IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I

CP (IB) 39/MB/C-I/2022

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

CFM Asset Reconstruction Private Limited
[CIN:U67100GJ2015PTC083994]
Having Office at 1st Floor, Wakefield House, Ballard Estate, Mumbai - 400001

…Financial Creditor

Versus

RNP Marketing and Cargo Private Limited
[CIN: U01100MH2008PTC187995]
Reg. Office- 808 B, Western Edge – II, Kanakia Spaces, Off W.E. Highway, Borivali (East), Mumbai - 400006

…Corporate Debtor

Order Delivered on 16.12.2022

Coram:

Hon’ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)
Hon’ble Member (Technical): Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor : Mr. Rahul Jain, Counsel a/w Adv. Akriti Shikha i/b HSA Advocates

For the Corporate Debtor : Mr. Nithish Bangera, Counsel

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This Company Petition is filed under section 7 ("**the Petition"**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by Mr. Kalpak Sawangkar, on behalf of **CFM Asset Reconstruction Private Limited ("the Financial Creditor")**, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **RNP Marketing and Cargo Private Limited ("the Corporate Debtor")**.

2. The Corporate Debtor was incorporated 05.11.2008 under the Companies Act, 1956. The registered office of the Corporate Debtor is situated at 808B, Western Edge -II, Kanakia Spaces, Off W.E. Highway, Borivali (East), Mumbai - 400006. Therefore, this Bench has jurisdiction to deal with this petition.

3. The total amount of debt alleged is Rs.46,76,76,228 (Rupees Forty Six Crores Seventy Six Lakh Seventy Six Thousand Two Hundred And Twenty Eight Only). The date of default as per Part IV is 02.11.2019.

<u>Submissions made by the Financial Creditor by the way of Petition:</u>

4. It is the case of the Financial Creditor that, ECL Finance Limited ("**Lender**") issued a Sanction Letter bearing number ECLFL/SF/2851 dated 11.06.2018 ("**Sanction Letter**") in favour of the Corporate Debtor for extending a term facility of Rs. 25,00,00,000/- (***Ref: Exhibit H i at Page Nos. 278-293 of Petition dated 30.11.2021***) in accordance with the terms and conditions of the Sanction Letter. An amendment to the terms of the Sanction Letter was made by the Amendment Letter dated 22.06.2018 bearing reference no: ECFL/SF/2865 (***Ref: Exhibit H ii at Page Nos. 294-298 of Petition dated 30.11.2021***) vide which certain key terms of the Sanction Letter including inter alia the rate of interest as applicable to the term loan were amended.

5. Thereafter, a Facility Agreement dated 28.06.2018 ("Facility Agreement") was entered into between EFL and the Corporate Debtor, whereby EFL agreed to provide a term loan of Rs. 25,00,00,000/- to the Corporate Debtor, subject to the terms of the Sanction Letter, for the purposes of foreclosing the Corporate Debtor's existing unsecured debts and meeting its working capital needs and capital expenditure as per Clause B(3) of Schedule I of the Facility Agreement. The same has not

been reproduced for the sake of brevity. (***Ref: Exhibit E- i at Page Nos. 54-123 of Petition dated 30.11.2021***)

6. The Facility was disbursed in accordance with Clause B(4) of Schedue-I of the said Agreement. The details of the same have been given below:

TRANCHES	AMOUNTS	DATE OF DISBURSEMENT
Tranche 1	Rs.19,00,00,000/-	03.07.2018
Tranche 2	Rs.6,00,00,000/-	Not Disbursed

The disbursement of the remainder amount under Tranche 2 was cancelled after the expiry of the "Availability Period" for Tranche 2 as stipulated under Clause B(5) of the Facility Agreement.

