

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI

IBA/724/2019

Under Section 7 r/w Rule 4 of the IBC, 2016

In the matter of M/s. Peekay Mediequip Limited

Mr. K.R Sundaresan

---Financial Creditor

V/s

M/s. Peekay Mediequip Limited

---Corporate Debtor

Order delivered on: 13.08.2019

Coram:

B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Financial Creditor: *Shri. B. Dhanaraj, Advocate*

For the Corporate Debtor : *Shri. A S Sathish Kumar, PCS*

ORDER

Per: B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

Order dictated in Open Court on 09.08.2019

It is an Insolvency and Bankruptcy Application (herein after called as "Application") filed by a financial creditor (herein after called as "Applicant") u/s.7 of the Insolvency and Bankruptcy Code, 2016 ("the Code") for initiation of Corporate Insolvency and Resolution Process ("CIRP") against the Corporate Debtor (herein

after called as the “Debtor”) on the ground the Corporate Debtor defaulted in repaying ₹ 5,75,00,000 towards principal and ₹ 1,89,75,000 towards interest put together aggregating to ₹ 7,64,75,000 as on 31.03.2019.

2. On perusal of this Application, it appears that this Applicant has initially entered into a Memorandum of Understanding (MoU) dated 30.08.2016 with the Debtor on proposed acquisition of 75% of Equity Share Holding of the Debtor by disbursing ₹ 5.08Crores towards settlement of the Debtor’s dues to third parties and towards funding of immediate working capital requirements.

3. Under the Funding Plan Clause of the MoU, it has been reflected the payment made by the Applicant towards the following:

- (i) *“Funding the settlement of outstanding of Shriram City Union Finance Ltd and closure of Liquidation proceeding against the winding up of notice in Madras High Court.*
- (ii) *Funding settlement of closure of pledged and share purchase from Sutures India Pvt Ltd including withdrawal of pending cases with company law board/SFIO.*

(iii) Funding of immediate working capital requirements to augment sales turnover of the company”.

4. The Applicant has filed a letter dated 20.04.2018 written by the Debtor to M/s. Rare Asset Reconstruction Private Limited (herein after called as “ARC”) disclosing that it wants funding for restructuring of its debts to M/s. Delvin Group Garuda Med Equipments and Mr. K. R. Sundaresan as reflected in the schedule of repayments reflected in Annexure 1, 2 and 3 attached to the letter. In Annexure-3 attached to this letter disclosed reflecting proposed repayment schedule towards the loan taken from Mr. K.R. Sundaresan which is as follows:

Payment Dates	Payment Amount	Appropriation – Principal	Appropriation – Interest @ ___% p.a.	Cumulative Payment	Closing Balance (Prin O/s)	Remarks
15-Jun-18	58,00,000			58,00,000	4,50,00,000	
31-Dec-18	1,00,00,000			1,00,00,000	3,50,00,000	
30-Jun-19	1,00,00,000			1,00,00,000	2,50,00,000	
30-Sep-19	1,00,00,000			1,00,00,000	1,50,00,000	
31-Dec-19	1,00,00,000			1,00,00,000	50,00,000	
31-Mar-20	50,00,000			50,00,000		

5. Subsequent thereto, the Debtor entered into Debt Settlement Agreement dated 01.06.2018 with the Applicant stating that the

Applicant (mentioning him as “Financial Creditor”) has advanced loan to the Debtor as on July 2016 as an advance for material. The value of the said loan amount as of 01.03.2018 was crystallized at ₹ 5.75 Crores, out of which, the Debtor has agreed to repay ₹ 75,00,000 on or before 30.06.2018. The Debtor has further agreed saying that it *“acknowledges that it is indebted to the Financial Creditor in the full amount of the debenture debt and this Debt Settlement Agreement dated 01.06.2018 supersedes any prior agreements, understandings and negotiations whether written or oral”*. It has further stated that *if any disputes, differences and/or claims arose out of this agreement, whether during its subsistence or thereafter, shall be settled by Jurisdictional High Court/NCLT by annexing schedule of repayment as Exhibit-A to the Debt Settlement Agreement dated 01.06.2018.*

