

NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.4
IA/33(MP)2023
in
TP 60 of 2019 [CP(IB) 32 of 2017]

Proceedings under Section 60 IBC

IN THE MATTER OF:

The State Trading Corporation of India
V/s
K S Oils Ltd through the Liquidator, Kuldeep Verma

.....Applicant

.....Respondent

Order delivered on 22/03/2024

Coram:

P. Mohan Raj, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

IA/33(MP)2023

The case is fixed for pronouncement of the order.

The order is pronounced in open Court *vide* separate sheet.

-sd-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

A. Bhadauria

-sd-

P. MOHAN RAJ
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH**

IA 33 of 2023

In

TP 60 of 2019 [CP(IB) 32 of 2017]

IA No. 33 of 2023

[An application under Section 60 of the Insolvency & Bankruptcy Code, 2016]

The State Trading Corporation of India

Through Authorized Officer

Jawahar Vyapar Bhawan

Tolstoy Marg

New Delhi- 110001

Applicant

Versus

KS Oils Limited

Through the Liquidator

Sh. Kuldeep Verma

46, B.B Ganguly Street

5th Floor, Unit 501

Kolkata-700012

Respondent

In the matter of TP 60 of 2019 [CP(IB) 32 of 2017]

SREI Infrastructure Finance Limited

Financial Creditor

Versus

KS Oils Limited

Corporate Debtor

Order Pronounced on: 22.03.2024

Coram: Hon'ble P. Mohan Raj, Member (J)

Hon'ble Kaushalendra Kumar Singh, Member (T)

Appearance:

For the Applicant: Ld. Counsel Mr. Navin Arora

For the Respondent: Ld. Sr. Counsel Mr. Vivek Sibal a.w. Ld. Counsel
Mr. Nishith Acharya a.w. Ld. Counsel Mr. Aditya J.
Pandya

ORDER

1. The present application is filed on 10.08.2022 (as per affidavit annexed to the application) by State Trading Corporation Of India (applicant) through its Manager Mr. Jatin Saini being the authorized officer of the applicant under section 60 of Insolvency & Bankruptcy Code, 2016 (Code) against the corporate debtor KS Oils Limited through the liquidator Mr.Kuldeep Verma (respondent).

2. In pursuance to the section 7 application (bearing No. CP(IB) 32 of 2017) filed by SREI Infrastructure Finance Limited, the corporate debtor- K.S. Oils Limited, was admitted under corporate insolvency resolution process (CIRP) vide order dated 21.07.2017 by this Adjudicating Authority. Shri Kuldeep Verma was appointed as Interim Resolution Professional (IRP). Subsequently, Shri Kuldeep Verma RP of the corporate debtor filed an appeal (Company Appeal (AT) (Insolvency) No.98 of 2021) before the Hon'ble NCLAT against the order dated 01.01.2021 passed by this Adjudicating Authority. In the said appeal the company was ordered to be liquidated vide order dated 16.03.2021 by Hon'ble NCLAT. The RP was appointed as the liquidator of the company.

3. The applicant is a premier international trading company of the Government of India engaged primarily in export and import operations. The said Corporation is registered as an autonomous company under the companies Act, 1956 and functions under the administrative control of the Ministry of Commerce & Industry, Government of India. The present application is filed by the applicant seeking direction to the liquidator to consider the claim of the applicant as financial creditor and to re-adjudicate the claim by adjusting credit balance of the corporate debtor amounting to Rs.6,68,65,987/- appearing in the books of the applicant from the total claim of Rs. 78,93,95,088/- filed by the applicant.

4. The averments made by the applicant in the present application and as argued by the learned counsel are summarized as under:

(i) The corporate debtor through its Chairman and Managing Director Mr. Ramesh Chand Garg approached the applicant with a business proposal for domestic procurement of mustard oil on a back-to-back basis. Mr. Ramesh Chand Garg requested for grant of financial assistance, so that the corporate debtor could purchase mustard oil from its nominated suppliers in the domestic market.

