

In the National Company Law Tribunal  
Mumbai Bench - (C-III)

C.P.(IB)-63/MB/2020

Under Section 7 of Insolvency & Bankruptcy Code, 2016

In the matter of

PEC Limited : Applicant/ Financial Creditor

V/s

Phulchand Exports Pvt. Ltd. : Respondent/ Corporate Debtor

Order delivered on: 27.08.2021

Coram:

Hon'ble Member (Judicial) : Shri H V Subba Rao  
Hon'ble Member (Technical) : Shri Chandra Bhan Singh.

For the Petitioner(s) : 1. Mr. Premlal Krishnan, Adv.  
2. Mr. Leona Furtado, Adv.  
3. Mr. Dinesh Bhatia, Adv.

For the Respondent(s) : 1. Mr. Shyam Kapadia, Adv.  
2. Mr. Rohit Gupta, Adv.

***Per: Chandra Bhan Singh, Member (T).***

**ORDER**

1. This Application has been filed by the Applicant/ Financial Creditor M/s. PEC Limited, (a Government of India Enterprise under Ministry of Commerce and Industry), (hereinafter, Applicant/ Financial Creditor/ Petitioner/ PEC) u/s 7 of the Insolvency & Bankruptcy Code, 2016 in Form No.1 to initiate Corporate Insolvency Resolution Process against M/s. Phulchand Exports Pvt. Ltd., Mumbai-400025 (Corporate Debtor) (hereinafter "PEP"/ Corporate Debtor/ Respondent), for a debt amount of Rs.42,78,84,916/- towards the outstanding

principal amount. The Applicant/ Financial Creditor has submitted Contract-wise details with the Petition as under:-

| <i>Contract</i>                                | <i>Amount</i>              | <i>Date of Disbursement</i>   |
|--|----------------------------|-------------------------------|
| <i>PEC/NET/10/2010-11<br/>DATED 02.11.2010</i> | <i>12,80,00,000</i>        | <i>November-December 2010</i> |
| <i>PEC/NET/17/2010-11<br/>DATED 07.04.2021</i> | <i>9,80,00,000</i>         | <i>April-May 2011</i>         |
| <i>PEC/NET/18/2010-11<br/>DATED 07.04.2021</i> | <i>12,80,00,000</i>        | <i>April-May 2011</i>         |
| <i>PEC/NET/05/2011-12<br/>DATED 25.05.2011</i> | <i>12,00,00,000</i>        | <i>May-August 2011</i>        |
| <i>PEC/NET/09/2011-12<br/>DATED 06.02.2012</i> | <i>7,50,00,000</i>         | <i>February-March 2012</i>    |
| <i>PEC/NET/01/2012-13<br/>DATED 12.07.2012</i> | <i>9,40,00,000</i>         | <i>July-August 2012</i>       |
| <b><i>Total</i></b>                            | <b><i>63,57,00,000</i></b> |                               |

2. The Applicant (PEC) has also submitted a tabular statement indicating the date of default and outstanding amount as on the date of default amounting to Rs.116,31,51,754/- including the applicable rate of interest as on 1<sup>st</sup> Dec 2019, which is reproduced below:-

“

| <i>Dates of Default</i> | <i>Outstanding as on date of default</i> |
|-------------------------|--|
| <i>31.03.2013</i>       | <i>43,12,40,920</i>                      |
| <i>31.03.2014</i>       | <i>51,84,90,511</i>                      |
| <i>31.03.2015</i>       | <i>61,59,16,835</i>                      |
| <i>31.03.2016</i>       | <i>71,44,16,118</i>                      |
| <i>31.03.2017</i>       | <i>81,71,79,940</i>                      |
| <i>31.03.2018</i>       | <i>93,23,95,399</i>                      |
| <i>31.03.2019</i>       | <i>106,42,53,656</i>                     |
| <i>30.11.2019</i>       | <i>116,31,51,754</i>                     |

”

1% Interest per month (i.e. 12% p.a.) till final realization of payment.

**BRIEF HISTORY OF THE CASE & SUBMISSIONS FROM  
THE PETITIONER :-**

3. The Financial Creditor (PEC) and the Corporate Debtor (PEP) were working together since 2003-04 in the business of export of Iron ore. The Financial Creditor submitted that it provided interest bearing export financing viz. packing credit to the Corporate Debtor for procurement of iron ore to be exported to different foreign buyers. The Financial Creditor booked the export turnover in its name and trade margin @1% of the Free on Board (FOB) value of shipment.
4. The Applicant submitted that it entered into contract with the buyer M/s. Networth Trading Pte. Ltd for selling Iron Ore fines and pellets. The Financial Creditor (PEC) and the Corporate Debtor (PEP) entered into six contracts on various dates under which the PEC provided export finance. Details of the six contracts are as under:-
  - i. PEC/NET/10/2010-11 DATED 02.11.2010
  - ii. PEC/NET/17/2010-11 DATED 07.04.2011
  - iii. PEC/NET/18/2010-11 DATED 07.04.2011
  - iv. PEC/NET/05/2011-12 DATED 25.05.2011
  - v. PEC/NET/09/2011-12 DATED 06.02.2012
  - vi. PEC/NET/01/2012-13 DATED 12.07.2012

Copies of above six contracts have been annexed with the Petition at Exhibit E-1 to E-6.

5. The Applicant/ Petitioner had advanced a total sum of Rs.63.57 crores to the Corporate Debtor (PEP) for export financing under the aforementioned six contacts. It is stated that Utilization

receipt was submitted by the Corporate Debtor to the Financial Creditor PEC for each of the contracts as received from the miner/ supplier against receipt of payment from the Corporate Debtor PEP for fulfilment of export contracts. The Petitioner submitted that as per the terms of the respective contracts, the underlying stock of iron ore was under the lien of Financial Creditor, PEC.

