

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

KOCHI

IA(IBC)/207/KOB/2022

IN

CP(IB)/25/KOB/2021

(Under Section 50 of IBC, 2016)

In the matter of M/s. Tenny Jose Limited:

MEMO OF PARTIES:

PRATHAP PILLAI,

IBBI/IPA-003/ICAI-N-00371-2021-22/13822

Resolution Professional of M/s. Tenny Jose Limited,

BLRA 15, Bridge Lane, Medical College P.O.,

Trivandrum – 695 001.

...Applicant

-Versus-

TENNY JOSE

Villa No:29,

Noel fragranz, Shihab Thangal Road,

Vidya Nagar Colony, Thrikkakara,

Edapally, Ernakulam – 682 021.

... Respondent

-In-

In the Matter of:

Korea Trade Insurance Corporation,

...Operational Creditor

-Versus-

Tenny Jose Limited,

...Corporate Debtor

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For Applicants : Mr. Akhil Suresh, Advocate
Mr. Prathap Pillai, RP

For Respondent : Mr. Pradeep Joy, Advocate

Order reserved on: 11.11.2022
Order pronounced on: 25.01.2023

ORDER

1. This application has been filed under section 50 of IBC 2016 for Extortionate credit transaction and return of amount.

Brief facts of Petition

2. The Applicant /resolution professional filed this application. The CIRP order was passed against the corporate debtor Tenny Jose Limited, in the petition filed under section 9 of IBC 2016 by Korea Trade Insurance Corporation on 21.12.2021. Mr. Krishna Raj was appointed as interim resolution professional then, the applicant was appointed as resolution professional on 14.03.2022. After his appointment he started to function then with the approval of 4th committee of creditors meeting dated 21.06.2022 the applicant appointed M/s. Jackson Abraham Thekkekara, Chartered Accountant as forensic Auditor on 02.04.2022, the forensic Auditor submitted his report on 04.06.2022, the copy of the report was served on the erstwhile directors of the corporate debtor for their objections if any. From the said Audit report the applicant came to know that the respondents/suspended Board of Directors of the Corporate Debtor had

deliberately and *mala fidely* acted and made certain transactions with the sole intention to defraud the creditors of the Corporate Debtor.

3. The respondent indulged in Extortionate credit transactions. In the application the applicant set out that the respondent advanced unsecured loan with Nil rate of interest. As per the financial statements for the financial year 2016-2017 and 2017-2018 no interest percentage was declared however an interest amount of Rs.23.26 lakhs and 18.07 lakhs were paid in the respective years. This unsecured loan was extended at Nil rate of interest by the directors. No interest has been paid to the respondent on his unsecured loan for the financial year 2018-2019. Further an interest of Rs.12.39 lakhs was paid to the respondent for the financial year 2019-2020. Further interest of Rs.16.13 lakhs has been paid for the period 1st January 2020 to 30th November 2021. The interest is to be calculated on a yearly basis, not to be computed on net average of over five years period from 2016-2017 to 2021-2022. The act of the respondent comes under section 50 of IBC 2016 and this Tribunal shall pass an appropriate order in the interest of the corporate debtor.

Brief facts of the reply of Respondent

4. The application is time barred. The application is filed after 208 days of Insolvency commencement date. By virtue of Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution of corporate persons) Regulation 2016 the applicant should have formed an opinion within 75 days made determination within 105 days and ought to have filed the application within 135 days of Insolvency commencement date which is not complied with in this instant

case. The present application is merely an afterthought of the applicant. The applicant has no valid reason to file the application in delay. The companies borrowing and lending un secured transactions with respondent needs to be considered on a net basis in which case it falls below 12% interest rate. The concept of extortionate credit transactions is not even arising in the instant case. The interest paid to the respondent is within permissible levels. There is no finding by the applicant with respect to any exorbitant transaction. The corporate debtor during the review period borrowed from several NBFC which prescribed much higher rate of interest. The present application is to dismissed.

