



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
KOLKATA**

Company Petition (IB) No. 316/KB/2022

***An application under Section 7 of the Insolvency and
Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority) Rules, 2016.***

IN THE MATTER OF:

**Tata Motors Finance Solutions Limited
[CIN: U65910MH1992LC187184]**

... Financial Creditor/ Applicant.

Versus

**P S Earthmovers Private Ltd
[CIN: U29244WB2006PTC108701]**

... Corporate Debtor/ Respondent.

Date of Pronouncement: February 29, 2024.

Coram:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI.D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

Appearance:

**For the Financial Creditor: Mr. Ratnanko Banerji, Sr. Adv.
Mr. Rohit Lakhmani, Adv.
Mr. Siddhant Makkar, Adv.**

**For the Corporate Debtor: Ms. M. Manot, Adv.
Mr. A. K. Upadhyay, Adv.**

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court assembled through a hybrid mode.

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2. Heard the Learned Senior Counsel appearing on behalf of the Applicant and Learned Counsel appearing for the Respondent.
3. This is an application preferred by **Tata Motors Finance Solutions Limited** (hereinafter referred to as the “Applicant”/ “Financial Creditor”) under Section 7 of the Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code” for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of **P S Earthmovers Private Limited** (hereinafter referred to as “Respondent”/ “Corporate Debtor”).

Facts as alluded by the Applicant:

4. The Applicant is an NBFC registered under the Reserve Bank of India.
5. On 4th July 2022, Tata Hitachi in its capacity as an Indemnifier made a payment of INR 8,03,07,683.16/- (Indian Rupees Eight Crore Three Lakhs Seven Thousand Six Hundred and Eighty-Three and Sixteen Paise Only).
6. That unaffected and irrespective of indemnification by Tata Hitachi under the separate and independent arrangements, the liability of the Corporate Debtor towards the Applicant under the said Term Loan Agreement is still subsisting and the Corporate Debtor continues to be liable to discharge its financial liability towards the Applicant. On account this continued default by the Corporate Debtor in repayment of the dues under the Term Loan, as on 31 October 2022 an amount of **INR 8,42,44,714.08** (Indian Rupees Eight Crore Forty-Two Lakhs Forty-Four Thousand Seven



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Hundred and Fourteen and Eight Paise) is **due and payable by the Corporate Debtor** to the Applicant (hereinafter referred to as the “the Outstanding Dues”).

7. The Details of the default amount concerning the Term Loan Facility are provided hereinbelow:

Principal	Interest	Penal Interest	Total
77,524,545.66	5,392,599	1,327,569.42	84,244,714.08

8. The Applicant submits that the Recall Notice was issued by the Applicant to the Corporate Debtor on 24th May 2022, and the Corporate Debtor was called upon to forthwith pay to the Applicant the outstanding dues. However, the Corporate Debtor failed to pay the total outstanding amount and has not responded to the Recall Notice till date. Accordingly, **the date on which the default occurred is 24th May 2022** and no payment has been received from 7 (seven) days thereafter as well.

Submission made by the Learned Senior Counsel appearing on behalf of the Applicant:

9. The Learned Senior Counsel, Mr. Ratnanko Banerji appearing on behalf of the Applicant would submit that upon the request of the Corporate Debtor, the Applicant had granted Credit Facility in favour of the Corporate Debtor, granting a Term Loan Facility of INR 15,00,00,000/-, as would be evident from letter dated June 07, 2016 annexed at Pages 19-26 and Credit Facility Letter dated June 10, 2016, annexed at Pages 27-50 to the application. The

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Term Loan Facility was disbursed by the Applicant to the Corporate Debtor to the extent of INR 14,84,75,000/- on 30th June 2016.

- 10.** That the interest rate was fixed at 13% per annum along with an Additional interest in case of default in payment was fixed at 2% per annum. Attention is drawn to clause 8 of the Credit Facility Letter at Page 29, read with paragraph 6 of Schedule – 2 to the Credit Facility Letter at Page 45-46 to the application.
- 11.** That the loan was repaid in 84 instalments between June 2016 to May 2023 as per the proposed repayment instalments schedule being Schedule – 4 to the Credit Facility Letter at Pages 49-50 to the application.
- 12.** A deed of Indemnity dated 8th June 2016 was executed by and between Tata Hitachi and the Applicant, whereby Tata Hitachi agreed to indemnify and make good the Applicant for all defaulted outstanding amounts including any interest, in respect of Credit Facilities granted to the Corporate Debtor up to INR 20,00,00,000/- (Indian Rupees Twenty Crore Only).
- 13.** It is asserted that the Applicant and the Corporate Debtor also entered into a Channel Finance Agreement concerning the Channel Finance facility of INR 4,25,00,000/- (Indian Rupees Four Crore Twenty-Five Lakhs Only) on 26th August 2016.
- 14.** Further, the Learned Senior Counsel would contend that the Corporate Debtor started committing defaults from January 2022



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and made no repayments whatsoever post-May 2022, as the Statement of Accounts from pages 67-79 and Bank Account Statements of the Financial Creditor for the period January 01, 2022, to November 01, 2022, would establish the same.