6. The Petitioner further stated that in October 2012, Government of India imposed a ban on export of Iron Ore basis the direction of the Hon'ble Supreme Court. Therefore, the Corporate Debtor could not export the iron ore against the six contracts for which the Financial Creditor had made advances for export financing to them. The Corporate Debtor contacted the buyer and sought time for supply of material. Meanwhile, the stocks of iron ore for which finances were paid by the Financial Creditor were confiscated by the Department of Mines and Geology, Government of Goa.
7. Thereafter, the Financial Creditor approached the Corporate Debtor for alternative securities including Bank Guarantees to cover up the outstanding dues but the Corporate Debtor was unable to provide for the same. On 08.09.2014 the Financial Creditor called upon the Corporate Debtor to make unconditional and firm payment strategy for repayment of an amount of Rs.73,84,12,693/- being the outstanding amount payable with respect to the six contracts.
8. The Corporate Debtor PEP submits that a proposal was firmed up vide its letter dated 15.09.2014 for repayment of the outstanding dues agreeing to repay an amount of Rs.12 crore

between 30.09.2014 to 05.10.2014 and remaining Rs.45 crore in instalments up to June 2015. Copy of this letter dated 15.09.2014 is placed at Exhibit 'G' in the Petition.

9. Vide letter dated 17.09.2014 the Financial Creditor PEC informed the Corporate Debtor that the total outstanding due was Rs.73,96,48,730/- and proposed that an initial amount of Rs.15 crore be paid by 26.09.2014 followed by a total payment of Rs.60 crore in instalments up to June 2015. PEC also stated that the Bank Guarantee of Rs.12 crore shall be extended beyond 30.09.2014. However, the Petitioner stated that the Corporate Debtor did not make the repayment of the outstanding dues and informed the Financial Creditor PEC that they were making a payment of Rs.3 cores as initial amount and that the remaining shall be done within 10-15 days.
10. On 19.09.2014, the Corporate Debtor, requested the Petitioner PEC to issue a letter to Paradip Port Trust requesting them to allow the Corporate Debtor to take out the 11,000 MT of iron ore pellets stored in the port premises. PEC accordingly addressed a letter to the Paradip Port Trust.
11. The Petitioner submitted that the Corporate Debtor deposited eight cheques for a total amount of Rs.49.60 crore in the Bank of the Financial Creditor for realization of outstanding dues. However, it is stated that all the cheques were dishonored and on 30.09.2016, the Financial Creditor filed complaint against Corporate Debtor u/s.138 of the Negotiable Instruments Act, 1881 in the Patiala House Court.

12. Settlement talks were going on between the Financial Creditor and Corporate Debtor at various stages, however, no proposal was finally accepted by either parties.

**Submissions by the Respondent/ Corporate Debtor :-**

13. The Respondent (PEP) has contested the Petition stating that the Petition is not maintainable under Sec. 7 of the IB Code as the Petitioner is not a Financial Creditor and the purported transaction forming the very basis of the claim of the Petitioner is not a financial debt under Section 5(8) of the Insolvency & Bankruptcy Code, 2016.
14. Respondent submits that the transaction forming the subject matter of the present Petition is of procurement and shipping of Iron Ore by Respondent (PEP) to the Petitioner (PEC) to enable the Petitioner to export the same to the Petitioner's Foreign Buyer.
15. The Respondent submits that the said Contracts with the Respondent referred to the Respondent as an "Associate Supplier". Contract in dispute being the Associateship Agreements dated 02.11.2010, 07.04.2011, 07.04.2011, 25.05.2011, 06.02.2012 and 12.07.2012 respectively, were entered into by the Petitioner with certain Foreign Contracts with a Foreign Buyer, Networth Pte. Ltd. for the supply of Iron Ore. The scope of the Agreement specifically mentioned at Clause No.1 of the said Contracts, characterized the scope, role and responsibility of the Respondent *qua* the said Contracts. The relevant portion of the agreement is reproduced below:-

*“The obligations, covenants and agreements as have been agreed to performed, fulfilled and observed by the Associate Supplier”, shall include, without being restricted to procure and supply iron ore fines, undertake all logistics involved, in export of iron ore fines to China right from loading into trucks at pithead in the mines upto loading into the ship at Panjim/ Mormugao Goa loading port, chartering vessel if any including inspection and fulfilling of warranties/guarantees under the Foreign Contract.”* Thus the role of the Associate Supplier Respondent was that of a Supplier/ Agent who would procure the Iron Ore for the Petitioner and act as Shipper and provide logistics service to enable the Petitioner to export the said goods to its Foreign Buyer. Therefore, the Respondent argued that monies were not lent as ‘against time value for money’ but were paid to the Respondent for providing services such as procurement of Iron Ore and shipping etc., as an Associate/ Agent to the Petitioner, to enable the Petitioner accomplish its export obligations under the Foreign Contracts. Therefore, the Respondent vehemently pleaded that it is not a debt ‘disbursed against the consideration for the time value of money’ within the meaning of Section 5(8) of the Code.

- 15.1. The Respondent also submitted that the admitted position of law is that merely because the Goods in Contract are pledged to secure a transaction of sale the same does not amount to a financial debt defined u/s. 5(8) of the Code. Also, the mere fact of non-payment/ non-compliance attracting interest is not sufficient to treat debt as a financial debt, as liability towards interest can also arise in case of an operational debt.

15.2. The Respondent submitted that the Judgment of Hon'ble NCLAT, relied by the Petitioner in the matter of PEC Ltd. v. Sree Ramakrishna Alloys, [Appeal No.225 of 2017] and the Judgment passed by the Hon'ble NCLT, Hyderabad Bench in the matter of Stressed Assets Stabilization Funds v. Sri Vasavi Industries Limited, in which the PEC Ltd was adjudicated as 'Financial Creditor' and thus the Petitioner also should be a Financial Creditor in the present Petition as well. However, the Respondent further submitted that a bare perusal of the said Judgments and the Agreements forming subject matter thereof, it is clear that the transactions in respect of the aforesaid Judgments were different from the situation in the present matter. He has advanced several arguments in the written submissions to demonstrate as to how the present case is different from the above two cases cited.

16. The Respondent further relies upon the Clause "Force Majeure" reproduced below:-

*"CLAUSE 14. FORCE MAJURE – If at any time during the existence of this contract either party is unable to perform whole or in part any obligation under this contract, because of war, hostility, military operation of any character, civil commotion's, sabotage quarantine restriction, **acts of Government**, acts of God, fire, floods, explosions, epidemics, strikes or other labor trouble, embargoes including all natural calamities ..... if the operation of such circumstances exceeds two months, either party will have right to refuse further performance of the Contract in which case neither party shall have right to claim eventual damage".*

16.1. The Respondent submitted that the said Contracts have been frustrated as they have become impossible to perform due to the

Government imposing ban on Export of Iron-Ore pursuant to Orders of the Hon'ble Apex Court and confiscating the stock Iron Ore at the ports and mines of Goa, which admittedly included the goods involved in the present transaction. Further submitted that the said Contracts categorically stated that the terms and conditions of the Foreign Contracts shall apply to the present matter. Therefore, it is clear from the above Force Majeure clause in the Foreign Contracts which were integral part of the said Contracts specifically dealt with Force Majeure events, which explicitly mentioned an Act of Government would amount to Force Majeure. Further the said clause mentioned that in the event of Force Majeure neither party shall have right to claim eventual damage.

