

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No.196/BB/2020

U/s 7 of IBC, 2016

R/w Rule 4 of I&amp;B (AAA) Rules, 2016

**In the matter of:****Shree Ashraya Souhard Credit Society Ltd.**

Reg. off at CTS No.107,

Arjun Sankul,

1<sup>st</sup> Floor Dane Galli,

Shahapur, Belagavi,

Karnataka -590003

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Petitioner/Financial Creditor

**Versus****Shree Ashraya Infra-Con Ltd.**

Reg. off at No.322,

Audumbar Savali, Roy Road,

Tilakwadi, Belagavi,

Karnataka -590006

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Respondent/Corporate Debtor

**Order Pronounced on: 06<sup>th</sup> April, 2021****Coram:**

1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial);
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present (Through Video Conferencing):**

For the Petitioner : Mr. S. Vivekananda. Adv.

For the Respondent : Mr. Kiran K. Kulkarni, Adv.

**ORDER*****Per: Ashutosh Chandra, Member (Technical)***

1. C.P. (IB) No.196/BB/2020 is filed by Shree Ashraya Souhard Credit Society Limited (hereinafter referred to as 'Petitioner/Financial Creditor') U/s 7 of the IBC, 2016, R/w Rule 4 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of Shree Ashraya Infra-Con Limited, on the ground that it has committed default for total amount of Rs.12,09,45,192/-



(Rupees Twelve Crore Nine Lakh Forty Five Thousand One Hundred and Ninety Two Only) as on 31.03.2020.

2. Brief facts of the case, as mentioned in the Company Petition, are as follows:

- (1) The Petitioner was a Co-operative Society registered under the name and style of Ashraya Co-operative Credit Society Limited, under Karnataka Co-operative Societies Act, 1959. Subsequently the Petitioner got registered under Karnataka Souharda Sahakari Act, 1997 and changed its name to 'Shree Ashraya Souhard Credit Society Limited'.
- (2) The Respondent is a company engaged in the business of Real Estate and Construction. It was initially a Partnership Firm under name and style 'Ashraya Constructions' and later got converted as a Public Limited Company under name and style of 'Shree Ashraya Infra-Con Limited' under the Companies Act, 1956.
- (3) The Petitioner Society and Corporate Debtor had some common directors and the Petitioner had been engaged in the activity of accepting deposits and lending loans. The Co-operative Society/ Petitioner has large base of depositors who have put in their money under various deposit schemes.
- (4) It is submitted that the Financial Creditor had provided secured cash credit facility to the tune of Rs.14 Cr before conversion of the Corporate Debtor from Partnership firm to a Public Limited Company (i.e prior to 06.08.1997). The Respondent obtained 4 cash credit facilities on 08.05.2000, 24.01.2008, 29.08.2009 and 02.04.2010 bearing loan account numbers 03, 19, 110 and 12 respectively. Three loan accounts numbered 03, 19, 110 were closed by merging them with loan account number 12 on 02.03.2012. Due to such arrangement, the entire loan amount claimed herein was not disbursed in a single tranche. The money was funded in various tranches as and when required for the completion of the projects of the Respondent. Copy of the Loan statement as on 02.06.2020 is annexed to the Petition.



