

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI
CP (IB) No.956/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:

REC LIMITED

[Formerly known as Rural Electrification Corporation Limited]

[CIN: L40101DL1969GOI005095]

Core-4 Scope Complex-7

Lodhi Road

New Delhi-110003.

...Financial Creditor

Vs.

GLOBAL METAL & ENERGY PRIVATE LIMITED

[CIN:U74120MH2012PTC234251]

103/104, Building No.3 Raheja Classique

Link Road, Near Infinity Mall

Andheri (W)

Mumbai-400053

Maharashtra.

...Corporate Debtor

Pronounced:15.10.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor : Adv. Siddharth Ranade a/w Adv. Nishi Bhankhari, Adv.

Pushkar Deo, Adv. Ananya Bajpai i/b Trilegal

Corporate Debtor : Adv. Jatin Sehgal a/w Adv. Omkar Deosthale

ORDER***[PER: SANJIV DUTT, MEMBER (TECHNICAL)]*****1. BACKGROUND**

- 1.1 This is an Application bearing C.P. (IB) No.956/MB/2023 filed by REC Limited, the Financial Creditor, on 05.09.2023 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Global Metal & Energy Private Limited, the Corporate Debtor, which is, *inter alia*, engaged in the business of power generation in the State of Maharashtra.
- 1.2 The Financial Creditor provided rupee term loan facility of Rs.47.09 Crore (Forty-Seven Crore and Nine Lakh Rupees) to Corporate Debtor *vide* Loan Agreement dated 03.06.2015 for the purpose of setting up a 10 MW Wind Power Project at Washan, Taluka Jath, District Sangli, Maharashtra. However, the Corporate Debtor was unable to repay the loan and due to continuing defaults, the account of the Corporate Debtor was declared as Non-Performing Asset (NPA) on 30.09.2018. Thereafter, the Corporate Debtor made payments towards its dues and the account was standardised.
- 1.3 However, the Corporate Debtor again defaulted in repayment of loan on 31.12.2020 and its account was re-classified as NPA on 31.03.2021. Consequently, a loan recall notice dated 07.07.2021 was issued by the Financial

Creditor recalling the loan. The Financial Creditor also issued various demand notices from January, 2021 to February, 2023 seeking repayment of the loan.

- 1.4 Thus, as on 10.08.2023, the total amount of debt outstanding is Rs.39,57,24,585/- (Thirty-Nine Crore Fifty-Seven Lakhs Twenty-Four Thousand Five Hundred and Eighty-Five Rupees) which is due and payable by the Corporate Debtor to the Financial Creditor. Since the Corporate Debtor has been unable to discharge its repayment obligations, the Financial Creditor is left with no alternative but to present the instant Application under Section 7 of the Code seeking initiation of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF THE FINANCIAL CREDITOR

- 2.1 The Financial Creditor approved rupee term loan amounting to Rs.47.09 crore *vide* Sanction Letter dated 24.02.2015. The Corporate Debtor *vide* its Board Resolution dated 20.05.2015 confirmed acceptance of the terms and conditions of the said loan.
- 2.2 Subsequently, Loan Agreement dated 03.06.2015 was executed between the Corporate Debtor and the Financial Creditor for the disbursement of the loan. It is submitted that in total, the Financial Creditor disbursed Rs.47,67,52,290/- (Forty-Seven Crore Sixty-Seven Lakh Fifty-Two Thousand Two Hundred and Ninety Rupees) to the Corporate Debtor as on 10.08.2023.
- 2.3 The account of the Corporate Debtor was classified as a non-performing asset (NPA) on 30.09.2018 due to defaults in repayment of the loan and a loan recall notice dated 12.10.2018 (Recall Notice 1) was issued by the Financial Creditor

to the Corporate Debtor recalling the entire loan. Thereafter, the Corporate Debtor made payments towards the loan and its account was standardised. However, the Corporate Debtor defaulted again on 31.12.2020 and the loan account continued to be in default since then. Consequently, the loan account of the Corporate Debtor was reclassified as NPA on 31.03.2021 and a loan recall notice dated 07.07.2021 (Recall Notice 2) was issued.

