

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 1621/IBC/MB/2019

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

Suraksha Asset Reconstruction

Private Limited

Having registered office at: 20th Floor,
“A” wing, Naman Midtown, Senapati
Bapat Marg, Prabhadevi Road
(Elphinstone Road), Mumbai-400013

.....Financial Creditor

Vs

**Mack Star Marketing Private
Limited**

(CIN: U51228MH2002PTC136649)
Registered office at: 1102, 11TH Floor,
Tower B, Peninsula Business Park, S.
B. Road, Lower Parel, Mumbai-
400013

.....Corporate Debtor

Order delivered on 20.09.2021

Coram:

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

For the Applicant: Mr. V R Dhond a/w Ms. Vinodini Srinivasan

For the Respondent: Ms. Tine Abraham

Per: Shri. Chandra Bhan Singh, Member

ORDER

1. This Company Petition is filed by M/s Suraksha Asset Reconstruction Private Limited, acting in its capacity as trustee of Suraksha ARC-016 Trust (hereinafter called “Financial Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against M/s Mack Star Marketing Private Limited (hereinafter called “Corporate Debtor”) alleging that the Corporate Debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present Petition is preferred under section 7 of the Insolvency and Bankruptcy Code, 2016. The genesis of the debts are Six loan transactions (Term Loans I to VI) that came to be executed between the Corporate Debtor and Yes Bank Limited (YBL). Out of the six term loans, Term Loans I & II were re-paid and therefore, the present Petition is not concerned with them. There were defaults in the repayment of the remaining four loans (Term Loans III to VI). These were assigned by the lender, i.e. Yes Bank Ltd (YBL) to the present Financial Creditor by an Assignment Agreement dated 29th September, 2017.
3. The details of these Four Term Loans are as follows:
 - I. Term Loan III was for a sum of Rs. 7,60,00,000/- and was disbursed on 12.11.2012.
 - II. Term Loan IV was for a sum of Rs. 40,00,00,000/- and was disbursed in 5 tranches on 29.03.2014, 30.04.2014, 29.05.2014, 28.06.2014 and 26.07.2014.

- III. Term Loan V was for a sum of Rs. 40,00,00,000/- and was disbursed on 29.09.2015.
- IV. Term Loan VI was for a sum of Rs. 60,00,00,000/- and was disbursed in 6 tranches on 07.01.2016, 29.01.2016, 26.02.2016, 23.03.2016, 26.04.2014 and 25.05.2016.
4. The Principal Amount due as of 15.03.2019 under these Four Term Loans comes to about Rs. 133,48,70,378/- and the interest thereon as of 15.03.2019 is Rs. 26,18,96,795/-. The Total Due as on 15.03.2019 is Rs. 159,67,40,173/-.
5. The fact that these loans are owed to the Financial Creditor is self-evident from the records maintained by the credit agency, CIBIL. The records reveals an outstanding balance for each Term Loan. These records clearly and unambiguously show that there has been a default by the present Corporate Debtor. In any case, the Reply of the Corporate Debtor does not dispute the factum of default.

Brief submissions of the corporate debtor as follows:

1. The Corporate Debtor denies that there is any valid financial debt in respect of these, what it calls as bogus term loans, and, therefore, submits that there can't be any financial default in respect of these sham credit facilities. The Corporate Debtor further disputes the amount claimed as the alleged financial debt and submits that the calculations presented in the Petition are erroneous.
2. The captioned insolvency application relates to four terms loans. The Corporate Debtor in its submission mentions the following:
 - a) Loans were not only fraudulently sanctioned in the CD's name by Yes Bank Limited (YBL) in conspiracy with certain individuals affiliated with the HDIL group in

spite of the fact that YBL was fully aware that the said individuals were not authorized to incur any financial debt on behalf of the CD but were also disbursed by YBL after notified in writing that these individuals were not authorized to avail any loans on behalf of the CD;

- b) Diverted from CD's YBL bank account by YBL officials to YBL bank accounts of HDIL group companies; and
 - c) Immediately debited by YBL officials from YBL bank accounts of these HDIL group companies towards repayment of unrelated loan facilities that had been extended by YBL to these HDIL group companies (and which were on the verge of turning into NPAs) so that YBL would be able to avoid complying with the RBI's capital provisioning requirements relating to NPA loan accounts (thus, making YBL the prime beneficiary of this fraudulent scheme).
3. YBL subsequently, "assigned" the Term Loans to the Applicant (SARL) whereby YBL retained all of the economic interest in the loans. The Corporate Debtor mentions that YBL knowing that if it were to initiate proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC), it would have to answer several inconvenient questions as to its illegal actions in collusion with the HDIL promoters (Wadhawan), has consciously chosen to precipitate matters through SARL. On 5 March 2019, a criminal complaint regarding the fraud perpetrated on the CD pursuant to these loans was filed with the Economic Offences Wing, Mumbai Police (EOW). Although, these loans had been in "default" since 2017, on 20 March 2019—barely two weeks after the criminal complaint was lodged—SARL issued a demand notice under the IBC to the CD. The Corporate Debtor mentions that the present proceedings are

a desperate attempt to: (a) wrest the control of the CD from its management and vest the control of the CD in a resolution professional chosen by YBL and SARL; and (b) thwart the ongoing attempts by the CD's management to affix civil and criminal liability on YBL and SARL for fraud, dishonest misappropriation, and other wrongful acts.

