



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

IA No. 57/JPR/2021
And CP No. (IB)- 26/7/JPR/2020

(Application under Section 7 read with 60(5) of the Insolvency and Bankruptcy Code, 2016 & Rule 11 of the NCLT Rules, 2016)

IN THE MATTER OF:

P.S. METAL WORKS

...Financial Creditor/Applicant

Versus

M/S JEPH BEV PRIVATE LIMITED

...Corporate Debtor/Respondent

MEMO OF PARTIES

P.S. METAL WORKS

House No. 626, Hiran Magri
Sector-11, Behind Alok School,
Udaipur – 313001 (Rajasthan)

...Applicant

VERSUS

M/S JEPH BEV PRIVATE LIMITED

Plot No. 36-37, Tagore Nagar,
Jaipur – 302024 (Rajasthan)

...Respondent

IA No. 57/JPR/2021

AND IN THE MATTER OF:

IA No. 57/JPR/2021
And CP No. (IB) - 14/7/JPR/2021



M/S JEPH BEV PRIVATE LIMITED

... Applicant

Versus

P.S. METAL WORKS

... Non-Applicant/Respondent

MEMO OF PARTIES

M/S JEPH BEV PRIVATE LIMITED

Plot No. 36-37, Tagore Nagar,
Jaipur – 302024 (Rajasthan)

...Applicant

VERSUS

P.S. METAL WORKS

House No. 626, Hiran Magri
Sector-11, Behind Alok School,
Udaipur – 313001 (Rajasthan)

...Respondent

For the Applicant : Prateek Kedawat, Adv.
For the Respondent : Nikhil Yadav, Adv.

Order Pronounced On:16.09.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application is filed by M/s P. S. Metal Works, ('Applicant / Financial Creditor'), through the partner and authorised signatory, Mr. Harpreet Singh Saluja, who is duly authorised to sign this Application *vide* Authorisation Letter dated 20.12.2019 at Annexure – O of the Application, claiming to be a Financial Creditor, under Section 7 of the Insolvency and Bankruptcy Code ('IBC' / 'Code'), 2016 read with Rule 4 of the Insolvency and



Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking to initiate a Corporate Insolvency Resolution Process ('CIRP') against M/s Jeph Bev Private Limited ('Respondent' / 'Corporate Debtor').

2. The Applicant, M/s P. S. Metal Works, is a registered partnership firm registered under the Partnership Act, 1932, having Registration No. 17/26/210/2010 dated 25.07.2014 issued by Registrar of Firms. Its registered office is at House No. 626, Hiran Magri, Sector – 11, Behind Alok School, Udaipur, Rajasthan – 313001 and is engaged mainly in the business of import, export, manufacturing, trading and dealing of lead batteries, scraps, ingots, aloo and related items. Copy of the same is annexed *vide* Annexure – B (Colly) of the Application.
3. Financial Creditor has provided the financial facility to the Corporate Debtor in the form of security deposit amounting to Rs. 50,00,000/- (Rupees Fifty Lakhs) through cheques of SBBJ Bank bearing Account Number 61095688842, towards the clearing & forwarding agreement ('C&F Agreement/ Financial Contract') which was furnished as per following details:

Serial No.	Date	Amount (in Rs.)	Cheques No.
1.	03.03.2017	Rs. 2,00,000/-	245925
2.	20.03.2017	Rs. 9,00,000/-	245926
3.	17.04.2017	Rs. 10,00,000/-	245927
4.	18.04.2017	Rs. 10,00,000/-	245928



5.	20.04.2017	Rs. 9,00,000/-	245929
6.	27.04.2017	Rs. 5,00,000/-	245931
7.	15.05.2017	Rs. 5,00,000/-	245932
Total		Rs. 50,00,000/-	

Financial Creditor, under the C&F Agreement, upon furnishing refundable security amount in favour of Corporate Debtor, was entitled to 12% per annum interest on aforementioned security deposit on a monthly basis. Copy of the C&F Agreement is annexed in Annexure – C of the Application.

