NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-VI
AT NEW DELHI

TP 38 of 2020
in
CP (IB) No. 1071/KB/2019

Under Section 7 of the Insolvency and Bankruptcy Code, read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of:

Techno Electric & Engineering Co. Ltd.

Applicant/Financial Creditor

Vs.

McLeod Russel India Limited

Respondent/Corporate Debtor

Judgment delivered on: 06.08.2021

CORAM:
P.S.N. Prasad, HON'BLE MEMBER (JUDICIAL)
Narender Kumar Bhola, HON'BLE MEMBER (TECHNICAL)

Counsel for Applicant: Mr. P.S. Narsimha, Sr. Advocate, Mr. Udit Gupta, Mr. Kumar Anurag Singh, Mr. Masoom Shah, Mr. Suresh Mongia and Mr. Anup Jain, Advocates

Counsel for Respondent: Mr. Virendra Ganda, Sr. Advocate, Ms. Eshna Kumar, Ms. Santosh Kumari, Mr. Ritoban Sarkar, Mr. Vishal Ganda, Mr. Aditya Maheshwari, Mr. Prithvi Singh, Mr. Ayandeb Mitra and Ms. Anoushka Sarkar, Advocates

ORDER

Per: P.S.N. Prasad, Member (J)

1. M/s Techno Electric & Engineering Co. Ltd. has filed the instant application 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. McLeod Russel India Limited, referred to as the corporate debtor.

2. The Respondent Company M/s. McLeod Russel India Limited (CIN No. L51109WB1998PLC087076) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 28.01.2005 having its registered office situated at 4, Mangoe Lane, Surendra Mohan Ghosh Sarani, Hare Street, Kolkata-700001 (West Bengal). The matter was transferred from Kolkata Bench to this Bench vide order dated 10.09.2020

3. The case of the applicant precisely is that the applicant and the Corporate Debtor entered into a Loan Agreement dated 28.09.2018 to provide an inter-corporate deposit of Rs. 100 crores to the Corporate Debtor subject to the condition that the same would be utilized by the Corporate Debtor for the purpose of repayment of all loans relating to the four tea estates namely, Addabarie Tea Estate, Mahakali Tea Estate, Dirai Tea Estate and Rajmai Tea Estate due to banks and financial institutions to ensure that all encumbrances created on the four tea estates are released by the banks and financial institutions. The said amount was remitted on the same date. Thereafter, in order to secure repayment of the aforesaid loan amount the Corporate Debtor, inter alia, agreed that the original title deeds of the said four tea estates which were in possession of ICICI Bank would be handed over to the applicant upon repayment of loans availed by the Corporate Debtor from the concerned banks and financial institution. In addition to the aforesaid, the Corporate Debtor also caused mortgaged of

a property situated at 4, Sunny Park, Kolkata–700019 in favour of the Financial Creditor by deposit of title deeds.

4. The loan amount carried interest @ 14 % per annum which would be payable by the corporate debtor on a monthly basis and in the event any payment of interest remained outstanding beyond the stipulated due date, the rate of interest would further increase by 5 %. The entire loan amount together with interest was to be fully repaid on or before March 31, 2019.

5. However, the Corporate Debtor failed and neglected to hand over the original title deeds relating to the four tea estates to the Financial Creditor and also to repay the entire loan amount within the due date, i.e., 31st March, 2019. On April 5, 2019, the applicant had issued a letter to the Corporate Debtor calling upon the Corporate Debtor to repay the entire loan amount. However, the Corporate Debtor took no steps for repayment of the same.

6. Thereafter, the Financial Creditor filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court at Calcutta and by an

order dated April 30, 2019 the Hon'ble Court was pleased to pass an order restraining the Corporate Debtor from dealing with Rajmai Tea Estate and the property situated at 4, Sunny Park. It is claimed that in the said order the representative of the Corporate Debtor had admitted the claim of the Financial Creditor but however, has expressed its inability to pay the loan with interest due to some financial difficulties.

