

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)**

**PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 17.01.2023 AT 10.30 AM**

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.6/7/AMR/2022		7 of IBC	SREI Equipment Finance Limited Vs. Vijay Mining & Infra Corp Private Limited

ORDER

Mr.Srikanth Hariharan, Counsel for the FC present.

CP(IB) No.6/7/AMR/2022 is dismissed, vide separate orders.

Sd/-
**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI**

*** **

CP (IB) No.6/7/AMR/2022

**In the matter of a Petition under Section 7 of the Insolvency and
Bankruptcy Code, 2016 Read with Rule 4 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority) Rules, 2016**

AND

**In the matter of
M/s. VIJAY MINING & INFRA CORP PRIVATE LIMITED**

Between:

M/s. SREI Equipment Finance Limited,
Vishwakarma, 86C, Topsia Road,
Kolkata – 700046. West Bengal.

... Financial Creditor

AND

M/s.Vijay Mining & Infra Corp Private Limited,
20/1073, R.K Colony, Cuddapah,
Andhra Pradesh - 516801.

... Corporate Debtor

Order pronounced on: 17.01.2023

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Financial Creditor : Mr. Srikanth Hariharan, Advocate.

For Corporate Debtor : Mr.D.Narendar Naik & Mr.Ambati Varun,
Advocates.

ORDER

1. This petition is filed by M/s. SREI Equipment Finance Limited i.e., the Financial Creditor (in short FC) against M/s. Vijay Mining & Infra Corp Private Limited i.e., the Corporate Debtor (in short CD) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the CD for the default committed in discharging the debt that was due to the FC.

2. The facts of the case, briefly, are as follows:
 - i). The FC is a registered non-banking financial company and the CD is in the business of engineering and mining projects. The FC extended credit facilities through Master Facility Agreement with different schedules dated 15.05.2019, to a tune of Rs.109,15,00,001/-, in favour of the CD. The CD executed ten deeds of hypothecation, securing the credit facilities by way of hypothecation, on the various assets as mentioned therein. The credit facilities were also secured by personal guarantees.

 - ii). The CD failed to make the repayments of the instalments, despite receipts of disbursements of the loan amounts from the FC. As the CD failed to make the repayments, the FC was constrained to sent a demand notice dated 10.11.2021. The CD failed to make the repayment and did not reply to the said notice. Hence, this Company Petition.

3. The CD filed counter with the following contentions:
- i) There is no Financial Debt which is in default and the Company Petition filed is premature. The CD filed a Writ Petition No.5025/2022 before the High Court of Telangana challenging the illegal action of the Petitioner in unilaterally cancelling the Terms of Settlement (TOS) dated 30.11.2020 which provided time up to 31.10.2022 for repayment vide cancellation letter dated 05.10.2021. The unilateral cancellation of Terms of Settlement (TOS) is in violation of the prudential framework for Resolution of Stressed Assets issued vide RBI Circular.
 - ii) The High Court was pleased to direct the Respondent (FC herein) not to take any coercive steps against the Petitioner (CD herein). It was recorded by the High Court of Telangana that the FC has initiated insolvency proceedings without waiting till the due date i.e., 31.10.2022.
 - iii) The CD is a highly reputed company and is engaged in engineering and mining projects. In the course of its business, the CD approached the FC and availed various financial facilities and availed a loan of Rs.109,50,00,001/- by virtue of ten Master Facility Agreements and Loan

Agreement and Ten different schedules, all dated 15.05.2019.

- iv) The CD, in order to secure the said credit facility, executed ten deeds of Hypothecation dated 15.05.2019 in favour of the FC. The Director of the CD also extended securities of the immovable properties by way of an undertaking for extension of security dated 06.09.2018. The CD also submitted personal guarantees of one Mr.Vijaya Sekhar and Mr.C.Dushyant Reddy dated 15.05.2019.
- v) While so, owing to the outbreak of corona virus and the subsequent lockdown, the CD suffered severe financial burden and delayed payment of the dues. Constrained by the said delay, the CD and the FC entered into TOS dated 30.11.2020 after due deliberations and negotiations.
- vi) As per the terms of the said TOS, both the parties agreed that the pending amount shall be settled at Rs.55 Crores only and the time for the payment shall be 31.10.2022. The altered payment period and the altered payment amount was revised as per the RBI definition of the term Restructuring and the payment period for the entire term even in case of delay or default in case of some of the instalments linked to sale of property is from 30.11.2020 upto 31.10.2022 and the same cannot be unilaterally terminated by the FC.

