

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V NEW DELHI BENCH**

COMPANY PETITION IB (IBC) NO. 225/ND/2023

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/S EMKEY COMMERCIAL COMPANY LTD.

Through Its Authorised Representative
Mr. Narender Singh Kaintura,
4, Ganesh Chandra Avenue, 6th Floor,
Kokata- 700013, West Bengal.

...Applicant/Financial Creditor

Versus

M/S PCL FOODS PRIVATE LIMITED

Registered Office at: E-5, F/F, Left Side,
(Old No. 133), Western Marg, Lane No.-1,
Saidulajab, New Delhi, 110030.

...Respondent/Corporate Debtor

Order Delivered on: 21.12.2023

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant: Mr. Anuj Tiwari, Ms. Aroshi Pal. Advs.

For the Respondent: Mr. Kunal Godhwani, Adv.

ORDER

PER: MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

1. This is a Company Application filed 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, by M/s Emkey Commercial Company Ltd. (hereinafter referred to as 'Financial Creditor'), through its Authorised Representative Mr. Narender Singh Kaintura, seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against M/s PCL Foods Private Limited ("Corporate Debtor"). The Financial Creditor was incorporated on 27.03.1992, having CIN: U51909WB1992PLC054969.
2. The Corporate Debtor was incorporated on 06.09.2013, having CIN: U15137DL2013PTC257318 under the Companies Act, 1956. Its registered office is at E-5, F/F, Left Side, (Old No- 133), Western Marg, Lane No- 1, Saidulajab, New Delhi- 110030. Therefore, this Bench has jurisdiction to deal with this petition. The Nominal Share Capital of the Corporate Debtor is Rs. 120,00,00,000 (Rupees One Hundred and Twenty Crores). The Paid-Up Capital of the Corporate Debtor is Rs. 28,49,88,440 (Rupees Twenty- Eight Crores Forty-Nine Lakhs Eighty-Eight Thousand Four Hundred and Forty).
3. The present application was filed on 12.04.2023 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs. 1,15,20,623/- (Rupees One Crore Fifteen Lakhs Twenty Thousand Six-Hundred and Twenty-Three) including interest to the tune of Rs. 4,20,623/- (Four Lakhs Twenty Thousand Six Hundred and Twenty-Three) as on 31.03.2023 (date of default).

Submissions of Learned Counsel appearing for the Applicant are as under: -

4. The details of transactions leading to the filing of this petition as averred by the Financial Creditor is as follows:

- a) That the present application is being filed by the Financial Creditor seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor which has defaulted in payment of the loan disbursed by the Financial Creditor in terms of Loan Agreement dated 10.07.2022.
- b) The Financial Creditor/Applicant is a company is a Non-Banking Financial Company ("NBFC") which is also registered with Reserve Bank of India as an NBFC. The total debt owed is INR 1,15,20,623/- (Rupees One Crore Fifteen Lakhs Twenty Thousand Six-Hundred and Twenty-Three) including interest till 31.03.2023, which comes to INR 4,20,623/- (Four Lakhs Twenty Thousand Six Hundred and Twenty-Three) for the debt.
- c) The Inter- Corporate Loan Agreement ("Agreement") particularly Clause 7 ("Repayment Clause"), states that the loan was repayable on 31.03.2023. In accordance with the Agreement, the Financial Creditor demanded repayment of loan via email to the Corporate Debtor on 31.03.2023. It is pertinent to mentioned that the Corporate Debtor verified the ledger balance of INR 1,15,20,623/- (Rupees One crore fifteen lakhs twenty-six hundred and twenty-three) in an email dated 01.04.2023. The Financial Creditor subsequently recalled the loan in accordance with the agreement in an email dated 05.04.2023.
- d) The Financial Creditor has disbursed the amount to the Corporate Debtor on the following dates 14.07.2022, 20.07.2022, 04.08.2022, 18.07.2022, 27.07.2022, 05.08.2022, 26.08.2022, 23.03.2023 and 23.03.2023. Further, the Financial Creditor has provided copy of letter dated 24.04.2023 which is certificate of disbursement in its Additional Affidavit. It is pertinent to mention that the Corporate Debtor in its own reply to the Company Petition has admitted in para 16 of the reply that it owes debt towards the Financial Creditor.
- e) The Corporate Debtor assertion in its reply that the Financial Creditor is obligated to furnish the record of default recorded with the Information Utility is misguided and misinformed. It is argued that while the word "*shall*" is used in Section 7(3) of the code to require a record of default to be submitted with the application to initiate the CIRP by the financial creditor, the provision does

not specify that the record of default must be submitted only after it has been obtained from the Information Utility.

- f) The Corporate Debtor in its reply offered to pay the entire outstanding debt of the Financial Creditor without interest in 15 equal instalments starting from 01.01.2024 is not acceptable for the mentioned reasons that the Corporate Debtor's offer does not provide for any payment of interest on the outstanding debt. This is contrary to the principles of natural justice and equity. Hence, the present Application is filed by the Applicant.