7. As per part IV of the application an aggregate amount of Rs. 1,04,81,21,676/- is outstanding as on June 30, 2019 to be paid by the Corporate Debtor to the Financial Creditor Rs. 100 crores being the principal amount and Rs. 4,81,21,676/- on account of interest as per agreed rate.

8. The respondent corporate debtor has filed its reply. Both the parties were heard at length and the order was reserved.

9. The respondent has raised objection against the admission of present application that there is no default occurred under the Loan Agreement. It is claimed that as per clause 16 and 17 of the Loan Agreement the amount

has yet not become due because the said clause says that recovery is first supposed to be done from secured assets and if anything remains then from borrower. The respondent argued that securities are sufficient to clear the liability and there will be no arrears left to be recovered from the respondent. Clause 17 is reproduced below:

> *"17. The Parties further agree that in case the Lender is not able to recover the entire Loan Amount and all other amounts due and payable to the Lender under this Agreement even after enforcing all securities extended by the Borrower as mentioned in clause 5 of this Agreement including sale of mortgaged properties, then under the said circumstances, the Lender shall have a right to recover the remaining amount from the Borrower."*

10. The applicant in its rejoinder argument has submitted that there is violation of the clause 9 and other clauses of the agreement and hence the default has taken place. Clause 17's pre-requisite is default committed by the respondent and it does not affect the present proceeding under Section 7. The applicant further argued that the said clause has been misinterpreted and only protects respondent until and unless the applicant failed to recover default amount from secured assets and the applicant has not opted for selling of secured assets.

11. The respondent further argued that Balance Sheet of applicant for the F.Y. 2018-19 shows that there was a loan of 100 crores which is not reflected thereafter which means a refund is done of 100 crores or the debt has been assigned to someone else. This argument has no strength as respondent itself agreed that no repayment has been made. Applicant in its rejoinder submitted that on the basis of opinion received, the Financial Creditor has re-classified and disclosed the loan of Rs. 100 crores, which was disclosed under 'loans' in the financial statements for the year ended 31 March 2019, under 'other financial assets' and other 'assets' in the financial statements for the year ended 31st March 2020. In both these years this amount of Rs. 100 crores is included as part of 5 the total assets of the company. Pursuant to this reclassification, there was increase in other financial assets and other assets in the cash flow statement for the year ended 31st March 2020. This increase was included under trade and other receivables. In order to reconcile the cash flow statement, a reduction of Rs. 100 Crores. was presented under the heading

'refund/(payment)of loan (net). There was no change in total assets of the company due to this re-classification. The reclassification does not impact the right of the company against the borrower and meets the definition of asset as discussed below. The company is following Ind-AS accounting standards for the preparation of the financial statements. The same no way affects the rights of the creditor to recover from the defaulter.

12. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5 (7) and 5 (8) of the Code and precisely "Financial debt" is a debt along with interest, if any, which is disbursed against the consideration for time value of money.

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

I. Default has occurred.
II. Application is complete, and
III. No disciplinary proceeding against the proposed IRP is pending.

14. An application under Section 7 of the Code is acceptable so long as the debt is proved to be due and

there has been occurrence of existence of default. What is material is that the default is at least Rs. 100 lakhs. In view of Section 4 of the Code, the moment default is of Rupees one hundred lakhs or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

15. In the present matter the applicant has produced loan agreement executed between the parties, according to which the respondent has failed to repay the loan within stipulated time. The respondent has not denied the same. The objections raised by respondent regarding sufficient security is not sustainable as proceeding under this Code is not money recovery proceeding. The other objection raised about removal of loan amount from Balance Sheet will also not help respondent.

16. It is seen that in order dated 30.04.2019 passed by Hon'ble High Court of Calcutta, the court has observed that:

> *"this court is, prima facie, satisfied that Respondent having taken inter corporate deposit of Rs. 100 Crores admits to not to have repaid. Petitioner is entitled to interim measures."*

From perusal of the above observation of High Court it is clear that it is an undisputed fact that the loan amount has not been repaid to applicant. That apart, a Demand Promissory Note dated 28.09.2018 was also executed by Respondent in favour of applicant, which prima facie proves the liability of Respondent to pay its dues with interest. In addition to this charge id 100208820 has been created in favour of applicant on the property of Respondent, this also proves that the applicant is still a secured creditor of Respondent.

