



**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

IBA/403/2020

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

*In the matter of **YES AND YES INFRACON (P) LTD.,***

STEP STONE INFRAS PRIVATE LIMITED,

Rep by its Managing Director
Mr.Mothish Kumar,
No.1/1, Shakthi Nagar, 2nd Street,
Choolaimedu, Chennai – 600 094.

... Financial Creditor

-Vs-

YES AND YES INFRACON (P) LTD.,

Rep by its Managing Director
D.Shanmugan,
No.14A, Sathy Road,
Near Soolai, Erode – 638 004.

... Corporate Debtor

*Order Pronounced on **24th April 2023***

CORAM:

**SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

*For Financial Creditor: Mr.S.Kamalakannan, Advocate
For Corporate Debtor: Mr.R.Rajesh, Advocate*

ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

This Application has been filed by **STEP STONE INFRAS PRIVATE LIMITED** (hereinafter referred to as 'Financial Creditor') through Mr.K.Mothish Kumar duly authorized vide Board Resolution dated 30.01.2020, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, against **YES AND**



YES INFRACON (P) LTD (hereinafter referred to as 'Corporate Debtor'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, declare a moratorium and appoint Interim Resolution Professional (IRP).

2. Vide order dated 08.07.2022 in IA(IBC)/90(CHE)/2021, this Tribunal had permitted the Financial Creditor to make necessary modifications in the instant application and the same was filed on 13.07.2022 vide SR No.4269.

3. In Part-I of the modified application, states that the Financial Creditor is a private limited company, having registered at No.1/1, Shakthi Nagar, 2nd Street, Choolaimedu, Chennai – 600 094.

4. Part II states that the Corporate Debtor is a Private limited company incorporated under the Companies Act, 2013 on 22.03.2017 with CIN: U45200TZ2017PTC028664. The registered office of the Corporate Debtor as per the MCA master data is situated at No.14A, Sathy Road, Near Soolai, Erode – 638 004.

5. Part-III states that, the Financial Creditor has proposed the name of the Interim Resolution Professional (IRP) viz., Mr.Vengari Seshari Sowrirajan, Reg. No. IBBI/IPA-002/IP-N00268/2017-18/10781.



6. Part-IV it is averred that the Financial Creditor has claimed a debt of rupees one crore, which is due and payable by the Corporate Debtor. The date of default is stated as 31.12.2019.

7. Part V of the application describes the particulars of Financial Debt as follows,

- i) SBI, Cheque No.695451, 31/10/2019, 50,00,000/-
- ii) SBI, Cheque No.695452, 30/11/2019, 25,00,000/-
- iii) SBI, Cheque No.695452, 31/12/2019, 25,00,000/-
- iv) Copy of Memorandum of Understanding signed between the Corporate Debtor and the Applicant dated 28.09.2019.

8. Fact in Brief:

8.1. The Financial Creditor and Srico Projects Pvt. Ltd., (SRICO) had entered into a Memorandum of Understanding (MoU) dated 14.06.2017 for sub-contracting the construction of dwelling units (described in MoU). The Financial Creditor had deposited a refundable security deposit to the Principal Contractor for the said contract.

8.2. Thereafter, the Financial Creditor and the Corporate Debtor entered into MoU dated 28.09.2019. Wherein, Financial Creditor agreed to transfer the above said construction work to the Corporate Debtor and the Corporate Debtor agreed to pay the security deposit which was deposited by the Financial Creditor with the SRICO plus the retention amount and yardstick payment which was payable by



the Financial Creditor to the SRICO, totalling Rs.85,00,000/- to the Financial Creditor.

8.3. The Corporate Debtor issued the post-dated Cheques as a guarantee to the Financial Creditor. Upon presenting the same on the due date with the respective bank, the cheques were returned with the remarks as 'insufficient funds'. Aggrieved by the dishonour the Applicant caused a legal notice dated 20.01.2020. In turn, the Corporate Debtor sent a reply dated 03.02.2020 denying the Applicant's claims. Hence this application.

9. It is submitted by the Applicant that as per the MoU dated 28.09.2020, the Corporate Debtor was liable to pay the Rs.85,00,000/- from 01.01.2020 with the interest at the rate of 14% per annum. It is further submitted that the transactions under the said MoU were admitted by the Corporate Debtor in the reply notice dated 03.02.2020. In addition to that the Applicant relied on various precedents to substantiate that the above debt is a Financial Debt under Section 5(8)(e) of IBC, 2016.

10. *Per contra*, the Corporate Debtor submitted that the claim of the Applicant is not a Financial Debt as per Section 5(8)(e) of IBC, 2016. In support of its submission, it relied on the decision of NCLT, Hyderabad in **Shree Jaya Laboratories Pvt. Ltd.**, wherein it was held that '*in Section 5(8)(e) only the factoring transactions in respect of "receivables other than non-recourse basis" are included*'.



