IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH,

KOLKATA

C.P (IB) No.302/KB/2021

In the matter of

An application 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.

And

In the matter of:

Yes Bank Limited, CIN: L65190MH2003PLC143249, having its registered at Yes Bank House, Off Western Highway, Santacruz East, Mumbai, Maharashtra- 400055,Branch Office: 56A, Hemanta Basu Sarani, Stephen House, Kolkata-700001.

… Financial Creditor

Versus

In the matter of:

Sarga Hotel Private Ltd. CIN U55101WB2004PTC098787, having its Registered office at Plot No. X-I, 2 and 3, Block-EP, Sector-V, Salt Lake City, Kolkata- 700091.

…Corporate Debtor

Date of hearing : 08/12/2021

Order Pronounced on : 11/02/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr.Siddhartha Chatterjee, Adv. } For the Financial Creditor
2. Mr. Prasun Ghosh, Adv.

1. Ms. Madhuja Barman,Adv. } For the Corporate Debtor

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition 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 has been filed by **Yes Bank Limited,** registered at Yes Bank House, Off Western Highway, Santacruz East, Mumbai, Maharashtra- 400055,Branch Office: 56A, Hemanta Basu Sarani, Stephen House, Kolkata-700001, through Ms. Priyanka Roy, its authorised representative vide Power Attorney of the Financial Creditor dated 22.07.2021(hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **Sarga Hotel Private Ltd. CIN U55101WB2004PTC098787,** having its Registered office at Plot No. X-I, 2 and 3, Block-EP, Sector-V, Salt Lake City, Kolkata- 700091.(hereinafter referred to as the Corporate Debtor.

3. It is submitted by the Financial Creditor that the Corporate Debtor has an authorised share capital of Rs.93,00,00,000/-and a Paid up share capital of Rs.92,30,76,920/- divided into 9,23,07,692 Equity Shares of Rs.10 each. It is submitted that the Corporate Debtor sought financial assistance from the Financial Creditor in or around February, March, 2016 consequent upon that, the Financial Creditor issued facility letter on 16th March, 2016. On 28th March, 2016, 26th April, 2016, 26th May, 2017 and on 8th April, 2019, Addendum facility Letters were issued by the Financial Creditor. It is submitted that on 13th December, 2016 Facility Agreement along with Demand Promissory Note, letter of continuity, hypothecation agreement and deed of guarantee were executed. On the same day Security Trustee Agreement was executed by and between the Corporate Debtor, Financial Creditor and Axis Trustee Services Limited whereudner security were created in favour of the said

Trustee acting for and on behalf of the Financial Creditor.

4. It is submitted that on 4th May, 2017 in terms of the Specific Clause of the Facility agreement, an Indenture of Mortgage was executed by the Corporate Debtor to create security as regards the facilities granted by the Financial Creditor. On 29th February, 2020, account of the Corporate Debtor became NPA. On 9th June, 2020, the loan was recalled by the Financial Creditor along with Invocation of corporate guarantee. On 12th August, 2020, the Corporate Debtor was admitted to CIRP by the order of this Adjudicating Authority on an application of the Operational Creditor and the Financial Creditor filed its claim with IRP on 26th August, 2020. It is submitted that on 21st September, 2020, Hon'ble NCLAT ordered that till next date of hearing, the CoCs will not take any decision. Subsequently, when the said matter was listed before the Hon'ble NCLAT on 4th November, 2020 by an order, the Hon'ble NCLAT directed that "interim directions to be continued". It is submitted that on 9th February, 2021 Financial Creditor filed appeal before the Hon'ble NCLAT for vacating the order dated 21st September, 2020 passed by the NCLT and allow the Committee of Creditors to take decisions in respect of Corporate Insolvency Resolution Process of the Corporate Debtor.

5. It is submitted that the Hon'ble NCLAT vide order dated 27th August, 2021 quashed the order dated 12th August, 2020 and by such order, the Corporate Debtor came out of the CIRP and moratorium. It is further submitted that the Financial Creditor is exposed to huge outstanding as against the Corporate Debtor and the total amount due and payable under the facility guaranteed to the Corporate Debtor is Rs.336,15,51,782.37 inasmuch as default occurred due to non receipt of payment on due date which is continuing. Due to such default on the part of the Corporate Debtor to repay the dues of the Financial Creditor, the Financial Creditor has filed the present application under section 7 of the Code. The Financial Creditor has given all these details of debt

along with dates of disbursement in Part IV of quorum I.