4. Further, in lieu of the aforesaid refundable security deposit, the Corporate Debtor issued two cheques ('000088 and 000089') of Rs. 25,00,000/- (Rupees Twenty-Five Lakhs) each of Account No. 50200020780025 of HDFC Bank. Consequently, the Corporate Debtor was granted the said financial facility by Financial Creditor in accordance with the C&F Agreement dated 15.05.2017 for obtaining C&F Agency of a brand name 'Indus Pride'. As per the Financial Contract, both parties had a lock-in period of 12 months. Each party to the Financial Contract had the right to withdraw from the agreement at any time by giving three months' advance notice after the lock-in period. It was also agreed that the Respondent should appoint no other C&F without clearing all the dues of the Applicant.
5. After the expiration of the lock-in period of the Financial Contract on 14.05.2018, the Financial Creditor opted to dissolve the Financial Contract on account of non-payment of reimbursable expenses. The Applicant



communicated their discontentment. Pursuant to discussions with the Corporate Debtor, it paid Rs. 10,00,000/- (Rupees Ten Lakhs) on 10.12.2018 and the same was acknowledged *via* email dated 10.12.2018 with the reference for payment of the remaining refundable security on 24.12.2018. Copy of the Payment Voucher and email dated 10.12.2018 is annexed as Annexure – G of the Application.

6. Meanwhile, the Financial Creditor presented Cheque No. 000088 and 000089 dated 15.09.2018 and 24.12.2018, respectively. The former Cheque was returned due to insufficient funds in the Corporate Debtor's account, while the latter was returned because the payment stopped by the drawer. Thus, the Respondent did not fulfil the agreement and defaulted. Copy of the Cheque dishonoured statements with return memos dated 05.12.2018 and 24.12.2018 is annexed as Annexure – H of the Application.
7. The Financial Creditor issued Loan Recall Notice dated 11.08.2019 to the Corporate Debtor on 14.08.2019 for repayment of the outstanding security deposit along with interest and other charges; the same is annexed as Annexure – I. Thereafter, Respondent sent a reply of notice dated 30.08.2019, wherein Corporate Debtor has raised an allegation on Financial Creditor that it has paid Rs. 25,00,000/- (Rupees Twenty-Five Lakhs) on 10.12.2018 instead of Rs. 10,00,000/- (Rupees Ten Lakhs) and the Applicant tore off the receipt amounting to Rs. 15,00,000/- (Rupees Fifteen Lakhs).



Copy of the reply to the notice is annexed as Annexure – L of the Application.

8. The Corporate Debtor failed to maintain financial discipline, i.e., failing to repay the entire security amount by 24.12.2018, clearly substantiated by bank statements and Form 26AS of the Applicant, as well as Financial Statements of the Corporate Debtor, *vide* Annexure – D, E, F and M (1) respectively of the Application. As a consequence, this Application was filed.
9. As claimed by the Applicant, the Respondent is liable to pay an amount of Rs. 43,71,835/- (Rupees Forty-Three Lacs Seventy-One Thousand Eight Hundred Thirty-Five) as of the date of filing of this Application. The total outstanding amount of the aforesaid financial debt along with interest, as enumerated under Part IV, is as follows:

Part IV

Particulars of Financial Debt

1.	Total amount of debt granted	<u>Amount of Debt Granted:</u> Total Principal Amount: Rs. 50,00,000/-
	Date(s) of Disbursement	03.03.2017 to 15.05.2017 [#]



2.	Amount claimed to be in default and the date on which the default occurred	<u>Amount Claimed:</u> Rs. 43,71,835/- Total Principal Amount: Rs. 40,00,000/- Total Interest Due: Rs. 3,71,835/-* Date from which Debt fell Due [^] : 23.12.2018
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* Calculated as per the Recall Notice.

As reflected in the C&F Agreement.

[^] The date of default is the date on which the Corporate Debtor failed to repay.

10. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 2453/2021 dated 23.11.2021, in which the following contentions are made:

- a. The Applicant does not fall under the provisions of Section 7 of the Code as the claim made does not qualify as 'financial debt' under Section 5(8) of the Code. The 'security deposit' paid by the Financial Creditor was a sum paid for smooth functioning and to secure the execution of the main objective, *i.e.* storage of goods and distribution.
- b. The nature of the security deposit does not meet the requirements of 'borrowing' because it fails to pass the concept of 'disbursement of an amount against the time value of money', and such money disbursed should have a 'commercial effect of borrowing'. The transaction of giving a security deposit is not an independent transaction. Consequently, the definition of financial debt under the



IBC excludes 'security deposit' as financial debt for filing an Application under Section 7 of the Code.

