

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL.

KOLKATA BENCH,

KOLKATA

C.P (IB) No. 1074/KB/2019

In the matter of

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of

ICICI BANK LIMITED, having its regional office at ICICI Bank Limited, ICICI Bank House, 3A, Gurusaday Road, Kolkata 700019

...Financial Creditor

Versus

In the matter of:

HINDUSTHAN SMALL TOOLS PRIVATE LIMITED, Having its Registered Office at 30, Chowringhee Road, Kolkata, West Bengal 700 016.

...Corporate Debtor

Date of hearing: 23/12/2021

Order Pronounced on : 14 /01/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Joy Saha Sr. Advocate] For Financial Creditor

2. Avishek Guha]

1. Manju Bhuteria] For Corporate Debtor

2. Namrata Basu]

ORDER

Per: Rohit Kapoor, Member (Judicial)

1. The court is convened by video conference today.

2. This Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by ICICI Bank Limited through Ms. Arundhati Iyer, (hereinafter referred to as the Financial Creditor). The financial creditor seeks initiation of Corporate Insolvency Resolution Process in respect of Hindusthan Small Tools Private Limited/Corporate Debtor.

3. Part IV of the application deals with the details of the Financial Debt. For the facility of records these details are reproduced hereafter.

i. The Financial Creditor sanctioned various credit facilities to Eastern Gases Limited ("Borrower/EGL"). The Corporate debtor herein furnished various Corporate Guarantees in favour of the Financial Creditor as contractual comfort for the credit facilities availed by the Borrower, namely Eastern Gases Limited in Liquidation.

ii. In 2005, the Borrower had approached the Financial Creditor for availing working capital facilities for an aggregate of INR 11,95,00,000 ("Overdraft Facility"). Accordingly, the Financial Creditor had issued a Credit Arrangement Letter dated April 30, 2015, to the Borrower stipulating the terms and conditions of the Overdraft Facility more particularly set out in the said Credit Arrangement Letter. The Borrower inter alia entered into a Master Facility Agreement dated May 15, 2015, with the Financial Creditor for an aggregate amount of INR 11,95,00,000.

iii. It is stated that certain modifications to the terms of the Overdraft Facility were made vide an Amending Credit Arrangement Letter dated June 01, 2015. On the request of the Borrower for disbursement of Working Capital Demand Loan ("DCDL"), an Amending Credit Arrangement Letter dated December 31, 2015 was issued by the Financial Creditor incorporating the terms and conditions of the SCDL, as a sub/limit of the Overdraft Facility along with an additional Derivative facility aggregating to INR 1,10,00,000.

iv. A renewal Credit Arrangement Letter dated March 31, 2016 was issued by the Financial Creditor for renewal of the Overdraft Facility. Further, pursuant to the revision in the facilities sanctioned, a Supplemental Facility Agreement dated May 24, 2016 was executed by and between the Borrower and the Financial Creditor.

v. Over and above the aforesaid limits constitution the facilities duly sanctioned and granted to EGL, due to technical error, on August 31, 2016, an excess drawing power of INR 9,99,75,000.00 (Rupees Nine Crores Ninety – Nine Lacs Seventy Five Thousand Only) was

inadvertently made available for utilization in the overdraft account of the Borrower. Since this excess drawing power was incorrectly set-up in the account of the Borrower due to technical error in the system of Financial Creditor, it cannot be interpreted to form part of any credit arrangement letter(s) issued by Financial Creditor of facility agreements (including) supplemental agreements thereof) executed by and between the Borrower and Financial Creditor.

vi. It may be noted that prior to the erroneous set-up of INR 9,99,75000 on August 31, 2016, the working capital facilities sanctioned to the Borrower were fully utilized/drawn. Despite being aware of this fact, the Borrower made draws of an amount aggregating to INR 7,09,71,097.73 from its overdraft account between August 31, 2016 to September 1, 2016.

vii. Upon reinstatement of the sanctioned drawing power in the overdraft account as per the original sanction, the overdraft account of the Borrower was overdrawn by an amount of INR 7,09,71,097.73 (Rupees Seven Crores Nine Lacs Seventy One thousand Ninety Seven and Seventy Three Paise Only) (hereinafter referred to as the "Overdrawn Amount") as on September 02, 2016, being the amount drawn by the Borrower in excess of sanctioned limits of the overdraft facility.