6. It is submitted that the default occurred due to non receipt of payment on the respective due dates and is still continuing. It is stated that the account became NPA on February 29, 2020. It is stated that the outstanding sums due and payable by the Corporate Debtor to the Financial Creditor amounts to Rs.336,15,51,782.37 as 6th September, 2021 and the computation of outstanding balances and days of default are contained in Annexure-Q, along with the statement of accounts duly certified under the Banker's Books Evidence Act.

7. The Financial Creditor proposed the name of **Mr. Avishek Gupta,** to act as an IRP having Registration No. **IBBI/IPA-003/IP-N000135/2017-2018/11499,** who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.

8. To secure the financial debt, the Financial Creditor got various documents executed by the Corporate Debtor, which are mentioned in Part-V of the application. The copies which have been annexed with the petition along with various other documents/correspondence with the Corporate Debtor. It is stated that the petition has been filed within the period of limitation and the application is otherwise also complete in all respects.

9. In reply to the petition, the Corporate Debtor filed reply affidavit of Mr. Ravi Prakash Choudhary, authorised representative of the Corporate Debtor. It is submitted that the reply affidavit is being filed for the sole purpose of dealing with the contents, allegations and averments made in

the said application and in case there is a requirement of providing further facts at subsequent stage, the permission to file supplementary affidavit may be granted. It is submitted that averments, allegations and contentions made in the application by the Financial Creditor are denied as the application is not maintainable and liable to be dismissed.

10. The Corporate Debtor in its reply affidavit has further submitted that the Corporate Debtor was established as a public company in the year 2004 as a wholly owned subsidiary of Shristi infrastructure Development Corporation Limited as a special purpose vehicle for the purpose of setting up of a Hotel (hereinafter referred as to SIDCL), and acquired a land admeasuring 8 Acres in Newtown within Police Station Rajarhat, from West Bengal Housing Infrastructure Development Corporation Ltd. (WBHIDCL). SIDCL granted a lease to the Corporate Debtor of the divided and demarcated portion of land containing an area of 3.5 Acres for a period of 50 years and executed a deed of lease dated 31st March, 2007 with effect from 22 March, 2007. A deed of extension and modification was executed on 12th September, 2008 vide which the term of lease was extended for 80 years. It is further submitted that thereafter a share subscription and shareholders' agreement dated 7th August, 2008 was executed with Rishima SA Enforcement LLP (hereinafter referred to as RISHIMA) whereunder the shareholding of the Corporate Debtor had undergone a change. It is further submitted that for the purpose of construction of the Hotel Project, the Corporate Debtor raised loans and advances from various Banks, institutions etc. aggregating to Rs.568,42,73,858/-, including from the applicant/ Financial Creditor. The Corporate Debtor repaid an amount of Rs.6,88,95,991/-. Hence, the balance of the principal amount stands as Rs.561,53,77,867/-. The Corporate Debtor commenced construction of the Hotel project on the aforesaid leased land from 2007-2008 and achieved commercial operation in September, 2017. It is stated that out of the said total aggregate of the loan obtained from the Banks, instructions and

corporate body, principal amount of Rs.275 Crore was received as disbursement from the applicant/Financial Creditor and as a security for the said loan,the Corporate Debtor created security on the movable assets of the Corporate Debtor and mortgage of the leased land and the Hotel project. It is further submitted that out of the total sanctioned loan of Rs.325 Crore, the applicant had disbursed Rs.275 crore. Such short-fall in disbursement caused a huge hardship for the Corporate Debtor to complete Hotel Project on scheduled completion date. It is further submitted by the Corporate Debtor that due to the said delay in completion of the project, there was certain delay in servicing of the loan obligations of the Corporate Debtor towards its lenders including the applicant herein and that the applicant is to be blamed for such delay as the applicant did not disburse the entire sanctioned amount to the Corporate Debtor.