- (5) It is also stated that since the management of Petitioner and the Respondent is the same, the Corporate Debtor was able to pool in huge investment from large number of small investors who are low and middle class individuals, through the society. These investments from individuals were diverted to the Corporate Debtor without following due procedure. Copy of the Loan Agreement dated 02.04.2010 executed by the Petitioner in favour of the Respondent is annexed to the Petition.
- (6) It is submitted that on conversion of the partnership firm into the Company, the CD which was under the same management as that of the Petitioner, deliberately did not create a charge on the assets of the CD on the outstanding amount of Rs.11,16,40,133.80 as on the date of conversion. Copy of Balance Sheet submitted to the office of ROC while converting the Partnership Firm into the Company is enclosed with the Petition.
- (7) The Petitioner has issued various letters dated 22.08.2016, 19.04.2017 calling upon the Corporate Debtor to repay the loan amounts and the Respondent has issued Reply letters dated 22.09.2016 and 02.05.2017. However, the monies have not been repaid till date. Copies of the aforementioned letters are annexed to the Petition.
- (8) Finally, The Petitioner issued Notice dated 01.03.2018 calling upon the Corporate Debtor to make payment. However, the notice was returned on 10.03.2018 with an endorsement, "not claimed". In the said Notice, the Petitioner has claimed a sum of Rs.8,11,05,806/- as total payable amount and further interest of 15% p.a. Copy of the Legal Notice dated 01.03.2018, RPAD returned undelivered dated 10.03.2018 with endorsement 'Not Claimed' is enclosed with the Petition.
- (9) It is submitted that the depositors of the Petitioner Society approached the Registrar of Co-operative Society and expressed their grievance before him. The Registrar after hearing the parties appointed Special Officer to facilitate holding of elections in the Petitioner society to appoint new Board of Directors in the Petitioner to regularise operations of Financial Creditor. Elections could not be held because of lack of interest



from the members of the Financial Creditor. Thereafter Liquidator was appointed on 14.01.2019 to recover the pending due and settle the dues of large number of individual investors. Copy of Liquidation order dated 14.01.2019 passed by Sub-Registrar of Co-operatives, Belgaum District, is annexed to the Petition.

- (10) It is submitted that the Petitioner has huge number of small depositors who have invested their hard earned money in the society and all the investments are matured and due to be repaid. However, CD is not going forward to repay the loan of the Petitioner. As on 31.03.2020, the money due and receivable from the CD stands at Rs.12,09,45,192/-. Copy of computation chart of loan amount is annexed to the Petition.
- (11) It is submitted that the Balance Sheet of the CD for the year ending 31.03.2018 makes it very clear that the CD is commercially insolvent and is unable to pay its debts. It is just and equitable to initiate CIRP against the CD in order to secure the interest of large section of general public who have invested their savings on trust with the society and invite a Resolution Plan for the CD. Copy of the Balance Sheet of CD for the financial year ending 31.03.2018 is annexed to the Petition.

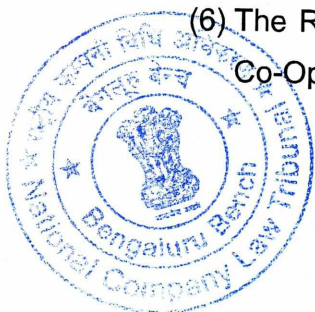
3. The Corporate Debtor, has filed the below stated submissions:

- (1) It is submitted that the Petitioner has already filed proceedings bearing No. DRL/ABN/2145/2014-2015 against the Respondent and others, before the Departmental Arbitrator of Co-op Societies claiming Rs.14 Crore which was already disposed as withdrawn on 27.06.2015 by the Arbitrator.
- (2) It is submitted that the Respondent availed Cash Credit facility for a limit of Rs.14 Cr from the Petitioner after providing relevant documents and had mortgaged 2 prime properties bearing CTS No. 3436-A, 3438 and 3436-F situated at Gondhali Galli, Belgaum at the time availing the loan. These properties were enough to cover cash credit facility.
- (3) It is submitted that the Respondent was receiving advance amounts for its construction projects, and monies were accordingly deposited in the Cash Credit facility. That the account was well within the upper limits of



Rs.14 Cr as credits were being made regularly. Copy of Statement of Account of the Respondent produced by the Petitioner makes it clear. Further, the loan account was never classified as NPA at any point of time and the respondent was never called upon by any letter informing it that it was in arrears or default of loan. The Respondent has never fully utilised the cash credit facility since the sanction of the loan.

