

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. 5

CP (IB) -1201/MB/2020

Under Section 7 of the I&B Code, 2016

In the matter of

Small Industries Development Bank of
India,

Branch Office- 1 & 2, Dhana Laxmi

Residency, near Hotel Tip-Top Plaza,

L.B.S. Marg, Thane (W)- 400604

....Petitioner

vs.

Adkure Technologies Private Limited

Registered Office- 20/577, Neha CHS,

Nehru Nagar, Kurla (East), Mumbai-

400024

.... Corporate Debtor

Order Pronounced on 21.01.2020

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

For the Petitioner: Mr. Abhishek Dutta, Mr. Vineet Shrivastava, Ms. Sayli
Petiwale, Advocates i/b Aureus Law Partners.

For the Respondent: Mr. Atul Umekar, Mr. Tanmay Satpute, Advocates.

Per: Chandra Bhan Singh, Member (T)

ORDER

1. Small Industries Development Bank of India(SIDBI) (hereinafter

called 'Petitioner') has sought the Corporate Insolvency Resolution Process of Adkure Technologies Private Limited (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default to the extent of Rs. 12,96,66,662/-and applicable interest as provided under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

Contentions of the Petitioner:

2. The Counsel for the Petitioner submits that the Corporate Debtor approached the Petitioner to grant it loan for setting up a pharmaceutical manufacturing plant (viz. dry powder oral dosage forms packaged in 'a drinking flavoring straws and sachets') at a total project cost of Rs. 19.63 crores at Plot 10/2, Village- Vijaypur, Taluka- Wada, Palghar, Thane under the "SIDBI Make in India Soft Loan Fund for Micro, Small and Medium Enterprises (SMILE) Scheme". The Petitioner, therefore, sanctioned a loan for Rs. 12 crores (Rs. 11.80 crores as Term Loan and Rs. 20 lacs as Soft Loan) to the Corporate Debtor on 13.10.2016.

3. In pursuance of the above said loan, Letter of Intent (LoI) dated 13.10.2016 was issued to the Corporate Debtor and Loan Agreement dated 17.02.2017 was executed between the Petitioner and the Corporate Debtor. In order to secure the loan amount, securities in the form of mortgage, hypothecation and personal guarantees were created in favor of the Petitioner by the Corporate Debtor.

4. The Counsel for the Petitioner further submits that the shareholders of the Corporate Debtor entered into an arrangement for the implementation/ set up and operations of the above said Plant. However, certain disputes arose between these shareholders and hence, the commercial production of the Plant could not start as per the scheduled date for commencement of commercial operation (DCCO) which was

originally 31.12.2017. The Petitioner then granted extension to the DCCO till 31.12.2019, but the commercial production again failed to begin despite repeated assurances from the Corporate Debtor. The Corporate Debtor could not pay the first installment also towards the principal amount of the Loan which was scheduled to begin on 10.01.2020.

5. The Counsel for the Petitioner then submits that the payments towards the principal amount and interest for the Loan were contemplated under the Loan Agreement as separate payments. The Corporate Debtor did pay interest amount as per applicable rates till May, 2019, but it committed default in paying the principal amount. Thereafter, the Corporate Debtor started defaulting in paying the interest amount as well from June, 2019. Due to these non-payments, account of the Corporate Debtor was declared as a Non-Performing Asset (NPA) on 08.11.2019.

6. The Counsel for the Petitioner further submits that the Petitioner had a right to recall the entire loan with interest in event of default in paying interest as per Section 9.1 of Article IX of General Terms and Conditions of Rupee Loan annexed with the Loan Agreement. So, the Petitioner issued a recall notice to the Corporate Debtor on 13.01.2020. However, even before the Recall Notice could be issued, the Corporate Debtor filed a Petition for voluntary Corporate Insolvency Resolution Process (CIRP) under Section 10 of the Code before the National Company Law Tribunal, Mumbai Bench. The Petitioner came to know about this fact when the Corporate Debtor was directed by the NCLT to intimate its creditors that it had initiated voluntary CIRP vide NCLT's order dated 04.11.2019. Pursuant to this order of NCLT, the Corporate Debtor sent a letter to the Petitioner on 21.01.2020.

