

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-II, CHENNAI**

IBA/1087/2019 filed under Section 7 read with Rule 4 of the Insolvency and Bankruptcy Code, 2016 Rule 4 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016.

In the matter of M/s. Pandi Devi Oil Private Limited

Shakti International Private Limited
Rep by its M D Mr. Srinivaas V. Sirigeri,
No. 303B, Alpha Main Street,
Hiranandani Business Park,
Powai, Mumbai – 400 076

---Financial Creditor

Vs.

M/s. Pandi Devi Oil Private Limited
(CIN: U15140PY20210PTC002471)
Old Thirubhavanai,
Pondicherry – 605 107

---Corporate Debtor

CORAM:

R.SUCHARITHA, MEMBER (JUDICIAL)
B. ANIL KUMAR, MEMBER (TECHNICAL)

For the Applicant : *Shri. Thriyambak J. Kannan, Advocate*
Ms. E.N. Hareepriya, Advocate
For M/s. Assentio Legal
For the Respondent : *Shri. K. Surendran, Advocate*
Shri. Pradeep Dhaiya, Advocate

ORDER

Per: B. ANIL KUMAR, MEMBER (TECHNICAL)

Order Pronounced on: 27.04.2021

It is an Insolvency and Bankruptcy Application (in short "IBA") filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short, **IB Code, 2016**) r/w Rule 4 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016 (for brevity, **AAA Rules, 2016**) by M/s. Shakti International Private Limited (hereinafter referred to as ("**Financial Creditor**") for initiation of Corporate Insolvency Resolution Process (in short "**CIRP**") against M/s. **Pandi Devi Oil Private Limited** (hereinafter referred as "**Corporate Debtor**") on the ground the Corporate Debtor defaulted in paying Rs. 5,25,00,000/- (Rupees Five Crore Twenty Five Lakh) as on 12.10.2018 for services rendered by the Applicant to the Corporate Debtor. The outstanding interest payable on the unpaid amount of debts as on 12.10.2018 by the Corporate Debtor is at a mutually agreed rate of 15% of the reducing balance (as per the Arbitral Award) amounts to Rs.1,42,19,282/- (Rupees One Crore Forty Two Lakh Nineteen Thousand Two Hundred and Eighty Two only). Further, in case the Corporate Debtor fails to pay the said interest, an additional interest of 24% per annum will be applicable

on the said amount which amounts to Rs.4,42,50,487/- (Rupees Four Crore Forty Two Lakh Fifty Thousand Four Hundred and Eighty Seven only) as on 20.08.2019 (also referred to as “**Outstanding Delayed Interest Due**”). The Outstanding Delayed Interest fell due and payable for all the instalments payable by the Corporate Debtor. The Applicant/Financial Creditor reserves the right to collect interest on the unpaid amounts till the date of realization of the principal payments. The total amount due and payable by the Corporate Debtor including the Outstanding Principal Amount and the Outstanding Delayed Interest amount stands at Rs.11,09,69,769/- (Rupees Eleven Crore Nine Lakh Sixty Nine Thousand Seven Hundred and Sixty Nine Only).

2. On perusal of this application, it appears that Part – I of the Application being Form I discloses the particulars of the Applicant/Financial Creditor as being represented by the Managing Director Mr. Srinivaas V. Sirigeri.



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3. Part – II of the Application discloses the details of the Corporate Debtor and it is evident that the Corporate Debtor was incorporated on 01.07.2010 and the Authorized Share Capital is ₹2,30,00,000/- and the Paid-up share capital is ₹2,30,00,000/-. The Registered Office of the Corporate Debtor is situated at Old Thirubhavanai, Pondicherry – 605 107 which co-relates with the address as disclosed in the Master Data with CIN: U15140PY2010PTC002471.

