

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-2027/(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:

TATA Capital Financial Services Limited

Registered office at:

11th Floor, Tower- A, Peninsula business Park,
Ganpatrao Kadam Marg, Lower Parel,
Mumbai- 400013

...Applicant/Financial Creditor

Versus

Kay Em Copper Private Limited

M-15/A, New Mandoli Industrial Area,
Saboli, Shahdara,
New Delhi- 110093

...Respondent/ Corporate Debtor

Coram:

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

DR. V.K. SUBBURAJ, Hon'ble Member (T)

Counsel for Applicant: Savyasachi K. Sahai, Advocate

Counsel for Respondent: Niti Arora Sachar and Rahul Malhotra
Advocates.



ORDER

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

Date: 19.04.2021

1. This is an application filed by Tata Capital Financial Services Limited to initiate corporate insolvency resolution process ("CIRP") against Kay Em Copper Private Limited 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. 3,14,08,827/- (Three Crore Fourteen Lakhs Eight Thousand Eight Hundred Twenty-Seven). The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. That the applicant is a Non-Banking Financial Company duly registered with the Reserve Bank of India. The applicant submits that the Respondent is in the business of wholesale trading of copper and zinc. That the Respondent applied for a Channel finance Loan to the Tune of Rs. 3,00,00,000/- vide loan application form dated 24.08.2017.



ii. The applicant submits that the respondent made representation that it was in a financially sound position to honor its obligations, pursuant to which the applicant issued a Sanction letter dated 04.07.2017, duly sanctioning a channel finance facility to the tune of Rs.3,00,00,000/- to the Respondent. Salient terms of the Facility are:

- (i) Tenure: 12 months
- (ii) Rate of Interest: 10.5% pa. i.e., ROI equal to STIR less 6.50%
- (iii) End Use: For purchase of raw materials from Vedanta Limited
- (iv) Payment under Facility: Disbursed to Vedanta Limited directly
- (v) Additional interest: (a) 6% p.a. for overdue days 1-30, (b) 8% p.a. for overdue days 31-60, and (c) 10% pa. for overdue days greater than 60; over and above the normal interest rate.
- (vi) Security: First and exclusive charge by way of hypothecation on inventory purchased from Vedanta Limited funded by the Applicant.
- (vii) Guarantee: irrevocable and unconditional personal guarantee of Mr. Akash Goyal and Mr. Meera Goyal.

iii. The applicant further stated that pursuant to the Sanction letter the following financing documents were also executed:

- A deed of hypothecation dated 20.09.2017 in favor of the applicant, wherein the applicant alleges that it was granted the first and exclusive charge over the present and future inventory of the Respondent, funded by the applicant.
 - That the Respondent also executed an irrevocable power of attorney dated 20.09.2017 in favor of the applicant in order to enable the applicant to enforce the deed of hypothecation in the event of default.
 - That the Directors of the Respondent Company, Mr. Akash Goyal and Mrs. Meera Goyal in order to provide guarantee executed a letter of guarantee dated 11.09.2017, jointly and severally guaranteeing the repayment of the Loan Amount of Rs. 3,00,00,000/- on demand along with the interest.
- iv. The applicant submits that on the request of the Respondent the applicant modified the terms of the facility and permits the facility to be utilized for purchasing raw material from Vedanta Limited and Hindalco Industries Limited, consequent to which the

security/collateral was also modified to the first and exclusive charge by way of Hypothecation on Inventory purchased from Vedanta Limited and Hindalco Industries Limited funded by the applicant.

- v. The applicant states that upon Respondent's request vide Letter dated 14.09.2018 for seeking extension of the facility, the applicant vide extension letter dated 18.09.2018 extended the same. the applicant further states that the Respondent vide letter dated 18.09.2018 confirmed that the outstanding amount due and payable by it to the applicant as of 18.09.2018 was Rs. 2,98,86,914/-.
- vi. The applicant submits that in light of Respondent's failure to respond to the legal notice dated 01.06.2019, as well as the continuing defaults by the Respondent of the amount owed to the applicant.