The Points for determination are: -

- 1) Whether the application is time barred?
- 2) Whether the applicant/RP has not filed the application on his own determination?
- 3) Whether the Respondent indulged in Extortionate credit Transaction? If yes whether the applicant is entitled for refund of amount?

Point No.1 and 2

5. The corporate debtor was ordered to CIRP on 21.12.2021. This application was filed on 15.07.2022. On the respondent side taken plea that since this application is not filed within the time limit prescribed under Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, is not maintainable. It is true that

as per Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, Resolution Professional has to form an opinion within 75 days from the date of CIRP, and made determination within 115 days and has to file an application within 135 days, from the date of commencement of CIRP. From the available materials it appears that after the initiation of CIRP on 21.12.2021, the Resolution Professional appointed Forensic Auditor on 02.04.2022. Forensic Auditor submitted his report on 23.09.2020, there after the Resolution Professional determined that the Respondents deliberately indulged in Extortionate credit transaction, then he filed this application on 9.11.2020, beyond 135 days from the date of initiation of CIRP.

6. On the application side argued that this application is maintainable even though it is filed after 135 days from the date of CIRP. The time line mentioned in Regulation 35-A of Insolvency Bankruptcy and (Insolvency Resolution Process for Corporate Persons) Regulation 2016 is directory in nature because no consequential effect is mentioned therein for non-compliance of time limit. This view is expressed and fortified in Madras High Court Judgment *Shahji Purushutom -vs- Union of India*, there it is observed that when there is no consequential result is prescribed it will consider as only a directory. In this regard on the applicant side relies upon the NCLAT-Delhi order passed in company Appeal (AT) Insolvency No.583 of 2021 order dated 06.04.2022, **Aditya Kumar Tibrewal Vs Om Prakash Pandey and Orsin** here the NCLAT clearly held that

the application filed by the resolution Professional relating Sections 43 and 45 read with Sections 66 and 60(5) of the Code is not to be rejected filed beyond the period of 135th days of Insolvency Commencement date only on the ground of non-compliance of Regulation 35A of CIRP Regulations, 2016, further held that the expression “shall” in regulations 35A(1),35A(2) and 35A(3) is not mandatory and requirement of “forming an opinion” under section 35A(1)” make a determination” under Section 35A(2) and “shall apply to the adjudication authority for appropriate relief on or before 135th day of the Insolvency Commencement date” are only directory. It is well settled proposition of law that one should not be allowed to take advantage of his own wrong. Thus, the applicant has vividly described the reason for maintenance of application. As per Section 5 of the Limitation Act, if the applicant satisfies the court that he had sufficient cause for not making the application within time, the delay to be condoned. The Apex Court held in Sesh Nath Singh and another -vs- Baidyabati Sheora phuli co-operative Bank Ltd. and another in Civil Appeal No. 9198 of 2019 order dated 22.03.2021 that delay can be condoned irrespective of whether there is any formal application or not if there are sufficient material on record disclosing sufficient cause for the delay. In this case also even though on the applicant side not filed any formal condone delay application but in the petition the delay is properly and satisfactorily explained.

7. The Division Bench of Delhi High court in **TATA STEEL BSL LIMITED Vs VENUS RECRUITERPRIVATE LIMITED & ORS, LPA 37/2021** dated 13.01.2023 at para 74 held as follows:

74. The first prong on which the Impugned Judgment holds that avoidance applications, in facts of the present case, are infructuous is because they have not been filed as per the prescribed timelines. However, it is our understanding that the timelines under Regulation 35A are directory and not mandatory in nature. This is because Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound by its own timelines. The same has been held by the Hon''ble Apex Court in Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, Neutral Citation Number: 2023/DHC/000257 LPA 37/2021 etc. Page 63 of 73 (2020) 8 SCC 531.

Thus, the catena of supra citations made clear that the Regulation 35A is only directory.

