

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (COURT-II),
KOLKATA**

I.A(IBC) 804/KB/2023
And
I.A(IBC) 2033/KB/2023
IN
CP No 302/KB/2021

IN THE MATTER OF:

Yes Bank LimitedFinancial Creditor
AND
Sarga Hotel Private LimitedCorporate Debtor
AND

IN THE MATTER OF:

Sh. Abhishek BhardwajApplicant
VERSUS
Yes Bank LimitedRespondent/Financial Creditor

Date of Pronouncement: 04.01.2024

CORAM:

SHRI BIDISHA BANERJEE, MEMBER (JUDICIAL)
SHRI D. ARVIND, MEMBER (TECHNICAL)

Appearance (via video conferencing/physically)

Mr. Debnath Ghosh, Adv.] For the Applicant in IA(I.B.C)/1271(KB)2022
Mr. Satyaki Mukherjee, Adv.]
Ms. Mini Agarwal, Adv.]
Ms. Manju Bhuteria, Adv.] For the Resolution Professional
Mr. Souvik Mazumdar, Adv.]
Mr. M. Sheharuddin, Adv.]
Mr. Surajit Dasgupta, Adv.]
Mr. Abhinav Vashist, Sr. Adv.] For the COC in IA(I.B.C)/1271(KB)2022
Mr. Pramit Chakraborty, Adv.]
Mr. Aditya Das, Adv.]
Mr. Arindam Mrinal Pal, Adv.]
Mr. Shaunak Mitra, Adv.] For the Suspended Board of Directors in
Ms. Tanusree Paul, Adv.] IA(I.B.C)/804(KB)2023
Mr. Orijit Chatterjee, Adv.] For the SRA
Ms. Swati Dalmia, Adv.]

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court convened through hybrid mode.
2. Heard the Ld. Counsels of both the Parties.
3. The applicant by way of the Application challenges the maintainability of the Company Petition No. CP 302/KB/2021 for being violative of Section 10A of the Code.
4. This Application has been preferred to seek the following reliefs:
 - a. *Decide maintainability of the present Petition in view of Section 10A of IBC as a preliminary prayer, prior to approval of the Resolution Plan; and*
 - b. *Pass such other and further order(s) and/or direction(s) as this Hon'ble Tribunal may deem fit and proper.*
5. It is submitted that in the year 2016, the Corporate Debtor availed Term Loan facility of Rs. 300 Crores from Yes Bank in furtherance to the Facility Letter dated 16th March, 2016. That subsequent thereto, the Company and Yes Bank entered into a Facility Agreement dated 13th December, 2016 along with Demand Promissory Note and Letter of Continuity for Demand Promissory Note. That in accordance with the facility letter dated 16th March, 2016, it was agreed between Yes Bank and the Company that a processing fee of 10 Crore plus taxes is to be levied on the amount disbursed by Yes Bank i.e., Rs. 300 Crores as loan to the Corporate Debtor. An amount of 300 Crore was to be disbursed in accordance with the sanction letter dated 16th March 2016. The Company had paid total processing fee amounting to Rs. 11.56 Crore till 6th March 2017 as against the total disbursed amount of Rs. 300 Crore, only a sum of Rs. 2,75,50,73,858/- had been disbursed against the said sanction letter in five tranches in lieu of which various securities were given subsequent thereto, even when excess processing fees had already been paid by the Company which should have been adjusted against the instalments.
6. It is alleged that the case of the Financial Creditor that NPA was declared on 29th February 2020 is patently belied from the fact that had the processing fee been adjusted prior thereto, there would be no occasion whatsoever of the alleged default. The Company also learnt that the loan account of the Company had been declared as a Non-Performing Asset on 29th February, 2020 which was contrary to the master circular

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issued by the Reserve Bank of India ("RBI") bearing no. RBI/2009-10/93, UBD.PCB.MC. No. 3/ 09.14.000/ 2009-10 dated 1st July 2009 which states that only after non-payment of 90 days, an account can be declared as NPA.

7. Further a regulatory package was brought into force by the Government as and from 29th February 2020, and account of the Company could not have been declared as NPA on 29th February 2020 so as to prevent the Company from availing the benefit of the said regulatory package.
8. That in accordance to a Facility Agreement, it was agreed that the Company is not required to make payments during the moratorium period which includes the construction period plus 12 months from the date of Scheduled Commercial Operation Date ("SCOD") i.e., 30th June, 2017. Therefore, the moratorium period continued till 30th June, 2018. That further, an amount of Rs. 6.89 Crore was already paid by the Company thereby rendering the entire declaration of NPA as otiose.
9. The Financial Creditor filed the present Company Petition being C.P. (IB) No. 302 of 2021 under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process ('CIRP') against Sarga Hotel Private Limited pursuant whereof, vide Order dated 11th February 2022 passed by this Hon'ble Tribunal, CIRP was initiated against the Corporate Debtor.
10. It is alleged that the Petition ought not to have been allowed for being violative of Section 10A of the Insolvency and Bankruptcy Code, 2016 ("IBC"). That as per the own case of Yes Bank invocation of the Code occurred for the first time on non-payment of outstanding amount in relation to the Loan facility" which was allegedly re-called vide Loan Recall Notice dated 9th June, 2020.
11. As such it is Prayed that the Company Petition being violative of Section 10A of IBC being not maintainable and urgent relief is sought for from this Tribunal to decide the issue of Section 10A as a preliminary issue.
12. The prayer is vociferously opposed by the Ld. Counsel for the RP as the ground that the issue of maintainability could not have been raised after more than a year of admission of the CP and the admission order clearly records admission on the part of the Ld. Counsel for the Corporate Debtor about the debt and default. The order reads as under: "*Ms. Madhuja Barman, Ld. Counsel appearing for the Corporate Debtor clearly*

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admitted the debt and default. She submitted that in the reply affidavit filed by the Corporate Debtor, the debt and default has been clearly admitted and she does not have any objection if the CIRP is initiated in respect of the Corporate Debtor. She, however, appearing on instructions from Mr. Supriyo Gole, Ld. Counsel for the Corporate Debtor in this matter” Page.48 of I.A. 804 of 2023. Evidently the applicant is the Director from the suspended board of the Corporate Debtor.

13. It is noticed that this applicant had earlier preferred Company Appeal No. 849/2022 assailing an order dated 30.06.2022 of this Tribunal, with an object to restrain the RP from proceeding with Expression of Interest and Stay Appointment of a support partner of the RP. The appeal was dismissed on 02.08.22. Even then this issue was not urged. The Company was declared NPA on 29.02.2020 which is beyond the period prescribed under Section 10A of the IBC, 2016.
14. Upon dismissal of the Appeal, it seems that the present application has hatched a new plan to stall the CIRP process. Such move cannot be encouraged as it would defeat the object of the Code.
15. The Present Application along with I.A. No 2033 of 2023 is therefore dismissed.
16. In view of dismissal of I.A. 804 of 2023, the other I.A. 2033 of 2023, seeking liberty to implead RP in I.A. 804 of 2023 stands rejected. No Costs.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Order Signed on 4th day of January, 2024.

A.J.S. [LRA]