

THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI

Company Petition No. (IB)-712 (PB)/2019

Under Section 7 of the Insolvency and Bankruptcy Code,
2016

In the matter of:

IBM India Private Limited

Applicant/Financial Creditor

Vs.

Global Infonet Distribution Private Limited

Respondent/Corporate Debtor

Judgment pronounced on: 03.03.2020

Coram:

MR. B.S.V PRASAD KUMAR, HON'BLE ACTG. PRESIDENT

MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)

For Petitioner:

Mr. Amit Agrawal, Advocate

For the Respondent:

Mr. Krishnendu Datta, Advocate



ORDER

1. The IBM India Private Limited has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. Global Infonet Distribution Private Limited, referred to as the corporate debtor.
2. Mr. Vikas Bhatnagar duly authorized on behalf of applicant has preferred the present application on behalf of the applicant for initiation of insolvency resolution process against the respondent under the Code. A copy of the General Power of Attorney executed on 18.07.2018 has been placed on record.
3. The Respondent Company M/s. Global Infonet Distribution Private Limited against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 27.12.2007 having



its registered office situated at B-3, Friends Colony (West), Main Mathura Road, South Delhi - 110065. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

4. The case of the applicant precisely is that a Wholesale Financial-Credit Agreement (hereinafter referred to as the "Credit Agreement") dated March 19, 2014 that had been entered into between the Financial Creditor and the Corporate Debtor. It was agreed between the parties that in the course of Corporate Debtor's business, the Corporate Debtor will acquire information technology products, including computer hardware and software products and the Financial Creditor will finance the Corporate Debtor's purchase of such products as per the terms and conditions of the Credit Agreement.



5. The Financial Creditor is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Level-2, Subramanaya Arcade-1, #12 Bannerghatta Main Road, Bangalore, India- 560029. The Financial creditor is a leading financial service provider. It is submitted that the present Application is being filed by Mr. Vikas Bhatnagar, the Constituted Attorney Authorized to file the present Application through General Power of Attorney dated July 18, 2018.

6. It is stated in the application that the financial debt originates from the aforesaid Credit Agreement vide which the Financial Creditor had financed the Corporate Debtor to purchase Information Technology equipment and raised invoices to the tune of INR 10,21,29,922.74/-. The Financial Creditor has lent the money to the Corporate Debtor from time to time. However, despite several requests and reminders, the Corporate Debtor has failed to return the money.



7. It is also mentioned that as per clause 10 of the Credit Agreement, additional charges were applicable towards late payment fees @ 24% per annum, Accordingly, an amount of INR 69,74,807.61 accrued till September, 2016 towards the extension charges. Further, an amount of INR 17,57,515.98/-, also became due towards the interest on the late payment charges.
8. The applicant further stated that despite repeated requests by the Financial Creditor and assurance by the Corporate Debtor, the Corporate Debtor had time and again failed to adhere to such requests and defaulted in the payment of both the principal amount and the late payment fee.
9. Thereafter the Financial Creditor was constrained to approach this Hon'ble Tribunal vide application bearing no. CP. (IB)-06(PB)/2018 under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the said Corporate Debtor in relation to the Financial Debt.



10. However before pronouncement of the final order, the parties had entered into the consent terms dated July, 20 2018 and basis the settlement arrived, the Tribunal vide its order dated July, 23, 2018, dismissed the application as withdrawn and granted liberty to the Financial Creditor to approach the Tribunal by way of a fresh note if the necessity arises.

11. It is also the case of the applicant that as per the Consent terms, on or before February, 15, 2019, the parties were obligated to discuss and negotiate to agree upon either a payment plan or one time settlement amount, as mutually agreed between the parties in relation to the entire debt amount. However, the Corporate Debtor neither approached the Financial Creditor nor made any balance payment. Accordingly, on the instructions of the Financial Creditor, their present lawyers wrote a letter to counsel of the Corporate Debtor requesting to advice/follow up with the Corporate Debtor to provide a payment plan to the Financial Creditor



within seven (7) days from the date of the receipt of the present letter. In view thereof and considering that the Corporate Debtor has failed to comply with its obligations by or before February 15, 2019, they are in breach of the Consent Terms.

