

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP No. 469/IBC/NCLT/MB/MAH/2018

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

Oriental Bank of Commerce
..... Financial Creditor

V.

Ruchi Global Limited.
..... Corporate Debtor

Heard on: 29.01.2018
Pronounced on: 14.02.2019

Coram :

Hon'ble M.K. Shrawat, Member (J)

For the Petitioner :

V. Ravi Kumar.

For the Respondent :

Advocate Prachi Wazalwar.

Per: M.K. Shrawat, Member (J)

ORDER

1. The Petitioner/Applicant viz. 'Oriental Bank of Commerce' (hereinafter as **Financial Creditor**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "**Financial Creditor**" on 16.03.2018 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against '**Ruchi Global Limited**' (hereinafter as '**Corporate Debtor**'). The registered address of the Corporate Debtor is stated to be 611, Tulsiani Chambers, Nariman Point, Mumbai.
2. In the requisite Form, under the head "**Particulars of Financial Debt**" the total amount of debt granted is **₹38.30 Crores** and the total amount claimed to be in default is stated to be **₹8,22,36,542/-** as on 31.08.2017. The account of the Corporate Debtor was classified as a Non-Performing Asset on 31.07.2017.

Submissions by the Financial Creditor:

3. The Corporate Debtor herein, approached a Consortium of Banks consisting of (i) Dena Bank, (ii) Punjab National Bank, (iii) Jammu & Kashmir Bank & (iv) Oriental Bank of Commerce for availing (a) Fund Based WC- Cash Credit (Hyp), (b) Packing Credit (PC) (Sub Limit of CC), (c) Non-Fund Based – Letter of Credit, (d) Guarantee. These facilities were sanctioned vide Sanction Letter dated 27.11.2009. Thereafter, the credit facility pertaining to Fund Based WC- Cash Credit (Hyp), Packing Credit (PC) (Sub Limit of CC), Non- Fund based – Letter of Credit, Guarantee was enhanced vide sanction letter dated 16.10.2011. The sanction letters were renewed from time to time. Third Supplemental Working capital Consortium Agreement dated 27.01.2012 was entered into by the Consortium of Banks and the Corporate Debtor in order to secure Credit facilities granted by the Financial Creditor Oriental Bank of Commerce for an amount of **₹34.15 Cr**, out of the total credit facility by the Consortium of Banks of **₹343.44 Crores**.
4. The credit facility given by the Oriental Bank of Commerce was further secured by:
 - i. Third Supplemental Joint Deed of hypothecation dated 27.01.2012 in favour of the Financial Creditor,
 - ii. Third Supplemental Inter Se Agreement dated 27.01.2012 in favour of the Financial Creditor,
 - iii. Deed of Guarantee dated 27.01.2012 executed by Mr. Kailash Chandra Shahra and Mr. Umesh Shahra in favour of the consortium of Banks including the Financial Creditor,
 - iv. Undertaking/Declaration dated 27.01.2012 of the Borrower in favour of the Consortium of Banks including the Financial Creditor.
5. The above said facilities are further secured by the Deposit of Title Deeds and Mr. Umesh Shahra has given the letter dated 23.04.2012 and declaration dated 03.05.2012 acknowledging the same. However, this must be noticed that the credit facilities secured by Deposit of Title Deeds are sanctioned by **Dena Bank Consortium** including the Financial Creditor. Furthermore, the liability towards the debt amount has been duly acknowledged by the Corporate Debtor as well as the Corporate Guarantors vide letter dated 31.10.2016.

Submissions by the Corporate Debtor:

6. The Corporate Debtor is challenging the maintainability of this petition itself on the ground that OBC (Petitioner) had moved this petition under insolvency code without taking into confidence all other members of the consortium. In support referred clause 3(e) of the **Third Supplemental Inter Se Agreement dated 27.01.2012, as below:**

“Dena Bank consortium shall act in accordance with the directions and instructions given by the Lead Bank in so far as the monitoring of the

Borrower's Cash Credit accounts or other accounts with them are concerned and abide by the decisions of the Lead Bank which will be binding on the other members of the consortium, in case of any dispute or difference of view on the quantum of the permissible bank finances, terms and conditions to be imposed or any other matter as agreed by the consortium pertaining to the borrowers cash credit accounts, packing credit accounts, other accounts”.