FINDINGS

4. The Financial Creditor is M/s Suraksha Asset Reconstruction Private Limited to which Yes Bank Limited (YBL) has assigned the loan vide Assignment Agreement dated 29.09.2017.
5. This Petition has been preferred under section 7 for four term loans amounting to total Rs.159,67,40,173/- along with interest as on 15.03.2019. The date of default as per the Petition is 13th July 2017. The Bench notes that existence of Financial Debt is admitted by the Corporate Debtor and these term loans are adequately reflected in the balance sheet of the Corporate Debtor for the year 2015-2016 and 2016-2017 as has been annexed in the rejoinder submitted by the Petitioner. The Financial Creditor has also produced the Bank statements before the Bench that clearly reflects disbursement of the money.
6. Though admitting the debt, the Corporate Debtor has advanced the following arguments:
 - a) That the loan is sham and that the promoters/shareholders (Wadhawan) of the Corporate Debtor have defrauded one of the shareholders of the Company i.e. Ocean Deity Investment Holdings Limited (PCC).
 - b) The Corporate Debtor mentioned that the loan amount disbursed to them were allegedly Siphoned Off to

various HDIL entities and was used to repay the loans by these entities to Yes Bank Limited.

7. The bench notes that the Corporate Debtor is a body Corporate and has independent identity distinct from the shareholders. The Bench also notes that the Corporate Debtor had borrowed the money and it must be repaid. Since the Corporate Debtor had borrowed the money, it cannot take a plea of intra shareholders dispute or allegation of internal wrong doings by the constituent shareholders as a reason for not meeting its repayment obligation.
8. Further, the alleged misuse on unauthorised use of the term loans by the constitutes of the Corporate Debtor does not in any way negate the existence of Financial Debt and the right of the Financial Creditor to recover the loans even assuming that the Corporate Debtor had diverted the money and misused the term loans. It does not discharge the Corporate Debtor of it is indebtedness in respect of loans and does not absolve the Corporate Debtor from repaying the same.
9. In any case, the term loans have been reflected in the balance sheet of the Corporate Debtor and is reflected in the CIBIL Report. The facts of the case clearly and unbiasedly shows that there is a Financial Debt in terms of section 5(8) of IBC, 2016 and there is default in terms of section 3(12) of the IBC, 2016 by the present Corporate Debtor.
10. In view of this the Bench admits this Petition to Initiate Corporate Insolvency Resolution Process against the Corporate Debtor by admitting the Petition under section 7 of the IBC.
11. Accordingly, the above Company Petition is admitted by passing the following:

- a. The above Company Petition No. (IB) 1621(MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Mack Star Marketing Private Limited.
- b. This Bench hereby appoints Mr. Saurabh Kumar Tikmani, Insolvency Resolution Professional, Registration No: IBBI/IPA-001/IP-P00559/2017-18/10989, email-saurabhtikmani@bsraffiliates.com as suggested by Financial Creditor in the Company Petition.
- c. The Financial Creditor shall deposit an amount of Rs.5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement 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 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. Accordingly, this Petition is admitted and the Registry is hereby directed to communicate this order to both the parties and to the IRP immediately.

I.A. 1740/2020

12. The Respondent in CP 1621/2019 in addition to filing a reply in the main Company Petition has also filed an Interim

Application no.1740/2020. This Interim Application has been filed under section 60(5) & 65(1) of the IBC 2016 against the Petitioner for filing the petition with fraudulent and malicious intent which as per the Applicant (Corporate Debtor) is unrelated to the Corporate Insolvency Resolution Process (CIRP).

The main contention of the Applicant in the I.A. 1740/2020 is that the term loans extended by the Petitioner (Yes Bank Limited) is vitiated with fraud and that Yes Bank Limited has perpetuated fraud on the Corporate Debtor. The submissions made in the Interim Application are similar to what has been made by the Corporate Debtor in its reply to the main CP 1621/2019.

The reasoned findings given by the Bench also deals with the points advanced by the Corporate Debtor in the Interim Application.

In view of this I.A. 1740/2020 in CP 1621/2019 is not allowed and stands dismissed.

13. Accordingly, CP 1621/2019 is allowed and I.A. 1740/2020 is dismissed.

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)