

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH  
COURT III**

**C.P. No. 3073/IBC/MB/2019**

Under Section 7 of the Insolvency and  
Bankruptcy Code, 2016 read with  
Rule 4 of the Insolvency and  
Bankruptcy (Application to  
Adjudication Authority) Rule 2016)

*In the matter of*

**Gannon Dunkerley & Co. Ltd.**

Having registered office at: New  
Excelsior Building, 3<sup>rd</sup> Floor,  
A.K. Nayak Marg, Fort, Mumbai

.....**Financial Creditor**

**Vs**

**Sangeeta Aviation Services Private  
Limited**

(CIN: U62200MH2012PTC233881)  
5B-34, Akshay Mittar Ind. Estate.,  
Saki Naka, Andheri (East), Mumbai  
400059, Maharashtra, India

.....Corporate Debtor

**Order delivered on: 10.08.2021**

**Coram:**

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

**For the Applicant:** Mr. Manoj Kumar Mishra, Advocate

**For the Respondent:** Mr. S. K. Jain a/w Yahya Batatawal

**Per: Shri H.V. Subba Rao, Member (Judicial)**

**ORDER**

1. This Company petition is filed by *Gannon Dunkerley & Co. Ltd.* (hereinafter called "Financial Creditor") seeking to initiate

Corporate Insolvency Resolution Process (CIRP) against *Sangeeta Aviation Services Private Limited* (hereinafter called “Corporate Debtor”) alleging that the Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 1,32,25,753/- and the Financial Creditor sought resolution.
3. **The submissions of the Financial Creditor are as follows:-**
  - i. During the May 2017 and on 22.03.2017 the Financial Creditor provided financial help to the Corporate Debtor.
  - ii. As a part of repayment, the Corporate Debtor executed two bills of exchange for an amount of Rs. 50 lacs each to be due on 22.06.2017 and 14.05.2018 respectively.
  - iii. On consistent failure of the Corporate Debtor to repay the dues, the Financial Creditor approached to the Bombay High Court.
  - iv. Hon’ble Bombay High Court was pleased to pass an order for the payment of Rs. 1 crore along with interest @ 12% per annum totalling to Rs. 1,21,71,242/- along with a cost of Rs. 5.20 Lacs.
  - v. As on the date, the total amount due is Rs. 1,32,25,753/- (Rupees One Crore Thirty-Two Lacs Twenty-Five Thousand Seven Hundred Fifty-Three only)
  - vi. Even after the Hon’ble Bombay High Court’s order, the Corporate Debtor has failed to make the payment.

Therefore, this petitioner for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor.

**4. The submissions of the Corporate Debtor are as follows:-**

- i. The Corporate Debtor submitted in his written submissions that in Part II of Form 1 which is a Statutory Form prescribed under Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rule, 2016 at Sr. No. 6, the applicant has given details of Section 55(2) of the IBC, 2016 which is applicable only to Fast Track Insolvency Resolution Process under Chapter 4 of the IBC, 2016. The Corporate Debtor submits that the Application is not filed under Fast Track Insolvency Resolution Process. Hence, the particulars given in Part II at Sr. No. 6 are not in conformity with the details required to be filled in.
- ii. In Form 2 which is a Statutory form annexed at page Nos. 16-17 of the Applicant, the proposed IRP has made glaring discrepancies and errors such:
  - a. The name should be proposed by the Applicant i.e. Gannon Dunkerley & Co. Ltd. However, it has mentioned that, '*...have been proposed as the Interim Resolution Professional by Mr. Manoj Kumar Mishra, Advocate, Bombay High Court and Insolvency Professional in connection with the...*'
  - b. The IRP has failed to make disclosures in accordance with the code of conduct for Insolvency Professionals as set out in the IBBI (Insolvency Professionals) Regulations, 2016.
  - c. Declaration given by the Proposed IRP is unsigned.
  - d. The attachment mentioned as Form 5 instead of Form-1.

- iii. In part IV of Form 1, the total amount of debt granted and date of disbursement are given. The applicant has included interest amounting to Rs. 27,05,753/- based on order dated 09.01.2019 passed by Hon'ble Bombay High Court in Summary Suit No. 714 of 2018. However, the Applicant claims that it is a Financial Creditor. Hence, it has to satisfy necessary ingredients as prescribed in IBC, 2016 i.e. the Applicant is a financial Creditor under Section 5(7) and the amount advanced by him is a Financial Debt under Section 5(8). However the applicant's claim is based on a decree passed by the Hon'ble Bombay High Court. Whereas the Hon'ble Bombay High Court has allowed interest at the rate of 12% per annum as an appropriate compensation which is normally allowed in Recovery Civil Suits. Thus, it is abundantly clear that there was no stipulation for payment of interest on the amount advanced by the Applicant to the Corporate Debtor Company. Hence, in absence of any Agreement prescribing interest to be paid by the Corporate Debtor on the amount advanced by the Financial Creditor, such advance does not become a Financial Debt under Section 5(8)(a) of the IBC, 2016. The Corporate Debtor further submitted that in absence of any stipulation for payment of interest, the Corporate Debtor has not paid any interest on the amount advanced by the Financial Creditor to the Corporate Debtor. The Corporate Debtor, therefore, submitted that the Financial Debtor's claim is based on the order passed by the Hon'ble Bombay High Court. The applicant, therefore, miserably failed to establish that it is a Financial Creditor under Section 5(7) and the amount advanced by the Financial Creditor is a Financial Debt

under any of the sub-clauses 'a' to 'i' of Section 5(8) of the IBC, 2016.

