

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH (RAJASTHAN)

IB No. 207(PB)2018
TA No. 139/2018

CORAM: SHRI R. VARADHANRAJAN, MEMBER (JUDICIAL)

IN THE MATTER OF SECTION 7 OF IBC, 2016.

ORDER PRONOUNCED ON: - 08.03.2019

IN THE MATTER OF:

RELIANCE COMMERCIAL FINANCE LIMITED
Reliance Centre, 6th Floor, South Wing,
Off Western Express Highway,
Santacruz (East), Mumbai-400055.

.....FINANCIAL CREDITOR/APPLICANT

VERSUS

RAYS POWER EXPERTS PRIVATE LIMITED
R-1, Shreesheel Mohar Plaza,
Yudister Marg, C-Scheme,
Near Yojana Bhawan,
Jaipur-302001 (Rajasthan)

...CORPORATE DEBTOR/RESPONDENT

FOR PETITIONER (S)	:	SHIVANGSHU NAVAL, ADV.
		NANDINI BHOWN, ADV.
FOR RESPONDENT(S)	:	MADHUSUDAN SINGH
		RAJPUROHIT, ADV.
		ALANKRITA SHARMA, ADV.



Order Pronounced on: - 08.03.2019

ORDER

1. This application has been filed by M/s Reliance Commercial Finance Limited in the capacity of a Financial Creditor as against the Corporate Debtor under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) seeking for initiation of the Corporate Insolvency Resolution Process (CIRP). The transactions giving rise to this application is stated to be that of a loan amount in a sum of Rs. 3,10,00,000/- and Rs. 63,00,000/- disbursed to the Corporate Debtor on 09.06.2015 and 22.06.2015 respectively, aggregating in all to a sum of Rs.3,73,00,000/- under a Facility Agreement dated 09.06.2015 and that in respect of the same a default has been committed in respect of payment of instalment amounts. The total amounts claimed in default is stated to be in a sum of Rs. 4,16,18,892/- on the part of the Corporate Debtor.
2. It is further averred in the prescribed application specified under the IBBI (Application to Adjudicating Authority) Rules, 2016 hereinafter for brevity (AAA) Rules, 2016 that payment of a monthly instalment in relation to the disbursement of the amounts by the Financial Creditor to the Corporate Debtor commenced from 01.08.2015 and was to end on 01.04.2029. However, from the inception of the tenure of the repayment, the Corporate Debtor had failed to make the payment of instalment amount in full and that only part payment of the instalment amounts from time to time have been made

Reliance Commercial Finance Ltd.

Vs.

Rays Power Experts Pvt. Ltd.



and that and on from 01.07.2016 the Corporate Debtor stopped in making the payments of instalment dues in accordance with the schedule.

3. It is further averred that the last payment which was received from the Corporate Debtor was on 11.01.2018 and that thereafter no further payments were received. Certain additional facts have also been brought to the notice of this Tribunal by the Financial Creditor in the application filed which are to the following effect: -

- (i) Financial Creditor is a non-banking Financial Company holding license to operate as such.
- (ii) In relation to scheme of Arrangement and the order passed therein by the Hon'ble High Court of Bombay on 09.12.2016, the loans together with securities and other benefits, rights and obligations created in favour of one Reliance Capital Limited has now been vested with the Financial Creditor.
- (iii) In part V of the prescribed application, it is also brought to the notice of this Tribunal that charges have been registered in relation to certain assets of the Corporate Debtor for an amount of Rs. 18,63,00,000/- dated 29.05.2015 and that a deed of hypothecation on the said date has also been executed hypothecating the assets belonging to the Corporate Debtor for which the value is not available in relation to the finance facilities granted.



- (iv) A petition under Section 9 of an Arbitration and Conciliation Act, 1996 has been filed before the Hon'ble High Court of Delhi in OMP (I) (COMM) 358/2017 and that certain directions have been obtained.
- (v) CIBIL Report is also annexed as a record of default of the Corporate Debtor.

Thus, in view of the default committed by the Corporate Debtor in relation to the amounts due to the Financial Creditor, this application has been preferred as already stated above under Section 7 of IBC, 2016, seeking for initiation of Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor.

4. It is seen from the records of this Tribunal that a reply has been filed to the above petition by the Corporate Debtor. From the perusal of the said reply it is seen that the Corporate Debtor is taking a contention that there is no default which has been committed by the Corporate Debtor as per the definition prescribed by law as well as taking into consideration the facts.
5. In this connection, it is contended that the repayment under the Letter of Intent was required to be made in 52 structured quarterly instalments commencing from 1st July, 2016 and ending on 1st April, 2029 in relation to Rupee Term Loan (RTL) and that in relation to Short Term Loan (STL) must be paid out of receivables/subsidy receivables from New Delhi Municipal Corporation (NDMC) within 12 months from the date of 1st

disbursement of the facility, whether any amount is received from NDMC or any other Authority and since the amount in default is stated to be outstanding in relation to RTL by the Financial Creditor, no amount can be claimed from the respondent if the dues are not being serviced by the NDMC. Under the circumstances, there is no default as amounts are not being paid by NDMC.