7. In addition to the above fact, SRS Pharmaceuticals Pvt. Ltd. (SPPL), which is one of the shareholders of the Corporate Debtor, also sent a letter to the Petitioner on 28.01.2020, through which SPPL notified the Petitioner

that SPPL had filed a reference to arbitration before the Hon'ble Bombay High Court for appointment of an arbitrator for purposes of resolving its disputes with the other shareholders of the Corporate Debtor. In the said reference, the Corporate Debtor has also been arrayed as a party to the dispute. Vide an order of the Hon'ble Bombay High Court of 12.02.2020, a sole arbitrator has already been appointed in the matter. SPPL also informed the Petitioner that it is a substantial shareholder of the Corporate Debtor and the Petition under Section 10 of the Code has been filed without SPPL's consent.

8. The Petitioner enclosed the following documents in respect of the above said loan:

- a. Letter of Intent (LoI) dated 13.10.2016
- b. Loan Agreement dated 17.02.2017
- c. Indenture of Mortgage dated 17.03.2017
- d. Deed of Hypothecation dated 17.02.2017
- e. Deed of Guarantee executed by Shri Akshay Kothari dated 17.02.2017
- f. Deed of Guarantee executed by Smt. Dipti Kothari dated 17.02.2017
- g. Deed of Guarantee executed by Shri Suchet Rastogi dated 20.02.2017
- h. Deed of Guarantee executed by Smt. Kalpana Jain dated 27.02.2017
- i. Deed of Guarantee executed by Shri Ajay Jain dated 25.03.2019
- j. Ledger Account of the Corporate Debtor maintained in the books of the Petitioner
- k. Recall Notice dated 13.01.2020 issued on behalf of the Petitioner
- l. CIBIL Commercial Report dated 16.06.2020

9. The Counsel for the Petitioner further submits that the dues of the Corporate Debtor towards the Petitioner are to the tune of Rs. 12,96,66,662/- (as on 26.03.2020) inclusive of interest (11.08% on the term loan and 9.35% on the soft loan). The Petitioner also has the right to recover further interest, for overdue interest, at a similar rate as that of rate of interest per annum on the principal amount and penal interest at

the rate of 2% per annum.

Contentions of the Corporate Debtor:

10. Mr. Akshay Kothari, the authorized representative of the Corporate Debtor has filed the Reply to the Petition.

11. The Counsel for the Corporate Debtor submits that the SRS group brought in funds from time to time but near the end of the project setup, the SRS group stopped funding the project. SRS group was responsible to provide the product formula, specifications, raw material, and packing material and bring the orders for manufacturing.

12. The Counsel for the Corporate Debtor further submits that the Kothari group has discharged its ability to setup the project as evidenced by FDA license received on 28.03.2019 and the minutes of the meeting, in respect of SIDBI officials Plant Visit on 03.10.2019, confirming the operation of the entire facility except the packing machine. SRS group has defaulted on its obligations and duty under the arrangement to provide orders, product formula, specifications, raw material and packing material resulting in the project being stillborn. Thus, the Corporate Debtor has been brought to the brink of insolvency due to the above default by the SRS group. The Counsel for the Corporate Debtor submits that under the Business Associate Agreement dated 09.03.2017; SRS is obligated to pay for the EMI due to SIDBI and the charges for operation and maintenance of the facility in full on/from 28.07.2019.

13. The Counsel for the Corporate Debtor then submits that due to the overall disputes between the Corporate Debtor and SRS Group, an application was filed before Hon'ble High Court, Bombay for appointing of an Arbitrator and the Hon'ble High Court was pleased to appoint Shri. R.G. Ketkar (Retired High Court Justice) as an Arbitrator to resolve the disputes between the Corporate Debtor and SRS Group. The Arbitration Proceedings

are still in process before the Learned Arbitrator.

14. The Counsel for the Corporate Debtor further submits that the Corporate Debtor was unable to commence the commercial production which was originally scheduled on 31.12.2017 due to internal disputes between all the stake holders of the Corporate Debtor even after taking certain extensions for the same. Thus, the Corporate Debtor had no other remedy other than filing a Company Petition No. 3757 of 2019 under Section 10 of the Code to show his bonafide. It is also submitted that the present Petition under Section 7 of the Code and the Petition filed by the Corporate Debtor under Section 10 of the Code pertains to similar issues and hence, both the Petitions can be clubbed and heard together in the interest of justice.