Submissions of Learned Counsel appearing for the Corporate Debtor are as under:

5. The details of the submissions made by the Corporate Debtor are as follows:
- a) That the Corporate Debtor submits that the instant petition preferred under Section 7 of the Insolvency and Bankruptcy Code, 2016 warrants dismissal as the same is incomplete and has not been preferred in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 ('IBC').
- b) That in terms of Section 215 of IBC, it is incumbent upon the Financial Creditor to furnish the record of default recorded with the Information Utility. It is stated that the record of default as available with the Information Utility is required to be annexed at Part V of Form 5 which the Financial Creditor has failed to provide.
- c) The Applicant has preferred the instant petition in its capacity as Financial Creditor and has not furnished any financial information with the Information Utility. The Applicant instead of providing details with information utility has simpliciter mentioned "No". It is submitted that in absence of the same and due to non-compliance of Section 215 of IBC, the instant Petition fails and is accordingly liable to be dismissed.
- d) The Financial Creditor in its petition has itself admitted that the Loan Agreement dated 10.07.2022 was entered for disbursements of an amount of Rs. 1,25,00,000/- whereas admittedly, the Financial Creditor has not disbursed the entire loan amount and hence, the repayment clause is not attracted and the petition filed by the Financial Creditor entails dismissal, as it is pre-mature. The Corporate Debtor submits that the failure on part of Financial Creditor to discharge the

entire loan amounts to breach of reciprocal promise and warrants dismissal of the instant petition.

- e) It is stated that the Corporate Debtor is willing to safeguard the interest of stakeholders including the present petitioner. It is submitted that Corporate Debtor is willing to pay the entire outstanding debt of Financial Creditor without interest in 15 equal instalments starting from 01.01.2024 and the present petition be dismissed with the aforesaid direction.
- f) It is submitted that the legislature suspended the provisions of the IBC for initiation of the Corporate Insolvency Resolution Process i.e. Section 7 and 9 of the IBC considering the impact of the pandemic. It is submitted that the pandemic has affected has affected the economy of the entire nation and due to the unprecedented situation, the Corporate Debtor is facing financial difficulties, however, assures the repayment of debt of Financial Creditor in a time-bound manner.

Analysis and Findings

- 6. We have heard the Learned Counsels for the Financial Creditor and the Corporate Debtor and perused the averments made in the petition, reply and written submission. Since the registered office of the Corporate Debtor is in Delhi, this Tribunal which has territorial jurisdiction over the Union Territory of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of the respondent Corporate Debtor under Section 7 of the Code.
- 7. In order to affirm that this petition falls within the ambit of Section 7, we need to see whether there is a “debt” owed to the Financial Creditor and whether there is a “default” with respect to such debt.
- 8. In the present case, the Financial Creditor and the Corporate Debtor entered into an Inter-Corporate Loan Agreement. In accordance with the Loan Agreement the Financial Creditor has disbursed the amount to the Corporate Debtor on 14.07.2022, 20.07.2022, 04.08.2022, 18.07.2022, 27.07.2022, 05.08.2022, 26.08.2022, and 23.03.2023. The paper book placed on record starting from Page IB 225/ND/2023
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27 of the Petition evidences the same. Further, the Financial Creditor has placed on record, in its Additional Affidavit, a copy of letter dated 24.03.2023, which is certificate of disbursal. Furthermore, the Corporate Debtor in its reply affidavit dated 14.06.2023, has admitted in Para 16 of the reply that it owes a debt towards the Financial Creditor. Therefore, one essential ingredient with respect to Section 7, that there has been a “debt”, stands substantiated.

9. In the instant case, the total debt owed is INR 1,15,20,623/- (Rupees One crore fifteen lakhs twenty-six hundred and twenty-three) including interest till 31.03.2023, which comes to INR 4,20,623/- (four lakhs twenty-six hundred and twenty-three) for the debt. The “Repayment Clause” of Inter-Corporate Loan Agreement states that the Loan was repayable on 31.03.2023. In accordance with the Agreement, the Financial Creditor demanded repayment of loan via email to the Corporate Debtor on 31.03.2023. It is pertinent to mentioned that the Corporate Debtor verified the ledger balance of INR 1,15,20,623/- (Rupees One crore fifteen lakhs twenty-six hundred and twenty-three) in an email dated 01.04.2023. Therefore, another major essential ingredient of Section 7 i.e., “default” with respect to the debt stand substantiated.
10. Further, the Corporate Debtor contends that the Financial Creditor is under obligation to furnish the record of default recorded with the Information Utility. As per Section 7(3) the Financial Creditor is required furnish the record of default recorded with the Information Utility or “such other record or evidence of default”. Since, the Applicant has provided bank statements for disbursements of amount, it is sufficient to establish that the amount was disbursed by the Financial Creditor to the Corporate Debtor. Moreover, in the instant case, the Corporate Debtor also did not claim that they have not received the amount. Therefore, the Contention of the Corporate Debtor with this regard does not hold ground.
11. In this regard Hon’ble Calcutta High Court in matter of ***Univalve Projects Pvt. Ltd. Vs Union of India 2020 SCC Online Cal 1452*** overruled a directive issued by the Ld. National Company Law Tribunal, New Delhi Registrar, which had retrospectively imposed a prescription requiring all financial creditors to provide specific financial information to the Information Utility (IU) as a record of default when submitting an
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application under Section 7 of the Code. The Court concluded that the impugned order was passed in violation of section 7(3)(a) of the code and that the Ld. NCLT, as a delegatee under the code, cannot exceed its jurisdiction. While Section 215 of the Code does establish a framework for the submission of financial information to the Information Utility, it does not explicitly mandate the Financial Creditor to provide the record of default. The relevant extract of the said judgment is reproduced hereunder as:

66. The impugned order, if allowed to persist in terms of its current legality, would not only restrict the modes of evidence to showcase or adduce an existence of debt accrued to a financial creditor under the IBC, 2016, before the AA or NCLT, it would directly be in confrontation with the Sec. 7(3)(a) read with Regulation 8 of the CIRP, 2016, be inconsistent with the IBC, 2016 and thereby defeat the very purpose for which the IBC, 2016 had been enacted. And therefore, this impugned order dated May 12, 2020, warrants an interference under the writ jurisdiction of this Court. In conclusion thereof, this writ petition succeeds. The impugned order dated May 12, 2020 issued by the Principal Bench of the NCLT, New Delhi is held to be ultra vires the IBC, 2016 and the Regulations thereunder, and is accordingly struck down.

12. Further, the Hon'ble Supreme Court in the judgement of "**Innoventive Industries Limited v. ICICI Bank and Another**" held that once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the Application under Section 7 of I & B Code, 2016. The relevant extract of the said judgment is reproduced hereunder as:

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

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of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

13. From the perusal of aforesaid facts, it is clear that the applicants are Financial Creditors and the debt owed to them by the Corporate Debtor is a Financial Debt, and there has been a default, as stipulated in Sections 3(12), 5(7) and Section 5(8) of the IBC which are as follows:

Section 3(12) of IBC defines Default. *“Default means non-payment of debt when whole or any part or installment 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.”*

Section 5(7) of IBC defines Financial Creditor: *“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) of IBC defines Financial Debt. *“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 de-materialised 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 maybe 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;*
- (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-clauses (a) to (h) of this clause.”*

14. The present petition made by the Financial Creditor is complete in all respects as required by law. The Petition established that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under Section 4(1) of the Code, stipulated at the relevant point of time. We are of the view that since this Petition was filed on 12.04.2023, and even admittedly the debt owed to the Financial Creditor is an amount of Rs. 1,15,20,623/- (Rupees One Crore Fifteen Lakhs Twenty Thousand Six-Hundred and Twenty-Three) including interest to the tune of Rs. 4,20,623/- (Four Lakhs Twenty Thousand Six Hundred and Twenty-Three) which meets the threshold of Rs. One Crore.

15. In the light of the above facts and circumstances, and in terms of Section 7(5) (a) of the Code, the instant petition **COMPANY PETITION IB (IBC)/225(ND) 2023** filed by M/s Emkey Commercial Company Ltd. , the Financial Creditor, under Section 7 of the Code read with Rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against M/s PCL Foods Private Limited, the Corporate Debtor, stands **admitted** and CIRP of M/s PCL Foods Private Limited is initiated.

16. That the petitioner in part-III of the petition has proposed the name of Mr. Rakesh Dugar, as Interim Resolution Professional, having Registration Number IBBI/IPA-

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001/IP-P01654/2019-2020/12892 and E-mail ID card190376@gmail.com, is hereby appointed as an Interim Resolution Professional (IRP) for Corporate Debtor. The consent of the proposed interim resolution professional in Form-2 is taken on record. The proposed Interim Resolution Professional is directed to give his written consent in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration certificate as well as a valid AFA within 5 days of receipt of this order.

17. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

- (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 Securitization 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.*
- (e) The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*

18. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.
19. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (within 3 days) as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.
20. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs (Two Lakh Rupees) with the Interim Resolution Professional namely Sandeep Mahajan to meet out the expenses to perform the initial functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount, however, is subject to adjustment towards Resolution Process cost as per applicable rules.
21. The Interim Resolution Professional shall perform all his functions as contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.
22. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'. In case

there is any violation committed by the ex- management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing appropriate orders.

23. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of his obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.
24. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.
25. Accordingly, the instant application filed under Section 7 of the Code, 2016 bearing **I.B./225 (ND)/2023 stands admitted.**
26. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)