

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

I.A. No. 494 of 2019

IN

C.P.(I.B)No.-1071/KB/2019

In the matter of:

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, Rule 11 of the National Company Law Tribunal Rules, 2016 and other applicable provisions of law.

In the matter of:

Mcleod Russel India Limited,
Having its registered office at:-
4, Mangoe Lane,
Surendra Mohan Ghosh Sarani Hare Street,
Kolkata-700001

...Corporate Debtor

In the matter of:

Gloster Limited,
Having its Registered office at:-
21, Strand Road Kokata-700001

...Applicant

Versus

1. Mcleod Russel India Limited

2. Techno Electric & Engineering Company Limited

...Respondents



Coram:

MR. P.S.N. PRASAD
Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ
Hon'ble Member (Technical)

For Applicant : Mr. Abhijeet Sinha, Mr. Goutham Shivashankar,
Advocates. Ms. Nitu Poddar and Mr. Bunny
Sehgal, PCSs.

For Corporate Debtor : Ms. Eshna Kumar, Advocate.

For Financial Creditor : Mr. Suresh Mongia, Mr. Kumar Anurag Singh, Mr.
Masoom Shah, Mr. Udit Gupta, Advocates.

Order Delivered on: 19.03.2021



ORDER

PER DR. V.K.SUBBURAJ, MEMBER (T)

1. This is an application under section 60(5) of the IBC, 2016, read with Rule 11 of the NCLT Rules 2016 and other applicable provisions of law in which the applicant has contended as follows:

- i. The Applicant herein is a financial creditor which had extended an inter-corporate loan (“ICD”) of Rs. 20 crore to the Respondent No.1 in August, 2018 with a condition for repayment within 32 days. However, on request of the Respondent No.1, the tenure of the said ICD was extended from time to time for further 03 months each, last extension being made on June 30th, 2019. Upon each extension request, the Respondent No.1 assured the Applicant of repayment of principal amount along with interest, however failed to service the commitments each time. In September, 2019, wary of the constant failing of commitments by the Respondent No. 1, the Applicant decided not to renew the ICDE anymore and informed the Respondent No.1 of encashing the PDCs. However, on presentation of the cheque, the same was dishonoured with remarks “exceeds arrangement”.



Accordingly, the Applicant initiated action u/s 138 of Negotiable Instruments Act, 1881.

ii. Further on taking legal consultancy on the matter, the Applicant herein was made aware about the CP (IB) No. 1071/KB/2019 wherein Respondent No.2 has filed application u/s 7 of IBC with NCLT Kolkata Bench. On further investigation, and particularly by examining the documents pertaining to charge created by on Seajuli Developers and Finance Limited in favour of Techno, it is found that the financial facility to McLeod was given by some company by the name of Techno Electric & Engineering Company Limited bearing CIN-U40108UP2005PLC094368. However, it is also apparent from the website of the Registrar of Companies that a company by that CIN No. is no longer in existence. Also, it is clearly visible that there is a collusion between the said Seajuli and Techno, since the person who has been authorized by Seajuli to execute the charge documents is the son of the directors of the lender company. It is, thus, quite obvious that a substantial security interest was created by Seajuli to secure a financial facility obtained by the McLeod, merely as a preferential transaction, to give undue preference to Techno to the exclusion of other lenders and creditors of McLeod. Section 43 of the Code



provides that preferential transfers are voidable transactions, and it will defeat the whole purpose of the Code, if a preferential transfer, which is completely voidable under Section 43 becomes the basis of initiation of insolvency proceedings. It is apparent that a person who is beneficiary under a preferential transfer is a party acting hands-in-glove with the lender, and therefore, Techno and Mclead are acting in collusion.

iii. On making further inquiries, from the records available with the Ministry of Corporate Affairs, the Applicant came to know that one of the alleged group companies of Mcleod viz Seajuli Developers and Finance Limited (hereinafter referred to as “Seajuli”) has mortgaged its property in favour of Techno in respect of the loan granted by Techno to Mcleod. There are several lapses on granting of the said secured loan which are evident from the documents filed by Seajuli in e-form CHG-I with the MCA.

a. On examining the documents pertaining to charge created by one Seajuli Developers and Finance Limited in favour of Techno it is found that the financial facility to Mcleod was given by some company by the name of Techno Electric & Engineering Company Limited



bearing CIN - U40108UP2005PLC094368. However, it is also apparent from the website of the Registrar of Companies that no such company by that CIN No. is in existence. Copy of screenshot of MCA is attached and marked as Annexure-J&K.

