

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

CP(IB)No.784/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

Open Sky Shopping LLP

[LLPIN: AAD-4477]

...Financial Creditor/Applicant

V/s

Thea Online Services Private Limited

[CIN: U74140MH2014PTC253451]

...Corporate Debtor/Respondent

Order Dated:28.01.2022

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Rishi Sood, Advocate.

For the Respondent(s) : Mr. Harshit Agarwal, Advocate.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an application being C.P. (IB) No. 784/MB/C-IV/2021 filed by Open Sky Shopping LLP, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against

Thea Online Services Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Financial Creditor is an entity registered under the Limited Liability Partnership Act, 2008. The Application is filed by Mr. Dinesh Jaiswar, Authorised Signatory of Financial Creditor vide its Board Resolution dated 15.12.2020, claiming total default of Rs.1,03,45,000/- (Rupees one crore three lakh forty-five thousand only) along with the interest @ 1.5% per month. The Loan Amount was disbursed between 20.01.2021 to 17.02.2021.
3. The Corporate Debtor is a Company incorporated on 20.02.2014 under the Companies Act, 2013, as a Private Company Limited by Shares with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U74140MH2014PTC253451. Its registered office is at 1/1, Laxmi Buberia Chawl, Near Ganesh Vidhyalay, Kharigaon, Kalwa Thane, Maharashtra-400605. Therefore, this Bench has Jurisdiction to deal with the present petition.
4. The Date of Default as mentioned in the Petition is 07.04.2021. The Petition is filed on 09.08.2021.
5. The case of the Financial Creditor is as under:
 - a) In 2021, the Corporate Debtor approached the Financial Creditor for allowing an advance by way of loan up to Rs.2 crore for New Project. Pursuant to this, the Financial Creditor agreed to allow loan up to Rs.2 crore to the Corporate Debtor and the Agreement dated 01.01.2021 was executed among both Financial Creditor and Corporate Debtor wherein certain terms and conditions were mutually accepted by both of them.

- b) From 20.01.2021 to 17.02.2021, pursuant to the Agreement and as per the request made by the Corporate Debtor, the Financial Creditor transferred sum of Rs.1,03,45,000/- (Rupees one crore three lakh forty-five thousand only). The Particulars of Debt is as follows:

Particular	Amount claimed to be in default (in Rs.)
Principal Amount	1,03,45,000/-
Interest from 20.01.2021 to 31.03.2021 @ 1.5% p.m. on Principal Amount of Rs. 1,03,45,000/-	2,63,303/-
Interest from 01.04.2021 to 30.06.2021 @ 1.5% p.m. on Principal Amount of Rs. 1,03,45,000/-	4,59,148/-
Total amount including interest	1,10,67,451/-

- c) As per clause 3(b) of the said Agreement, it was agreed between the Financial Creditor and the Corporate Debtor that as and when the amount is transferred to the Corporate Debtor whether in tranches or otherwise, the Corporate Debtor shall pay interest on the said amount already received @ 1.5% per month to the Financial Creditor and the same shall be paid by 7th day of every quarter. The clause 3(b) is as under:

“3(b) It has been agreed among the parties that as and when the money is transferred to the Borrower whether in tranches or otherwise, the Borrower shall pay interest on the money already received @ 1.5% per month to the Lender and the same shall be paid by 7th day of every quarter”

- d) Vide letter dated 05.05.2021, Financial Creditor requested Corporate Debtor to pay the interest as per the Agreement on the amount which had transferred to the borrower i.e. Rs.1,03,45,000/- (Rupees one crore three lakh forty-five thousand only) along with the interest @ 1.5% per month which was due on 07.04.2021.
- e) The Corporate Debtor vide its letter dated 21.05.2021, responded and stated that Corporate Debtor had utilised the loan amount of Rs.1,03,45,000/- (Rupees one crore three lakh forty-five thousand only) for the purposes of new project and are in the process of opening of new trading platforms, however, due to surge in COVID-19 cases in Mumbai, Maharashtra, the Corporate Debtor is still in the initial phase of installation and launch of the new project and therefore they requested 15 days' time to pay interest and information/documents as stated in the letter dated 05.05.2021.
- f) Vide letter dated 19.06.2021, the Financial Creditor once again advised to provide information/details in term of letter dated 05.05.2021 and pay the interest. However, no reply was received by the Corporate Debtor.
- g) The Financial Creditor issued notice dated 08.07.2021 to recall the entire loan disbursed i.e. Rs.1,03,45,000/- (Rupees one crore three lakh forty-five thousand only) along with interest for period January, 2021 to June, 2021 and advised Corporate Debtor to unconditionally pay the debt of Rs.1,10,67,451/- (Rupees one crore ten lakh sixty-seven thousand four hundred fifty-one only) in full within 7 days from the receipt of this letter failing which Financial Creditor constrained to initiate legal action in accordance with section 7 under the Code. Clause 3 of the agreement is as under:

3. Repayment of Loan & Interest

a) The Borrower shall be liable to repay the total loan amount to the Lender on or before 31.03.2023. However, in case if there is any violation of terms and conditions stated in this agreement and/or default by Borrower in payment of interest, the Lender shall be entitled to recall the loan disbursed up to the date of together with interest by giving 7 days' notice to the Borrower.

b) It has been agreed among the parties that as and when the money is transferred to the Borrower whether in tranches or otherwise, the Borrower shall pay interest on the money already received @ 1.5% per month to the Lender and the same shall be paid by 7th day of every quarter.

c) The Lender reserves the right to vary the interest rate specified in this Agreement after giving a notice in writing to the Borrower if in its reasonable opinion it perceives a change in the risk associated with the Loan or New Project and/or there has been a breach of the terms of this Agreement.

6. Vide letter dated 16.07.2021, Corporate Debtor responded to the letter dated 08.07.2021 wherein Corporate Debtor further requested some time to pay debt of Rs.1,10,67,451/- (Rupees one crore ten lakh sixty-seven thousand four hundred fifty-one only).
7. The Financial Creditor submitted the NeSL Report dated 20.07.2021 wherein the total outstanding reflected therein is of Rs.1,10,67,451/- (Rupees one crore ten lakh sixty-seven thousand four hundred fifty-one only) which is at pp 65-66 of the Petition.

8. The Financial Creditor has also submitted his Bank Statement held with Axis Bank for the period from 01.02.2021 to 28.02.2021 which is at pp. 37 & 38 of the Petition.
9. The Corporate Debtor has filed its reply and submitted as under:
 - a) The Corporate Debtor has denied all the contentions of the Financial Creditor in his reply. The Corporate Debtor submitted that the Petition filed by the Financial Creditor is not maintainable as there is no Debt and Default on the part of the Corporate Debtor and hence the Petition is liable to be dismissed.
 - b) The Corporate Debtor submitted that the Corporate Debtor shared details of its new venture with the Financial Creditor and the Financial Creditor expressed its interest to be part of the said new venture and agreed to invest up to 2 Crore. Therefore, the amount given by the Financial Creditor was in nature of an investment and not as Financial Debt.
 - c) However, the Financial Creditor represented that, initially the investment be treated as loan as it wanted to see the progress of the new venture, to which, the Corporate Debtor agreed with a clear understanding that it shall always be treated as an investment.
 - d) An Agreement was got signed by the Financial Creditor alleging that it is an investment agreement and copy of the same was shared with the Corporate Debtor.
 - e) The Financial Creditor remitted some amount of money, in intervals, however, failed to remit the agreed sum of Rs.2 Crore. The amount which was remitted by the Financial Creditor was also remitted with utmost delay and not on time, for which day to day