The Borrower was forthwith intimated by the Financial Creditor about the erroneous limit set up vide an email dated September 02, 2016.

viii. It is submitted/that despite repeated and regular reminders from the Financial Creditor, the Borrower failed and neglected to service its debt obligations in the aforesaid overdrawn account, as a result of which the current amount of claim (outstanding dues) of ICICI Bank stands as INR 28,81,26,05.42 as on May 31, 2019, which includes the overdrawn amount owed by the Borrower to the Financial Creditor.

ix. The details of the various corporate guarantees furnished by the Corporate Debtor in favour of the Financial Creditor:

i. Deed of Guarantee for working capital facilities executed by M/s. Hindusthan Smalls Tools Private Limited dated May 15, 2015 (Corporate Guarantee) and letter confirming continuing guarantee dated May 29, 2016.

ii. Deed of Guarantee for derivative facility executed by M/s Hindusthan Small Tools Private Limited dated May 24, 2016.

x. The aforementioned corporate guarantees dated May 15, 2015 and May 24, 2016, along with the confirmation dated May 29, 2016 are hereinafter collectively referred to as the "Hindusthan Small Tools Pvt Ltd Corporate Guarantees")

The Hindusthan Small Tools Pvt Ltd Corporate Guarantees have been annexed herewith and are a part of "EXHIBIT-G" and is "EXHIBIT-H" respectively

xi. It is stated that the Financial Creditor recalled the aforesaid credit facilities vide Loan Recall Notice dated May 08, 2017 along with the addendum dated September 06, 2017 on account of the Borrower having failed to repay the amounts due and outstanding to the Financial Creditor. The Financial Creditor thereafter invoked the Hindusthan Small Tools Corporate Guarantees vide invocation letter dated May 12, 2017 along with the addendum dated September 06, 2017 and the Corporate Debtor failed to repay the amounts demanded in its capacity as a guarantor. Consequently, the amounts stated below became due and payable to the Financial Creditor from the Corporate Debtor.

As on May 31, 2019, the Borrower has failed to repay an amount aggregating to Rs. 28,81,26,056.42 (Rupees Twenty Eight crore eighty one lakhs twenty six thousand and fifty six and forty two paise only) due to the Financial Creditor.

In view of the aforesaid, as May 31, 2019 the Corporate Debtor is liable to pay an amount of Rs. 28,81,26,056.42 in its capacity as the guarantor of aforesaid credit facilities.

xii. It is further submitted that the amount in default under the Overdraft Facilities as on May 31, 2019 by the Borrower was Rs. 28,81,26,056.41/- (Rupees Twenty Eight Crore Eighty One Lakhs Twenty Six Thousand and Fifty Six and Forty Two Paise Only) together with interest, default interest, future charges and commission. The details of the computation of amount and days of default have been annexed herewith at EXHIBIT "D".

On account of the aforementioned default by the Borrower, the Financial Creditor issued a letter of invocation dated May 12, 2017 along with the addendum dated September 06, 2017 invoking the Hindusthan Small Tools Corporate Guarantees furnished by the Corporate Debtor in favour of the Financial Creditor.

The Corporate Debtor thereby in its capacity as the Guarantor is in default for a total amount of Rs. 28,81,26,056.42 as on May 31, 2019.