11. It is further submitted by the Corporate Debtor that the hospitality industry came to a grinding halt during the pandemic and that the entire hospitality industry suffered a severe set back. There was no capacity utilization during the pandemic, the receivables were not sufficient to honour the repayment obligation of the applicant and hence defaulted in repayment obligation. It is submitted that the Corporate Debtor was admitted to insolvency on an application filed by an operational creditor and there was a moratorium on the Corporate Debtor to make any payment from 12.08.2020 to 27.08.2021 during the period when the IRP was in control of the Corporate Debtor. It is submitted that certain disputes exist in the shareholders of the Corporate Debtor and in a litigation between SIDCL and Rishima before the Delhi High Court, the Hon'ble High Court was pleased to pass an order dated 30th May, 2019 restraining the SIDCL from creating any 3rd party interest or parting with the possession of Westin Hotel, Rajarhat, Kolkata i.e. the hotel project of the Corporate Debtor. The Hon'ble Supreme Court while deciding an appeal in the said litigation also in its

order dated 19th July, 2019 held that such restraint order passed by the Hon'ble Delhi High Court will continue till the decision taken by the Hon'ble Court.

12. It is submitted that the dues of the applicant are secured by way of hypothecation and mortgage of the assets of the Corporate Debtor. It is further submitted that the Corporate Debtor being in the hospitality industry, is going through a lean period, hence unable to meet its debt obligation. It is submitted that the economy is showing slow recovery and the business travel has resumed and the Corporate Debtor expects that in the near term, it will be able to generate revenue whereby it can meet its debt obligations to the applicant as well as other creditors.

13. During the course of arguments, the Ld. Counsel appearing for the Financial Creditor submitted that the Corporate Debtor has admitted in the reply affidavit the total disbursement of the loan by the Financial Creditor and the same is reflected in the Auditor's Report as on March 31, 2019 and Auditor's Report as on March 31, 2020. Ld. Counsel further mentioned that the statement of accounts from 1st April, 2020 till 12th August, 2020 annexed with the petition (pages 586 to 620 of the petition Vol.-IV), also depicts all the relevant entries of disbursement and payments. It is submitted that the record of debt/default in respect of the Corporate Debtor is maintained by the National E-Governance Services Limited and is annexed with the petition as on 8th September, 2021 from pages 650-659 of the petition Vol.-IV.

14. Ld. Counsel further submitted that on 12th August, 2020, the Corporate Debtor was admitted to CIRP by the Adjudicating Authority, Kolkata in an application filed under section 9 of the IBC, 2016 filed by one Universal International Creation Limited. The Financial Creditor filed its claim in form 'C' with the IRP on 26th August, 2020. However, by an

order dated 27th August, 2021, the Hon'ble NCLAT was pleased to set aside the order passed by this Adjudicating Authority. Accordingly, the present company petition has been filed on 21st September, 2021. It is further submitted by the Ld. Counsel that the written communication of the proposed IRP in Form-2 as required under Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of the certificate of Registration issued by IBBI is annexed with the petition at pages 93-96 Vol.I. The Financial Creditor has finally prayed for an order of CIRP of the Corporate Debtor.

15. Ms. Madhuja Barman, Ld. Counsel appearing for the Corporate Debtor clearly 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. She was asked to file Vakalatnama during the day and on with these directions, the matter was heard and reserved for orders.

16. We have gone through the petition, reply affidavit and documents placed on record by the Ld. Counsel for the parties. From the record, it is very clear that the Financial Creditor had duly disbursed the loan amount but the Corporate Debtor failed to repay the same, which resulted into classifying the account of the Corporate Debtor as NPA on 29th February, 2020.

17. In view of the default in making the re-payment and account having been declared as NPA, the Financial Creditor has been able to prove its case and we are satisfied that the petition deserves to be admitted. We, therefore, pass the following orders:-

O R D E R S

i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) 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;

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

c) 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) **Mr. Avishek Gupta,** registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-003/IP-**

N000135/2017-2018/11499, Email avishek.gupta@gmail.com hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xi) The Financial Creditor/Applicant is directed to deposit **Rs. 5,00,000/- (Rupees Five Lakh Only**) with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

xiii) List the matter on **18/04/2022** for the filing of the progress report.

xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(*Rohit Kapoor.*)
Member (Judicial)

Order signed on, this 11th day of February, 2022

Pj