6. It has also been further contended that, in the circumstances unless NDMC is made as a necessary party in the present proceedings, no default can be claimed as against the respondent/Corporate Debtor as the payments made by NDMC is intrinsically linked to the payment to be made by Corporate Debtor. In relation to the petition filed under Section 9 of Arbitration and Conciliation Act, 1996, it is contended that NDMC has also been made a party by the petitioner herein. In the circumstances, no adjudication of disputes can be made in the absence of NDMC, by this Tribunal.
7. It is also contended that in the absence of agreements, namely, two separate Agreements bearing No. RLIPMUM000302741 and RLIPMUM000303111 respectively, default cannot be claimed under these agreements as against the Corporate Debtor as only the Facility Agreement and Letter of Intent has been annexed as Annexure- A-8 and A-9 to the petition. Further the documents which has been annexed clearly shows that there is a dispute resolution clause as between the parties and that if a

dispute stand unresolved within 30 days of correspondence by a party to the other thereof, then the same would be resolved by the arbitration.

8. It is also averred that subsequent to the issue of demand notice in the month of July, 2017 payments have also been received as paid by the Corporate Debtor. Under the circumstances, dispute which has been raised vide the said notice is different from the one that is subsisting before this Tribunal in this petition.
9. It is also contended that in view of the Hypothecation Deed dated 29.05.2018 annexed as Annexure-10 in favour of the petitioner for a sum of Rs. 15,75,00,000/- and 2,88,00,000/- respectively in relation to RTL & STL the petitioner has security of more than 400 per cent than the amounts which has been allegedly disbursed to the Corporate Debtor. Objection is being also raised in relation to the charge of interest as it is against the principal as laid down by Hon'ble Supreme Court in Central Bank of India Vs. Ravindra, wherein it has been held that final interest cannot be capitalised and charging of interest as done by the Financial Creditor is an unscrupulous activity engaged by the Financial Creditor and the Corporate Debtor contentions in short is raised as above and the Corporate Debtor seeks for dismissal of the Company Petition as filed by the Financial Creditor.

10. At the time of hearing the respective oral submissions of learned counsels appearing for the parties, it is noticed that the matter has been transferred from the New Delhi Bench of NCLT to this Bench subsequent to the Notification No. S.O. 3145(E) dated 28.06.2018. Learned counsel for the Financial Creditor took us through the documents as filed by the petitioner at the time of oral submissions and pointed out that the Facility Agreement dated 29.05.2015 which has been annexed as Annexure 9 of the typed set of petitions filed by the petitioners and draws the attention of this Tribunal that a sum of Rs. 3.1 crores and Rs. 63 lacs were disbursed under RTL on 09.06.2015 and 22.06.2015 respectively and no amount has been disbursed in relation to STL to the Corporate Debtor. Under Clause 2.8 of the said agreement the repayment of loan amount by way of instalment have been specified and that in relation to the same there has been a default as evidenced from the computation of interest and principal. In relation to the defaults committed annexed as Annexure-6, it is also pointed out that on 31.01.2017 a legal notice was issued to the Corporate Debtor enclosed as Annexure-13 of the typed set wherein a due amount of Rs. 3,88,74,439/- was claimed from the Corporate Debtor as the amounts in default along with the interest and that one more legal notice was issued as subsequent to the issue of prior notice some payments were received which has also been duly accounted for. From the said legal notice dated 13.07.2017 and



after the adjustments of the payment made subsequent to the earlier legal notice dated 13.01.2017 a sum of Rs. 3,91,96,725/- was claimed under the loan accounts as the foreclosure amount.

11. It is further pointed out that the deed of hypothecation as well as the personal guarantee given by the promoter of the Corporate Debtor clearly shows that the amounts have been duly availed by the Corporate Debtor and there has been default considering the documents as filed above.
12. Learned counsel for the respondent/Corporate Debtor reiterated the contentions as made in the reply as filed by the Corporate Debtor and, particularly stresses on the aspect that even though amount claimed under two loan agreements by the Financial Creditor, however, the said loan agreements have not been produced before this Tribunal under the circumstances, the same should not be considered.
13. It is also further pointed out that the non-payment by NDMC to the Corporate Debtor has occasioned in default and that it is willing to satisfy the loan of Rs. 63 lacs along with the interest if Financial Creditor is willing to accept the said amounts as NDMC is inclined to release a sum of Rs. 96 lacs and that the said account can be fully settled. Learned counsel for the Corporate Debtor also points out that by way of additional affidavits bearing Diary No. 3859 dated 11.06.2018 and that when the matter was pending before the New Delhi Bench of this Tribunal, details of payment



made by the Corporate Debtor since the inception of the loan agreement has been given and it is evident even subsequent to the filing of this petition certain amounts have been received by the Financial Creditor.