15. The Counsel for the Corporate Debtor further submits that the Petition under Section 10, filed by the Corporate Debtor, be admitted and an Interim Resolution Professional (IRP) be appointed so that the restructuring of the Corporate Debtor Company can be carried out and then the Corporate Debtor would be in a position to repay the dues of all its creditors instead of allowing the Petition filed by the Petitioner under Section 7 of the Code.

Findings:

16. The Bench notes that SIDBI under the "SIDBI Make in India Soft Loan Fund for Micro, Small and Medium Enterprises (SMILE)" Scheme had sanctioned loan facility on 13th October, 2016 to the Corporate Debtor M/s. Adkure Technologies Private Limited. In this scheme, a total loan of Rs.11.8 crores were sanctioned as term loan and Rs. 20 lakhs as soft loan. The Bench also notes that these loans were disbursed on 30th March, 2017 wherein the repayment of the loan was to take place after a period of 18 months from the date of disbursement at an interest rate enshrined in the Letter of Intent executed on 13th October 2020 and loan agreement

between the parties on 17th February, 2017.

17. The Bench also notes that the Corporate Debtor could not commence its commercial operations as planned on 31st December, 2017 and subsequently asked SIDBI for extension of two years vide its letter dated 29th June, 2018 and 24th December, 2018. Even subsequent to the grant of extension, the commercial production could not commence in December, 2019 and first installment of principal amount became due on January 10th, 2020. The Bench also notes that the Corporate Debtor even defaulted on interest payment of loan on 10th January, 2019, 10th July, 2019 and 10th August, 2019. Subsequently, SIDBI as per the terms and condition declared the Corporate Debtor's account as NPA on 8th November, 2019 and a recall notice was given to the Corporate Debtor on 13th January, 2020.

18. The Bench also notes that the Corporate Debtor has admitted its default which as per the Financial Creditor stands at about Rs. 12.96 crores inclusive of interest as on 24th March, 2020. The Corporate Debtor mentions that they have defaulted in its payment obligation because of the one of its partner (SRS group) who holds 24% of equity and has not been able to meet its commitment towards funding of its project as agreed upon by the shareholder.

19. The Corporate Debtor also mentions that they have filed a Petition under Section 10 of the Code vide CP No. 3757 of 2019 before NCLT, Mumbai. The Corporate Debtor further mentions that both these Petitions one under Section 10 of the Code brought by the Corporate Debtor itself and another under Section 7 of the Code by SIDBI, may be heard and decided together.

20. The Bench has also been informed that the Company Petition No. 3757/2019 under Section 10 has not been decided upon yet which is being

heard by a separate Bench in NCLT, Mumbai. The Bench notes, keeping in view the fact that the Corporate Debtor has admitted its dues to the financial creditors in its reply and also the fact that the said default of the Corporate Debtor is reflected in the master ledger maintained by the Financial Creditor, the Bench has no hesitation in coming to the conclusion that there is a debt and that the Corporate Debtor has committed a default and therefore, it is a fit case for admission in view of the position laid down in ***Innoventive Industries Ltd. vs. ICICI Bank and Ors. - MANU/SC/1063/2017***, wherein the Hon'ble Supreme Court has held that:

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.....

29.

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."

(Emphasis Supplied)

21. In view of the above, the Bench admits the Petition and accordingly the Corporate Debtor may inform the outcome of this Petition to the concerned Bench of NCLT Mumbai in CP 3757 of 2019 filed under Section 10 of the IBC, 2016 as and when it comes up for hearing before the concerned Bench.

22. This Bench, on perusal of the documents filed by the Petitioner, is of the view that the Corporate Debtor defaulted in repaying the loan availed. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Petitioner as a major constituent for admission of a Petition under Section 7 of the Code. Therefore, the Petition under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-(I), namely:

(I) (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 (SARFAESI Act);

(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.

(II) 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.

(III) 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.

(IV) 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.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of the Code.

(VI) That this Bench hereby appoints, Ms. Poonam Basak, having office at 91, Springboard Business Hub Private Limited, Opp. Gate 2,

SEEPZ, Andheri – East, Mumbai – 400093; having Registration No. IBBI/IPA-001/IP/P-01234/2018-2019/11957 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

23. The Petition is hereby “Admitted”. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of order.

24. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately

Sd/-
Chandra Bhan Singh
Member(Technical)

Sd/-
Suchitra Kanuparthi
Member(Judicial)