- (4) It is submitted that the common Directors on Board of the Petitioner and Respondent who were in minority in the Respondent could not digest the fact that the Respondent was engaged in its dream project 'Ashraya Enclave' which was being built in prime locality. These Directors created hurdles and spread rumours of bankruptcy of the Respondent and eventually decided to recall the cash credit facility as they believed that the Respondent would be unable to complete the project without the CCL of the Petitioner society.
- (5) The Directors of Petitioner Society started harassing the Respondent Company demanding closure of CCL account and also for repayment knowing fully well that it was a classic account without any default. The proceedings bearing No. DRL/ABN/No2145 of 2014-15 before Senior Inspector of Co-op Societies of Dy. Registrar of Co-op Societies at Belagavi and Departmental Arbitrator Belagavi for recovery of loan despite there being no default were initiated in November 2014 despite having received Rs.49 Lakh in May 2014, Rs.4.42 Cr in September 2014. The proceedings had huge impact on the Respondent's project which slowed down and the construction cost increased which affected the Respondent's financial health. The matter before the Departmental Arbitrator was contested by the Respondent. The Petitioner sought permission vide application dated 27.06.2015 to withdraw the petition on the ground that they had resolved to recover the loan amount by persuasion and compromise. The matter was disposed vide order dated 27.06.2015 permitting the petitioner to withdraw the petition.
- (6) The Respondent states that one "The Belgaum Vyapari Multi purpose Co-Op Society Ltd' showed interest to purchase flats in the project



Ashraya Enclave. The buyer informed the Respondent that they had invested in fixed deposits with the Petitioner Society to the tune of Rs.75,26,623/- and offered to encash the amount from the petitioner society. They also offered to transfer the amount in their FDR lying with the Petitioner into Cash Credit loan account of Respondent and to pay the balance consideration if any to the Respondent. The Buyer vide letter dated 14.07.2016 called upon the Petitioner to liquidate the deposits and credit the entire FDR proceeds amounting to Rs.1,20,00,536/- with interest to their savings account and further also requested them of having issued a cheque of their savings account in the name of the respondent company and asked them to credit the amount to the cash credit loan account of Respondent. This arrangement would have reduced the loan amount from the CCL. The Respondent issued letter dated 25.07.2016 calling upon the Petitioner to credit the amount FDR proceeds of the Buyer to the CCL account of Respondent. Another letter demanding liquidation of FDR was issued on 30.05.2018 by the Buyer to the Petitioner. It is submitted that the Petitioner had no right to refuse to carry out the requests of their customers. Another FD Holder 'The Gajanana Multipurpose Souharda Sahakara Niyamit' issued letter dated 28.05.2018 to Petitioner to transfer FD amount of Rs.1,29,31,312/- plus interest after maturity to CCL account. Similar efforts were undertaken by 'Navahind Co-operative Credit Society' vide letter dated 14.09.2016. Other FDR Holders Smt. Vijaya ParshuramChavan and Venugrammulti purpose Society Ltd also expressed to liquidate the FDR's. The Petitioner has not performed its obligation of liquidating the FDR's on demand.

- (7) It is submitted that there is no clarity as to amount payable from the statement of accounts from the Petitioner as they have also included time barred debt of Rs.1.92 Cr for the 1<sup>st</sup> time which was never claimed before in the Arbitration petition. Therefore there exists a dispute as per section 5 (6) (a) of the Code, in the amount of debt claimed by the Petitioner.



- (8) It is further submitted that section 7 proceedings under IBC, 2016 should not be used to shut down a company or as blackmail tactics as an inappropriate substitute for debt enforcement forcing an existing viable business out of market place.
- (9) In response to Letter dated 22.08.2016 issued by Petitioner to Respondent seeking proposal for closure of loan, the Respondent vide letter dated 22.09.2016 requested to consider their counter claim raised in arbitration proceedings as well as requested them to transfer the amounts of the FD holders to CCL account as requested by FD holders. The Petitioner kept mum regarding this issue and kept on demanding closure of loan account.
- (10) It is submitted that the Petitioner adopted pick and choose policy in deciding to liquidate FDR's. While the FDR holders willing to purchase property from Respondent were not entertained in their requests for liquidating the FDRs, one 'Shree Siddha Bhairavnath Co-op Society Ltd' an FDR holder was allowed to liquidate its FDR and adjust against other pending loans. Further, the Petitioner owned commercial premises ad-measuring 1825 sq.ft in building known as 'Ashraya Empire' situated at Khanapur. The said property was sold by the Petitioner for a sum of Rs.2,00,75000/-. The buyer had FDR with the Petitioner to the tune of Rs.1,64,75,611/- which was adjusted by the Petitioner society against the sale of the property in October 2017 which clearly demonstrates Petitioner's adjustments to accommodate other transactions and deliberately not liquidate the FDR's of holders who are willing to purchase property in the Respondent's project. Copy of Sale Deed between the Petitioner and Shree Siddha Bhairavnath Co-op Society Ltd is annexed to the objections.
- (11) A Special Officer was appointed under the Karnataka Cooperative Societies Act. The Special Officer after assuming charge again filed recovery proceedings before the Deputy Registrar of Cooperative Societies/ Sahakari, Souharda Court at Bengaluru. The Special Officer without referring to the background and facts of the case sought recovery



