



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.271/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

Tata Capital Financial Services Limited

...Financial Creditor/Applicant

V/s

High Ground Enterprise Limited

[CIN: L74999MH1986PLC222681]

...Corporate Debtor/Respondent

Order Dated: 17.02.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s)

:

Mr. Gauraj Shah a/w Ms. Pooja
Jhaveri i/b Katariya & Associates,
Advocates.

For the Respondent(s)

:

Mr. J Amal Anand a/w Elvin
Joshy, Alisha Sharma, Insha
Mushtaq, Advocates.

ORDER

Per: Prabhat Kumar (Member Technical)

1. This is an Application being C.P. (IB) No. 271/MB/C-IV/2021 filed by G. Selvakumar, the Regional Collection Manager (West) of



Financial Creditor/Applicant authorized to file the present application Vide Board Resolution dated 20.12.2019, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against High Ground Enterprise Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

Brief Facts of the Case:-

2. The Financial Creditor sanctioned a finance lease facility amounting to Rs. 5 crores to the Corporate Debtor in terms of the Sanction letter bearing reference No. LF/FL/MUM/4085 dated 13.09.2017 and an Addendum Sanction Letter bearing No. LF/FL/MUM/4085-1 dated 24.11.2017. The Financial Creditor also sanctioned an additional finance lease amounting to Rs. 6 crores in terms of sanction letter bearing No. IE/FL/MUM/1749130 dated 25.09.2018 and executed various agreements in respect of the same.
3. In accordance with the same, a finance lease facility amounting to a total of Rs.10,99,86,440/- was disbursed on 30.11.2017 and 04.10.2018 as per Bank Certificates attached to the petition. The Financial Creditor has stated that the Corporate debtor has defaulted in payment of lease rentals under the Lease Facilities. The total amount claimed to be in default is stated as Rs. 8,08,38,864/- and the date of default as 24.08.2019.
4. As per Sanction Letter, the nature of facilities is stated to be finance lease. The total tenure of the facilities is stated as 36 months (12 quarters) which is non-cancellable period as well.
5. On failure of the Corporate Debtor to repay the outstanding dues pursuant to the said facilities, the Financial Creditor liquidated the



Bank Guarantees and appropriated the security deposit towards the defaulted amount of lease rentals. Subsequently, the Applicant terminated the lease and called upon the Corporate Debtor to pay the then outstanding amount of Rs. 8,08,38,864/- vide Loan Recall Notice dated 22.08.2019. The account of the Corporate Debtor was declared as NPA on 22.11.2019.

6. The Financial Creditor recorded the default with the Information Utility on 08.02.2021. The record of the debt and default as submitted to and held by the NeSL shows the date of default to be 24.08.2019.
7. The Corporate Debtor has pleaded that the lease in question is not in nature of a financial debt. Hence, the present petition is not maintainable. For this purpose, the Corporate Debtor has drawn our attention to the decision of the Hon'ble Supreme Court in **Association of Leasing and Financial Service Companies vs. Union OF India and Others (2011) 2 SCC 352** wherein the Hon'ble Apex Court observed that in case of finance lease, the Lessee could use the asset for its entire economic life and thereby, acquires the risks and rewards incidental to the ownership of such assets. Further, in **Asea Brown Boveri Ltd. Vs. Industrial Finance Corporation (2004) 12 SCC 570**, The Hon'ble Supreme Court, while distinguishing a finance lease and an operating lease held that "*A finance lease is the one where the lessee uses the asset for substantially the whole of its useful life and the lease payments calculated to cover the full cost together with interest charges. It is thus disguised way of purchasing the cost asset with the help of a loan.*"



8. We have heard both the parties and perused the material on record. We find that there is no dispute as regards the existence of debt and the default in payment thereof.
9. The Corporate debtor has objected to the present application claiming the amount of debt owed by it to the Applicant is not a Financial Debt. Hence, present application filed under section 7 of the code is not maintainable as only a creditor to whom a financial debt is owed can file application under section 7 of the Code.
10. Section 5(8) of the Insolvency And Bankruptcy Code, 2016 defines “financial debt” as -

“5. In this Part, unless the context otherwise requires,—

(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) 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 nonrecourse 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-clauses (a) to (h) of this clause;