- b. That the application initiated by Techno is malafide and collusive is proven on perusal of the board resolution dated September 27, 2018, of Seaujli wherein the agenda of providing security against loan is discussed and resolution is passed. It can be seen that the one Mr. Ankit Sariya, who was the then director of Techno (lender) has been authorised on behalf of Seajuli to inter alia negotiate terms, execute mortgage documents. It is surprising to see that a director of the lender, being the opposite party, has been authorised by the security provider to negotiate and finalise the terms and agreement of the mortgage.
- c. As per the Loan Agreement executed between Mcleod and Techno, it has been represented that Seajuli is a promoter and shareholder of Mcleod. However, on perusal of the promoter and promoter group list, as



available from the website of the stock exchange, Seajuli is not the promoter of Mcleod.

- iv. It is to be noted that, as per the records available on the MCA, there are two companies with identical name viz. TECHNO ELECTRIC & ENGINEERING COMPANY LIMITED having CIN -L40108UP2005PLC094304 and TECHNO ELECTRIC & ENGG CO LTD having CIN L45309WB1963PLC025898. The status of both the companies shows “amalgamated” as on date. In any case, as per the e-Form CHG-1 the charge was created in favour of a third company with same name but different CIN being U40108UP2005PLC094368, data of which is not available on the MCA site. On further introspection, it is found that there is a fourth company with almost the same CING as the third one but listed L40108UP2005PLC094368. However, this fourth company was not the lender company. In such case the fourth company, only existing company with such name, has no locus standi to initiate the section 7 application. A copy of the screenshot of MCA showing three companies in the name of Techno Electric, the master data of first two companies showing “amalgamated”, the screenshot of no data available of the third

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company, master data of the fourth company is attached herewith and marked as J&K.

- v. It is clearly visible that there is a collusion between the said Seajuli and Techno, since the person who has been authorized by Seajuli to execute the charge documents is the son of the directors of the lender company. It is, thus, quite obvious that a substantial security interest was created by Seajuli to secure a financial facility obtained by the Mcleod, merely as a preferential transaction, to give undue preference to Techno to the exclusion of other lender and creditors of Mcleod. Section 43 of the Code provides that preferential transfers are voidable transactions, and it will defeat the whole purpose of the Code, if a preferential transfer, which is completely voidable under Section 43 becomes the basis of initiation of insolvency proceedings. It is apparent that a person who is beneficiary under preferential transfer is a party acting hands-in-glove with the lender, and therefore, Techno and Mcleod are acting in collusion.
- vi. In view of the facts stated herein, CP (13) No.1071/KB/2019 be declared as malafide, and a clear case of collusion between the Techno and Mcleod, and therefore, is an abuse of the process of

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insolvency under the Code as per section 65 of the IBC, 2016,
and therefore, be dismissed.

2. Consequent to the notice issued by this Tribunal to the Financial Creditor a response has been filed by him in which he has contended as follows:

- i. I say that the applicant who claims to be a creditor of the corporate debtor is a friendly creditor who has been set up to delay the hearing of main section 7 application. I say that if the applicant claims itself to be a creditor of the corporate debtor, the applicant ought to have taken steps in accordance with law for realizing its claim and/or debts which according to the applicant is payable by the corporate debtor. However, it appears from the stand taken by the applicant that the applicant has not taken any steps for recovery of its alleged dues from the corporate debtor.
- ii. I say that the corporate debtor and the applicant are acting in collusion and conspiracy with each other and both are acting hand in glove to mislead the Hon'ble Adjudicating Authority and to defeat the bona fide claim of the financial creditor/respondent no.2.
- iii. I say that Mr. Ankit Saraiya who is the authorized representative of the financial creditor was mentioned in the board resolution of Seajuli dated September 27,2018 along with Mr. Aditya Khaitan of the corporate debtor because such joint authorization was given to one of



the officer of the corporate debtor and the financial creditor for the execution of the Deed of Mortgage and its registration before the ARA only to ensure that in the event the corporate debtor or Seajuli is unable to take any step or refuse to take steps for registration of the mortgage deed before the ARA then the interest of the financial creditor will still remain protected because one of the officers of the financial creditor will then be authorized to take steps for registration of the Deed of Mortgage before the ARA on behalf of Seajuli. This was a safety measure which was inserted in the board resolution on September 27, 2018 to protect the interest of the financial creditor/ respondent no.2. However, the board resolution of September 27, 2018 was not acted upon or given effect to because ultimately and equitable mortgage was created by deposit of title deeds by Seajuli on behalf of the corporate debtor which does not require registration and hence reference on the part of the applicant to the board resolution of Seajuli dated September 27, 2018 is not at all relevant. From the shareholding pattern of the corporate debtor as downloaded from the Stock Exchange, it will appear that one Bishnauth Investments Limited (BIL) is the promoter of the corporate debtor whereas Seajuli (Seajuli Developers & Finance Ltd.) is a wholly owned subsidiary of BIL. Hence, Seajuli and the corporate debtor are the sister concern



and group companies which are controlled and managed by Aditya Khaitan (son of late Brij Mohan Khaitan).