(ii) The applicant and the corporate debtor entered into an agreement dated 09.06.2010 and addendum no.1 dated 20.10.2010 (hereinafter called "Agreement") and as per the agreement the applicant was to purchase the mustard oil from the nominated suppliers and then sell it to the corporate debtor. Further, that the mustard oil procured was to be stored in the designated oil tanks of the corporate debtor at Morena and Guna exclusively earmarked for the applicant.

(iii) The corporate debtor also executed the corporate guarantee (not exceeding Rs.75 crores) on 09.06.2010 thereby undertaking to discharge the liability due to the applicant in case of any default. Mr. Ramesh Chand Garg also issued personal guarantee on the same date and thereby making him personally liable to discharge the liability of the corporate debtor which are due and payable to the applicant. Moreover, the corporate debtor also issued Indemnity Bond on the same date, undertaking to indemnify the applicant for all losses, damages, outstanding payments, interest, penal interest cost etc. suffered or sustained by the applicant due to the acts and misconduct of the corporate debtor.

(iv) A tripartite agreement dated 09.06.2010 was also executed between the applicant, corporate debtor and M/s Star Agri Warehousing and Collateral Management Limited according to which mustard oil was to be stored in the oil tanks of the corporate debtor under the supervision of M/s Star Agri Warehousing and Collateral Management Limited, who were appointed as Collateral Management agency (CMA). The management charges of M/s Star Agri Warehousing

and Collateral Management Limited was to be paid by the applicant after the receipt of the same from the corporate debtor.

(v) The terms of the agreement were such that:

(a) the applicant was to provide finance to the corporate debtor and inland LCs were opened by the applicant in favor of nominated suppliers for 120 days. The corporate debtor was supposed to liquidate the entire amount of LC to the applicant within a period of 120 days from the date of opening of LC in favor of the nominated supplier. Further, the corporate debtor was to deposit EMD with the applicant @ 10% of the total value of finance which was Rs. 8,33,07,927/-;

(b) the mustard oil purchased by the applicant was to be lifted by the corporate debtor against the payment in the following manner:

- 15% of the total qty. to be lifted between 45 to 60 days.
- 35% of the total qty. to be lifted between 61 to 90 days.
- Rest qty. of 50% to be lifted before the expiry of the lifting period i.e. 120 days.

(vi) The corporate debtor was under the contractual duty to discharge the amount of LC on its respective due date. It was also categorically informed to the corporate debtor by the applicant that overdue payment will attract interest at applicant prevailing lending rate of interest, according to the applicant trading finance policies/guidelines.

(vii) As per the liquidation schedule, the corporate debtor had to liquidate total quantity of mustard oil i.e., 15757.50 MT within 120 days from the date of opening of LC. However, at the request of the corporate debtor, this period was further extended to 180 days. The extended period expired on 12.04.2011 and 22.04.2011 for stocks stored at Morena & Guna respectively. However, the corporate debtor failed to

liquidate mustard oil worth Rs. 60.90 crores, as of 14.10.2011. As a consequence of not lifting the stocks in time, and therefore, interest started accruing on the outstanding amount.

(viii) Later, as on 20.11.2014, the corporate debtor liquidated the stock of 12618.64 MT only and a stock of 3138.86 MT was still lying for liquidation by CD. Even after several follow-ups by the applicant upon the corporate debtor and Mr Ramesh Chand Garg, to liquidate the remaining stock of 3138.86 MT and to pay the entire outstanding amount along with accrued interest, the corporate debtor repeatedly sought time from the applicant for liquidation of the outstanding payment.

(ix) Mr. Davesh Agarwal, Director and C.F.O. of the corporate debtor, signed and issued one cheque dated 20.06.2014 bearing no. 552337 for Rs. 10 crores drawn on State Bank of India, Kasturba Gandhi Marg, 23, Himalaya House, New Delhi-110001 to the applicant on behalf of the corporate debtor to liquidate a part of the outstanding amount of LC. However, the said cheque was dishonored with the remarks "Insufficient Funds".

