

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH – IV**

CP (IB) 496/MB/2023

Under section 7 of the Insolvency and Bankruptcy
Code, 2016

In the matter of

State Bank of India

State Bank Bhavan, Madame Cama Road, Nariman
Point, Mumbai-400 021.

... Financial Creditor/Applicant

Versus

Advanatge Overseas Private Limited

[CIN: U05121MH2004PTC199195]

414/A-Wing, 4th Floor, Express Zone Off W.E.
Highway, Malad (East), Mumbai-400097.

... Corporate Debtor/Respondent

Order Delivered on: **10.11.2023**

Coram:

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Mr. Anu Jagmohan Singh

Mr. Kishore Vemulapalli

Appearances:

For the Financial Creditor

: Mr. Gaurav Joshi, Ld. Senior
Counsel a/w Mr. Feroze Patel,
Ms. Fatema Kachwalla & Mr.
Ashaan Allana.

For the Corporate Debtor

: Mr. Shyam Kapadia a/w Ms.
Nidhi Singh, Mr. Bubab Sayyed
& Ms. Nidhi Faganiya.

ORDER

1. This Company Petition is filed under section 7 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **State Bank**

of India ("the Financial Creditor") herein the "Applicant", seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Advanatge Overseas Private Limited** ("the Corporate Debtor").

2. The Corporate Debtor is a private company limited by shares incorporated on 10.18.2004 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its registered office is 414/A-Wing, 4th Floor, Express Zone Off W.E. Highway, Malad (East), Mumbai-400097. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present Petition was filed on 13.03.2023 before this Tribunal for claiming an Amount for a sum of INR 2730,51,66,175.58/- (Rupees Two Thousand Seven Hundred and Thirty Crores Fifty-One Lakhs Sixty-Six Thousand One Hundred and Seventy-Five and Fifty-Eight Paise only) as on 28.02.2023 including the outstanding principal and interest. The Date of Default as part IV is 08.08. 2018.Nesl Certificate (Authenticated) is placed on record.

Submissions made by the Financial Creditor:

4. The Financial Creditor submits that sometime in November 2012, the Corporate Debtor approached the Applicant to avail financial facilities. Accordingly, on March 15, 2013 a letter of arrangement was executed inter alia between the parties on the basis which the Corporate Debtor was granted facilities to the tune of Rs. 10 crores.
5. It is submitted that on March 18, 2013, the board of directors of the Corporate Debtor resolved to avail the Initial Facility sanctioned by

the Applicant. In addition, the Board of Directors of the CD also resolved to create equitable mortgage over certain properties of the Corporate Debtor.

6. The Financial Creditor submits that thereafter an Agreement of Loan- Cum-Hypothecation dated March 23, 2013 was executed between the Applicant and the Corporate Debtor (acting through its directors Mr. Jijo John and Mr. Maneesh Kumar Singh), wherein the terms and conditions with respect to the Initial Facility and its repayment schedule.
7. To secure the amounts granted under the Initial Facility, on March 23, 2013 a Guarantee Agreement was executed by Mr. John and Mr. Singh in favour of the Applicant. Vide the Guarantee Agreement, Mr. John and Mr. Singh personally guaranteed the repayment of the Initial Facility.
8. Thereafter, the Corporate Debtor approached the Applicant for enhancement of the Initial Facility. After discussions inter alia between the Corporate Debtor and the Applicant, on December 17, 2014 a Letter of Arrangement was executed, basis which the Initial Facility was enhanced to an aggregate amount of Rs. 51,00,00,000/- (Rupees Fifty-One Crore Only).
9. It is submitted that on December 26, 2014, the board of directors of the Corporate Debtor resolved to avail the Revised Facility sanctioned by the Applicant. In addition to avail the Initial Facility, the board of directors of the Corporate Debtor resolved to create equitable mortgage over certain additional properties of the Corporate Debtor. Accordingly, an Agreement of Loan for

Overall Limit was executed on December 29, 2014, setting out the terms and conditions with respect to the Revised Facility.

10. The Financial Creditor submits that for securing the amounts sanctioned under the Revised Facility, the following documents were executed:
 - a. Agreement of Hypothecation of Goods and Assets dated December 29, 2014 executed by the Corporate Debtor in favour of the Applicant.
 - b. Deed of Guarantee for Overall Limit dated December 29, 2014 executed by Mr. John and Mr. Singh in favour of the Applicant.
 - c. Deed of Guarantee for Overall Limit dated January 10, 2015 executed by Mr. Shrikant Bhasi (director of the Corporate Debtor) in favour of Applicant.
 - d. Deed of Guarantee for Overall Limit dated January 10, 2015 ("Original Guarantee") executed by Asian Business Connections Private Limited ("ABCPL") in favour of the Applicant, as Corporate Guarantor.
11. The Financial Creditor further submits that in April 2016, the Corporate Debtor again approached the Applicant seeking a renewal and an enhancement in the Revised Facility. On April 7, 2016, the Applicant by way of a letter of arrangement, sanctioned facilities aggregating to Rs. 6249.50 Crores ("Facility").
12. Accordingly, a Supplemental Agreement of Loan for Increase in Overall Limit was executed on May 12, 2016, setting out the terms and conditions with respect to the Facility.

