

IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

Corrected vide order dated 21.10.2019

Company Petition (IB) No. 80/ALD/2019
(Under Section 7 of Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016) (Member) (Judicial)

IN THE MATTER OF:

M/S BHAGWATI RAIL INFRA PVT. LTD

AND

IN THE MATTER OF

BANK OF INDIA

.....Applicant/Financial Creditor

VERSUS

M/S BHAGWATI RAIL INFRA PVT. LTD

.....Respondent/Corporate Debtor

ORDER DELIVERED ON : 21.10.2019



CORAM :

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)

For the Applicant/ Operational Creditor: Sh. Ankur Gupta, Advocate

For the Respondent/ Corporate Debtor: Sh. V. K. Shukla, Advocate

Corrected vide order dated 21.10.2019

AS PER: Mr. Abni Ranjan Kumar Sinha, Member, Judicial.

Signature
(Member) (Judicial)

Order

1. The present petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the petitioner/financial creditor *i.e. Bank of India* for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate debtor company *M/s Bhagwati Rail Infra Pvt. Ltd.*

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2. The Applicant "**Bank of India**" is a Banking Institution and corporate body constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970. Having Identification No. as PAN No. AAACB0472C. **Mr. Kunj Behari Srivas**, Chief Manager, has been authorised to file this application on behalf of Financial Creditor. (***The Power of Attorney is annexed as annexure 1 of the Application.***)

3. The Respondent **M/s Bhagwati Rail Infra Ltd.**, incorporated on 07.03.2011 (*Having its Registered Office at, 24, MLB Market, Khanderao Gate, Jhansi, UP 248002; CIN U4500UP2011PTC043852*). The authorised share capital of respondent is Rs. 50,00,000/- (Rupee Fifty Lacs Only) and Issued Subscribed and Paid- Up share Capital is Rs. 47,90,000/- (Rupees Fourty Seven Lacs Ninety Thousand Only).

4. Brief facts related to petition are as follows:



The learned counsel for the applicant submitted that the corporate debtor was enjoying various credit facilities from the applicant since 2013. The financial creditor had granted facilities/ debt to the corporate debtor vide Sanction letter dated 17th January, 2013 in form Financial Guarantee of Rs. 668 Lacs and Performance Guarantee of Rs 40 Lacs, both in shape of Bank Guarantee and despite repeated requests and reminders by bank officials, the corporate debtor have not paid the invoiced bank guarantee amount.

ii. Further stated that the demand Notice was issued by the Financial Creditor to the Corporate Debtor dated 19th July, 2018 and submitted that the total sum, which was in default is Rs.

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Rs. 3,30,94,712.39 (Rupees Three Crores Thirty Lacs Ninety Four Thousand Seven Hundred Twelve Paise Thirty Nine) and the date of default is on 24.04.2018.

iii. In the reply filed by the Corporate Debtor , it is specifically mentioned in the replt that the applicant bank failed to file the certificate as per the provision of the Banker's Books Evidence Act, 1891, confirming the correctness of the statement of loan account and the certificate is also undated and unsigned, the applicant has also not filed the statement of unapplied interest and also certified/ original copy of any General power of attorney in four of Mr. Kunj Behari Srivas, on instruction of whom the captioned C.P is filed.

iv. Further stated that the application filed by the corporate debtor is full of mistakes and discrepancies and is not filed according to the format given in the Act and rules of the Insolvency And Bankruptcy Code, 2016 and the demand notice served on the corporate debtor and its directors on 19th July,2018 is not in prescribed pro- forma, so, the petition should be rejected.

v. In reply to the objections raised by the corporate debtor, the learned Counsel for the applicant submitted that the financial creditor had annexed the certificate under Banker's Book Evidence Act along with the application and also filed the power of attorney issued by the financial creditor to the attorney holder Sri Kunj Behari Srivas. Further submitted that an application U/S 7 of the Insolvency and Bankruptcy Code, 2016 is filed according to the format given in the Act and Rules of the Code.