4. In reply, it is stated on behalf of Corporate Debtor that the Corporate Debtor is not a borrower of credit facilities granted by the Financial Creditor. The Corporate Debtor stood as a

guarantor to the credit facilities provided by Financial Creditor to one Eastern Gases Limited. It is also an admitted position that the borrower being Eastern Gases Limited is now in liquidation pursuant to orders passed by this Tribunal. Initially by an order dated November 8, 2017 an application under Section 7 of the Code being C.P. (I.B.) No. 482/KB2017 was admitted and Resolution Professional was appointed. Thereafter, by order dated August 21, 2018 this Tribunal started process of liquidation of the borrowers being Eastern Gases Ltd. The liquidation process is continuing as of today. Copies of orders dated November 8, 2017 and August 21, 2018 are annexed herewith and marked with the letter "R1".

5. In view of the admission of the aforesaid application against the borrower the present application is not maintainable. It is pertinent to mention that both the applications under Section 7 of the IBC, Code 2016 are in verbatim claiming the exact same claim.

6. In addition thereto prior to execution of guarantee by the Corporate Debtor in favour of the Financial Creditor on behalf of the borrower, the borrower executed a counter guarantee of Rs. 13,05,00,000/- in favour of the Corporate Debtor on May 24, 2016. Thus the Corporate Debtor is entitled to a sum of Rs. 13,05,00,000/- in favour of the Corporate Debtor on May 24, 2016. Thus the Corporate Debtor is entitled to a sum of Rs. 13,05,00,000/- from the borrower.

7. During the course of arguments and as is borne out from the application under Section 7, the Financial Creditor has stated that over and above the aforesaid limits constituting the facilities duly sanctioned and granted to EGL, due to technical error, on August 31, 2016, an excess drawing power of the INR 9,99,75,000.00 (Rupees Nine Crores Ninety – Nine Lacs Seventy Five Thousand Only) was inadvertently made available for utilization in the overdraft account of the Borrower, Since this excess drawing power was incorrectly set-up in the account of the Borrower due to technical error in the system of Financial Creditor, it cannot be interpreted to form part of the any credit arrangement letter(s) issued by Financial Creditor or facility agreements (including supplemental agreements thereof) executed by and between the Borrower and Financial Creditor.

8. It is further stated that this amount was utilized/drawn by the borrower. The Ld. Senior Counsel has referred to deed of guarantee executed between the Financial Creditor and the guarantor and stated that the guarantor is also liable for the above referred amount of Rs. 9,99,75,000/- erroneously credited in the account of the borrower and utilized by the borrower.

9. It is further stated by the Ld. Senior Counsel that the guarantor is unconditionally and absolutely liable for this amount also and therefore the present application under Section 7 has been filed against the guarantor.

We have considered the respective submissions of the Ld. Counsel for both the parties and observed as under.

In the written notice filed by the Financial Creditor it has been stated that it is correct that the Financial Creditor granted credit facilities to the borrower as disclosed. It is also correct that the credit facilities to the tune of Rs. 11,95,00,000/- was granted in favour of the borrower. It is also correct that the working capital demand loan was also sanctioned thereafter credit facilities was also renewed. It is also not in dispute that the Corporate Debtor stood as guarantor upto credit facility provided till May 24, 2016.

10. However, allegedly, by mistake after disbursement of credit facility and renewal of corporate guarantee as aforesaid, on 31st May, 2016 the Financial Creditor owing to an alleged technical error provided overdraft credit facilities of Rs. 9,99,75,000/- in favour of the borrower. Such incident was not known to the guarantor being the Debtors. The borrower, however utilized Rs. 7,09,71,097/- facility provided erroneously as alleged, to it. The disbursal of erroneous facility and utilization thereof was not known to the Corporate Debtor herein. The Corporate Debtor's liability is therefore restricted to the amount of credit facilities provided to the borrower as the same was beyond credit facility and beyond binding agreement between the parties.

11. From the facts stated hereinabove and after perusal of the documents of the record we find that the Financial Creditor had sanctioned overdraft facility to the borrower namely Eastern Gases Limited which is now under liquidation. The aggregate of total amount overdraft facility claim of Rs. 28,81,26,056.42/- together with interest, default interest, future charges and commission.

