

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

CP (I&B) 1687/NCLT/MB/MAH/2018

Under Section 7 of the I&B Code, 2016

In the matter of

Edelweiss Asset Reconstruction Co. Ltd.

...Financial Creditor/ Petitioner

v/s

Maxx Mobile Communications Ltd.

...Corporate Debtor

Order dated 31.01.2019

Coram: Hon'ble Shri V.P. Singh, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Ms Suchitra Valjee, Advocate a/w Prerana Wagh, Advocate i/b MKA.

For the Respondent: Amit Dhall, Advocate a/w Ms Aarti Suvarna, Advocate.

Per V.P. Singh, Member (Judicial)

ORDER

1. It is a Petition filed u/s 7 of Insolvency & Bankruptcy Code, 2016 (**IBC/Code**) by Edelweiss Asset Reconstruction Co. Limited, Financial Creditor or Petitioner against Maxx Mobile Communication Limited, Corporate Debtor to initiate Corporate Insolvency Resolution Process (**CIRP**) against the Corporate Debtor on the ground that as on 04.05.2018, the Corporate Debtor has defaulted in making a total repayment of ₹73,74,35,980/-. The date of default in repayment of the debt by the Corporate Debtor is mentioned as 29.01.2013.
2. The Financial Creditor entered into an assignment agreement with Allahabad Bank on 01.09.2015 wherein it got assigned the

impugned loans disbursed by the assignor to the Corporate Debtor.

3. The Allahabad Bank had granted a Term Loan of ₹25,00,00,000/- and a Cash Credit Facility of ₹15,00,00,000/- vide its sanction letter dated 27.11.2009.
4. The Allahabad Bank entered into an Interse Agreement dated 12.03.2010 with several other banks to create a consortium of lender banks called the SBI Consortium. The said agreement recognised State Bank of India as Lead Bank of the SBI Consortium.
5. The said loan was secured by a mortgage, hypothecation and personal as well as corporate guarantee.
6. The Petitioner has annexed to the Petition a copy of Memorandum of Entry for extension of Mortgage/Charge dated 12.03.2010, Memorandum of Entry for extension of Mortgage/Charge for guarantor's properties dated 12.03.2010, Declaration and Confirmation of Deposit of Title Deeds for creation of Joint Mortgage by Corporate Debtor dated 12.03.2010, Declaration and Confirmation of Deposit of Title Deeds for creation of Joint Mortgage by Maxx Media Technologies Private Limited dated 12.03.2010, Memorandum of Entry for extension of Mortgage/Charge dated 06.09.2011, Memorandum of Entry for extension of Mortgage/Charge for guarantor's properties dated 26.09.2011, Declaration and Confirmation of Deposit of Title Deeds for creation of Joint Mortgage by Corporate Debtor dated 06.09.2011, Declaration and Confirmation of Deposit of Title Deeds for creation of Joint Mortgage by Maxx Media Technologies Private Limited dated 06.09.2011, Copy of Joint Deed of Hypothecation dated 12.03.2010, First Supplementary Joint Deed of Hypothecation (For increase in the Overall Limit) dated 30.08.2011, Personal Guarantee executed by Mrs. Barkha Agarwal and Mr. Moti Lal

Agarwal Dt. 12.03.2010, Personal Guarantee executed by Mr. Ajjay Agarwal dated 17.03.2010, Deed of Guarantee executed by Focells Communication Private Limited dated 12.03.2010, Deed of Guarantee executed by Maxx Media Technologies Private Limited dated 12.03.2010, First Supplemental Deed of Guarantee for increase in the overall limit dated 30.08.2011, Form CH1 and Certificate of Registration of Charge, Sanction Letter dated 27.11.2009, Term Loan Consortium Agreement dated 12.03.2010, Working Capital Consortium Agreement dated 12.03.2010, Inter-se Agreement dated 12.03.2010 and Demand Promissory Note executed by the Corporate Debtor in the name of the Allahabad Bank dated 18.03.2010.