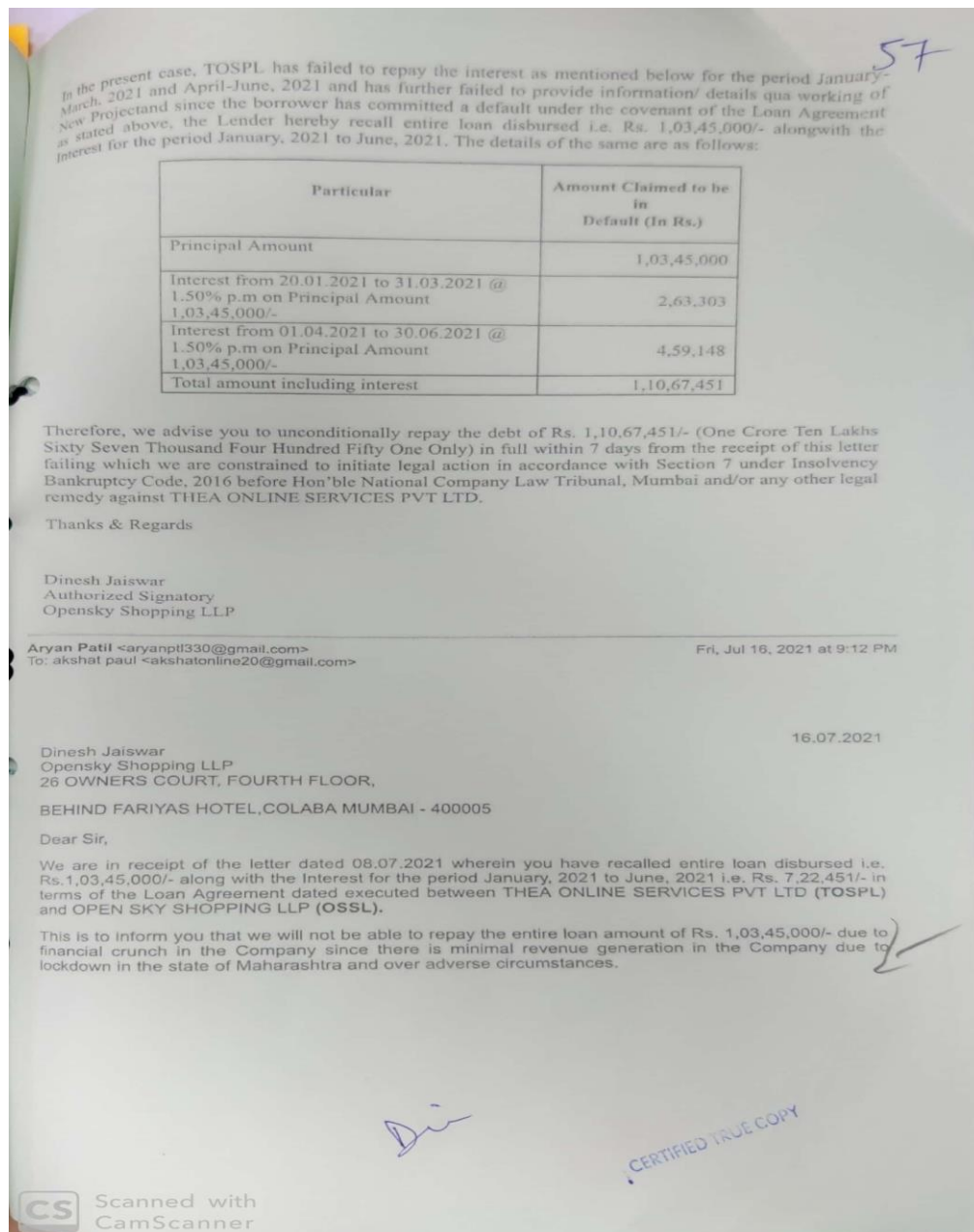
affairs of project started by the Corporate Debtor suffered and it incurred losses which is solely attributable to the Financial Creditor.

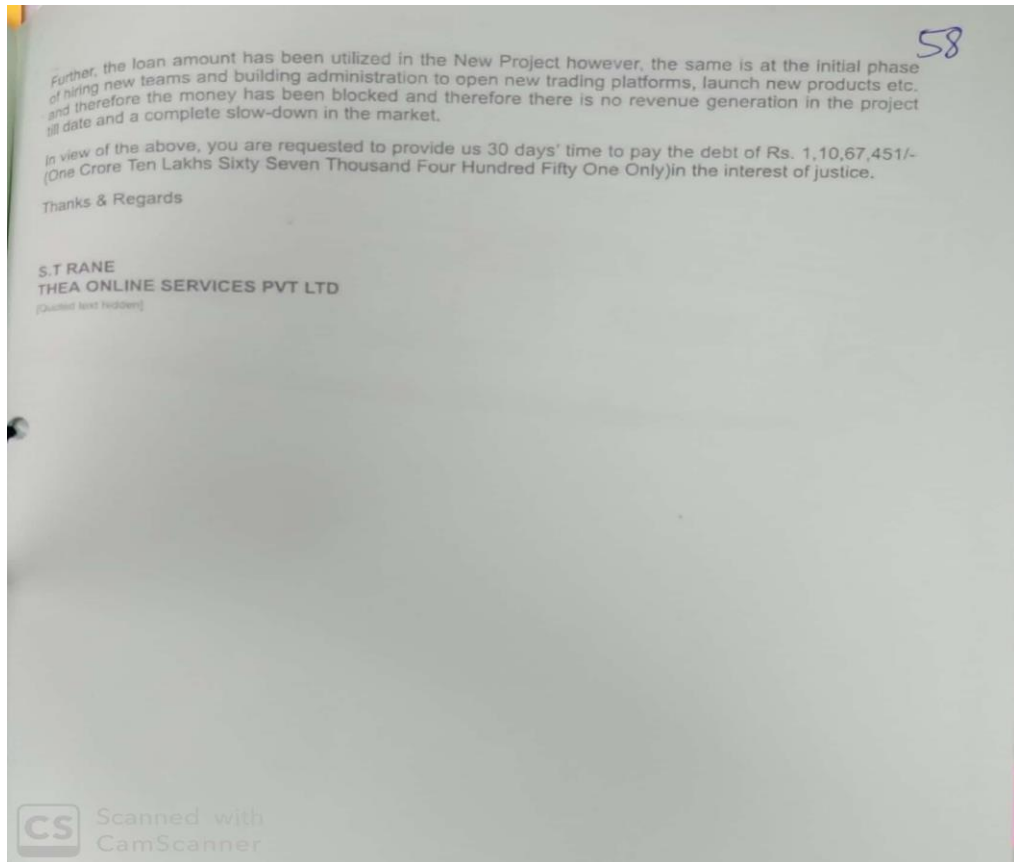
- f) The Corporate Debtor repeatedly asked the Financial Creditor to release the balance amount, however, the Financial Creditor has not remitted the same.
- g) Therefore, the delay in disbursement of money and on account of non-disbursement of entire money, the project of the Corporate Debtor came to a grinding halt and it suffered heavy losses. In view of the matter, the Corporate Debtor requested for time to repay the amount to the Financial Creditor.
- h) The Corporate Debtor is in acute financial crisis and cannot pay the amount back to the Financial Creditor. The Corporate Debtor is willing to pay the amount in instalments and therefore has established its bonafide and cannot be termed as defaulter as though it willing to pay amount.