4. Part – IV of the Application gives the details, as under:

a) A High Seas Sale Agreement (HSSA) executed between the Financial Creditor and the Corporate Debtor dated 23.04.2012, wherein the Financial Creditor agreed to import crude palm oil in bulk for and on behalf of the Corporate Debtor for a consideration of USD 1191.25 per Metric Ton. In order to secure the interest of the Financial Creditor, the Corporate Debtor pledged his movables in an Agreement for Pledge dated 03.05.2012. The Financial Creditor had granted a loan amount of Rs.1,84,00,000/- (Rupees One Crore Eighty Four Lakh) to the Financial Creditor vide an agreement (also referred to as “Loan Agreement”) dated 09.04.2012. The said loan Agreement was renewed vide a Loan Renewal and Working Capital

Loan Agreement dated 21.03.2013 executed between the parties, and the repayment period was extended until 30.06.2013. Further, the Financial Creditor also agreed to grant a further loan to meet the working capital requirements of the Corporate Debtor to the extent of Rs.71,00,000/- (Rupees Seventy One Lakh).

- b) The said loan amount as provided under the Loan Agreement would carry an interest at 2.5% per month. The terms of interest and repayment by the Corporate Debtor are provided for at clauses 22 of the Loan Renewal and Working Capital Loan Agreement.
- c) The Financial Creditor initiated arbitration proceedings against the Corporate Debtor and based on the consent terms entered between the parties, arbitration award was passed dated 18.03.2015. The arbitration award was communicated to the parties vide the Procedural Order Sheet of the arbitration proceedings dated 30.07.2015.
- d) A Legal Notice was sent by the Financial Creditor to the Corporate Debtor demanding payment dated 21.01.2016.
- e) On an appeal filed by the Corporate Debtor against the said award, the Hon'ble High Court of Bombay passed an order in Arbitration Petition No.999 of 2016 dismissing the appeal filed by the Corporate Debtor dated 17.02.2017.



- f) Thereupon, the Corporate Debtor sent an email dated 22.02.2018 acknowledging the debt and on 10.05.2018 and 18.05.2018 to settle the dispute.
- g) The total outstanding principal amount due and payable by the Corporate Debtor stands at Rs.5,25,00,000/- (Rupees Five Crore Twenty Five Lakh) from 12.10.2015 (hereinafter referred to as the "Outstanding Principal Amount Due"). The Outstanding Principal Amount fell due and payable on 12.10.2018. The Corporate Debtor has till date not made any payment.
- h) The outstanding interest payable on the unpaid amount of debts as on 12.10.2018 by the Corporate Debtor is at a mutually agreed rate of 15% of the reducing balance (as per the Arbitral Award) amounts to Rs.1,42,19,282/- (Rupees One Crore Forty Two Lakh Nineteen Thousand Two Hundred and Eighty Two Only). Further, in case the Corporate Debtor fails to pay the said interest, an additional interest of 24% p.a. will be applicable on the said amount which amounts to Rs.4,42,50,487/- (Rupees Four Crore Forty Two Lakh Fifty Thousand Four Hundred and Eighty Seven Only) as on 20.08.2019 (also referred to as "Outstanding Delayed Interest Due"). The Outstanding Delayed Interest fell due and payable for all the instalments payable by the Corporate Debtor. The

Financial Creditor reserved its right to collect interest on the unpaid amounts till the date of realization of the principal payments.

- i) The calculation of the Outstanding Principal Amount and the Outstanding Delayed Interest is provided and filed in a tabular format in the present Application.
- j) The total amount due and payable by the Corporate Debtor including the Outstanding Principal Amount and the Outstanding Delayed Interest Amount stands at Rs.11,09,69,769/- (Rupees Eleven Crore Nine Lakh Sixty Nine Thousand Seven Hundred and Sixty Nine only) (also referred to as the "Total Amount Due and Payable"). The detailed tabular working is provided below:

S.No	Particulars	Amount
1	Outstanding Principal Amount Due	Rs. 5,25,00,000/-
2	Interest of 15% of the reducing balance	Rs. 1,42,19,282/-
3	Additional Interest of defaulted amount at the rate of 24% p.a.	Rs. 4,42,50,487/-
	Total Amount Due and Payable	Rs.11,09,69,769/-