7. The letter of the Allahabad Bank dated 08.02.2013, addressed to the Corporate Debtor, informed the Corporate Debtor that as per the terms of restructuring, the promoters of the Corporate Debtor were required to bring in funds of ₹1,04,00,000/- upfront towards 15% of estimated sacrifice amount. Since the said stipulation has not been met by the Company, the restructuring sanctioned for the said account stands cancelled. It is also stated that the account in the books of the Bank had been classified as NPA.
8. The Petitioner sent a notice under section 13(2) of Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act, 2002 (**Securitisatation Act**), wherein it was mentioned that Allahabad Bank has classified the account of the Corporate Debtor as NPA on 29.01.2013, and called upon the Corporate Debtor and Guarantors to discharge their liabilities in full, under the said facilities.
9. The Corporate Debtor's Letter, annexed to the Petition, dated 15.02.2015, mentions that a strategic investor is interested in

purchasing the Corporate Debtor and is willing to settle the account of the Corporate Debtor.

10. The Petitioner sent a letter dated 20.02.2017 to the Corporate Debtor mentioning the outstanding amount towards Allahabad Bank along with other Banks and demanding the settlement of its dues, failing which the Petitioner will be filing proceedings under IBC.
11. As per the computation of dues attached with the Petition, the default under the Term Loan stands at ₹41,70,51,000/- and under Cash Credit Facility at ₹32,03,84,980/- as on 04.05.2018.
12. The Petitioner has annexed the Bank statement of the Corporate Debtor along with Certificate as per the provisions of section 2A & 2(8) of Bankers Book of Evidence Act showing the disbursement of debt.
13. The Corporate Debtor has filed its Affidavit in Reply stating that the Petition is not maintainable and should be rejected on the grounds;

firstly, that the original creditor, i.e. Allahabad Bank has assigned the debt to the Petitioner through an assignment agreement dated 01.09.2015 for a total sale consideration of ₹4,00,00,000/- and thus it cannot claim more than the amount for which the Debt has been assigned to it;

Secondly, the Corporate Debtor has preferred a substantive petition under section 17(1) of the Securitization Act before DRT, Lucknow which vide its final order dated 02.01.2017 has set aside the demand raised by the Petitioner under section 13(2) of the Securitisation Act and therefore, as such there remains no demand to initiate the proceedings under section 7 of the IBC;

Thirdly, regarding the Inter-se Consortium Agreement dated 12.03.2010 it is only the lead bank and not the Petitioner who is entitled to institute any proceeding and as such there is no

liability or consent, regarding the Inter-se Agreement to institute petition under section 7 of the Insolvency & Bankruptcy Code, 2016;

Fourthly, the account was not NPA on 29.01.2013, as the date of default itself is said to be in contravention to the RBI guidelines;

Fifthly, the applicant has approached DRT, Mumbai for recovery of its dues against the Corporate Debtor, proceeding under which are still pending for adjudication upon the issue of dispute in relation to the wrongful classification of the account as NPA and notice of demand under section 13(2) of the Securitisation Act issued by the Applicant and as well as the other creditors dated 22.01.2015 has already been set aside;

Sixthly, the statement of account filed by the Petitioner is incorrect, as the rate of interest is not mentioned; and on the ground that the Petition is not maintainable as the Petitioner has wrongfully classified the account of the Corporate Debtor as NPA.

14. The Corporate Debtor has submitted that it has pending work orders and it is vital that its manufacturing activities continue without any further loss at this crucial juncture. Further, the letter of demand Dt. 20.02.2017 and reply to it by the Corporate Debtor are of no consequence, as the statutory demand notice under section 13(2) of the Securitisation Act has been quashed on the ground of wrongful classification of the account of the Corporate Debtor as NPA.
15. The Petitioner has filed its Affidavit in Rejoinder, in reply to the defence raised by the Corporate Debtor. The Petitioner has relied upon the order passed by the Hon'ble NCLAT in M/s. Unigreen Global Private Limited v. Punjab National Bank & Anr., on 01.12.2017. The relevant portion of the order is reproduced below:

"...Similarly, if any action has been taken by a 'Financial Creditor' under section 13(4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against Corporate Debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal cannot be a ground to reject an application under Section 10, if the application is complete."