11. It is further argued by the Corporate Debtor that there is no disbursal against the consideration for the time value for money. No money has been paid or disbursed to the Corporate Debtor by the Applicant, in fact, it was paid only to the SRICO which is not a party to this proceeding. It is further argued that as per MoU dated 14.06.2017 the term Security Deposit does not carry any interest and hence there is no disbursal against consideration for time value for money and it cannot be termed as financial debt.

12. It is further contended by the Corporate Debtor that, as per clause 4 (extracted hereunder) of the MoU dated 28.09.2020,

“After the settlement of Rs. 1,50,00,000/- (Rupees One Crore and Fifty Lakhs only) by the party of Second part to the party of the first part, Rs. 1,00,00,000/- (Rupees One Crore only) through SRICO and Rs. 50,00,000/- (Rupees Fifty Lakhs only) directly, the party of the first part shall have no claim from the party of the Second part.”

the amount claimed is not payable by the Corporate Debtor.

13. It is further argued that as per the letter dated 30.10.2020, issued by the SICO to the Applicant Rs.50 lakh and Rs.15 lakh have been paid to the Applicant on 01.10.2019 and 02.01.2020 respectively, towards refund of the security deposit. Be that as it may, the respondent argues that out of Rs.1 crore being claimed towards the security deposit after deducting the above 65 lakhs, only 35 lakhs are liable which is also payable by SRICO not by the Corporate Debtor.



14. The Corporate Debtor further pressed that the issue raised in the application is complex in nature and has to be dealt in civil court and it is beyond the purview of IBC, 2016.

15. Heard the submissions of Ld. Counsels of both parties, before parting with the case, it necessary to refer to Section 7 of IBC, 2016

"Section 7: Initiation of corporate insolvency resolution process by financial creditor:

...
(5) Where the Adjudicating Authority is satisfied that—
(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:
..."

In **Innoventive Industries Ltd Vs. ICICI Bank & Anr. [2017 SCC Online SC 1025]**, it was held as under,

"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise".

16. In view of the above, this Adjudicating Authority has to delve only into whether the amount claimed is Financial Debt or not and the said debt was defaulted or not?



17. It can be seen from the primary MoU dated 14.06.2017 entered into between the Applicant and SRICO where the parties agreed as follows,

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SCOPE:

Construction of dwelling units designated as D types in different towers. The following are the Dwelling units as indicated below:

S.No	Description	Nos of Units/	Area Details sqm/SftSuper area	each builtup area	Total Built up area Approx.	Value of Work Rs. in Cr
1.	Dwelling units (Stilt +10 Floors) D TYPE	240	38608.71 sqm or 415430 sqft		415430 sqft	Rs.47.78Cr
	Parkings (Approx)	195 Nos			Rs.50000 each	Rs.97.50 Lacs

Specification for wall and ceiling finishes, Doors and windows, handrails, roof terraces, sanitary fittings, kitchen accessories, water supply, waste water and sewerage systems, rain water harvesting, electrical works, electrical fittings, DG set connections, Lifts, fire protection system, lighting protection, earthing, unit numbering, parking area marking etc., are given as Annexure to this MOU.

1. PAYMENT OF BILLS: This is a Turnkey work. Unit of measurement is square foot of built up Area as specified by principal employer. The unit rate payable is **Rs. 1150/-** (Rupees One Thousand One Hundred and Fifty only) per Sq foot, including steel and cement. For super built-up area, payment to the stilt will be paid based on the number of parking lots each at **Rs. 50,000/-** (Rupees Fifty Thousand Only). Running account bills will be paid on mutually agreed pro-rata basis as per the agreement with Principal Employer SRICO. The primary responsibility of SRICO to maintain liaison with CGEHWO to get the bills passed and payment released as early as possible. Since there is no escrow mechanism, SRICO commits to release payment to the SUB CONTRACTOR within two working days from the release of payment from Principal Employer. Billing cycle shall be one month till completion of project.

2. SECURITY DEPOSIT: Rs. 1.00 Cr (Rupees One Crore Only) as deposit has to be made by **M/S.STEPSTONE INFRAS PVT LTD** to SRICO by way of Demand Drafts/RTGS as Performance Guarantee and SRICO shall refund the security Deposit on successful completion of the project. The SRICO agreed to refund the Security Deposit to the Subcontractor in case of termination of the contract for no fault of the sub contractor

3. PERIOD OF COMPLETION: Time is the essence of the contract and the work allotted to **M/S.STEPSTONE INFRAS PVT LTD** under this MOU shall be executed within 18 months from date of MOU, another 4 months to carry out internal works and also as per the terms and conditions of the Original Agreement. The detailed program for completion of the work shall be submitted by SRICO and the mile stone defined by the Principal Employer must be achieved, subject to requisite approvals and issue of GFC drawings to **M/S.STEPSTONE INFRAS PVT LTD.**

Contd... P-4

For SRICO PROJECTS PVT. LTD.


