IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-2359/(ND)/2019

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

SUNEDISON ENERGY (INDIA) PVT. LTD.
Registered office at:
1/171, Old Mahabalipuram Road,
Thiruporur Thirurporur, Chennai
Tamil Nadu- 603110

...Applicant

Versus

Sun Alternate Energy Pvt. Ltd.
Registered office at:
11, Ground Floor, Community Centre, Saket,
New Delhi- 110001

...Respondent

Coram:

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

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

Counsel for Applicant: Mr. Chetan Roy, Surendra Kumar, Shashank Shekhar, Kunal Tandon, Ms. Niti Jain and Ms. Richa Advocates
Counsel for Respondent: Mr. Mayank Mishra and Ms. Pallavi Kumar Advocates

ORDER

Per SHRI. P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 22.07.2020

1. This is an application filed by Sunedison Energy (India) Pvt. Ltd. to initiate corporate insolvency resolution process ("CIRP") against Sun Alternate Energy Pvt. Ltd. under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code") for the

alleged default on the part of the Respondent in settling an amount of Rs. 3,06,90,000/- (Three Crore Six Lakhs Ninety Thousand) paid to the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

a. The Respondent is a Subsidiary Company of "Khemka Aviation Pvt. Ltd." who approached the Applicant and sought financial assistance on behalf of the Respondent. The financial assistance was sought for the purpose of Unsecured Loan to Sun Clean Renewable Power Private Ltd. (a wholly owned company of the Respondent).

b. That the Respondent has entered into a power purchase agreement (PPA) with Gujarat Urja Vikas Nigam Limited, for developing Solar Power project of 25 MW at the Gujarat Solar Park at Charanka Village, District Patan in the State of Gujarat. Accordingly, a loan agreement dated 20.09.2011 was executed between the applicant and the respondent along with its parent holding company Khemka Aviation Pvt. Ltd. and its nominee Hooghly Holdings Pvt. Ltd. The applicant further submitted that the clause 2 of the agreement stipulated that the loan amount shall be disbursed in two tranches by the Applicant:

i. The first Tranche of the Loan for an amount equal to Rs. 56,90,000/- (Rupees Fifty Lakhs Ninety Thousand Only).

ii. The second Tranche of the Loan for an amount of Rs. 2,50,00,000/- (Rupees Two Crore Fifty Lac Only).

c. The applicant submitted that as per the clause 5 of the Loan agreement dated 20.09.2011, it was agreed between the parties that the Respondent shall repay the entire loan in full on the final maturity date i.e. the date falling 6 years from completion or one year after the expiry of the PPA lock in period, at a simple interest of 3% per annum, thus final maturity date as per the agreement is 22.09.2017.

d. The applicant further submitted that at the time of the execution of Loan agreement, two more agreement namely "Subscription Agreement" dated 20.09.2011 and "Frame work Agreement" dated 20.09.2011, were executed between the parties. Clause 2(a) of the subscription agreement specifically stated that: -

*"**Prior to the final maturity date,** and upon the expiry of the PPA lock in period, in discharge of the entire sunedison loan together with all outstanding interest, If any thereon, sun alternate board may, if permissible as per applicable law, issuer free of any encumbrances, such number of sun alternate shares to sunedison (Sunedison subscription shares) as may be determined by dividing only the principal amount of the loan viz. the sunedison loan (as defined under the sunedison loan agreement).....*

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions are made:

   i. That the Respondent Sun Alternate Energy Pvt. Ltd. is a company engaged in the business of developing solar power projects in India. The Respondent is a subsidiary of Khemka Aviation Pvt. Ltd. ("KAPL").

   ii. That in year 2010, a wholly owned subsidiary of the Respondent by the name of Sun Clean Renewable Power Pvt. Ltd. ("Sun Clean") agreed to carry out the establishment and operation of up to 25 MW capacity solar photovoltaic power generation plant situated in Gujarat under phase II of the Gujarat Solar Policy 2009. The respondent submits that the applicant agreed to be the technology supplier/ technological partner for the aforesaid purpose and joined the Sun Group in making an investment in the Respondent Company and the Respondent was to in turn invest in Sun Clean.

iii. The Respondent submits that on 14.08.2010 the applicant, the Respondent, KAPL and Hooghly Holdings Pvt. Ltd. ("HHPL") entered into a shareholder and share subscription agreement ("SHA") for investment in the Respondent. The Respondent further submitted that it was agreed that the applicant shall be technology supplier/ technical partner for the purpose of assisting the respondent in the technology supply, development, design, construction, marketing and administration of the project on day to day basis. That the applicant also agreed to provide earnest money deposit of Rs. 2.5 Crores which was to be submitted to the Gujarat Energy Development Agency.