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vi. Further it is also stated that there is no harm to the corporate debtor, if the demand notice is not in the format because the said demand notice was sent prior to the filing of the application U/s 7 of the IB Code, 2016 and in this regards, Andhra Pradesh High Court in its judgment in AIR 2012 AP 11 has specifically stated that *"No one can be permitted to take advantage of the technicalities of law and deliberately deceive others. Law is never intended to be used as tool to enrich oneself unduly"*. Hence, prayed for the present petition to be admitted.

5. The Learned Counsel for the Financial Creditor submitted that in order to prove the Existence of the Financial Debt; they have annexed following documents:

- i. The Copy of Sanction letter dated 17.01.2013 are annexed as *Annexure 6 of the Application.*
- ii. The title deeds of the immovable properties mortgaged by the Corporate Debtor in favour of the Financial creditor are annexed as *Annexure 9 of the Application.*
- iii. The entries in the statements of Accounts maintained by the Financial Creditor under The Banker's Books Evidence Act, 1891 is annexed as *Annexure 10 of the Application.*
- iv. The Copy of the Demand Notice dated 19.07.2018 sent to the Corporate Debtor, the copy of various Board Resolutions of the Corporate Debtor and the copy of letter of encashment of Bank Guarantee & Indemnity are annexed as *Annexure 11 of the Application.*



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v. The chart showing details of days and amount of default is annexed as *Annexure 7 of the Application*.

6. I have gone through the contents of the petition, the counter affidavits filed by the respondent and reply to the counter affidavit filed by the petitioner and documents annexed there of.

7. As on the date of hearing, the learned Counsel for the Corporate Debtor failed to produce any document to prove that there is no debt and default on the part of Corporate Debtor. So, from the perusal of averments made in the counter affidavit filed on behalf of the respondent, I find that respondent has raised the question of maintainability on the ground referred in the counter affidavit. I have carefully examined the ground mentioned in the counter affidavit along with the provisions contained Under Section 7 of IB Code. The relevant provision of Section 7 (1), (2), (3) is as quoted below:

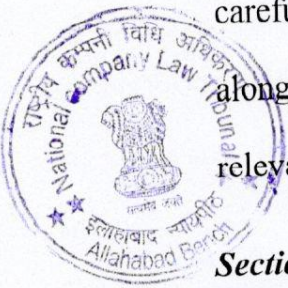
Section 7: Initiation of corporate insolvency resolution process by financial creditor:

(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation. —For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—



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(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

8. Mere plain reading of the provision shows that in order to make an application under Section 7 (1) the financial creditor / petitioner is required to establish:

a. Whether there is duly established financial debt.

b. Whether there is default in payment by the corporate debtor.

c. Whether the documents attached with the applicant shows that there is default in payment of debt and name of resolution professional is proposed to act as IRP and no disciplinary proceedings are pending against the proposed resolution professional.



9. The Hon'ble Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank*, (2017)205 Comp Cas 57(SC) held :

“The scheme of Sec 7 stands in contrast with the scheme under Sec 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in sec 8(1) of the Code. Under Sec 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub Section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing –i.e., before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor goes out of the clutches of the Court.

On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other

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evidence produced by the Financial Creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is 'due', i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some further debt. It is only when this is prove to the satisfaction of the adjudicating authority may reject an application and not otherwise".

10. In the case of *Ajay Agarwal vs. Central Bank of India (2018) 208 Comp Cas 402 (NCLAT)* Hon'ble NCLAT held:

"When in case a "Corporate Debtor" commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the "financial creditor" to satisfy itself that a default has occurred. Other considerations, such as the existence a dispute or discrepancy are irrelevant, so long it has not been disputed the same debt is due and is payable to the financial creditor and the corporate debtor has defaulted."