- 16.2. The Respondent further pleaded that the issue of frustration of contract due to force majeure is a triable issue and as such the liability, if any, of the Parties towards each other ought to be determined through a proper procedure of trial and cannot be ipso facto foisted upon the Respondent by the Petitioner.
17. The Respondent also submitted that the said Claim is barred by law of Limitation. The Petitioner has not mentioned any date of default in its Petition and stated that it is for the Petitioner to show that the Petition is within limitation. However, the Petition is silent in this respect and has in no manner justified as to how the present Petition has been filed within a period of limitation.
18. The Respondent also vehemently pleaded that all the six contracts cannot be construed as a part of a single transaction and hence the limitation period ought to be computed separately in respect of each contract. In support of this, the Respondent relied

upon the Hon'ble NCLAT Order in the matter of *International Road Dynamics South Asia Pvt. Ltd. Versus Reliance Infrastructure Ltd* [Company Appeal (AT)(Insolvency) No.77 of 2017] wherein the Hon'ble Tribunal categorically held that “*We are of the view that different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate*”.

19. The Respondent further submitted that the several letters relied by the Petitioner viz. Letter dated 15.09.2014, 07.10.2014, 08.04.2014, 31.07.2015, 24.11.2016 and 02.01.2017 wherein the Petitioner has alleged that the Respondent had acknowledged its liabilities in the said letters from time to time. The Respondent denies the acknowledgement of liability and stated that they were “Without Prejudice” and were issued with an intention of settling the dispute to enable the parties carry out other business ventures. Respondent also submitted that not all letters relied in the Petition pertains to the said Contracts.

### **FINDINGS**

20. This Company Petition has been filed by PEC Limited as a Financial Creditor u/s.7 of the IBC against Phulchand Exports Pvt Ltd, the Corporate Debtor, for a total debt of about Rs.63.57 crores with interest of 12% p.a. at the monthly rest basis i.e., 1% per month. There is no date of default mentioned by the Petitioner. This total debt of about Rs.63.57 crores is emanating as per the Petition by way of six different contracts starting

02.11.2010 to 12.07.2012. The details of these contracts and amount involved as per Part IV of the Petition is as under:-

| Contract                               | Amount              | Date of Disbursement   |
|--|---------------------|------------------------|
| PEC/NET/10/2010-11<br>DATED 02.11.2010 | 12,80,00,000        | November-December 2010 |
| PEC/NET/17/2010-11<br>DATED 07.04.2021 | 9,80,00,000         | April-May 2011         |
| PEC/NET/18/2010-11<br>DATED 07.04.2021 | 12,80,00,000        | April-May 2011         |
| PEC/NET/05/2011-12<br>DATED 25.05.2011 | 12,00,00,000        | May-August 2011        |
| PEC/NET/09/2011-12<br>DATED 06.02.2012 | 7,50,00,000         | February-March 2012    |
| PEC/NET/01/2012-13<br>DATED 12.07.2012 | 9,40,00,000         | July-August 2012       |
| <b>Total</b>                           | <b>63,57,00,000</b> |                        |

21. Before we go further into the matter, we would like to reproduce some of the important part of the agreement which is the basis for the claim by the Petitioner. These agreements are separate for all the six contracts. However, the language of agreement is same in all the six contracts. The important excerpts of the Agreement is as under:-

*“This Agreement (hereinafter called the AGREEMENT) is made at New Delhi on this day of 3-11-2010 between M/s. Phulchand Exports Pvt.Ltd.,254-B, Nirlon House, 4<sup>th</sup> floor, Worli, Mumbai-400 030 (hereafter called ‘Associate Supplier’ which expression shall, unless excluded by or repugnant to the context or meaning thereof, be deemed to include its/their legal representatives, successors and assigns) of the ONE PART; and PEC LTD., a company incorporated under the Companies Act, 1956 having its registered office at “Hansalaya”, 15,Barakhamba Road, New Delhi-110 001 (hereinafter called as ‘PEC’, which expression shall, unless excluded by or repugnant to the context or*

*meaning thereof be deemed to include its successors and assigns) of the OTHER PART.*

*AND Whereas PEC has in consultation with and with the concurrence of the 'Associate Supplier' entered into a Contract No; PEC/NET/10/10-11 Dated 2-11-2010 (hereinafter called 'Foreign Contract' with M/s. **NETWORTH TRADING PTE.LTD., 24B Temple Street,China Town The ATTIC Singapore 058569** (hereinafter called the 'FOREIGN BUYER') for supply of Iron Ore Fines as per specifications, quantities, payment and other terms and conditions specified in the 'Foreign Contract'. Foreign Contract forms an integral part of this Agreement.*

*AND WHEREAS 'Associate Supplier' has advised PEC that they have already received confirmation from Different suppliers for supply of minimum quality of 1,00,000+/-5% WMT only of iron ore fines as per specifications and delivery schedule of the 'Foreign Contract' during the current financial year.*

*AND WHEREAS the 'Associate Supplier' has agreed to fulfil, perform and discharge the obligations and responsibilities of PEC under, in terms of and by virtue of the above said Foreign Contract in the manner and on the terms and conditions as contained in the Foreign Contract and/or which PEC have imposed.*

*Now, THEREFORE, in consideration of the aforesaid premises, the parties hereto agree and declare as follows:-”*

*1. SCOPE OF AGREEMENT*

*The 'Associate Supplier' shall, unless inconsistent with the provisions of the Agreement perform, fulfill and observe all the obligations covenants and agreements and observe under, in terms of or by virtue of the 'Foreign Contract' including obligations, agreement and covenants, as made in consultation with the 'Associate Supplier' be modified or*