(x) That due to failure on the part of the corporate debtor and Mr Ramesh Chand Garg in liquidating the outstanding liability which was due and payable by corporate debtor to the applicant, the latter vide notice dated 28.01.2015 invoked personal guarantee issued by Mr. Ramesh Chand Garg and corporate guarantee issued by the corporate debtor to the applicant.

(xi) That the corporate debtor and Mr Ramesh Chand Garg, are jointly, severally and collectively liable to liquidate the outstanding liability as Mr Ramesh Chand Garg, has given his personal guarantee to liquidate outstanding dues of the corporate debtor in case of failure, neglect and omission on the part of the corporate debtor, in liquidating the outstanding dues which are due and payable to the applicant.

(xii) That as on 16.03.2021 the applicant is entitled to recover amount of ₹78,93,95,088/- from the corporate debtor. The corporate debtor is under the contractual and legal duty to pay interest including penal interest to the applicant until and unless it liquidates the entire outstanding amount which is payable by the corporate debtor to the applicant.

(xiii) The corporate debtor was admitted into CIRP by this Adjudicating Authority vide its order dated 21.07.2017 and subsequently was ordered to be liquidated by the Hon'ble NCLAT vide its order dated 16.03.2021. Subsequent to the liquidation order, the liquidator issued a public notice on 18.03.2021 inviting the claims and accordingly the applicant submitted its claim to the liquidator on 12.04.2021 for an amount of Rs. 74,77,24,727/- due from the corporate debtor as on 16.03.2021. The said claim was submitted as an operational creditor.

(xiv) The applicant thereafter through a letter dated 11.05.2022 submitted a revised claim of Rs.78,93,95,088/- as of 16.03.2021 stating therein the reason to consider the applicant as a financial creditor. However, the same was rejected by the liquidator through its letter dated 06.07.2022 stating that the applicant is an operational creditor and does not qualify as a financial creditor.

(xv) It is evident that the Respondent has failed to consider the nature of transactions between the applicant and the corporate debtor and further admitted only an amount of Rs 55.91 crores towards the claim of the Applicant.

(xvi) The Liquidator also made several error in Adjudicating the amount of the claim submitted by the Applicant. The said adjudication of the claim was made by wrongly adjusting the credit balance

appearing in the books of accounts of the applicant amounting to Rs. 6,68,65,987/- crores. The said credit balance has been appearing as a liability in the applicant books of accounts and as such has not been adjusted. Thus, in all fairness the credit balance appearing in the books of accounts of applicant amounting to 6,68,65,987/- to be adjusted from the total claim amount of ₹78,93,95,088 filed by the applicant. Therefore, the applicant also seek re-adjudication of the claim by adjusting the credit balance of Rs.6,68,65,987/- from the total claim of Rs. 78,93,95,088/-.

(xvii) It is to be mentioned that the Respondent failed to consider the fact that "A perusal of the definition of 'financial creditor' and 'financial debt' makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be stated that money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise is considered as financial debt, as Section 5(8) is an inclusive definition.

(xviii) On the other hand, an 'operational debt' would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."

(xix) Further in similar case of the Applicant in case of RPIEL, which is under liquidation and has similar nature of transaction, the claim of the Applicant was accepted as the financial creditor.

(xx) During the liquidation, the liquidator is required to verify all the claims of the Creditor in terms of Section 35(1)(a) of the Insolvency & Bankruptcy Code, 2016 (I&B' Code, for short). Thereafter he is required to access information u/s 37 and consolidate the claims u/s 38. After verification of the claim u/s 39 the liquidator is required to admit the claim or reject the claim u/s 40.

