

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP(IB) 10 (IB)2023

Under section 7 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and
Bankruptcy Rules, 2016)

IN THE MATTER OF

**Small Industries Development Bank
of India**

SIDBI Tower, 15, Ashok Marg,
Lucknow, Uttar Pradesh - 226 001.

And

SIDBI, Swavalamban Bhavan, C-11,
G-Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 051.

... Financial Creditor

V/s.

Apodis Hotels & Resorts Limited

Unit No. 002, Ground Floor, Kanakia
Wall Street, A Wing, Chakala, Andheri
Kurla Road, Andheri (E), Mumbai -
400 093.

... Corporate Debtor

Order delivered on :- 17.10.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Financial Creditor : Adv. Akshay Petkar a/w
Aniket Malu
For the Corporate Debtor : Adv. Nausher Kohli a/w
Akash Agarwal

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Small Industries Development Bank of India (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Apodis Hotels & Resorts Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 4,40,25,802/-.

The submissions by the Financial Creditor: -

2. Small Industries Development Bank of India ("SIDBI" or "Financial Creditor") vide its letter dated 14.11.2013 sanctioned a financial assistance by way of Optionally Convertible Sub-ordinated Debt (OCSD) for an amount of Rs. 6,00,00,000/- (Rupees Six Crore Only) to Apodis Hotels & Resorts Limited ("Corporate Debtor") under the Growth Capital and Equity Assistance Scheme for MSMEs (GEMS) to meet a part of cost of hotel project at Motera, Gujarat ("the Project"). The date of disbursement and amount are:

Date	Disbursement (Rs.)
31.12.2013	3,00,00,000.00
29.01.2014	2,40,00,000.00
28.03.2014	60,00,000.00
TOTAL	6,00,00,000.00

3. The Financial Creditor entered into a Subordinated Debt Agreement dated 16.12.2013 with the Corporate Debtor to lend the above sanctioned amount of Rs. 6,00,00,000/- (Rupees Six Crore Only) for financing the hotel project at Motera, Gujrat.
4. Along with the aforesaid debt agreement, the Financial Creditor executed the following agreements to secure the Loan sanctioned to the Corporate Debtor:
 - i. Deed of Hypothecation with the Corporate Debtor creating a first charge in favour of the Financial Creditor on all the movables of the Corporate Debtor including plant, equipment, tools, accessories, furniture, fixtures, computers, etc. acquired/proposed to be acquired under the project.

5. On 13.01.2014, Mr. Pravin Babulal Rathod Whole-time Director provided his undertaking that the leasehold rights of the land of the Corporate Debtor including all building and structures thereon and plant and machinery attached or permanently fastened to the earth are free from any encumbrances or charges.
6. As indicated above, the financial assistance of Rs.6,00,00,000 (Rupees Six Crores Only) was disbursed to the Corporate Debtor. As per the agreement the first payment of interest was due to be repaid on 10.01.2014 and principal instalment was due to be repaid on 10.01.2015.
7. The Corporate Debtor vide its letter dated 15.03.2017 requested for deferment of 180 days in repayment of the above financial assistance of Rs.6,00,00,000 (Rupees Six Crores Only).
8. The Corporate Debtor vide its letter dated 30.01.2018 requested for 2nd deferment of 180 days in repayment of the above financial assistance of Rs.6,00,00,000 (Rupees Six Crores Only).
9. On 07.03.2018, the Corporate Debtor defaulted in repayment of loan instalments due and consequently as per the provisions of RBI its account was classified as NPA.
10. On 13.03.2018, at the request of the Corporate Debtor the loan was restructured.
11. On 14.05.2019, the Corporate Debtor yet again defaulted in re-payment of the instalments as per the restructured loan

and requested for another restructuring of the above loan facility of Rs.6,00,00,000 (Rupees Six Crores Only).

12. The Corporate Debtor once again acknowledged its default in re-payment of the debt on 02.12.2019 and requested for another restructuring of the above loan facility of Rs.6,00,00,000 (Rupees Six Crores Only).
13. The Corporate Debtor applied for the One Time Settlement Scheme for MSME Non-Discriminatory & Non-Discretionary (OTS-NDND 2022) on 20.12.2021. The Corporate Debtor proposed a Repayment Plan as per its proposal for OTS.
14. On 24.01.2022, the Financial Creditor taking into consideration Corporate Debtor's request approved the OTS Proposal subject to its terms and conditions.
15. On 27.01.2022, the Board of Directors of the Corporate Debtor passed resolution accepting the terms and conditions of the OTS-NDND Scheme 2022.
16. The Corporate Debtor failed to make payment as per the One Time Settlement and yet again defaulted. Consequently, the GTS failed on 31.03.2022.
17. Considering the consecutive defaults by the Corporate Debtor, the Financial Creditor vide its recall notice dated 10.05.2022 called upon the Corporate Debtor to repay the entire outstanding loan within 15 days from 10.05.2022.
18. The Corporate Debtor vide its letter dated 01.06.2022 replied to the recall notice dated 10.05.2022 thereby

requesting the Financial Creditor to extend the OTS NDND offer.