6. In Exhibit A attached to this Debt Settlement Agreement, the Debtor agreed for schedule of payment in the manner stated below:

<i>Schedule of Settlement</i>	<i>15/6/2018</i>	<i>31-03-2019</i>	<i>31-03-2020</i>	<i>31-03-2021</i>	<i>31-03-2022</i>
<i>Payment Plan</i>	<i>7500000</i>	<i>20000000</i>	<i>15000000</i>	<i>15000000</i>	<i>13475000</i>
<i>Outstanding Loans</i>	<i>63475000</i>	<i>43475000</i>	<i>28475000</i>	<i>13475000</i>	<i>0</i>

<i>Interest rate p.a.</i>			8%	14%	22%
<i>Interest</i>			3478000	3986500	2964500

For PEEKAY MEDIEQUIP Limited

Sd/-

Managing Director.

7. Since the Debtor failed to adhere to the time lines given in the earlier agreement dated 01.06.2018, the Debtor has entered into another agreement with the Applicant on 01.11.2018 stating that the value of the said loan amount as of 01.03.2018 was crystallized at ₹ 5.75Crores, but owing to delay happening in release of funds from the ARC, this Debtor extended the date of repayment of ₹ 75,00,000 from 01.06.2018 to 31.01.2019 mentioning as to other clauses stated in the Debt Settlement Agreement dated 01.06.2018, they shall prevail without any change.

8. Thereafter when repayment has not come from the Debtor except agreement after agreement, this Applicant initiated Section 7 proceedings against the Debtor for initiation of CIRP against the

Debtor for the Corporate Debtor has failed to repay the money borrowed from the Applicant along with interest agreed upon.

9. As against the submissions of the Applicant Counsel and the material available on record, the Debtor Counsel raised three legal contentions – one, it is not a financial debt because this is a money given for allotment of equity as reflected in the original MoU dated 30.08.2016, therefore whatsoever agreements subsequently entered into referring interest rates and failure of repayment by the Debtor will not have any bearing on the character of the parties set out in the MoU dated 30.08.2016; two, for it has been mentioned in the Debt Settlement Agreement dated 01.06.2018, subsequent to the MoU dated 30.08.2016, that this money is shown as given towards material, it shall not be treated as financial debt because this money being said as given against supply of material, this disbursement of money is to be construed as operational debt, therefore a proceeding shall be initiated u/s 9 of the Code after Section 8 notice has been issued against the Debtor; three, since the money given by the Applicant has been showing in the records of the Debtor as

Share Application Money, based on the books of the Debtor Company, it shall not be treated as Financial Debt. With these three contentions, the Debtor Counsel has sought for dismissal of this Application.

10. On hearing the submissions of either side and by looking at the material available on record, as per MoU dated 30.08.2016, it is true that this money shall be treated as money given for acquiring Equity in the Debtor Company. In this case, it is not in dispute about the Applicant releasing funds as claimed by the Applicant. Showing this money under the caption of share application money further strengthens that money has come to the company and it has not been repaid till date because it is the argument of the Debtor that this Money is showing in the books of the debtor company as share application money.

11. If we come to the rights and obligations of the parties, as we all know character of a debt depends upon how parties enter into agreements between them. The rights and obligations emanate from such Agreements.

12. In this case, since disbursal of money to the Debtor Company not being in dispute, now the point left for determination is what rights and obligations emanated from the Agreements these parties from time to time entered into and how they are binding against each other.

13. As to nature of debt, MoU dated 30.08.2016 discloses that initially the money was disbursed to the Debtor for allotment of equity, it is evident it has not happened in first two years, the parties in between them reframed their rights and obligations on 01.06.2018 through Debt Settlement Agreement dated 01.06.2018 stating this Applicant as Financial Creditor advanced loan to the Debtor as on July 2016 as an advance for the materials. The value of the said loan amount as of 01.03.2018 crystallized at ₹5.75Crores. Out of which, the debtor would pay ₹75,00,000 on or before 30.06.2018.