of a sum of Rs.6,72,72,096/- and an additional amount of Rs.1,92,20,119/- with interest from 21.05.2018. The Respondent states that the Special Officer included an amount of Rs.71,48,815/- along with interest which was actually a rebate given by the earlier BOD of the Petitioner Society in the year 2012. The amount was sought in recovery proceedings after 6 years from the rebate being given to Respondent. Further, several other properties, personal properties of Directors were also sought to be attached in a malafide manner inspite of having availed the loan by hypothecating property worth Rs.5.72 Cr.

- (12) It is submitted that on the direction of Deputy Registrar, the Petitioner reworked the loan account from 2010 and submitted a statement of account along with a list of FD holders considering all the amounts of the FD holders and Rs.1,97,31,316.80 was shown as due and payable as on 20.12.2018.
- (13) It is submitted that the statement of account maintained with the Petitioner Society shows that as on 31.03.2018 a sum of Rs.6,68,62,504.80 as due. However the computation of loan amount as per page 216 of the petition depicts a different picture where balance due as on 31.03.2018 is Rs.8,66,92,215/- which runs contrary to the account statement produced by the Petitioner and claim amount in dispute before Dy. Registrar of Co-op societies.
- (14) It is submitted that the Petitioner's claim is barred by limitation as Petitioner seeks to include Rs.1,92,20,119/- which was agreed to be a rebate to the Respondent in the year 2012 and the said amount was never claimed by the Petitioner in proceedings before Departmental Arbitrator. The said claim has been raised only before Dy. Registrar and in this petition.
- (15) Through Additional Objections filed by the Respondent, it is submitted that Petitioner first issued notice in 2014 and since then there have been exchange of various legal notices, correspondences and even court notices. The Respondent has received notices/ letters /summons sent by the Petitioner. There is no reason for the Respondent to refuse any



notices issued by the petitioner. Further it is pointed out that the Demand Notice sent by the Petitioner bears the date 01.03.2018. However, the acknowledgement annexed to the notice reflects that the postal authorities have tried to serve the notice on 03.02.2018 and 05.02.2018 which is one month prior to the issuance of notice which creates suspicion as to whether the notice was issued at all. Copies of Demand Letter dated 07.10.2014 and summons issued by Departmental Arbitrator are annexed to Additional Objections to establish that notices were received in all other matters and there is no need to refuse any subsequent notice of demand.

4. The Petitioner filed Rejoinder with the below stated submissions:

(1) It is submitted that the Petitioner being a Souharda Credit Co-operative society, some of the Directors of the respondent company were also on the Board of the Petitioner Society and were in control of the management of the Petitioner Society, they ensured that huge amounts were received as deposits from a large number of people and public by the Petitioner society and all the said funds were given as loan to the Respondent company in contravention to the Chapter 22 Clause 49 and 50 of the bye-laws of the Petitioner Society and section 17 & 18 of the Karnataka Souharda Sahakari Act, 1997 and Section 58 of Karnataka Co-operative Societies Act, 1959. The Petitioner was unable to repay the deposits due and outstanding since 2012-13. There are many small depositors whose money was not repaid by the Petitioner Society on account of which, on approaching the Registrar of Co-operative societies Limited, the Sub-Registrar of Belagavi District, vide order dated 14.01.2019 deemed it proper to order liquidation of Petitioner society. Sri. Srikanth Baruve, divisional officer, Karnataka State Souharda Co-operative Societies, Belgaum was appointed as the liquidator. Copy of the order dated 14.01.2019 is annexed to the petition.