*provided for in the Foreign Contract in future. The obligations, covenants and agreements as have been agreed to be performed, fulfilled and observed by the 'Associate Supplier' shall include, without being restricted to procure and supply iron ore fines, undertake all logistics involved in export of iron ore fines to China right from the loading into trucks at pithead in the Mines upto loading into the ship at Panjim/Mormugao, Goa loading port, chartering of vessel if any including inspection and fulfilling of warranties/guaranties under the Foreign Contract.*

2. DELIVERY SCHEDULE

*The 'Associate Supplier' shall furnish to PEC within 15 days of the date of this 'Agreement their detailed programme of the procurement and supply of Iron Ore fines in accordance with the delivery period as mentioned in the 'Foreign Contract'. The Associate Supplier shall supply the Iron Ore fines procured strictly as per the delivery schedule mentioned in the 'Foreign Contract on FOB Panjim/Mormugao, Goa Port or C&F FO Port of China as the case may be, and which will include arrangement of trucks, procurement and supply of Iron Ore fines, inspection, undertaking all logistics operations like road transportation through trucks, wharfage, port handling, removal for stacking, reclaiming and intra port transfer to Jetty, ship loading, water sprinkling etc. and other related viz. clearing, forwarding and customs clearance and payment of any other charges/taxes leviable etc.*

3. TERMS OF FOREIGN CONTRACT:

*The 'Associate Supplier' shall abide by all the terms and conditions of the Foreign Contract appended at ANNEXURE-I. The 'Foreign Contract' shall form an integral and inseparable part of this Agreement. Contents*

*of 'Foreign Contract' shall not be disclosed to any third party without PEC's written permission to this effect.*

4. ....

5. **FINANCIAL ASSISTANCE**

5.1 *At the request of Associate Supplier **PEC may consider to give an interest bearing advance to Associate Supplier so as to facilitate them to fulfill, perform and discharge all the obligations and responsibilities of PEC under, in terms of and by virtue of the Order, in the manner and on the terms and conditions therein contained and/or by which PEC have imposed.*** (Emphasis supplied)

5.2 .....

5.3 *Interest @ 9% p.a. on monthly rest basis shall be chargeable on the amounts advanced to the Associate Supplier and if for any reason Associate Supplier are not able to supply the materials as per foreign contract, Associate Supplier shall pay to PEC interest @ 11.5% p.a. on monthly rest basis on the payments already made by PEC on their advice and refund the principal and interest amount immediately.*

5.4 .....

6. ....

7. ....

8. ....

9. ....

10. ....

11. ....

12. **INTEGRAL PART**

***The Foreign Contract shall be an integral and inseparable part of this agreement.***

22. It can be seen from the above that the contract which has been signed by the main supplier i.e., PEC Ltd with the Associate

Supplier who is the Corporate Debtor, in order to fulfil a Foreign Contract with M/s. Networth Trading Pte Ltd. Para 12 of the contract as reproduced above mentions that the Foreign Contract shall be an integral and inseparable part of this agreement. However, the Petitioner has not enclosed copy of the “Foreign Contract” which is an integral and inseparable part of this agreement, with this Petition. The foreign contract for the same agreement i.e., PEL/PEC/NET/10/10-11 has been attached by the Corporate Debtor in his reply, the excerpts of which are as under:-

“Contract no.: PEC/NET/10/10-11 Date : 2<sup>nd</sup> Nov 2010

**BUYER** **NETWORTH TRADING PTE LTD** **Phone :** +6562254780  
**24 B TEMPLE STREET**  
**CHINA TOWN THE ATTIC**  
**SINGAPORE 058569** **Fax:** +6562254792

**SELLER** **PEC LTD.,**  
**HANSALAYA, 15,BARAKHAMBA ROAD,** **Phone:** 911123314727  
**NEW DELHI-110 001** **Fax:** 911123327262

*This contract is made by and between the buyer and seller whereby the Buyer agrees to buy and the Seller agrees to sell the under mentioned goods for China, on the terms and conditions stated below:-*

**CLAUSE 1** **NAME OF COMMODITY:** 50.00% FE IRON ORE FINES  
**COUNTRY OF ORIGIN** India  
**PACKING:** In bulk  
**Port of Loading:** Mormugao, India  
**Port of Destination:** One Main Port, China

**CLAUSE 2** **SHIPMENT PERIOD AND QUANTITY**

**Quantity :** 1,00,000 MTS ± 5% at Seller's option  
**Shipment:** On or before 31<sup>st</sup> Dec 2010  
**Partial Shipment** Allowed

**CLAUSE 3** **IRON ORE FINES SPECIFICATION :**

**CHEMICAL COMPOSITION (ON DRY BASIS)**

|             |           |       |
|-------------|-----------|-------|
| FE          | 50.00 PCT | BASIS |
|             | 50.00 PCT | MIN   |
| SIO2        | 9.00 PCT  | MAX.  |
| AL2O3       | 9.00 PCT  | MAX.  |
| SULPHUR (S) | 0.04 PCT  | MAX.  |

|  |           |      |
|--|-----------|------|
| PHOSPHORUS (P)                               | 0.07 PCT  | MAX. |
| MOISTURE                                     | 11.00 PCT | MAX. |
| <i>(FREE LOSS AT 105 DEGREES CENTIGRADE)</i> |           |      |

**PHYSICAL COMPOSITION (SIZE DISTRIBUTION)**

|                |           |     |
|----------------|-----------|-----|
| Below 100 mesh | 35.00 PCT | MAX |
| BELOW 10MM     | 90.00 PCT | MAX |
| ABOVE 40MM     | 10.00 PCT | MAX |

**CLAUSE 4 PRICE**

*USE43.00 per DMT FOB ST Mormugao, India based on 50.00 PCT FE fraction prorata.*

**CLAUSE 5** .....

**CLAUSE 6** .....

**CLAUSE 7** .....

**CLAUSE 8** .....

**CLAUSE 9** .....

**CLAUSE 10** .....

**CLAUSE 11** .....

**CLAUSE 12** .....

**CLAUSE 13** .....

**CLAUSE 14 FORCE MAJEURE**

*If at any time during the existence of this contract either party is unable to perform whole or in part any obligation under this contract, because of war, hostility, military operation of any character, civil commotion's, sabotage, quarantine restriction, acts of Government, acts of God, fire, floods, explosions, epidemics, strikes or other labour trouble, embargoes including all natural calamities then the date of fulfillment of any obligation shall be postponed during the time when such circumstances are operative.*

.....