2.4 Due to the continuing default, the Financial Creditor issued demand notices on 14.01.2021, 08.02.2021, 01.03.2021, 16.03.2021, 23.06.2021, 24.06.2021 and 09.02.2023. The Corporate Debtor acknowledged its debt through letters dated 07.07.2022, 27.03.2023, 31.05.2023, 16.06.2023 and 27.06.2023. In its letter dated 31.05.2023, the Corporate Debtor informed the Financial Creditor that it was clearing all outstanding amounts towards the loan *vide* Cheque No.275213 dated 17.06.2023 and requested the Financial Creditor to present the cheque on that date. Subsequently, the Corporate Debtor requested the Financial Creditor to present the said cheque on 03.07.2023 and 20.08.2023 through letters dated 16.06.2023 and 27.06.2023 respectively. However, the cheque was dishonored due to insufficient funds on 19.06.2023, 05.07.2023 and 21.08.2023.

2.5 The Corporate Debtor has also acknowledged its default in relation to the loan in its Standalone Financial Statements for FY 2020-21, as available on the website of the Ministry of Corporate Affairs. The Auditor's Report in the Standalone Financial Statements for FY 2020-21 confirms that the Corporate Debtor defaulted in repayment of the loan and that the account was classified as NPA on 31.03.2021. The latest acknowledgment of debt by the Corporate Debtor is

dated 27.06.2023, ensuring that the present Application is within the limitation period.

- 2.6 Therefore, as on 10.08.2023, the outstanding amount due by the Corporate Debtor towards the loan is Rs.39,57,24,585/- (Thirty-Nine Crore Fifty-Seven Lakh Twenty-Four Thousand Five Hundred and Eighty-Five Rupees). This amount includes Rs.1,99,90,112/- of unpaid dues that the Financial Creditor had capitalised in 2021 due to COVID-19 in accordance with the Deed of Undertaking dated 15.01.2021.
- 2.7 The Financial Creditor has filed the present Application based on the outstanding amounts as on 10.08.2023. However, the Financial Creditor expressly reserves the right to claim any additional amounts that are due and payable or may become due and payable by the Corporate Debtor to the Financial Creditor before the interim resolution professional or otherwise.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 The Corporate Debtor *vide* its Affidavit-in-Reply dated 12.12.2023 has raised following objections:-
- 3.2 The Application is barred under Section 10A of the Code, since the date of default as per Part-IV of the present Application is 31.12.2020 which falls within the period covered by Section 10A of the Code. Accordingly, the Application for initiation of CIRP in respect of the Corporate Debtor filed by the Financial Creditor is not maintainable under Section 10A of the Code. Reliance is placed in this regard on the judgment of Hon'ble Supreme Court in ***Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Limited*** [(2021) 3 SCC 224] and

order of co-ordinate Bench at Bengaluru in *M/s. Asset Reconstruction Company (India) Limited. Vs. M/s. Manyata Developers Private Limited* [CP (IB) No.125 (BB) of 2022].

- 3.3 Two reports from the National E-Governance Services Limited, each dated 05.08.2021 relied upon by the Financial Creditor, also indicate that the date of the alleged default is 31.12.2020, which falls within the period covered by Section 10A. Further, letters dated 14.01.2021, 08.02.2021 and subsequent correspondence addressed by the Financial Creditor to the Corporate Debtor intimating the amount of overdue principal and interest explicitly state the date of default as 31.12.2020. Therefore, the present Application is not maintainable as it pertains to defaults occurring within the Section 10A period.
- 3.4 Reasons for declaration of loan account as NPA were not attributable to the Corporate Debtor. The Corporate Debtor suffered a significant loss of revenue due to the nationwide lockdown. Despite this, the Corporate Debtor made efforts to honor its payment obligations to the Financial Creditor. In June 2020, in light of the impact of the lockdown and in accordance with the RBI's Regulatory Package dated 20.03.2020, the Financial Creditor granted an extended moratorium to the Corporate Debtor for another six months. Further, the Corporate Debtor faced delays in receiving outstanding dues from Maharashtra State Electricity Distribution Company Limited (MSEDCL) which led to defaults in payment to the Financial Creditor. Consequently, a default occurred at the end of the moratorium on 31.12.2020.