- c. Further, such security deposit paid can also not be treated as a 'guarantee' given that the two essential components, 'contract to promise' and 'contract to discharge the liability', are missing in the C&F Agreement.
- d. The present Application arises out of the C&F Agreement executed between the parties with the purpose of undertaking storage and distributorship of goods supplied by the Respondent and thus, giving rise to a principal-agent relationship, as provided under Clause 5 of the C&F Agreement. Clause 5 of the C&F Agreement is reproduced below for ease of reference:

'5. 2.5% Commission shall be payable on the Net sale exclusive of VAT, freight, Trade Discounts and Cash Discount (if any) subject to TDS or other taxes as applicable from time to time. Minimum committed sales of Rs. 25,00,000 (twenty-five lakh) shall be the responsibility of the Company.'

- e. Moreover, the Corporate Debtor has paid Rs. 25,00,000/- (Rupees Twenty-Five Lakhs) instead of Rs. 10,00,000/- (Rupees Ten Lakhs), and F.I.R. in this respect was registered with the police station Gandhi Nagar, Jaipur bearing number 671/2018.

11. We have gone through the documents filed by both parties and heard the arguments made by the counsels. The Applicant has claimed the default on the part of the Respondent for the security amount of Rs. 43,71,835/-



(Rupees Forty-Three Seventy-One Eight Hundred Thirty-Five), including interest. Furthermore, Corporate Debtor has failed to substantiate and provide any documentation for the payment of Rs. 15,00,000/- (Rupees Fifteen Lakhs) over and above Rs. 10,00,000/- (Rupees Ten Lakhs) as acknowledged by the Financial Creditor.

12. Financial Creditor, in its reply to IA No. 57/JPR/2021, filed *vide* Dairy No. 1426/2021 dated 23.07.2021 has annexed the FIR Report dated 12.12.2018 and Final Report dated 27.02.2019 whereby the allegation made against the Applicant found to be false and bogus. Copy of the FIR Report dated 12.12.2018 and Final Report dated 27.02.2019 is annexed as RA/ 1 (Colly).
13. This Adjudicating Authority perused all the relevant papers and found them in order. The Registered Office of Corporate Debtor is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. The matter is within the limitation period as enunciated under the Law of Limitation.
14. In order to decide whether the debt is a Financial Debt, it is desirable to notice and refer to specific relevant provisions of IBC, 2016, which are set out below:

Section 5(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;

Section 5 (8) "financial debt" means a debt along with 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 dematerialised 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 commercial 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-clause (a) to (h) of this clause;*



Section 3 (11): “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(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 [paid] by the debtor or the corporate debtor, as the case may be;

15. As per Section 5(8), financial debt is a debt along with interest which is disbursed against the consideration for the time value of money, and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore, the first essential requirement of financial debt is that the debt should be disbursed against the consideration for the time value of money, which may include situations enumerated in various sub-clauses. In the matter of **Mr. Rajnish Jain vs. (Manoj Kumar Singh – I.R.P.) & Ors.**, Company Appeal (AT) (Insolvency) No. 519 of 2020, the Hon’ble NCLAT observed that-

“47. The Hon’ble Supreme Court, in the case of Pioneer Urban Land Infrastructure Vs. Union of India 2019 SCC Online Page 1055 has observed that; “The definition of ‘Financial Debt’ in Section 5(8) then goes on to state that a debt must be ‘disbursed’ against the consideration for the time value of money. In the present context, it is clear that the expression ‘disburse’ would refer to the fund transfer made by the Respondent No.3 to the Corporate Debtor for the particular purpose of funding, i.e. working capital. The expression ‘disburse’ refers to money, which has been paid against consideration for the time value of money. In short, the disbursal must be money and must be against Consideration for the time value of money, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money for the working capital requirement or any other purpose of the company. Thus, it is clear that the Respondent No.3 disbursed money in the form of



fund transfer made towards the purpose of working capital of funding.”

Therefore, it is essential that for any transaction to be a Financial Debt, an element of the consideration for the time in view of money is very critical.

16. A security deposit can be considered a Financial Debt depending on the facts and circumstances in which money was tendered. When the interest accompanies a security deposit, it partakes the definitions as provided in Section 5(8) of the Code. The list of the definitions/ explanations given under Section 5(8) of the Code is not exhaustive in nature but merely illustrative, as held in the case of ***Dr. B.V.S. Lakshmi vs. Geometrix Laser Solution Pvt. Ltd.***, Company Appeal (AT) (Insolvency) No. 38 of 2017.
17. In addition, the acknowledgement of the Security Deposit as a liability in the financial statements of the Corporate Debtor and the deduction of TDS at various instances under Form 26 AS; the security deposit undertakes the characteristics of a Financial Debt. Consequently, the surrounding circumstances, the relationship, the character of the transactions and the manner in which the parties treated the security deposit transaction reveals the proper form of the C&F Agreement. In the present matter, the agreement in question appears to be a C&F Agreement, whereas, in reality, inferring from the context of the agreement, it holds the spirit of Financial Debt under Section 5(8) of the Code.
18. The Hon'ble NCLAT in ***Sach Marketing Pvt. Ltd. vs. Resolution Professional of Mount Shivalik Industries Ltd., Ms. Pratibha Khandelwal***, Company Appeal (AT) (Insolvency) No. 180 of 2021 has squarely covered the issue and held that



