

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.301
C.P.(IB)/113(AHM)2023

Order under Section 7 IBC, 2016

IN THE MATTER OF:

Shree Sulphurics Pvt Ltd
V/s
C M Smith and Sons Ltd

.....Applicant

.....Respondent

Order delivered on: 13/12/2023

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in open Court, vide separate sheet.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH -I, AHMEDABAD**

CP(IB)/113(AHM)/2023

(An application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of **M/s. C M Smith and Sons Ltd.**

M/s. Shree Sulphurics Pvt. Ltd.

CIN: U24231GJ1979PTC003529

Having its registered office at:

No. 906, Shapath V,

Opposite Karnavati Club,

Nr. Crown Plaza, S.G. Road,

Ahmedabad, Gujarat-380015

...Applicant/Financial Creditor

VERSUS

M/s. C M Smith and Sons Ltd.

CIN: U17297GJ1998PLC034205

Having its address at:

Dashrath Wadi, Court Road,

Nadia, District-Kheda,

Nadiad, Gujarat-387001.

...Respondent/Corporate Debtor

Order pronounced on 13.12.2023

CORAM:

SHAMMI KHAN, MEMBER (JUDICIAL)

SAMEER KAKAR, MEMBER (TECHNICAL)

Appearance

For the Applicant : Mr. Saurabh Soparkar, Sr. Adv.
a.w. Mr. Jaimin Dave, Adv.
For the Respondent : Mr. Monaal Davawala, Adv.

ORDER

(Per: BENCH)

1. This is an application filed on 18.04.2023 by the Shree Sulphurics Private Limited (**“Applicant/Financial Creditor”**) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**“IBC, 2016”**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **M/s. C M Smith and Sons Ltd.**, (**“Respondent/Corporate Debtor”**) with prayers to admit the Respondent to the Corporate Insolvency Resolution Process (**“CIRP”**), appoint Interim Resolution Professional (**“IRP”**) and declare the moratorium.
2. From Part-I of the application, it is seen that the Applicant is M/s. Shree Sulphurics Pvt. Ltd. whose registered office is situated at no. 906, Shapath V, Opposite Karnavati Club, Nr. Crown Plaza, S.G. Road, Ahmedabad, Gujarat-380015.

3. The application has been affirmed by one Mr. Chauhan Micheal Sikandarbai who has been authorized by Board Resolution dated 14.03.2023 as Authorized Signatory.
4. From Part-II of the application, it is seen that the Corporate Debtor is one M/s. C M Smith and Sons Ltd., having CIN: U17297GJ1998PLC034205. The Corporate Debtor was incorporated on 01.06.1998 and is having its registered office at Dashrath Wadi, Court Road, Nadiad, District-Kheda, Gujarat-387001.
5. From Part-III of the application, it is seen that the Applicant has named one Mr. Alkesh Omprakash Jalan, having Registration No. IBBI/IPA-002/IP-N00718/2018-2019/12199 as Interim Resolution Professional (“**IRP**”).
6. From Part-IV of the application, it is seen that the total amount in the default is Rs.3,90,00,000/- (Rupees three Crore Ninety Lakh).
7. In Part-IV of the application, it is stated that the Corporate Debtor had approached the Financial Creditor and requested it to advance a sum of Rs.3,90,00,000/-. The Corporate Debtor voluntarily agreed to pay interest of the said sum at the rate of 15% per annum. Pursuant to

such request, the Financial Creditor had advanced a sum of Rs.3,90,00,000/- to the Corporate Debtor vide sanction letter dated 01.05.2022. A copy of such sanction letter is marked as Annexure-E.

8. It is stated that the Corporate Debtor had agreed that penal interest will be charged at the rate of 2% per month on the overdue amount and that the entire amount will be paid within a period of 9 months i.e., by 28.02.2023 along with interest at the rate of 15% per annum.
9. In accordance with the sanction letter and agreed terms, the Financial Creditor has disbursed a total sum of Rs.3,90,00,000/- to the Corporate Debtor on various dates.
10. It is stated that the Corporate Debtor was liable to repay the amount of Rs.3,90,00,000/- along with interest at the rate of 15% per annum on or before 28.02.2023. However, till date, the Corporate Debtor has repaid negligible amount of Rs.43,40,000/- and an amount of Rs.3,46,60,000/- is outstanding and payable and has been defaulted by the Corporate Debtor. A copy of the ledger account of the Corporate Debtor in the books of

accounts of the Financial Creditor is marked and annexed as Annexure-F.

