

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
[Through Physical hearing/VC Mode (Hybrid)]

CP (IB) No.145/BB/2022
U/s. 7 of the IBC, 2016
R/w Rule 4 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

Krone Finstock Private Limited,
Monarch House, Near Ishwar Bhuvan,
Cross Road, Near Commerce Six Road,
Navrangpura, Ahmedabad,
Gujarat- 380 009.

... Financial Creditor/Petitioner

VERSUS

Deccan Charters Private Limited,
Jakkur Aerodrome, Bellary Road,
Bangalore,
Karnataka- 560 064.

... Respondent/Corporate Debtor

Order delivered on: 05/04/2024

Coram: Hon'ble Mr. K. Biswal, Member (Judicial)
Hon'ble Mr. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri Vijay B.N.H., Adv
For the Respondent : Shri Anandodaya Mishra., Adv

O R D E R

Per: Manoj Kumar Dubey, Member(Technical)

1. The present petition is filed on 04.05.2022, under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016'/Code), read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating

Authority) Rules 2016 (for brevity 'Rules'), by Krone Finstock Private Limited (for brevity 'Financial Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of Deccan Charters Private Limited (for brevity 'Corporate Debtor/Respondent') for a total outstanding default amount of Rs. 9,82,24,077.47/- (Rupees Nine Crore Eighty-Two Lakh Twenty-Four Thousand Seventy-Seven and Forty-Seven Paise Only) along with interest at the rate of 17% P.A, as per Part IV of Form No.1 the Date of Default maintained in Form No.1 in 24.09.2019.

2. The facts of the case are discussed below:

- a. It is submitted that the Financial Creditor is a Non-Banking Finance Company registered under the Companies Act, 1956. The corporate debtor is engaged in the business of operation of chartered helicopters and fixed-wing charter services. One Mr. G.R Gopinath, along with other directors of the corporate debtor intermittently approached the Financial Creditor requesting that they were in immediate requirement of a Loan to the tune of Rs. 5,00,00,000/- (Rupees Five Crore Only) and hence requested the Financial Creditor to forward a loan of Rs. 5,00,00,000/- to the corporate debtor.
- b. Further, based on the representation and warranties of the corporate debtor, the Financial Creditor initially forwarded a sum of Rs. 50,00,000/- on 19.07.2018. Subsequently, a Loan Agreement was entered into by the corporate debtor and the financial creditor on 31.07.2018 wherein the Agreement was signed by one M. Sanjay Saighal, director of the corporate debtor. Pursuant to the execution of the Loan Agreement, the Financial Creditor disbursed the remaining loan amounts to the Corporate Debtor in the following manner:
 - A sum of Rs. 50,00,000 by NEFT on 02.08.2018
 - A sum of Rs. 2,00,00,000 by NEFT on 23.08.2018
 - A sum of Rs. 2,00,00,000 by NEFT on 24.08.2018
- c. Further, Clause 2 of Schedule II of the Agreement pertained to the repayment schedule which provided that the amount of loan shall be repayable by the borrower to the lender within 12 months from the date of each disbursement hence, the afore-mentioned sums were due and

payable by the corporate debtor on 02.09.2019, 23.08.2019 and 24.09.2019 respectively.

- d. Moreover, the corporate debtor initially paid a sum of Rs. 3,07,800/- to the financial creditor 01.09.2018 which was adjusted against the accrued interest as per Clause 2.11 of the Agreement. However, the corporate debtor then failed to make payment to the Financial Creditor as per the terms laid out in the Agreement. Further, in October, 2020 after a series of discussions, the corporate debtor handed over 4 cheques dated 28.10.2020 for an amount of Rs. 1,00,00,000/- each having numbers 213866, 213867, 213868 and 213869 as part payment of their Debt.
 - e. The Financial creditor deposited the afore-mentioned cheques on 02.11.2020 which were dishonoured on 03.11.2020. Further, the financial creditor issued a statutory notice under Section 138 and 141 of the Negotiable Instrument Act, 1881 before the Additional Chief Metropolitan Magistrate Ahmedabad.
 - f. It is submitted that the corporate debtor has since then failed to repay the financial creditor under the Agreement. Therefore the present petition has been filed before this Tribunal.
3. The main objection raised by the Respondent is as follows:
- a. It is submitted that the respondent is a company registered under the provisions of the Companies Act, 2013, engaged in the business of operations and maintenance of aircrafts. Further, Shaishav Shah & Family (GSEC) and Himanshu Shah & Family (Monarch Group) together and collectively referred to as “GSEC-Monarch” in the year 2017, had expressed the desire to participate in “Commuter Airline Business i.e., Air Deccan” business undertaking operations of the Respondent.
 - b. Moreover, the Respondent and GSEC-Monarch after having deliberate discussions and negotiations, in order to expand their business formed a Joint Venture company (JV) with the help of an existing company called GSEC Renewable Energy Private Limited. It was later renamed to GSEC Monarch Deccan Aviation Private Limited (GMDAPL), and a MoU cum binding Term Sheet dated 12.12.2017