Findings:

- 10. We have heard the arguments of the Learned Counsel for both the parties and perused the records.
- 11. It is observed by the Bench that the Corporate Debtor contended that the amount given by the Financial Creditor was in the nature of an investment and not as financial debt. However, the Corporate Debtor has unequivocally admitted its liability vide reply dated 16.06.2021 to the email dated 08.06.2021 sent by the Financial Creditor which is at pp 57 & 58 of the Petition. The Corporate Debtor has admitted the loan Amount of Rs.1,03,45,000/- (Rupees one crore three lakh forty-five thousand only) and the same could not be paid due to financial crunch

in the Company. The Corporate Debtor also admitted that there was a Loan Agreement dated 01.01.2021 entered between the Financial Creditor and the Corporate Debtor. However, the Corporate Debtor cannot say that the amount given by the Financial Creditor was in the nature of an investment and not the Loan. The details of the said email are as under:





12. It is also observed by the Bench that the Corporate Debtor has not disputed the amount given by the Financial Creditor to the Corporate Debtor. The Loan Agreement dated 01.01.2021 for an amount of Rs.2 Crore was entered between the Financial Creditor and the Corporate Debtor. As per Clause E of the said Agreement, the Corporate Debtor shall be liable to repay the total loan amount to the Financial Creditor on or before 31.03.2023. Further Clause 3(a) of the said Agreement also talks about the repayment of Loan. Clause E and Clause 3 (a) of the Agreement are as under:

“E. The Borrower shall be liable to repay the total loan amount to the Lender on or before 31.03.2023.”

“3. a) The Borrower shall be liable to repay the total loan amount to the Lender on or before 31.03.2023. However, in case if there is any

violation of terms and conditions stated in this agreement and/or default by borrower in payment of interest, the Lender shall be entitled to recall the loan disbursed up to the date of default together with interest by giving 7 days' notice to the Borrower."

13. After perusal of the material on record, this Bench is of considered view that there is no reason to deny the Petition under section 7 filed by the Financial Creditor to initiate the CIRP against the Corporate Debtor.
14. On perusal of the documents submitted by the Applicant, it is clear that financial debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) is due and payable by the Corporate Debtor to the Applicant. There is default by the Corporate Debtor in payment of debt amount. Therefore, we do not have any objection on record against the application filed for initiation of CIRP against the corporate debtor. Hence, the Application filed by the Financial Creditor is liable to be admitted.
15. The application is complete and has been filed under the proper form. The debt amount is more than Rupees One Crore and default of the Corporate Debtor has been established.
16. The Applicant has proposed the name of Mr.Hemant Sharma, a registered insolvency resolution professional having Registration Number [IBBI/IPA-002/IP-N00015/2016-17/10019] 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. 784/NCLT/MB/C-IV/2021 filed under Section 7 of I&B Code, 2016, filed by Open Sky Shopping LLP, Financial Creditor/ Applicant against Thea Online Services Private 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. Hemant Sharma, a registered insolvency resolution professional having Registration Number [IBBI/IPA-002/IP-N00015/2016-17/10019], E-mail: hemant78sharma@gmail.com 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/-

Kishore Vemulapalli
Member (Judicial)

28.01.2022

Sd/-

Rajesh Sharma
Member (Technical)