19. The Corporate Debtor vide its letter dated 01.08.2022 requested the Financial Creditor to consider another OTS proposal.
20. The Financial Creditor after due consideration was constrained to decline request of another OTS Proposal of Corporate Debtor's vide letter dated 11.08.2022.

Reply filed by the Corporate Debtor: -

21. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
22. The Respondent is in business of developing, operating and managing Hotels in the affordable segment of Hospitality Industry. In July 2013, the Respondent launched its first Asset Light Hotel model under the brand of "Tune Hotels" ("Tune Hotels") in Motera, Ahmedabad. The Respondent had made an investment of about Rs.15.60 crores in the Hotel. The Respondent as its business model, takes immovable property in cold shell or warm shell format suitable for conversion into a Hotel on long term lease and invests funds towards Design and Planning the space into a full-fledged Hotel with three star amenities including additional civil work inside the hotel, Interiors, Furniture, Fixtures and Equipment including air conditioning, hot water systems, plumbing and other utilities and fire management systems. The Respondent built this 100 room's hotel in

Motera area of Ahmedabad, an upcoming suburb in vicinity of now famous Motera Cricket Stadium and 15 minutes to Capital city of Gandhinagar and the Airport per international brand specifications of Tune Hotels of Malaysia (an Air Asia Group Associate). Being first such Hotel in India, the Respondent -invested with best-in-class equipment to provide a quality offering in the affordable segment in India.

23. Accordingly, the Respondent availed financial assistance from the Petitioner almost near completion of the Hotel. In view thereof, vide a sanction letter dated November 14, 2013, the Petitioner sanctioned credit facilities by way of Optionally Convertible Sub-Ordinated Debt ("OCSD") of Rs.6 Crores under Growth Capital and Equity Assistance Scheme for MSMEs at an Interest rate of 15.5% per annum to the Respondent and not as a Project Loan.
24. The Respondent had availed Private Equity from leading PE Fund to set up an Hospitality business in affordable segment with pan India presence and also substantially invested in a company operating and managing a small chain of Hotels under brand 'Mango Hotels to assist it to expand at pan India level also in asset light business model of taking 40-80 rooms hotels under lease or on management contract.
25. The Respondent commenced the commercial operations in September 2013. Unfortunately, the new hotel business under a new brand took time to take off and incurred net loss for major part of the time between sanction and to

date. The Respondent further invested over Rs.7 Crores to operate the Hotel including making cumulative payments to the Petitioner of about Rs.7.77 Crores including Principal of Rs.3.32 Crores and Interest of Rs.4.45 Crores, most of which came from Equity and related capital and not from internal accruals demonstrating good track record of debt servicing with the Petitioner. Further due to good track record, the Petitioner also released Rs.0.50 Crores held as Security Default Reserve on March 2, 2016. The Petitioner granted a Cure Period on March 27, 2017 and March 13, 2018, however, did not reduce the high interest of 15.5% per annum. The Respondent had made a bonafide and a genuine request to reduce the high interest rate because the Petitioner itself provided project loans on a lower rate of interest around 10.5% per annum. Despite this, the Petitioner did not reduce the interest rate. Further, the Respondent had requested the Petitioner to convert the credit facility into Equity Capital as per the terms of the Sanction Letter, However, even this request of the Respondent was turned down, despite showing good track records of repayment of credit facilities.

26. The Respondent kept servicing the credit facilities to the best of its abilities. Then on account of Covid-19 pandemic, the Hotel industry was devastated, and operations of the Respondent were shut due to the stringent measures being taken by the Government such as complete lockdown and thereafter intermittent restrictions right upto May 2022.
27. On June 28, 2019, the Petitioner filed a Company Petition No.2500 of 2019 ("Previous Company Petition") against the

Respondent to recover a sum of Rs. 3,78,00,064/- (Rupees Three Crore Seventy-Eight Lakh and Sixty-Four only). In the Previous Company Petition the purported date of default is shown as May 10, 2019.

