

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

COURT V

IA. No. 791 of 2022 &

C.P.(IB) No. 590 of 2021

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Birla Cotsyn (India) Limited,

Through its Liquidator: Mr. Anil Goel,
E10S, Lower Ground Floor, Kailash Colony, Greater Kailash- I, New Delhi-110048

.....Financial Creditor/ Petitioner

Vs

Birla Integrated Textile Park Limited,

(CIN: U51310MH2008PLC185850)

Plot 75, Sagar Tarang, Laxmibai Jagmohandas Marg, Malabar Hill, Mumbai-400006

.....Corporate Debtor/ Respondent

Order Pronounced on: 09.05.2023

Coram:

Hon'ble Sh. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearance of Parties:

For the Petitioner: Mr. Dhananjaya Sud, Advocate

For the Corporate Debtor: Mr. Nausher Kohli, Advocate

Per: Kuldip Kumar Kareer (Judicial)

ORDER

1. This Company Petition is filed by Petitioner, namely Birla Cotsyn (India) Limited, (hereinafter called "**Financial Creditor**") through its liquidator, Mr. Anil Goel, seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Birla Integrated Textile Park Limited, (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Financial Debt of Rs. 5,15,11,722/-.
2. IA. No. 791 of 2022 is filed by the Respondent herein challenging the maintainability of the present Company Petition.

BRIEF FACTS OF THE CASE

3. The Financial Creditor is a company incorporated on 24.09.1941 under the Companies Act, 1913. The Corporate Debtor is a private limited company incorporated on 13.02.1946 under the Companies Act, 1913.

4. Vide order dated 20.11.2018 in C.P. (IB) 579 of 2018, the CIRP proceedings were initiated against the Petitioner and Ms. Sujata Chattopadhyay was appointed as the Interim Resolution Professional of the Petitioner.
5. The CIRP period expired on 19.08.2019 and the liquidation process was initiated against the Petitioner vide order dated 24.09.2019 passed in MA. No. 2929 of 2019 in CP. No. 579 of 2018 whereby Mr. Anil Goel (hereinafter referred to as "**Liquidator**") was appointed as the Liquidator of the Petitioner.
6. It has been submitted that Financial Creditor had granted a loan to the Corporate Debtor amounting to Rs. 8,40,63,700/- during the period 2015-2016 and the same is evident from the Balance Sheet of the Financial Creditor as on 31.03.2016. As per the Annual Report of the Financial Creditor as on 31.03.2016, it has been stated that the Financial Creditor had extended loans to the Corporate Debtor which have not been repaid till date. Further, it was submitted that the Corporate Debtor has paid a partial sum of Rs. 4,50,00,000/- to the Financial Creditor with regard to the said loan.
7. It has further been submitted that the liquidator issued an email dated 19.02.2021 to the Corporate Debtor asking for the refund of the said loan amount. The Financial Creditor further stated that the Corporate Debtor vide Email dated 01.03.2021 requested for four weeks to examine the same. However, till date, the liquidator has neither received any reply nor refund of the said amount.
8. It has been submitted by the Petitioner that the Corporate Debtor wrote a letter dated 07.04.2021 to the Liquidator and admitted that the Corporate Debtor owed an amount of Rs. 3,90,63,700/- along with the interest of Rs. 1,24,48,022/- to the Financial Creditor.

9. It has further been submitted that as per the Balance Sheet of the Corporate Debtor as on 31.03.2017, the Corporate Debtor owed an amount of Rs. 3,90,63,700/- to the Financial Creditor.
10. It has further been submitted that the Corporate Debtor has committed a default of total sum of Rs. 5,15,11,722/- till the commencement of the CIRP of the Financial Creditor i.e. 20.11.2018. Since the Corporate Debtor failed to make the repayment of the said amount, this necessitated the filing of the present petition.

IA. NO. 791 OF 2022 FILED BY THE RESPONDENT HEREIN

11. The present Interlocutory Application has been filed by the Respondent herein challenging the maintainability of the Company Petition no. 590 of 2021.
12. It has been submitted that the Petitioner in the Company Petition has not obtained prior approval from this Hon'ble Tribunal for Initiation of CIRP against a third party, which is a mandatory compliance as per Section 33(5) of the Code.
13. It has further been submitted that the Company Petition is barred by law of limitation. It was stated that the last payment was made on 29.03.2013, and therefore, the petition could have been filed only within the period of three years from 29.03.2013.
14. It has further been submitted that the Petitioner in the Company Petition has not produced any material documents to substantiate its claim of a financial debt and therefore, by only relying upon certain entries of ledger account, the fundamental requirement of Section 7 of the Code cannot be said to have been fulfilled. It has also been submitted that the said

monies were paid as fees and therefore, the same cannot be termed as Financial Debt.

15. It has further been submitted that the orders of this Tribunal Dated 20.11.2018 and 24.09.2019, admitting the company petition and directing the initiation of liquidation proceedings, were challenged by some of the shareholders before the Hon'ble Bombay High Court vide WP. No. 755 of 2020 filed under Article 226 of the Constitution of India. It has further been stated that the Hon'ble Bombay High Court has granted an interim relief vide its order dated 16.03.2020 pursuant to which the further auction of the assets of the Corporate Debtor was stayed and same is still in operation. The Respondent therefore, has requested for stay until the final adjudication of the given Writ Petitions.
16. On the basis of the above given grounds, the dismissal of the Company Petition has been pleaded by the Respondent.

FINDINGS

17. We have heard the Counsel appearing for both the parties and perused the records.
18. The present Company Petition has been filed by the Financial Creditor through its liquidator, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor alleging that the Corporate Debtor has committed default in making aggregate payment of Rs. 5,15,11,722/- to the Financial Creditor.
19. Before going into the merits of the matter, the Bench would indicate that the Petitioner is itself a company under-going Liquidation and the present Petition has been filed by the Liquidator of the Petitioner. The Petitioner Company went into liquidation vide order dated 24.09.2019. In that regard, reference can be made to the provisions of Section 33(5) of the

Insolvency and Bankruptcy Code, 2016 which are being reproduced hereunder:

“(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

*Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, **with the prior approval of the Adjudicating Authority**”.*

20. It is further noteworthy that this Tribunal whilst passing the order of the liquidation dated 24.09.2019 categorically stipulated in para 14(f) as under:

*“Since this liquidation order has been passed, subject to Section 52 of the Code, **no suit or other legal proceedings shall be instituted by or against the Respondent**, in the event of initiation of a suit or legal proceeding by the liquidator on the Respondents behalf, **it may initiate such proceedings with prior approval of this Adjudicating Authority** save and except as mentioned in sub-section 6 of Section 33 of the Code.”*

Upon plain reading of section 33(5) of the code, it can be construed that the Company under Liquidation is disbarred from initiating any legal proceedings without seeking the prior approval of the Adjudicating Authority. However, in this case, no such approval of the Adjudicating Authority is shown to have been obtained any time prior to the filing of the instant petition. Therefore, the Liquidator was not competent to initiate proceedings under Section 7 of the Code. The Bench is further of the view that the proviso under Section 33(5) of the is mandatory in nature.

Therefore, the Bench is of the considered view that as the present Company Petition has been filed without obtaining the prior approval of the Adjudicating Authority, it **is not maintainable** and on this short ground merits dismissal.

21. Accordingly, this Company Petition C.P.(IB) No. 590 of 2021 is **“dismissed”** and **“disposed of”**. IA. No. 791 of 2022 is hereby **“allowed”**.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)