16. The Petitioner has submitted that the Interse Agreement between the banks does not preclude the Petitioner from filing the present Petition in respect of the debt arising out of individual facilities granted to the Corporate Debtor. The Petitioner has placed reliance on the order passed by the Hon'ble NCLT, Principal Bench, New Delhi in the matter of **Asset Reconstruction Company (India) Limited v. White Metal Limited** in (IB)-160(PB)/2018 on 13.06.2018. The relevant portion of the order is reproduced below:

"...Section 7 of the Code itself shows that a financial creditor either by itself or jointly with other financial creditors may file an application for initiating Corporate Insolvency Resolution Process against a Corporate Debtor when a default has occurred. Therefore, there is no obligation to join the consortium of Banks. It is pertinent to state here that the Indian Overseas Bank even individually has granted several loan facilities to the respondent as discussed above and the said financial debts have been legally assigned and transferred to the applicant through valid assignment agreement, the applicant accordingly comes within the definition of 'financial creditor' under sub-section 7 of Section 5 of the Code on the strength of the deed of assignment. Hence the applicant financial creditor has clear right to file application under Section 7 of the Code in order to recover its dues and the inter-se

agreement between financial creditors cannot override the said provision of the Code nor can take away the right of the applicant to file an application under Section 7 of the Code."

17. The Petitioner further submitted that the declaration of the company as an NPA is not the subject matter of the present Petition and that an account does not have necessarily to be an NPA before applying under section 7 of IBC 2016. Thus, any challenge to the petition on the ground of declaration of the account of the Corporate Debtor as NPA, in contravention of RBI guidelines, should be rejected. To state this the Petitioner has relied upon the order passed by the Hon'ble NCLT, Principal Bench, New Delhi in **White Metal Limited** case (*supra.*) where it is held that:

"...In this connection, it is pertinent to state that in an application under Section 7 of the Code, adjudicating authority is not supposed to decide the date on which the loan account became NPA. That apart, in view of the overriding effect given by the provisions of Section 238 of the Code, the initiation and pendency of proceedings before DRT is no bar for triggering resolution and insolvency proceedings under the Code. Therefore, pendency of proceedings before DRT will not preclude the applicant to file application for corporate insolvency resolution process under Section 7 of the Code."

18. We have heard the arguments of both sides and perused the record. Allegedly, in this case, the Petitioner was assigned the loans granted by the Allahabad Bank vide a duly executed Assignment Agreement Dt. 01.09.2015. The present Petition is filed by Ms. Neha Pathak, Assistant Manager, Law of the Petitioner Company, duly authorised to initiate proceedings under IBC, vide resolution passed in the Operations Committee

meeting Dt. 07.03.2018. The Petitioner has submitted the requisite fee along with the Petition as evidenced by the supporting document with the Petition.

19. The Petitioner has annexed a statement showing the calculation of the amount claimed to be in default as on 04.05.2018. The Petitioner has also annexed the updated documents evidencing the sanction of the financial debt and supporting instruments evidencing the creation of security for the same debt.
20. The present Petition is regarding repayment of the money secured by a mortgage and charge upon the immovable property. The limitation period for such Petitions is prescribed as Twelve years from the time when the amount becomes due. Thus, the Petition is well within the limitation prescribed. The contention of the corporate debtor that the Petition is beyond the prescribed period of limitation is not tenable.
21. The Petitioner has also annexed the Bank statement of the Corporate Debtor, along with the Certificate as per the provisions of section 2A & 2(8) of Bankers Book of Evidence Act, showing the disbursement of debt and the unpaid balance in the account.
22. The records of the Corporate Debtor's account in the Books of the Lender Bank along with, among other things, the letter of the Corporate Debtor dated 15.02.2015, mentioning that a strategic investor is interested in purchasing the Corporate Debtor, and is willing to pay for final settlement of the account of the Corporate Debtor, also proves that the default has occurred. The communications between the Petitioner and the Corporate Debtor show that the debt is due and payable and the repayment of the same has been demanded by the Petitioner from the Corporate Debtor. It may also be noted that the existence of the debt or any of the security instrument has

not been challenged by the Corporate Debtor. Thus, the existence of debt and that it is due and payable is undisputed.

