IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP (IB) No.1583/KB/2019

Under section 7 of the Insolvency & Bankruptcy Code, 2016

In the matter of

PM Cold Storage Private Limited [CIN: U63023WB2008PTC128173] …	Petitioner/ Financial Creditor

Versus

STB Export Pvt Ltd [CIN: U27205WB1993PTC059440] …	Respondent/ Corporate Debtor

Order reserved on: 19.11.2020
Order pronounced on: 24.11.2020

Coram:

Mr. Rajasekhar V.K.	:	Member (Judicial)
Mr. Harish Chander Suri	:	Member (Technical)

Appearances (via videoconferencing):

For the Financial Creditor	:	Mr Joy Saha, Senior Advocate a/w Mr Chayan Gupta & Mr Anujit Mookherjee, Advocates
For the Corporate Debtor	:	Ms Aparajita Rao a/w Ms Pallavi Gandhi, Advocates

ORDER

Per: Harish Chander Suri, Member (Technical)

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by PM Cold Storage Private Limited *("the Financial Creditor")*, a company within the meaning of section

2(20) of the Companies Act, 2013 and represented by its Authorised Representative, Mr Manish Kumar Agarwal, on the basis of a Board Resolution dated 25.03.2019 seeking to initiate Corporate Insolvency Resolution Process (CIRP) against STB Export Pvt Ltd *("the Corporate Debtor").*

2. The Corporate Debtor is a private company limited by shares and incorporated on 13.07.1993 under the Companies Act, 1956, with the Registrar of Companies, West Bengal, Kolkata. Its Corporate Identity Number (CIN) is U27205WB1993PTC059440. Its registered office is No.63/3 (5th Floor), Sarath Bose Road, Kolkata 700025, within the State of West Bengal. Therefore, this Bench has jurisdiction to deal with this petition.

3. The present petition was filed on 02.09.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹50,00,000/- (Rupees fifty lakh only) as principal and ₹16,93,882/- (Rupees sixteen lakh ninety-three thousand eight hundred and eighty-two only) as interest as on 31.03.2017, which is the date of default. The Financial Creditor has, by way of supplementary affidavit, *inter alia* submitted that the date of default mentioned as "31.03.2017" is a typographical error, and that the same be read as "31.03.2019." It is further submitted that the principal and interest sums mentioned in the application should be read accordingly instead of the principal sum as ₹15,43,232.00 (Rupees fifteen lakh forty-three thousand two hundred and thirty-two only) and interest due as ₹1,50,650.00 (Rupees one lakh fifty thousand six hundred and fifty only) as mentioned in the application. It has been stated that the same are typographical errors.

4. Mr Joy Saha, learned Senior Counsel for the petitioner, submitted that the case of the Financial Creditor is as follows: -

(a) The Corporate Debtor approached the Financial Creditor for financial assistance to the extent of Rs.50,00,000/- as investment in the business, specifically towards the working capital *(para 1 at page 6 of the Petition)*;

(b) The Corporate Debtor would repay the said amount before 31.03.2019. Such amount would carry interest @10% per annum, which the Corporate Debtor would make over regularly to the Financial Creditor *[para (b) and (c) at page 7 of the Petition]*;

(c) Accordingly, relying on the reputation and goodwill of the Corporate Debtor and the representations made by Mr Murari Lal Sharma and Mr Mahabir Prasad Sawaria, the Financial Creditor lent and advanced a sum of Rs.50,00,000/-. *(para 2 at page 8 of the Petition).*

5. The rate of interest charged is stated to be 10% per annum. Bank statements are also attached as **Exhibit '6'** at pages 29-32. The total debt due and payable to the Financial Creditor is ₹66,93,882.00 (Rupees sixty-six lakh ninety-three thousand eight hundred and eighty-two only), as mentioned at page 11 of the Petition, duly corrected to read in terms of the supplementary affidavit. The bank statement at p.30 clearly indicates that a sum of ₹50,00,000/- has been credited by RTGS into the bank account of the Corporate Debtor *vide* entry dated 19.01.2017 (3rd entry at p.30) with Ref. No.910528.

6. The Financial Creditor has served copies of the petition on the Corporate Debtor *vide* registered letter dated 27.08.2019, which was received by the Corporate Debtor on 28.08.2019. Court Notice dated

24.09.2019 was also issued, which has been served on the Corporate Debtor by email on the same date. Affidavit of service dated 30.08.2019 has been placed on record.

7. Ms Aparajita Rao a/w Ms Pallavi Gandhi, Learned Counsel appeared on behalf of the Corporate Debtor and made her submissions.

8. In its reply dated 21.02.2020, the Corporate Debtor has submitted as follows:-

(a) The Corporate Debtor had taken an advance in the nature of temporary business advance of Rs.50,00,000/- from the Financial Creditor on 19.01.2017, but the same was repaid on 07.04.2017. *[para (i) at page 4 of the Reply]*;

(b) The Financial Creditor requested for urgent repayment of the principal amount without any interest and closure of the deal. However, the Corporate Debtor did book TDS but did not pay any interest and the account was closed upon payment of the principal amount of Rs.50.00 lakh from the account of Mr Sanjeev Agarwal, son of Mr Amar Chand Agarwal, director of the Corporate Debtor, on 07.04.2017, by way of bank transfer *[para (ii) at page 4 of the Reply]*;

(c) Form 26 AS evidencing deduction of tax at source is not conclusive proof of payment since TDS is deducted immediately even before payment. The payment thereafter may not be made due to changed circumstances *[para (iii) at page 4 of the Reply]*;

(d) There was no loan, no loan agreement, no interest payable and therefore no default *[para (iv) at page 5 of the Reply]*;

(e) The Financial Creditor never demanded any interest nor was any interest paid *[para (v) at page 5 of the Reply]*.

