

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No. 40/CB/2023
&
IVN. No. 6/ CB/2023

CP (IB) No. 40/CB/2023

In the matter of:

Petition under Section 10 of the Insolvency and Bankruptcy Code, 2016 read with 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

-And-

In the matter of:

SMS Asia Private Limited, having its registered office at- W-9, CIVIL Township , 1st Floor, Rourkela, Odisha- 769 004;

... Corporate Applicant

-And-

Appearances (through hybrid mode)

For the petitioner : Mr. Saswat Kumar Acharya, Adv.
Mr. Jayabrata Mukherjee, Adv.
Mr. Abhijeet Agarwal, Adv.

-And-

IVN. No. 6/ CB/2023

In the matter of:

An Application under Section 60 (5) read with Section 65 of Insolvency and Bankruptcy Code, 2016 and Rule 11 of the NCLT, Rules 2016;

-And-

In the matter of:

TRL KROSAKI REFRACTORIES LIMITED, having its registered office at- Belpahar, Jharsuguda, Orissa- 768 218;

...Applicant

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-Versus-

SMS Asia Private Limited, having its registered office at- W-9 , CIVIL Township
, 1st Floor, Rourkela, Odisha- 769 004;

...Respondent

Appearances (through hybrid mode)

For the applicant : Mr. Gaurav Khanna, Adv.
Mr. Venugopal Mahapatra, Adv.
Mr. Gautam Burnwal, Adv.
Ms. Aishwarya Ray, Adv.
Mr. Sachin Sahoo, Adv.
Mr. Tushar Srivastava, Adv.

For the Respondents : Mr. Saswat Kumar Acharya, Adv.
Mr. Jayabrata Mukherjee, Adv.
Mr. Abhijeet Agarwal, Adv.

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Kaushalendra Kumar Singh : Member (Technical)

Order Pronounced on:22.04.2024

COMMON ORDER

1. This petition has been filed by **SMS Asia Private Limited** ('Petitioner/Corporate Applicant') under Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process (CIRP) against itself as the Corporate Person is unable to pay the debt of Rs 3.07 Crores out of which Rs.0.30 Crore refers to Financial Debt and Rs.2.94 Crore refers to Operational Debt as the Corporate Applicant started Financial Losses since FY-2019-20.

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2. The petitioner company was incorporated on 12.05.2008 as a Private Limited Company with the main objective to carry on business as traders, manufacturers, contractors, processors, dealers, buyers, sellers, importers, exporters, inventors, fabricators, engineers, merchants, stockists, suppliers, distributors, transporters, agents, representatives, commission brokers, liaison job agents and consignors of all kinds and forms of refractory items, refractory raw materials and their scrap, cement, chemical, ceramic fiber products.
3. While taking up the matter this Adjudicating Authority issued notice to all the creditors of SMS Asia Private Limited mentioned in Annexure -K of the Petition. On receipt of notice, TRL KROSAKIREFRACTORIES PRIVATE LIMITED filed an intervention Application for dismissal of the petition filed u/s 10 of IBC and penalty upon the Corporate Applicant for initiating an insolvency resolution process with fraudulent and malicious intent.
4. **Brief Contents of Intervention Petition:** The intervenor company has pioneered refractories producer in India. That on 18.07.2014, intervenor/operational creditor entered into an agreement with the petitioner company i.e. SMS Asia Private Limited where under the petitioner became one of the stockists of the intervenor Company. Under the said agreement, the petitioner would place a purchase order with the intervenor Company for the supply of products. Intervenor Company would then manufacture and supply the said products to the petitioner Company at a discounted rate so that the petitioner could sell the said products to its customers at a profit margin.
5. Given the outstanding dues payable by the petitioner Company to intervenor Company/OC, the petitioner Company issued seven cheques, all dated 13.03.2015, in total amounting to Rs. 1,10,00,000/- in favour of Intervenor/OC Company. When these cheques were presented for