iv. The Respondent submits that on 08.12.2010 Sun Clean entered into a power purchase agreement ("PPA") with Gujarat Urja Vikas Nigam Limited, for developing a solar Power Project of 25 MW at Gujarat solar park. That the applicant agreed to enter into a project management consultancy arrangement with the respondent and separately, invest into Sun Clean for the purpose of the project.

v. That one of the conditions of the PPA under clause 4.1(x) was that the Sun Clean shall ensure that its share holding pattern as submitted by them at the time of application for getting allocation of solar capacity, is not changed up to a period of 5 years from the date of commercial operation of the project. The said clause 4.1(x) of the PPA reads as under:

> *"Power producer shall ensure that promoters of applicant company to whom allocation of solar capacity is made (i.e. M/s Sun Clean Renewable*

Power Private Limited), shall not change the share holding pattern in the applicant company, submitted by them at the time of application for getting allocation of solar capacity up to a period of 5 years from the date of commercial operation of the project.... However, with prior approval of Government of Gujarat, power producer/ applicant Company/ its promoter may bring in Technical partners(s) who may contribute in the equity, provided the share holding pattern submitted at the time of application shall not go below 51%."

vi. That the parties were constrained to enter into new agreements in supersession of the SHA. Pending finalization of the new agreements, the applicant, the respondent, KAPL and HHPL entered into an interim arrangement dated 25.07.2011, whereby it was agreed that the applicant shall sell and transfer all its 42601 equity shares in the Respondent to KAPL at par. Recital 4 of the said interim arrangement reads as below:

"In the event the new agreement does not achieve such first closing/ completion, the equity shares transferred under this agreement will be transferred

back to SE and the SIHA will then continue to apply unchanged."

vii. That the amount paid by the applicant to the Respondent was an investment in the project and was not forwarded as debt.

viii. That the investment by the applicant by way of a under the Loan Agreement dated 20.09.2011 was pursuant to the Framework Agreement entered into by the parties on the same date. The framework agreement sets out the contours of the commercial understanding between the parties. The Respondent further submits that the investment by the applicant by way of a loan under the loan agreement dated 20.09.2011 was entered only with a view to comply with the restrictions in power purchase Agreement in respect of the project in which investment was made.

ix. The Respondent submits that the arrangement for debt vide Loan Agreement dated 20.09.2011 was only a *pro-tem* arrangement between the parties till conversion of the said loan to equity shares takes place and/or is permitted by the regulations. Respondent further submits that the amount of loan was not required to be repaid and remedy was contractually limited to conversion of outstanding amount to equity shares either by subscription or mandatory conversion.

x. The Respondent submitted that under the Loan Agreement dated 20.09.2011, the applicant granted an unsecured loan of Rs. 3,06,90,000 in two tranches. i) first tranche for an amount of Rs. 56,90,000 disbursed by the applicant to the Respondent directly and ii) second tranche for an amount of Rs. 2,50,00,000 which was originally disbursed to Sun Clean for the purpose of the Project and was then paid by Sun C lean to the Respondent, for and on behalf of the Applicant. it is submitted that the purpose of the Loan was investment by the Applicant as a stakeholder to the Project.

xi. That the loan agreement cannot be looked into isolation but must be read with the other transaction documents viz., the Framework Agreement and the Subscription

Agreement. The arrangement was that the applicant will invest by paying the money which remains as loan, earning an interest at rate of 3% p.a. till the final maturity date and thereafter the entire outstanding would be converted into equity shares. Whereas, in case of non-repayment, the only remedy agreed by the parties is conversion of debt into equity.

xii. The Respondent submits that they had already offered to convert the loan into equity shares in terms of transaction documents, and it hereby unequivocally undertakes to do so even as on date. Respondent further submits that the mandatory conversion has already taken place as per the transaction documents and only formal recognition of the same is outstanding.

3. Pursuant to the Respondent's reply, the applicant has filed its Rejoinder in which the following contentions were made:

i. That in order to dwell into the contractual relationship between the parties, it is most pertinent to mention that there were three documents executed between the parties, regarding the debt amount i.e. Framework Agreement, dated 20.09.2011, Subscription Agreement, dated 20.09.2011, and Loan Agreement dated 20.09.2011.

ii. Clause 20.4 of the Loan Agreement dated 20.09.2011, states *that the Right of the parties under the Loan Agreement dated 20.09.2011 are independent, cumulative and without prejudice to other rights accrued to the parties under the Law. Exercise or non- exercise of any such right shall not prejudice or constitute a waiver of any other right of the party, whether under this agreement or otherwise.* That, non-conversion of the due amount into the equity shares does not waive off the right of the petitioner to recover its loan amount under the law.

