

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V

CP(IB) 1058 MB 2022

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

IN THE MATTER OF

SREI Equipment Finance Limited

“Vishwakarma”, 86C, Topsia Road
(South), Kolkata - 700046.

... Financial Creditor

V/s.

**R S Kamthe Infrastructure
Developers Private Limited**

208, Ganraj Market, 2nd Floor, Opp.
Union Bank of India, Gate No. 2,
Gultekadi Market Yard, Pune,
Maharashtra - 411037.

... Corporate Debtor

Order delivered on :- 02.11.2023

Coram:

Hon’ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon’ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances:

For the Financial Creditor	: Adv. Rohan Agrawal
For the Corporate Debtor	: Adv. Rohit Gupta

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by SREI Equipment Finance Limited (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against R S Kamthe Infrastructure Developers Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 7,28,54,918/- as on 12.08.2022.

The submissions by the Financial Creditor: -

2. The Financial Creditor states that the default is continuing in nature. The Corporate Debtor has failed and neglected to repay the outstanding amounts due and payable to the Financial Creditor. The Financial Creditor states that every month, the payment schedule by way of an instalment is failing due and even though the instalment amounts are to be paid, the Corporate Debtor has failed to pay the instalments and in fact Section 10A of the Insolvency and Bankruptcy Code, 2016 does not extinguish the aspect of Debt and Default in the eye of law.
3. The Petitioner and Corporate Debtor executed two Master Facility Agreement (collectively referred to as "the MFAs") being Loan Agreement No. 178747 dated 01.07.2019 ("the First Loan Agreement") and Loan Agreement No. 180822

dated 28.09.2019 (“the Second Loan Agreement”). By way of these MFAs, the Corporate Debtor availed from the Petitioner and the Petitioner agreed to disburse large amounts to the Corporate Debtor, subject to certain rights, liabilities, terms and conditions set out thereunder. In furtherance to these agreements, the Petitioner disbursed the agreed amounts and the Corporate Debtor agreed to abide by the payment schedule pre-agreed upon, which schedule was contained in the said MFAs. It was also agreed in the MFAs, that any inability or failure to make the payments as per the payment schedule under the MFAs would constitute to be an Event of Default; and consequently, the Petitioner would be entitled to request the Corporate Debtor to pay the entire outstanding dues under the MFAs. In lieu of this, the Petitioner disbursed the amounts under the relevant MFAs.

4. The Petitioner further submits that in terms of the said disbursement as agreed upon by and between the parties, the Corporate Debtor and the Financial Creditor had entered and executed various agreements thereby securing the loan amount disbursed by the Financial Creditor to the Corporate Debtor.
 - i. Loan Agreement No. 178747 dated 01.07.2019.
 - ii. Loan Agreement No. 180822 dated 12.08.2019.
 - iii. Deed of Personal Guarantee dated 01.07.2019 for Loan Agreement No. 178747 executed by Mr. Nandkishor Shankar Kamthe in favor of Petitioner.

- iv. Deed of Hypothecation dated 12.08.2019 for Loan Agreement No. 180822.
 - v. Deed of Personal Guarantee dated 01.07.2019 for Loan Agreement No. 180822 executed by Mr. Nandkishor Shankar Kamthe in favor of Petitioner.
 - vi. RoC Charge Certificates for registration of charges created for security under the Loan Agreements.
5. Despite mutually agreed and executed terms under the MFAs and after disbursement of amounts by the Petitioner, the Corporate Debtor has admittedly defaulted on its repayment obligations set out under the MFAs. As clearly and undeniably evidenced in the Statement of Accounts, the Corporate Debtor has defaulted in making the payment under the aforesaid MFAs on 15.04.2021. The Petitioner submits that there is a continuous default on account of the Corporate Debtor, till date. There is no denial by the Corporate Debtor that there is a persistent default on and after 15.04.2021.
6. The Petitioner submits that the CIBIL Report clearly demonstrates that there is continuous default on part of the Corporate Debtor to repay the amounts under the MFAs.
7. The Petitioner submits that the National E-Governance Services Limited- Record of Financial Information under Form C (NeSI) also records the default and date of default.
8. The Petitioner has also issued a Demand Notice dated 24.12.2021 to the Corporate Debtor calling upon the Corporate Debtor to make payments to the Petitioner

towards the overdue amounts. However, the Corporate Debtor has failed to make payment to the Petitioner. Hence, the Petition.

The submissions by the Corporate Debtor: -

9. The Respondent submits that the present Company Petition filed by the Applicant is unsustainable as the present Company Petition fails to satisfy the necessary ingredients of Section 7 of the IBC, 2016 and, therefore, the present Company Petition deserves to be dismissed.
10. At the outset the Corporate Debtor has submitted that there is no debt or default for maintaining the Petition. However, if the version of the Petitioner is to be accepted that there was actually debt which was disbursed and there exists the debt, then in that case also, the Petition is liable to be dismissed as it is hit by Section 10A of IBC, 2016 as the default as per own showing of the Applicant has occurred during the time when there was moratorium under the legislation and no petition can be maintained for the default which has occurred during that period.
11. The Applicant has conveniently stated the wrong date of default and filed the Petition. In fact, action should be initiated against the officers of the Applicant for providing false and incorrect information as to the date of default. The Applicant was conscious that the default had occurred during the period prescribed under Section 10A and deliberately stated the date after the period came to an end to mislead this Hon'ble Tribunal.