- 15.** Despite the consistent follow-ups, the Corporate Debtor failed to repay the outstanding dues under the Term Loan Facility.
- 16.** The Applicant issued a Recall Notice dated 24th May 2022 calling upon the Corporate Debtor to repay the outstanding dues under and concerning the Term Loan Facility, annexed at Page 80-82 to the application.
- 17.** The Financial Creditor was contractually entitled to recall the entire loan facility with immediate effect upon the Corporate Debtor's failure to pay any amount when due under the Credit Facility Letter in terms of Clause 14 of the Credit Facility Letter, annexed at Pages 33-34.
- 18.** The Corporate Debtor neither replied to the recall notice nor complied with it.
- 19.** The account of the Corporate Debtor was declared the "Non-Performing Asset" (NPA) with effect from May 2022, which is also reflected in its CIBIL Report annexed at Pages 86-143 to the application (relevant at page 98).
- 20.** A sum of INR 8,42,44,714.08/- (Indian Rupees Eight Crore Forty-Two Lakhs Forty-Four Thousand Seven Hundred and Fourteen



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and Eight Paise) is due and payable by the Corporate Debtor to the Applicant. The Corporate Debtor till the date of filing of the present Company Petition has not responded to the Recall Notice till date and has not repaid the outstanding amount.

- 21.** Hence, debt and default stands established. The application is not time-barred, and the financial threshold is duly met.

Revelations about the conduct of the Corporate Debtor:

- 22.** We would note that this matter first time came on board on December 28, 2022, when this Tribunal directed the Registry to issue notice to the Corporate Debtor by way of speed post and by email and place tracking record information.
- 23.** The Court Officer of this Bench issued notice on 29.12.2022. From the Track Consignment record of the India Post, it would be evident that the notice was duly delivered on 31.12.2022.
- 24.** On the next hearing date, i.e., on 15.02.2023, it is recorded that despite service of notice, none appeared on behalf of the Corporate Debtor.
- 25.** The Registry was once again directed to issue notice to the Corporate Debtor indicating the next date of hearing, i.e., on 11.04.2023.
- 26.** The Notice issued notice on 02.03.2023, was duly served on 22.03.2023 through email and on 10.03.2023 through speed post.



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- 27.** Due to persistent defaults made on the part of the Corporate Debtor in securing its appearance, despite service of notice, on 11.04.2023 the Corporate Debtor was set *ex-parte*.
- 28.** However, the Corporate Debtor filed an interlocutory application being **I.A. (IB) No. 1141/KB/2023** with a prayer to recall and set aside the order dated 11.04.2023 setting it *ex-parte*. The Application was allowed on August 03, 2023, upon the direction to file the reply within a period of two weeks.
- 29.** Further, it is evident that the last and final opportunity of two weeks was granted, at the request of the Corporate Debtor on September 06, 2023, upon the payment of costs of Rs. 10,000/-.
- 30.** On December 18, 2023, having noted that the Corporate Debtor had not filed its Reply Affidavit till then, its right to file Reply Affidavit was forfeited. However, filing of Written Notes of arguments was allowed.
- 31.** On January 17, 2024, the matter was reserved for order after the Learned Senior Counsel for the Financial Creditor and the Learned Counsel for the Corporate Debtor appeared and were heard at length. Both parties were allowed to file written notes of arguments within three days. Despite the liberty, neither any reply nor written submissions from the Corporate Debtor has been filed till date in this matter and thus, there is no statement from the Corporate Debtor, denying, disputing or controverting the averments of the Financial Creditor.

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- 32.** We are accordingly of the considered opinion that the matter can be decided on its merits on the basis of oral and written submissions and materials available on record. We proceed accordingly.

Analysis and Findings:

- 33.** It is evident and there is no denial of the fact that on June 07, 2016, the Financial Creditor issued a sanction letter bearing Ref. No. ADV/2016/26 in favour of the Corporate Debtor by approving the credit facilities in favour of the Corporate Debtor, wherein a Terms Loan was approved as of Rs. 15 Crore along with the Channel Finance facility of Rs. 04.25 Crore, totalling Rs. 19.25 Crore.
- 34.** Further, it is evident and there is no denial of the fact that a Credit facility Letter dated June 10, 2016, was issued in favour of the Corporate Debtor, wherein the Financial Creditor granted the Long-Term Loan facilities of Rs. 15 Crore with 13% per annum interest rate along with 2% additional interest in case of default in repayment.
- 35.** It is also evident from Schedule 4 (Repayment Schedule) of the Credit Facility Letter dated June 10, 2016, that the loan was to be repaid in 84 instalments between June 2016 to May 2023.
- 36.** The Deed of Indemnity dated 8th June 2016, executed by and between Tata Hitachi and the Applicant establishes that Tata Hitachi agreed to indemnify the Applicant (Tata Motors) for all defaulted outstanding amounts including any interest, in respect



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of Credit Facilities granted to the Corporate Debtor (P.S. Earthmover) up to INR 20,00,00,000/-. Relevant Portion of the said Deed of Indemnity annexed at page 53 to the application, is reproduced hereunder:

“A. The Lender has at the request of PS Earthmovers Private Limited provided/ agreed to provide to the Borrower and the Borrower has agreed to avail from ("Borrower"). the Lender, the Facility, aggregating to Rs. 20 crores (Rupees twenty crores only) for the purpose and on the terms and conditions contained in the facility letter dated June 8, 2016) ("Facility Agreement") and the other Financing Documents and any addendum thereto,

B. One of the conditions for providing the Facility is that all outstanding amounts under the Facility ("Outstanding Amounts"), including any interest thereon shall be secured by this indemnity for an amount of up to Rs. 20 crores (Rupees twenty crores only) ("Indemnity Cap").)