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- 3.5 The Corporate Debtor is an ongoing concern, solvent and capable of paying its outstanding debts. The company has other secured and unsecured creditors and is making efforts to make timely payments on its loan facilities. The Corporate Debtor is a bona fide borrower with a good reputation in the industry. Despite the alleged non-cooperation by the Financial Creditor, the Corporate Debtor has complied with all its obligations under the Loan Documents.
- 3.6 In view of the above submissions, the Corporate Debtor submits that the Application filed by the Financial Creditor does not justify invoking the Code. The Corporate Debtor thus requests that the Application be dismissed with exemplary costs.

4. REJOINDER BY THE FINANCIAL CREDITOR

- 4.1 The Financial Creditor filed a rejoinder dated 04.01.2024 in which it specifically submitted that Section 10A does not apply to any default committed after 25.03.2021. Section 10A was introduced in the Code to save the corporate sector from facing insolvency proceedings for defaults that occurred due to the onset of COVID-19. This safeguard was only applicable where defaults occurred on account of COVID-19 during the lockdown period. However, the Corporate Debtor committed defaults in repayments according to the scheduled installments from 31.12.2020. These defaults have continued even after the suspension period. In view of these persisting defaults, the Financial Creditor issued a Recall Notice on 07.07.2021, post the suspension period, recalling the entire loan amount and calling upon the Corporate Debtor to repay the entire dues of Rs.39,59,00,839/- within seven days of the Recall Notice. Upon non-

payment of this amount by 14.07.2021, an event of default occurred as per clause 7.1 of the loan on 14.07.2021 which is beyond the suspension period. Therefore, the date of default is 14.07.2021 and this default has been ongoing.

4.2 The Hon'ble Supreme Court has clarified that the expression "default," as defined in Section 3(12) of the Code, means non-payment of "debt" when the whole or any part of the installment of the amount of debt becomes due and payable and is not paid by the debtor or the corporate debtor. Thus, in terms of the Recall Notice, the "default" in this case arose after the expiry of seven days from the Recall Notice, i.e., on 14.07.2021. Hence, the date of default clearly falls beyond the suspension period and the purported shelter under Section 10A of the Code that the Corporate Debtor is attempting to utilise is inapplicable. Thereafter, the Corporate Debtor has remained in default and failed to repay the amount even after the issuance of another notice on 09.02.2023, wherein the Corporate Debtor was called upon to repay the entire outstanding amount within seven days. As a result, the Corporate Debtor cannot claim the benefit of Section 10A of the Code.

4.3 The Hon'ble Supreme Court has stated in various cases that the Adjudicating Authority is only required to consider the existence of a debt and default in an Application filed under Section 7 of the Code and upon being satisfied, it must admit the application. In the present case, the Financial Creditor has duly demonstrated the existence of a debt and default by the Corporate Debtor. Further, by the Corporate Debtor's own admission in its Reply at paragraph 17, it is established that the Corporate Debtor has defaulted in its payment towards

the loan and has failed to make payment of Rs.39,57,24,585/- to the Financial Creditor. Therefore, the Financial Creditor has sufficiently met the threshold for the admission of the Application.

- 4.4 In addition to the Financial Creditor demonstrating debt and default, the Corporate Debtor has itself acknowledged its debt through various communications and Financial Statements, as brought out in Para 2.5 above. It is also pertinent to note that the Corporate Debtor has not filed its financial statements for FY 2021-22 and FY 2022-23, as per the records of the MCA. Therefore, in view of the above, it is amply clear that the Corporate Debtor is not a solvent company.

5. ANALYSIS AND FINDINGS

- 5.1 Upon perusal of all the documents and pleadings and hearing both the Ld. Counsel for the Financial Creditor and the Corporate Debtor, our findings in the matter are as under:-
- 5.2 Before delving into the merits of the matter, the primary issue to determine is whether the present Application is barred by the provisions of Section 10A of the Code. In this connection, it will be pertinent to first consider the provisions of Section 10A of the Code which was inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 with effect from 05.06.2020. Section 10A mandates that notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed for any default arising during the period from 25.03.2020 to 24.03.2021. The proviso to Section 10A makes it clear that for the default

occurring during the aforesaid period, no application shall ever be filed for initiation of CIRP of a corporate debtor. The Explanation below Section 10A clarifies that the provisions of this section shall not apply to any default committed under Sections 7, 9 and 10 before 25.03.2020. As held by the Hon'ble Apex Court in the case of **Ramesh Kymal** (supra), the correct interpretation of Section 10A must take into account the object behind insertion of this provision and the extraordinary circumstances in which it was introduced in the Code. "*The onset of the COVID-19 Pandemic was a cataclysmic event which had serious repercussions on the financial health of corporate enterprises*". The intent of the legislature was to bar the institution of any application for commencement of CIRP in respect of a default which occurred between 25.03.2020 and 24.03.2021. However, it must be noted that the retrospective bar on the filing of an application for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of the creditors to recover it.