17. The respondent argued that a perusal of "Techno Electric & Engineering Q2 FY2020 Earnings Conference Call", dated 14/11/2019, shows that Applicant's CMD was questioned about the issues in respect of Applicant's exposure to the Respondent. To this Applicant's CMD categorically stated that the Applicant was out of the alleged debt exposure. Applicant's CMD also explained that the money (exposure/alleged debt) has been replaced in the Applicant's Company by its daughter's in laws. Applicant's CMD also elaborated that a proceeding for recovery of money was being pursued by the Applicant

against the Respondent "on behalf of" his larger family. On being further questioned on this issue, Mr. Gupta referred to the balance sheet of September 2019 and categorically stated that the exposure of the Applicant to the Respondent is nil. Further the respondent has submitted that this transcript is not an internal document. Being a listed company, the Applicant is statutorily bound to disclose the schedule and presentation of these Earnings Conference Call dated 14/11/2019, to the stock exchanges under Regulation 30 read with Point 15 of Schedule III (Part A) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and to disseminate the same on its website under Regulation 46(2)(o) of the said Regulations. This regulation makes it incumbent upon every listed company to disclose all events or information related to the company including calls.

18. In this respect it is seen that no assignment agreement has been placed on record by either party to show that the debt has been assigned to someone else's name. In the said Minutes also applicant's CMD clarified that the loan

agreement is still in the name of Applicant Company and they are initiating steps for recovery on behalf of the larger family. The alleged arrangement regarding loan of respondent is an internal arrangement of applicant which will not affect liability of the respondent to clear the dues of Applicant Company. Fact still remains that the respondent has enjoyed the loan amount and failed to clear the dues on time. It is clear that the family member of applicant put forth their money in the company against the loan of the respondent company, however no assignment is made and admittedly the applicant is still a financial creditor of the respondent. The same fact has not been denied by the respondent itself.

19. Hon'ble Supreme Court in the matter of M/s. Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (2018) 1 SCC 407, has held as follows:

> *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount.....*
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> *30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial*

debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

20. On perusal of the aforementioned judgment it is clear that if a debt become due and payable and not paid by Corporate Debtor, it will be said that the Corporate Debtor has committed default. When we apply the aforesaid judgment in the present matter it is seen that the debt become due and payable on 31.03.2019 as per the loan agreement and the respondent itself has admitted that the payment has not been made to the applicant, as more particularly brought out in para 16 herein above. Therefore, existence of debt and default cannot be ruled out in the present matter.

21. In respect of removal of loan amount from one section of Balance Sheet, the applicant has relied upon the case of *Salim Akbarali Nanji v. Union of India, (2006) 5 SCC 302,* in which Hon'ble Supreme Court has held that even written off debt can be recovered and that write off is

internal accounting procedure of the Bank, but that doesn't affect the right of creditor against borrower. The relevant portion of the judgement is reproduced below:

> *"9. It was further explained that the write-off is an internal accounting procedure to clean up the balance sheet of the Bank. Such write-off is resorted to even in cases where the Bank has not exhausted all the avenues for recovery of dues. Such write-off does not affect the right of the Bank to proceed against the borrowers to collect the dues. The legal proceedings initiated by the Bank to recover the loans or to enforce the security against the borrowers may continue. The write-off does not bar the Bank from following up recoveries. Further recoveries, if any, in these accounts are credited to the income account, in turn improving the net worth of the Bank. ....."*
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> *17. The submission proceeds on the assumption that the bad debts written-off cannot be recovered. In fact and in law it is not so. Despite writing-off the debt is still recoverable by the Bank. The affidavit filed by the Bank also discloses the steps which are being taken to realise the dues from the debtor. Some amounts have been recovered over the years though the figure does not appear very impressive. Even so, steps are being taken to recover the dues whenever possible and Respondent Bank has furnished particulars of the various proceedings pending for recovery of such debts. The write-off is only an internal accounting procedure to clean up the balance sheet, and it does not affect the right of the creditor to proceed against the borrower to realise his dues. Moreover, it does give some benefit to the Bank under the income tax laws because after write-off tax is payable only on the amount recovered as and when recovery is made. ....."*

22. Therefore, applying the aforesaid ratio to the present case, the objections raised by respondent are not sustainable. It is reiterated that the respondent itself has admitted the loan amount and non-payment of loan amount. The respondent by giving option to realise the securities made/given clear that the loan amount has not been repaid and thus default has been committed.