was executed to formalize the relationship 50% of the shareholding was with the respondent and 50% with GSEC- Monarch. As per the term sheet 100% of the Business Undertaking of this Respondent Company was to be acquired by GMDAPL.

- c. It is submitted that the respondent considering the need to the funds required to sustain operations of the GMDAPL and for expansion of the business had availed loan of Rs. 5,00,00,000/- from the Applicant vide loan agreement dated 31/07/2018. The amounts were also duly disbursed by NEFT on 19.07.2018, 02.08.2018, 23.08.2018 and 24.08.2018. The due dates were 12 months from dates of each disbursement.
- d. However, before the time of repayment of loan arrived, the Respondent and the GMDAPL in order to enable the terms and conditions of the MoU cum binding Term Sheet executed the Business Transfer Agreement (BTA) on 05.03.2019, wherein GMDPL had categorically agreed for:
 - (i) *In lieu of Clause 1 of the BTA, to undertake the 100% of the assets and liabilities of the business undertaking of the Applicant "Air Deccan" as a going concern on slump sale basis, against the payment of total consideration of Rs. 11,50,00,000/-*
 - (ii) *In lieu of clause 3 (c) of the BTA, to undertake and settle all the liabilities of the Respondent, as listed out in Schedule C- "Liabilities" of the BTA consisting of Non-Current Liabilities, Current Liabilities and other Current Liabilities in furtherance of purchasing the business undertaking of the Respondent, which included the liability of repayment of debt i.e., loan disbursed by the Applicant.*
- e. It is submitted that Director No.1 i.e Himanshu Shah and Director No.2 i.e., Mr. Bankim Shah having a collective shareholding of 50% in the JV i.e., GMDAPL and being directors of the JV as well as the Applicant company, it is implied that the Applicant were fully aware about the transfer of business undertaking of the Respondent along with 100% assets and liabilities to the JV i.e., GMDAPL.

- f. It is submitted that the Respondent Company had duly performed the part of its contractual obligation as agreed upon under the BTA and transferred the business to GMDAPL. However, at the time of the performance of the GMDAPL's part of paying the consideration and settle all the debts, liabilities and dues of the respondent as agreed upon under Clause 3 (c) of the BTA, the Applicant Company started threatening the Respondents for repayment of loan.
- g. Further, the respondent vide email dated 13.12.2018, had categorically informed and apprised the directors of the Applicant company about the fact that the liability of repayment of debt has been transferred to GMDAPL and therefore refrain from depositing cheques and from demanding payment and interest.
- h. The respondent vide email dated 19.10.2019 requested the respondent not to deposit the cheques as the business unit for which the funds were borrowed was transferred to GMDAPL along with borrowing and the revised security package which were discussed and approved and the bank account were also closed.
- i. However, the applicant deposited the undated cheques bearing no. 213851, 213853, 213854 and 213865 and the same was dishonoured. The applicant further sent a legal notice under Section 138 of the Negotiable Instrument Act, 1881 on 27.06.2020, demanding the payment of unpaid debt for the which the respondent has replied stating that the business was transferred to GMDAPL and the loan repayment was the responsibility of GMDAPL and therefore, the cheques given as security with the respondent, will not fall under the purview of Section 138 of NI Act.
- j. It is submitted that inspite of receiving clarification from the respondent , the applicant issued another legal notice dated 26.11.2020 under section 138 of the NI Act for dishonour of cheques amounting to Rs. 1,00,00,000 each and the total amount of Rs. 4,00,00,000.
- k. It is further submitted that JV i.e., GMDAPL wrote a letter dated 21.10.2020 (Intimation Letter) to the Applicant that the BTA dated 05.03.2019 executed between the Respondent and the JV i.e.,

GMDAPL stands cancelled and was null and void. This enabled the Applicant to file the present Application under section 7 of I & B Code, 2016.