9. Mr Joy Saha, learned Senior Counsel, further submitted that the notice under section 8 of the IBC was wrongly sent to the Corporate Debtor. Under section 7 of the Code, no notice is envisaged unlike under section 9 of the Code.

10. We have heard the arguments of both sides and perused the records, which consists of the petition, reply, rejoinder, supplementary affidavit and the reply to the supplementary affidavit.

11. There are some inherent contradictions in the submissions of the Corporate Debtor with regard to the interest component. On the one hand, the Corporate Debtor has claimed that there was no interest component. On the other hand, they have deducted tax at source. If it was the understanding that there was no interest, then the question of tax deduction at source should never have arisen.

12. The time value of money is proved by the fact that interest had been deducted at source by the Corporate Debtor, and this has also been admitted by the Corporate Debtor, though it has been explained away as of no consequence on the ground that Form 26AS evidencing deduction of tax at source is not conclusive proof of payment since TDS is made immediately even before payment. The payment thereafter may not be made due to changed circumstances. However, even if we accept this argument at face value, the very fact that tax has been deducted at source in respect of the interest component, itself proves the fact that there was an interest component attached to the

loan, even though there may not have been actual payment of interest as has been claimed by the Corporate Debtor.

13. The repayment of the loan ought to have been made to the bank account of the Financial Creditor. It is not understood why the transaction was completed by making payment of the said sum of Rs.50,00,000/- from the personal account of the son of the director of the Corporate Debtor to the account of a proprietorship firm, M/s Pannalal Mahabir Prasad, which is said to belong to the director of the Financial Creditor, Mr Lakshman Prasad Agarwal, which has no connection to the Financial Creditor.

14. A company such as the Corporate Debtor which has been in existence for more than 27 years, ought to have known that such a transaction could never be recognised as closure of the outstanding dues. No plausible reasons have been given for this, other than the fact that it was on the request of the Financial Creditor. Such a reason cannot be countenanced, especially when there was no written agreement between the parties.

15. Ms Aparajita Rao, learned Counsel finally submitted that the balance sheets of the Financial Creditor do not reflect the loan. To this, Mr Joy Saha, learned Senior Counsel, submitted that the loan in question has been reflected under the category ‘Capital Advances’ in aggregate form along with other advances, and that the sum of ₹3,47,74,763/- shown in the balance sheet as at 31.03.2017 at p.81 of the supplementary affidavit is inclusive of the said sum of ₹50,00,000/- lent to the Corporate Debtor.

16. Upon a query posed by the Bench, the Financial Creditor has produced the necessary resolution dated 12.10.2016 for advancing the loan in question. The said resolution has been passed at a General Meeting of the Financial Creditor. Extracts of the said resolution have been placed on record by way of a supplementary affidavit dated 09.11.2020. Therefore, the argument of Ms Aparajita Rao, learned Counsel for the Corporate Debtor, that the lending is not in accordance with the provisions of section 186 of the Companies Act, 2013, does not hold water.

17. In any case, in a petition under section 7 of the IBC, we are only required to be satisfied that there is a debt due and payable, and that there is a default in this respect. We are satisfied that this is the case here.

18. The Financial Creditor has proposed the name of Mr Ajay Goyal, Registration No.IBBI/IPA-001/IP-P01083/2017-18/11783, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016. As per the IBBI website,[1] the proposed appointee has Authorisation for Assignment (AFA) valid upto 05.01.2021, which is a pre-requisite in terms of regulation 7A of the IBBI (Insolvency Professionals) Regulations, 2016.

19. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of

[1] https://www.ibbi.gov.in/ips-register/view-ip/1?page=90

minimum amount of one lakh rupees stipulated under section 4(1) of the IBC at the relevant time. Therefore, the default stands established and there is no reason to deny the admission of the petition. In view of this, this Adjudicating Authority admits this petition and orders initiation of CIRP against the Corporate Debtor.

20. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP (IB) No.1583/KB/2019** filed by **PM Cold Storage Private Limited,** the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **STB Export Pvt Ltd [CIN: U27205WB1993PTC059440],** the Corporate Debtor, is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(i) 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;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) 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 Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest (Sarfaesi) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium,-

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) **Mr Ajay Goyal,** Reg. No.IBBI/IPA-001/IP-P01083/2017-18/11783, having address at Room No.305-B (3rd Floor), Martin Burn House, No.1, RN Mukherjee Road, Kolkata, 700001 [email: aaa3india@yahoo.com], is hereby appointed as Interim

Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

(i) The Financial Creditor shall deposit a sum of ₹1,00,000/- (Rupees one lakh only) with the IRP to meet initial expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(j) In terms of section 7(5)(a) of the IBC, the Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order. Additionally, the

Financial Creditor shall serve a copy of this Order on – (i) the IRP and (ii) the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this Order.

21. List the matter for further consideration and progress report on 13/01/2021.

Harish Chander Suri	Rajasekhar V.K.
Member (Technical)	Member (Judicial)

24.11.2020