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- encashment to the respondent bank i.e. Vijaya Bank informed the applicant bank i.e. Axis Bank Limited, the Bank returned those cheques with an endorsement that the Corporate Debtor A/c with the bank has been closed.
6. After cheques drawn in favour of intervenor/OC were dishonored, the intervenor/OC Company filed a complaint, being Case No. I.C.C 422 of 2015 before Learned SDJM, Jharsuguda, alleging offences punishable under section 138 of the Negotiable Instrument Act,1881, against the Corporate Debtor and its Managing Director.
 7. On 14.12.2017, The Hon'ble High Court of Orissa, at Cuttack allowed the quashing petition filed by the petitioner/Corporate Debtor and its Managing Director with an observation that the Complaint was not filed by an officer who was duly authorized by the Company i.e. intervenor/OC being CRLMC No. 1210 of 2017. Being aggrieved, by a Special Leave Petition filed in SLP(Crl.) No. 3113 of 2018, before the Hon'ble Supreme Court of India.
 8. That the Hon'ble Supreme Court passed a judgement in favour of the Intervenor Company, setting aside the order dated 14.12.2017 of the Hon'ble High Court of Orissa and restored Complaint under the Negotiable Instrument Act,1881, on the file of SDJM, Jharsuguda and directed the trial should be concluded within a period of six months and imposed a cost of Rs 1,00,000/-. That being aggrieved by the said Order the Petitioner Company and its Managing Director filed a review petition, being R.P (Crl.) No.81 of 2022, seeking review of the above order dated 22.02.2022 and Hon'ble Apex Court dismissed the review petition by its order dated 21.04.2022.
 9. After the direction of the Hon'ble Supreme Court that the trial should be concluded within a period of six months the Respondents delayed the process in some way or the other and when the trial was in an advanced stage before Learned SDJM, Jharsuguda the Respondent Company preferred a petition

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under Section 10 of Insolvency and Bankruptcy Code, 2016 on 14.07.2023.

10. The Managing Director of the petitioner's company Mr. Sarat Chandra Choudhary along with two family members namely, Mr. Devang Choudhury and Mr. Ram Chandra Choudhury, incorporated a new company by the name of Thyme India Private Limited on 05.04.2018 herein referred to as "New Company". It is also pertinent to mention that the said new company has identical business in respect of the petitioner Company. The registered address of the petitioner Company and the newly formed company are same i.e. W-9, Civil Township, Rourkela, Orissa, India-769004. It is also pertinent to note that Mr. Sarat Chandra Choudhary, who is the Managing Director of the petitioner company, is also the Managing Director of the new Company. A true copy of master data of SMS Asia Private Limited extracted from mca.gov.in is Annexure- 2 at Page 31-32. A true copy of master data of Thyme India Private Limited extracted from mca.gov.in is Annexure- 3 at page 33-34.
11. It is also pertinent to note that the Managing Director and Director of the New Company are all "related parties" in respect of the Petitioner Company, within the meaning of Section 5(24)(a) of the Insolvency and Bankruptcy Code, 2016.
12. The "related parties" of the petitioner Company have engaged in an unfair competition whereby the business of the petitioner Company has been deliberately moved to a new company for the benefit of the same individuals. The management of the petitioner Company has moved the same business under the new company while leaving the petitioner Company in debt of creditors. Therefore, it is respectfully submitted that it is a fit case for this Hon'ble Tribunal to lift the corporate veil of Respondent Company and to reach at the bottom of the fraud which is being committed by the management of the respondent company.

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13. The petitioner company has been brought to a stage where it is almost bereft of any assets. The Financial statement of the petitioner company shows that the sudden extinction of funds and assets of the company from the financial year 2017-18. Therefore, it is evident that after the incorporation of the new company, the petitioner company started to divert its business through the new company, and did not take any steps for the progress of the business SMS Asia Private Limited, with an intention to defraud the creditors, including the intervenor/OC. Apart from this in the year 2021-22, some related party transactions were made between the petitioner Company and the new Company and the same is evident from the financial statement of petitioner Company. The Financial statements of the new company i.e. Thyme India Private Limited from the year 2018-19 to 2021-22 is Annexure-O-9 at page 113-183. The Financial Statement of petitioner Company i.e. SMA Asia Private Limited from the year 2015-16 to 2021-22 is Annexure-O-10 at page 184-296.

