

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

C.P. (IB) 1066/MB/2023

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016)

In the matter of

**Spenta Enclave Private Limited
(Through its Resolution Professional, Mr.
Rajesh Jhunjunwala)**

Having address at : A51, Aashit CHS, Azad Road, H B Gawde Marg, Stanburg Estate, Juhu Koliwada, Mumbai City, Maharashtra- 400049.

..... Petitioner/Financial Creditor

Versus

Spenta Sun City Private Limited

Having address at: - Office no. 1052, 10th Floor, Hubtown Solaris, N S Phadke Road, Saiwadi, Andheri East, Mumbai City, Maharashtra- 400069.

..... Respondent/Corporate Debtor

Order Delivered on :- 10.07.2024

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Financial Creditor : Adv. Manoj Mishra

For the Corporate Debtor : Adv. Chintan Gandhi

ORDER

Per: - Mr. Kuldip Kumar Kareer, Member (Judicial)

1. The present petition has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") by **Spenta Enclave Private Limited (Through its Resolution Professional Mr. Rajesh Jhunjunwala)** (hereinafter called as "Financial Creditor") praying inter-alia for initiation of Corporate Insolvency Resolution Process (CIRP) against **Spenta Sun City Private Limited** (hereinafter called as "Corporate Debtor") by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter called "the Code") for resolution of an unresolved Financial Debt of Rs. 6,43,04,016/- as on 01.04.2022 along with further interest @ 18% p.a. till the date of payment.

The submissions of the Financial Creditor are as follows:

2. The Petitioner Company was admitted into Corporate Insolvency Resolution Process (“CIRP”) vide NCLT order dated 24.03.2023 in CP(IB) 389(MB)-IV/2022 and consequently Mr. Rajesh Jhunjhunwala was appointed as the RP in place of existing IRP, Mr. Pranav J Damania vide NCLT order dated 19.06.2023 in IA 2535 of 2023 in CP(IB) 389(MB)2022.
3. The Petitioner had sanctioned and disbursed a total amount of Rs. 7,85,98,065/- in favours of the Respondent from 28.10.2016 to 04.05.2018, against which the Corporate Debtor had repaid an amount of Rs. 1,42,94,049/- in favour of the Petitioner from 28.07.2017 to 31.03.2018.
4. The Petitioner (through its Resolution Professional Mr. Rajesh Jhunjhunwala) issued a Demand Notice dated 29.06.2023 (served vide mail dated 01.07.2023), whereby the Corporate Debtor was called upon to repay a sum of Rs. 6,43,04,016/- along with further interest @ 18% p.a. till the date of payment/actual realization within a period of 15 days from the date of the said notice.
5. The Corporate Debtor defaulted in payment of dues by 14.07.2023 i.e. within a period of 15 days from Demand Notice dated 29.06.2023 (“Date of Default”). Consequently, the Petition (through its Resolution Professional) sent a final reminder mail dated 20.07.2023 and subsequent Legal Notice dated 26.08.2023 (received on 28.08.2023).
6. As per Section 25 of the Code, the Resolution Professional of the Petitioner Company is required to take into his control and custody all the assets of the Petitioner Company for successful realization of the CIRP Process, In

backdrop of the Respondent being a debtor of the petitioner Company and especially in light of the Corporate Debtor defaulting in payment of the said dues, hence the Resolution Professional of the Petitioner Company has preferred the instant Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 seeking for initiation of CIRP process against the Corporate Debtor. Hence the present Company Petition.

Reply filed on behalf of the Corporate Debtor:-

7. In reply, the Corporate Debtor has denied all allegations and/ or contentions and/or submissions made by the Petitioner in the Petition which are inconsistent with and/or contrary to what has been stated herein. Further, nothing shall be deemed to have been admitted for the reasons of non-traverse.
8. It is submitted that the Company Petition is not maintainable as there is no financial debt or default. A bare perusal of the Index to the Company Petition read with Part IV and Part V of the Form 1 Application filed by the purported financial creditor reveals that the Petitioner has claimed that the alleged debt is in default on the basis of copies of the following documents: (i) Subsidiary Ledger from 1.10.2016 to 31.10.2023, (ii) Confirmation of Accounts from 1.04.2016 to 31.08.2022, (iii) Share Purchase Agreement dated 09.09.2022, (iv) Demand Notice / Legal Notice sent by the Petitioner/ Petitioner's Advocates to the Respondent and (v) Record of Financial Information in Form C as available with NeSL which seems to be an Information Utility. The Respondent submits that the Petitioner's reliance on the above documents are misplaced/misleading and the Respondent disputes the same.