- vii) Mr.C.Vijaya Shekar Reddy, being the Director of the CD, had given eight apartments as collateral security by an equitable mortgage. During the repayment of the loan, the CD offered to sell the collateral properties to pay the balance loan amount and Mr.C.Vijaya Shekar Reddy gave consent and executed a registered Power of Attorney dated 30.09.2014 in favour of the FC and authorised the FC to identify a prospective buyer and sell the collateral property.
- viii) In turn, the FC executed another Power of Attorney in favour of its employee's Mr.K.A.Harish to look after the affairs of the FC's Branch Office in Bengaluru.
- ix) The FC uncovered a fraudulent transaction done by Mr.K.A.Harish who had executed an Agreement of Sale dated 02.02.2016. After verifying the records, the FC found that Mr.K.A.Harish does not have any authorization to carry out any transaction with respect to the collateral properties. In the above mentioned Agreement of Sale dated 02.02.2016, the FC was shown as the vendor of the collateral properties and Mr.K.A.Harish was Attorney Holder of the FC. Mr.K.A.Harish received an advance amount of Rs.1,00,00,000/- on behalf of the FC.

- x) Pursuant to the said revelation, the FC filed a complaint against Mr.K.A.Harish before Ashok Nagar Police Station, Bengaluru.
 - xi) Solely due to the actions of the FC and its employee, the FC could not recover the first two instalment amounts which are linked to the sale of property as per the terms of settlement dated 30.11.2020. Hence it cannot be said that there is any failure by the Respondent to pay the amounts under the TOS which provides for the payment of the entire amount by 31.10.2022. On the contrary it is the action of the FC which is vicariously liable.
 - xii) The FC issued a cancellation letter dated 05.10.2021 cancelling the TOS dated 30.11.2020. The CD was never in violation of the TOS. Since the time for payment has not reached, this Company Petition is premature and is liable to be dismissed.
4. Rejoinder was filed by the FC with the following contentions:
- i) It is incorrect to say that there is no financial debt. In terms of TOS, the CD admitted that it has availed various financial facilities from the FC and also admitted the dues, the TOS was signed by Mr.C.Vijaya Shekar Reddy and Mr.C.Dushyant Reddy as personal guarantors of the CD.

- ii) As regards the writ petition, the High Court of Telangana by order dated 20.07.2022 has clarified that this Tribunal can proceed with the instant Section 7 Application. If the intention of the CD was to pay off the dues, it could have done the same by 31.10.2022.
- iii) The CD has never paid any amounts towards the contracts. Therefore, the plea taken by the CD that due to Covid-19 the CD was unable to pay its dues is false. It was upon the oral request made by the CD that a loan was sanctioned to one Vijay Mining Private Limited which is one of the group concerns of the CD and the same was paid back by the said Company and adjusted towards the over dues of the CD.
- iv) As per the terms of TOS, the first instance of the payment was on 31.03.2021 and on the failure of the CD to make the said payment, the FC has right to terminate the TOS and as such the same was terminated by invoking Clause 4 of the TOS.
- v) A Power of Attorney was registered by Mr.C.Vijaya Shekar Reddy. However, the FC has not acted upon to sell any property that was mortgaged by virtue of the said Power of Attorney. A Power of Attorney executed in favour of Mr.K.A.Harish was in the year 2016 and it did not empower him to execute Sale Deed or Agreement for Sale with any

purchaser. Mr.K.A.Harish resigned from service in 2016. While the Power of Attorney is in the year 2016, the TOS referred by the CD was executed in 2020, hence, the statement made by the CD that by virtue of Clause 10 of the TOS, power was granted to Mr.K.A.Harish, is false. The CD neither made payment through sale proceeds of any immovable property. Hence, his commitments under TOS have failed. In view of the above the FC seeks this Tribunal to admit the CP.

5. Heard the arguments of both the Counsel and perused the written submissions filed by them.
6. The important contention raised on behalf of the CD is that the Company Petition is premature since there was a TOS executed between the parties on 30.11.2020, wherein the payment schedule was incorporated. But under Clause 3(b) it was recited that notwithstanding any delay or default by the Debtors under this present, the debtors have to pay the entire settled amount of Rs.55 Crores only and the payment has to be made within 31.10.2022. Hence, the point that has to be considered in the foremost is:
 - i) Whether there was any default committed by the CD in terms of the TOS and whether the Company Petition is premature.

