



2. The petitioner is a private limited company incorporated on 26.06.2008 with CIN U45200DL2008PTC180087. This petition has been filed through Sandeep Sagar in whose favour the Board of Directors of petitioner company has passed resolution on 25.05.2017 (Annexure 1/A) authorizing him for doing various acts including initiation of the corporate insolvency resolution process. The contents of the petition are supported by the affidavit of Sandeep Sagar, aforesaid.

3. The respondent-corporate debtor was incorporated on 29.12.1995 with CIN U26920HR1995PLC032947. The authorized share capital of the respondent-corporate debtor is ₹600 lacs and paid up capital of ₹597.50 lacs having its registered office in district Jhajjar in the State of Haryana. Therefore, the matter falls within the territorial jurisdiction of this Tribunal.

4. It is evident from the order dated 10.12.2012 passed by the Board for Industrial and Financial Reconstruction (BIFR) (Annexure 1/D) (colly) that the respondent-corporate debtor was declared sick industrial company vide order dated 18.12.2002 in terms of Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) in the proceedings before the BIFR in Case No.65/2002. It is stated that the petitioner company and the respondent-corporate debtor entered into a Memorandum of Understanding (MoU) dated 16.11.2009 Annexure 1/E. This MoU was entered into with an understanding that the petitioner shall invest substantial sum of money i.e. ₹564 lacs towards equity shares and repayment to HSIIDC for revival of the respondent company and shall get itself involved in the process of revival by infusion of funds by

participating in the management. Pursuant to the said MoU the petitioner started paying the amounts for and on behalf of the respondent for settling the pressing liabilities of the respondent-corporate debtor, like electricity dues and payment to third parties etc. as provided in the MoU. The petitioner was even impleaded as a party before the BIFR vide order dated 10.12.2012 Annexure 1/D in view of the admitted investment to the tune of ₹2.00 Crores. The total amount invested by the petitioner is ₹2,14,60,176/-, the last payment being to the tune of ₹55,000/- on 23.03.2013.

5. Vide another order dated 27.02.2014 which is part of Annexure 1/D (colly) the proceedings were adjourned *sine die* by the BIFR till the outcome of the order of AAIFR where an appeal was pending. Those proceedings were yet to be resumed when the provisions of Code came into force w.e.f. 01.12.2016 and proceedings before BIFR stood abated by virtue of 8<sup>th</sup> schedule of the Code in terms of Section 252 thereof.

6. The version of the petitioner-financial creditor is that as per clause 8 of the MoU, in case of rejection of Debt Rehabilitation Scheme (DRS) the petitioner shall submit a statement of expenses to the respondent whereupon the respondent shall refund the said amount immediately with 15% interest per annum. It is on this relevant date the cause of action accrued to the petitioner-financial creditor to demand payment.

7. Accordingly the demand notice dated 17.05.2017 (Annexure 1/F) for payment of ₹2,14,60,176/- alongwith 15% interest was sent by

the Financial Creditor granting two weeks time to the respondent to repay the amount. This demand was also raised vide e-mail dated 09.06.2017 sent at the e-mail address of the respondent-corporate debtor but no response has been received.

8. The total amount claimed to be in default is stated to be ₹3,51,74,110/- by adding interest @15% per annum over the principal amount of ₹2,14,60,176 calculated w.e.f. 23.03.2013, when the last payment of ₹55,000/- was made, as per computation chart in the tabulated form Annexure 1/C.

9. On filing of this application the petitioner also sent copy of the petition and the entire Paper Book to the respondent-corporate debtor by Speed Post on 06.07.2017.

10. As required by clause (b) of Section 7(3) of the Code it is mandatory for the 'Financial Creditor' to furnish alongwith the application, the name of Resolution Professional proposed to act as Interim Resolution Professional which was not proposed in the present case by the petitioner and in the relevant column in Part 3 of the application it was simply stated that the IRP shall be appointed by moving a separate application or the appointment of IRP may be made by the Adjudicating Authority.

11. When the matter was listed 28.07.2017 it was observed that this provision is mandatory and, therefore, the matter was adjourned to 02.08.2017 for the petitioner to do the needful. On the adjourned date it was found that the written communication filed was not in order nor was there any supporting affidavit. The matter was adjourned to 04.08.2017.