- 5.3 Adverting to the facts of the present case, it is observed that the Financial Creditor has in Column 2 of Part-IV of the Application clearly stated that the Corporate Debtor defaulted in its payment towards the loan on 31.12.2020 and its loan account has continued to be in default since then. Therefore, it is an admitted fact that the date of default in the instant case is 31.12.2020 which falls within the prohibited period covered by Section 10A. Further, on perusal of the two records of financial information filed by the Financial Creditor in Form-C with the National E-Governance Services Limited on 05.08.2021, it is observed that

the date of default is mentioned therein as 31.12.2020. The loan account of the Corporate Debtor was classified as NPA on 31.03.2021, which is 90 days after the date of default. In other words, this also confirms the occurrence of default on 31.12.2020. Moreover, letters dated 14.01.2021, 08.02.2021 and 01.03.2021 sent by the Financial Creditor to the Corporate Debtor requiring it to pay the overdue amount of principal and interest also categorically state the date of default as 31.12.2020 (when the amount in question fell due and payable to the Financial Creditor but remained unpaid).

- 5.4 The Financial Creditor in its Rejoinder attempted to shift the date of default by claiming it to be case of a continuing and subsisting default and stating that *vide* Recall Notice dated 07.07.2021, the Financial Creditor recalled the entire loan amount, demanding repayment from the Corporate Debtor within seven days. Upon failure of the Corporate Debtor to do so, the Financial Creditor contends that it is entitled to take the date of default as 14.07.2021. However, such attempt by the Financial Creditor at this juncture to shift the date of default to suit its claim is not only inconsistent with the date of default mentioned in Part-IV of the Application but also contrary to its pleaded case and supporting documentary evidences as per the Application viz., NeSL record of financial information, correspondences with Corporate Debtor for payment of overdue principal and interest etc. It is also pertinent to note that when the loan account of the Corporate Debtor was itself classified as NPA on 31.03.2021, the date of actual default can only be prior and not subsequent to it. The plea taken by the Financial Creditor is thus nothing more than a desperate attempt to get over the embargo

imposed by Section 10A of the Code. If such plea is accepted, the provisions of Section 10A of the Code will be rendered meaningless and redundant as by simply issuing a legal notice after the end of the suspension period, the creditors would be able to shift the date of default in every case and seek initiation of CIRP against corporate debtors under Section 7 or Section 9 of the Code.

5.5 We maintain that the date of default has to be determined with reference to the point of time when the debt became due and payable and was not paid by the Corporate Debtor and not when the debt recall notice was issued by the Financial Creditor. Therefore, the date of default occurring within the prohibited period cannot be shifted merely because a notice for payment is issued again after the end of such prohibited period. Mention of date of default in Part-IV of the Application is a mandatory statutory requirement. Having already specified 31.12.2020 as the date of default in Part-IV of the Application, the Financial Creditor in present case cannot be allowed to retract its stand and instead claim at this stage that the date of default was actually subsequent to the suspension period covered under Section 10A of the Code which ended on 24.03.2021. Such contention by the Financial Creditor seems to have been raised so as to somehow wriggle out of the restriction imposed by Section 10A of the Code and the same is found to be untenable and unacceptable. Similarly, mere acknowledgement of debt by the Corporate Debtor in its financial statements for FY 2020-21 will not have the effect of negating or nullifying the provisions of Section 10A of the Code.

5.6 In view of the foregoing discussion, we are of the considered view that the present Application is clearly barred by Section 10A of the Code and consequently, it is not maintainable and is liable to be rejected. Accordingly, we do not deem it necessary to go into the merits of the case.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.956/MB/2023 filed under Section 7 of the Code by REC Limited, the Financial Creditor, for initiating CIRP in respect of Global Metal & Energy Private Limited, the Corporate Debtor is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Financial Creditor to pursue such other remedies as may be available in accordance with law.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

/LRA-Deepa /

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)