

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 225 of 2017

(Arising out of Order dated 29.08.2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in Company Petition No. (IB)-39/7/HDB/2017)

IN THE MATTER OF:

PEC Ltd. ... Appellant

Versus

M/s. Sree Ramakrishna Alloys Ltd. ... Respondent

Company Appeal (AT) (Insolvency) No. 236 of 2017

(Arising out of Order dated 29.08.2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in Company Petition No. (IB)-40/7/HDB/2017)

IN THE MATTER OF:

PEC Ltd. ... Appellant

Versus

M/s. SriGangadhara Steels Limited ... Respondent

Present: For Appellant: Mrs. Sangeeta Sondhi, Shri Sanjeev Narula, Ms. Kaanan Gupta and Shri Vikas, Advocates.

For Respondent: Shri Rajesh Bohra, Shri Aditya Naryan and Shri Tanmay Jain, Advocates.

J U D G E M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In both the appeals as common question of law is involved, Appellant is common, the terms of agreement are similar, they were heard together and are being disposed of by this common judgment.

2. The Appellant- 'M/s. PEC Ltd.' is a Government of India Enterprise, and is a 'Financial Creditor' of Respondent(s)- 'Corporate Debtor(s)' of both the appeals.

3. The case of the Appellant is that the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' defaulted of Rs.15,16,26,907/- as on 6th March, 2017. Initially, on demand, the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' issued three cheques which have been bounced, three Criminal Complaints under Section 138 of the Negotiable Instrument Act, 1881 has been instituted against the said Respondent being Criminal Complaint No. 40156/2016, Criminal Complaint No. 18535/2016 and Criminal Complaint No. 18399/2017 pending in Patiala House Courts, New Delhi.

4. According to Appellant, the Respondent(s)- 'M/s. Sree Ramakrishna Alloys Limited' has also sold the goods pledged by the Appellant and has misappropriated the sale proceeds of the stock of pledged goods for which Criminal Complaints have also lodged by filing

FIR before Station House Officer (SHO), Parawada Police Station, Visakhapatnam-CII.

5. The Appellant- 'M/s. PEC Ltd' filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against 'M/s. Sree Ramakrishna Alloys Limited'. The said application on notice has been admitted by impugned order dated 29th August, 2017, order of moratorium has been passed and 'Interim Resolution Professional' has been appointed. The grievance of the Appellant is that though the application was preferred by the Appellant under Section 7 of the 'I&B Code', at the request of the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' ('Corporate Debtor'), the application has been treated to be an application under Section 9 of the 'I&B Code', and order of admission has been passed.

6. Learned counsel appearing on behalf of the Appellant submits that in view of the fact that the application under Section 7 of the 'I&B Code' has been treated to be an application under Section 9 of the 'I&B Code', the Appellant is now deprived of its right as 'Financial Creditor' and cannot take part as a member of 'Committee of Creditors' which has a vital role to play. It was further submitted that the application having filed under Form-1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (hereinafter referred to as "Adjudicating Authority Rules") the same cannot be treated to be an

application under Form-5 of the Adjudicating Authority Rules, as per which different informations and records are to be provided and enclosed.

7. Similar is the plea taken in the case of 'M/s. SriGangadhara Steels Limited' the other ('Corporate Creditor') Respondent in the other appeal. According to Appellant, 'M/s. SriGangadhara Steels Limited', also defaulted to pay the amount of Rs. 7,43,89,467/- as on 6th March, 2017. The said 'M/s. SriGangadhara Steels Limited' also issued three cheques which were bounced giving rise to three Criminal Complaints under Section 138 of the Negotiable Instrument Act against the Respondent(s) being Criminal Complaints No. 40154/2016, Criminal Complaint No.18534/2016 and Criminal Complaint No. 18400/2017, all pending in the Patiala House Court at New Delhi.