12. The Applicant herein had advanced loans to one Rithwik Projects Pvt. Ltd. It is in order to recover these liabilities that these transactions were undertaken. The Applicant has, in order to resolve its own problem, duped the present Respondent.
13. The Applicant, in order to sell the machinery owned by it and machinery hypothecated to it for the dues of its borrower where the default had occurred, agreed to grant these loans and transfer the assets. On one hand, it is claimed that the loans are sanctioned and disbursed, but admittedly the assets were not transferred till the account came in default (as per Applicants version). In these circumstances, to contend that the Respondent is liable to pay the loan amount but not entitled to the machinery purchased from the loan disbursed is wholly illegal and untenable.
14. This act on the part of the Applicant clearly demonstrates the fraud played by the Applicant on the Respondent. The Applicant claims interest under the loan transaction and at the same fails in complying with its obligation to transfer the asset for which the loan was granted. This transaction is not a transaction of financial debt.
15. The Respondent further submits that the Loan Account No 178737 was sanctioned for an amount of Rs. 2,95,00,000/- (Rupees Two Crores and Ninety-Five Lakhs Only) as the Respondent was to utilize the said amounts towards purchasing heavy machineries and equipment's from M/s. Rithwik Projects Private Limited. The amount, therefore,

was returned. However, the transfer of machine physically never took place.

16. The Respondent submits that, for the purpose of said Loan Account bearing No 180822, the Applicant had sanctioned an amount of Rs. 2,74,50,000/- (Rupees Two Crores Seventy-Four Lakhs and Fifty Thousand Only) vide Master Facility Agreement dated 28th September 2019 ("MFA 2"). However, the Applicant has failed to demonstrate the fact of disbursement of the said sanctioned amount to the Respondent. Therefore, the principal aspect of default being committed by the Respondent does not arise as the Respondent has not been disbursed the said sanctioned amount in itself thereby resulting in no alleged default by the Respondent occurring whatsoever.
17. The amount, as stated above, is appropriated by the Applicant itself without actually obtaining mandate and transferring it to the Respondent. Assuming that such disbursement is permissible, then in that event also, the assets which were underlying transaction ought to have been forthwith transferred. The money cannot be considered to be disbursed till the time asset is transferred.
18. The Applicant has falsely claimed that the Respondent has committed default when, in fact, the date of default as claimed by the Applicant i.e., 15th April 2021 is much prior to the issuance of the invoices dated 16th August 2021. Furthermore, the invoices have only been issued in respect of 8 out of 9 assets as were required to be transferred by

the Applicant to the Respondent thereby confirming that the Applicant itself is in default in so much so that the Applicant has not only failed to disburse the sanctioned amount but has also not transferred all the assets to the Respondent thereby resulting in no alleged default being committed by the Respondent.

19. In the end, the Respondent has prayed for the dismissal of the Petition.

Findings:-

20. We have heard Counsel for the parties and gone through the records.
21. In this case the only defence raised by the Corporate Debtor is that the Petition is barred by Section 10 of the Code, 2016. In this regard, the Counsel for the Corporate Debtor has argued that as per the case of the Petitioner, the first default in respect of Contract No. 178737 took place on 15.01.2021, whereas in respect of Contract No. 180822 the default took place on 15.02.2021. The Counsel for the Corporate Debtor has further argued that the Petitioner has wrongly claimed the date of default in respect of both the Contracts as on 15.04.2021 without any basis. Counsel for the Corporate Debtor has further urged that the Petition is liable to be dismissed on this ground alone.
22. On the other hand, the Counsel for the Petitioner has argued that it is case of continuing default on the part of the Corporate Debtor. The Counsel for the Petitioner has further referred to NeSL report which shows the date of

default as 15.04.2021 and, therefore, according to the Counsel for the Petitioner, the Petition cannot be said to be barred u/s 10 of the Code, 2016.

23. Having weighed the contentions raised by the Counsel for the parties, we are of the considered view that it has been specifically pleaded by the Petitioner himself in Part IV of the Petition that in respect of Contract No. 178737 the default occurred on 15.01.2021 while in respect of Contract No. 180822 it occurred on 15.02.2021. It is a well settled proposition of law that for the purpose of Section 7 and 9 of the Code, 2016, the first default in repayment is to be taken into account for the purposes of initiating proceedings u/s 7 or 9 of the Code, 2016. This proposition of law cannot be bypassed by claiming that the default is of continuing nature one. As stated above, since the default took place on 15.01.2021 and 15.02.2021 and in respect of both these dates the default is said to have occurred during the period covered u/s 10A of the Code, 2016 which provides that no proceedings u/s 7 or 9 shall ever be filed for initiation of Corporate Insolvency Resolution Process of a Corporate Debtor for the default occurring during the 10A period i.e. 25.03.2020 to 24.03.2021.
24. So far as, the NeSL report is concerned, no doubt the date of default therein is mentioned as 15.04.2021. However, considering the fact that it is the admitted case of the Petitioner itself that the default took place on 15.01.2021 and 15.02.2021, it has to be held that the date of default in the NeSL report is not correctly stated nor the same can be relied upon.

25. In the light of the above discussion, we hold that this Petition is barred u/s 10A of the Code and is, therefore, **dismissed**. However, this order will not preclude the Petitioner from pursuing other remedies for the recovery of the disputed amount, if any, as per law as the debt cannot be said to have extinguished merely because the Petition is barred u/s 10A of the Code, 2016.

Sd/-
ANURADHA SANJAY BHATIA
Member (Technical)

Sd/-
KULDIP KUMAR KAREER
Member (Judicial)