5. The learned counsel for the Corporate Debtor filed counter on 22.11.2019 and submitted as follows:



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- a) The Counsel for the Respondent/ Corporate Debtor states that the present reply is being filed by the Respondent/Corporate Debtor without prejudice to its rights and contentions and without prejudice to the fact that the above captioned insolvency Petition filed by the Applicant/Financial Creditor is not maintainable. Nothing contained in this reply shall be deemed to be an admission on the part of the Respondent of the contents of the captioned Petition. It is submitted that each and every submission in the present reply is independent of and without prejudice to the other submissions as stated herein.
- b) It is submitted by the Counsel for the Respondent/ Corporate Debtor that the Applicant has filed the present application under Section 7 of the Code claiming itself to be a financial creditor by virtue of the High Seas Sale Agreement dated 23.04.2012. The said High Seas Sale Agreement was entered into between the Applicant and Respondent for import of crude palm oil in bulk, which sets out all the terms and conditions of a seller and a buyer for import and delivery of crude palm oil on cash basis. Therefore, any debt, if any, arising out of the said agreement cannot by any stretch of imagination be termed as a "financial debt" as per Section 2(8) of the Code.



- c) The Counsel for the Respondent/ Corporate Debtor states that it is relevant to note herein that as per the relevant clauses of the High Seas Sale Agreement, the Respondent was liable to pay the Applicant for import of 500 MTs of crude palm oil @ 1191.25 USD per MT (applicable exchange rate 1 USD = Rs.52.39) i.e., Rs.3,12,04,793.75/-. Out of the said amount, the Respondent had already paid a total sum of Rs.51,80,719/- including certain charges amounting to Rs.46,80,719/- (as per Clause 7 of the High Seas Sale Agreement, at the time of entering into the agreement. It is to be noted that the receipt of the said amount of Rs.51,80,719/- has been duly admitted by the Applicant.
- d) The Counsel for the Respondent/ Corporate Debtor states that it is further relevant to note that for the remaining amount of Rs.2,60,24,074.75/- plus certain other charges under Clause 2 of the High Seas Sale Agreement dated 23.04.2012. The Respondent had issued an irrevocable Letter of Credit (LC) dated 21.06.2012 for an amount of Rs.2,70,00,000/- (Rupees Two Crore Seventy Lakh only) in favour of the Applicant in total discharge of their liability towards the High Seas Sale agreement. It is also to be noted that the LC issued by the Respondent was for the discharge of no other liability but for its liability under the High Seas Sale Agreement dated 23.04.2012 for import of crude palm



oil in bulk, as specifically stated in the LC. According to the Respondent, they had discharged its fully liability arising out of the High Seas Sale Agreement dated 23.04.2012 and there does not remain any further debt that is owed by the Respondent to the Applicant. Copy of the irrevocable LC dated 21.06.2012 issued by the Respondent to the Applicant had been honored, according to the Corporate Debtor.

- e) The Counsel for the Respondent/ Corporate Debtor states that with regard to the loan agreement dated 09.04.2012 of Rs.1,84,00,000/- (Rupees One Crore Eighty Four Lakh only) entered into between the parties, it is submitted that the Applicant has wrongly placed reliance on the same to prove itself to be a financial creditor of the Respondent. The above captioned Petition filed by the Applicant is ripe with utmost malafide on the part of the Applicant. It is submitted that the Respondent had not taken any loan of Rs.1,84,00,000/- (Rupees One Crore Eighty Four Lakh only) from the Applicant. It is submitted that it is the Applicant who owed a sum of Rs.1,84,00,000/- to the Respondent with respect to some past business transactions between the parties, which was transferred into the bank account of the Respondent. Since the Applicant was facing some difficulties in closing his books of accounts due to the



transfer of large amounts from its bank account, the Applicant requested the Respondent to sign a loan agreement dated 09.04.2012. It is to be noted that the said loan agreement was signed by the Respondent in good faith and at the request of the Applicant that all the account would be cleared by him by the close of the financial year. An amount of Rs.39,00,000/- standing in our credit in the account of Shakti Enterprises a firm owned by the promoters of the Corporate Debtor in which, we have been remitting the brokerage as per the instruction of the Corporate Debtor. There is another amount of Rs.1,26,00,000/- standing in our credit in our books and amounts which the Corporate Debtor has claimed in excess of the agreed prices of some 3 shipment of Crude Palm Oil, there raised by the Respondent. Copy of the ledger account of the Respondent for the period from 01.04.2011 to 31.03.2012 is annexed thereto and marked as Annexure-R2A of the Application.