8. In the said appeal similar plea has been taken that the Respondent-'M/s. SriGangadhara Steels Limited' had also sold the goods pledged by the Appellant and have misappropriated the proceeds of the stock of pledged goods and for which, the Appellant has filed Criminal Complaints. Against 'M/s. SriGangadhara Steels Limited'-('Corporate Debtor') also an application under Section 7 of the 'I&B Code' was filed but the Adjudicating Authority at the instance of the 'Corporate Debtor', treated the application as an application under Section 9 and by impugned order dated 29th August, 2017, admitted the application, passed order of moratorium and appointed 'Interim Resolution Professional'.

9. We have heard learned counsel for the Appellant(s) and learned counsel appearing on behalf of the Respondent(s).

10. From the record of both the appeals, we find that the agreement reached between the Appellant-‘M/s. PEC Ltd.’ and respective Respondent(s) are verbatim similar. For the said reason, we are referring one of the agreement, language of both the agreements being same, except the name of one of the party.

11. From relevant fact as pleaded we find that ‘M/s. Sree Ramakrishna Alloys Limited’ (‘Corporate Debtor’) by their letter dated 19th February, 2014 intimated the Appellant- ‘M/s. PEC Ltd.’ that the said Respondent has proposed to procure ‘M.S. Billets’ as per the policies of the Appellant. So, the Appellant was requested to approve and grant clearance for the purchase of ‘M.S. Billets’ through ILC for Rs. 4,99,97,493/- (Rupees Four Crores Ninety-Nine Lakhs Ninety-Seven Thousand Four Hundred and Ninety-Three Only) and enclosed the offer and proforma invoice with request to the Appellant- ‘M/s. PEC Ltd.’ to arrange an amount of Rs.63,75,000/- (Sixty-Three Lakh Seventy-Five Thousand Only) towards the 12.5% margin money with conditions as mentioned therein, which reads as follows:

“SREE RAMAKRISHNA ALLOYS LIMITED
INNOVATIVE GROWTH

To
M/s PEC Limited
A Govt. of India Enterprise
(Under Ministry of Commerce)
Jagannadh Nilayam, 10-27-17A,
Waltair Uplands,
VISAKHAPATNAM-530 003
Tel. No. 0891-2710311, Fax No. 0891-6642008

Company Appeals (AT) Nos. 225 & 236 of 2017

Kind Attn: Shri G.Y. Dupate, Branch Manager

Dear Sir,

Sub: Proposal for procurement M.S. Billets as per your policies

We are very thankful to you for your continued support. We now wish to procure 1292 MT of MS Billets from M/s. HARI HARA TRADERS MIG-81, D. No. 24-33-26, Vinayaka Nagar, Vuda Colony, Peda Gantyada, Visakhapatnam (AP) 530044 for which we request you for your approval and clearance for the purchase through ILC for Rs. 4,99,97,493/- (Rupees Four Crores Ninety Nine Lakhs Ninety Seven Thousand Four Hundred and Ninety Three Only). We are enclosing herewith a firm offer and proforma Invoice from the supplier of MS Billets M/s. HARI HARA TRADERS Visakhapatnam at Rs. 36,855/- (Basic price Inclusive of duty) + VAT 5% extra. This price is inclusive of freight i.e., delivery to our yard.

We hereby inform your good selves that we will arrange an amount of Rs.63,75,000/- (Sixty Three lakh Seventy Five Thousand Only) towards the 12.5% margin money for the above LC by way of RTGS.

We request your good selves to open ILC with following conditions:

1. Advising bank: State Bank of India Overseas branch, Visakhapatnam
2. Time for lifting of material: One month
3. Time for documentation: 10 days
4. Partial Negotiations should be allowed

We look forward for your confirmation of our proposal for domestic purchase.

With Best Regards

Thanking you,

Yours faithfully,
For SREE RAMAKRISHNA ALLOYS LIMITED

Sd/-
(S. RAMAKRISHNA)
Managing Director”

12. It was followed by an agreement reached between the Appellant- M/s. PEC Ltd. and Respondent- ‘M/s. Sree Ramakrishna Alloys Limited’ on 24th February, 2014. Relevant portion of the said agreement reads as follows: -

“NOW IT IS AGREED BY AND BETWEEN THE PARTIES AS UNDER:-

SRAL is desirous of purchase approx. LC1292.000 MTS (+/-2%) MS Billets @ Rs. 36,855/- PMT + 5% Taxes. (Total value to Rs. 4,99,97,493/- (+/-2%).