(2) It is submitted that at the behest of the Respondent, several FDR holders started making demands of liquidation of their FDRs by issuing letters.



- (3) It is submitted that it is the proposal of the Respondent that the Petitioner should liquidate FDRs of the 24 FDR Holders/Purchasers of Respondent's project properties as requested by the depositors and to deposit the same into the CCL Account of the Respondent which will reduce Respondent's liability under the CCL. This proposal is unacceptable and cannot be entertained by the Petitioner since the Petitioner society is in liquidation and there are around 6002 FDR holders aggregating to Rs.22,39,81,119/- whose right to receive their dues will be affected. The Liquidator does not have a complete picture as to the settlement in respect of all the depositors in the Petitioner Souharda Cooperative Society and in such scenario if the demands of the Respondent are agreed to, then it clearly would be preferential transaction.
- (4) It is submitted that it is well settled position of arbitration proceedings, civil suits, proceedings before the DRT, SARFAESI proceedings or any other proceedings would not be a bar for initiating action under the code, 2016.
- (5) It is submitted that 5 Directors of the Respondent Company were also on the board of the Petitioner Society and were in control of management of the Petitioner Society. The Respondent Company was in a position to obtain huge loan with rebate being provided with such wrong means. The Respondent used Petitioner to collect huge deposits from public which were used siphoned into the Respondent Company.
- (6) It is submitted that the Petitioner Co-operative Society has lent mostly the entire money to the Respondent herein and not to any other individual or organization which cannot be justified under the Karnataka Souharda Sahakari Act, 1997. Very few loans were given to persons other than the Respondent, and they were mostly customers of the Respondent Company. The Directors of Respondent on board of Petitioner ensured rebate of Rs.71,48,815/- was given to the Respondent on 31.03.2012 without taking any approval of general body meeting of the Petitioner Society. Further, the Respondent through its



directors ensured that it did not have to register the mortgage by way of deposit of title deeds and no charge was registered with ROC thereby putting the petitioner Souharda to huge risk.

- (7) It is submitted that in so far as the allegation by Respondent about the sale of property to and credit of deposits of Shree Siddha Bhairavnath Society, the resolution for the same was made and signed by the common directors wherein it was the Respondent Company's directors leading the action of the petitioner society for effecting the said sale and credit of deposits. Respondents are taking undue benefit of separate entity principle.
- (8) It is submitted that about 264 of the depositors even approached the Addl. District Consumer Disputes Redressal Forum, Belgavi and the Ld. Forum, in 40 cases directed the Petitioner Society to repay the amounts due. Copies of few notices received from the District consumer forum are annexed to the Rejoinder. It is submitted that the Petitioner Souharda Society has been exploited as a vehicle for generating funds for the Respondent company as the deposits of Petitioner were lent only to Respondent and no other Company.
- (9) Additional Rejoinder is filed by the petitioner to refute the claims made by the Respondent in the Additional Statement of Objections. It is submitted that the Petitioner had issued notices to Respondent calling upon to pay the amounts due. The final notice was issued on 01.03.2018 claiming Rs.8,11,05,806/- annexed at page 72 of the Petition was sent to the Respondent by Registered Letter Acknowledgement due (RLAD) on 02.03.2018. The seal of postal department on the envelope shows that the post was returned on 10.03.2018. However, due to the inadvertence of the postal authorities the date of service has been wrongly mentioned as 03.02.2018 and 05.02.2018 in place of 03.03.2018 and 05.03.2018 on the postal acknowledgement. The postal receipt however shows that the letter was sent on 02.03.2018. It is further stated that since the petition is filed under section 7 of the Code, 2016 a demand notice is not contemplated. Even prior to the said notice, several



notices have been sent to the Respondent demanding payment of the amounts due.

