

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH, CHENNAI**

IBA/780/2019

*(Filed under Section 7 of the Insolvency and Bankruptcy Code, 2016
r/w Rule 4 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016*

In the matter of **M/s. MPL 2 Wheelers Private Limited**

M/s. Sundaram BNP Paribas Home Finance Limited

Reg. Office at 21, Patullos Road,
Chennai – 600 002.

... *Financial Creditor*

-Vs-

M/s. MPL 2 Wheelers Private Limited,

Reg. Office at F1, Abdul Regency, 1st Floor,
No.6, South Mada Street, Srinagar Colony,
Saidapet, Chennai – 600 015.

... *Corporate Debtor*

Order pronounced on 13th November, 2020

CORAM :

**R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

*For Financial Creditor
For Corporate Debtor*

*: S. Sathiyarayanan, Advocate
: Ambili Menon, Advocate*

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

1. Under consideration is an Application filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") by one **M/s. Sundaram BNP Paribas Home Finance Limited** (hereinafter referred to as "**Financial Creditor**") against

M/s. MPL 2 Wheelers Private Limited (hereinafter referred to as "Corporate Debtor").

2. From Part-I of the Application, it is evident that the Financial Creditor is a Limited Company incorporated on 02.07.1999 and having CIN: U65922TN1999PLC042759. From Part-II of the Application, it is evident that the Corporate Debtor is a Private Limited Company which was incorporated on 15.09.2011 and having CIN: U5040TN2011PTC082348 with the Nominal Share Capital of Rs.7,25,00,000/- and Paid-up Share Capital of Rs.3,50,00,000/-.

3. From Part-III of the Application, it is seen that the Financial Creditor has proposed one **Mr. A. Mohan Kumar** (Reg. No. IBBI/IPA-002/IP-N00377/2017-2018/11120) as the Interim Resolution Professional (IRP) and the written communication of the said IRP obtained in Form-2 is placed at page No.64 of the typed set filed along with the Application. Part-IV of the Application discloses the total amount of debt from which it is evident that the Financial Creditor has claimed a sum of Rs.2,79,08,639/- as against the Corporate Debtor and that the account of the Corporate Debtor was classified as Non – Performing Asset (NPA) on 31.10.2016.



4. Part – V of the Application contains the list of documents filed by the Financial Creditor in order to prove the existence of Financial Debt, which are as follows;

- i) Loan Agreement dated 30.06.2015.
- ii) Deed of Guarantee dated 28.05.2015.
- iii) Memorandum Confirming Deposit of Title Deeds dated 24.03.2016.
- iv) Notice issued by the Financial Creditor under Section 13(2) of the SARFAESI Act, 2002 dated 01.02.2017.
- v) Statement of Outstanding.
- vi) Statement of Accounts

5. It is submitted by the Learned Counsel for the Financial Creditor that the Financial Creditor and the Corporate Debtor entered into a Loan Agreement dated 30.06.2015, wherein the Financial Creditor sanctioned a sum of Rs.3,00,00,000/- (Rupees Three Crores Only) to the Corporate Debtor and as per the Loan Agreement, the Corporate Debtor is obliged to pay a sum of Rs.4,65,000/- (Rupees Four Lakhs Sixty Five Thousand Only) per month for a period of 120 months and the rate of interest was fixed at 14% p.a.

6. In pursuance of the same, the Financial Creditor has executed a Deed of Guarantee dated 28.05.2015 wherein the Corporate Debtor along with one M/s. Call Express Construction India (P)

Limited stood as a Guarantor to the loan disbursed by the Financial Creditor. Further, the Corporate Debtor has also executed a Memorandum of Deposit of Title Deeds in favour of the Corporate Debtor which document has been registered in the Sub - Registrar office, Neelangarai, Chennai as Document No.2107 of 2016.

7. The Ld. Counsel for the Financial Creditor submitted that the Corporate Debtor has failed to repay its dues and as such the account of the Corporate Debtor has been declared as NPA by the Financial Creditor on 31.10.2016 and pursuant thereto, the Financial Creditor has issued Demand Notice under Section 13(2) of the SARFAESI Act, 2016 to the Corporate Debtor on 01.02.2017, however, it is submitted that the Corporate Debtor has failed to make payment which is due to the Financial Creditor. Thus, it was submitted that the Corporate Debtor has committed 'default' in repayment of dues to the Financial Creditor and as such prayed for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

8. In relation to the Corporate Debtor, it is seen that Reply has been filed and it was submitted by the Ld. Counsel for the Corporate Debtor that the present petition is bad in law since it failed to disclose certain materials facts. It was submitted by the Ld. Counsel

for the Corporate Debtor that the Financial Creditor eventhough sanctioned loan to the tune of Rs.3,00,00,000/-, however disbursed only a sum of Rs.2,00,00,000/- and it is stated that the said loan was availed to purchase a flat in the name of the Corporate Debtor.