C. Accordingly, the Indemnifier has agreed to execute these presents in favour of the Lender and the Parties have therefore agreed to enter into this Agreement.”

- 37.** The Applicant has supplied the Bank Statement annexed at pages 144-978 to the Application evincing the disbursement of the loan amount.
- 38.** The Applicant has also furnished the CIBIL Report as on October 22, 2022, with respect to the Corporate Debtor annexed at Page 86-143 to the application.
- 39.** The document at Page 98 of the application, establishes that the account of the Corporate Debtor was classified “Non-Performing Asset” (NPA) with effect from May 2022.

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40. Thus, we are of the view that there is a “debt” which is “due and payable” to the Financial Creditor herein and “default” on the part of the Corporate Debtor in repayment thereof.
41. The total amount claimed to be in default is in excess of the prescribed threshold financial limit as per Section 4 of the I&B Code.
42. Further, the account of the Corporate Debtor has been declared on May 2022 and this application has been filed on November 09, 2022. Thus, the application is not barred by limitation.
43. In the aforesaid backdrop, the application deserves to be allowed. To fortify in our view, we would rely upon the judgment rendered by the Hon’ble Apex Court in ***Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund*** reported in (2021) 6 SCC 436: MANU/SC/0231/2021 (para 14) that:

“14. ... in order to trigger an application, there should be in existence four factors: (i) there should be a 'debt' (ii) 'default' should have occurred (iii) debt should be due to 'financial creditor' and (iv) such default which has occurred should be by a 'corporate debtor...”

(Emphasis Added)

44. Further, the Hon’ble Apex Court in the case of ***Innoventive Industries Ltd. v. ICICI Bank*** reported in (2018) 1 SCC 407: MANU/SC/1063/2017 laid down that:



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“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. ...”

“28. ... the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, ...”

XXX XXX XXX XXX

“30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

(Emphasis added)

45. Thus, in terms of the enumerations above, we **ALLOW** this instant application bearing **Company Petition (IB) No. 316/KB/2022** filed under **Section 7 of the I&B Code**, and accordingly, we order the initiation of the **Corporate Insolvency Resolution Process (CIR Process)** in respect of the Corporate Debtor by the following **Orders:**

- i.** The Application filed by **Tata Motors Finance Solutions Limited (Financial Creditor)**, under Section 7 of the

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Insolvency & Bankruptcy Code, 2016, is hereby, **ADMITTED** for initiating the **Corporate Insolvency Resolution Process** in respect of **P S Earthmovers Private Limited (Corporate Debtor)**.

- ii.** As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.
- iii.** Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:
- 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 asset 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 (54 of 2002);*
 - d)** *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.*

[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration,

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quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

- iv.** The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- v.** 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.
- vi.** The Applicant has proposed the name of **“Mr. Manish Buchasia”**, Address: 206, 3rd Floor, Gala Mart, Nr. Sobo Centre, before Safal Parisal, above SBI/Union bank, South Bhopal, Ahmedabad – 380058, Gujarat, Email ID: manishbuchasiacs@gmail.com, Registration No. IBBI/IPA/-002/IP-N00487/2017-2018/11449, as the “IRP”. We have perused that there is a written communication and consent of IRP in Form 2 with Affidavit, as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board IBBI or ICSI Insolvency Professional Agency. In

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addition, further necessary disclosures have been made by **“Mr. Manish Buchasia”** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7(3)(b) of the code. Hence, we appoint **“Mr. Manish Buchasia”** as the **Interim Resolution Professional** (IRP) of the Corporate Debtor to carry out the functions as per the I&B Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the I&B Code.

- vii.** In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016, shall be made immediately. The expression immediately means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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- viii.** During the CIR Process period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the I&B Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.
- ix.** The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned **Police Authorities** and/or the **Officer-in-Charge** of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.
- x.** The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIR Process in respect of the Corporate Debtor.
- xi.** The Financial Creditors shall be liable to pay to IRP a sum of **Rs. 3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

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- xii.** In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.
- xiii.** Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- xiv.** The Resolution Professional shall conduct CIRP in a time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- xv.** The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIR Process in respect of the Corporate Debtor to this Adjudicating Authority from time to time.
- xvi.** The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.



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- 46.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.
- 47.** Post the Company Petition **22 / 04 /2024** for filing the Periodical Progress Report by the IRP/RP as appointed herein.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This Order is signed on the 29th Day of February, 2024.

Bose, R. K. [LRA]
Tiwari, V. [LRA]