5. In the context, the defense placed by the liquidator in its reply and submissions made thereon and as presented/argued by the learned Counsel are summarized as under:

i. The respondent was appointed as the liquidator of the corporate debtor- K.S. Oils Limited vide order dated 16.03.2021. The present application is filed by the applicant wrongly contending that the applicant is a financial creditor of the corporate debtor.

ii. Subsequent to the liquidation order public notice was issued on 18.03.2021 and thereafter the applicant filed its claim on 11.04.2021 as an Operational Creditor of the corporate debtor for an amount of Rs. 74,77,24,727/-, against which the liquidator admitted the claim to the tune of Rs. 7,54,45,362/-. However, after more than a year to filing of the said claim the applicant through its letter dated 11.05.2022 submitted a revised claim amounting to Rs. 78,93,95,088/-. In the said revised claim the applicant contended that the claim submitted earlier as an operational creditor was by mistake and that the applicant is a financial creditor of the corporate debtor.

iii. The Liquidator through his letter dated 6.07.2022 after further clarification and documents received from the applicant admitted the final claim of the applicant as an operational creditor as under:-

Total claim made - Rs. 78,93,95,088/- (revised)

Total claim admitted Rs. 55,90,98,361/-

Claim rejected - Rs.23,02,96,727/-

iv. Moreover, the contention of the applicant in the revised claim that the applicant is the financial creditor of the corporate debtor is not in accordance with the provisions of the Code. Since according to section 38(5) a creditor may vary its claim within fourteen days of submission of the original claim and hence letter dated 11.05.2022 which has been filed after more than a year from its original claim dated 11.04.2021 cannot be considered by the Liquidator, as the same is time-barred.

v. The Code provides for a specific procedure for dealing with claims of the creditors during the liquidation process. Sections 38 to 41 of the Code deal with said process. Further, Chapter V of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 provides the procedure and process of submission of Claims by the creditors and verification and admission/rejection by the Liquidator. Moreover, as per section 42 of the Code a creditor may file an appeal before the Adjudicating Authority against the decision of the Liquidator rejecting the claim within a period of fourteen days of receipt of such decision.

vi. Without prejudice to the aforesaid submission that the Applicant in view of Section 38(5) of the Code cannot vary/amend its claim at a later stage i.e. after 14 days from the date of its submission, the Applicant is not a secured financial creditor of the Corporate Debtor. Further, the key feature of financial transactions as postulated by Section 5(8) is its consideration for time value of money. For ready reference section 5(8) of the Code is reproduced hereunder:

5(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- a) money borrowed against the payment of interest;*
- b) any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;*
- c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument,*
- d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial borrowing;*

Explanation.- For the purposes of this sub-clause, -

- i) *any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- ii) *the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

- g) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- h) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- i) *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;"*

vii. In other words, in the definition of Financial debt the legislature has included such financial transactions which are usually for a sum of money received today to be paid over a period of time in a single or series of payments in the future. The Hon'ble Supreme Court of India in "Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. vs Axis Bank Ltd." (2020) 3 SCC 328 has held that for a debt to become a financial debt the disbursement should be against the consideration for the time value of money. The relevant part is reproduced as under:

"43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the

definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub- clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursement, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursement against consideration for the time value of money."

viii. The Applicant has relied upon the agreement dated 9.06.2010 executed between the Applicant and the corporate debtor to contend that the applicant is a Financial Creditor of the Corporate Debtor. However, it is evident from the recitals of the said Agreement that it is an agreement for the procurement of Mustard Oil by the Applicant from its nominated suppliers and then sale thereof to the corporate debtor. Thus, in effect, it is a transaction for the sale of goods. Further, it was also agreed in the agreement that the corporate debtor was supposed to pay the purchase tax for the supplies, this also indicates that the transaction between the applicant and the corporate debtor was for the sale of goods and that the applicant was charging a trading margin on sales. The relevant part of the agreement is reproduced as under:

6.AND WHEREAS STC has agreed to arrange for the above-mentioned item for and behalf of KSOL by purchasing domestically and to sell the entire quantity to KSOL at the determined price(landed cost upto warehouse, 0.75% STC Trade Margin and other statutory levies, if any."