23. The applicant has filed the certificate of record of default with Information Utility (Report as on 27.06.2019) which shows the amount as Rs. 100 crore with interest of Rs. 4,47,67,123; this Report is deemed to be authenticated. The respondent has raised objection against the report of Information Utility. It is alleged that the email seeking confirmation and verification of default/reminders from the Respondent has been addressed to persons who are no longer associated with the Corporate Debtor [(a) Mr. K.K. Baheti (b) Mr. BK Singh (C) D. Mukherjee (d) A. Guha Sarkar] and no email has ever been addressed to the Corporate Debtor on its registered email id. It is claimed that the deemed authorization is without any basis and

the document is in violation of Regulation 21 of IBBI (Information Utilities) Regulations, 2017.

24. In this respect the certificate has been issued by NeSL, is deemed to be issued after following due process until unless it has been challenged. The respondent has not challenged the certificate before the appropriate authority and also not contested the loan agreement or amount in default. Therefore, in absence of any document on record against the said certificate, the certificate will be deemed to be valid.

25. The respondent also placed reliance of Arbitration Clause, i.e., Clause 25 of the loan agreement. However, it is a settled preposition that the pendency of arbitration proceeding is not a defense in case of Section 7 application. In fact, no evidence is placed to show that any arbitration proceeding is pending in the present matter. The respondent has not raised any dispute over quantum of default or existence of loan amount. Therefore, this objection is also not sustainable.

26. We are satisfied that the present application is complete in all respects and the applicant is entitled to claim

outstanding financial debts from the respondent and that there has been default in payment of the financial debt. Consent of the IRP is enclosed with Petition. The defaulted amount is more than Rs. 100 lakhs being the minimum threshold limit fixed by the Code. Under such circumstances, this Adjudicating Authority is inclined to admit this petition and initiate CIRP against the respondent. Accordingly, this petition is admitted.

27. Mr. Kanchan Dutta, having IBBI Registration no. IBBI/IPA-001/IP-P00202/2017-18/10391, email id. kanchan@kgrs.in, is hereby appointed as Interim Resolution Professional (IRP) of the Respondent Corporate Debtor.

28. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the IRP immediately (within 3 days) with regard to admission of this application under Section 7 of the Code.

29. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flow from the provisions of Section 14 (1) (a),

(b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

- the institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 respondent."

30. The supply of the essential goods or services to the respondent as may be specified, are not to be terminated

or suspended or interrupted during the moratorium period [Sec 14(2) of the Code]. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government in consultation with any financial regulator. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the respondent in terms of Section 14 (3) (b) of the Code.

31. The IRP shall perform all his functions contemplated, inter-alia, by Sections 17, 18 and 21 of the Code and conduct proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations and shall file reports before Adjudicating Authority. It is further made clear that all the personnel connected with the respondent, its promoters or any other persons associated with the Management of the respondent are under legal obligation as per Section 19 of the Code to extend every assistance and cooperation to the IRP as may be required by him in managing the day to day affairs of the respondent. The

IRP shall be under duty to protect and preserve the value of the property of the respondent 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.

32. The applicant is directed to deposit a fee of Rs. 2 lakh to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by IRP and shall be reimbursed by the Committee of Creditors (CoC) to the applicant to be recovered as CIRP cost.

33. The office is directed to communicate a copy of the order to the applicant, the respondent, the IRP and the Registrar of Companies, New Delhi at the earliest possible but not later than seven days from today.

(Narender Kumar Bhola)
Member (Technical)

(P.S.N. Prasad)
Member (Judicial)