- f) The Counsel for the Respondent/ Corporate Debtor states that in addition to the above, it is submitted by the Counsel for the Respondent that the Applicant had paid a sum of Rs.35,00,000/- to one M/s. Suraj Agro Instructure (India) Pvt. Ltd. on behalf of the Respondent as part clearance of the Respondent's rental arrear of their warehouse.



Pursuant to the said transaction and in order to maintain its books of accounts correctly, the Applicant asked the Respondent to enter into a loan renewal and working capital agreement dated 21.03.2013 of Rs.71,00,000/-. The Applicant also forced the Respondent to honour the said loan renewal agreement by issuing a post-dated security cheque of Rs.71,00,000/-. The Respondent after much reluctance issued a cheque of Rs.71,00,000/- in favour of the Applicant under protest.

6. On an examination of the Written Submissions filed by the Financial Creditor on 08.03.2021, the observations made by this Adjudicating Authority are elucidated below:

- a. Financial Creditor agreed to import crude palm oil in bulk for and on behalf of the Corporate Debtor by way of High Seas Sale Agreement dated 23.04.2012 and in order to secure the interest of the Financial Creditor, the Corporate Debtor pledged its movables in an agreement of Pledge dated 03.05.2012.
- b. By virtue of Loan Agreement dated 09.04.2012, the Financial Creditor granted a loan amount of Rs.1,84,00,000/- at the rate of 2.5% interest per month. The repayment period was extended until 30.06.2013 as per the Loan Renewal and Working Capital Loan Agreement dated 21.03.2013. As per Clause 7 of the said



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agreement, the Financial Creditor agreed to grant a further loan of Rs.71,00,000/-.

- c. Subsequently, the Financial Creditor initiated arbitration proceedings against the Corporate Debtor based on the consent terms entered between the parties and the Arbitration Award was communicated to the parties vide the Procedural Order Sheet of the arbitration proceedings dated 30.07.2015. The Corporate Debtor preferred a petition to set aside the arbitral award under section 34 of the Arbitration and Conciliation Act, 1996. The Hon'ble High Court of Bombay dismissed the above petition by way of an order dated 17.02.2017. Therefore, the award has become final and is binding on the Corporate Debtor.
- d. Further, the Corporate Debtor sent an email dated 22.02.2018 acknowledging the debt on 10.05.2018 and 18.05.2018 to settle the dispute. The total outstanding financial debt is Rs.11,09,69,769/-.
- e. The Respondent contended that as per the letter dated 16.12.2020 of Karur Vysya Bank confirming transfer of the funds from the Respondent to the Petitioner the entire debt due has been paid. It is evident from the fact that the parties entered into the consent terms based on which the arbitral award was passed after such payment was made on 18.03.2015. If such payment was already made by the Respondent, the Respondent

need not have entered into consent terms with the Petitioner for further payment of the outstanding dues. Therefore, the present transaction is independent of the claim made by the Petitioner herein in the present petition and is irrelevant to the present petition. It cannot lie for the Respondent herein to now take advantage of the fact that payment of the additional loan borrowed by the Respondent herein will amount to repayment of the claimed outstanding dues of the Petitioner.

- f. It is not disputed that the Corporate Debtor has not made payments as per the Arbitration Award which provided thirty days' time for payment of the awarded amount. Non-payment of the awarded amount thus amounts to a 'default' of debt under the IBC.
- g. The Financial Creditor relies on the judgements of Hon'ble Bombay High Court in *R.K. Textiles, Mumbai vs. Sulabh Textiles Pvt. Ltd, Mumbai*, 2002 (4) Mh.L.J.678; Hon'ble NCLAT in *Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Limited – Company Appeal (AT) (Insolvency) 6 of 2017*; *Annapurna Infrastructure Pvt. Ltd. Vs. SORIL Infra Resources Ltd.* 2017 SCC Online NCLAT 380 and *Urgo Capital Limited vs. Bangalore Dehydration and Drying* (Company Appeal (AT) (Insolvency No.984 of 2019).
- h. Therefore, in the light of the above judgements the arbitral award has become final on account of the appeal being

dismissed in Arbitration Petition No.999 of 2016 by way of an order dated 17.02.2017 and an Arbitral Award is a valid record of an event of "default".