28. On the basis various discussions ensued between the Petitioner and the Respondent, the Petitioner agreed to withdraw the Petition. On December 5, 2019, the Petitioner sought leave of this Hon'ble Tribunal to withdraw the Previous Company Petition. Accordingly, this Hon'ble Tribunal vide its order dated December 5, 2019, dismissed the Previous Company Petition as withdrawn. Annexed hereto and marked as Exhibit "B" is a copy of the order dated December 5, 2019.
29. It is pertinent to note that the Petitioner did not seek any liberty from this Hon'ble Tribunal to either revive the Previous Company Petition or to file a new Company Petition. Therefore, in absence of such liberty, the present Company Petition ought to be dismissed as the Petitioner has mis-utilized the well-established principals of the Code and this Hon'ble Tribunal as a recovery forum to 'recover' the sums from the Respondent which arise from the same Agreements and same transaction between the same parties herein.
30. In the Previous Company Petition the purported date of default is shown as May 10, 2019 whereas, in the present Petition the date of Default is shown as March 7, 2018. It is interesting to know how there can be two default dates for the same transaction between the same parties. It evident

that the Petitioner is using this Hon'ble Tribunal to arm-twist the Respondent to succumb to its illicit demands.

31. In the present Petition, the Petitioner has deliberately and with a mala fide intention concealed the Previous Company Petition being dismissed as withdrawn. The Petitioner has done so as it is aware that the present Petition will not be maintainable as same reliefs were sought in the Previous Company Petition which has already been dismissed.
32. The Respondent further claims that the Petitioner itself contends that the "default" occurred on March 7, 2018. If this be so, then ex facie the Petitioner's claim is barred by limitation, and the Petition ought to be dismissed in limine on this ground alone. The Petition was filed on January 9, 2023. The date of default stated in the Petition is March 7, 2018 which is beyond the period of limitation of 3 years. The Petition is filed after lapse of 2 years after the limitation to file the Petition expired. Thus, on this count alone, the Petition ought to be dismissed.
33. The Respondent has further submitted that during Covid-19 pandemic, hospitality was one of most badly affected sectors in the industry. Due to complete lockdown and later partial lockdown, many companies such as the Respondent in the hospitality sector faced dire consequences. Even the Government of our country had come up with remedial measures to support the industries in the hospitality sector. In view of Covid-19 pandemic, accordingly, the Petitioner offered a One Time Settlement ("OTS") of Rs. 1,07,04,000/- (Rupees One Crore Seven Lakh Four Thousand only) vide

its letter dated December 20, 2021 to the Respondent. As there was low to negligible recovery from the companies who were financed prior to Covid-19 pandemic by the financial institutions, the financial institutions offered the OTS which was promptly accepted by the Respondent. Likewise, the Respondent submitted its signed acceptance along with necessary Resolution which the Petitioner vide its letter dated January 24, 2022, accepted. However, despite making the upfront payment as accepted by the Petitioner and onset of third wave post the acceptance, did not accede to the request of extending the OTS and the Petitioner later addressed a recall notice recalling the facilities to which the Respondent refuted and submitted that despite facing dire consequences, the Respondent adhered to the terms of the OTS and had made the upfront payment. The Respondent had requested to consider and extend the OTS along with the Petitioner's support to sell its leasehold interest in the operating hotel to monetize the asset. Instead of considering the genuine and bonafide request of the Respondent, the Petitioner chose the easiest way to recover its money by invoking insolvency provisions of the Code against the Respondent.

34. The other averments made in the Petition have been denied as wrong and a prayer for dismissal of the Petition has also been made.

Findings:-

35. We have heard the Counsel for the parties and have gone through the records.

36. During the course of arguments, the Counsel for the Petitioner has argued that the Corporate Debtor was granted financial assistance vide sanction letter dated 14.11.2013. The Corporate Debtor executed Sub-ordinated Debt Agreement dated 16.12.2013 and deed of hypothecation dated 16.12.2013 in favour of the Petitioner. The Counsel for the Petitioner has further pointed out that the Corporate Debtor submitted request for deferment of repayment schedule vide letter dated 15.03.2017 and vide letter dated 13.03.2018, the Petitioner allowed re-schedulement of principal installment of term loan. Thereafter, the Corporate Debtor submitted request for restructuring of the loan facility of Rs. 6 crores vide letter dated 02.12.2019. The Counsel for the Petitioner has further referred to one time settlement proposal submitted by the Corporate Debtor vide letter dated 20.12.2021 which was allowed by the Financial Creditor vide letter dated 24.01.2022, and was also accepted by the board of the Corporate Debtor vide Resolution dated 27.01.2022. However, the Corporate Debtor committed default of the one time settlement terms and conditions and failed to make the payments as per the terms of the OTS. Resultantly, a recall notice dated 10.05.2022 was issued. According to the Counsel for the Petitioner, the factum of Financial Debt and default stands proved on record and, therefore, the Petition deserves to be admitted.
37. On the other hand, the Counsel for the Corporate Debtor has argued that the present Petition is not maintainable considering the fact that the Petitioner had earlier filed a

similar Petition u/s 7 of the Code, 2016 [i.e. CP (IB) 25 (MB)2019] which was unconditionally withdrawn on 05.12.2019 nor any liberty to file a fresh Petition on the same cause of action was granted. Therefore, the present Petitioner is liable to be dismissed on this ground alone as a second Petition on the same cause of action does not lie.