14. This agreement and annexure thereto reflect that this Debt Settlement Agreement supersedes all prior agreements, that being the clause entered into between the Applicant and the Debtor,

though money was initially shown as given towards proposed acquisition through MoU, the nature of Debt and mode of payment are subsequently governed by the Debt Settlement Agreement dated 01.06.2018, not by the MoU dated 30.08.2016.

15. This being the scenario, this Debtor should not have argued that since money was given money for proposed acquisition, it should never be seen as financial debt because the debtor knowingly and consciously entered into subsequent agreement with clause that subsequent agreement supersedes earlier agreements. And since subsequent agreement has categorically mentioned that the applicant is a financial creditor entitled to collect the debt along with interest, it has to be treated as debt collectable with time value of money. It is pertinent to mention that these obligations have for the first time come into existence through Debt Settlement Agreement dated 01.06.2018. As to time value of the money, it has been mentioned after payment of ₹ 75,00,000 agreed to be paid by 30.06.2018, the Debtor is indebted to pay the Applicant an amount of ₹ 6,34,75,000, which constitutes the money advanced

and the time value of money calculated over it. At the time of entering into Debt Settlement Agreement, interest was already added to the principal amount of ₹5.08Crores. Therefore as to first contention saying that since money has come into the company towards allotment of proposed acquisition, it shall be considered as equity, pales into insignificance.

16. To know whether it is a debt or not, it is essential to look into two definitions envisaged under the Code, one – debt and two – claim. The word “debt” says, what could be a debt. The word “claim” says, exercising right accrued against something owed by somebody to the claimant. It could be found out from the definition of debt, how debt has to be ascertained, which is as follows:

“Section 3 (11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

17. To say something as either financial debt or operational debt, there shall be four elements.

1. There shall be a liability or obligation.

2. A person shall have created such liability or obligation upon himself/herself/itself.
3. That liability or obligation shall disclose something due and payable.
4. Such money due and payable shall be claim of that particular subject matter.

18. By reading these elements against the present case, it is evident that Debt Settlement Agreement dated 01.06.2018 has created obligation against the Debtor superseding the earlier MoU dated 30.08.2016 with regard to the money (claim in the present case) disbursed by the Applicant. Though the Applicant has disbursed the money to the Debtor and then entered into MoU on 30.08.2016, since thereafter both the parties having entered into the Agreement in the year 2018 changing their rights and obligations (novation) over the same disbursement of money (consideration), then parties are bound by the subsequent agreement that has come into force in the place of the earlier agreement (MoU dated 30.08.2016). So, determining factor in respect to rights and obligations between the parties is the agreement dated 01.06.2018. It

need not be said separately that past consideration is valid consideration for entering into an agreement.

19. Since the Debt Settlement Agreement dated 01.06.2018 has disclosed that the debtor is under obligation to repay the money given by the Applicant, next point to be determined as to whether it is financial debt or operational debt.

20. Exhibit-A annexed in this Agreement dated 01.06.2018 discloses that over and above the principal, this Debtor is liable to pay @ 8% per annum over the interest agreed on the amount from 31.03.2019 to 31.03.2020, 14% per annum from 31.03.2020 to 31.03.2021, 22% per annum for the money payable from 31.03.2021 to 31.03.2022. As to calculation of ₹6,34,75,000, time value of money is added to the original amount of ₹5.08Crores received from the Applicant.

21. Since this Corporate Debtor failed to repay the first installment of ₹75,00,000 on 30.06.2018, the Applicant has again entered into an Amendment to Debt Settlement Agreement with the Debtor stating that the date of payment of ₹75,00,000 has been

extended up to 31.03.2019 on the ground that some delay happening in release of funds from ARC.

22. Besides this, the Applicant has filed a letter the Debtor wrote to an ARC disclosing that the Debtor owed to repay the sum shown as claim in this case, therefore it needs funding from the ARC.