9. The Ld. Counsel for the Corporate Debtor further submitted that the Corporate Debtor has paid EMI for a sum of Rs.3,07,534/- per month continuously for a period of two years and the Company has already paid a sum of Rs.24,86,043/- to the Financial Creditor and also disbursed a sum of Rs.18,26,752/- on 31.04.2017 towards the said project to regularize the EMI.

10. It was further submitted by the Ld. Counsel for the Corporate Debtor that the Financial Creditor has already initiated action under the SARFAESI Act, 2002 and as such the mortgaged property has been taken possession by the Financial Creditor as on 04.04.2018 under the SARFAESI Act, 2002, which fact was concealed by the Financial Creditor in the present Applicant filed before this Tribunal. It was further submitted that the present Application has been filed for recovery of Rs.2,79,08,639/- and the Financial Creditor has admitted in the application itself that the estimated value of the property is Rs.4,22,37,595/- and as such since the value of the



property is more than the actual debt claimed by the Financial Creditor, the same should be set off against the outstanding loan.

11. It was also submitted by the Ld. Counsel for the Corporate Debtor that as on date of the application there is no "Financial Debt" outstanding from the Corporate Debtor as defined under Section 5(8) of IBC, 2016 since the Financial Creditor has already taken possession of the property of the Secured assets as early as on 04.04.2018 and the said property is under their possession. It was also submitted that the Financial Creditor has no right to invoke the provisions of IBC, 2016 after more than a period of one year after having taken possession to recover a home loan for which the secured assets has already been taken over by the Financial Creditor. Hence, it was prayed by the Corporate Debtor to dismiss the present Application.

12. Heard both sides and perused the records and pleadings before this Tribunal.

13. *Prima facie* it is the contention of the Ld. Counsel for the Corporate Debtor that since the Financial Creditor has initiated recovery proceedings under the SARFAESI Act, 2002 by taking possession of the property under Section 13(4) of the SARFAESI Act,

2002 and as such the Financial Creditor cannot initiate parallel proceedings under IBC, 2016 to recover the said sum from the Corporate Debtor. The identical issue fell for consideration before the Hon'ble NCLAT in the matter of **Rakesh Kumar Gupta -Vs- Mahesh Bansal & Anr.** in *Company Appeal (AT) (Insolvency) No. 1408 of 2019*, dated 20.02.2020, wherein the Hon'ble NCLAT has held as follows;

".....Insolvency & Bankruptcy Code 2016 is subsequent Code to SARFAESI Act of 2002 & Recovery of Debts Due to Banks & Financial Institution Act, 1993 with provision of Moratorium under Section 14 and Section 238 giving the Provisions of the Code overriding effect on other laws. The Judgment relied on by learned Counsel for Appellant does not appear to support the argument of learned Counsel for Appellant that if Bank had resorted to SARFAESI or proceeding before D.R.T. it is barred from resorting to IBC.

.....The pendency of actions under the SARFAESI Act or actions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filing an Application under Section 7 of Insolvency and Bankruptcy Code 2016, specially in view of Section 238 of IBC. The Application is more to bring about a Resolution of Corporate Debtor than any penal action or any recovery proceedings. We do not find any substance in the Appeal. The Appeal is dismissed. No costs."

14. It is also significant to refer to the decision of the Hon'ble Madras High Court in the matter of **M/s. Anandram Developers Pvt. Ltd. & Anr. -Vs- The National Company Law Tribunal & Anr.** in *W.P Nos. 29084 and 29085 of 2017 and W.M.P. Nos. 31321*

to 31323 of 2017 decided on 17.11.2017, wherein it has held as follows;

"48. Further contention of the petitioners that the action of the 2nd respondent in approaching the NCLT, would amount to forum shopping, also cannot be countenanced, for the reason, I&B code, 2016, has been enacted, consolidating various enactments, such as, Sick Industrial Companies (Special Provisions) Act, 1985; the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993; the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; Companies Act, 2003; Insolvency and Bankruptcy law and other laws.

49. As per Section 238 of the Insolvency and Bankruptcy Code, 2016, provisions of the Code shall have the effect, notwithstanding anything inconsistent therewith, contained in any other law, for the time being in force or any instrument, has effect, by virtue of such power. As per sub-Section (4) of Section 60 of the Code, the National Company Law Tribunal is vested with all the powers of the Debts Recovery Tribunal, as contemplated under Part II of the Code, for the purpose of sub-section (2) of Section 60 of the Code and therefore, it is for the NCLT to consider, all the materials, and pass appropriate orders.