12. The petitioner filed the written communication in Form No.2 furnished by Mr. Amit Sharma, Insolvency Resolution Professional bearing registration No.IBBI/IPA-002/IP-N00172/2017-18/10442 as the Interim Resolution Professional (Annexure-IV) on 02.08.2017. The written communication contains all the necessary particulars and is found to be in order.

13. Another affidavit dated 03.08.2017 was filed by enclosing therewith copy of the reply sent by the respondent to the demand notice dated 17.05.2017 of the petitioner.

14. Notice of this petition was issued to the respondent-corporate debtor to show cause as to why this petition be not admitted. The respondent-corporate debtor filed objection by way of counter affidavit of Ram Raj Bhandari Authorised Representative of the respondent who is also a party/signatory to the MOU. MOU dated 16.11.2009 (Annexure R-1) is not disputed and copy of the same was also attached with the counter affidavit as Annexure R-1. The respondent also relied upon the defence taken in the reply dated 27.06.2017 to the demand notice.

15. It is further stated that the petitioner does not fall within the definition of term 'Financial Creditor' as per Section 5(7) of the Code. The petitioner would be a strategic investor who agreed to acquire 90% of the paid up share capital of the corporate debtor upon its rehabilitation. The petitioner is currently holding 2,31,000 equity shares of the corporate debtor having purchased the same from HSIIDC Ltd. for a total consideration of ₹23.75 lacs. The petitioner has also not been able to

show that the default as defined in Section 3(12) of the Code has been committed by the corporate debtor. No instance of any default has been pointed out by the petitioner. There was no provision in the MoU to enable the petitioner to issue any default notice to the respondent-corporate debtor. In the absence of any date of default or even the default, the instant petition is not maintainable.

16. It was further stated that the respondent-corporate debtor could be liable only in the event of rejection of DRS by the BIFR as per clause 8 of the MoU. In this case there has been no rejection of DRS by the BIFR. It is only an act of legislature whereby the provisions of SICA have been repealed.

17. It is further stated in the reply that the application is not complete because it does not contain the verification as per requirement of Part V towards the end of Form No.1 which reads as under:-

*“I hereby certify that to the best of my knowledge, (name of proposed insolvency professional), is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.”*

18. Further the petitioner has not furnished the record of evidence of default by way of copies of the entries in a Bankers Books Evidence Act, 1891, but relied only upon some ledger account of respondent maintained by the petitioner. There is the non-compliance of the serial No.7 of Part V of Form No.1 of the Rules.

19. The matter was heard on 06.09.2017. Vide order dated 13.09.2017, it was observed that there are certain defects and by virtue of sub-section (5) of section 7 of the Code opportunity should be granted  
CP (IB) NO. 50/Chd/Hry/2017

to the petitioner for rectification. It was observed that application in Form No.1 should contain necessary declaration and that as per requirement of column 7 of Part V of Form No.1, the petitioner is required to attach copies of the Account Statements in respect of all the Bank Accounts certified under the Bankers Books Evidence Act, 1891. It was, thus, directed that the defects as referred to in the order dated 13.09.2017 be removed by filing fresh application in Form No.1 with the requisite declaration and complete serial No.7 of Part V of Form No.1 alongwith copies of the account statement of the bank accounts certified under the Bankers Books Evidence Act within a period of seven days.

20. The petitioner accordingly filed the fresh application in Form No.1 containing the requisite declaration wherein the Authorised Representative of the petitioner has certified that to the best of his knowledge Mr. Amit Sharma is fully qualified and permitted to act as an Insolvency Resolution Professional in accordance with the Insolvency & Bankruptcy Code, 2016 and the associated rules and regulations. Alongwith the application the petitioner has also filed copies of the statements of account of all the four banks i.e., Axis Bank, Punjab National Bank, HDFC Bank and Union Bank of India referred to in the ledger account of the respondent being maintained in the account books of the petitioner. These statements of account bear seal of the respective banks but the same have not been certified under the Bankers Books Evidence Act. The effect of such non-compliance would be discussed in later part of this order.

21. I have heard the learned counsel for the parties and carefully perused the records.

22. The basic issue in this case is whether the petitioner falls within the definition of term 'Financial Creditor'. Learned counsel for the respondent vehemently contended that the petitioner was a potential investor in the equity of company and thus cannot be termed as a 'Financial Creditor'. The learned counsel would refer to various clauses of MOU in support of his contention. The petitioner had agreed to invest ₹564 lacs towards equity infusion and repayment to HSIIDC for revival of the respondent-corporate debtor. Out of this, ₹540 lacs were to be brought in by the petitioner towards equity and the balance for repayment to HSIIDC.

