IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IB-1736(ND)/2019

Order 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.

IN THE MATTER OF:

SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA

Having its registered office at:

1st Floor, Atma Ram House, 1,

Tolstoy Marg, New Delhi-110001. **...... Financial Creditor**

VERSUS

M/s. STANLEY HOTEL AND RESORTS PRIVATE LIMITED

Having its registered office at:

E-104, Greater Kailash Enclave Part-I,

New Delhi-110019. **...... Corporate Debtor**

Order Delivered On: 27.02.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Mohd Moonis Abbasi, Adv.

For the Respondent : Mr. Gaurav Mitra, Mr. Sonam Sharma, Ms. Riddhi Jain and Mr. Ishan Roy Chaudhary, Advs.

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This Application has been filed by Small Industries Development Bank of India, the Applicant/Financial Creditor before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 4 of the Insolvency and Bankruptcy

(Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), against M/s. Stanley Hotel and Resorts Private Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding amount of Rs. 25,47,27,091/- which includes the Claim Amount against the Corporate Debtor in the capacity of Borrower i.e. Rs. 19,63,84,851/- and the Claim Amount against the Corporate Debtor in the capacity of Corporate Guarantor for the loan granted to M/s. Aashiyana Infrastructure Development Pvt. Ltd. i.e. Rs. 5,83,42,240/- as on 17.07.2019.

2. **Submissions of the Applicant/ Financial Creditor:**

i. It is the case of the Applicant/ Financial Creditor that on 01/11/2013, the Applicant/SIDBI sanctioned a term Loan of Rs. 2000 lakhs to the Respondent/Corporate Debtor herein, which accepted the General Conditions for Rupee loan and entered into loan Agreement for the aforesaid Term loan and also signed the deed of hypothecation. On 06/11/2013, the Managing Director of Corporate Debtor Sh. Suresh Dhawan, and Sh. Raman Khanna, submitted declarations and undertakings w.r.t to above term loan.

ii. On 29/10/2013 a Deed of Corporate Guarantee was entered into with the Financial Creditor by Corporate Debtor for a term loan of Rs. 1500 lakhs sanctioned to M/s. Ashiana Infrastructure Development Pvt. Ltd. On 08/11/2013 Irrevocable and unconditional Corporate Guarantee was tendered by the Corporate Debtor to the Applicant for lending aforesaid term loan of Rs. 1500 lakhs to M/s. Ashiana Infrastructure Development Pvt. Ltd.

iii. It is the Case of the Applicant that on 10/03/2017, the Loan granted to the Corporate Debtor turned Non-Performing Asset (NPA) as it did not repay the aforesaid term loan of Rs. 2000 lakhs in terms of the schedule provided in the loan documents.

iv. The Applicant submitted that on 01/08/2017, the Applicant/SIDBI issued a Statutory Demand Notice under Section 13(2) of the

SARFAESI Act, 2002 to the Corporate Debtor thereby demanding payment of Rs. 18,89,79,250/-. On 21/08/2018, the Applicant/SIDBI invoked Corporate Guarantee which was given by the Corporate Debtor herein as in the meanwhile M/s. Ashiana Infrastructure Development Pvt. Ltd. also defaulted in re-payments against the term loan of Rs. 1500 lakhs granted to it.

v. Therefore, the Corporate Debtor has become liable to pay for its total outstanding dues existing as on date.

Hence the present Application.

3. **Submissions of the Respondent/Corporate Debtor:**

i. The Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant and stated that a settlement was reached between the parties and a Debt Settlement Agreement dated 10.10.2019 was executed between the parties pursuant to the order dated 04.09.2019 of the Ld. Debt Recovery Tribunal, Jaipur in the matter titled as **Stanley Hotel and Resorts Pvt. Ltd. vs. Small Industries Development Bank of India** bearing SA No. 56 of 2018.

ii. As per the terms of the Agreement dated 10.10.2019, the Corporate Debtor had undertaken to make the payment within 90 (ninety) days, i.e. by 10.01.2020. However, due to uncertain contingencies and in the wake of COVID-19, the Financial Creditor had itself extended the timeline as prescribed under the Agreement dated 10.10.2019 by 1 (one) year, i.e., September 2021 vide letter dated 25.09.2020.

iii. The Corporate Debtor was disappointed to receive a letter dated 27.07.2021 from the Financial Creditor from which the Financial Creditor had formally cancelled the Agreement dated 10.10.2019 especially when the same was already extended till 31.09.2021. The Corporate Debtor was startled by the fact and realisation that all the efforts made to honour the Agreement dated 10.10.2019 went in vain as the Financial Creditor had unilaterally and illegally cancelled the Agreement dated 10.10.2019 much prior to it the expiry of its extended tenure.