And as per Clause 3(i) of the said Agreement:

“Any action for the enforcement of the said securities against the borrower shall be taken by the lead bank in consultation with the other members of Dena bank consortium and Dena Bank as the lead bank shall be at liberty to take any steps to realise or enforce the said securities agreed to be created or closed and caused to be closed the respective cash credit accounts or other accounts opened in the books of the said banks but in the morning of the full working day immediately preceding, any action intended to be taken under this clause due notice of such intention and of the action intended to be taken shall be communicated in writing by the lead bank to the other banks and other banks shall immediately or as soon as possible after receipt of such notice demand repayment of the monies due under the relative cash credit account/packing credit account/other accounts and stop all further advances or accommodations to the borrower on the relative cash credit accounts/packing credit accounts/other accounts of the borrower with it and notify its intentions in writing either to act jointly in such action with the lead bank or otherwise and in case the other Banks shall agree to jointly in such action then the said banks shall act jointly and in case of failure, neglect or refusal by the other banks to join in any such action, the lead bank taking action shall make the banks so refusing, a defendant/respondent in any action with it may take against the borrower.

In case of any of the said banks desire to initiate any action for the enforcement of the said securities against the borrower for the recovery of any monies due to them, the said banks shall provide a notice of such intent to the lead bank. In the event of the lead bank does not within a period of 30 days after the receipt of such notice take steps to the satisfaction of such bank to realise or enforce the said securities and/or to recover the dues of the said banks from the borrower, the said banks shall be at full liberty to enforce all its rights severally and take such proceedings against the said securities and/or the borrower as it may deem fit. However, in all such proceedings, the

said bank shall make the lead bank and other banks as nominal defendants/respondents”

6.1 It is pleaded by the Corporate Debtor that the understanding among the members of the consortium was very clear. Therefore, the Financial Creditor is bound by instructions and directions of the Lead Bank and shall provide a notice of their intention to initiate proceedings under section 7 of IBC to the **Dena Bank which is the lead bank**. The lead bank is always under the liberty to act or not to act on the said notice of any of the banks under the consortium. In case the lead bank does not revert on such notice within 30 days, then the Financial creditor or any other bank in the consortium shall have full and complete authority to take appropriate legal steps to enforce all its rights individually and independently. However, in the present case in hand, the Lead Bank has provided continuous instructions to the Financial Creditor to resume its credit facilities. But the Financial Creditor did not abide by the same. Moreover, the Financial Creditor has failed to produce any such notice sent to the lead bank and this *ipso facto*, proves that the Financial Creditor does not have any authority to file this petition and hence the petition is defective.

7. It is further argued that all the member banks have confirmed that the asset classification of the account of the Corporate Debtor with all the respective banks is standard. The Financial Creditor unilaterally and suddenly **declined** to provide Non-Fund Based Facility to the Corporate debtor thus committing a breach of contract and thereby affecting the liquidity and performance of Corporate Debtor. Moreover, out of the total debt granted by the Financial creditor, the Corporate Debtor has already paid a considerable amount towards its repayment and only a meagre sum of ₹8.00 Crores approx. is left to be paid. The Corporate debtor has committed a breach of contract by withdrawing its credit funding facilities.

Rejoinder by the Financial Creditor:

8. In the rejoinder submitted by the Financial Creditor, it is stated that the account of the Corporate Debtor was classified as NPA on 31.08.2017 by the Financial Creditor for a default of ₹8,22,36,542/- and accordingly SARFAESI Notice u/s 13(2) dated 05.09.2017 was issued. The Financial creditor argues that the notice to the Lead Bank is not mandatory for filing Section 7 Petition under IBC as the requirement of Section 7 is “*a financial creditor either by itself or jointly with other financial creditors may file an application....*”. Reliance has been placed on a principle of law that “*the clause of an agreement cannot supersede or breach the provision of the statute made*

by the parliament". Moreover, it is argued that Inter Se Agreement cannot be read with IBC proceedings as IBC proceedings are meant for resolution and not for recovery.

Sur-rejoinder by the Corporate Debtor:

9. The Corporate Debtor has further argued through its Sur-rejoinder that the clause of an agreement which is neither void nor repugnant to any provisions of existing and applicable laws is binding on both the parties. The objective of the Financial Creditor is not the Resolution of the Corporate debtor but the recovery of their purported debt. Due to the arbitrary termination of the loan agreement by the Financial Creditor, the Corporate Debtor could not repay. Otherwise, the account of the Corporate Debtor was regular and due to one time default, the Corporate Debtor's account was declared NPA. It is further contended that the provisions of IBC cannot be misused to bypass the contractual obligations.