23. According to respondent the petitioner purchased the shares of the corporate debtor from HSIIDC to the tune of ₹23.75 lacs which of course is as per the terms of the MOU. Reference is also made to contents of the MOU to the effect that the petitioner is engaged in exploring possibilities of taking over sick industrial undertakings and taking them over as long term investment and reviving them for socio economic benefits. Further that the petitioner having satisfied itself of the potential for revival of the respondent decided to get involved in the process of revival of the respondent by infusing funds and participation in its management.

24. Therefore, it was contended that MOU was executed by the petitioner only with a view to invest in the equity of the respondent by investing funds and in no case it can be termed as a 'Financial Creditor'.



25. Having given my thoughtful consideration to the issue, I am of the view that the petitioner falls within the definition of term of 'Financial Creditor' as defined in Section 5 of the Code. The term Financial Creditor as defined in sub-section (7) of Section 5 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.

26. The terms 'financial debt' is defined in sub-section (8) of Section 5 of the Code relevant part of which reads as under:-

*(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)*

*to*

*(i) .....*

27. The question here would be whether the money invested by the petitioner can be termed as the amount disbursed against the consideration for the time value of money and includes (a) money borrowed against the payment of interest. The terms of MOU are complete answer to this issue. This is an admitted document. Clause No.4 of MOU states that the respondent shall make immediate payment to settle various pressing liabilities of the respondent-corporate debtor i.e., ₹1,41,51,000/- to Apollo Equipment Private Ltd.; ₹6,03,634/- to ESI; ₹1,88,149/- to UHBVN, Bahadurgarh (Electricity Department) and negotiated OTS amount to HSIIDC. The other pertinent term is that the respondent was to provide for these expenses in its books of accounts as **unsecured loan** from the petitioner for the time being.

28. The sums under different Heads as agreed in clause 4 of the MOU having been paid by the petitioner are reflected in the ledger account of the respondent maintained by the petitioner. Copy of the ledger account is at Annexure 1/B. There is entry dated 19.09.2009 of ₹6,03,634/- paid by cheque drawn on Union Bank of India in favour of Assistant Regional Director, ESI Corporation. Next entry of the same date is regarding payment of ₹15,50,832/- by cheque drawn on Union Bank of India in favour of Assistant Provident Fund Commissioner payable at Rohtak on the account of the respondent. There is another entry dated 19.09.2009 of payment of ₹1,88,149/- by cheque drawn on Union Bank of India in favour of SDO, UHBVN, Bahadurgarh. After a few more entries of payment through cheques there is an entry of deposit of ₹41,51,000/- on 01.12.2009 by pay order drawn on Union Bank of India in favour of Apollo Equipment Pvt. Ltd.; other two entries of deposit in favour of the aforesaid concern of ₹25,00,000/- each on 07.01.2010 and 14.01.2010 by cheque drawn on HDFC Bank. So the total amount of ₹1,41,51,000/- stood paid to Apollo Equipment Pvt. Ltd. which was the amount mentioned in the MOU itself. Rest are various other entries mostly by cheque on behalf of the respondent to different authorities/persons and containing last entry dated 23.03.2013 of payment of ₹55,000/- by pay order through HDFC Bank.

29. With regard to the Bank Statements there was a direction of this Tribunal in the order dated 13.09.2017 that the account statements certified under the Bankers Books Evidence Act, 1891 be filed. Learned counsel for the respondent vehemently contended that the requisite

certificate should be as per the proforma containing various clauses certifying further that the statement is true copy of the print out of such entries certified under the Bankers Books Evidence Act and that the above entries are true copies of print out of such entries of bank accounts maintained by the bank in ordinary books of account of the Bank and made in usual and ordinary course of business and that the said books are still in the custody of the Bank. Computer Incharge has to further certify that these are true to the best of his knowledge and belief and that the computer system operated properly on the date of certificate and he has been provided with all the relevant data and copy of the print out represents correctly the relevant data. I am of the view that the aforesaid contention may be true in case the Bank itself is the Financial Creditor which mostly relies upon the statements of account. Column 7 of Part V of Form No.1 requires filing of the copies of books of account maintained under Bankers Books Evidence Act and the document filed by the petitioner of course complies with the said requirement.