.....

**CLAUSE 15 ARBITRATION**

*All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by Arbitration in SINGAPORE as per ICC Rules of conciliation and arbitration 1998 and the award made in pursuance thereof shall be binding on the parties. The venue of arbitration proceedings will be SINGAPORE. The contract shall be governed and construed by English Laws AND ENGLISH LANGUAGES.*

**CLAUSE 16** .....

**CLAUSE 17** .....

**CLAUSE 18** .....

**CLAUSE 19** .....

**CLAUSE 20** .....

**BUYER**  
**NETWORTH TRADING PTE LTD**  
*Sd/-*  
**AUTHORISED SIGNATORY**

**SELLER**  
**PEC LTD**  
*Sd/-*  
**AUTHORISED SIGNATORY"**

23. It can be seen from the above that this "Foreign Contract" is between the buyer M/s. Networth Trading, and the seller i.e., PEC Ltd and this contract has been signed between the Buyer i.e., Networth Trading Pvt Ltd and Seller, PEC Ltd. It may be remembered here that this is a back to back contract and it is part of the Agreement between the Supplier and Associate Supplier i.e., PEC and the Corporate Debtor. In the foreign contract the same contract number is mentioned at the top i.e., PEL/PEC/NET/10/10-11 as in the case of Agreement between the Petitioner and the Respondent. Thus, it is clear that this agreement necessarily under all conditions have to be seen in totality as it is inseparable and integral part of the Agreement between the Supplier (Petitioner) and Associate Supplier (Respondent).
24. The Agreement with the Associate Supplier mentions in the said contract about the role and responsibility of the Associate Supplier (Respondent). It is clear from the wordings that the Associate Supplier was to procure and supply iron ore fines, undertake all logistics involved, in export of iron ore fines to China right from the loading into trucks at pithead in the Mines up to shipment at Panjim/ Mormugao, Goa including fulfilling warranties, guaranties under the Foreign Contract. The Bench notes that the Associate Supplier is an agent who would procure the iron ore on behalf of the Petitioner and act as a shipper and provide logistic service to enable the Petitioner exports the said goods to its foreign buyer. Therefore, the monies extended as financial assistance is to

facilitate the 'Associate Supplier' to fulfil, perform and discharge all the obligation and responsibility of PEC the main supplier in terms of the Foreign Contract. To facilitate this, these monies were advanced as is mentioned at para 5.1 of the Agreement which reads as follows:-

**“an interest bearing advance to the associate supplier is to facilitate to fulfil perform and discharge all the obligations and responsibility of the PEC under in terms of and by virtue of the order”.**

It is clear from this that these monies, though bearing an interest, has been given as advance to the Respondent for providing services like procurement of iron ore and shipping etc as an associate agent of the Petitioner to enable the Petitioner to accomplish its export obligation under the Foreign Contract. This also explains the dilemma faced by the Petitioner as to why it has not been able to mention a date of default against each of the contract as it is evident that the money is not for time value of money but to accomplish the export obligation of the Petitioner who is supplier under the foreign contract to the buyer who is (Networth Trading Pte. Ltd). This Bench notes that the mere fact of non-payment/ non-compliance attracting interest is not sufficient to characterize a debt as a financial debt as liability towards interest also arises in case of an operational debt.

25. We find it interesting to note that even though the Petitioner has not mentioned date of default upfront in his Petition but the date of default has been mentioned through one of the Exhibits in the Petition at Exhibit 'K' where while mentioning about outstanding dues the Petitioner has enclosed a table which is as under:-


| ANALYSIS OF PENDING CONTRACTS - PUNJAB AND SINDH 31-03-2014 |                    |               |                                       | POSITION OF PENDING CONTRACTS AS ON 31.08.14 |  |                            |                            |      |             |          |                  |                |                 |                |
|---|--------------------|---------------|---------------------------------------|--|--|----------------------------|----------------------------|------|-------------|----------|------------------|----------------|-----------------|----------------|
| Sl. No.   | PENDING CONTRACTS  | CONTRACT DATE | CONTRACT FROM WHICH IT IS TRANSFERRED | CONTRACT DATE                                | DATE FROM WHICH FINANCING IS OUTSTANDING | CUMULATIVE DAYS TILL TODAY | CONTRACT QTY DETAILS (WMT) |      |             |          | BALANCE (approx) | FINANCING      | INTEREST        | TOTAL O/S      |
|   |                    |               |                                       |  |  |                            | CONTRACTED QTY             | BE   | SHIPPED QTY | REALISED |                  |                |                 |                |
| 1   | PEC/NET/15/2010-11 | 00-11-2010    |                                       | 26-12-2011                                   | 08-04-2011                               | 380                        | 1,00,000                   | 1131 | 44,250      | 44,250   | 55,750           | 7,32,71,040.00 | 42,38,473.00    | 7,75,09,513.00 |
| 2   | PEC/NET/17/2010-11 | 07-04-2011    |                                       | 11-04-2011                                   | 11-04-2011                               | 1242                       | 1,00,000                   |      |             |          | 13,06,81,614.00  | 75,59,484.00   | 13,82,41,098.00 |                |
| 3   | PEC/NET/18/2010-11 | 07-06-2011    |                                       | 26-05-2011                                   | 26-05-2011                               | 1239                       | 1,00,000                   |      |             |          | 14,39,02,621.00  | 83,24,274.00   | 15,22,26,895.00 |                |
| 4   | PEC/NET/05/2011-12 | 25-05-2011    |                                       | 08-02-2012                                   | 08-02-2012                               | 1194                       | 1,00,000                   |      |             |          | 15,56,23,503.00  | 90,02,387.00   | 16,46,25,790.00 |                |
| 5   | PEC/NET/09/2011-12 | 08-01-2012    |                                       | 24-07-2012                                   | 24-07-2012                               | 986                        | 1,00,000                   |      |             |          | 8,25,28,199.00   | 53,64,886.00   | 8,76,93,085.00  |                |
| 6   | PEC/NET/04/2011-13 | 12-07-2012    |                                       | 30-08-2013                                   | 30-08-2013                               | 789                        | 1,00,000                   |      |             |          | 11,91,15,416.00  | 74,54,886.00   | 12,65,74,301.00 |                |
| 7   | GENERAL A/C        | 28-08-2013    |                                       | 07-11-2013                                   | 07-11-2013                               | 367                        | BANK GUARANTEE             |      |             |          |                  |                |                 |                |
| 8   | GENERAL A/C        | 29-10-2013    |                                       |  |  | 298                        | 50,000                     |      |             | 50,000   |                  | (71,49,617.00) | (71,49,617.00)  |                |
|   |                    |               |                                       |  |  |                            |                            |      |             |          | 69,79,04,435.00  | 4,17,44,295.00 | 73,96,48,730.00 |                |