13. To secure the amounts granted under the Facility, the following documents were executed:
- a. Supplemental Agreement of Hypothecation of Goods and Assets for enhanced Overall Limit dated May 12, 2016 executed by the Corporate Debtor in favour of the Applicant;
 - b. Supplemental Deed of Guarantee for enhanced Overall Limit dated May 12, 2016 executed by Mr. John and Mr. Singh in favour of the Applicant;
 - c. Deed of Guarantee for Overall Limit dated May 12, 2016 executed by Mr. Gagan Sharma and Mr. Dinesh Arcot Chelvaraj in favour of Applicant;
 - d. Supplemental Deed of Guarantee for enhanced Overall Limit dated May 12, 2016 ("Supplemental Guarantee") executed by the ABCPL in favour of the Applicant.
 - e. Deed of Guarantee for Overall Limited executed by Advantage Oils Pvt Ltd ("Advantage Oils") dated May 12, 2016.
 - f. Supplemental Deed of Guarantee for enhanced Overall Limit dated May 29, 2016 executed by Mr. Shrikant Bhasi in favour of Applicant.
14. In addition to the above, a mortgage was created on immovable properties of the Corporate Debtor and Advantage Oils, to secure repayment of the Facility.
15. As the Corporate Debtor failed to adhere to the terms and condition of the Facility and failed to repay the amounts due under the NFB WC (LC) Limit for Merchant Trading facility and under the NFB Credit Exposure Limit for Merchanting Trade, the loan account of the Corporate Debtor was classified as a NPA.

16. On January 7, 2019, the Applicant issued a legal notice ("Notice") inter alia calling upon Corporate Debtor to repay an amount of Rs. 1388,87,38,968 (Rupees One Thousand Three Hundred Eighty-Eight Crores, Eighty-Seven Lakhs, Thirty-Eight Thousand Nine Hundred Sixty-Eight only) being the outstanding amount as on November 30, 2018 along with further interest from December 1, 2018, within 15 days from the receipt of the notice. By way of this Notice, the Applicant also invoked the Original Guarantee and Supplemental Guarantee and called upon ABCPL and Advantage Oils, in their capacity as the Corporate Guarantors, to repay the outstanding amounts within 15 days from the receipt of the Notice. However, neither the Corporate Debtor or ABCPL and Advantage Oils responded to the notice nor Re-paid the outstanding dues.
17. On January 30, 2019, the Applicant filed an OA under Section 19 of the Debts Due to Banks and Financial Institutions Act, 1993 before the Debts Recovery Tribunal, Jabalpur inter alia against the Corporate Debtor, for recovery of Rs. 1408,57,30,754/-.
18. On March 11, 2020, the Corporate Debtor addressed a letter to the Applicant requesting for settlement of its dues. The above request was repeated by the Corporate Debtor on May 5, 2020.
19. On September 5, 2020, the Applicant addressed a letter providing the Corporate Debtor with an "One Time Settlement Offer" ("OTS"). It is submitted that the said OTS was agreed and accepted by the Corporate Debtor, ABCPL, Advantage Oils, Mr. Shrikant Bhasi, Mr. Dinesh Chevalraj, Mr. Gagan Sharma, Mr. Maneesh Kumar Singh and Mr. Jijo John on September 16, 2020.

20. The OTS was also placed before the board of directors of the Corporate Debtor on September 15, 2020, wherein the board of directors, after deliberating, approved the same and agreed to be bound with the terms and conditions of the OTS.
21. As per the terms of the OTS amount was to be paid in 4 tranches:
- a. The first tranche of Rs. 31.70 crores were to be paid upfront.
 - b. The second tranche of Rs. 165.96 crores were to be paid within 6 months of sanction.
 - c. The third tranche of Rs. 203 crores and fourth tranche of Rs. 24.34 crores were to be paid within 3 year of sanction.
22. In compliance with the terms of the OTS, on May 11, 2021, the Corporate Debtor issued an undertaking. This undertaking was executed by the Corporate Debtor, ABCPL, Advantage Oils, Mr. Shrikant Bhasi, Mr. Dinesh Chevalraj, Mr. Gagan Sharma, Mr. Maneesh Kumar Singh and Mr. Jijo OF M John.
23. As a result of the above, the parties arrived at an amicable settlement. Accordingly, on June 25, 2021, the parties jointly filed an application for a consent decree to be passed by the DRT in the OA.
24. The Financial Creditor submits that on April 26, 2022, a judgment was passed by the DRT ("Judgment"), wherein, it was agreed that the Defendants to the OA (which included the Corporate Debtor) would pay an amount of Rs. 425 Crores to the Applicant. It is pertinent to note that the DRT vide the Judgment recorded that the counter claim filed inter alia by the Corporate Debtor would

stand withdrawn and the same would not be revived in event of any failure.

