IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V

CP(IB) 446 MB 2023
Under section 7 of the Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF

Think Hard India Private Limited
611, Reliable Business Centre, Anand Nagar, Jogeshwari (West), Mumbai – 400102.

... Financial Creditor

V/s.

Seya Industries Limited
T-14, Tarapur Industrial Area, MIDC Boisar, District- Palghar, Mumbai- 401506.

... Corporate Debtor

Order delivered on :- 02.11.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances:

For the Financial Creditor	: Adv. Shyam Kapadia a/w Adv. Nishant Rana
For the Corporate Debtor	: Adv. Rajeev Ravi

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Think Hard India Private Limited (hereinafter called "**the Petitioner**") seeking to

initiate Corporate Insolvency Resolution Process (**CIRP**) against Seya Industries Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 432,86,16,798/-.

<u>The submissions by the Financial Creditor: -</u>

2. The Financial Creditor sanctioned business loan of Rs. 152,00,00,000/- pursuant to Sanction Letter dated 09.10.2019. The said loan was disbursed to the Corporate Debtor on 06.01.2020. The aggregate outstanding amount of Rs. 432,86,16,798/- as on 30.04.2023 is due and payable by the Corporate Debtor to the Financial Creditor.

3. The aforesaid facilities are, inter alia, secured by the following financing document:

    i. Mortgage by the Borrower of land admeasuring in aggregate approximately 61,760 sq. meters or thereabouts, MIDC Industrial Area, Tarapur, Village: Salwad, Taluka & District Palghar – 401506 on the terms and conditions contained in the Mortgage Deed dated 21.01.2020.

    ii. Deed of Personal and Corporate Guarantees all dated 27.07.2020 executed by the Security Providers, respectively, in favour the Financial

Creditor, in compliance with the Financial Creditor's letter dated 20.07.2020.

iii. Demand Promissory Note dated 06.01.2020.

4. In or around April 2022, the Borrower started defaulting on its payment obligations against the said Facility as stipulated under the Loan Agreement. Despite several reminders by the Financial Creditor, the Corporate Debtor failed to regularize the loan account and further neglected to clear the outstanding due and payable to the Financial Creditor. Consequent upon occurrence of events of default, the Financial Creditor issued an Event of Default Notice dated 15.09.2022 to the Corporate Debtor and also asked for recall of entire loan amount within 15 days of the said Even of Default Notice. Accordingly, the date of default is 15.09.2022 and the date on which the debt became due is 30.09.2022.

5. The Financial Creditor also issued separate statutory Demand Notices on 15.09.2022, in Form B under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtor) Rules, 2019 to the security providers who had provided personal guarantees and invocation of guarantee notices to the security providers who had provided Corporate Guarantee in favor of the Financial Creditor, calling upon them to pay the total aggregate Loan amount outstanding as on 15.09.2022.

6. The Financial Creditor, as no payment of the outstanding amount was received from the Corporate Debtor and/or the Security Providers, filed Company Petition No. 1265 of 2022 and Company Petition No. 1266 of 2022 under Section 95 of the Insolvency and Bankruptcy Code, 2016 before the NCLT, Mumbai Bench against two of the Guarantors.

7. Pursuant thereto, upon failure of the Corporate Debtor and the Personal Guarantors to pay the outstanding dues to the Financial Creditor, the Petitioner/Financial Creditor addressed an additional Demand Notice to the Corporate Debtor dated 19.04.2023 for the outstanding debt in accordance with the relevant provisions and the same was received by them on 20.04.2023. Despite receipt of the Notice, the Corporate Debtor has failed, refused and neglected in making payment and hence the Financial Creditor has initiated the present Petition against the Corporate Debtor in the instant matter. Hence the present Company Petition.

The Reply filed by the Corporate Debtor:-

8. The Corporate Debtor submitted that the present Petition is unwarranted, tainted with malafide motives and deserve to be dismissed in limine. It is submitted that the Petitioner ought to have approached this Tribunal with clean hands and correctly placed all the material facts and documents before this Tribunal, which, as explained in detail hereinafter, the Petitioner has deliberately and mischievously failed to do. The Plaintiff is guilty of

suppressio veri and *suggestio falsi* and the present Petition ought to be dismissed on this ground alone.

9. In the present case, it can be seen that the board Resolution annexed at page no. 17 of the Petition is completely defective and lacking in material particulars and it cannot be said to be a resolution authorizing the initiation of CIRP and/or permitting the concerned person to appoint an Interim Resolution Professional.