23. As to the argument saying that since this money is shown as share application money in the books of the debtor, therefore it shall not be treated as financial debt, it has to be seen what agreement parties entered into between them for determination of the character of the liability and obligation and status of the parties. Herein this case, as per Debt Settlement Agreement, it is a financial debt repayable by the debtor to the applicant along with time value of money. Therefore, merely showing the money as share application money in the books of the debtor will not alter the nature of obligation the debtor entered into with the Applicant.

24. In the back drop of these facts, when this Bench has set the argument of the Corporate Debtor counsel against the facts, this Bench is unable to comprehend that money has come into the

debtor company as equity and it has remained in the same character after execution of Debt Settlement Agreement dated 01.06.2018 because by 01.06.2018, the Corporate Debtor consciously entered into agreement to repay the money taken from the Applicant along with interest as stated in the Agreement.

25. As to one of the clauses in the Debt Settlement Agreement dated 01.06.2018 mentioning that money has been advanced to the material, the Debtor Counsel raised a defense that it is an operational debt for this money was shown as given against material, but it could not be construed as argued by the Debtor Counsel. The reason is when any transaction is taken place, to understand the nature of the transaction, entire document has to be read and understood.

26. In Debt Settlement Agreement dated 01.06.2018, the Applicant has been cited as financial creditor, and no clause is present in the Agreement disclosing that money is given for supply of goods or services, moreover this money has to be repaid along with interest. From one side, when the Debtor counsel himself

saying that this is a money given for proposed acquisition, it could not be understood as money given against supply of material. In the MoU dated 30.08.2016, it has been categorically mentioned that money has been given to clear the debts of the Corporate Debtor and for working capital requirements. In the Debt Settlement Agreement, since repayment is coupled with a clause for return of money along with interest clause, it could not be assumed as operational debt simply by seeing a clause saying money is given *as an advance for material*. On the top of it, when transaction has a clause for return of money along with interest, it will squarely fall within the ambit of financial debt. This money initially came into the company for proposed acquisition; when it has not been converted into equity, later the debtor agreed to return the money along with interest.

27. In respect to a citation in between *Good Value Financial Services Private Limited vs. ARK Landscapes LLP* (Order dated 11.02.2019 passed by NCLT, Bombay) the Corporate Debtor counsel relied upon to say that if time value of money is not reflected at the

time of disbursement, such debt shall not be recognized as financial debt. This citation is not applicable to this case because in the case referred above there is no document reflecting disbursement is against the time value of money.

28. In view of the same, we are of the considered view that it is a clear financial debt payable by the Corporate Debtor to the Applicant as on the date of filing this IBA and the same not being repaid, it is to be construed that the Applicant has proved the existence of debt and default, whereby, we hereby admit this Insolvency and Bankruptcy Application by appointing Mr. R. Raghavendran as Insolvency Resolution Professional looking at the consent given by him with the directions as follows:

- I. That Moratorium is hereby declared prohibiting all of the following actions, namely,
 - 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;

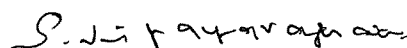
- b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action 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.
- II. That Supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
 - III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - IV. That the order of moratorium shall have effect from **09.08.2019** till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of IBC


or passes an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.

- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.
- VI. That this Bench hereby appoints Mr. R. Raghavendran, having Registration Number [IBBI/IPA-001/IP-P00211/2017-2018/10411], Flat No.3, Dhruvatara Apartment, 241, Dr.Rajendraprasad Road, Tatabad, Coimbatore – 641 012, Email: ragavcarp@gmail.com, Mobile No: 93631 05841 as Interim Resolution Professional to carry out the functions as mentioned under IBC. Fee payable to IRP/RP shall be in compliance with the IBBI Regulations/Circulars/Directions issued in this regard.

29. Accordingly, this Petition is admitted.

30. The Registry is hereby directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by way of email or whatsapp.


(S. VIJAYARAGHAVAN)
MEMBER (Technical)


(B. S.V. PRAKASH KUMAR)
MEMBER (Judicial)

SR / TJS