11. It is stated that the Corporate Debtor is also liable to pay the Financial Creditor a sum of Rs.40,29,863/- as interest calculated up to 28.02.2023. The calculation sheet thereof is annexed as Annexure-G.
12. It is stated that as on 28.02.2023, the total outstanding amount is Rs.3,86,89,863/-, being the principal amount of Rs.3,46,60,000/- and interest of Rs.40,29,863/- is due and outstanding.
13. It is stated that through an email dated 21.03.2023, the Financial Creditor issued notice to the Corporate Debtor recalling the entire amount. Such notice was also dispatched through registered post on 23.03.2023. However, the registered post notice returned unserved with an endorsement "Item Refused". The same is attached as Annexure-I. The Financial creditor has attached the bank statement at Annexure-J to prove the disbursement between the periods from 13.05.2022 to 13.07.2022. The date of default is mentioned as 28.02.2023. The record of default with NeSL is attached

as Annexure-K. The Financial Creditor has filed purshis under Inward Diary No. D4221 dated 26.10.2023 attaching therewith the Form-D issued by NeSL which is deemed to be authenticated.

14. Affidavit in reply was filed by the Corporate Debtor under Inward Diary No. D3335 dated 01.09.2023. The affidavit in reply is affirmed by one Mr. Ashwin Smith in his capacity as Ex-Director of the Respondent Company.

15. In reply, the Corporate Debtor has stated that:-

(a) The majority shareholder (Bali Industries Limited) holding around 78% of the shareholding is purposefully and deliberately not representing the company and, hence, on behalf of the Respondent Company, being the Ex-Managing Director is defending the company in the present application.

(b) The present petition is, in fact, filed at the behest of the majority shareholder and is a part of the group of the majority shareholder and, hence, such petition is nothing but sheer abuse of the process of law and court and is required to be dismissed with costs.

- (c) Through the present application valuable rights of the minority shareholders are being taken away.
- (d) The Petitioner is a related party and has no locus and statutory right to file a Section 7 petition.
- (e) The alleged claim as made in the petition is eye washing and there were only entries made in the ledger since the same day the amounts were transferred from the account of the Respondent Company to the account of one of the related parties of the Petitioner and thus it is a case of round-tripping of funds undertaken at the behest of mastermind person viz. Mr. Mahendra Lodha who is in 'control' over the affairs of the Petitioner, Respondent and such another related party in whose accounts the very same alleged amount came to be transferred for an amount of Rs.3.90 Crores.
- (f) They are relatives and near friends and even the driver of Mr. Mahendra Lodha and associates are inducted in various companies and there are numerous entries made and the funds got rotated for oblique purposes. In support of the same, the

Respondent has filed a statement at Annexure-A to the affidavit in reply.

- (g) On 13.05.2022 the funds were infused by the Petitioner and on the very same date, they were transferred to Amar Dye Cham Private Limited.
- (h) It is the case of the Petitioner that payments were made out of the proceeds of the loan to:-
 - (i) Amar Dye Cham Private Limited;
 - (ii) Multimedia Frontiers Limited;
 - (iii) Rasna Processors Pvt. Ltd.

All Companies are directly or indirectly controlled by Mr. Mahendra Lodha.

- (i) The account of the Corporate Debtor with YES Bank where the funds were deposited was operated by one Mr. Pawankumar Murarka who is an ally of Mr. Mahendra Lodha.
- (j) The Respondent has placed Board Resolution authorizing the said Mr. Pawankumar Murarka to operate the bank account of the Respondent which is attached as Annexure-B to the reply.

16. It is further stated that Mr. Prakashchandra Hiralal Shah, Mr. Sureshkumar Dwarkadas Bannatwala were directors of the Respondent from the group of Mr. Mahendra Lodha/majority shareholders of the Respondent. They have resigned and one Mr. Rajesh Man Mal Lodha (relative of Mr. Mahendra Lodha) and Mr. Abhishek Prakashbhai Shah and Mr. Rajesh Man Mal Lodha were also directors in various group companies of Mr. Mahendra Lodha.
17. It is stated that Company Petition No. 17 of 2023 was filed by the deponent along with other family members who were the promoters of the company against the ongoing acts of mismanagement and oppression conducted by the majority shareholders present and past and their allies which is pending on the file of this Tribunal.
18. It is stated that Applicant has time and again made attempts directly and also through some ARCs to take control of the Corporate Debtor by filing various applications with the sole object of defeating the minority shareholders.

19. It is stated that there are no directors in the Respondent Company since all of them have tendered resignations and in order to defend the present application, this reply has been filed.