5. The Respondent filed Sur Rejoinder reiterating its stance and refuting the claims of the Petitioner, and both the parties have filed their written submissions.
6. As per the Respondent, since the Petitioner in all its notices has never mentioned the words due and default and it has always used the word "outstanding amount" which suggests that the amount is outstanding but not due and payable, no demand has been made. As per the Respondent the Loan account has never been classified as NPA and there is no default as the Respondent was paying the loan amounts and was well within the credit limit of Rs.14 Cr. Further, there no term specified in the loan documents. In fact, it has paid Rs.4.5 cr. on 01.09.2014. However, within a month, on 07.10.2014 notice was issued to the Respondent which shows that there was no procedure followed to classify the Respondent as Defaulter. Further, if the notice dated 07.10.2014, if considered to be rightly issued, becomes the date of default and the limitation period for the Petitioner to file this petition is 07.10.2017.
7. The Respondent submits that the right to sue accrues to the Petitioner only after classifying the loan account as NPA. Further, Notice dated 01.03.2018 does not say that the respondent is a defaulter in repayment of loan. Instead, it is stated that the Respondent has not paid regular loan instalment and there is an outstanding. The said notice cannot be relied to prove default on part of the Respondent as the covenants of the notice do not explicitly mention that the Respondent was a defaulter. It looks like a friendly request.
8. The Petitioner initiated action way back in November 2014 by filing dispute before Departmental Arbitrator. The same was withdrawn stating that the matter is settled and later letters dated 22.08.2016 and 19.04.2017 requesting to close the CCL account. Later Notice dated 01.03.2018 is issued which also does not say default. Further, this Notice was never received.



9. Claiming the rebate amount of Rs.1.6 Cr which was rebated in 2012 after 6 years, is barred by limitation and the entire claim under section 7 IBC ought to be set aside.
10. The Petitioner states that the Respondent has not denied the debt. It is only proposing that the loan amount may be settled by way of adjusting few deposit holder's money against their purchase of property/ flat of the Corporate Debtor. However, this is not permitted by law since the Petitioner is under liquidation and it would amount to preferential payment to few deposit holders whereas there are 6002 depositors and their interest would be jeopardised. Further, on point of non-classification of the Respondent's loan account as NPA, it is submitted that section 3(12) of the code makes it clear that default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and not paid by the debtor or Corporate Debtor as the case may be. Nowhere in the Code, 2016 it has been mentioned that classification of loan as NPA is mandatory to maintain a Petition under section 7 of the Code, 2016.
11. Clause 4 of the Hypothecation Agreement makes it clear that the loan becomes payable on demand and such demand for repayment has been made on 22.08.2016, 19.04.2017 and 01.03.2018. Further, RBI norms are not applicable to the Petitioner society, hence the classification of loan as NPA as per RBI guidelines does not arise at all.
12. It is submitted that the Respondent has admitted the debt in its Balance Sheet for year ending 31.03.2018 however proposes to settle the debt in a way not permissible under law. On 04.12.2017 the Petitioner received Rs.8,32,413/- against the outstanding loan after which no payments were received and Final Notice was issued on 01.03.2018 which was returned as 'Not Claimed' on 10.03.2018. Therefore the date of default, cause of action arose on 10.03.2018 and the petition is filed on 16.06.2020 which is well within the period of limitation.
13. In respect of the contention of Respondent that since proceedings have already been initiated before Dy. Registrar, IBC proceedings should not be



admitted, the Petitioner relies on the decision of the Hon'ble NCLAT in *Mr. Vineet Khosla v. Edelweiss Asset Reconstruction Company Ltd.*, in Company Appeal (AT) (Ins) No.441/2019 held that there is no provision which bars referring to IBC if already relief has been sought or pending in another forum. Rather, as per section 238 of IBC, the provisions of IBC shall have effect notwithstanding anything inconsistent therewith contained in any other law for time being in force. In this decision it has been made clear that there is no substance in the argument that if dispute is already pending in another forum, IBC cannot be invoked.