23. As to the defences raised by the Corporate Debtor inter alia that there is no demand for initiating the CIRP as the notice under section 13(2) of the Securitisation Act has been quashed by the DRT, Lucknow vide its order dated 02.01.2017 is not sustainable on the ground that the proceeding under Securitisation Act has no bearing on the proceeding under IBC, especially in the present case, where neither the debt nor the default is under challenge.
24. It is also pertinent to note the judgment of the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India*, *WRIT PETITION (CIVIL) NO. 99 OF 2018*, has held that "*...it is a fallacy to say that no notice is issued to the financial debtor on defaults made, as financial debtors are fully aware of the loan structure and the defaults that have been made.*" Thus the contention of the Corporate Debtor that the petition under section 7 of the Code is not sustainable on the ground that no notice was issued demanding repayment and intimating default. The date of classification of the account of the Corporate Debtor as NPA is not relevant to admit a petition under section 7 of Code, as it has no relevance with any pending legal proceedings in which the challenge is not upon the existence of a debt, or its default. Thus the Corporate Debtor's contention that the Petitioner has wrongfully classified the account as NPA cannot be a ground to reject the Petition.
25. Further, as to the incorrectness of the statements of accounts submitted by the Petitioner, it is well settled that in a petition under section 7 of the Code the Adjudicating Authority has only to ascertain that there exists a debt of more than ₹1,00,000/- and the same was due and payable and has not been paid. Thus, unless the Corporate Debtor can prove that the debt does not exist or is not in default, which is not the case here, a

challenge to the statement of the account being incorrect, cannot be a ground for rejection of the Petition.

26. As regards the Corporate Debtor's defence that since the Lead Bank is SBI, which was only authorised to initiate proceedings under IBC cannot be accepted given the definition of 'Financial Creditor' under section 5(7) of I&B Code. This contention finds support from the decision of Hon'ble Principal Bench of NCLT in **White Metal Limited** case (*supra.*) that a Financial Creditor has the right to initiate a proceeding under section 7 of IBC individually or jointly on behalf of other 'financial creditors'. Also, the fact that the assignor has also legally assigned the impugned loans individually to the Petitioner makes the Petitioner all the more eligible to file a petition under section 7 of I&B Code.
27. By the above discussion, we are of the considered view that the respondent's contentions raised in the Affidavit in reply are short of any merit. The existence of debt is clear from Loan agreements and various documents relating mortgage deed, hypothecation deed, certificate of creation of charge, guarantee agreements, both corporate as well as a personal, and the promissory note which are undisputed.
28. The Petitioner has proved the existence of debt as well as the default.
29. The Petitioner has proposed the name of Sri Mr Ashok Kumar Dewan, Registration Number [IBBI/IPA-001/IP-P00603/2017-18/11054] as Interim Resolution Professional, to carry out the functions as mentioned under IBC, and given his declaration, no disciplinary proceedings are pending against him.
30. The Application under sub-section (2) of Section 7 of IBC, 2016 is complete. The existing debt of more than one Rs lac against the corporate debtor and its default is also proved. Accordingly, the petition filed U/S 7 of the Insolvency and Bankruptcy Code

for initiation of corporate insolvency process against the corporate debtor deserves to be admitted.

ORDER

This petition filed under Section 7 of IBC, 2016, against the Corporate Debtor for initiating corporate insolvency resolution process is hereby admitted. We further declare moratorium u/s 14 of IBC with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
 - 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 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 the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by

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the Central Government in consultation with any financial sector regulator.

- IV. That the order of moratorium shall have effect from 31.01.2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of IBC or passes an order for the liquidation of the corporate debtor under section 33 of IBC, 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 IBC.
- VI. That this Bench hereby appoints Mr. Ashok Kumar Dewan, having Registration Number [IBBI/IPA-001/IP-P00603/2017-18/11054] as Interim Resolution Professional to carry out the functions as mentioned under IBC. Fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
31. The Registry is hereby directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

V.P. SINGH
Member (Judicial)

31th January 2019