7. The Rate of interest for the said Facility was agreed at 13.75% per annum payable monthly as per clause B(6) of Schedule I of the said Facility Agreement. Pursuant to Clause 2.4 of the Facility Agreement, the Lender and its successor has the right to resent to interest rate on certain events. EFL has vide its letter dated 20.02.2019 bearing reference number ECLF/SF/2975 to the Corporate Debtor revised the interest

rate from existing interest of 13.75% per annum to 15% per annum payable monthly. The revised interest rate came into effect from 01.03.2019. The Corporate Debtor thereafter paid interest @15% per annum.

8. Furthermore, a default interest at the rate of 2% per month for the period of default over and above the applicable interest rate, on the entire outstanding obligations was also laid down under Clause C(2) of Schedule-I of the Facility Agreement and applicable to the Corporate Debtor with effect from 01.09.2018 as stipulated in Clause C(2) of Schedule-I of the Facility Agreement.

9. Further, the terms of the Facility Agreement stipulated that as security for the term loan facility provided to the Corporate Debtor, charge was to be created in favour of EFL *vide* the following documents ("**Security Documents**") in such form and manner and over such assets as is stipulated therein the Security Documents:

    a. Indenture of Mortgage dated 02.07.2018 entered into by Mr. Ramesh Kumar Gami and Mr. Piyush Joshi, as the promoter-directors of the Corporate Debtor, which created charge by the way of a mortgage in favour of EFL over the immovable properties as specified therein and the terms of which were amended slightly vide the Supplemental Indenture of Mortgage dated 02.07.2018; ***(Ref: Exhibit E vi at Page Nos. 178-226 of Petition dated 30.11.2021 and Exhibit E- vii Page Nos. 227-232 of Petition dated 30.11.2021***)

b. Deed of Hypothecation dated 28.06.2018 entered into by the Corporate Debtor along with Mr. Ramesh Kumar Gami and Mr. Piyush Joshi, which created charge by the way of hypothecation over the movable properties as specified therein in favour of EFL; ***(Ref: Exhibit E ii at Page Nos. 124-135 of Petition dated 30.11.2021)***

c. Promissory note dated 28.06.2018 was executed by the Corporate Debtor in favour of the Lender unconditionally and irrevocably undertaking to pay Rs.25,00,00,000/- with interest to the Lender.

d. Separate personal guarantees by the promoter-directors of the Corporate Debtor namely Mr. Ramesh Kumar Gami and Mr. Piyush Joshi, as personal guarantors were entered into by them respectively in favour of EFL *vide* Personal Guarantee Agreements dated 28.06.2018. ***(Ref: Exhibit E- iii and Exhibit E-iv at Page Nos. 157- 176 of Petition dated 30.11.2021)***

10. In accordance with the terms of the Facility Agreement, Rs.19,00,00,000/- was disbursed to the Corporate Debtor by the Lender on 03.07.2018 as first tranche of the term loan facility as stipulated under clause B(4) of Schedule 1 (Special Conditions) of the Facility Agreement. ***(Ref: Fourth transaction dated 03.07.2018 of Ledger Accounts of Corporate Debtor maintained with Lender at Page No. 14 of Affidavit in Rejoinder dated 12.08.2022)***

11. The counsel of the Financial Creditor further submits that the confirmation on the same may be drawn by the perusal of the Disbursement Request Letter dated 02.07.2018 by the Corporate Debtor to EFL wherein the Corporate Debtor specifically requests for a disbursement of Rs. 19,00,00,000/-out of which Rs. 13,00,00,000/- was to be disbursed to current account of the Corporate Debtor bearing account no. 9100 2002 5385 467 held at AXIS Bank, Borivali East Branch and the balance amount in the escrow account i.e. the Account number 5750 0000 2071 47 held at HDFC Bank, Kanjur Marg, Mumbai, Maharashtra Branch ("**Escrow Account**"). ***(Ref: Page No. 2 of Compilation of Documents dated 21.09.2022)***

The flow of the disbursement amount of Rs.19,00,00,000 from EFL to the Corporate Debtor is also unequivocally confirmed by the Bank

Statements of the Escrow Account placed on record by the Financial Creditor before this Tribunal. ***(Ref: Annexure B at Page No. 30 of Affidavit in Rejoinder dated 12.08.2022)***