Managing Director

For Stepstone Infrass Pvt. Ltd.,


Vice President

Reading the above shows that the Applicant had deposited Rs.1,00,00,000/- to SRICO for construction work and this transaction is operational in nature.





18. In the MoU dated 28.09.2020, entered into between the Applicant and the Corporate Debtor, it was stated as under,

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4. The security deposit and the retention amount totaling Rs.1,37,11,876/- (Rupees One Crore Thirty Seven Lakhs Eleven Thousand Eight Hundred and Seventy Six only) of the First Part due and payable by Srico shall be transferred to the party of the first part by the Second Part either directly or through Srico. Effective the transfer of the construction project to the party of the second, Srico shall make the payments to the party of second part and the party of the second part undertakes to pay the yard stick payment of Rs.12,88,124/- (Rupees Twelve Lakhs Eighty Eight Thousand One Hundred and Twenty Four Only) payable and due to the party of the first part mentioned infra in para 6, for the work so far executed.
5. The PARTY OF THE SECOND PART has agreed to pay the above said security deposit and retention amount, totaling Rs.1,37,11,876/- (Rupees One Crore Thirty Seven Lakhs Eleven Thousand Eight Hundred and Seventy Six Only) to the PARTY OF THE FIRST PART towards the transfer of construction rights of "D" Block and accordingly the PARTY OF THE SECOND PART shall pay a sum of Rs.50,00,000/- (Rupees Fifty Lakhs Only) as advance in the above said amount to the PARTY OF THE FIRST PART on ~~01.10.2019~~ 01.10.2019. The PARTY OF THE SECOND PART has agreed to pay the balance sum of Rs. 87,11,876/- (Rupees Eighty Seven Lakhs Eleven Thousand Eight Hundred and Seventy Six only) and yard stick payment of Rs.12,88,124/- (Rupees Twelve Lakhs Eighty Eight Thousand One Hundred and Twenty Four only) due and payable to the party of the first part amount totaling to Rs. 1,00,00,000/- (Rupees One Crore only) in arrears, Rs.50,00,000/- (Rupees Fifty Lakhs only) payable on 31.10.2019, Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) payable on 30.11.2019 and Rs.25,00,000/- (Rupees Twenty Five Lakhs) payable on 31.12.2019.
6. The PARTY OF THE SECOND PART shall pay a sum of Rs.12,88,124/- (Rupees Twelve Lakhs Eighty Eight Thousand One Hundred and Twenty Four only) to the PARTY OF THE FIRST PART, mentioned in para 5 herein, being the yard stick Payment of construction Work executed so far in the project by the PARTY OF THE FIRST PART payable by Srico/Main Contractor at the

For. Yes and Yes Infracon Pvt. Ltd.


Managing Director

PARTY OF THE SECOND PART

For. Stepsstone Infracon Pvt. Ltd.


Vice President

PARTY OF THE FIRST PART





progress stages of the Construction under the MOU dated 14.06.2017 entered between party of the First and Srico. The PARTY OF THE SECOND PART has provided necessary guarantee to the PARTY OF THE FIRST PART by way of post dated cheques /instruments towards the payment of above said amount in discharge of their liability to the first party.

Amount	Cheque No	Bank	Dated
Rs.50,00,000/-	695451	SBI,SME BRANCH,BHAVANI	31.10.2019
Rs.25,00,000/-	695452	SBI,SME BRANCH,BHAVANI	30.11.2019
Rs.25,00,000/-	695453	SBI,SME BRANCH,BHAVANI	31.12.2019

The party of the second part accepts that the total payment of Rs. 1,50,00,000/- (Rupees One Crore Fifty lakhs only) is due and payable to the party of the first on the dates mentioned herein as financial credit and in the event of delay in making the payments as agreed herein, the PARTY OF THE SECOND PART shall pay an interest @ 14% P.A to the PARTY OF THE FIRST PART till the date of realization of said payment.

The party of the second part agrees that the security deposit of Rs.1,00,00,000/- (Rupees One Crore Only) of the party of the first part held by Srico, shall stand transferred to the party of the second part only upon the performance of the party of the second under this agreement.

After the settlement of Rs.1,50,00,000/- (Rupees One crore and fifty lakhs only) by the party of Second part to the party of the first part, (Rs.1,00,00,000/- (Rupees One Crore Only) through SRICO and Rs.50,00,000/- (Rupees Fifty Lakhs only) directly),the party of the first part shall have no claim from the party of the Second part.