12. Therefore, in view of the above, the total amount due to the Financial Creditor is INR 10,08,62,246.33/-. It is pertinent to note that the original amount due to the Financial Creditor was INR 11,08,62,246.33 out of which the Corporate Debtor had paid an amount of INR 1,00,00,000/-. While INR 50,00,000/- was paid before signing of the consent terms, another INR 50,00,000/- was paid upon acceptance of the consent terms by the Tribunal. However, since then the Corporate Debtor has not made any payment and INR 10,08,62,246.33/- remains outstanding as on date, which is an admitted debt.

13. The respondent corporate debtor has filed its reply and raised certain objection against the admission of the present application.



14. Heard the Ld. Counsels for both the parties and perused the case records.

15. However, before parting with the matter the various objections raised by the respondent in its reply are discussed below.

16. The main objection raised by the respondent is that the said Consent Terms could not be acted upon by respondent because the applicant intentionally suppressed the fact that it had already initiated complaints under Section 138 of N.I. Act. It is also stated in the reply that the consent terms clearly stipulates good faith settlement of the inter-se disputes between the parties. However it is alleged that since no settlement discussion has taken place as per the consent terms, the respondent has substantial claim against applicant. It is the claim of respondent that due to the reason stated above the applicant cannot rely upon the Consent Terms.

17. In this regard the applicant in its written arguments filed on 10.02.2020 has submitted that the respondent itself has breached the terms of



consent terms as the respondent never approached or responded to the applicant for settlement regarding the remaining payments. The applicant has also served a notice through its advocate dated 11.01.2020. The relevant portion of the notice dated 11.01.2020 has been reproduced below:

4. *"Further, as per clause 5 (b) of the Consent Terms, on or before February 15, 2019, there was an obligation upon the parties to discuss and negotiate to agree upon, either a payment plan or one time settlement amount, as mutually agreed between the parties in relation to the outstanding amount INR 10,21,922.74 (after deduction of upfront payment of INR 1,00,00,000/-) along with certain extension charges amounting to INR 69,74,807.61 till September, 2016 and interest of INR 17,57,515.98. It was also agreed that subject to parties agreeing to the payment plan, Global Infonet was/is also obligated to hand over post-dated cheques for the entire payment plan to IBM India on or before February, 15, 2019. For ease*



of reference, the said clause is set out hereinunder:

'b) The parties shall on or before February 15th 2019 discuss and negotiate to agree upon either a payment plan for the amount INR 10,21,29,922.74 (after deduction of upfront payment of INR 1,00,00,000/-) along with extension charges amounting to INR 69,74,807.61 and interest of INR 17,57,515.98 or one time settlement amount, as may be mutually agreed between the parties. In the event a payment plan is agreed between the parties in terms hereof, the Corporate Debtor shall handover post-dated cheques for the entire payment plan to the Applicant herein on or before February 15th 2019. The said post-dated cheques shall be drawn in the name of Atradius India Credit Management Services Private Limited."



5. In relation to the obligation under clause 5 (b) of the Consent Terms, Global Infonet had also agreed to provide our client with regular updates. However, since last three (3) months, there has been no update from Global Infonet. Our Client would like to bring to your kind attention that the deadline of February 15, 2019 is fast approaching and it may take substantial time for both the parties of discuss and close the negotiations in accordance with clause 5 (b) of the Consent Terms. Further, you would appreciate that our client is not in a position to discuss and/or negotiate on the payment plan until the same is provided to it by Global Infonet. **In the event, the obligations as envisaged under clause 5 (b) are not met within the stipulated time, Global Infonet would be in breach of the Consent Terms, which our client understands is not the intention of Global Infonet.** " (emphasis given)



18. It is an admitted fact that the consent terms were executed between the parties. It is seen that as per clause 5 (e) and (g) both the parties were agreed that after payment of mutually agreed payment plan or one time settlement as per clause 5 (b), both the parties will have no recoverable dues against each other in respect of settled claim and C.S. (Comm) No. 658 of 2017.
19. Further as per clause 5 (d) it was agreed between the parties that in the event the parties failed to settle a payment plan or one time settlement as per clause 5 (b) on or before 05.02.2019 the petition filed by applicant shall stand admitted.
20. It is well settled that when the parties arrived to a settlement or consent terms, whatever disputes that were in existence before execution of the consent terms, have to be treated as resolved by the Consent Terms subsequently arrived at. Therefore, in the present matter also the previous disputes between the parties shall be treated as resolved at the time of execution of consent terms dated 20.07.2018.