iv. The Corporate Debtor with a view to honour its obligations and to put an end to the lingering to and between the parties had applied for One-Time Settlement Scheme for MSME-Non-Discriminatory, Non-Discretionary by agreeing to the letter dated 09.12.2021 sent by the Financial Creditor. The Financial Creditor approved the offer of One-Time Settlement Scheme for MSME-Non-Discriminatory, Non-Discretionary vide letter dated 19.01.2022, whereby, the Financial Creditor had calculated the discounted loan amount of Rs. 8,86,96,415/- to be paid by the Corporate Debtor latest by 31.03.2022 as a full and final payment. However, the Financial Creditor did not convey the approval of the OTS dated 19.01.2022 to the Corporate Debtor. Further, the Financial Creditor ensured that the said letter dated 19.01.2022 was never served upon the Corporate Debtor right till the end of the OTS Period.

v. The Financial Creditor has approached this Adjudicating Authority on the basis of the expiry of OTS dated 19.01.2022 by way of the Restoration Application bearing No. 10 of 2023 in Section 7 Application. The said Restoration Application was allowed by this Adjudicating Authority vide order dated 18.01.2023 in terms of the "conditional liberty" granted by this Adjudicating Authority vide order dated 01.11.2019.

vi. The Corporate Debtor further contended that the default occurred as per the Agreement dated 10.10.2019 and OTS dated 19.01.2022 even though not specified in Part IV of Form 1. It is a well settled position of law that the breach of consent terms by way of One Time Settlement cannot be treated to be Financial Debt in as much a mere obligation to pay does not bring the liability within the ambit of Section 5(8) of the Code. The Hon'ble NCLAT in the case of **Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd**. reported in 2020 SCC Online NCLAT 1202 had observed that:

> *"that a mere obligation to pay does not bring the liability within the ambit of 'financial debt as defined under IBC....... Mere breach of terms of any agreement including a Settlement*

Agreement by a party, whereby some payment was due, would not fall within the scope of Section 5(8) of IBC, so as to constitute a 'Financial Debt'. Accordingly, it was observed that mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money, and thus, breach of such obligation would not entitle a party to invoke CIRP against the other party."

vii. The preposition of Law, as laid down by the Hon'ble NCLAT in **Amrit Kumar Agrawal (supra)** was reiterated by the Hon'ble NCLAT in **Dr. Gopal Krishnan MS & Anr. Vs. Mr. Ravindra Beleyur & Anr.** CA(AT) (CH) (INS) No. 316 of 2022.

viii. The Corporate Debtor had followed up with the Financial Creditor to allow them to comply with the order dated 06.05.2023 passed by the Ld. DRT Jaipur. However, the Financial Creditor refused to acknowledge and abide by the order dated 06.05.2023 passed by the Ld. DRT Jaipur and merely informed that the same order has been appealed before the Hon'ble DRAT, New Delhi which is pending adjudication before the Hon'ble DRAT, New Delhi.

ix. The Corporate Debtor submitted that the Ld. DRT Jaipur vide order dated 06.05.2023 had categorically recorded the frivolous and malicious conduct of the Financial Creditor and while taking a serious view of the biased and malafide conduct of the Financial Creditor had passed the following observations:

"As the applicant was taking all efforts to arrange money through assignment, so he requested to the bank to grant permission which was declined on 30.03.2023, just a day ago of the last day of settlement i.e. 31.03.2023.

So, in my considered opinion, it is clear that the OTS- NDND-2022, letter dated 19.01.2022 was forwarded to applicant on 30.03.2022, informing to deposit the amount latest by 31.03.2022 i.e. within 24 hours.

Again, it is important to mention here that till 19.01.2022, the respondent bank was ready to give benefit of OTS-NDND-2022, *latest by 31.03.2022 and so the timely compliance of order dated 04.09.20219 passed by this Tribunal in SA No. 55/2018, was not given much importance by the respondent bank also because on 19.01.2022 also, they were ready to settle the account under OTS-NDND-2022 and were ready to accept the amount latest by 31.03.2022.*

*****

So considering the entire facts, I am of the considered view that the respondent bank was ready and willing to give benefit of their OTS-NDND-2022, scheme till 19.01.2022, and was ready to accept amount of Rs. 23215500/- condition with regard to Assignment. The OTS-NDND-2022 scheme, was not informed to applicant well within time and as alleged in Para no. 18 of IA no. 615/2023, it is sufficient to show that the intentions of respondent bank were not bona fide, it was full of mala fide intention as can be inferred from the fact that prayer of OTS-NDND-2022 scheme through assignment was declined on 30.03.2023 by giving one day time only i.e. on 31.03.2023, that too for an amount of Rs. 23215500/-."

4. **Analysis and Findings:**

i. We have heard the Ld. Counsel appearing for both parties and also perused the records.

ii. At this stage, it is pertinent to refer to the definition of the expression "Financial Creditor" in sub-section 7 of Section 5 of the Code.

Section 5 of sub-section 7 reads as follows:

> *"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"*

iii. At this stage, it is also pertinent to refer to the definition of the expression "Financial Debt" in sub-section 8 of Section 5 of the Code.