12. As stated above, out of the total sanctioned amount of Rs.25,00,00,000/-, Rs.19,00,00,000 was disbursed to the Corporate Debtor as Tranche-1 disbursement. The remaining amount of Rs.6,00,00,000/- under Tranche-2 was cancelled upon the expiry of "Availability Period" i.e., 30.01.2019 for tranche 2 as stipulated under Clause B (5) of Schedule- I of the Facility Agreement at Page No. 104 and was not disbursed to the Corporate Debtor. ***(Ref: Para 5 at Page No. 104 of Petition dated 30.11.2021)***

13. Under the terms of the Facility Agreement, a fifteen-month moratorium was agreed on the repayment of the principal amount, however there was no such mortarium allowed on the Corporate Debtor for making payments towards the interest. It is submitted that the Corporate Debtor started making irregular payments towards interest from September 2019 onwards. The Financial Creditor failed to receive complete payment towards interest for September 2019 and October 2019 on time. Notably, the Corporate Debtor paid Rs.12,73,870/- as delayed interest payment due for September 2019 and Rs.21,78,493/- towards delayed

interest payment due for October 2019 on 30.12.2019. No further payments towards have been received from the Corporate Debtor after 30.12.2019. ***(Ref: Transaction dated 30.12.2019 of Ledger Accounts of Corporate Debtor maintained with Lender and the Financial Creditor at Page No. 14 of Affidavit in Rejoinder dated 12.08.2022)***

14. Concerning the repayment of the principal amount, it is pertinent to note that after the expiry of an initial moratorium of 15 months from the date of initial disbursement i.e., 03.07.2018 (for ease of calculation, the date is calculated from 01.07.2018), a monthly EMI of Rs.55,55,556/- was to be paid by the Corporate Debtor over the next 45 months i.e., from 01.11.2019 along with the applicable rates of interest and other charges from time to time. ***(Ref: Page No. 105 of Petition dated 30.11.2021)***

15. The first installment became due on 01.11.2019 but the Corporate Debtor only delayed and made a part payment of Rs.27,41,637/- towards the repayment of 1st principal amount on 30.12.2019 and failed to make any further payments towards the principal amount EMIs thereafter. ***(Ref: Transaction dated 30.12.2019 of Ledger Accounts of Corporate Debtor maintained with Lender and the Financial Creditor at Page No. 14 of Affidavit in Rejoinder dated 12.08.2022)***

16. Therefore, it is submitted that the date of default is 02.11.2019 and the Corporate Debtor's accounts were classified as a Non-Performing Asset in the books of the Lender on 01.02.2020.

17. Subsequently, vide Assignment Agreement dated 17.03.2020, the lender, ECL Finance Limited in accordance with the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**"SARFAESI ACT"**) read with Article 8.5 of the Facility Agreement, assigned the loan under the terms of the Facility Agreement to the Financial Creditor. ***(Ref: Exhibit F. I at Page Nos. 233-269 of dated 30.11.2021)***

18. Thereafter, the Financial Creditor issued a Demand Notice dated 09.03.2021 under Section 13(2) of SARFAESI, 2002 along with Corrigendum dated 21.10.2021 to the Corporate Debtor demanding repayment of the outstanding amounts under the Facility. ***(Ref: Annexure E at Page Nos.69. 77 of Affidavit in Rejoinder dated 12.08.2022)***. The Advocates for the Financial Creditor issued a Notice dated 04.10.2021 along with Addendum dated 11.10.2021 to the Corporate Debtor demanding repayment of the outstanding amounts under the Facility. ***(Ref: Annexure F at Page Nos.78-87 of Affidavit in Rejoinder dated 12.08.2022)***