9. It is further submitted that the Petitioner has failed to substantiate through any document that Spenta Enclave Private Limited had sanctioned any loan in favour of the Respondent or that it had entered into any lending agreement akin to a loan agreement with the Respondent. It is also pertinent to mention that Spenta Enclave Private Limited is not even in the business of lending.
10. It is submitted that the Respondent i.e. Spenta Sun City Private Limited is the subsidiary of Spenta Enclave Private Limited. This subsidiary ledger also indicates that there were other entries for transfer of TDS payments to the Respondent as well as for return of some purchased machinery. The Schedule of Disclosures appended at Schedule 7 of the Share Purchase Agreement dated 09.09.2022 at Exhibit N indicates that the transaction is a related party transaction (Exhibit N) and it is in the nature of a non-interest bearing inter-corporate deposit.
11. It is further submitted that Part IV of the Form 1 Application indicates the date of default of 14.07.2023. This date of default seems to be calculated on the basis of expiry of 15 days from the date of the Petitioner's Recovery Notice of June 29, 2023 (Exhibit O). In absence of any specific terms and conditions for repayment of the alleged claim amount, the Petitioner has, in the 'Record of Financial Information' in the prescribed Form C has loosely stated that the alleged claim was repayable on demand. However, this financial information is not verified by NeSL as per Regulation 21 of The Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 and such authentication of default in the prescribed Form D is not brought on record.

12. It is submitted that the Petitioner's claim of 18% p.a. interest is also highly absurd and unsubstantiated. As already mentioned above, there is no document to record the terms and conditions of repayment including repayment schedule, interest rate or otherwise.
13. It is further submitted that the Petitioner being a Resolution Professional is not entitled/authorised to file a petition for initiating corporate insolvency resolution process ("CIRP") against any other entity. Section 11 of the Code sets out a list of persons who are barred from filing an application for initiating CIRP and a corporate debtor undergoing a corporate insolvency resolution process is barred from filing such an application.
14. It is further submitted that the Petitioner is interested only in recovery and not in resolution. Without prejudice, it is an admitted position as per the Petition that there was no demand raised by the Spenta Enclave Private Limited. The demand notice / recovery notice was raised for the first time only by the Petitioner who is Resolution Professional and apparently, for the purposes of recovery.
15. In the end, the Corporate Debtor has prayed for the dismissal of the Petition.

Analysis and Findings:-

16. We have heard the Counsel for the parties and gone through the record.
17. During the course of arguments, Counsel for the Financial Creditor has pointed out that the Financial Creditor advanced a loan of Rs. 7,85,98,065/- which was disbursed by way of cheques as claimed in part (IV) of the Petition, out of the advanced amount, the Corporate Debtor repaid a sum of Rs.

1,42,94,049/- and a sum of Rs. 6,43,04,016/- was still outstanding at the time of the filing of the present Petition. It has been further contended by the Counsel for the Financial Creditor that even if there is no agreement of loan, the advancement of the loan to the Corporate Debtor stands fully proved on record. The loan was disbursed between 28.10.2016 and 04.05.2018. Counsel for the Financial Creditor has further pointed out that the Corporate Debtor acknowledged the loan by way of balance confirmation letters Exhibit (G) to Exhibit (M) every year from 01.04.2017 to 01.04.2022. Counsel for the Financial Creditor has further pointed out that the date of default in this case is 14.07.2023 when notice for payment of the outstanding amount was issued to the Corporate Debtor and despite the notice, the amount was not repaid.

18. Counsel for the Financial Creditor has further referred to the NeSL Report (Exhibit R) which also shows that date of default is 14.07.2023. Therefore, in light of the circumstances mentioned above, Counsel for the Financial Creditor has contended that the existence of financial debt and its default committed by the Corporate Debtor stands proved on record and further that the Petition has been filed well within the period of limitation.
19. On the other hand, Counsel for the Corporate Debtor has argued that the Financial Creditor has miserably failed to prove that the nature of the debt allegedly advanced to the Corporate Debtor was a financial debt. In this regard, it has been argued by the Counsel for the Corporate Debtor that no agreement of loan was executed between the parties nor any such loan document has been placed on record. There is no sanction letter nor any terms of contract in respect of the alleged loan have been brought on record. Therefore, according to the Counsel for the Corporate Debtor, it has not been

established that the loan in question was a financial debt covered under the definition provided in Section 5 (8) of the Insolvency and Bankruptcy Code, 2016. It has further been argued by the Counsel for the Corporate Debtor that even otherwise, the Corporate Debtor is a related party of the Financial Creditor and, therefore, it cannot be a case of financial debt having been advanced to the Corporate Debtor.