38. The Counsel for the Respondent has further argued that there is a discrepancy in the date of default as in the instant Petition the date of default is mentioned as 07.03.2018 whereas in the previous Petition date of default was mentioned as 10.05.2019 and on this ground also, the Petition deserves to be dismissed.
39. The Counsel for the Respondent has further argued that the Petition cannot be allowed to use the present Petition as a recovery tool nor the provisions of the Code can be utilized as a recovery mechanism by filing Petitions repeatedly on the same cause of action.
40. We have weighed the contention raised by the Counsel for the parties and have also gone through the records.
41. In this case, the Corporate Debtor has not disputed that loan facility was availed by it from the Financial Creditor in respect of which the default has been committed. The only defence raised by the Corporate Debtor is that the present Petition is not maintainable considering the fact that a similar Petition, earlier filed by the Petitioner was dismissed as withdrawn and, therefore, the second Petition on the same cause of action does not lie. Moreover, the factum of filing of the said Petition has not been disclosed in the

present Petition. Therefore, the present Petitioner is not maintainable.

42. Having thoughtfully considered the above contention, we are of the considered view that the same is not tenable. The proceedings u/s 7 of the Code, 2016 are summary proceedings and the provisions of Civil Procedure Code are not strictly applicable to these proceedings. Therefore, it cannot be said that the second Petition u/s 7 cannot be maintained. Besides it is evident from the records that the Corporate Debtor itself submitted letter dated 15.03.2017 requesting for deferment of repayment schedule. The Corporate Debtor further submitted a similar requests vide letter dated 30.01.2018, 02.12.2019 and 14.05.2019. In addition to this, the Corporate Debtor submitted one time settlement proposal dated vide letter dated 20.12.2021 which was accepted by the Financial Creditor vide letter dated 24.01.2022. As per letter dated 24.01.2022 the Corporate Debtor was to pay as per the terms and conditions attached with the letter dated 24.01.2022. However, the Corporate Debtor miserably failed to adhere to the repayment schedule of the OTS and committed default. In these circumstances, it cannot be said that the Petitioner has no cause of action to file the present Petition.
43. Secondly, it has been argued on behalf of the Corporate Debtor that the present Petition is barred by time. Even this contention raised on behalf of the Corporate Debtor does not appear to be tenable considering the fact that it has been acknowledging its liability from time to time by submitting request for deferment of repayment schedule.

The Corporate Debtor further acknowledged its liability by submitting an OTS proposal dated 20.12.2021 which was accepted but again the Corporate Debtor committed default and did not repay the loan as per the schedule attached with OTS approval letter. Therefore, it cannot be said that the present Petition is barred by time.

44. It has also been argued on behalf of the Corporate Debtor that there is a discrepancy with regard to the date of default. It has been pointed out that in Part-IV of the claim the date of default is mentioned as 07.03.2018 whereas in the previous Petition the date of default of 10.05.2019. Even this contention raised on behalf of the Corporate Debtor is without any substance. It cannot be disputed that the date of default cannot be changed. As per the ledger account Exhibit-Q placed on record by the Financial Creditor, the account of the Corporate Debtor was declared NPA w.e.f. 07.03.2018. After the Corporate Debtor failed to repay the loan amount as per the OTS plan, a recall notice dated 10.05.2022 was issued. Even in the NESL report Exhibit-R placed on record also shows the date of default as 07.03.2018. Therefore, in our considered view, it cannot be said to be a case of any discrepancy in the date of default nor on this ground the Petitioner can be non-suited specially when it is clear cut case of financial debt and its default committed by the Corporate Debtor.
45. No other pointes have been argued by the Counsel for the Corporate Debtor.

46. From the foregoing discussion, it become evident that the Applicant Bank has been able to establish the existence of Financial debt in respect of default has been committed by the Corporate Debtor. Besides, the Application u/s 7 of the Code has been filed within the period of limitation. Therefore, we find the present case to be a fit one to be admitted u/s 7 of the Code, 2016. It is ordered accordingly in the following terms:

ORDER

- a. **The above Company Petition No. (IB) - 10(MB)/2023 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Apodis Hotels & Resorts Limited.**
- b. This Bench hereby appoints Mrs. Megha Agrwal, Registration No: IBBI/IPA-001/IP-P-01456/2018-19/12272 as the Interim Resolution Professional having registered office at 001, Shivanjini Apartments, In Circle of Congress Nagar Garden, Nagpur - 440012, email :- ip.meghaagrawal@gmail.com, to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of Rs. 3 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution

Professional appointed herein, immediately upon communication of this Order.

- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover 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; 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. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such

transactions as may be notified by the Central Government in consultation with any financial sector regulator.

- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

ANKIT

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)