30. In any case the basic requirement for 'Financial Creditor' to rely upon the record as provided in sub-section (3) of Section 7 of the Code. It says that:-

*“(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.”*

31. The evidence on record in this case not only comprises of the copies of the statement of account obtained from the banks but the Ledger Account of the respondent maintained in the books of Account of

petitioner. Each of the entry in the account relating to the transactions through banks tally with the entries in statement of Bank Accounts of all these four Financial Institutions. In fact the major amount for which the claim of the petitioner is based is the agreed sum admitted in the MOU.

32. Learned counsel for the petitioner also refers to the admission of the corporate debtor in the order dated 10.12.2012 of BIFR Annexure 1/D. In paragraph 2.4.2 of the order it is observed that the learned advocate representing the company i.e. the respondent stated that the company had proposed to implead the petitioner as a strategic investor through DRS submitted in November, 2011. It was further submitted before the BIFR on behalf of the company that they entered into MOU with the petitioner subject to approval of DRS by the BIFR. In paragraph 2.4 of the order, BIFR observed that counsel for the company stated that on the basis of MOU the petitioner had invested an amount of ₹2.00 crore in the company and the company has used this amount to settle the outstanding electricity dues and also paid part dues of ESI. Though BIFR had not accepted the MOU, yet it impleaded the petitioner as a party being unsecured creditor having already invested ₹2.00 crores in the respondent company.

33. It was next contended by learned counsel for the respondent that in any event the status of the petitioner could assume the character of a Financial Creditor only in the eventuality of rejection of DRS by BIFR whereas in the instant case the proceedings of BIFR stood abated by the legislative action. It is, therefore, contended that the petitioner could not trigger the action under clause 8 of MOU nor claim itself to be a Financial

Creditor. Having considered the matter deeply, I am of the view that the abatement of the proceedings before BIFR due to the legislative action would clearly amount to the rejection of the DRS by the BIFR so as to enforce the rights and liabilities of the parties under MOU which contains the clause of refund of the amount with 15% interest.

34. Even if the petitioner is a shareholder in respect of the shares purchased from HSIIDC that will not make the petitioner ineligible. So far as rest of the payments which are agreed and admitted in the MOU the said amount invested by the petitioner has been defined as unsecured loan in the MOU itself and the amount is to be refunded in case of rejection of DRS. In view of the above, the petitioner falls within the definition of the term Financial Creditor entitled to maintain the petition under section 7 of the Code.

35. The amount in default in this case is ₹2,14,60,176. The petitioner has also claimed interest @15% per annum from the date of last incurring payment of the amount of ₹55,000/- on 23.03.2013. MOU was executed in 2009 and payment of the major amount was made in 2009 itself by the petitioner. Clause 8 of the MOU is silent about the date when the interest would start running in case of rejection of DRS. This clause reads as under:-

*“In the unlikely event of rejection of DRS by BIFR, SF shall submit a statement of expenses of TCL, detailing all sums paid by SF to TCL / on behalf of TCL along with documentary evidence and TCL shall immediately refund the said sum of money with 15% interest.”*

In the absence of the specific term it can be readily said that the interest would start running under the Code from the date of repeal of SICA  
CP (IB) NO. 50/Chd/Hry/2017

provisions i.e. 01.12.2016 at the agreed rate and not for the previous period.

36. Term default is defined in sub-section (12) of Section 3 of the Code and reproduced as under:-

*“(12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.”*

So even the non-payment of the whole or any part or instalment of debt, amounts to default.

37. The respondent in this case has denied its liability towards the petitioner on the ground of the petitioner being not covered within the definition of the term ‘Financial Creditor’ which issue has been held against the petitioner. Now sub-section (5) of Section 7 of the Code says that 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.

38. In view of the above, the instant petition deserves to be admitted. The petition is, therefore, admitted declaring the moratorium as per Section 14 of the Code as under :-

- 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 Securitisation 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.

39. It is further directed that the supply of essential goods or services to the Corporate Debtor as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall not be terminated or suspended or interrupted during moratorium period. This, however, shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

40. The matter be listed on 11.10.2017 for passing of formal order of appointment of Interim Resolution Professional. Copy of this order be communicated to both the parties.

Sd/-  
(Justice R.P. Nagrath)  
Member (Judicial)

September 29, 2017  
arora