19. The Advocate for Corporate Debtor in response issued a Reply letter dated 26.10.2021 to the Corporate Debtor, wherein the Corporate Debtor, while expressly admitting that it had availed the Facility goes on to state that "....Our clients state that as per their record, they had availed term loan facilities from ECL Finance Limited (ECL) for a period of 5 years.". Thus, there was an express admission of liability on the part of the Corporate Debtor in its own submission. ***(Ref: Annexure G at Page Nos. 88-90 of Affidavit in Rejoinder dated 12.08.2022)***

20. The Advocates for the Financial Creditor in response to the aforesaid Reply letter, issued a Rejoinder letter dated 17.11.2021 to the Advocate for the Corporate Debtor. ***(Ref: Annexure H at Page Nos. 91-94 of Affidavit in Rejoinder dated 12.08.2022)***

21. Subsequently, the Financial Creditor filed the present Company Petition dated 30.11.2021 against the Corporate Debtor under Section 7 of IBC for an amount of Rs.46,76,76,228/- including the interest due as on 27.09.2021. ***(Ref: Exhibit D at Page No. 53 of Petition dated 30.11.2021 for working of computation of default amount)***

Submissions made by the Corporate Debtor by the way of filing Affidavit in Reply:

22. The Corporate Debtor submits that the Financial Creditor has not enclosed any documents supporting the debt:

Section 5(8) of IBC 2016 reads as follows:

"Financial debt means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money"

The Financial Creditor has annexed Sanction Letter for Rs.25 Crore as loan granted to Corporate Debtor. However, the Financial Creditor never disbursed the loan amount to the Corporate Debtor. The Financial Creditor has intentionally not enclosed the bank statement reflecting disbursement of loan amount to the Corporate Debtor. It is pertinent to note that the Financial Creditor has filed case on the basis of sanction letter and without disbursement of loan amount.

23. The Corporate Debtor relied on the order of NCLT, Mumbai Bench, Court II in the matter of *Sudhir T Deshpande vs. Dhanada Corporation Limited*, *Company Petition No. 4671 of 2018* wherein it was held that:

"Para 18.

On-going through the facts and submissions of the Financial Creditor and the Corporate Debtor it is concluded that the Financial Creditor has not established that the money was disbursed to the Corporate Debtor and hence the question of default on the part of the Corporate Debtor does not arise.

19. Without proof of disbursement, the said amount cannot be claimed as financial debt, as a disbursement is a sine qua non for any debt to fall within the ambit of the definition of financial debt.

24. The Corporate Debtor also placed reliance on the order of the Hon'ble NCLAT in *Dr. B.V.S Laxmi vs. Geometrix Laser Solution Private Limited (2018) 142CLA321*:

"30. In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'. There is nothing on record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellants cannot claim that the loan, if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I&B Code'.

20. For the foregoing reasons, the above Company Petition is liable to be rejected."

25. The Financial Creditor has failed to enclose a single document which is within 3 years from the date of alleged sanction of loan amount i.e. 11.06.2018 and the application was filed on 30.11.2021 hence it is beyond the limitation period of 3 years and hence not maintainable under Section 14 of the Limitation Act 1963 and Section 238A of IBC 2016.

Hon'ble Supreme Court in the matter of *Jignesh Shah & Anr vs Union of India & Anr, Writ Petition (Civil) No.455 of 2019* held that Limitation shall start from the date of default:

"The right to sue", therefore accrues when a default occurs i.e. three years from the right to sue."

"The triggers for limitation is the inability of a company to pay its debts. Undoubtedly, this triggers occurs when a default takes place, after which the debt remains outstanding and is not paid."

26. For all the above reasons, the Corporate Debtor has prayed that this Petition be dismissed.

Submissions made by the Financial Creditor by the way of Affidavit in Rejoinder:

27. The Financial Creditor submits that Corporate Debtor's claims of the loan not being disbursed by EFL is completely baseless and disbursement of the term loan to the Corporate Debtor has been unequivocally proved by placing reliance on the ledger accounts of EFL and the bank statements of the Escrow Account.