26. This Bench notes that the above table lists all the six contracts and lists dates from which financing is outstanding which for four of the contracts out of six is shown in the year 2011 itself. Now, even assuming that the first acknowledgement of some debt with regard to some settlement has been made by the Corporate Debtor for the first time on 15.09.2014, it is clear that by the own admission of the Petitioner at least three of the claims, i.e. PEC/NET/17/2010-11, PEC/NET/18/2010-11 and PEC/NET/05/ 2011-12 with the date of financing outstanding as 08.04.2011, 11.04.2011 and 26.05.2011 respectively stands time barred. It seems Petitioner is aware of this and, therefore, he has clubbed all the agreements in one Petition and put the claim u/s 7 of the Insolvency & Bankruptcy Code. The Bench will later on go into the issue of whether these agreements can be clubbed or not. However, for the present we would again revert back to the issue of whether the money advanced is a financial debt or is to complete obligations as an associate supplier of the main supplier under Foreign Contract.
27. This issue also becomes clear when the PEC i.e. Petitioner for the first time sends a communication to the Respondent on all these six relating


to outstanding payments relating all the six contracts. The letter dated 08.09.2014 is reproduced.

**EXHIBIT - F** 76

**पीईसी लिमिटेड**  
(भारत सरकार का उद्योग)  
"हंसालया", 15 बाराकम्बा रोड  
नई दिल्ली - 110 001



**PEC LTD.**  
(A Government of India Enterprise)  
"Hansalaya", 15 Barakhamba Road  
New Delhi - 110 001



Date: 08.09.2014

PEC/Agro Commodity/Iron ore/Phulchand/01/14-15

M/s. Phulchand Exports Pvt. Ltd  
Regd. Office: Nrihari House, 4<sup>th</sup> Floor,  
254-B, Dr. Amle Besant Road, Worli,  
Mumbai-400 030  
Tel No: + 91 22 4231 9900

Kind Attn: Mr Ram Mansulchani

Subject: Outstanding Payment due to PEC Ltd

Dear Sir,

This has reference to payments due to PEC Ltd against the following contracts/Agreements:

| Sl. No. | Agreement No. & date (Contract No. & date)   | Description of goods          | Due date (Latest Shipment date as per contract/addendums) | Outstanding dues as on 31.07.14 |
|---------|--|-------------------------------|---|---------------------------------|
| 1.      | Agreement No. PEL/PEC/NET/10/10-11 dated 03.11.10 (Export Contract No.PEC/NET/10/10-11 dated 02.11.10) | Iron Ore Fines(Fe 50/50)      | 31.12.2013  | Rs. 7,66,50,743/-               |
| 2.      | Agreement No. PEL/PEC/NET/17/10-11 dated 07.04.11 (Export Contract No.PEC/NET/17/10-11 dated 07.04.11) | Iron Ore Fines(Fe 50/50)      | 31.12.2013  | Rs. 13,67,09,136/-              |
| 3.      | Agreement No. PEL/PEC/NET/18/10-11 dated 07.04.11 (Export Contract No.PEC/NET/18/10-11 dated 07.04.11) | Iron Ore Fines(Fe 50/50)      | 31.12.2013  | Rs. 15,05,40,271/-              |
| 4.      | Agreement No. PEL/PEC/5/11-12 dated 25.05.11 (Export Contract No.PEC/NET/5/11-12 dated 25.05.11)       | Iron Ore soft lumpy(Fe 50/50) | 31.12.2013  | Rs. 16,28,01,797/-              |
| 5.      | Agreement No. PEL/PEC/9/11-12 dated 06.02.12 (Export Contract No.PEC/NET/9/11-12 dated 06.02.12)       | Iron Ore Fines(Fe 48/48)      | 31.12.2013  | Rs. 8,66,46,605/-               |
| 6.      | Agreement No. PEL/PEC/1/12-13 dated 16.07.12 (Export Contract No.PEC/NET/1/12-13 dated 12.07.12)       | Iron Ore Lumps(Fe 54/53)      | 31.12.2013  | Rs. 12,50,63,814/-              |

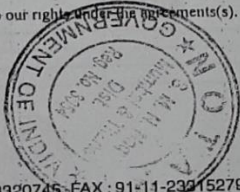
A sum of Rs.73,84,12,693/- which includes applicable interest up till 31-07-2014 as per above mentioned contracts is outstanding from the date of financing of respective contracts as stated above.

In view of the out of pocket situation being faced by PEC you are hereby advised to liquidate the liabilities without any further delay for which an unconditional and firm payment plan should be furnished to us not later than fifteen (15) days from date of this letter. The entire dues have to be cleared by next six months.

Failure to furnish an acceptable response would compel us to resort to legal remedies and/or punitive action for recovery of our dues.

This letter is being issued without prejudice to our rights under the agreements(s).

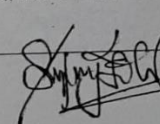

Thanking You



Yours faithfully  
For PEC LIMITED  
(Rajiv Chaturvedi)  
Chief General Manager.