50. Code enables a financial creditor to make an application, under Section 7 of the Code, if the Adjudicating Authority is satisfied that default has not occurred or the application is

complete and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application. Contention of the Learned Counsel that applications are mechanically admitted, cannot be accepted. Contention that approach of the 2nd respondent to NCLT, amounts to forum shopping is not tenable, as the Code enables filing of an application, notwithstanding the pendency of any proceedings, under the SARFAESI Act, 2002. When the code has not been stayed, the process envisaged in the code, has to be continued, and cannot be restrained."

15. The Hon'ble NCLAT also in the matter of **Harkirat S. Bedi -Vs-Oriental Bank of Commerce [2019] 108 taxmann.com 110 (NCLAT)** held as under;

"From the aforesaid finding, it is evident that even if a claim is disputed and if the amount payable is more than Rupees 1 lakh, the application u/s 7 of the I&B Code is maintainable. Mere pendency of the case before the DRT for adjudicating of such disputed amount cannot be a ground to reject the application u/s 7 of the I&B Code, if the Adjudicating Authority is satisfied that there is a 'debt' and 'default' and the application is complete. On the other hand, in view of Section 14 all such proceedings in respect of any debt will remain stayed and cannot proceed during the period of moratorium."

16. Thus, from the Judgment cited above, it is now trite that pendency of actions under the SARFAESI Act by the Financial Creditor is not a bar for filling an Application under Section 7 of IBC, 2016, especially in view of Section 238 of IBC. Further, the proceedings under IBC, 2016 cannot be said to be a parallel proceedings since the Application under Section 7 of IBC, 2016 is filed to bring about a Resolution for the Corporate Debtor, on the other hand the proceedings under SARFAESI Act, 2002 is for recovery of the amount which is due and payable to the Financial Creditor.

17. Under these circumstances, we are satisfied that there is a debt and default on the part of the Corporate Debtor and the Corporate Debtor is unable to repay its dues to the Financial Creditor. It has also been consistently held by the Hon'ble Supreme Court both in **Innoventive Industries Ltd. -Vs- ICICI Bank and another (2018) 1 SCC 407** as well as **Mobilox Innovations Pvt. Ltd. -Vs- Kirusa Software Pvt. Ltd. (2018) 1 SCC 353** after going through the Scheme of I&B Code, 2016 in depth in relation to an Application under Section 7 filed by a Financial Creditor as compared to the one filed under Section 9 by an Operational Creditor, in relation to a Section 7 Application where there is an existence of a 'financial debt' and its default is in excess of Rs.1,00,000/- (*now increased to Rs.1 Crore*), this Tribunal is bound to admit the Application and as a consequence trigger the Corporate Insolvency Resolution Process (CIRP) and in relation to a Section 7 Application defence of set off or counter claim put forth by the Corporate Debtor cannot be considered as a dispute in relation to the Financial debt and default in relation to it.

18. It is also seen that the present Application has been filed before this Tribunal on 17.06.2020 and as such the Notification issued by the Central Government in this regard by increasing threshold limit from Rs.1 Lakh to Rs.1 Crore would not apply to the

facts and circumstances of the present case, as the amount claimed to be in default is already more than Rs.1 Crore.

19. It is also noted that the Central government by way of an amendment inserted in Section 10A of I&B Code, 2016 wherein the default in respect of the dues arising from the period 25.03.2020 till 25.09.2020, (*now extended upto 25.12.2020*) has been excluded and as such in the present case from Part-IV of the Application it is seen that the default has occurred much prior to 25.03.2020 and hence Section 10A of I&B Code, 2016 also would not come to the aid of the Corporate Debtor.

20. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that this Application as filed by the Applicant – Financial Creditor is required to be admitted under Section 7 (5) of the I&B Code, 2016.

21. The Financial Creditor has proposed the name of **A. Mohan Kumar** having Registration Number *IBBI/IPA-002/IP-N00377/2017-2018/11120* as Interim Resolution Professional (IRP) and a written communication in the format prescribed under Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 has been filed by the proposed

IRP who is appointed as the IRP to take forward the process of Corporate Insolvency Resolution of the Corporate Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIR Process in relation to the Corporate Debtor in terms of the provisions of I&B Code, 2016.

22. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

- a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 respondent.

23. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.



- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

24. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

25. Based on the above terms, the Application stands **admitted** in terms of Section 7(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above



named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)
MEMBER (JUDICIAL)

Raymond