1. It is furthermore pointed out that this Tribunal does not have residuary jurisdiction under Section 60(5)(c) of the I &B Code, to entertain contractual disputes that does not have any nexus with respect to the Insolvency of the Corporate Debtor, since the Tribunal can exercise jurisdiction only upon those matters which fall within the ambit of the I&B Code. The Learned Counsel relied on the Judgment of Hon'ble Supreme Court in the matter of *"Tata Consultancy Services Limited vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited, Civil Appeal No. 3045 of 2020"* wherein it was held that *"26..... This Court observed that NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor. The nexus with the insolvency of the corporate debtor must exist (para 69). Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor."*
- m. Hence it is submitted that this Tribunal doesn't have the jurisdiction to deal with the contractual dispute raised by the JV i.e., GMDAPL vide Intimation Letter dated 21.10.2020 with respect to the fact that, the BTA dated 05.03.2019 executed between the Respondent and the JV i.e., GMDAPL is null and void, since it does not fall within the ambit of the I&B Code and hence does not fall within the residuary jurisdiction of this Tribunal.
- n. Moreover, it is submitted that the respondent has already invoked Arbitration in accordance with Clause 10.2 of the Loan Agreement and had filed an Application bearing no. R/Arbitration Petition No. 47 of 2022 before the Hon'ble High Court of Gujarat for appointment of Arbitrator. It is submitted that the dispute in the present matter is arbitrable and the Respondent having already initiated the Arbitration proceeding against the Applicant the present petition shall be dismissed.

4. The Learned Counsel for the Petitioner filed its rejoinder vide Diary No 2235 dated 21/04/2023, submitting the following
 - a. It is stated that the allegations of common directorship between the Applicant and the JV giving legitimacy to an alleged Business Transfer Agreement (BTA) are vague, baseless and denied. Further, Clause 7 of the Loan Agreement dealt with Assignment of loan wherein Clause 7.1 of the Loan Agreement reads as under:
“the obligations herein shall bind not only the borrower but its executors, legal representatives, administrators and/or as the case may be its successors. The Borrower shall not be entitled to transfer or assign any of its obligations herein without the written approval of the Lender”.
 - b. Clause 7 of the Loan Agreement highlights that the respondents had no authority under the Loan Agreement to assign the Loan through the BTA or even otherwise without the prior written approval of the Applicant company. Accordingly, the “Debt” of the Respondent has not been transferred to any third party as alleged.
 - c. It is further submitted by the petitioner that nowhere stated that existence of an arbitration agreement or the mere invocation of arbitration bars the jurisdiction of this Tribunal.
5. The Petitioner has filed written submissions vide diary no.70 dated 03.01.2024, in which, the earlier contention has been reiterated, starting from the date of disbursement of the loan, the issue regarding the Business Transfer Agreement (BTA) and cancellation thereof and the cheques issued by the Corporate Debtor getting dishonoured by the Bank. It is further been explained by the Petitioner that GMDAPL intimated vide letter dated 21.10.2020 to the Financial Creditor that the BTA was null and void. Following the same, the Financial Creditor approached the Corporate Debtor, and the Corporate Debtor issued four cheques mentioned above in para no.2, all dated 28.10.2020. As these cheques got dishonoured, the complaint under Section 138 of NI Act, 1881 was filed against the Corporate Debtor. Following which, the Corporate Debtor and its Directors have been convicted under Section 138 of the NI Act by the Special Court of Negotiable Instruments Act,

Ahmedabad by order dated 03.06.2023. On the basis of this, the Petitioner submitted that this conviction confirms that there was a legally enforceable debt and the Corporate Debtor had defaulted in making the payment.