7. The written submissions also contain, gist of decisions culled out from the orders passed by various Judicial fora. Based on the above, the Applicant sought for admission of this application and pass such order, as may be deemed fit.

8. On a perusal of the Written Submissions filed by the Respondent on 08.03.2021, this Adjudicating Authority made the following observations:

- a. The applicant has not filed record of default with the information utility or such other evidence of default.
- b. Bank account statement to establish the disbursement of the amounts mentioned in the application has not been filed.
- c. The alleged Ledger Book entries at pages 83 to 86 of the application are totally bogus and highly manipulated and self-serving statements of accounts prepared by Applicant.

d. Since the Respondent has made the entire payment due under the High Seas Sale Agreement dated 23.04.2012, alleged loan



agreement dated 09.04.2012 and alleged loan renewal and working capital loan agreement dated 21.03.2013, there was no debt due to the Applicant.

e. The Applicant is not a 'financial creditor' for the amount claimed under the award dated 18.03.2015 as per the judgement on 09.12.2019 passed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.1329 of 2019; and judgement dated 14.08.2020 by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.452 of 2020.

9. We have heard the submissions made by both the parties during the course of various stages of 17 hearings and we have examined the written submissions. We have also examined the High Seas Sale agreement which is the source document produced before us from which the claim by the Applicant as a Financial Creditor is said to emanate. The Applicant also has produced the Loan Agreement and Loan Renewal Agreement in order to substantiate their claim.

10. The Applicant has also submitted that since the debt fallen due has not been paid by the Corporate Debtor they have approached a

sole Arbitrator and the Arbitration Award was passed by the sole Arbitrator on 18.03.2015 and the order was received by the parties on 31.07.2015.

11. As per their application, the Applicant/Financial Creditor sent a legal notice dated 21.01.2016 to the Corporate Debtor demanding payment. Thereafter, it appears that the Corporate Debtor had filed an appeal before the Hon'ble High Court of Bombay in Arbitration No. 999/2016 which is reportedly dismissed on 17.02.2017. Thereafter, it is seen from the application that the Corporate Debtor had sent an email dated 22.02.2018 acknowledging the debt with a view to settle the dispute.

12. In this context, this Adjudicating Authority hereby elucidate the characteristic of transaction by means of High Seas Sale (HSS) Agreement, which is a sale carried out by the actual consignee (the consignee shown in the Bill of Lading) to the other buyer while the goods are yet on the high seas after its dispatch from the Port of Loading and before their arrival at the Port of Discharge which is

otherwise known as purchase in the course of import before the goods cross the territorial waters of India, with a view to conclude the sale in order to save the local Sales Tax/GST. This is a usual Trade Practice followed and practiced in the Import Trade for avoiding double taxation in the downstream commercial transaction when the situs of the goods is in India.

13. It is learnt from the copy of High Seas Sale agreement, the averments in the application and submissions made during the course of hearing that the party claiming as Financial Creditor has sold the goods and transferred the document of title to goods to the Corporate Debtor while the goods are still in transit or in the course of Import by means of the said High Seas Sales Agreement by adding 1.25% trade margin to the C & F value.

14. It is crystal clear that projecting this High Seas Sale Agreement as the source document by the Applicant their claim as Financial Debt and the Applicant claiming themselves to be the Financial Creditor is



misconceived and we are not inclined to treat this transaction as Financial Debt.

15. We observed from the averments in the application and submissions made by the Counsel for the Corporate Debtor that they have obtained a Letter of Credit for the payment of the said amount opened in Corporation Bank which is said to have been honoured. Since there appears to have been a dispute between the parties they referred the matter to the sole Arbitrator and an award had been passed in favour of the Applicant which is appealed before the Hon'ble High Court of Bombay and the appeal was dismissed and some email communication is seen to have been exchanged between the parties with a view to settle the claim.

16. As may be seen from the nature and characteristics of the transaction governed by the said High Seas Sale Agreement such transaction cannot be re-christened as Financial Debt. We are of the considered view that as evidenced by the source document namely

High Seas Sale Agreement, written submissions and pleadings, we

cannot treat the Applicant as Financial Creditor and there is no Financial Debt, this application is liable to be **dismissed**.

17. Accordingly **IBA/1087/2019** is hereby **dismissed** without costs.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

SR