Findings:

10. On perusal of the arguments of both the sides and the documents and evidences placed on record, this Bench finds that before going into the merits of this petition, the question of maintainability has to be decided. The question of maintainability, as raised from the side of the Corporate Debtor, revolves around the terms & conditions enshrined in **Third Supplemental Inter Se Agreement** dated 27.01.2012. It is therefore necessary to examine the clauses of the said agreement with due care. It is undisputed that the Financial Creditor has entered into a **Third Supplemental Inter Se Agreement** dated 27.01.2012, with three other banks, wherein Dena Bank is the Lead Bank in the Consortium of Lenders. It is also undisputed that the Financial Creditor is well aware of the terms of the said agreement and is legally bound by the same. The Agreement clearly says that the Lead Bank has to be informed well in advance about the initiation of the legal proceedings by any member of the consortium against the Corporate Debtor. The Financial Creditor has failed to produce 30 days' notice to the Lead Bank intimating about the present proceedings against the Corporate Debtor as required by the provisions of the agreement. Nor the Financial Creditor's move of discontinuing/withdrawing the credit facility given to the Corporate Debtor, without the consent or directions of the Lead Bank or other members of consortium was in consonance with the terms of the agreement. Hence, *prima facie*, it appears that the Financial Creditor has committed a breach of contract, therefore, it appears that the Financial Creditor is not entitled to file this petition.
11. Moreover, after perusing the minutes of the meetings of the members of the consortium, and *ipso facto* that the Financial Creditor is legally tied in a consortium and has received several suggestions from the Lead bank as well as the Member Banks not to squeeze the cash flow, it is understood that the action of the Financial

Creditor is absolutely an independent decision which may hamper the interest of other stakeholders therefore devoid of any merits.

12. It is further believed that when parties enter into a valid and lawful contract, they are under an obligation to abide by the same and merely because a move is made under the IBC, does not discharge the parties from a lawful obligation. Section 7 of IBC starts as “*a financial creditor either by itself or jointly with other financial creditors may file an application....*”. A joint application under IBC ought to be filed with the consent of all other interested parties. In the present case, the Financial creditor appears to have filed this petition U/s 7 on its own without having consultation or without having approval of rest of the members of the consortium.
13. On consideration of a legal interpretation of the word “*jointly*” and on due analysis of terminology used in section 7 that “*a financial creditor either by itself or jointly with other financial creditors....*”, has its own significance because of the introduction of word jointly, probably keeping in mind that the banks jointly lend money to the borrower and in that situation, a joint petition is required to be filed by banks. The examples are JLF or Consortium of Banks when in respect of the same assets of debtor company as well as the same business of the company, several banks join hands and collectively grant loan under various schemes. Once the banks have taken a decision to advance loan in a collective manner and for due implementation executed inter-se agreement between members of consortium, the signatories i.e. banks are under judicial obligation to implement the terms and conditions as agreed upon in letter and spirit. Keeping this situation in mind, the legislature has therefore added the term “*jointly*” so that the petition under section 7 can be filed accordingly.
14. IBC nowhere says that irrespective of all the contractual obligations, a financial creditor can file by itself without the knowledge/approval of other financial creditors. Rather, on reading of several clauses of consortium agreement, it is clear that all the members shall act in coherence with each other. In one of the clauses i.e. clause (n) it is provided that if a bank is desiring to opt out of the consortium, or want to reduce its share, has to offer his offer of quitting the consortium to other members of the agreement. In this case, the OBC /Financial Creditor has not exercised this option. While OBC remained a member of consortium, has taken this step which is prejudicial to the interest of rest of members. The Third Supplemental Inter Se Agreement is not in contravention in any of the provisions of IBC. So it will prevail over the decision of OBC and to be applied along with the provisions of IBC. The parties to the agreement are under a strict obligation to follow the terms & conditions and have to comply diligently without any deviation. A solitary or an independent action may on one hand put rest of the members of the consortium in disadvantageous position and side by side may give advantage to the borrower. Granting of various

loan facilities, as listed herein above is an intricate arrangement and the transactions are dove-tailed with each other, therefore, it is unethical to a member to keep in mind its own interest without taking due care of the interest of other parties to the consortium agreement. Hence, this contention of the Financial Creditor is cliché' for deciding the fate of the present case, thus rejected.

15. This petition is '**Dismissed**' on the ground of maintainability, with liberty to file a fresh petition in accordance with law.
16. Ordered Accordingly.

Dated : 14.02.2019

js

SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)