28. The Financial Creditor further submits that the Captioned Company Petition is filed within the limitation period as envisaged under the IBC read with the Limitation Act, 1963. For the purposes of calculating the limitation period for a debt under the IBC, the three year period is to be calculated from the date of default and not the period from the date of sanction as per Section 238A of IBC read with Article 137 of the Schedule to the Limitation Act, 1963.

Findings:

29. We have heard both the parties and perused the documents.

30. We observe that there is a valid Sanction Letter dated 11.06.2018 issued by the Lender in favour of the Corporate Debtor. Thereafter, a Facility Agreement dated 28.06.2018 was also entered into between the parties. The Corporate Debtor has not argued on the above mentioned documents. Corporate Debtor has rather claimed that the loan amount

was never disbursed by the Financial Creditor. However, the Financial Creditor has placed on record the Bank Statements of the Escrow Account which confirms the disbursement amount of Rs.19,00,00,000 from EFL to the Corporate Debtor. Thus, the defence of the Corporate Debtor that the Financial Creditor has failed to attach any bank statement reflecting the disbursal of the amount, stands invalid.

31. The Corporate Debtor has also in their reply to the demand notice, dated 26.10.2021 admitted that they had availed term loan facilities from the Lender for a period of 5 years, although the loan documents were not provided by the Lender. Further it was admitted that an amount of Rs.6 Crore was disbursed and the same was directly appropriated towards repayment of unsecured loan which the Corporate Debtor had obtained from different finance companies. It was further acknowledged that the Corporate Debtor has faced huge losses and the financial condition of the Corporate Debtor has deteriorated due to the lockdown situation and subsisting slack in the market due to which they failed to pay the interest amount regularly. The Corporate Debtor further admitted that they were genuinely interested to resolve and settle the legitimate claims of the Lender and thus requested the lender not to take some drastic action as set out in the demand notice.

32. The above reply of the Corporate Debtor evidently contradicts from their own defence that the Financial Creditor never disbursed any loan amount to the Corporate Debtor in pursuance of the Sanction Letter and Facility Agreement entered into between both the parties. This makes the submissions of the Corporate Debtor vague and unreliable. The Corporate Debtor may note that acknowledgement of debt means admission of debt. Hence, even if the loan documents are not presented the acknowledgement itself still establishes a debt and a default.

33. As regard to limitation, the Corporate Debtor has rightly relied on the judgement of the Hon'ble Supreme Court in the matter of *Jignesh Shah & Anr vs Union of India & Anr, Writ Petition (Civil) No.455 of 2019* wherein it was held that Limitation shall start from the date of default:

"The right to sue", therefore accrues when a default occurs i.e. three years from the right to sue."

34. A careful read of the above statement indicates that the 3 year calculation begins from the date of default or the right to sue. However, the Corporate Debtor has wrongly interpreted and calculated the period of 3 years from the date of sanction letter. The date of default in the present petition is 02.11.2019. This Petition was filed on 12.01.2022. Hence it is very well within the limitation period.

35. We also consider the facts of the case in the lights of the Order passed by Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition.

36. The Financial Creditor has proposed the name of Mr. Jitender Kothari, Registration No. IBBI/IPA-001/IP-P00540/2017-2018/10965, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

37. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority

admits this Petition and orders initiation of CIRP against the Corporate Debtor.

38. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP (IB) 39/(MB)/2022** filed by **CFM Asset Reconstruction Private Limited,** the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **RNP Marketing and Cargo Private Limited,** the Corporate Debtor is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(i) 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;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium:-

(i) 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;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) **Mr. Jitender Kothari,** Registration No. IBBI/IPA-001/IP-P00540/2017-2018/10965, having address at 702, Orchid A Wing, Evershine Park CHS, Off Veera Desai Road, Andheri West, Mumbai – 400053 [email: jitenderkothari@rediffmail.com] Mob. No. 9969117020 is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of Rs.3,00,000/- (Rupees Three Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**JUSTICE P.N. DESHMUKH**
Member (Technical)	**Member (Judicial)**

16.12.2022

DSB