6. Heard Learned Counsel for both the parties and perused the records available.
7. The present petition is filed on 04.05.2022 by the Financial Creditor M/s Krone Finstock Private Limited against M/s Deccan Charters Private Limited for a total amount in default of Rs. 9,82,24,077 /-.
8. It is seen that the main defence raised by the respondent is that a Business Transfer Agreement dated 05.03.2019 was entered into between the Respondent and GMDAPL (GSEC Monarch Deccan Aviation Private Limited), wherein as per clause 1 of the BTA, GMDAPL agreed to undertake 100% of the assets and liabilities of the business undertaking of "Air Deccan" and settle all the liabilities of the respondent which included the liability of repayment of debt i.e., loan disbursed by the Applicant. Accordingly, it is claimed that the repayment of loan is the responsibility of GMDAPL. Further the Corporate debtor had notified the Financial Creditor about the Transfer of business to GMDAPL, in compliance with Clause 4.1 read with Clause 4.2 of loan agreement. It is argued by the Corporate debtor that it has not received any objection from the Financial Creditor within 45 days from the receipt of the notice and hence it is deemed to have been approved by the Financial Creditor.
9. Rebutting to the contention raised by the respondent, the petitioner relied upon the loan agreement dated 31.07.2018 wherein Clause 7.1 states that borrower shall not assign any of its obligation without prior approval of the Lender.
10. This Tribunal has perused Clause 7.1 of the Loan agreement dated 31.07.2018 which reads as follows:

ARTICLE VII – ASSIGNMENT

7.1 The obligations herein shall bind not only the Borrower but its executors, legal representatives, administrators and/or as the case may be its successors. The Borrower shall not be entitled to transfer or assign any of its obligations herein without the written approval of the Lender. The Lender may however transfer or assign any of its rights or obligations under this Agreement at its sole discretion. Upon such assignment, the Borrower shall fulfill and perform all its obligations to such assignee, in accordance with the terms and conditions of this Agreement, as if such assignee were the Lender herein and shall execute all documents required in this behalf by the Lender.

11. It is seen that the respondent vide letter dated 23.10.2019 (Annexure K, Pg. 109) had intimated the Petitioner about the Business Transfer Agreement (BTA) dated 05.03.2019 and the Transfer of assets, receivables and past and future liabilities payable from Air Deccan to GSEC Monarch and Deccan Aviation Private Limited. On perusal of the above mentioned clauses of the loan agreement, it is observed that the reliance is placed by the Respondents on clause 4.1 read with 4.2 which are general conditions with respect to the operations and contracts of the Corporate Debtor. The Petitioner had on the other hand relied on Clause 7.1 of the Loan Agreement which has been reproduced above, which specifically states that the assignment of the loan cannot be made without the written approval of the Financial Creditor herein. Thus, the basic thrust of the arguments on the part of the Petitioner are that considering this Clause 7.1 which specifically prohibits such an assignment, the reliance on Clause 4.1 and 4.2 of the Loan Agreement would not be relevant, since it related to different matters which are mentioned at Clause 4.2; such as entering into any contracts, providing any loans or guarantees etc., payment of commission, dividend and undertaking any restructuring of the Corporate Debtor. Further, reliance was placed by the Petitioner on the letter dated 21.10.2020 from

GMDAPL addressed to the Financial Creditor stating the BTA dated 05.03.2019 has ceased to exist being void.

12. On the other hand, it was vehemently argued by the Ld Counsel for the Respondent that the present case cannot be entertained by this Tribunal for the want of jurisdiction to deal with Contractual Disputes that arise other than disputes during CIRP process. The Respondent has relied upon the judgement of Hon'ble SC in *Tata Consultancy Services Limited (supra)*, which related to termination of Contract after initiation of CIRP, wherein the issue addressed was regarding the Power of NCLT and NCLAT to adjudicate on contractual disputes not related to Insolvency process.
13. However, the matter under the consideration in the above mentioned judgment was the residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual disputes. The NCLT in that case had stayed the termination of the Facilities Agreement, which was entered into by the Corporate Debtor with the Operational Creditor to provide the premises with certain facilities for conducting examinations. There was a termination Clause for material breach of the Agreement, and the Operational Creditor invoked the termination Clause in the Agreement due to lapses by the Corporate Debtor in fulfilling the contractual obligations i.e. insufficiency of housekeeping staff and their malpractices, shortage of power supply etc. When the Corporate Debtor was admitted to CIRP by the NCLT, the NCLT went ahead and stayed the termination notice issued by the Operational Creditor, observing that the contract was terminated without issue of notice to the Corporate Debtor. The Hon'ble NCLAT upheld this order of the NCLT relying on the moratorium under Section 14 of the Code. However, the Hon'ble Apex Court observed that the NCLT has the jurisdiction to adjudicate on dispute which arose solely from the insolvency of the Corporate Debtor and does not have any residuary jurisdiction to entertain the contractual dispute between the two parties. Thus, the NCLT could not have imposed an *ad-interim* stay on the termination notice.
14. However, in this case the matter before us is not of any contractual dispute. The dispute regarding the validity of the Business Transfer

Agreement and its cancellation is not a matter which this Tribunal is adjudicating upon. Therefore, this is not a case where there is invocation of residuary jurisdiction under Section 60(5)(c) of the IBC and not a matter related to contractual dispute.