14. Petitioner Company has been denuded of its assets by the present management to run the same business through the new company. In such circumstances, it is submitted that both the objects of IBC, (i) protection of interest of creditors and (ii) revival of corporate debtor remain unsatisfied under the present condition of the petitioner Company. Consequently, triggering of corporate insolvency resolution process is not going to help the creditors in any way, particularly, when the very initiation of Insolvency proceedings is based on the fraudulent and malicious intent of the present management of petitioner Company.

15. *Brief contents of the Reply to intervening Petition:* The objection of the intervenor/OC is that the trial which is in pending before Learned SDJM, Jharsuguda is a separate matter filed under Section 138 of the Negotiable Instrument Act, 1881 and it has nothing to do with the petition filed under

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Section 10 of the Insolvency and Bankruptcy Code, 2016 even if CIRP was initiated and moratorium was declared under section 14 of Insolvency and Bankruptcy Code, 2016 it will not affect the trial which was conducted before Learned SDJM, Jharsuguda. The petitioner company denies that there was any intention on the part of the petitioner to engage in fraudulent activities.

16. The products of the two companies are different. Thyme India Private Limited herein referred to as a new company does not trade in finished refractory products manufactured by TRL or other refractory companies, which has been the primary business of SMS Asia Private Limited since its incorporation in 2008.
17. The allegations which are raised by intervenor Company are all general allegations that do not highlight any specific instances or evidence of illegal activity. Instead, they appear to be intended to create confusion rather than establish fraudulent or malicious intent on the part of the Corporate Applicant.
18. The petitioner Company has submitted that the related party transactions done between SMS Asia Private Limited and Thyme India Private Limited are in compliance of the prevailing Corporate Law and Income Tax Norms. The Primary Business and product line of SMS Asia differs from Thyme India. No Customers were transferred from SMS Asia to Thyme India. No Assets were transferred from SMS Asia to Thyme India. Related Party Transactions did not result in a loss for either SMS Asia or Thyme India.
19. After hearing the submission of counsel for Intervenor and Respondent, since intervenor have proved its interest with all supporting documents, we are of the view to arrive at just and correct conclusion by hearing the submission of intervenor is useful. Hence, Intervention Petition IVN. No. 6/CB/2024 is **"ALLOWED"**.

20. On the intervenor side also submitted that the petitioner company filed this petition to avoid criminal proceeding I..C.C. No.422 of 2015 initiated by the intervenor under section 138 of N.I.Act 1881 and pending before SDJM, Jharsuguda. The Hon'ble Apex court in P. Mohanraj vs Shah Bros. Ispat (p) Ltd (2021)6 SCC 258 it is held that moratorium issued under section 14 of IBC exclusively applies to corporate debtor, however the private individuals those responsible for the conduct of the company remain outside moratorium.

21. Points for consideration:

1. Whether the Corporate petitioner has filed this petition with malicious and fraudulent intention?

20. The petitioner filed this petition under section 10 IBC 2016 to initiate CIRP against on its own. The petitioner stated that that there is a debt of Rs.2.94 crores payable by the petitioner company to various creditors and prayed for admission of the petition. One of the operational creditor TRL Krosaki Refractories Ltd filed an intervention application and opposed the petition alleging that the petitioner filed this petition with malicious and fraudulent intention to defraud the creditors and get rid of the criminal proceedings pending on the file of SDJM, Jharsuguda.

21. The intervenor/Operational creditor is pioneer in refractories production in India and dealing with wide range of products. The intervenor company and petitioner company entered into an agreement dated 18.07.2014 where under the petitioner become one of the stockists of the petitioner company. In this regard the petitioner placed purchase order and the intervenor company manufactured and supplied products. In this transaction the total outstanding due amount payable by the petitioner to this intervenor as on 13.03.2015 is Rs.1,10,00,000/-.

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22. The main contention of the intervenor/operational creditor is the directors of the petitioner/corporate debtor along with other family members incorporated a new company under the name "Thyme India Ltd" giving the same address of the petitioner company as the registered office address of the newly incorporated company. From the records submitted it reveals that the directors of the petitioner company viz. SMS Asia Pvt. Ltd Mr. Sarat Chandra Chowdhary and Mrs. Anita Chowdhary are husband and wife. These two directors along with their two sons Devang Chowdhary and Ram Chandra Chowdhury started new company Thyme India Private Ltd.