2. Consequent to the notice issued to the Respondent by the Hon'ble Tribunal, the Respondent filed its reply and following contentions were made:

- i. The Respondent in its reply denied the contents of the application and further submitted that no Power of Attorney or board resolution has been referred to in the said affidavit establishing authority to file the said application.
- ii. The respondent stated that the application is verified by affidavit of one Mr. Sushant Sharma who has not stated in the supporting affidavit as to which branch does he belong to. Further, the Respondent submits that the copy of resolution passed by the Board of Directors of the company on 22.12.2017 does not contain that Mr. Sushant Sharma is authorized on behalf of the applicant to file the application.
- iii. The Respondent alleges that Mr. Sushant Sharma is not authorized to institute the proceedings on behalf of Tata Capital Financial Services or to represent the applicant.
- iv. The Respondent in its reply cited the decision of the Hon'ble Division Bench of the High Court of Delhi passed in the matter of "Deepak Khosla & Anr. Vs.



1101 & Ors." [W.P. (C) No. 7651 / 2009J wherein it has been held as follows:

12. Pertaining to vakalatnamas executed not by the Principal himself but by some person claiming to appoint or give authority on this behalf, Rule 1, Part-A of Chapter 16 of the Delhi High Court Rules, inter alia, stipulates: ... (2) Proof required when power of attorney not executed by the principal - When such appointment or power is not executed by the principal himself, but by some person claiming to appoint or give authority on his behalf, the pleader will not be recognized by the Court without proof that such person was duly authorized by the principal to execute such appointment or power"

That the Respondent M/s Chahal Parivahan Private Limited is a company incorporated under Companies Act, 1956 and having its registered office at House No. 5, Shop no. 1, Block B-5, Model Town, New Delhi. The respondent has been into tour and travels business.

- v. The Respondent in its reply alleges that the Director of Respondent Company Mrs. Meera Goyal is not able to read and write English Language and further submits that the Signatures of Mrs. Meera Goyal were also obtained on blank application form.
- vi. The Respondent further submitted that the Channel Finance Agreement is undated and has been allegedly executed by the applicant and as filed in application as Annexure E is also not signed by the Director i.e., Mrs. Meera Goyal and further submitted that no board



resolution has been placed on record to demonstrate that Mr. Akash Goyal was authorized by the Board to sign and execute the said Channel Finance Agreement on behalf of the Respondent company.

- vii. The Respondent submits that the applicant has filed a copy of letter dated 18.09.2018 at Page No. 148 in support of which the applicant contended that the balance of Rs. 2,98,86,914/- was confirmed by the Respondent Company. However, the respondent alleges that the applicant has failed to disclose the fact that an amount of Rs. 3 crores were duly paid by the Respondent Company in the following manner and the receipts issued by the applicant are annexed as Annexure R-1:

19.09.2018	Rs. 20 Lakh
20.09.2018	Rs. 10 Lakh
26.09.2018	Rs. 5 Lakh
27.09.2018	Rs. 13 Lakh
28.09.2019	Rs. 1.03 Cr
29.09.2018	Rs. 10 Lakh and Rs. 53 Lakh
03.10.2018	Rs. 26 Lakh and Rs. 30 Lakh

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04.10.2018	Rs. 20 Lakh and Rs. 10 Lakh
Total	Rs. 3,00,00,000/-

viii. That the Respondent duly repaid the entire dues of the applicant and stated that any reliance placed on balance confirmation letter is totally misplaced, the Respondent further in its reply submits that the said application lacks the material particulars.

ix. The Respondent in its reply states that the applicant has grossly overcharged interest and is seeking to wrongfully penalize the Respondent company.

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

a) That the application has been verified by the affidavit of Mr. Sushant Sharma and a board resolution has also been annexed along with the applicant in entry 5 of Part 1.

b) That the applicant did not get blank application signed and did not unilaterally fill in the application form without explaining the terms therein and did not

impose any Arbitrary clause as alleged by the Respondent.

4. While advancing the arguments before the Tribunal on 11.02.2021, the Learned counsel for the Corporate Debtor pointed out certain defects in the application and the Tribunal granted time to the applicant to cure the defects.

5. In pursuant to the Tribunal's order dated 11.02.2021, the Financial Creditor filed an affidavit stating that During the course of the arguments advanced by the Ld. Counsel for the corporate debtor, the Ld. Counsel has raised the following defects in the application:

a) The application is not maintainable since Mr. Sushant Sharma, who has been identified as the person authorized to submit the application as stated in Entry 5 of Part I of Form I, is not adequately authorized vide Board Resolution dated 22.12.2017 1 (Annexure B of the Application).

b) The written communication by the proposed interim resolution professional as set out in Form 2 (Annexure



U of the Application) is incomplete since pages 187 and 188 of the Application are missing.

c) The computation of the outstanding amount owed to the Financial Creditor (Annexure T of the Application) is not as per the Bankers' Books Evidence Act, 1891.