14. It is stated that all efforts of settlement have failed. Memo dated 22.02.2021 has been filed by the Petitioner annexing the settlement proposal of the Respondent where the Respondent is willing and ready to pay Rs.1.97Cr. and the remaining amount to be adjusted from the deposits of the FDR holders. The Reply issued by the Petitioner to the Respondent that the FDR Holder's deposits cannot be liquidated and transferred to CCL account of Respondent and hence the proposal is unacceptable.
15. Heard Mr. Vivekananda .S, learned Counsel for the Petitioner, and Mr. Kiran K Kulkarni, learned Counsel for the Respondent, through Video Conferencing. We have carefully perused the pleadings of the parties, and the extant provisions of the Code and the law.
16. So far as the law with regard to initiation of CIRP is concerned, Hon'ble NCLAT vide order dated 15<sup>th</sup> May, 2017 passed in Company Appeal (AT) (Insolvency) No.1 & 2/2017 in the case of *M/s.Innoventive Industries Limited vs. ICICI Bank & Anr.* has dealt the issue of admission of a case filed under Section 7 of the Code, under Paras 55 to 58, which are extracted below:

*"55. Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I&B Code. As per sub-section (1) of Section 7 of the I&B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7*



*provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including:*

- i. "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;*
- ii. The name of the resolution professional proposed to act as an interim resolution professional; and*
- iii. Any other information as may be specified by the Board.*

*56. The procedure once an application is filed by the financial creditor with the Adjudicating Authority is specified in sub-section (4) of Section 7 to sub-section (7) of Section 7 of the Code. As sub-section (4) of Section 7 of the I&B Code:*

*"(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3)."*

*57. Sub-section (5) of Section 7 of the I&B Code provides for admission or rejection of application of a financial creditor. Where the Adjudicating Authority is satisfied that-.....the documents are complete or incomplete.*

*58. The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statue mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to*



*the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'.*"

The Hon'ble Supreme Court has also upheld the above judgement in Civil Appeal Nos.8337-8338 of 2017 vide judgment dated 31<sup>st</sup> August, 2017. The Hon'ble Supreme Court has adverted to Section 7, at para 28, which reads as under:

*"28. When it comes to financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the Corporate Debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the Corporate Debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in*



*the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."*

17. On perusal of the Loan Documents, the Demand Promissory notes issued by the Respondent for Rs.14 Cr at the time of entering the Loan agreement, Hypothecation Agreement and the pleadings, it is clear that the Respondent has received Cash Credit Loan which is clearly in the nature of financial debt. This is not denied by the Respondent. The debt arises at the time when loan is granted. Therefore existence of debt is established. The question that arises now is whether there is a default in repaying the financial debt. Is it necessary that the Corporate Debtor be classified as Non-Performing Asset to be called a defaulter.
18. One of the contentions of the Respondent is that the Respondent's loan account was never declared as a Non-Performing Asset, nor was the term "default" used in any of the letters issued by the Petitioner. It was only making friendly requests. There was no term fixed for the loan and that the Respondent has never utilised the entire facility and was always within the 14 cr. Limit. Further, the Respondent was paying amounts to the loan account.
19. On a perusal of the loan documents, clause 4 of the Hypothecation agreement provides that the loan shall be repayable on demand. The Petitioner has demanded repayment and no payment in spite of the demand makes the Respondent a defaulter. The Petitioner issued Letters of demand



on 22.08.2016 and 19.04.2017. The Respondent paid Rs.8,32,413/- towards the CCL on 04.12.2017 which was the last payment received by the Petitioner. Thereafter, Notice dated 01.03.2018 was issued. The Notice was returned with an endorsement 'not claimed' on 10.03.2018 which has been considered as the date of default. It is not material that each demand letter should use the word default, when the same is clear from records. That the debt and default are accepted by the Respondent is clear from the fact that it only seeks to settle the same with certain adjustments, which have not been accepted by the Petitioner.