14. Further, learned counsel for the Corporate Debtor also points out that vide Diary No. 73/2019 dated 11.01.2019, it has been brought by way of short affidavit that Short Term Loan (STL) bearing No. RLIPMUM000303111 will be satisfied upon release of payment by NDMC and that the Rupee Term Loan (RTL) bearing No. RLIPMUM000302741 will be regularized and all instalments, dues and payable shall be paid henceforth.

15. Pleadings of the parties as well as the oral submissions had been duly considered by this Tribunal. The main contention of the respondents/Corporate Debtor seems to be that even though amounts being claimed is under two loan Agreements bearing No. RLIPMUM000303111 and RLIPMUM000302741 pursuant to the facility agreement entered into between the parties on 09.06.2015 the said amounts cannot be claimed as it is not supported by any evidence. However, we are afraid that such a contention cannot be entertained in view of the overwhelming evidence made available before this Tribunal by the petitioner in the form of evidence in relation to disbursal of amounts in a sum of Rs. 3,10,00,000/- and Rs. 63,00,000/- in the year 2015 which is not denied and from time to time, even though not regular, the payment of instalment amounts. The

disbursal of the amount and the receipt of it by the Corporate Debtor under the above loan agreement is not denied. In the absence of such a denial necessarily there is a debt as defined under Section 3(11) of IBC, 2016, wherein, debt has been defined as follows: -

“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;

16. The contention of the Financial Creditor is that the amount which has been availed as a loan being a debt has not been repaid in accordance with the instalment schedule as required to be done taking into consideration Schedule 2 of the facilitation agreement and also points out to the definition of default as contained in Section 3(12) of IBC, 2016 and highlights the aspect of the said definition that non-payment of even instalment amount of a debt which has to become due and payable must be construed as a default.
17. This Tribunal is in concord with the said submission as default of a debt includes non-payment of instalments due and payable. Further, from the short affidavit which has been pointed out by learned counsel for the Corporate Debtor as filed on 11.01.2019 vide Diary No. 73/2019 from paragraph 6 and which is reproduced as below.

That in light of the same the account bearing short term loan No. RLIPMUM000303111 will stand satisfied and closed. That the account bearing No. RLIPMUM000302741 or the Rupee Term Loan will be regularized and all instalments due and payable shall be paid henceforth.

The Corporate Debtor from the above it is seen is not disputing the amount in default and is rather seeking for some time to regularize it and pay all instalment dues and payable. Even though, a feeble argument was sought to be raised in relation to the pending proceeding under Section 9 of Arbitration and Conciliation Act, 1996 that there is presumption of a pre-existing dispute as otherwise, it was not necessary for the Financial Creditor to invoke the said provision before the Hon'ble High Court, however, we are afraid that dispute cannot be a material criteria or plea in relation to an application filed by the Financial Creditor as compared to the one by an Operational Creditor as it is evident that Section 7 governs the initiation of CIRP by a Financial Creditor whereas Section 8 read with Section 9 deals with the Insolvency Resolution by an Operational Creditor and the application for initiation of Corporate Insolvency Resolution by an Operational Creditor under the said provisions in relation to an application of an Operational Creditor, 'dispute' can be a defence as per the provisions of IBC, 2016 and also taking into consideration the decision of Hon'ble Supreme Court in Mobilox Innovations Private Limited Vs. Kirusa



Software Private Limited in Civil Appeal No. 9405 of 2017 dated 21.09.2017.

18. Thus, we do not find any merit in the contention of the Corporate Debtor to stave off of the petition as filed by the Financial Creditor in relation to the debt in default. In the circumstances, in view of default committed which is in excess of Rs. 1 lac, this Tribunal is constrained to admit this petition and initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor with the following consequences: -

- (a) As a consequence of admission, moratorium as envisaged under Section 14 of IBC, 2016 is invoked in relation to the Corporate Debtor which will continue during CIR process of the Corporate Debtor. Mr. Manoj Kulshrestha is appointed as IRP having Registration No. IBBI/IPA-033/IP-N00005/2016-17/10024 and the above-named Interim Resolution Professional (IRP) to carry out the Corporate Insolvency Resolution Process as envisaged under the provisions of IBC, 2016, in relation to the Corporate Debtor.
 - (b) The said IRP shall strictly act in compliance with the provisions of IBC, 2016. The IRP shall duly convene the First Committee of Creditors Meeting and file the status report apprising this Tribunal about the progress of CIR process unfolded in relation to the Corporate Debtor.
- In terms of Sections 17 and 19 of IBC, 2016 all the personnel of the



Corporate Debtor including its promoters and Board of Directors whose powers shall stand suspended will extend all co-operation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP. In terms of Section 7 of IBC, 2016, a copy of this order shall be duly communicated to the Financial Creditor, Corporate Debtor as well as the Interim Resolution Professional appointed by this Tribunal to carry out the CIR process, at the earliest not exceeding one week from today. A copy of this order shall also be communicated to IBBI for its records. In the circumstances this application stands admitted.

-Sd-

08/03/2019

(R. Varadharajan)
Member (Judicial)

Vishwajeet Singh