20. Counsel for the Corporate Debtor has further contended that related party is not covered under the mechanics of IBC. Moreover, the Financial Creditor is neither in the business of lending nor has a lending license from Reserve Bank of India. In this regard, Counsel for the Corporate Debtor has further referred to the share purchase agreement dated 09.09.2022 which indicates that the alleged transaction is a related party transaction which, at best, can be considered as interest free inter-corporate deposit.
21. Counsel for the Corporate Debtor has further argued that even the date of default is not correctly claimed by the Financial Creditor. Counsel for the Corporate Debtor has further contended that the alleged date of default i.e. 14.07.2022 seems to have been calculated on the basis of expiry of 15 days from the notice dated 29.06.2023. According to the Counsel for the Corporate Debtor, the alleged date of default is not verified by any NeSL Regulations, 2021 of Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017. In support of his arguments, Counsel for the Corporate Debtor has relied upon *Swiss Ribbons Limited & Others Vs. Union of India & Others. (2019) 4 SCC 17*, whereby it has been held that a claim gives rise to a debt only when it becomes due and a default occur only when a debt becomes due and payable and is not paid by the Debtor. It has also been argued on behalf of the Corporate Debtor that the Financial Creditor is trying to use the

present Petition as a recovery mechanism which is not permissible under the law especially when the Financial Creditor is a well performing entity and should not be pushed into insolvency.

22. We have weighed the contentions raised by the Counsel for the parties and have also carefully gone through the record.

23. So far as the question of advancement of the unsecured loan by the Financial Creditor to the Corporate Debtor is concerned, it is evident from the ledger (Exhibit F) that the amount of Rs. 7,85,98,065/ was disbursed to the Corporate Debtor between 28.10.2016 and 04.05.2018. There is no dispute with regard to the fact that no document of loan was executed between the parties at the time the loan was advanced and disbursed to the Corporate Debtor. However, in our considered view, it is not always necessary and imperative to execute a loan agreement as and when a loan is advanced. The factum of advancement of loan can be ascertained from other documents and the attending circumstances. In this context, a reference can be made to the confirmation of accounts from Exhibit (G) to Exhibit (M) executed/signed on behalf of the Corporate Debtor every year from 01.04.2017 to 01.09.2022. In this regard, a reference can further made to the NeSL report Exhibit (R) wherein also the sanctioned amount of the unsecured loan is stated to be Rs. 7,85,98,065/- and the date of default is also mentioned as 14.07.2023 in respect of the defaulted outstanding amount of Rs. 6,43,04,016/-. Though it has been claimed by the Corporate Debtor that the Financial Creditor has not been able to establish as to what were the terms and conditions of the alleged debt and further that the Financial Creditor has failed to establish the nature of the borrowing, however, in our considered view, this contention raised on behalf of the Corporate Debtor is not tenable. The Corporate Debtor having

received the amount in question and also having acknowledged the same from time to time by way of balance confirmations cannot now be heard harping that the transaction was not, in fact, a loan transaction. Once the Petitioner alleged that the money was transferred and disbursed to the Corporate Debtor as financial debt, the onus shifted on to the Corporate Debtor to explain as to on what account the money was received by it, in case it was not on account of a financial debt. However, in the reply filed by the Corporate Debtor, no explanation has been rendered as to on what account the money was received by the Corporate Debtor and that being so, in our considered view, the plea raised on behalf of the Corporate Debtor cannot be said to be sustainable. Rather, in the absence of any explanation forthcoming from the Corporate Debtor as to on what account the money was received, if not as a financial debt, an adverse inference has to be drawn against the Corporate Debtor. Further, in the absence of any such explanation on the part of the Corporate Debtor, the plea of the Financial Creditor that the money was transferred as a loan as well as a financial debt is liable to be accepted.