12. It is also borne out from record as mentioned above it was due to technical error on 31st August 2016 an excess amount of Rs. 9,99,75,000/- was inadvertently made available in the account of the borrower and it was used by the borrower (Page 9 of the Petition), that the guarantee was given by the Corporate Debtor herein this petition for an amount of Rs. 13,05,00,000/-. It is also a matter on record the Financial Creditor issued letter dated 14th September 2017 to the Corporate Debtor under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI), Act 2002.

13. From the facts stated hereinabove and the records referred thereto we are of the considered opinion ;

i.The liability of the guarantor, Corporate Debtor herein this application cannot be extended to the amount of Rs. 9,99,75,000/- which according to the Financial Creditor/Applicant herein which was inadvertently put into the account of the borrower.

ii.The liability of the guarantor is limited to the extent of amount for which the CIRP was initiated against the borrower.

14. In the present petition the claim has been made by the Financial Creditor to the tune of Rs. 28,81,26,056.42/- which includes the amount of Rs. 9,99,75,000/- transferred into the account of the borrower admittedly due to error/inadvertence and also not with the consent of the guarantor. During the course of the arguments the Ld. Senior Counsel for the applicant bank submitted that the present application may be allowed to the extent of the amount of Rs. 13,05,00,000/-

15. In the argument on behalf of the Corporate Debtor, it has been stated that during the course of the hearing the Learned Counsel appearing on behalf of the Financial Creditor admitted that the guarantee was only for a sum of Rs.13,05,00,000/- and not Rs.28,81,26,056.42 as alleged in the petition. It is an admitted fact that the petition has been filed on the basis of inflated claim knowingly and as such the petition is liable to be rejected with costs.

16. The National Company Law Tribunal Rule 2(19), reproduced herein after, define pleadings as under:-

“ 19. “Pleadings” means and includes application including interlocutory application, petition, appeal, revision, reply, rejoinder, statement, counter claim, additional statement supplementing the original application and reply statement under these rules and as may be permitted by the Tribunal”.

17. Rule 11 gives inherent powers to this Tribunal, and which reads as under:-

“ 11. Inherent Powers- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal”.

18. We deem it fit to exercise the inherent powers and admit this petition to the extent of amount i.e. Rs.15,76,26,056.42 which is above the thresh-hold limit for filling this application and reject this petition for the rest of the amount of alleged default of Rs INR 9,99,75000... as the same could not be included in the default amount for the reasons stated hereinabove.

19. The Financial Creditor has suggested the name of **Mr. Kuldip Verma**, as the IRP, in case the order of admission is passed in the present case. He has also filed Form 2, addressing the NCLT, Kolkata Bench that he agrees to accept the appointment as the IRP, if an order admitting the petition is passed. He also affirmed that there are no disciplinary proceedings pending against her with the Board or Indian Institute of Insolvency Professional ICAI.

20. The application is complete in all respects.

21. Having gone through and considered the pleadings and documents placed on record by both the parties, we consider it to be a fit case for admission of the present petition, and initiation of CIRP against the Corporate Debtor. We therefore pass following orders:-

ORDERS

i.The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating corporate Insolvency Resolution Process against the Corporate Debtor is hereby *admitted to the extent as indicated above*.

ii.We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii.Moratorium is declared for the purpose referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under sub-Section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv.Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- a. The institution of suits of 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;
- b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor 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 Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (52 of 2002);
- v. The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi. 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.
- vii. The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution Process.
- viii. 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 the 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.
- ix. **Mr. Kuldip Verma**, IRP, registered with Insolvency and Bankruptcy Board of India having Registration No. **IBBI/IPA-001/IP-P00014/2016-17/10038**, Email ID- kuverma@gmail.com is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production or written consent within one week from the date of receipt of this order.
- x. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the Insolvency commencement date.
- xi. The Financial Creditor/Applicant is directed to deposit **Rs. 5,00,000/- (Five Lakhs)** appointed hereinabove within three days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.
- xii. Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii. List the matter on **22/03/2022** for the filing of the Progress Report.

xiv.Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on **14/01/2022**.

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