‘Security Deposit’ carrying an interest would fall under the ambit of Section 5(8) of the Code. The relevant extract of the Judgment is reproduced for ease of reference:

‘22. The ‘Corporate Debtor’ had accepted the ‘Security Deposit’ from the Appellant and credited the interest for some time against such amounts for the period 2014-15, and bearing in mind the payment of interest on the amounts borrowed by the ‘Corporate Debtor’ is nothing but a consideration for the time value of money and the interest is being paid to the Appellant for using the money belonging to the Appellant over a period of time and hence we arrive at the conclusion that the status of Appellant is that of a Financial Creditor vis-à-vis the amount of ‘Security Deposit’ as per Section 5(7) read with Section 5(8) of the Code. We are of the considered view that the ratio of the Judgement of the Hon’ble Supreme Court in ‘M/s. Orator Marketing Pvt. Ltd.’ (Supra) is squarely applicable to the facts of this case and we hold that the ‘debt’ in question is a ‘Financial Debt’.’

19. The financial debt and further default in the debt payment should be established to initiate proceedings under Section 7 of the IBC. In the present matter, the Security Deposit provided by the Financial Creditor does fulfil the requirement of the consideration for time value. The Corporate Insolvency Resolution Process can be initiated against the Corporate Debtor, as it has committed a default. Therefore, the Adjudicating Authority has come to the view that the Corporate Insolvency Resolution Process of the Corporate Debtor should be initiated.
20. The Applicant has named one Mr. Anoop Bhatia with Registration No. IBBI/IPA-001/IP-P01142/2018-19/11969, duly registered with the Insolvency and Bankruptcy Board of India, to be appointed as the Interim



Resolution Professional ('IRP'). The Applicant has filed Consent in Form 2 under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016, stating that no disciplinary proceedings are pending against the named IRP. The credentials of the proposed IRP have been checked from the IBBI website, and nothing adverse is found on record.

21. Consequences of initiation of CIRP shall be inter-alia as follows:

- a. The Insolvency Resolution Professional proposed by the Applicant Mr. Anoop Bhatia, is hereby appointed as the IRP to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of IBC, 2016, including the issuance of publication in widely circulated Newspapers as contemplated under the provisions of IBC, 2016 and calling for claims from the creditors of Corporate Debtor and collation of the same shall be done.
- b. Further, as a sequel of admission, the moratorium, as envisaged under Section 14 of IBC, 2016, is invoked concerning the Corporate Debtor, which will be in vogue during the Corporate Insolvency Resolution Process of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of IBC, 2016, in relation to the Corporate Debtor.
- c. The said IRP shall act strictly in accordance with the provisions of IBC, 2016, and to defray his expenses to be incurred and fees on the account,



the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Rs. Two Lakhs Only) to the bank account of IRP within a week from the date of this order. The IRP shall duly file a status report apprising this Adjudicating Authority about the progress of CIRP as unfolding in relation to the Corporate Debtor. In terms of Section 17 & 19 of IBC, 2016, all personnel of the Corporate Debtor, including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- d. In terms of Section 7 of IBC, 2016, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor, and the IRP appointed by this Adjudicating Authority to carry out the CIRP. A copy of this order shall also be communicated to IBBI for its records.

22. CP No. (IB) 26/7/JPR/2020 is admitted in the abovementioned circumstances.

IA NO. 57/JPR/2021

The Corporate Debtor filed this IA under Section 60(5) of the Code read with Rule 11 of the NCLT Rules, 2016, seeking dismissal of CP (IB) No. 26/7/JPR/2020 on the maintainability of the subject petition.



In light of the foregoing, this Interim Application is infructuous and is disposed of accordingly.

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CHANDRA
JOSHI

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**DEEP CHANDRA JOSHI
JUDICIAL MEMBER**

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**