15. The Respondent has also argued that they have already invoked arbitration as per the Clause in Loan Agreement and filed an Application before the Hon'ble High Court for appointment of Arbitrator. However, it is relevant to point out here that existence of an arbitration Clause for appointment of Arbitrator is not an impediment in admission of the cases under Section 7 of the IBC. This is in accordance with the Judgment of Hon'ble Supreme Court of India in the case of ***Indus Biotech Pvt. Ltd. vs. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Ltd.) & Ors (2021) ibclaw.in 52 SC*** in which the Hon'ble Apex Court observed that when there is an arbitration pending under Section 8 of the Arbitration Act as well as an Application under Section 7 of the IBC, which is yet to be admitted, the Adjudicating Authority is duty bound to first decide upon the Application under Section 7 of the IBC even if the Application under Section 8 of the Arbitration Act is kept pending for consideration.
16. Moreover, judgments relied on by the Respondent in their compilation of judgements relate to Section 9 of the IBC only, where pre-existing dispute is a determining factor for admission of Petition under Section 9 of the IBC. In so far as the matter regarding admission of cases under Section 7 of the IBC is concerned, the Hon'ble Supreme Court in the case of ***Innoventive Industries Ltd. vs. ICICI Bank and Ors. reported in (2018) 1 SCC 407*** has held as under:

...30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

Thus, existence of dispute is not material in so far as the proceedings under Section 7 of the IBC is concerned.

17. Further, the Hon'ble Apex Court in the above mentioned judgment has also pointed out to the records of the information utility reflecting the existence of a debt and a default to be a determining factor. In this case also the information utility has furnished a Record of Default in Form-D which was authenticated on 08.11.2023 and filed before this Adjudicating Authority vide diary no.5899 dated 22.11.2023. This Record of Default in Form-D issued by NeSL clearly shows the default amount as Rs.5 Crore, and the date of default as 25.08.2019, *albeit* with a remark "disputed" against the authentication. However, existence of a dispute is not relevant for the purposes of Section 7 of the IBC. It is pertinent to mention here that the Respondent in its objection filed on 13.12.2022 has not denied and has confirmed the availing of the loan for an amount of Rs.5 Crore, and also its disbursement in four different instalments by NEFT between 19.07.2018 and 24.08.2018. It is a matter of record that the loan has not yet been paid and the Cheques issued by the Respondent on 28.10.2020 were all dishonoured. The only defence taken by the Respondent that debts have been assigned through a Business Transfer Agreement which has been disputed by the Financial Creditor and its subsequent cancellation is also under dispute. However, these issues are not the matters to be decided by this Adjudicating Authority as discussed above.
18. In view of the above discussion, we are of the considered opinion that there is a debt and default in this case; and the Petition is filed within the limitation period. The threshold requirement is also fulfilled. Hence the present petition **CP (IB) No. 145 of 2022 is admitted** under section 7 of IBC and moratorium is declared in terms of Section 14 of the Code. As a necessary consequences of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:
- 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
 - b. any court of law, tribunal, arbitration panel or other authority;

- c. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - d. 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;
 - e. The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor;
 - f. It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
 - g. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
 - h. The order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of Section 31 or passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;
19. This bench appoints Mr Manish Kumar Registration No. IBBI/IPA-001/IP-P00856/2017-18/11438, having registered address: 103-104, Panchdeep Complex, Mithakhali Six Road, Navarangpura Ahmedabad 380009, Contact No: 9879061500, e-mail: mbhagat2003@gmail.com as Interim Resolution Professional to carry the functions as mentioned under the IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

The IRP shall carry out functions as contemplated by Section 15,17,18,19,20,21 of the IBC.

20. The Financial Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakhs Only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors.
21. The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.
22. A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send the copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

Sd/-

(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-

(K. BISWAL)
MEMBER (JUDICIAL)