**20.** It is also seen that the Respondent has acknowledged the due amounts to be payable on Souhard Co-Operative Society's demand as Rs.6,68,36,647/- in Balance Sheet for year ending 31.03.2018. In such a scenario declaration of NPA is not mandatory. The default has been established with irregular payment of loan amounts and subsequent non-payment of amounts as seen from the Statement of Accounts of the Corporate Debtor. Further, the RBI norms on classification of NPA do not apply to Petitioner Society.

**21.** Any other contention that the Petitioner Society ought to liquidate the FDR deposits of a few Deposit holders/buyers of the Respondent's project properties cannot be entertained in view of the fact that the Petitioner is under liquidation itself and there are many other FDR holders whose interests will be affected by selective repayments of deposits. Any dispute in this regard cannot be considered as this Adjudicating Authority is to only determine the existence of financial debt and default as per the Code, 2016. It is not a dispute resolution mechanism. In any case, the Petitioner's refusal to liquidate some other accounts of FDRs has no bearing on the default committed by the Respondent. It is explained that many have been liquidated as a result of directions from the Consumer Disputes Redressal Forum. In fact it goes to show that the Respondent is unable to carry on its business unless funds are diverted by the Petitioner to it. The fact that there is a clear debt and default above the thresh hold limit, it is not for this Tribunal to compute the exact debt. Also, that several other proceedings for recovery have been initiated by the Petitioner, does not come in the way of the



Petitioner initiating proceedings under the IBC. Further, the Respondent is prima facie found to be insolvent with a deficit of Rs.1,11,28,096/- in the reserves and surplus of the Company as on 31.03.2018 and with Cash in hand of only Rs.16,777/-.

22. The instant application is filed strictly in accordance with the extant provisions of the Code, and debt and default are established and the Petitioner has also suggested a qualified Resolution Professional namely **Shri. Hari Babu Thota** with Registration No. **IBBI/IPA-002/IP-N00084/2017-2018/10225** who also filed written Consent in Form-2 on 29.05.2020, by inter alia declaring that no disciplinary proceedings pending against him with the Board or the Indian Institute of Insolvency. Therefore, he is provisionally eligible to be appointed as IRP. Hence, the instant Company Petition is fit case to admit by initiating CIRP appointing by IRP, and declaring moratorium etc. in respect of the Corporate Debtor.
23. In view of the above facts and circumstances of the case, by exercising powers conferred on this Adjudicating Authority, U/s 7(5)(a), and other extant provisions of the IBC, 2016, we hereby admitted C.P.(IB) No.196/BB/2020 by initiating Corporate Insolvency Resolution Process (CIRP) in respect of Respondent/Corporate Debtor with the following consequential directions:
- 1) *Shri Hari Babu Thota, bearing Registration No. IBBI/IPA-002/IP-N00084/2017-2018/10225, who is qualified Resolution Professional, is hereby appointed as Interim Resolution Professional, in respect of the Respondent/ Corporate Debtor namely **Shree Aashraya Infra-Con Limited** to carry out the CIRP as mentioned under the Insolvency and Bankruptcy Code, 2016 and various rules issued by IBBI from time to time;*
  - 2) *The following moratorium is declared prohibiting all of the following, namely:*
    - a) *the institution of suits or continuation of pending suits or proceedings against the Respondent/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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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;*
- e) *The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;*
- f) *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;*
- g) *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;*
- 3) *The IRP is directed to follow all extant provisions of the IBC, 2016 and all extant rules including fees rules as framed by IBBI from time to time. The IRP is hereby directed to file progress reports to the Adjudicating Authority from time to time.*
- 4) *The Board of Directors and all the staff of Respondent/ Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.*
- 5) *Post the case for report of IRP on 24.05.2021.*

Sd/-

**ASHUTOSH CHANDRA**  
**MEMBER, TECHNICAL**



Sd/-

**RAJESWARA RAO VITTANALA**  
**MEMBER, JUDICIAL**

CERTIFIED TO BE TRUE COPY  
 OF THE ORIGINAL  
 for *[Signature]* 07/04/21  
 Deputy/ ~~Asst.~~ Registrar  
 National Company Law Tribunal  
 Bengaluru Bench