8. On the respondent side it is alleged that the Resolution Professional not acted independently, he had delegated his duty of forming an opinion,

determination of transaction to the forensic auditor and such delegation of duty is in contravention to the provisions of IBC. The mere acceptance of auditor's report does not amount to delegation of power of Resolution Professional. It is the exclusive domain of Resolution Professional either to accept the report of forensic auditor report or not. It does not mean that when Resolution Professional accepted the report of auditor, he delegated his duty to auditor. Here the Resolution Professional accepted the Forensic Auditor's report and determined on his own and filed this application. Thus, the contention of the respondents is unsustainable. In this scenario it is answered that the petition is not barred by limitation and Resolution Professional has filed this application on his own. Thus, these points are answered

Point No.3

9. On the applicant side stated that the respondent indulged in Extortionate transaction by withdrawing exorbitant interest at 26.50% for the loan given to the corporate debtor. On the applicant side further submitted that the respondent erstwhile managing director of the corporate debtor advanced unsecured loan, interest free loan to the corporate debtor in the year 2016-2017. No loan document is produced in this regard. On the respondent side admitted the fact that the loan was given to corporate debtor but stated that the said loan was not interest free loan. In the application itself applicant admitted that for the loan interests were paid for the financial years 2016-2017 and 2017-2018. The loan was extended for further period but no interest was drawn for the year 2018-2019, but interest was

drawn for the year 2019-2020 and 2020-2021. On the applicant side quoting non-drawl of interest for the financial year 2018-2019 pleaded that loan advanced to the corporate debtor by the respondent is interest free loan. In the absence of any loan document the contention of the applicant is not acceptable. Now the point is whether the interest drawn by the respondent for the financial year 2019-2020 Rs.12.39 Lakhs and interest from 1st January 2020 to 30th November 2020-2021 at Rs. 16.39 Lakhs are exorbitant and amounts to Extortionate transactions. Even though there is no mentioning of Principal loan amount lent to the corporate debtor, both sides admitted respondent withdrawn interest for the year 2019-2020 Rs.12.39 Lakhs and interest from 1st January 2020 to 30th November 2020-2021 at Rs. 16.39. According to the petitioner on calculation the interest drawn by the respondent comes at 26.50% interest which is exorbitant and usurious, taking advantage of his dominant position over the corporate debtor the respondent acted arbitrarily. The transactions within a period of two years preceding the date of commencement of insolvency alone comes under section 50 of IBC 2016. The date of commencement of CIRP in this case is 21.12.2021, the transaction taken after 21.12.2019 are to be considered.

10. On the respondent side not disputed the facts regarding the loan advanced, and receipt of interest. According to respondent if the interest is computed in net from the beginning it comes only 12% interest hence the transaction does attract section 50 IBC 2016. The normal trading practice should be adopted in computing interest; accordingly, interest should be computed on the

basis of rate of interest agreed annually. If the rate of interest is computed annually the amount received by the respondent comes under 26.50%, the said percentage of interest is abnormal and usurious. In the circumstances it is concluded that the receipt of 26.50% interest for loan is Extortionate transaction.

11. In this case from the forensic report annexure 3, (page 121 of petition) it is mentioned that on several occasions negative balance shown in the loan account received from the respondent, but interest not collected from the respondent for those periods. The respondent collected 26.50% interest, it is too high, when the applicant failed to prove that the loan advanced by the respondent is an interest free loan, then the respondent is entitled for reasonable interest for his loan. It is determined that 12% interest per annum is reasonable interest. In this situation an interest withdrawn by the respondent Rs.12,39,000+Rs.16,39,000=Rs.28,78,000/- represents 26.50% interest out of which after deducting Rs.13,03,245/- representing 12% interest for which the respondent is entitled, then require the respondent to repay the remaining amount Rs.15,74,755/- to the applicant as provided under Section 51(d) of IBC 2016.

12. In the result the respondent is directed to pay a sum of Rs.15,74,755/- (Fifteen Lakh Seventy-Four Thousand Seven Hundred and Fifty-Five Only) within a month from today, failing which the said amount will carry 12% simple interest per annum from the date of this order to till the date of realization of amount. Thus, the application is ordered. No cost.

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13. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

14. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.01.25 12:44:31 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN
MOHAN RAJ Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.01.25 13:03:17 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 25th day of January, 2023.

Supriya-P. s