21. In relation to the breach of terms of the consent terms dated 20.07.2018, it is seen that the respondent intentionally has avoided the correspondences of the applicant and also failed to arrive at a consent payment plan/one time settlement before 05.02.2019, therefore, the respondent is now liable to make payment of the dues of applicant.

22. It is seen that the materials on record and the documents clearly depict that the loan was disbursed. Infact settlement was made between the parties for the claimed dues of applicant. Respondent company utilized and enjoyed the financial facility from time to time. The applicant has placed on record relevant documents in support of the claim.

23. It is reiterated that the respondent has not denied the fact that settlement was arrived between the parties and the respondent itself had settled all its disputes with applicant and agreed to pay the financial dues of the applicant and committed



default in payment as per consent terms. Once the respondent already agreed to pay the dues of the applicant it cannot take a U turn and avoid its liability.

24. The respondent has also claimed that the claim of the applicant is an operational debt and not a financial debt.

25. The sole argument of respondent in this regard is that the applicant has sent a demand notice for recovery of its unpaid operational debt on 20.09.2017 and after reply sent by respondent on 03.10.2017 the applicant changed its stand and titled itself as a "financial creditor" of respondent. The respondent has also relied upon the judgement passed in matter of Ruchi Soya Industries Limited Vs. Cooperative Rabobank UA Singapore Branch- Mumbai dated 18.05.2018. However, the judgment relied upon by the respondent has no bearing in the present case because in that order the operational debt was assigned to the petitioner therein, and hence the petitioner was termed as operational



creditor and in the present matter no such transfer has been made.

26. It is seen that in the said demand notice the applicant has relied upon the same facts and same Wholesale Finance (Credit) Agreement dated 19.03.2014. In fact in reply sent by the respondent it has not been claimed that the claim of the petitioner is related to provisions of goods and services. It is not the case of the respondent that the petitioner has either supplied any goods or provided any service to the respondent. Therefore, the claim of respondent that petitioner is an operational creditor is unsustainable.

27. In the present matter the applicant has provided financial aid to the corporate debtor for purchasing approved inventories. An agreement to that effect has also been executed between the parties and has not been denied by the corporate debtor. The Wholesale Finance (Credit) Agreement dated 19.03.2014 has not been disputed by the corporate debtor. There for the money given by applicant can be termed as



'financial debt' and the applicant can be termed as 'financial creditor'. Even after the settlement the corporate debtor having not paid the dues, the default of debt is apparent.

28. In fulfilment of other conditions required for admission of the application, it is seen that the applicant has filed the present application under Section 7 of the Code in the requisite FORM-1 to initiate Corporate Insolvency Resolution Process against the respondent Corporate Debtor. Form-1 filed under Section 7 of the Code read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 shows that the required information and other facts as prescribed have been furnished. The applicant has annexed to the application detail particulars of 'financial debt' including documents, records and evidence of default as required under subsection 3 (a) of Section 7 of the Code. On a bare perusal of the Form reveals that the same is complete in all respect and there is no infirmity in the same.



29. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Yogender Pal Singhal, for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P00492/ 2017-18 / 10880 resident of Rani Jhansi Road opp Jhandewalan Mandir, New Delhi - 110055 with email - id info@ypsinghalassociates.com. Mr. Yogender Pal Singhal has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Yogender Pal Singhal as per the requirement of the IBBI Regulations. Accordingly, it



is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

30. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending

31. It is pertinent to mention here that the Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. The material on record clearly goes to show that respondent had availed the credit facilities and has committed default in repayment of the outstanding loan amount.

32. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.



33. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

34. Mr. Yogender Pal Singhal, having registration number IBBI / IPA-001 / IP-PO0492/ 2017-18 / 10880 resident of Rani Jhansi Road opp Jhandewalan Mandir, New Delhi - 110055 with email - id info@ypsinghalassociates.com is appointed as an Interim Resolution Professional.

35. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

36. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs with the Interim Resolution Professional namely Mr. Neeraj Bhatia to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of



Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per applicable rules.

37. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

"(a) 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;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;



(c) any action to foreclose, recover or 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;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

38. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.



39. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and



preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

40. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.



Sd/-

(B.S.V. PRAKASH KUMAR)
ACTING PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (T)

Company Petition No. (IB)-712 (PB)/2019

09/3/2020
Deputy Registrar
National Company Law Tribunal
CGO Complex, New Delhi-110003

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