7. There is no denial of the fact by the CD that there is default in payment of the amounts as scheduled in the TOS. The TOS recites that the settlement for Rs.55 Crores was made and the payment period was mentioned as 24 months and the moratorium was 6 months starting from 30.11.2020 @ 12% simple interest. The first instalment of Rs.4,10,00,000/- was to be paid by 31.03.2021 and the source of funds was mentioned as sale proceeds of property at Bengaluru and Chimakurthi. As such the 2nd instalment of Rs.10 Crores was to be paid by 31.06.2021 and the source of funds is the same as per the 1st instalment. The 3rd instalment of Rs.12 Crores was to be paid on 31.12.2021. the source of funds being the same as above. Thereafter, equal instalments of Rs.4,18,52,100/- were to be paid from future operational profits. After mentioning all this, the TOS recites that notwithstanding any delay or default by the CD, the CD has to pay the entire settled amount of Rs.55 Crores, within 31.10.2022.
8. The counsel for the FC contends that it has right to cancel the MoU under Clause 4 of the TOS. He also contends that the financial statements of the CD reflect the outstanding amount due and payable to the FC and that in the Balance Sheet it is categorically admitted that there are dues to the FC. It is contended that even if the debt is disputed, as long as the debt is due, the Company Petition deserves to be admitted. He relies on Section 3 (6), 3(11)

& 3(12), to contend that if they are read together, it would be clear that where a debt is due and payable and not paid, there is a default that has occurred though the debt may be disputed. He also contends that the explanation to Section 7 makes it clear that default includes any financial debt owed not only to the Applicant Financial Creditor but to any other financial creditor of the CD.

9. There is no doubt that there was a debt and the CD does not deny the same anywhere. But the only contention is that the repayment schedule was according to the TOS and that the final date for repayment of the entire debt has not yet reached by the date of filing this Company Petition and hence, the Company Petition is liable to be dismissed.

10. The contention of the counsel for the FC is that the due date has nevertheless reached after the filing of this Company Petition and if the CD is really bent upon discharging the debt, it would have paid the amount by now. But in the considered opinion of this Tribunal the limited jurisdiction of this Tribunal is to see whether there was any debt and default by the date of filing of this Company Petition. The debt and default as defined under Section 3 (11) & 3(12) respectively, no doubt means that when whole or any part or instalment of the amount of debt has become due and payable it becomes a default. But the other attendant circumstances, have also to be looked into to conclude whether there is default on the part of the CD in repayment of the debt. The High Court of Telangana by

virtue of the order dated 12.04.2022, has directed the FC not to take any coercive steps, by considering the fact that the due date for payment of the debt has not reached. It is also true that subsequently the said order was modified by virtue of the order dated 12.07.2022 considering that the Petitioner therein, who is the CD herein, is not a state and is not amenable to writ jurisdiction. But the fact remain that prima facie the High Court of Telangana found that the due date of payment of debt has not reached. That apart, even going by the terms of the TOS, it can be understood that a leverage was given to the CD to make the entire payment by 31.10.2022 even if the earlier instalments were not paid. The non-obstante clause pertaining to the said final payment would imply that the time for the entire payment was extended to 31.10.2022. The last instalment as per the schedule mentioned in the TOS also falls on the said date. Hence when the time for final payment has not reached, simply because, the TOS recites that termination of TOS can be done, it does not empower the FC to make a unilateral cancellation of TOS. The power of the cancellation is incorporated under Clause 4 of the TOS, wherein it is mentioned that in case the debtors fail to comply with any of its obligations under this TOS, including but not limited to Clause 3 above without any valid reason, the TOS can be terminated. But the contention of the FC is not that the CD failed to comply with any of the obligation under the TOS apart from the obligation under Clause 3 of the TOS. Hence what emanates from a whole reading of clause 3 is, that the

non-compliance would arise only on the failure of the CD to make the entire payment by 31.10.2022.

11. The questions of the Power of Attorney, being given to Mr.K.A.Harish and Mr.K.A.Harish misusing the same need not be gone into, as it involves adjudicating on several disputed questions of fact which is outside the purview of the I&B Code. Moreover, no evidence is placed by the CD, with regard to the said contention. The powers of attorney are not filed, so as to verify the disputed dates of execution. However, in view of the above discussion this Tribunal holds that there is no default committed by the CD as on the date of filing this Company Petition. Hence, CP(IB) No.6/7/AMR/2022 is dismissed.

Sd/- dated 17.01.2023

**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

Swamy Naidu