11. Recently in the matter of *Karan Goel v. M/s Pashupati Jewellers & Anr. Company Appeal (AT) (Insolvency) No. 1021 of 2019 dated 01.10.2019* stated :

"..... it is clear that once the Adjudicating Authority is satisfied on the basis of records that the debt is payable and there is default, the Adjudicating Authority is required to admit the application."

12. From the perusal of the record, as the learned counsel for petitioner submitted that the petition filed is in accordance with the pro forma prescribed under the Code, whereas it is mentioned in the reply filed by the corporate debtor that it is not in accordance with the law. At this juncture, I would like to refer **Rule 4 Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016**

4. Application by financial creditor. —

(1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process



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against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

(4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.



13. From the above, this adjudicating Authority is of the considered view that according to Rule 4 (3) of The Adjudicating Authority Rules, 2016 the applicant at first is merely required to dispatch a copy of the application to the respondent then filed application before the adjudicating authority and in the present matter, the same copy has been dispatched and it is not necessary to send the demand notice as required Under Sec 8 of the IBC, which has already been discussed in the above mentioned paragraphs. So this Adjudicating Authority finds no force in the facts mentioned in the reply filed by the corporate debtor, by which the Corporate Debtor made prayer to reject the application filed by the financial creditor.

14. So far the other points raised by the corporate Debtor in reply is concerned, this Adjudicating Authority is of the considered view that those points are

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not sufficient to demolish the claim of the Financial Creditor, when he files the application under Sec 7 of the IB Code.

15. Further, it is matter of record that the statement of account which has been filed shows that the date of default is on 24.04.2018 on which the first default was made by the corporate debtor of Rs.2,99,28,044 and the Applicant/ Financial Creditor has filed this application on 25.01.2019 which is well within limitation.

16. Hence, the application filed on behalf of financial creditor/Applicant under Section 7 of IBC is found complete and it is within limitation. It further appears that there is default in non-payment of the debt owed by the corporate debtor which is more than Rs One Lakh to trigger the CIRP against the Corporate Debtor and the applicant has annexed sufficient documentary evidence to show that there is default on behalf of the corporate debtor. Therefore, application filed U/S 7 of IBC deserves to be admitted.

17. The Financial Creditor has proposed the name of **Mr Aditya Agarwal**, **Registration Number IBBI/IPA-001/IP-000529/2017-18/10954** for appointment as Interim Resolution Professional (IRP). Further IRP has filed a declaration in form 2 affirming that he is registered insolvency professional and no disciplinary proceedings are pending against him. **(Copy of Form -2 is annexed as Annexure-5 of the Application)** and there is default in the payment of the financial debt which is more than Rs One Lakh. Therefore, as per section 7(5)(a) of the code, the present application filed U/s 7 of the IB Code is admitted.



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18. Mr Aditya Agarwal, Registration Number IBBI/IPA-001/IP-000529/2017-18/10954 is appointed as Interim Resolution Professional (IRP). Further, a moratorium under the provision of section 13 & 14 of the Code is declared prohibiting the following:

- i. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, 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 Act, 2002 (54 of 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.



It is further directed that:

- (i) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period
- (ii) The provision of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial sector regulator.

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12. The IRP shall comply with the Provision of Section 13(2), 15,17 &18 of the Code. Further, the Directors, Promoters or any person associated with the Management of the Corporate Debtor are directed to co-operate to the IRP as prescribed under Section 19 and for discharging his function under a provision of section 20 of the Code.

13. The Registry is further directed to communicate the copy of this order to Financial Creditor and Corporate Debtor and IRP through email and speed

14. List on 13.11.2019 for the filing of the progress report.

Date : 21.10.2019

— Sd —

Abni Ranjan Kumar Sinha /
(Member Judicial)

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL

21/10/19

P. P. PANDEY
ASSISTANT REGISTRAR
NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD-U.P.

FREE OF COST COPY

Compared by Me
Mahesh Sahai
21/10/19