Section 5 of sub-section 8 "Financial Debt" reads as follows:

"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

*(b)**************************

*(c) ***********************

*(d) ***********************

*(e) ***********************

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

*(g) ************************

*(h) ************************

*(i) *************************"*

iv. Admittedly, the Financial Creditor has crystalized the date of default in Part-IV of the Application as the date when the account of the Corporate Debtor was declared as NPA i.e. 06.01.2017.

v. It is an admitted fact that the Applicant/Financial Creditor sanctioned a term Loan of Rs. 2000 lakhs to the Respondent/Corporate Debtor on 01/11/2013. From the perusal of the clauses of the Loan Agreement dated 01/11/2013, we find that "Financial Debt" is owed to the present Applicant and therefore the present Applicant can be called as a "Financial Creditor". The Loan Agreement dated 01/11/2013 carries a 'time value for money' and therefore such amount is 'Financial Debt'.

vi. We note that the Corporate Debtor has not denied the execution of the Loan Agreement dated 01/11/2013. It is also not disputed by the Corporate Debtor regarding the monies disbursed and the quantum of debt due and computation of interest. But, the Corporate Debtor raised a contention that the Financial Creditor had approached this Adjudicating Authority according to the Debt Settlement Agreement dated 10.10.2019 and OTS-NDND Scheme dated 19.01.2022.

vii. The Corporate Debtor also contended that after the cancellation of the Agreement dated 10.10.2019, the parties had entered into a new agreement namely OTS-NDND Scheme dated 19.01.2022. Consequently, the OTS-NDND Scheme dated 19.01.2022 entered into between the parties resulted in novation/alteration wherein the liability of the Corporate Debtor herein stood renewed.

viii. We find that the present Application is not founded only on the default of the consent terms rather application is founded on the original Financial Debt which was extended by the Financial Creditor to the Corporate Debtor. The Financial Debt which was claimed by the Financial Creditor would not be wiped out nor the nature and character of the Financial Debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving a premium to the Corporate Debtor who breaches the consent terms.

ix. Further, the Respondent relied on the judgment passed by Hon'ble NCLAT in **Amrit Kumar Agrawal (supra).** We are of the considered view that the judgment passed by Hon'ble NCLAT in **Amrit Kumar Agrawal (supra)** was entirely on different facts and circumstances and has no application in the present case. As the above quoted judgment passed by Hon'ble NCLAT talks about the case where the corporate guarantor after the failure of the principal borrower to make the payment came forward and entered into the settlement agreement, there being a breach of the settlement agreement, Application under Section 7 claiming financial debt was filed. Therefore, it was held by the Hon'ble NCLAT that the Settlement Agreement subsequently entered between the Financial Creditor and the Corporate Guarantor does not contain any element of financial debt, hence, its breach was not financial debt.

x. In the present case, the Section 7 Application has been filed not only on the ground of default in the settlement agreement rather the present Section 7 application has been filed on the basis of original Financial Debt which was extended by the Financial Creditor to the Corporate Debtor.

xi. In the light of the above facts and circumstances, the existence of debt and default is reasonably established by the Applicant as a major constituent for admission of the Application under Section 7 of the Code. Therefore, the Application under sub-section (2) of Section 7 is taken as Complete.

5. In light of the above facts and circumstances, it is ordered as follows: -

i. The Application bearing **IB-1736(ND)/2019** filed by the Applicant/(FC), under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent/(CD) is **admitted.**

ii. We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flow from the provisions of Section 14(1)(a), (b), (c) and (d) of the Code. Thus, the following prohibitions are imposed:

"(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;

(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.

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the

Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]"

iii. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the Corporate Debtor in terms of Section 14(3)(b) of the Code.

iv. The Applicant/(FC) has proposed the name of Mr. Vinay Bansal as the Interim Resolution Professional ("IRP") having address: 7 -D, Row Buildings, Surya Vihar, Sector-21, Gurugram, Haryana-122016. His Email id is bansal_vinay@hotmail.com. His registration number is IBBI/IPA-001/IP-P00989/2017-18/11629. The Applicant filed a copy of the Consent Issued by Mr. Vinay Bansal in Form 2, Written Communication by proposed IRP, as per the requirement of Rule 9(l) of the Adjudicating Authority Rules along with the Certificate of Registration and Authorization for Assignment in Form B. Accordingly, Mr. Vinay Bansal is appointed as IRP.

v. In pursuance of Section 13(2) of the Code, we direct the IRP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

vi. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.

vii. The IRP is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.

viii. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

ix. The Financial Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakh Only) with the IRP to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by IRP and shall be paid back to the Financial Creditor.

x. In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today.

xi. The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.

xii. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India ("IBBI") for their record.

xiii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-	Sd/-
(ATUL CHATURVEDI)	**(BACHU VENKAT BALARAM DAS)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**