20. Rejoinder was filed under Inward Diary No. D3369 dated 04.09.2023. In rejoinder, the following points have been raised by the Applicant:-

a) Reply was filed by Mr. Ashwin Smith who is a rank stranger to the Respondent, and thus, has no locus. The resignation of said Mr. Ashwin Smith was of 12.12.2022 and Form DIR-11 was filed with MCA on 20.12.2022.

b) The scope of inquiry of this Tribunal is limited to debt and default. The Applicant, thereafter, relied upon the judgment of the Hon'ble Supreme Court in the matter of *Innoventive Industries Ltd. v. ICICI Bank Ltd.*, particularly, at para-30. Thereafter, the Applicant relied upon the following judgments:

i. *E.S. Krishnamurthy v. Bharath Hi-Tech Builders (P) Ltd.*

ii. *M. Suresh Kumar Reddy v. Canara Bank*

21. It is stated that as many as nine insolvency petitions are pending before this Tribunal under Sections 9 and 7 of IBC, 2016. It is stated that the financial condition of the Respondent is very weak.
22. It is stated that Amar Dye Cham Pvt. Ltd., had also advanced a sum of Rs.2,30,00,000/- to the Respondent Company on various dates. Amar Dye Cham Pvt. Ltd., was in need of funds and requested the Respondent Company to pay the outstanding amount. As Respondent Company was financially weak at this state a loan of Rs.3,90,00,000/- was disbursed by the Applicant to the Respondent to pay the said Amar Dye Cham Pvt. Ltd.
23. All allegations against Mr. Mahendra Lodha and another group companies are void. The Applicant, thereafter, relied upon the judgment of Hon'ble NCLAT in the matter of *Jagmohan Bajaj v. Shivam Fragrances (P.) Ltd.*, and states that the pendency of Section 241-242 of the Companies Act, 2013 petition is not a valid defence.
24. Written submissions were filed by both sides. We have considered the same and perused the documents.

25. We have heard Mr. Saurabh Soparkar, Ld. Sr. Adv. along with Mr. Jaimin R. Dave, Ld. Adv. appearing for the Applicant and Mr. Monaal Davawala, Ld. Adv. appearing for the Respondent.

26. It is the contention of the Applicant that a loan was advanced to the Company by the Applicant “**at the request**” of the Respondent. The sanction letter is placed at page no. 25 which states as under:-

“With reference to your request & subsequence meetings with you, we are to inform that loan of amount of Rs.3,90,00,000/- (Rupees Three Crores Ninety Lakh Only) is sanctioned on the following terms and conditions:”

The said sanction letter has never been acknowledged/accepted by the Respondent/Borrower.

The Applicant has not attached the request letter from the Respondent seeking such loan. Further, the Applicant has not attached the Board Resolution of the company accepting the sanction and its terms.

27. During the hearing held on 07.11.2023 specific query was raised by the Bench to the Ld. Sr. Adv. Mr. Saurabh Soparkar appearing on behalf of the Applicant as to whether there is any Board Resolution accepting the

terms of the sanction. To the query, Mr. Saurabh Soparkar responded that there is no such Board Resolution. Ld. Adv. Mr. Monaal Davawala appearing on behalf of the Respondent stated that the Board of the Respondent Company was in existence at the date of disbursement. Later on, sometime in November-December, 2022, the other directors resigned.

28. No TDS Certificate or Form 26AS for the year ended 31.03.2023 was placed on record by the Applicant to show that TDS was deducted by the Respondent herein towards any interest payment.
29. In the rejoinder, the Applicant had not denied that the majority shareholders Mr. Mahendra Lodha was controlling the Respondent Company directly or indirectly.
30. The Respondent has not denied that the purported bank account of the Respondent Company with YES Bank was operated by persons who are acting upon instructions of Mr. Mahendra Lodha. On the contrary, the Respondent Company has placed relevant Board Resolution dated 18.02.2022 at page no. 49 and 50 of reply whereby Mr.

Pawankumar Murarka/Mr. Rajesh Lodha was authorized to open and operate the said bank account of the Respondent with YES Bank Limited. These persons are acting in concert with Mr. Mahendra Lodha.

31. It is also seen that monies were received in the account of the Corporate Debtor and were immediately transferred to other account/company.
32. In our view, the transactions as claimed to be debt by the Applicant herein and the conduct of the Applicant along with absence of Board Resolution, absence of request letter from the Borrower/Corporate Debtor are questions which cannot be decided in a summary manner in the present case.
33. As regards to the locus of Mr. Ashwin Smith who has filed the affidavit in reply, this Tribunal is bound by the principles of natural justice in summary proceedings. It is an admitted position by both sides that the Respondent Company's Board of Directors is at present defunct as there are no directors. In view of the same, we had to consider the reply which was filed by the minority shareholders.

34. The entire conduct of the Applicant herein right from sanction of loan, immediate transfer of funds to its group/associate company, control of Bank Account, absence of any Board Resolution or even mere acceptance by the Respondent on the purported letter of sanction dated 01.05.2022 leaves lot of doubts.
35. Considering the above position, we are of the view that the present application must be rejected. Accordingly, CP(IB) No. 113 of 2023 is hereby rejected.
36. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

Rajeev Kr. Sen/P.S