ix. Further, there is no disbursement of money by the applicant to the corporate debtor against the consideration for the time value of money. Thus, the transaction between the applicant and the corporate debtor is not a financial transaction in the nature of financial debt and the applicant cannot be considered as a financial creditor of the

corporate debtor either under Section 5(8)(f) or Section 5(8)(h) of the Code.

x. The Applicant reliance on the Corporate Guarantee dated 9.06.2010 and the Indemnity Bond dated 9.06.2010 is also misplaced and not tenable in law, since any or every Corporate guarantee or Indemnity Bond does not make a transaction financial debt under Section 5(8) of the Code. The underlying basis of the transaction should be the disbursement of money and that too against the consideration for the time value of money for it to be a financial debt as defined under Section 5(8) of the Code. In the present case, it is evident from the Agreement dated 9.06.2010 that it is an agreement for sale of goods and the Corporate Guarantee and Indemnity Bond relied upon by the Applicant are not in respect of disbursement of money against the consideration for time value of money.

xi. The Application filed by the Applicant is misconceived and is based on an incorrect premise that the Applicant is a Financial Creditor of the Corporate Debtor. Thus, the present application is liable to be dismissed and the applicant is not entitled to any of the reliefs claimed in the application.

Our Analysis

6. We heard the learned counsel for the applicant & the respondent and have perused the material available on record. It is noted that the corporate debtor was admitted into CIRP by this Adjudicating Authority vide its order dated 21.07.2017. Subsequently, since no resolution plans could be approved, the RP filed an application (bearing No. IA 165 of 2018) before this Adjudicating Authority seeking liquidation of the corporate debtor, however, the said application for liquidation was rejected by the Adjudicating Authority vide order dated 01.01.2021 with a direction to the CoC to consider the revised plan of the resolution applicant. Therefore, the RP filed an appeal before the Hon'ble NCLAT (bearing No. Company Appeal (AT) (Insolvency) No.98 of 2021)

against the order of this Adjudicating Authority dated 01.01.2021. The Hon'ble NCLAT vide its order dated 16.03.2021 directed the liquidation of the corporate debtor and appointed the RP as liquidator.

6.1 It is noted that the facts of the case are such that the applicant and the corporate debtor entered into an agreement dated 09.06.2010 for procurement of the mustard oil by the applicant from its (applicant's) nominated suppliers and then selling it to the corporate debtor at the determined price (landed cost upto warehouse plus 0.75% applicant trade margin and other statutory levies if any). The oil stock purchased was to be kept in the name of the applicant and stored in the oil tanks of the corporate debtor at Morena & Guna under collateral management arrangement at the expense of the corporate debtor.

6.2 It is also noted that the Corporate guarantee dated 09.06.2010 was executed by the corporate debtor to discharge the liability due to the applicant in case of any default. Further personal guarantee was also issued by Mr. Ramesh Chand Garg (Chairman and Managing Director of the corporate debtor). The corporate debtor also issued an Indemnity Bond on the same date, undertaking to indemnify the applicant for all losses, damages, outstanding payments, interest, penal interest cost etc. suffered or sustained by the applicant due to the acts and misconduct of the corporate debtor.

6.3 It is noted that the corporate debtor had to liquidate total quantity of mustard oil i.e., 15757.50 MT within 120 days from the date of opening of LC. However, at the request of the corporate debtor, this period was further extended to 180 days. The extended period expired on 12.04.2011 and 22.04.2011 for stocks stored at Morena & Guna respectively. However, the corporate debtor failed to liquidate the mustard oil worth Rs. 60.90 crores, as of 14.10.2011 (till expiry of 180 days), as a consequence of not lifting the stocks in time and therefore, interest started accruing on the outstanding amount. Later, the corporate debtor could liquidate the stock upto 12618.64 MT only till 20.11.2014 and a stock of 3138.86 MT was still lying for liquidation by Corporate Debtor as on 20.11.2014.

6.4 Subsequently, since the corporate debtor failed to liquidate the outstanding liability, the applicant through its letter dated 28.01.2015 invoked personal guarantee and corporate guarantee issued by Ramesh Chand Garg and the corporate debtor respectively.