25. In the Judgment it was expressly stated that in the event the Defendants to the OA failed to adhere to the terms of the OA, the entire outstanding amount would be payable by them. It is submitted that in terms of the settlement arrived by the parties, as recorded in the OTS and Judgement, till date an aggregate payment of Rs. 105.19 Crores has been paid.
26. As the Corporate Debtor failed to adhere to the terms of the OTS, the Applicant addressed a letter to the Corporate Debtor, with a copy marked to ABCPL, Advantage Oils, Mr. Shrikant Bhasi, Mr. Dinesh Chevalraj, Mr. Gagan Sharma, Mr. Maneesh Kumar Singh and Mr. Jijo John on January 2, 2023, highlighting the Corporate Debtor's failure to clear the outstanding amount and its failure to abide by the terms of the OTS. In the said letter, the Applicant stated that the OTS has failed due to the Corporate Debtor's failure in complying with its terms and hence, the entire outstanding amount became due and payable.
27. It is also pertinent to note that the outstanding amount has been acknowledged by the Corporate Debtor in its financial accounts ending March 31, 2019 and March 31, 2020. By this acknowledgment the period of limitation was extended. Hence, the present petition is within limitation.
28. The Financial Creditor submits that owing to failure to comply with the OTS and the Judgment (which was binding on all parties, including the Corporate Debtor), the outstanding amounts, as

originally filed before the DRT were revived. In this regard, the Applicant submits that the present application is within limitation.

29. The Financial Creditor submits that due to acknowledgment of debt by the Corporate Debtor in the various correspondences and settlement offers referred above, the period of limitation stands extended and the present application is within the period of limitation.
30. The Financial Creditor submitted that the *Hon'ble Supreme Court vide order dated January 10, 2022, adjudged that "for the purposes of computing the period of limitation the entire period between March 15, 2020 and February 28, 2022" would stand excluded*. Hence, the present application is within limitation. Till date the Corporate Debtor has failed to repay the outstanding dues and has thus breached the terms of the Facility.
31. In view of the above facts and circumstances, the applicant has filed the present application against the corporate debtor.

Submissions made by the Corporate Debtor:

32. The Corporate Debtor submits that the Applicant has not approached this Hon'ble Tribunal with clean hands.

32.1 It is stated that the petition is clearly an attempt to execute a consent decree of the Hon'ble DRT which is not the object of the Code.

On 25.06.2021, the Applicant and the Respondent had jointly filed an application for a consent decree before the Hon'ble DRT, Jabalpur. The Hon'ble DRT, Jabalpur

passed its order on 26.04.2022 on the joint application of the Applicant and Respondent for consent decree. The order clearly contemplates the Applicant to apply for a Recovery Certificate and to execute the same. That under Section 7 of the Code cannot be used to enforce/ execute a decree or order of a court.

- 32.2 The respondent submitted that the alleged default is squarely covered under the protected period under Section 10-A of the Code. The Petition has been filed by the Applicant solely on the basis of an alleged default of part-payment of the 2nd tranche of the OTS, and the date of such alleged default according to the Applicant is 04.03.2021 as evident from legal notice dated 02.01.2023 issued by the Applicant before the filing of the petition. It is submitted that the alleged default date i.e 04.03.2021 falls within the notified period u/s 10A.
- 32.3 The petitioner further submitted that the Applicant has in fact waived the alleged default. The sole alleged default in the Petition is the part payment of 2nd tranche of the OTS which according to the Applicant occurred on 04.03.2021. However, the said alleged default has been waived by the Applicant itself by subsequently entering into a joint application for filing Consent Terms on 25.06.2021. Once having waived the alleged default there cannot be revival of such alleged default.
- 32.4 It is submitted that there is no "financial debt" or "default"; The commercial dealings between the parties are intrinsically linked to letter of credit facilities which are

made available pursuant to deposits kept by the Respondent with the Applicant Bank. The huge deposits kept with the Bank had become onerous to the Applicant due to change in interest rate. The Applicant could not find adequate avenues to deploy the deposits of the Respondent and abruptly started pressurizing the Respondent to reduce the deposits. It was in this context that a Letter of Arrangement dated 13.04.2016 came about to be issued to the Respondent for a total sanction of Rs 6,249.50 crores (out of which Rs. 249.50 crores were towards hedging of dollar LCs), which is being referred by letter of arrangement dated 07.04.2016 by the Applicant. There was no fresh sanction of any facility by the Applicant rather it was the existing truncated LCs of Rs. 6,000 crores.