फैक्स: 91-11-23315279, 23314797 & 23320745; FAX: 91-11-23315279, 23314797 & 23320745  
E-mail: pec@peclimited.com Web: www.peclimited.com

"यदि आप अपने पत्र हिन्दी में लिखेंगे तो उनका जवाब जल्दी ही जल्दी मिलेगा जितना अंग्रेजी में पत्र लिखने पर मिलता है।"

28. It is interesting to note that the due date for the outstanding payment has been mentioned as not the time when these amounts became due as reflected at Exhibit 'K' of the Petition but a due date when shipping was due as per the foreign contract i.e., 31.12.2013. Therefore, it again reinforces the fact that this advance has not been made for the time value of money but for procurement of iron ore and shipping it to the foreign buyer as per the foreign contract entered between the parties. This also clearly shows that it is an operational debt, an advance bearing a rate of interest to procure goods on behalf of the Petitioner to supply to the foreign buyer, where, the Petitioner is the 'Supplier', on a given shipment date i.e., 31.12.2013.
29. This fact that the complete agreement between the supplier i.e. PEC and associate supplier is for supply of iron ore by the PEC to the Networth Trading Pte Ltd is borne out by the foreign contract which in case of PEC-10-11-12 was entered between Networth Trading, 'Buyer', with PEC Limited, 'Seller', where the price at which the seller would be getting is also mentioned which is USD 43 per DMT FOB.
30. To substantiate the point further we would like to revisit the terms of the foreign contract which is "an integral part of the agreement". Being the integral part of the agreement, whatever is mentioned in the foreign contract will have to be abided by all the parties concerned i.e., the Petitioner (Supplier), the Associate Supplier (i.e., the Respondent) and the foreign buyer (i.e., Networth). The terms of the foreign contract reproduced once again below relating to *force majeure* clearly mentions that

if there is any military operation, civil commotion, including acts of Government then the date of fulfilment of any obligation shall be postponed.

*“CLAUSE 14. FORCE MAJURE – If at any time during the existence of this contract either party is unable to perform whole or in part any obligation under this contract, because of war, hostility, military operation of any character, civil commotion’s, sabotage quarantine restriction, acts of Government, acts of God, fire, floods, explosions, epidemics, strikes or other labor trouble, embargoes including all natural calamities ..... if the operation of such circumstances exceeds two months, either party will have right to refuse further performance of the Contract in which case neither party shall have right to claim eventual damage”.*

31. It is clear from the above clause, in the Foreign Contract, which is an integral part of the contract signed between the Associate Supplier and the main supplier, that the said contract specifically deals with *force majeure* event which mentions that if there is any military operation, civil commotion including acts of government then the date of fulfilment of any obligation will be postponed. It is the case of the Corporate Debtor/ Respondent (Associate Supplier) that he was not able to procure iron ore and ship them on the due dates because of Government having imposed a ban on supply of export of iron ore and confiscating goods lying at Goa ports. The Associate Supplier, i.e., the Respondent was not able to supply the goods to the foreign buyer i.e. Networth Trading Pte Ltd as an agent of the Supplier i.e. PEC because of the ban on the iron ore mining in Goa and confiscation of iron ore lying at Goa Port. It seems to the Bench

that the Petitioner being aware of all these related issue of the Foreign Contract which is an integral part of the agreement, therefore, did not upfront file the Foreign Contract as a part of the Petition. The Foreign Contract being integral part of the Agreement thoroughly dilutes its claim to be considered as a financial creditor. In view of all the above, the Bench is of the view that this particular Petition cannot be considered as a financial debt u/s 7 of IBC.

32. During course of hearing PEC has mentioned that in a similar matter relating to PEC Vs. Sree Ramkrishna Alloys, the Hon'ble NCLAT had held the claim against the Corporate Debtor as a financial debt. A perusal of the facts which were being agitated before the NCLAT in Appeal No.225/2017 PEC Vs. Sree Ramkrishna Alloys is totally different compared to the present case. In fact, before the NCLAT the contract with the third party was entered into by the Corporate Debtor i.e., Sree Ramakrishna Alloys and not PEC. In the matter before Hon'ble NCLAT the agreement between PEC with the Corporate Debtor was for a purely financial debt where it was not the obligation of the PEC to supply any goods to any third party whereas in the current agreement before this Bench, the reference to the Corporate Debtor is only as an "Associate Supplier" who is assisting the supplier i.e. PEC to supply goods to the foreign purchaser and the counter party to the foreign purchaser is PEC itself and not the Corporate Debtor. However, in case of the judgment being referred to of Hon'ble NCLAT, the counter party to the domestic purchaser was not PEC but the Corporate Debtor itself. Therefore, it would be highly erroneous to suggest that any

financing by PEC Ltd would be in the nature of financial debt on the basis of Hon'ble NCLAT judgment. In the present case, an agreement has been entered between PEC and Phulchand Exports wherein PEC is the supplier and the Respondent is the 'Associate Supplier'. The Associate Supplier acts as an agent who would procure iron ore on behalf of the Supplier and act as a shipper and provider of logistics services to fulfil the foreign contract entered into by the Supplier with a foreign buyer. Therefore, in the first case, PEC Limited v. Sree Ramkrishna Alloys in Company Appeal (AT)(insolvency) 225/2017, the Hon'ble NCLAT had dealt the matter under a totally different set of agreement which was only for extending pure financial credit.

33. The Bench notes that in the letter of 08.09.2014 from the Petitioner to the Respondent which is at Exhibit 'F' of the Petition, against each of the agreement the due date is mentioned which in all the six contracts relates to the shipment date which is in all these cases 31.12.2013. It can be safely construed from this that all these Agreement contract relates to supply of goods and, therefore, the due date of payment is the date of shipment even though the financing amount is outstanding in all the cases from an earlier date. The Bench therefore has no doubt in its mind that the reason for there not being a date of default is because it was never a financial debt but an advance given to the associate supplier to supply goods on behalf of the seller i.e. PEC to the foreign buyer and therefore the due date is due date of shipment of the iron ore and not the date on which the payment of the advance became due. In view of this, the Bench

is of the considered view that in the present case the transaction of the Respondent, i.e., M/s. Phulchand Exports Pvt. Ltd with the Petitioner PEC Ltd is regarding advancing money by PEC for procurement and supply of goods/ materials for PEC which PEC Ltd can export to its own foreign buyer. For this reason also this transaction, therefore, does not qualify as a loan under Section 7 of the IBC, 2016.