6. While replying to the above defects the Financial creditor submitted that vide Board Resolution dated 22.12.2017 (Annexure B of the Application) the MD and CEO of the Financial Creditor is authorized to appoint the persons/officers who hold the designations as set out on Page 29 and it is an undisputed fact that Mr. Sushant Sharma is a Regional Collections Manager, a designation which is listed out on Page 29. Further, replying on other defects the Financial Creditor submitted that the missing pages (Pages 187 and 188) which form part of written communication provided by the proposed IRP (Annexure U of the Application), the same is an inadvertent error at the time of scanning the Application, and consequently, the Financial Creditor is annexing the entire Annexure U with this affidavit once again as Annexure 1.

7. The Learned counsel for the Financial Creditor has filed its written submissions in which he has reiterated the certain points raised in the Application and relied upon the following judgements:

- That the Hon'ble NCLAT in ***Mr. Satyaprakash Aggarwal and Ors. v. Vistar Metal Industries Limited (Company Appeal (AT) (Insolvency) No. 136 of 2018)***, held that the Adjudicating Authority is not required to determine the actual amount of claim but only whether Form 1 along with documents is complete or not.
- That the Hon'ble NCLAT has held in ***Binani Industries Limited v. Bank of Baroda and Anr. (Company Appeal (AT) (Insolvency) No. 82 of 2018)*** as well as in ***Excel Metal Processors Limited v. Benteler Trading International GMBH and Anr. (Company Appeal (AT) (Insolvency) No. 782 of 2019)***, that CIRP is not a suit or a litigation or a money claim and pursuant to Section 408 of the Companies Act, NCLT has been constituted in different states to deal with matters within its territory, where the

registered offices of the companies are situated. In the present case, the Respondent's registered office is in Delhi and therefore this application is maintainable. Reliance is also placed on Section 238 of the IBC to state that arbitration proceedings do not impinge / interfere on the ability of the Hon'ble NCLT to adjudicate in the present matter.

8. The Learned Counsel for the Corporate Debtor has also filed its written submissions in which he has reiterated the certain points raised in the Reply.

9. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. The Financial Creditor has claimed the default on part of the Corporate Debtor for the Loan amount of Rs. 3,14,08,827/- (Three Crore Fourteen Lakhs Eight Thousand Eight Hundred Twenty-Seven).

10. The Corporate Debtor in its reply raised defects regarding the Authorization letter, jurisdiction of the Hon'ble Tribunal and Computation of the Default amount

which the financial Creditor vide its reply affidavit dated 16.02.2021 has replied to all the objections raised. 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 the above said matter the Financial creditor has clearly established that a financial debt in form of Channel finance Loan has been advanced to the Corporate Debtor which can be clearly substantiated by the Confirmation of balance letter dated 18.09.2017 wherein, the Corporate Debtor confirmed the remaining balance of the said loan to the Financial Creditor.

11. While advancing the arguments the learned counsel for the Financial Creditor stated that the channel finance facility is not a term Loan, which is a one-time disbursement. On the contrary, it is a rolling facility and disbursements are made on an ongoing basis to a maximum of INR 3 Crores and repayment occur as per the terms of the financing documents. Hence, the Learned counsel

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further submitted that the receipts attached by the applicant which indicates repayment of INR 3 Crore are all towards the Hindalco Account.

12. The Tribunal on a keen examination of the application and perusal of the documents submitted by both the parties can clearly substantiate that the attached receipts issued by the Financial Creditor indicating repayment of Rs 3 Crore are towards the Hindalco account as dealer code HIN0001 has been clearly stated on the attached receipts. Whereas, no receipt regarding payment towards Vedanta account has been annexed by the Corporate Debtor.

13. In the light of the aforesaid facts, we find that the documents submitted by 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.

14. That this tribunal after giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to

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substantiate the claim, this Tribunal **admits** this petition and **initiates CIRP** on the Corporate Debtor with immediate effect.

15. A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:

“(a) the institution of suits or continuation of pending suits or proceedings against the Respondent 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 Respondent 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 Respondent 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 Respondent.
- (2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.”
16. The interim resolution professional (“IRP”) proposed by the Applicant is Mr. Dhiren Shantilal Shah, (Email – dss@dsshah.in), (Mobile No.- 9820073090) Reg. No: IBBI/IPA-001/IP-P00220/2017-2018/10419 is appointed to carry forward the process of CIRP. He shall take such other and further steps as are required under the statute,



more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

—Sd—

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

—Sd—

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

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