- iv. It is denied and disputed that any security interest was created by Seajuli as a preferential transaction or to give undue preference to the financial creditor to the exclusion of other lenders and creditors of the corporate debtor.
- v. Similarly, from the financial statements of the applicant for the financial year 2018-19, it does not appear that the applicant had given any ICD loan to the corporate debtor. Even if it is assumed, there is a loan transaction between the applicant and the corporate debtor, still such loan transaction cannot disrupt the independent section 7 application filed by the financial creditor against the corporate debtor. There is no provision in law whereby one creditor can obstruct the legal action initiated by another creditor who has taken steps for protecting its interest and/or for recovery of its dues.

3. The Corporate Debtor (Respondent No.2) has also filed a reply in which he has contended as follows:-

- i. The allegations of collusion do not pass muster of the test laid down under section 65 of the code as no fraudulent/malicious intent on the ground of collusion can be made out.



- ii. The Non-Applicant 2 has sought enforcement of security by initiating a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996, before the Kolkata High Court seeking appointment of receiver over secured properties. Non-Applicant 2 has successfully received an interim relief in the form of an injunction (which in turn is a step towards enforcement of security), which is sufficient in order to discharge the alleged amount claimed by the Non-Applicant 2. Thus, the present proceeding cannot be initiated (See Annexure A12, Section 7 application, page 149-153). Further, in the presence of an arbitration clause in the loan agreement (See Clause 25, Annexure N of IA 494, pages 82,83) all disputes relating to the transaction, including the one raised in IA 494, are subject matter of an arbitration.
- iii. Additionally, the Non-Applicant 2 cannot be allowed to unjustly enrich itself at the cost of pushing the Non-Applicant 1 into the rigours of corporate insolvency resolution process. Initiation of the corporate insolvency resolution process at the behest of the Non-Applicant 2, whose contractual obligation is to realize the value of its security having least stake in the Non-Applicant 1's growth, rejuvenation, revival would defeat the object of the Code. As a matter of fact, the intention is to coerce out money and such intention of



Non-Applicant 2 also pushes it out of the meaning of 'financial creditor' under the Code.

iv. He has also denied that both the financial creditor and the corporate debtor are related parties within the meaning of Section 5(24) of the Code.

4. Heard the arguments advanced by the applicant and the respondents (Financial Creditor and Corporate Debtor in the main petition) and perused the documents submitted by all the parties.

The main issue to be decided in this issue is whether there is any collusion between the financial creditor and the corporate debtor as contended by the Applicant. The Applicant has relied on 03 issues as follows:-

i. The fact that the Corporate Debtor has authorised both Shri Aditya Khaitan and Shri Ankit Sariya, as their Authorised Representations and it is contended by the Applicant that Shri Ankit Sariya has signed the documents on behalf of the Financial Creditor. He has questioned the motive of the Corporate Debtor in authorizing a person of the Lender Company which leads to the complaint of collusion.

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- ii. The CIN No. of the Techno Electric and Engineering Company Limited, as mentioned in the charge- related documents filed by the said Seajuli Developers and Finance Limited does not exist in the Records of the Registrar of Companies and as such it has no locus standi to initiate the Section 7 application.
 - iii. The security interest created by M/s Seajuli with the Lender Company is a preferential transaction.
5. The response filed by the Respondent Corporate Debtor as well as the Financial Creditor clearly explain the circumstances leading to the authorization given to two officials by the Board of the Corporate Debtor to deal with the matter keeping the financial interest of the Financial Creditor and it doesn't hamper the proceedings and doesn't lead to the conclusion that there is collusion between the Financial Creditor and Corporate Debtor.
6. Similarly the reply filed by the Financial Creditor clearly explain the circumstances of the filing of this petition under the name Techno Electric and Engineering Company with CIN No. L51109WB1998PLC087076 due to various arrangements made by the company due to mergers etc. over a period of time.



7. The Applicant has not provided sufficient material evidence to establish the fact that the security interest created by M/s Seaujli Builders amounts to preferential financial transaction.

In view of the above reasons the present IA is dismissed.



(Dr. V.K. SUBBURAJ)
MEMBER (TECHNICAL)



(P.S.N. PRASAD)
MEMBER (JUDICIAL)

Deepak