34. We note that the Petitioner has relied upon six different contracts which have been signed on six different dates.

| Sr No | Reference No     | Date of Contract               |
|-------|------------------|--------------------------------|
| 1.    | PEC/NET/10/10-11 | 2 <sup>nd</sup> November, 2011 |
| 2.    | PEC/NET/17/10-11 | 7 <sup>th</sup> April, 2011    |
| 3.    | PEC/NET/18/10-11 | 7 <sup>th</sup> April, 2011    |
| 4.    | PEC/NET/5/11-12  | 25 <sup>th</sup> May, 2011     |
| 5.    | PEC/NET/9/11-12  | 6 <sup>th</sup> February, 2012 |
| 6.    | PEC/NET/1/12-13  | 12 <sup>th</sup> July, 2012    |

It is clear to this Bench that all the six contracts cannot be clubbed together as part of a single transaction. In fact, the six contracts cannot be considered as a single transaction. In this regard, the Respondent has referred to Order passed by Hon'ble NCLAT in the matter of International Road Dynamics South Asia Pvt Ltd Vs. Reliance Infrastructure Ltd [Company Appeal (AT) (Insolvency) 77 of 2017] wherein the Hon'ble Tribunal had categorically held that “*we are of the view that different claims arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action being separate*”. The Bench, therefore, finds that in the present case also clubbing all the six Agreements as part of a single Petition

with different quantity of iron ore supply, different amount of payment and different dates of defaults cannot be clubbed together. The single Petition clubbing all the six agreements in its present form is, therefore, not maintainable.

35. The Bench notes that the Petitioner has not mentioned any date of default in its Petition. However, it is the onus of the Petitioner to state the date of default and whether limitation is attracted or not. The Petition is silent and in no manner justifies as to how the present Petition has been filed within the period of limitation. In fact, on this issue the Bench went into detail in the documents which have been produced by the Petitioner in the Petition. This Bench notes that there is no due date of payment. However, at Exhibit 'A' a table has been filed by the Petitioner under the heading 'Summary of pending contracts, as on 31.08.2014' where the Petitioner has enumerated all the six contracts. The sheet is reproduced below.

| SUMMARY OF PENDING CONTRACTS |                              |                                       |               |  | CONTRACT QTY DETAILS (WMT) |                |      |             | POSITION OF PENDING CONTRACTS AS ON 31.08.14 |                  |                 |                |                 |
|------------------------------|------------------------------|---------------------------------------|---------------|--|----------------------------|----------------|------|-------------|--|------------------|-----------------|----------------|-----------------|
| 31 September 2014            |                              |                                       |               |  |                            |                |      |             |  |                  |                 |                |                 |
| S. NO.                       | CONTRACT DATE                | CONTRACT FROM WHICH IT IS TRANSFERRED | CONTRACT DATE | DATE FROM WHICH FINANCING IS OUTSTANDING | CUMULATIVE DAYS TILL TODAY | CONTRACTED QTY | BE   | SHIPPED QTY | REALISED                                     | BALANCE (approx) | FINANCING       | INTEREST       | TOTAL O/S       |
| 0.                           | PENDING CONTRACTS            |                                       |               | 25-12-2011                               | 980                        |                |      |             |  | 53,750           | 7,32,71,040.00  | 42,38,479.00   | 7,75,09,519.00  |
| 1.                           | PEC/NET/20/2010-11           |                                       |               | 08-04-2011                               | 1242                       | 1,00,000       | 1111 | 44,250      | 44,250                                       | 93,000           | 13,06,81,614.00 | 75,59,484.00   | 13,82,41,098.00 |
| 2.                           | PEC/NET/17/2010-11           |                                       |               | 11-04-2011                               | 1239                       | 1,00,000       |      |             |  | 1,00,000         | 14,39,02,611.00 | 83,24,274.00   | 15,22,26,885.00 |
| 3.                           | PEC/NET/18/2010-11           |                                       |               | 25-05-2011                               | 1194                       | 1,00,000       |      |             |  | 1,00,000         | 15,56,23,503.00 | 90,02,287.00   | 16,46,25,790.00 |
| 4.                           | PEC/NET/05/2011-12           |                                       |               | 08-02-2012                               | 936                        | 1,00,000       |      |             |  | 1,00,000         | 8,25,28,199.00  | 51,64,896.00   | 8,76,93,085.00  |
| 5.                           | PEC/NET/09/2011-12           |                                       |               | 24-07-2012                               | 769                        | 1,00,000       |      |             |  | 1,00,000         | 11,91,19,416.00 | 74,54,885.00   | 12,65,74,301.00 |
| 6.                           | PEC/NET/01/2012-13           |                                       |               | 30-08-2013                               | 367                        | BANK GUARANTEE |      |             |  | 0                | (72,341.00)     |                | (72,341.00)     |
| 7.                           | GENERAL A/C FROM/PEC/1420/13 |                                       |               | 07-11-2013                               | 298                        | 50,000         |      |             |  | 50,000           | (71,49,617.00)  |                | (71,49,617.00)  |
| 8.                           | 14                           | 29-10-2013                            |               |  |                            |                |      |             |  |                  | 69,79,04,435.00 | 4,17,44,295.00 | 73,96,48,730.00 |

36. Col.3 of the table relates to contract date whereas the dates from which finance is outstanding has been given at Col.6. It can be construed from this that even though the Petitioner has not

mentioned the date of default, however, the date on which the finances stood outstanding can be treated as a date of default. The Petitioner in this Petition has mentioned that on 15.09.2014, the first letter was sent by the Respondent acknowledging its liabilities. Even though the Respondent mentions that they had concurrently several contracts with the Petitioner and therefore it is not a specific acknowledgement or settlement letter. However, be that it may, let us accept the contention of the Petitioner that letter dated 15.09.2014 is an acknowledgement of debt, even then three out of six contracts PC/NET/17/2010-11, PC NET 18/2010-11 and PC NET 05/2011 becomes time barred as in all these three contracts, date from which finances outstanding has been mentioned as 08.4.2011, 11.4.2011 and 26.5.2011 respectively. Now the first purported acknowledgement being 15.4.2014 makes all these three contracts barred by limitation. Therefore, clubbing all the six agreements in the Petition, where three of them are clearly time barred also makes the Bench not to consider the Petition maintainable in its present form.

37. The Bench, therefore, does not find the Petition worthy of “Admission” on two counts namely, (i) The Petitioner has clubbed six agreements each with different amounts and different date of default into one Petition with cause of action being different and also at least three of the Agreements being time barred; (ii) The Petition has been filed under Section 7 of Insolvency & Bankruptcy Code, 2016. However, the debt claimed do not qualify as ‘Financial Debt’. In view of this the Petition u/s 7 filed as a ‘Financial Debt’ is not maintainable and is “dismissed”.

38. CP(IB)-63/MB/2020 stands “**Dismissed**” on the above terms.

Sd/-

CHANDRA BHAN SINGH  
Member (Technical)

Sd/-

H V SUBBA RAO  
Member (Judicial)