- iv. The Corporate Debtor further says and submitted that in absence of satisfaction of necessary ingredient to claim as a Financial Debt, the applicant has to clinchingly establish that the amount advanced by it had time value of money to fulfil the condition as prescribed in 5(8)(a) of the IBC, 2016 or the Applicant has to establish that the amount advanced by it to the Corporate Debtor had a commercial effect to satisfy the condition prescribed under Section 5(8)(f) of the IBC, 2016. Since, the applicant is neither a Shareholder nor a Director of the Corporate Debtor, the ratio of Judgment passed by the Hon'ble NCLAT in *Shailesh Sangani Vs. Joel Cardoso and Anr. (CA(AT)(Ins) NO. 616 of 2018)* does not apply.
- v. The Corporate Debtor further submitted that the applicant has claimed a sum of Rs. 5,20,000/- towards legal cost based on the Decree passed by the Hon'ble Bombay High Court. This further proves that the Applicant's claim before the Hon'ble Bombay High Court was based on money suit and at the best the Applicant is a Creditor of the Corporate Debtor but not a Financial Creditor under Section 5(7) of the IBC, 2016.
- vi. The applicant in its Application has given date of default as 14.05.2018. Since, the amount advanced by the Applicant is not a Financial Debt under Section 5(8) of the IBC, 2016, the question of Applicant's satisfying the definition of Debt under Section 3(11) of the IBC, 2016 does not arise. Since the Applicant has miserably failed to prove that the amount advanced by it to the Corporate Debtor is covered within the

meaning of Debt under Section 3(11) and the amount so advanced is a Financial Debt under Section 5(8) of the IBC, 2016, the occurrence of any Default under Section 3(12) does not arise.

### **Findings**

1. In the light of above pleadings, the following issues falls for consideration:
  - i. Whether the present Company Petition filed by Financial Creditor on the basis of a decree passed by the Hon'ble Bombay High Court against the Corporate Debtor is maintainable?
  - ii. Whether the defence taken by the Corporate Debtor is legally sustainable in law?
2. Heard both sides and perused the record. The learned counsel appearing for the Financial Creditor submitted that the Financial Creditor has advanced an amount of Rs. 1 crore to the Corporate Debtor in the month of March and May 2017 respectively and the Corporate Debtor in receipt of the said amount executed two bills of exchange dated 22.03.2017 and 31.05.2017.
3. Counsel for the Financial Creditor further submitted that subsequently the Corporate Debtor failed to Honour the liability for which the Financial Creditor was constrained to file a suit in the Hon'ble Bombay High Court and obtained a decree and judgement dated 09.01.2019.
4. Counsel for the Financial Creditor also relied on the Ruling of Hon'ble NCLAT **in M/s Ugro Capital Limited Vs. M/s Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)** to substantiate that an application under Section 7 can be filed by Financial Creditor basing on a decree passed by the Competent Court. Thus, he prayed

for admission of the above Company Petition since the above Company Petition fulfils all the legal requirements for admission viz. debt, default and also limitation.

5. Mr. S.K. Jain, Chartered Accountant, appearing for the Corporate Debtor submitted his arguments contending that the claim of the Financial Creditor does not become a Financial Debt within the code. He further contends that the applicant has filed money suit in the Hon'ble Bombay High Court and the Hon'ble High Court has allowed interest @ 12% per annum as an appropriate compensation for the time value of money. He further contended that the above Company Petition is based on a decree passed by the Hon'ble Bombay High Court in a money suit and at best the applicant is a creditor of the Corporate Debtor but not a Financial Creditor under Section 7, Clause (8) of the Code. He also relied on the Judgment of Hon'ble NCLAT in *Shree Ambica Rice Mill Vs. M/s Kaneri Agro Industries Limited*.
6. It is an admitted case on both sides that the above Company Petition is filed basing on a decree passed by the Hon'ble Bombay High Court against the Corporate Debtor. The advocate appearing for the Financial Creditor cited the above ruling of Hon'ble NCLAT in which the Hon'ble NCLAT held that a Company Petition filed on the basis of a decree is a Financial Debt within the meaning of the Code. All the above pleas of the Corporate Debtor with regard to the interest etc. are beyond the scope of this petition since this Tribunal has no power to decide the validity or correctness of a decree passed by the Hon'ble High Court. The decree passed by the Hon'ble Bombay High Court is binding on the Corporate Debtor. If at all the Corporate Debtor is

aggrieved against the decree passed by the Hon'ble Bombay High Court, his remedy is only to file an appeal against the decree. It appears the time for preferring an appeal against the decree is over without any appeal being filed and thus attained finality. It is not out of place to mention here that recently the Hon'ble Supreme Court in the case of **M/S Orator Marketing Pvt. Ltd. vs M/S Samtex Desinz Pvt. Ltd.** held that stipulation of payment of interest is not a condition precedent to qualify as a financial debt.

7. All the above defences raised by the Corporate Debtor are not legally sustainable and are liable to be rejected. This Bench is of the considered opinion that the above Company Petition filed by the Financial Creditor basing on a decree is maintainable and is liable to be admitted. The petitioner has also suggested the name of proposed Interim Resolution Professional in part-3 of the Petition along with his consent letter in Form-2. Thus, the present Company Petition satisfies all the necessary requirement for admission. Accordingly, the above Company Petition is admitted by passing the following:

**ORDER**

- a. The above Company Petition No. (IB) -3073(MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Sangeeta Aviation Service Pvt. Ltd.
- b. This Bench hereby appoints **Mr. Modilal Dhanraj Pamecha** Insolvency Professional, Registration No: IBBI/IPA-001/IP-P01231/2018-19/12127 as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.



- c. The Financial Creditor shall deposit an amount of Rs.5 Lakh 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 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; 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 Registrar of Companies, Mumbai, 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/-**

**CHANDRA BHAN SINGH  
MEMBER (TECHNICAL)**

**Sd/-**

**H.V. SUBBA RAO  
MEMBER (JUDICIAL)**