,448.95 in the Channel Financing account of the Corporate Debtor, out of which, the applicant bank wrongly debited with a sum of ₹79,71,166.16 from the Channel Financing account of the Corporate Debtor. The debtor counsel further submits that since the invoices for the above said ₹1,54,17,448.95 raised by FCA India Automobiles

Pvt. Ltd. were dated between 21.04.2014 and 25.06.2014, that is prior to the date of loan disbursement i.e., 19.07.2014 and by that time, cars under the invoices had already been delivered to the Corporate Debtor by FCA India Automobiles Pvt. Ltd free of payment as part of compensation for losses suffered. In the same submissions, the debtor further stated that when it was brought to the notice of FCA India Automobiles Pvt. Ltd, the manufacture has in fact re-credited to this Channel Finance account. Besides this, the Corporate Debtor, subsequent to this happening also, continued this facility and utilized the services of this Bank until Fiat Dealership has been terminated i.e. up to September 2015. He continued availing the facility until the entire facility has been exhausted.

4. After availing this facility, when time has come for repayment of this bank money, this Corporate Debtor defaulted in making repayment of this facility in the month of September 2014 itself, whereby this account has become Non-Performing Asset (NPA) on 16.12.2014. For this Corporate Creditor having given even post-dated cheques to collect in the event of failure to pay, those cheques were also bounced when it was presented by the Financial Creditor. When the cheques were bounced, this Corporate Debtor, to the legal notice sent by the Financial Creditor, wrote a letter to HDFC Bank on 22.06.2016 stating that the company was making arrangements to pay the total amount of ₹1,29,09,422 shortly to the Bank. In view of the same, the debtor made a request not to initiate legal action u/s 138 of the Negotiable Instrument Act. On 11th May 2016, this company made an assurance to the Financial Creditor to repay the balance, to which it has been stated that it required to study debt statement from the Financial Creditor to determine their exact liability, but whereas in the notice dated 22.02.2016, the debtor company itself agreed that the total amount outstanding as on 20.02.2016 was ₹1,29,09,422. When nothing has worked out to realize the dues from this Corporate Debtor, within some days, the Petitioner initiated Debt Recovery Proceedings with respect to this claim. Thereafter, the Creditor had initiated winding up proceedings before the Hon'ble High Court of Bombay. After this case was transferred from the Hon'ble High Court of Bombay to this Bench, when this matter came for hearing, the Corporate Debtor having agreed to repay the outstanding amount to the Petitioner, the Petitioner

and Corporate Debtor together filed Settlement Agreement for withdrawal of CP 595/2017 agreeing that the Corporate Debtor would pay in four installments, in furtherance of it, the debtor gave post-dated cheques along with this agreement to assure that the Petitioner herein could collect the money by presenting the cheques given by this Corporate Debtor.

5. In view of the agreement entered in between the Petitioner and the Corporate Debtor, on request of the Petitioner's Counsel, CP 595/2017 was dismissed as withdrawn. Soon after withdrawal of the CP, when the first cheque presented by the Financial Creditor was dishonored, the Bank issued dishonored memo dated 24.03.2017. For this agreement in CP 595/2017 had not been worked out, realizing the fact that these cheques were of no use, this Petitioner again came to this NCLT with another CP34/2017. Then another turn came to the Corporate Debtor to enter into another Consent Terms, this time agreeing to give Demand Drafts instead of giving cheques. By looking at those Consent Terms, this Petitioner again agreed to withdraw CP34/2017 hoping that this time, dues would be realized from the Corporate Debtor. But, when the date for giving Demand Drafts came, this Corporate Debtor again failed to give the Demand Drafts in pursuance of the Consent Terms arrived between them.

6. For this Corporate Debtor again and again defaulted in making repayment, this Petitioner has third time come up with this Company Petition to initiate the Insolvency Resolution Process against this Company.

7. Now when this matter has come for hearing, this Corporate Debtor in person has argued that since the bank debited extra money of ₹79,71,166.16 to the manufacturer and since it has taken more than 6 months for re-crediting that amount, owing to the wrongful debit made to his account, this Corporate Debtor has incurred loss, whereby he says this petition is liable to be dismissed.

8. Looking at the way this case progressed, it is evident that this Corporate Debtor availed this Channel Finances facility until facility was fully exhausted, thereafter when cheque was bounced, this debtor company wrote a letter on 22.06.2016 stating that company owed to pay ₹1,29,09,422 to the Financial Creditor and would repay the same shortly. Then two successive company petitions one after another were dismissed on the debtor side having entered into consent terms making the petitioner believe the debtor would honor cheques given in the first case, in the second petition, on the assurance that the petitioner would be given demand drafts but none happened. That the Promoter of the company namely Mr. Chandra K. Prakash had, right before this Bench, entered into Consent Agreements in the first Company Petition and second company petitions. After having all this happened, this Debtor Company could not now say that the debtor has counter claim before the Tribunal and account has not been settled between them. When the claim has been crystallized by the letter sent by him and the agreement entered between Petitioner and Corporate Debtor on 10.03.2017, thereafter in the Consent Term on 24.04.2017, the argument such as the debtor sustained loss by debiting ₹79,71,166.17, pales into insignificance. It is needless to say a person, entering into an agreement agreeing to repay certain sum subsequent to raising an allegation, has been estopped from raising the old allegation ignoring the consent terms arrived, here this debtor, not once, but twice entered into consent terms to pay the claim amount.

9. Since the Petitioner having placed loan agreement dated 12.07.2014, thereafter bank statement reflecting the default committed by this Corporate Debtor and subsequently presentation of cheques and thereafter this Corporate Debtor admitting liability many a times directly in front of this Court, the evidence placed by the Petitioner is more than enough to admit this Company Petition.

10. On perusal of the documents filed by the Creditor, it is evident that the Corporate Debtor defaulted in repaying the loan availed and the Petitioner has also placed the name of the Insolvency Resolution Professional to act as Interim

Resolution Professional. And having this Bench noticed that default has occurred and there is no disciplinary proceedings pending against the proposed resolution professional, the Application under sub-section (2) of section 7 is taken as complete, accordingly this Bench hereby admits this Application declaring Moratorium with the directions as mentioned below:

- (a) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (b) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (d) That the order of moratorium shall have effect from 29.06.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(f) That this Bench hereby appoints, Mr. Rajeev Mannadiar, 33, Kamer Building, 5th Floor, 38, Cawasji Patel Street, Fort, Mumbai – 400 001, e-mail: rajeev@integroip.com, Registration No.: IBBI/IPA-01/IP-00320/2016-17/1904, as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

11. Accordingly, this Petition is admitted without cost.

12. The Registry is hereby directed to communicate a copy of this order to both parties.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
B. S.V. PRAKASH KUMAR
Member (Judicial)