The material shall be delivered and stored in open space earmarked for PEC and duly fenced at **SRAL's** Yard Paravada, Visakhapatnam.

In order to procure raw material and to fulfill their obligations under their supply contracts with different buyers of the finished goods, **SRAL** has requested PEC for financial assistance to purchase the raw material. And at the request of **SRAL**, PEC has agreed to provide ILC of Rs. **4,99,97,493/-** (+/-2%) (Rupees Four Crore Ninety Nine Lakhs Ninety Seven Thousand Four Hundred and Ninety Three Only) towards cost of said material (inclusive of applicable taxes).

1. **SRAL** shall provide to PEC Margin Money as advance equal to 12.5% on 100% of the value of the material to be procured through PEC.
2. **SRAL** has to pay **1%** Trade Margin to PEC on invoice value of the material procured through PEC.
3. **PEC** shall raise Tax invoice by loading 1% Trade margin on purchase value immediately and differential VAT would be remitted to the state govt. and same shall be recovered from **SRAL**.
4. **SRAL** shall pledge the stock to PEC by way of entering into deed of pledge.
5. **SRAL** shall lift the entire stock within the usance period of ILC i.e. 90 by making payment at the Release Order rate fixed by the PEC.
6. **SRAL** agrees to pay usance interest at the applicable rate. All bank charges, incidental expenses, taxes, levies & duties involved in the said supply transactions shall be on **SRAL's** account.
7. In case **PEC** remains out of pocket beyond the recovery period of 90 days as stated above and **PEC's** fund remain blocked, **SRAL** will pay interest at the rate of **14.5%** per annum for the delayed period beyond 90 days.
8. **SRAL** will also pay to PEC all bank charges including DD/Pay Order/Fax charges etc. and any other incidental charges that may be incurred by PEC. These charges will be settled at actuals. Any excess/refund will be settled within a week's time after getting such advice from PEC.
9. **SRAL** will ensure the delivery of material from **M/s HARI HARA TRADERS** immediately on opening of ILC by PEC. PEC shall not be responsible for the quantity and quality of material at the point of loading as well as at the point of unloading. Immediately after delivery of material by supplier, **SRAL** will intimate PEC and its surveyor with a copy of the invoices/DC and will immediately pledge the Material in favour of PEC and will store the Material in PEC's warehouse/Plant Premises of **SRAL** to the satisfaction of PEC.
10. **SRAL** has agreed to pledge the Material in favour of PEC and store them in Warehouse/plant premises to the satisfaction of PEC at the cost and risk of **SRAL**. It will be a first charge and **SRAL** will not put any further charge with any other person/party. For this, **SRAL** shall sign an Agreement of Pledge, which shall form an integral and inseparable part of this Agreement.
11. **SRAL** shall earmark area in their plant premises for PEC to store the pledged material/goods. The area so earmarked shall be properly

fenced and shall have the facility of electricity/water and sitting arrangement for PEC's security at the cost of **SRAL**. Shall also reimburse to PEC electricity, water and/or any other charges for the services available at PEC's warehouse and/or provide these services free of cost."

13. Sub-Section (7) of Section 5 of the 'I&B Code' defines 'Financial Creditor' means:

"5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to"

'Financial Debt' is defined in sub-section (8) of Section 5 of the 'I&B Code' as follows:

"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 dematerialised 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 nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(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-clauses (a) to (h) of this clause”

14. From the letter referred to above and the agreement, we find that the Appellant-M/s. PEC Ltd. has disbursed the amount to ‘M/s. Sree Ramakrishna Alloys Limited’ against the consideration for the time value of money. It is also clear that M/s. Sree Ramakrishna Alloys Limited by the agreement dated 24th February, 2014 has borrowed money from the Appellant-M/s. PEC Limited against the payment of interest. Thus, the Appellant-M/s. PEC Ltd. come within the meaning of ‘Financial Creditor’ and is eligible to file an application under Section 7 of the ‘I&B Code’ there being a debt and default on the part of the Respondent.