6.5 It is further noted that pursuant to the liquidation order the applicant filed its claim on 11.04.2021 for Rs.74,77,24,727/- as an operational creditor of the corporate debtor. Out of the said claim the liquidator admitted claim of the applicant to the tune of Rs.7,54,45,362/-. Subsequently, the applicant through its letter dated 11.05.2022 submitted the revised claim amounting to Rs.78,93,95,088/- claiming itself to be the financial creditor of the corporate debtor instead of operational creditor as submitted in its original claim. However, from the revised claim the liquidator admitted the claim of the applicant to the extent of Rs.55,90,98,361 and rejected the balance amount i.e. Rs. 23,02,96,727/-.

6.6 It is noted that in addition to the above the liquidator also rejected the contention of the applicant that it is the financial creditor of the corporate debtor stating that the applicant cannot vary/amend its claim after 14 days from the date of submission of its original claim and that the transaction between the applicant and the corporate debtor can not be considered as a financial transaction in the nature of financial debt and therefore the applicant cannot be treated as a financial creditor of the corporate debtor either under Section 5(8)(f) or Section 5(8)(h) of the Code. Further, there is no disbursement of money by the applicant to the corporate debtor against the consideration for the time value of money.

6.7 We note that according to section 38 of the Insolvency & Bankruptcy Code, 2016 the liquidator should collect or receive all the claims from the creditors within thirty days from the date of commencement of the liquidation process. Further, the creditor can withdraw or verify the claim within 14 days of its submission. However, in the present case the applicant submitted the claim on 11.04.2021 as an operational creditor and subsequently after more

than a year submitted the revised claim in Form D through letter dated 11.05.2022 stating that the applicant should be considered as a financial creditor.

6.8 We find that the transaction between the applicant and the corporate debtor was such that the applicant was to purchase the mustard oil for and on behalf of the corporate debtor. Further, the corporate debtor was supposed to pay the purchase tax for the supplies and other taxes and levies to its account. Thus this is a case where as per the agreement the applicant has purchased the mustard oil and then sold it to the corporate debtor by including its trade margin and as such the contention of the applicant that the said transaction is within the definition of the financial debt as defined under section 5(8) of the Code is quite misplaced. The definition of financial debt as per section 5(8) includes any amount disbursed against the consideration for time value of money. However, in the present case no such amount has been transferred by the applicant to the corporate debtor and the said transaction between the applicant and the corporate debtor was nothing else but the sale of goods by the applicant to the corporate debtor and such transactions are not covered in the definition of the financial debt under the Code.

6.9 Even otherwise the revised claim of the applicant submitted much belatedly as financial creditor cannot be considered, since in accordance with section 38(5) of the Code, the modification in the claim is permissible only within 14 days of submission of the claim. The applicant submitted its revised claim as financial creditor after more than one year from the submission of its original claim as an operational creditor. Moreover, section 42 of the Code categorically states that the appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims should be made within 14 days of the receipt of such decision and since the claim of the applicant was partly rejected by the liquidator through letter dated 06.07.2022, the applicant could have approached the Adjudicating Authority within 14 days from the date of receipt of the decision of the liquidator.

However the affidavit annexed to the present application is dated 10.08.2022 and therefore the same is time barred.

6.10 We have also taken note of the content of the agreement dated 09.06.2010, specially opening para's and clauses 1, 2, 5, 6, & 15 which demonstrates that the said agreement was entered into by the applicant (STC) with a view to make available the mustard oil to the corporate debtor (KS Oils Limited) by purchasing it from the domestic market (though from the nominated suppliers of KS Oils Limited) and to sell the entire quantity to KS Oils Limited at the determined price (including its trade margin). For ready reference the opening para's and the said clauses of the agreement are reproduced hereunder:

Whereas STC is a Premier Trading Organization of India with experience of handling international and domestic business for nearly five decades and has been handling various kinds of products and commodities and uses effectively its vast infrastructure of offices of Indian States, including procurement of agricultural products in the domestic market for actual users and consumers in various industries.

