IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

I.A. No. 156/ND/2021

Connected with IB-1772/(ND)/2019

Section: Under Section 10(3)(a) of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

M/s PAN ASIA PROJECT DEVELOPMENT FUND INDIA & ANR.
Versus
M/s WORLDS WINDOW IMPEX (INDIA PVT. LTD.)

M/s WORLDS WINDOW IMPEX (INDIA PVT. LTD.)
Registered office at:
75, Khirki Village, Malviya Nagar,
New Delhi- 110017

... Applicant

Versus

M/s PAN ASIA PROJECT DEVELOPMENT FUND INDIA & ANR.
Registered office at:
IL&FS Financial Centre, Plot No. C-22, G Block,
Bandra Kurla Complex (EAST),
Mumbai- 400051

...Respondent

Coram:
SH. P.S.N. PRASAD, Hon'ble Member (Judicial)
SH. DR. V.K. SUBBURAJ, Hon'ble Member (Technical)

Counsel for Applicant: Mr. Prashant Mehta, Advocate
Counsel for Respondent: Mr. Saumay Kapoor and Ms. Sanjukta Roy, Advocates

ORDER

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

Date: 13.04.2021

1. This is an application filed by the Applicant, who is Respondent in the main matter IB no. 1772/(ND)/2019, M/s Worlds Window Impex India Pvt. Ltd. seeking to direct Respondent, M/s Pan Asia Project Development Funds India & Anr, who happens to be the applicant in the main matter to Produce balance sheets from 2008-09 till 2018-19. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

   i. The applicant states that the Respondent did not provide any financial or credit facility to the applicant in the main matter.

   ii. The applicant further submits that the Respondent in the main matter alleges that the Investment vide share subscription agreement comes under the ambit of Financial Credit as per section 7 of the IBC, 2016. The applicant further submits that in terms of the order of Hon'ble NCLAT in the matter ***of Shailesh Sangani Vs. Joel Cardoso & Anr. [Company Appeal (AT) (Insolvency) No. 616 of 2018]*** the Hon'ble Tribunal while adjudicating on similar facts with placing reliance on the balance sheets made the following observations.

"6. A plain look at the definition of financial debt' brings it to fore that the debt along with interest, if any should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of financial debt'. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (1) of Section 5(8) embody the nature of transactions which are included in the definition of financial debt'. It includes money borrowed against the payment of interest. Clause (l) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter. Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the pan of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds; Whom' claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production

and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the pan of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a financial debt'.

"9.... In the face of this documentary evidence, it is abundantly clear that the amount disbursed by Respondent No.1 to the Corporate Debtor was in the nature of debt treated as long term loan and not as an investment in the nature of share capital or equity. Such disbursement cannot either be treated as largesse. We are convinced that the aforesaid amount outstanding as against Corporate Debtor, default whereof is not in issue, has all the trappings of a financial debt' and falls within the purview of Section 5(8)(J) of the MB Code and Respondent No.! is covered by the definition of 'Financial Creditor'.

iii. The applicant states that in terms of order dated 18.02.2020 it placed its balance sheets on record and further submits that the copies of the said balance sheets are showing that the investment made by the alleged Financial Creditor in the main matter is in the form of equity contribution and not as a financial debt.

iv. The applicant further submits that the Balance sheets are necessary documents that are to be produced by the petitioner in terms of Section 10(3)(a) of the IBC code, 2016 at the time of filing for adjudicating purposes. That it is paramount that balance sheets from 2008-2009 till

2018-2019 of the Respondents (Applicants in the main matter) be produced before the Hon'ble Tribunal.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions are made:

   i. The Respondent in its reply submitted that the present application has been filed under incorrect provisions of law and deserves to be dismissed on maintainability. The Respondent further submitted that the main application has been filed under section 7 of IBC, 2016 which pertains to initiation of CIRP by Financial Creditor. Contrary to this the present application has been filed under section 10(3)(a) of the IBC, 2016 which pertains to initiation of CIRP by the Corporate Applicant itself.

   ii. The Respondent submits that the Corporate Debtor while advancing final arguments requested that the Financial creditor be directed to place on record their financial statements, whereas the Financial Creditor objected to the said submissions of the Corporate Debtor as an afterthought for delaying the proceedings.

iii. The Respondent stated that the Tribunal vide order dated 02.03.2020, granted the applicant to file an application seeking discovery of financial statements. Whereas, the applicant failed to file the said application within the stipulated period of time further, the application filed is at a highly belated stage of the proceedings.

iv. The Respondent further relied upon the order of the Hon'ble NCLAT in the matter of ***V. Padmakumar v. Stressed Assets Stabilisation Fund (SASF) & Anr. [Company Appeal (AT) (Insolvency) No. 57 of 2020),*** wherein the Hon'ble Tribunal held that the Balance Sheets/Annual Returns of the Corporate Debtor cannot be treated as an acknowledgement of debt for the purposes of section 18 of the Limitation Act, 1963.

3. We have gone through the documents filed by the applicant and heard the arguments made by the counsel for the

applicant. The applicant prayed for the directions to be given to the Respondent to produce Balance Sheets from 2008-09 till 2018-19.

4. From the perusal of the Application, it is clear that the present application has been filed under section 10(3)(a) of IBC, 2016 Read with Rule 11 and Rule 32 of the NCLT Rules, 2016. The section 10(3)(a) of IBC, 2016 for brevity has been reproduced below:

10. Initiation of corporate insolvency resolution process by corporate applicant. –

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application, furnish-
(a) the information relating to its books of account and such other documents for such period as may be specified;
(b) the information relating to the resolution proposed to be appointed as an interim resolution professional; and
(c) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.**]**

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order-
(a) admit the application, if it is complete 2[and no disciplinary proceeding is pending against the proposed resolution professional**]; or**

(b) reject the application, if it is incomplete 3[or any disciplinary proceeding is pending against the proposed resolution professional]: Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

5. It is clearly evident from the bare perusal of the section 10(3)(a) of IBC, 2016, that it deals with the 'Corporate Applicant' whereas, the applicant in the present application is 'Corporate Debtor' in the main matter i.e., IB-1772/ND/2019 along with that the main matter has been filed under section 7 of IBC, 2016 not under the section 10 of IBC, 2016. For brevity of the applicant the definition of "Corporate Applicant" along with the relevant part of section 7 of IBC, 2016 is reproduced below:

"Corporate Applicant" means—
(a) Corporate Debtor, or
(b) A member or partner of the Corporate Debtor who is authorized to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor, or
(c) An individual who is in charge of managing the operations and resources of the corporate debtor, or
(d) A person who has control and supervision over the financial affairs of the corporate debtor.

7. Initiation of corporate insolvency resolution process by financial creditor.

(3) The financial creditor shall, along with the application furnish –

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
(b)the name of the resolution professional proposed to act as an interim resolution professional; and
(c) any other information as may be specified by the Board.

6. Hence, it is clearly evident that the application has been filed under section 10(3)(a) of IBC, 2016 whereas the main matter against the applicant has been filed under section 7 of IBC, 2016, meaning that the applicant is not the Corporate Applicant in the main matter. Thus, the present application is not maintainable and no direction prayed in the present application can be granted to the applicant.

7. Hence, in light of the above, after giving careful consideration of the entire matter and hearing the arguments of the applicant, the present application is **Dismissed**.

-Sd-

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

-Sd-

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

RDS