15. In so far as the other Respondent-‘M/s. SriGangadhara Steels Limited’ is concerned, similar proposal for procurement M.S.Billets as per the policies of the Appellant-‘M/s. PEC Ltd.’ was made by letter dated 3rd May, 2014. The language of letter dated 3rd May, 2014 is same and similar to the language used by ‘M/s. Sree Ramakrishna Alloys Limited’ dated 19th February, 2014.

16. It is stated that both the Respondents belong to same group of Directors, and have same business.

17. In the agreement reached between the Appellant-M/s. PEC Ltd. and Respondent-‘M/s. SriGangadhara Steels Limited’ dated 19th May, 2014 similar terms and conditions have been mentioned, as in the agreement of ‘M/s. Sree Ramakrishna Alloys Limited’ and quoted

above, except the difference of amount. In the agreement with 'M/s. SriGangadhara Steels Limited' also terms and conditions is similar. It has been agreed that beyond the period of ninety days, if the amount is not paid, 'M/s. SriGangadhara Steels Limited' will have to pay interest @ 14.5% per annum for the delayed period beyond ninety days, as the terms and conditions in the case of 'M/s. Sree Ramakrishna Alloys Limited'.

18. From the letter dated 3rd May, 2014, written by 'M/s. SriGangadhara Steels Limited' and the agreement reached with M/s. PEC Ltd. with the said Respondent(s) dated 19th May, 2014, it is clear that the Appellant-M/s. PEC Limited is a 'Financial Creditor' of 'M/s. SriGangadhara Steels Limited' ('Corporate Debtor').

19. For the reasons aforesaid, we hold that the Adjudicating Authority failed to appreciate that the application(s) preferred by Appellant under Section 7 of the 'I&B Code' cannot be treated as an application under Section 9 of the 'I&B Code' and the Appellant who is a 'Financial Creditor' cannot be treated as 'Operational Creditor'.

20. Further, we hold that if an application is filed by a person under Section 7 of the 'I&B Code' and in case the Adjudicating Authority comes to the conclusion that the Applicant is not a 'Financial Creditor' in such case the Adjudicating Authority has jurisdiction to reject the application under Section 7 of the 'I&B Code', but the said Authority cannot treat the format of the application under Section 7 of the 'I&B Code' (Form-1) as an application under Section 9 of the 'I&B Code' (Form-5), nor can treat

such person an 'Operational creditor', in absence of any claim made under Section 9 of the 'I&B Code'. Further, as the informations required to be given in Form-1 varies from the informations as required to be given in Form-5 (As per Section 9), including instructions made below the requisite form(s), no application filed under Section 7 can be treated as an application under Section 9 of the 'I&B Code'.

21. Further, for filing an application under Section 9 of the 'I&B Code' it is mandatory to issue a demand notice/invoice of payment under sub-section (1) of Section 8, but no such requirement is there for filing an application under Section 7 of the 'I&B Code'. Therefore, in absence of a notice under sub-section (1) of Section 8 of the 'I&B Code', an application under Section 7 cannot be treated to be an application under Section 9.

22. In the present case, as the application preferred by the Appellant under Section 7 in both the appeals are maintainable and have been admitted, order of moratorium has been passed and 'Interim Resolution Professionals' have been appointed, no interference is called for against the impugned order dated 29th August, 2017 challenged in Company Petition No. (IB)-39/7/HDB/2017 and the impugned order dated 29th August, 2017 challenged in Company Petition No. (IB)-40/7/HDB/2017, except to modify the part of the order whereby the Appellant is treated to be an 'Operational Creditor'. Both the applications for all purpose should be treated to be an application under Section 7 of the 'I&B Code' and the Appellant-'M/s. PEC Ltd.' in both the cases should be treated as 'Financial Creditor'. The 'Interim Resolution Professionals' are directed to

treat the Appellant accordingly, and include the Appellant as a Member of 'Committee of Creditors' in both the cases for taking decisions in accordance with law.

23. Both the appeals are allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice Bansi Lal Bhat)
Member (Judicial)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

13th December, 2017

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