10. The Corporate Debtor was under CIRP from 03.08.2021 to 18.04.2023. It is submitted that vide order dated 03.08.2021 passed by this Tribunal in CP No. 606 of 2020 and the CP was admitted, moratorium was ordered and the CIRP commenced against the Corporate Debtor. Since the Corporate Debtor settled the dispute with the Petitioner in the said CP, the IRP appointed in the said proceedings filed IA No. 1853 of 2021 u/s 12A of the IB Code, 2016, and by an order dated 18.04.2023 passed therein, this Tribunal was pleased to close the proceedings in CP No. 606 of 2021 and the Corporate Debtor was thus out of CIRP on 18.04.2023. It is submitted that the balance confirmation letter dated 03.04.2023 was purportedly issued during CIRP by the company and not the IRP and thus the same is not valid in law. It is thus submitted that the same cannot be relied upon and treated as admission by the Corporate Debtor. It is further submitted that the Financial Creditor appears to have recalled the loan during CIRP period, which could not have been done in view of the moratorium order and thus the same is also invalid.

11. Further, the Financial Creditor has failed to appreciate that the proceedings under IBC are not recovery proceedings. Furthermore, proceedings under the IB Code can be commenced and/or continued only upon satisfaction of the various provisions and requirements set out under the IB Code, which inter alia require that there should be in existence a legal, valid and subsisting financial debt. In the facts and circumstances of the present case, it is evident that there is no financial debt.

12. The Petitioner filed rejoinder reiterating the averments made in the Petition and controverting those made in the written reply.

Findings:-

13. We have heard Counsel for the parties and gone through the records.

14. The instant Petition has been filed by the Financial Creditor u/s 7 of the Code, 2016 on the ground that the Corporate Debtor has failed to repay the outstanding loan of Rs. 6,00,75,000/- which was granted vide facility agreement dated 15.03.2017 executed between the parties. As per the agreement, the rate of interest was 15% per annum w.e.f. 30.03.2017. The Corporate Debtor vide its letter dated 29.03.2019 made a request to extend the period of repayment up to 30.03.2020. The said request was accepted and the repayment date was extended to 30.03.2020 by the Financial Creditor vide letter dated 29.03.2019. However, the outstanding amount was not repaid despite demand notice dated 01.02.2023 was served

upon the Corporate Debtor to make payment of the total outstanding amount of Rs. 13,07,49,534/-.

15. The defence raised in the reply is that the Petition is barred by time. According to the Counsel for the Corporate Debtor the facility agreement was executed on 15.03.2017 and as per the agreement, the amount was required to be re-paid on 30.03.2019 whereas the Petition has been filed after a period of three years from 30.03.2019. The Cousnel for the Corporate Debtor has further pointed out that the balance confirmations issued by the Corporate Debtor for the years from 2016-17 to 2019-20 cannot be relied upon as the same were issued as a routine audit exercise and cannot be equated with acknowledgments.

16. We have thoughtfully considered the above contentions raised by the Counsel for the Corporate Debtor but have found the same to be devoid of any force or substance. No doubt the loan was advanced vide agreement dated 15.03.2017. However, the Corporate Debtor vide its letter dated 29.03.2019 requested the Financial Creditor to extend the repayment date to 30.03.2020. In the reply filed by the Corporate Debtor, the issuance of the letter dated 29.03.2019 has not been disputed. Thereafter, vide letter dated 29.03.2020 the time was extended. Therefore, the due date for repayment of the outstanding amount of loan was 30.03.2020.

17. The Petitioner has also relied upon balance confirmations issued by the Corporate Debtor on 01.04.2017, 01.04.20189, 01.04.2019 and 01.04.2020 whereby the total

outstanding amount including interest has been acknowledged by the Corporate Debtor from time to time. In view of the balance confirmations, which are acknowledgments of debt, the present Petition which was filed on 10.03.2023, cannot be said to be barred by time.

18. It is also worth mentioning that after the demand notice dated 01.02.2023 was issued to the Corporate Debtor, the latter executed a settlement agreement dated 06.03.2023 with the Petitioner undertaking to pay at least Rs. 1 crore out of the outstanding amount on or before 09.03.2023 and the remaining amount of Rs. 5,00,75,000/- on or before 09.06.2023. Even the said commitment was not honoured by the Corporate Debtor as no payment was made on 09.03.2023.

19. The argument that the balance confirmations were issued in routine audit process and the same cannot be treated as acknowledgment is nothing but specious and cannot be accepted.

20. No other points have been raised on behalf of the Corporate Debtor. Even otherwise, in this case the factum of existence of the financial debt and its default has been proved on record. It has also been established that the present Petition is well within the period of limitation.

21. In the light of the above discussion, we find the instant Petition to be a fit one to be admitted u/7 of the Insolvency and Bankruptcy Code, 2016. It is ordered accordingly in the following terms:

ORDER

a. **The above Company Petition No. (IB) -446 (MB)/2023 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Seya Industries Limited.**

b. This Bench hereby appoints Ms. Bhavesh Rathod, Registration No: IP/P-01200 as the Interim Resolution Professional email :- info.cabhavesh@gmail.com and address at 12D, A wing, White Spring, Rivali Park Complex, Western Express Highway, Borivali East, Mumbai - 400066, to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of Rs. 3 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That 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.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
ANURADHA SANJAY BHATIA
Member (Technical)

Sd/-
KULDIP KUMAR KAREER
Member (Judicial)