- 32.5 It is submitted that the original claim (based on revival theory of the Applicant) is clearly time barred and the true nature of transactions between the parties (which has been suppressed by the Applicant) cannot be ignored as is being suggested by the Applicant;

Findings:

33. Heard the Ld. Counsel for the Financial Creditors and the Ld. Counsel for the Corporate Debtor and perused the records.
34. The following facts are not in dispute:
- 34.1 On 07.04.2016, the Applicant by way of a Letter of Arrangement sanctioned facilities amounting to Rs. 6249.50 Crores to the Corporate Debtor.

- 34.2 A supplemental agreement of Loan for increase in overall limit was also executed on 12.05.2016 and to secure the debt mortgages and personal guarantees were executed by the Corporate Debtor.
- 34.3 On Account of default by the Corporate Debtor to adhere to the terms and conditions of the facility granted, the Applicant on 30.01.2019 filed and OA before the DRT Jabalpur.
- 34.4 At the Request of the Corporate Debtor vide their Letters dated 11.03.2020 and 05.05.2020, an OTS Settlement was proposed by the Applicant. The Corporate Debtor issued an undertaking on 11.05.2021 in compliance to the OTS and thereafter both parties filed consent terms before the DRT in June,2021, on which Judgement was passed by the DRT on 26.04.2022. The said order provided that in the event of default the entire outstanding amount would be payable by the Corporate Debtor. Accordingly, vide recall notice dated 02.01.2023 the Applicant recalled the entire loan amount with interest.
- 34.5 The Corporate Debtor had admitted its liability in its Financial Accounts ending on 31.03.2019 and 31.03. 2020.
- 35 In view of the facts of the case as stated above it is a clear case of Financial debt which is disbursed against consideration for time value of money and thus falls within the purview of Section 5 (8) of the IBC. In view of the undertaking given by the Corporate Debtor on 11.05.2021 w.r.t OTS and admission of liability in the financial statements of the Corporate Debtor, the period of limitation stands extended.
- 36 Pursuant to the OTS proposal, the Corporate Debtor gave an undertaking on 11.05.2021 and filed consent terms before DRT in

June, 2021. The Consent decree was given by the DRT in April, 2022 pursuant to which recall notice was issued on default by the Corporate Debtor. This is beyond the 10A period and hence, the submission of the Corporate Debtor that the petition is covered under section 10A is without merits.

- 37 The Corporate Debtor in its reply has stated that there is no default. However, on ascertainment of DRT Judgement passed on 26.04.2022 the Corporate Debtor was to pay the outstanding amount which the Corporate Debtor failed to pay. Hence default is established.
- 38 It is the Corporate Debtor case that having moved before DRT for execution of decree, it is not permissible for the Applicant to use provisions of IBC and to execute the decree as there exists statutory mechanism under RDDB Act to enforce default/breach of consent decree. This issue is raised by the Corporate Debtor is no longer res-integra. The *Hon'ble Apex Court* in the case of "*Tottempudi Salalith Vs. State Bank of India and another*" held that doctrine of election cannot be applied to prevent Financial Creditor from approaching NCLT for initiating CIRP against the Corporate Debtor under the IBC, 2016.
- 39 Upon perusal of records, this Bench is of the considered opinion that there is no dispute regarding the fact that the Corporate Debtor owes debt to the Financial Creditor and has defaulted in the payment of debt. Hence, the debt due and default is established. Hence, this Company Petition is liable to be admitted.
- 40 The Financial Creditor has proposed the name of **Mr. Sunit Jagdishchandra Shah**, Registration No: IBBI/IPA-001/IP-

P00471/2017-18/10814, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration.

41 The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

42 It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP (IB) 496/MB/2023** filed by **STATE BANK OF INDIA**, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Advanatge Overseas Private Limited [CIN: U05121MH2004PTC199195]**, the Corporate Debtor, is **Admitted**. We are hereby directing the Suspended Board of Director to Co-operate with the RP/IRP for smooth functioning of CIRP proceeding with providing necessary documents/information as required by the RP/IRP.

- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
- (i) 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;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium:
- - (i) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be

notified by the Central Government in consultation with any sectoral regulator;

- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) **Mr. Sunit Jagdishchandra Shah, Registration No: IBBI/IPA-001/IP-P00471/2017-18/10814**, having address at 801-802, 8th Floor, Abhijeet 1 Mithakhali, Six Roads, Navrangpura, Ahemdabad-9, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the 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 a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

- (h) The Financial Creditor shall deposit a sum of Rs. 5,00,000/- 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 (CoC).
- (i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-
ANU JAGMOHAN SINGH
Member (Technical)

Sd/-
KISHORE VEMULAPALLI
Member (Judicial)