11. On perusal of provisions of Section 5(8) of the Code defining “Financial debt”, it is noted that financial debt includes “*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*”.
12. The learned counsel for the Corporate debtor has relied heavily on the definition of ‘Finance Lease’ as contained in AS-19 issued by Institute of Chartered Accounts of India defining “finance lease” as a lease that transfer substantially all the risks and rewards incident to ownership of an asset and has also relied on the decision of the Apex Court in the case of *Association of Leasing and Financial Service Companies vs. Union OF India and Others (Supra) AND Asea Brown Boveri Ltd. Vs. Industrial*



Finance Corporation (Supra). The Corporate debtor has further drawn our attention to the decision of National Company Law Tribunal in case of *Ind Barath Energy (Utkal) Ltd. Vs. Tata Capital Financial Services Limited and Ors. (2020) SCC Online NCLT 675*, wherein this Tribunal held the Petitioner as an Operational Creditor involving a similar lease agreement.

13. The Applicant has relied upon the Respondent's Board Resolution dated 26.09.2018 and Respondent's letter dated 05.08.2019 which refers to the present lease agreement as a finance lease. It has further been stated that the Sanction letter dated 13.09.2017 and 25.09.2018 clearly mentions that the lease agreement is a finance lease. The Applicant has further relied upon the judgement passed by the Hon'ble NCLAT in the matter of *Pradeep Kumar Sekar, Suspended Directors of Solar Semiconductor Energy Systems (India) Private Limited VS. Solar Semiconductor Energy Systems (India) Private Limited & Ors (2021 SCC Online NCLAT 149)*, the relevant extracts therefrom is reproduced here asunder:

"52. Although, a plea is taken on behalf of the Appellant' that in the instant case, the disbursal' is against the supply of the Assets' and against the usage of the Assets' (Furniture & Fixture) and not against the time value for money' and that the primary ingredients of Section 5(8) of the Code are not satisfied, this Tribunal' bearing in mind the meaning of 'Time Value' that it is 'the price associated with length of time that an investor must wait until investment matures or related income is earned' (vide Black's Law Dictionary) and also considered the fact that the Second Respondent/Financial Creditor had invested a sum of Rs.1,07,76,815.35paise under the Lease Agreement' dated



3.4.2017, in and by which a repayment schedule was mentioned as lease rental for a period of 36 months and at the end of the lease, the Asset' will be purchased by the First Respondent/Corporate Debtor at a value of Rs.21,65,190/- which was received by the Second Respondent/Financial Creditor as Security Deposit comes to an inevitable and inescapable conclusion that the disbursement of amounts to the manufacturer 'Interio Architecture' comes within the requirement of 'time value for money' and the contra plea projected on the side of the Appellant' is not acceded to, by this Tribunal.

53. In so far as the contention of the Appellant' that the Second Respondent/Financial Creditor had not pleaded in the Section 7 of the Application that the Lease Agreement' dated 3.4.2017, is a Financial Lease Agreement' satisfying the requirements of Section 5(8)(d) of the 'Insolvency & Bankruptcy Code', it is to be pointed out by this Tribunal' that the Lease Agreement' dated 3.4.2017 entered into between the Second Respondent/Financial Creditor and the First Respondent/Corporate Debtor clearly envisages that the Lessor' (Second Respondent) had offered to provide Lease Finance Assistance' to the Lessee' (First Respondent/Corporate Debtor) in respect of Furniture and Fixture (Asset') and which the Lessee' (First Respondent/Corporate Debtor) was desirous to take for its business purposes on lease basis from the Lessor' (Second Respondent) on the basis of offer made. And also that, in Part IV of the Application 'Particulars of Financial Debt' it is mentioned that the Corporate Debtor had entered in to a "Lease Agreement' with the applicant company to avail financial assistance of Rs. 1, 07, 76, 815/- to carry out interior work on 03.04.2017 and further that, the amount of default was mentioned as Rs. 1, 16, 98, 242. 60 which was not paid by the



Corporate Debtor, as per the computation and statement of accounts annexed along with the application. Therefore, it cannot be said that the Second Respondent/ Financial Creditor had not pleaded in the application about the Financial Lease' in strict sense of the term. Suffice it for this Tribunal to point out that requisite averments as required to the application under section 7 of the Code were furnished by the Second Respondent/Financial Creditor. Hence, the contra contention advanced on behalf of the Appellant is not accepted by this Tribunal.”