And whereas KS Oils Limited as one such company has approached STC for procurement of Mustard Oil by STC from their nominated suppliers and then sale thereof to M/s KS Oils Limited at the mutually agreed rates, term & conditions.

And whereas STC has agreed to arrange for the above-mentioned item for and on behalf of KS Oils Limited, by purchasing domestically and to sell the entire quantity to KS Oils Limited at the determined price (landed cost up to warehouse, 0.75% STC trade margin and other statutory levies if any).

(1) Security

STC will release 100% payment to the supplier (nominated/identified by M/s KSOL) for purchase of Mustard Oil in the name of STC after taking 10% EMD from M/s KSOL in the shape CHEQUE/RTGS or in the case of cheque, after realization into STC's account.

(2) Mode of purchase-

STC shall purchase above Mustard Oil from the nominated suppliers of M/s KS Oils Limited in the name of STC indicating details of quantities, quality, specifications, price etc. On receipt of confirmation from installation (Goods Receipt) about the quantity of above Oil received on STC's account, on verification and receipt of all requisite documents in original, STC shall release 100% payment through 120 days usance LC to the Suppliers based on their invoice after checking the same from market sources based on authenticated newspaper/market/mandi report. STC will not reimburse any amount towards freight, any other charges excepting the purchase price. STC will appoint independent surveyor at the cost and expenses of KS Oils Limited. Quality and quantity report given by the surveyor will be final and binding. The oil stock purchased shall be kept in the name of STC and would be stored in KS Oils Limited tanks under collateral management arrangement at the expense of KS Oils Limited. The stock lying in the tanks shall not be removed by KS Oils Limited or given delivery without the specific instructions of STC as the ownership of goods remain exclusively with STC.

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(5) STC shall pay supplier of above oil at the landed cost of Oil so purchased to the extent of 100% of the value of Oil and kept in the tanks, but not exceeding Rs.75.00 Crores. The payment shall be released to suppliers of oil immediately on production of purchase advice/invoice and storage of Oil in the Tanks. The cost of the oil will be released based on the quantity declared as in Storage Tank Receipt after ensuring quality aspect also. KSOL assures that the oil will be purchased at prevailing market prices. Prices to be confirmed from news papers/Broker/Mandi Reports. However, in case STC feels that the price as declared in the documents is not in line with the prevailing market price, STC has the right to ask for all the related proof concerning prevailing market price such as reputed brokers' report/other report/news paper. In the case of a substantially variation in price, cost of Oil will be released on the basis of prevailing market price. KSOL will be responsible for quantity and quality of oil purchased.

(6) At the time of taking delivery/buying of the oil, KSOL will submit an applicable Declaration Form to STC which will be submitted to Sales Tax Department by STC. KSOL will pay Purchase Tax as applicable to the concerned Sales Tax Department. All taxes, levies, costs of whatsoever will be to KSOL's account and STC will be indemnified against all taxes/liability etc (if any).

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(15) Trading Margin

KSOL will pay STC trade margin of 0.75% of the amount of purchase price irrespective of the quantities for above oil so purchased. The trade margin will be added to the Oil cost at the time of issuance of Sales Invoice/Delivery of goods and this cost shall be the basis for calculation of tax, if any.

All quantity/quality losses during storage will be to the account of KSOL.

7. As a result, the contention of the applicant that it is a financial creditor cannot be accepted. We are of the considered view that the applicant is an operational creditor of the corporate debtor and the liquidator has made no error in considering its claim in the category of operational creditor. Accordingly, the present application deserves to be rejected.

8. Thus IA 33 of 2023 in TP 60 of 2019 [CP(IB) 32 of 2017] stands dismissed.

-sd-

Kaushalendra Kumar Singh
Member (Technical)

-sd-

P. Mohan Raj
Member (Judicial)

Swati Khandelwal