iii. That after expiry of the PPA Lock – in period and till the final maturity date i.e. 22.09.2017, clause 2(a) of the Sunedison Subscription Agreement dated 20.09.2011 permitted the Respondent to issue shares in the favor of the applicant, in discharge of the entire outstanding Loan.

iv. That the issue of shares was not mandatory, as the word used is 'may' and the provision of clause 2(a) is for a period between the expiry of the PPA and the final maturity date. This period has expired and therefore, the corporate debtor cannot now take recourse to a clause which has expired.

v. That the clause 2(b) of the Subscription Agreement is a successive step to clause 2(a). Clause 2(b) stipulated that if the equity shares cannot be issued for any reason as a successive step to clause 2(a), i.e. during the period between the expiry of the PPA Lock-in period and the final maturity date, then the debt of the petitioner would be automatically converted into the Respondent's Equity Shares within a period of 6 months of the final maturity date. The Applicant further submitted that the clause stipulated a complete procedure for the mandatory conversion which included passing of the Additional

Board Resolution, which was not followed by the Respondent, along with that right to convert was also not exercised by the Respondent.

vi. The Applicant submits that if the debt amount was not converted as per the provisions of the Subscription Agreement, the amount remaining with the Respondent must be returned and it is wrong to suggest that only remedy available to the applicant is limited to conversion.

4. The Respondent has filed the application under section 60(5)(c) of IBC to place on record additional documents which respondent states are necessary to substantiate the case of the Respondent. The additional documents placed on record are the E-mail communication between the parties from 30.08.2011 to 20.09.2011, to provide the context of the arrangement between the parties.

5. The Applicant has filed written submissions in which he has reiterated the certain points raised by him in the petition and they are as follows:

   i. That according to the Clause 1.1. of the Loan Agreement, the final maturity date is the date falling 6 years from the completion or one year after the expiry of the Lock-in period as per which, the final maturity date is 22.09.2017. the Loan amount along with the payable interest has not been repaid to the Applicant as on the date of the Application.

   ii. That the Loan amount is an admitted debt duly reflected in the books of accounts i.e. the profit and loss accounts and balance sheets of the Respondent for the years 2017-18 and 2018-19. The Balance Sheet for the year 2017-18 at point No.4 categorically records that the Respondent has taken a short term borrowing of an amount of Rs. 3,06,90,000/- along with interest @ 3% per annum payable during the financial year 2017-18. Further, the Balance sheet for the financial year 2018-19 at point No.

5.1 categorically records the fact of the execution of the transaction with the applicant and of the Unsecured Loan of Rs. 3,06,90,000/- along with outstanding accrued interest upto March 2019. The applicant submitted that the only difference in the two balance sheets is that in the balance sheet for the year 2018-19, added that the unsecured loan is mandatorily liable to be converted into equity shares and that this act has been done after issuance of the notice dated 29.01.2019, which implies that the same is an afterthought by the respondent.

iii. The applicant further submitted that the contention of the Respondent is more so an afterthought since it is Respondent's claim that the conversion had to take place mandatorily after 6 months from the final maturity date which would result in mandatory conversion to necessarily take place on or after 22.03.2018 but the Balance sheet as on 31.03.2018 does not record such afterthought and instead identifies the Loan Amount as a short term borrowing repayable as on 31.03.2018.

iv. That to establish the existence of financial debt the applicant has cited the order of Hon'ble National Company Law Appellate Tribunal, Delhi Bench in the case of ***Ravinder Pal Singh Lamba v. Satkar Air Crgo Services Pvt. Ltd. Co. Appeal (AT) (Insolvency) No. 592/2018*** as in the said order the Hon'ble Appellate Tribunal while admitting the application under section 7 of the code observed that the amount extended has been treated as a long term borrowing against the consideration for time value of money in the books of the Respondent Company and therefore the same is a financial debt and cannot be termed as an investment. Whereas in the present case the applicant submits that he had extended the loan amount to the Respondent for the time value of money in the form of interest payable at the rate of 3% p.a. and the same was recorded to be a short-term borrowing in the books of the Respondent.

v. The applicant has also placed reliance on the order passed by Hon'ble NCLAT, in ***Karan Goel v. M/s Pashupati Jewellers & Anr. Co. Appeal (AT) (INSOLVENCY) 1021/2019.***

vi. That the application filed by the Respondent under section 60(5) of the IBC for additional documents ought to be dismissed. The applicant placed reliance on the judgement of Hon'ble Supreme Court in ***Nabha Power Limited (NPL) V. Punjab State Power Corporation Limited (PSPCL) and Anr. (2018) 11 SCC 508,*** where the apex court held that a contract should be read as it reads, as per its express terms and that the express terms of contract are the final words of the party. The applicant further submitted that the prior email exchanges cannot be looked into for the purpose of understanding the commercial relationship between the parties and that the intention of the parties can only be gathered from the contractual arrangement between them.

6. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. The applicant has claimed the default on part of the Respondent for the Loan amount of Rs. 3,06,90,000/- (Three Crore Six Lakhs and Ninety Thousand) along with interest of 3% per annum payable during the financial year 2017-18.

7. From the perusal of the Loan Agreement executed between the applicant and the Respondent dated 20.09.2011. The Clause 5 and 6 stated that:

5.Repayment:
The borrower must repay the SunEdison Loan in full on the final maturity date.

6. *No Prepayment:*
Unless otherwise agreed jointly by KAPL, Sunedison and Sun Alternate in writing, the borrower shall not be required to repay nor shall prepay the Sunedison Loan prior to the final maturity date, nor will the lender be entitled to seek repayment of the same prior to the final maturity date. This condition will apply notwithstanding an event of default or breach under clause 13 for which the lender can only take recourse to equity conversion on the final maturity date as provided herein.

8. The clause 13 of the loan agreement dated 20.09.2011, categorically dealt with the events of default which stated that:

13. Events of Default

Each of the events or circumstances set out in this clause (other than sub clause 13.3 (conversion to equity is a default).

13.1. Non- payment

The borrower does not pay to the lender on the final maturity date, any amount payable by it under this agreement in the manner required in this agreement.

13.2. Breach of other obligations

The Borrower does not comply with any material term of this agreement which if capable of remedy, is not remedied within 30 business days of the lender giving notices of such failure.

13.3. Conversion to equity

The lender or any party shall, subject to applicable laws, have the right after a period of 6 months from the final maturity date, to require Sun Alternate to convert the whole or such part of the defaulted amounts of the lender into fully paid up equity shares of the borrower at a price to be agreed separately.

In case the concerned party has exercised all its rights deemed to be granted to it by other parties to give effect to conversion of such outstanding amount and the party concerned has been unable to have such outstanding amount converted solely due to any act or abstinence of the other party, the non-defaulting party shall have the option to claim damages suffered by it from the defaulting party and if Sun Edison is the non-defaulting party, the interest rate of the Sun Edison Loan shall be revised to be 12% p.a. from the date conversion right was exercised by the sun Edison.

9. Mere plain reading of the provision under section 7 of IBC and decision (supra) shows that in order to initiate CIRP Under Section 7 the applicant is required to establish that there is a

financial debt and that a default has been committed in respect of that financial debt. That while dealing with an application under section 7 the Adjudicating Authority is not required to consider the question of dispute between the parties as long as the 'debt' and 'default' is proved.

10. In the light of the aforesaid facts, we find that the agreements executed between the Financial Creditor and the Corporate Debtor clearly substantiate the Financial Creditor's claim that the Corporate Debtor has defaulted on repayment of loan amount. (The conversion of equity shares should have taken place within 6 months from the final maturity date i.e. 22.09.2017, which has not admittedly taken place). The Corporate Debtor's plea that only remedy agreed by the parties is conversion of debt into equity cannot be upheld as the clause 13.3 of Loan Agreement specifically states that non conversion of debt into equity shares will be an Event of Default.

11. In light of the above discussion, after giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal admits this petition and initiates CIRP on the Corporate Debtor with immediate effect.

12. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Rajiv Bajaj, for appointment as Interim Resolution Professional having registration number IBBI / IPA-002 / IP-N00276/ 2017-18 / 10834 resident of 4/180, Backside, Ground Floor, Subhash Nagar, New Delhi-110027, with email - id rbajajip@gmail.com. Mr. Rajiv Bajaj has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are

pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Rajiv Bajaj as per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

13. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending.

14. It is pertinent to mention here that the Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. The material on record clearly goes to show that respondent had availed the credit facilities and has committed default in repayment of the outstanding loan amount.

15. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to

claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

16. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

17. Mr. Rajiv Bajaj, having registration number IBBI / IPA-002 / IP-N00276/ 2017-18 / 10834 resident of 4/180, Backside, Ground Floor, Subhash Nagar, New Delhi - 110027 with email - id rbajajip@gmail.com is appointed as an Interim Resolution Professional.

18. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

19. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs with the Interim Resolution Professional namely Mr. Rajiv Bajaj to meet out the expenses to perform

the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per applicable rules.

20. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(a) 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;*
>
> *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
>
> *(c) 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;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

21. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

22. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further

made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

23. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim

Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

-Sd-

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

-Sd-

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

Ramandeep Singh