23. The object of the new company "Thyme India Ltd" and its line of business are identical and similar to the petitioner company. Both the companies managed by the same family members. On the petitioner side denies that the new company Thyme India Private Ltd also engaged in the same business of SMS Asia Private Limited. On the petitioner side specifically denies this allegation and stated in the response to intervention petition that the Thyme India Pvt Ltd does not trade in finished refractory products manufactured by SMS Asia or other refractory companies. The contention of the petitioner is falsified by Annexures 1 & 2 of written submission of intervenor i.e. Profile created by Thyme India Pvt Limited and Product brochure of Thyme India. Annexures 1 & 2 of written submission of intervenor, in which it is referred about the foundation of petitioner company. The property picture and its description found in these two annexures clearly proved that the new company Thyme India Pvt Ltd engaged in refractories business and the business of SMS Asia Asia Pvt Ltd and Thyme India Private Ltd are same. The growing pattern of Thyme India Ltd and decline pattern of SMS Asia Pvt Ltd shows the business of the SMA Asia Pvt Ltd are gradually shifted to Thyme India Pvt Limited. Thus, the management of the petitioner company substantially shifted/moved its business to the newly incorporated "Thyme India Ltd, and thereby avoided to have business transaction in the petitioner company and left the petitioner company mired in debt.

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24. The financial statements of the petitioner company shows the sudden extinction of funds and assets of the company from 2017-18. This also proves that after the incorporation “Thyme India Ltd the persons managing the affairs of company started to divert the business of the petitioner company into the newly incorporated “Thyme India Ltd” company and avoided to do business of the petitioner company to defraud the intervenor and other creditors.

25. The table given below shows the SMS Asia Turnover and Thyme India Turnover which is relied on by both parties are as follows:

FY	SMS Turnover	Thyme Turnover	SMS Profit	Thyme Profit
2014-15	54,325,249		(4,625,809)	
2015-16	26,693,345		(4,950,146)	
2016-17	49,469,329		(3,179,503)	
2017-18	78,693,090		162,086	
2018-19	54,647,407	26,506,862	170,000	(221,909)
2019-20	13,154,680	27,807,664	(858,325)	(1,869,817)
2020-21	807,782	54,820,160	(5,493,709)	(307,972)
2021-22	975,230	84,209,230	(714,310)	2,508,930

Note: “Turnover” refers to income and “Profit” refers to Profit after Tax, both after rounding off taxes.

26. It is quite evident from the above table that since incorporation of Thyme India Private Ltd in the financial year 2018-19, the turnover of SMS Asia Private Ltd rapidly started to decrease but started to huge increase in the turnover of Thyme India Private Ltd. For the F.Y. 2021-22, it has shown a profit of Rs. 2,508,930 of Thyme India Private Ltd.

27. The newly incorporated company Thyme India Ltd expand its business to

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Hongkong, South America and Europe. The website of the company shows how the newly incorporated company gradually expand beyond India. The three directors of Thyme India Limited incorporated company in Europe, London “Thyme Europe Ltd. The incorporation company of Thyme Europe Limited is filed as Annexure 3 of written submission of intervenor.

28. The copy of Master data of petitioner company SMS Asia Pvt Ltd is Annexure 2 at page 31 of intervening petition. The copy of Master data of Thyme India Ltd is Annexure 3 at page 33 of intervening petition and the copy incorporation certificate of Thyme Europe Limited is Annexure 3 at page 24 of written submission of intervenor. These three certificates discloses that Mr. Sarat Chandra Chowdhary is a key person for all these three companies.

29. The formation of new company Thyme India Ltd, and engaging in the very same business of SMS Asia Private Ltd, and expansion of Business of Thyme India Ltd to Hongkong, and other countries beyond India and incorporation of new Company Thyme Europe Limited in United Kingdom, established the case of intervenor. It leads to prove that the directors of the petitioner company being family members connivance with each other and in order to defraud the creditors of the petitioner company SMS Asia Private Ltd, clandestinely started the New Company Thyme India Private Ltd and shifted the business of the SMS Asia Private Ltd to Thyme India Private Ltd, then maliciously filed this section 10 petition with intent to defraud the creditors.