24. It has also been argued on behalf of the Corporate Debtor that since there is no loan document, it cannot be ascertained as to when the loan was to be returned and further that as to how much interest, if any, was applicable and in the absence of any interest clause or agreement with regard to the payment of interest, there is no time value of money in respect of the alleged loan transaction, and, therefore, the same cannot be treated as a financial debt in terms of Section 5 (8) of Insolvency and Bankruptcy Code, 2016.
25. Having thoughtfully considered this contention, we are of the considered view that the same is also not tenable. In this context a reference can be made

to the law laid down in *Orator Marketing Private Limited Vs. Samtex Desinz Private Limited, Civil Appeal No. 2231 of 2021 decided on 26.07.2021* whereby it was held by the Hon'ble Supreme Court that a term loan advanced to meet the financial requirements of a Corporate Debtor for its operation, which obviously has the commercial effect of borrowing, which did not carry interest, cannot be excluded from the purview of a financial debt. It was further held that the definition of financial debt under Section 5 (8) of Insolvency and Bankruptcy Code, 2016 does not expressly exclude an interest free loan. In light of the law laid down by the Hon'ble Supreme Court, it has to be held that an inter corporate loan, which has the commercial effect of borrowing, is also covered under the definition of financial debt. In this regard, a further reference can also be made to the law laid down in *Shailesh Sangani Vs. Joel Cardoso and Priority Marketing Private Limited, Company Appeal (AT) (Insolvency) No. 616 of 2018 decided on 30.01.2019* whereby it has also been held by the Hon'ble NCLAT that the component of interest is not a sine qua non for bringing the debt within the fold of financial debt.

26. It has also been argued on behalf of the Corporate Debtor that the Financial Creditor has not been able to establish the date of default. In this regard, Counsel for the Corporate Debtor has argued that since there is no loan agreement or any other document to show as to when the loan was to be repaid, the date of default cannot be established nor can it be said with conviction that the date of default is relatable with the date of notice issued by the Financial Creditor to the Corporate Debtor. Even this contention raised on behalf of the Counsel for the Corporate Debtor does not appear to be holding much water. If there is no loan agreement between the parties with regard to the specific time as to when the loan was to be repaid, it can be safely presumed that such a loan was repayable on demand. The Financial

Creditor through Resolution Professional issued notice dated 29.06.2023 asking the Corporate Debtor to return the outstanding dues within a period of 15 days from the date of notice and since the amount was not repaid as demanded within the period of 15 days, it can be safely presumed that the Corporate Debtor committed default in repayment on 14.07.2023 which has been rightly claimed to be the date of default and has been so recorded in the NeSL report Exhibit (R) as well. Therefore, it cannot be said by any stretch of imagination that the Financial Creditor has not been able to establish the date of default in this case or that the Financial Creditor is liable to be non-suited on this ground.

27. It has also been argued on behalf of the Corporate Debtor that the Corporate Debtor is nothing but a related party of the Financial Creditor and, therefore, the present Petition is not maintainable. In this context, it would suffice to say that there is no bar under the law that a related party cannot file a Petition under Section 7 of Insolvency and Bankruptcy Code, 2016. Therefore, we discard this contention at this stage without going into the question as to whether or not, the Financial Creditor is a related party of the Corporate Debtor
28. As a result of above discussion, we hold that the Financial Creditor has been able to establish the existence of financial debt and its default having been committed by the Corporate Debtor and further that the Petition is filed within the period of limitation. Therefore, the Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 deserves to be admitted and it is ordered accordingly in following terms:-

ORDER

- a. The above Company Petition No. (IB) 1066/(MB)/2023 is hereby admitted and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Spenta Sun City Private Limited**.
- b. This Bench hereby appoints **Mr. Gajesh Labhchand Jain**, Registration No: **IBBI/IPA-001/IP-P-01697/2019 -2020/12588** as the Interim Resolution Professional having his address at **D Wing Flat No 501 Clifton Society Raviraj Oberoi Complex Shastri Nagar ,Andheri West ,Mumbai Suburban, Maharashtra, 400053, ,Email :- gajeshjain@gmail.com, Mobile No:- 9167108835**; to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of **Rs. 3,00,000/-** (Rupees Three Lakhs Only) towards the **initial CIRP cost** by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution

plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the concerned Registrar of Companies, Mumbai for updating the Master Data of the Corporate Debtor.

29. **Accordingly, this Petition is admitted.**

30. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)