The Party of the First part has installed all infrastructures like RMC Plants & all related accessories including motors, Testing equipment, Labour sheds, Electricity connection from TNEB, DG, Electrical wirings, fittings and boards, Bore, Water lines, Temporary structures, Additional barricading for RMC plant, at cost of the First Part for the project.

For. Yes and Yes Infracon Pvt. Ltd.

Managing Director

PARTY OF THE SECOND PART

For. Stepsstone Infrass Pvt. Ltd.

Vice President

PARTY OF THE FIRST PART



19. In the above MoU, the Financial Creditor (party of the First Part) transferred the same construction work to the Corporate Debtor (party of the Second Part) which the Applicant had agreed in



the MoU dated 14.06.2017. Transfer of the same work by subsequent MoU would not alter the nature of the original transaction. Thus, it is apparent that the Applicant had attempted to convert a debt of operational nature into a financial debt. At this juncture, it is relevant to refer to the decision of NCLT, Delhi in ***Jambudwip Exports and Imports Limited Vs. U P Bone Mills Private Limited, (IB)-447(ND)/2021 decided on 23.05.2022,*** wherein it was held as under,

"24. In view of the aforesaid discussion, we conclude that the amount advanced by the Applicant Company to the Corporate Debtor for purchase of certain goods was neither disbursed as loan per se nor the conversion of the said advance into an Intercompany Loan through the instrument of an MoU is in accordance with the law. Further, it is observed that by executing the MOU dated 10.05.2019, the parties have cleverly attempted to convert an Operational Debt into a Financial Debt.

25. The Application is accordingly, Dismissed."

20. Be that as it may, in the MoU dated 28.09.2020, the Corporate Debtor (party of the Second Part) expressly has accepted that Rs.1,50,00,000/- is due and payable to the Financial Creditor (party of the First Part). Moreover, it has been agreed by the Corporate Debtor that it would pay 14% interest per annum in case of delay in making the above payment.

21. Now we turn to provisions of IBC, 2016 Section 3(1) & Section 5(8)(e) of IBC, 2016 reads as follows,

"Section 3(1): "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"



Section 5:

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

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;"

A conjoint reading of the above provisions and facts makes clear that the amount claimed by the Applicant in the above MoU is debt as per Section 3(10) of IBC, 2016.

22. However, for entertaining an application under Section 7 of IBC, 2016 the debt should also be qualified as a 'financial debt' as per Section 5(8) of IBC, 2016. To qualify as 'financial debt', the debt should be disbursed against consideration for the time value of money. In the instant case, there is neither disbursement of debt nor the time value of money for the debt. 14% interest component in the MoU will take effect only in the event of delay in payment, in such case it cannot be considered as the time value of money.

23. Hon'ble NCLAT in ***Budhpur Buildcon Pvt. Ltd. Vs. Mr. Abhay Narayan Manudhane, RP of Housing Development and Infrastructure Ltd [Company Appeal(AT) (Ins) No. 589 of 2021 decided on 09-Sep-22]*** has held as under:

"All the above citations reflect one thing categorically and clearly that there must be a disbursement of fund by the Creditor to the Debtor purely in the form of release of fund as a "borrowing" and must have a "time value of money". The method may be different but the nature must be borrowing and in extended terminology even the liability in respect of guarantee is also covered. There must be a "Financial Debt"



which is owed by the other side i.e. the Debtor. It should be amply clear that the CD owe the "Financial Debt" to the Creditor. There is a difference between the levy of liquidated damages or penal interest for default and the financial debt per se. Hence, we cannot borrow unrelated concept from unrelated judgments to prove that wherever a word "interest" is there it means corresponding to a "Financial Debt" and we accordingly confirm that "Financial Debt" will always carry an interest towards time value of money. However, interest per se in any business contract cannot be termed to make the "debt" as a "Financial Debt", if it is in the nature of liquidated damages or in the nature of penal interest, which is a result of compensation for breach of contract which is stipulated for penalty. Hence, while examining the case, whether the Appellant is a Financial Creditor or not we are now arriving at a conclusion based on above said discussions both on law & on facts and the citations produced by the parties, some of which have been explicitly cited as above reveals that the Appellant is not a "Financial Creditor" and hence, we are upholding the order of the Adjudicating Authority.

24. In view of the above discussions and the case *supra*, we reasonably conclude that the debt owed by the Corporate Debtor was not disbursed against the time value of money and does not qualify as financial debt. The application under Section 7 of IBC, 2016 will not survive. Accordingly, IBA/403/2020 is dismissed and disposed off.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd -

SANJIV JAIN
MEMBER (JUDICIAL)

Gopishankar, D

Order pronounced under Rule 151 of NCLT Rules 2016, by **Hon'ble Judicial Member Sanjiv Jain** on behalf of the Bench comprising of **Sanjiv Jain, Member (Judicial)** and **Sameer Kakar, Member (Technical)**.

M. Nallachetty
CC-07