30. On the intervenor side placed reliance on *Wave Megacity Centre (P) Ltd. v. Rakesh Taneja, 2023 SCC Online NCLAT 50* in which the Hon’ble Tribunal held as follows:

“14. When finding recorded by the Adjudicating Authority is that Section 10 Application has been initiated fraudulently and maliciously, even if there is debt and default, the Adjudicating Authority is not obliged to

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admit Section 10 Application. Section 10 and Section 65, which are part of the same statutory scheme needs to be read together to give effect to the legislative scheme of the Code. In event CIRP is initiated by a corporate applicant fraudulently with malicious intent for any purpose other than the resolution of insolvency, holding it that it is obligatory for the Adjudicating Authority to admit Section 10 Application, will be contrary to the statutory scheme under Section 65. In event conditions under Section 65 are fulfilled, Section 10 Application can be rejected, even if debt and default is proved. Thus, Section 65 has to be read as enabling provision to reject an application even on proving of debt and default Section 10 Application is not to be obligatorily admitted.”

31. In the circumstances we believe that this petition has been filed with malafide intention to escape from clutches of debt liabilities of petitioner company after shifted the assets to the newly incorporated company with an intention to defraud the creditors hence we incline to dismiss the petition.

32. Thus we conclude that this instant petition C.P.No.40/CB/2023 is not filed for resolution of the corporate petitioner's insolvency but to defraud the creditors. The petition is filed with a fraudulent and malicious intention. Hence it is a fit case to deal with Section 65 of IBC 2016. In this regard, Hon'ble NCLAT held in the case of *Monotrone Leasing (P) Ltd vs PM Cold Storage (P) Ltd Company Appeal No.99 of 2020 MANU/NL/0460/2020* as follows:

“28. Section 65 of the Code provides for penal action for initiating Insolvency Resolution Process with a fraudulent or malicious intent or for any purpose other than the resolution. However, the same cannot be construed to mean that if a petition is filed under section 7, 9 or 10 of the Code without any malicious or fraudulent intent, then also such a petition can be rejected by the Adjudicating Authority on the ground that the intent of the Applicant/Petitioner was not resolution for Corporate Insolvency Resolution Process. As the proceedings under IBC are summary, in nature,

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it is difficult to determine the intent of the Applicant filing an application under sections 7, 9 or 10 of the Code unless shown explicitly by way of documentary evidence. This situation may arise in specific instances where a petition is filed under IBC specifically with a fraudulent or malicious intent.”

33. From the record as observed, we have concluded this petition filed maliciously with the intent to defraud the creditors of SMS Asia Private Limited. In consequence as per section 65 of Insolvency and Bankruptcy Code, 2016. The Person who have initiated insolvency resolution process fraudulently made himself liable to pay the penalty as per section 65 of Insolvency and Bankruptcy Code, 2016. Accordingly, we are imposing a penalty of Rs. 1,00,000/- (Rs. One Lakh only) upon the Corporate Applicant SMS Asia Private Limited. The Applicant is directed to pay the penalty amount to the “Ministry of Corporate Affairs” through online payment in www.mca.gov.in within a fortnight period i.e. on or before 06.05.2024 and file the proof of the payment there on in the registry on or before 13.05.2024. Failing which the directors of the company Mr. Sarat Chandra Chowdhary and Mrs. Anita Chowdhary are jointly and severally liable to pay the penalty amount.

34. The Registry is directed to send copy of this order to ROC Cuttack. The ROC, Cuttack is hereby informed that if the petitioner company failed to pay the penalty amount as stated above, the ROC, Cuttack is directed to take coercive action to collect the amount, further without prejudice to his right to take any coercive action, the ROC, Cuttack also can file necessary execution petition to recover the said amounts from company or from its directors named above.

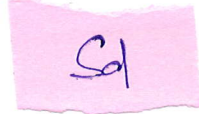
35. In fine this petition C.P. (IB) No.40/CB/2023 is **dismissed** with penalty of Rs.1,00,000/- (Rupees One lakh only).

36. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

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37. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities



Kaushalendra Kumar Singh
Member (Technical)



P. Mohan Raj
Member (Judicial)

Signed on this, the 22th day of April, 2024

Bighmesh LRA / Supriya P.S.