14. We have perused the Lease Summary Schedule 002 & 003 to the Master Lease Agreement between both the parties, whereunder the Applicant had placed a Purchase Order TCLFSL/FL/25017-18/001418 for a value of Rs.1,74,31,547/- (Including GST of Rs. 32,09,897/-, (which can be set off against future GST liability, hence is not a cost in hands of applicant). The gross value of the Equipment to be leased is stated to be Rs.91,11,547/- and Rs.83,20,000/- respectively under these lease Summary Schedule. We further find that Net Lease Rental (after Rebate) for the cancellable lease period of 12 quarters is Rs.81,95,910/- and Rs.69,33,052/- respectively under both lease(s) and Gross Lease Rental (before Rebate) is Rs.95,88,810/- and Rs.87,53,056/- respectively. Delayed payment charges are stated to be 18% per annum and asset transfer value is stated to be 15% of original gross asset cost i.e. Rs.21,33,247/-. In other words, the Corporate Debtor is paying total net lease rent (assuming rebate will be available) amounting to Rs.1,51,28,962/- (Rs.81,95,910/- + Rs.69,33,052/-) exclusive of GST as against gross purchase cost in hands of applicant amounting to Rs. 1,42,21,650/- (Rs.1,74,31,547/- - Rs.32,09,897/-) over the non-cancellable tenure of lease.



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15. The Decision of judgement of Hon'ble Supreme Court in *Asea Brown Boveri Ltd. Vs. Industrial Finance Corporation (Supra)* as relied by the Corporate Debtor does not support his case as the said judgement itself has held that “*A finance lease is the one where the lessee uses the asset for substantially the whole of its useful life and the lease payments calculated to cover the full cost together with interest charges. It is thus disguised way of purchasing the cost asset with the help of a loan.* In the present case, the Corporate Debtor has contracted to pay more than the cost of the equipment(s) under the lease which leads to a conclusion that the periodical lease payments have been calculated to cover full cost together with interest charges. Further, the Lease Summary Sheet has estimated the asset transfer value @ 15% of the gross value in advance signifying that assets under lease would have been used significantly during the non-cancellable period of 3 years and the lessee has an option, by implication, to seek transfer of these assets at their stated transfer value upon expiration of non-cancellable period of the lease. Hence, the decision of Hon'ble Supreme Court in the case of **Association of Leasing and Financial Service Companies (supra)** also does not support the contention of the Corporate Debtor. The reliance placed on decision of NCLT in case of *Ind Barath Energy (Utkal) Ltd. (supra)* is distinguishable on the facts as in that case the coordinate bench of NCLT had not examined whether total lease rent over the non-cancellable tenure of lease have been determined to cover cost alongwith interest; any option to seek transfer of the asset by the Corporate Debtor upon expiration of lease; and substantive exploitation of the asset.
16. In the present case, the lease rentals have been determined so as to recover the cost of equipment alongwith interest thereon; the asset



transfer value at end of lease period is agreed beforehand; and lease period is non-cancellable. This meets the necessary ingredients stipulated under Accounting Standard(s) to classify it as a Finance Lease. The corporate debtor has not produced its Financial Statement for the relevant period to substantiate that this lease has not been considered as finance lease in the books of accounts.

17. We find that the present petition fairly falls within the definition of “financial debt” under Section 5 (8) of the Insolvency and Bankruptcy Code, 2016 and the present application is a fit case for admission of the Corporate Debtor into CIRP under the Code.
18. The Applicant has proposed the name of **Mr. Dhiren Shantilal Shah**, a registered insolvency resolution professional having Registration Number **[IBBI/IPA-001/IP-P00220/2017-18/10419]** as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him.

ORDER

This Application being C.P. (IB) No. 271/NCLT/MB/C-IV/2021 filed under Section 7 of I&B Code, 2016, filed by Tata Capital Financial Services Limited, Financial Creditor/ Applicant against High Ground Enterprise Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:



- 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 possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the



liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench appoints Mr. Dhiren Shantilal Shah, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00220/2017-18/10419], Email: dss@dsshah.in as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- e) The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of issuing Public Notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- f) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.
- g) The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

Prabhat Kumar
Member (Technical)
/Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)