

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V**

C.P. 43 OF 2021

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

In the matter of

IBM India Private Limited

No. 12, Subramanya Arcade, Bannerghata Main Road, Bangalore – 560 029

..... Financial Creditor

V/s

Powersoft IT Private Limited

Sunstream City, IT, Unit No. 1, Building No. 1, Near EEH Mulund (East), Mumbai – 400 081

.....Corporate Debtor

Order reserved on: 22.12.2022

Order Pronounced on: 15.02.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via videoconference)

For the Petitioner: Adv. Shamiana I/b Adv. Rakesh Sawant

For the Corporate Debtor/ Respondent: Mr. Adv. Meghna Arvind a/w Adv
Nishit Dhruva, Adv Astha Ojha &
Adv Prakash Shinde i/b MDP &
Partners

Per: Shri Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by IBM India Private Limited, hereinafter called as “**Petitioner**” seeking to initiate of Corporate Insolvency Resolution Process (“**CIRP**”) against Powersoft IT Private Limited hereinafter called as “**Corporate Debtor**” by invoking the provisions of Section 7 Insolvency and Bankruptcy code (hereinafter called “**Code**” read with rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of an unresolved Financial Debt of Rs. 72,17,315.03/-.

Facts of the Case

2. The Petitioner submits that it had entered into a Term Lease Master Agreement dated 28.10.2011, (herein after referred as “**TLMA**”) with the Respondent Company. The TLMA would be effective when a Term Lease Supplement is signed by both the Parties. In order to secure the financial assistance, one Hubtown Limited had executed a corporate guarantee dated 29.09.2011 in favour of the Petitioner. Thereafter further supplements were executed between the parties. Apart from that a Master Financing Agreement dated 03.12.2014, (herein after referred as the “**MFA**”), was also executed wherein the Respondent was the borrower and Hubtown Limited was the co-borrower.
3. As per the TLMA Clause 31, the Petitioner was entitled to levy a late payment fee of 2% per month, in the event the Respondent failed to pay

invoice amount. A similar provision was also made under Clause 20 of the MFA. It was further provided in the MFA that, in the event of failure of the Respondent in making payment towards the outstanding amount, the Petitioner was entitled for terminating the transaction and the Respondent was required to pay an amount equivalent to the current instalment. Further, the Corporate Guarantee dated 29.09.2011 provided for issuance of notice to the Guarantor of the Respondent, in the event the latter fails to make payment. Thereby the Guarantor shall be liable to pay the sum demanded within 15 days of receipt of such notice.

4. The Petitioner submits that the Respondent was unable to clear the dues and in the view of the same the Petitioner had issued a letter of demand dated 08.01.2019 to the Respondent calling upon the latter to make payment of outstanding dues on or before 18.01.2019. In this regard, the Petitioner had also issued a letter of demand dated 18.01.2019, to the Corporate Guarantor of the Respondent calling upon it to make the outstanding dues by 25.01.2019. As the Respondent and its Guarantors did not make payments, the Petitioner issued a Legal Notice Dated 04.04.2019 calling upon them to make payment of Rs. 63,71,026.24/- along with late payment fees at the rate of 2% per annum due under the TLMA and MFA. The Respondent and its Guarantors however failed to make payment. The Petitioner issued another legal notice dated 22.07.2019, demanding payment of Rs. 84,09,482.55/- wherein Rs. 63,77,695.89/- was claimed as the principal amount and Rs. 20,31,786.66/- was claimed as interest.
5. The Petitioner is entitled to an amount of Rs. 72,17,315.03/- together with late payment fee which is due under the MFA. Wherein an amount of Rs. 52,49,175.89/- claimed as principal and amount of Rs. 19,68,139.14/- claimed as the late payment fee. Hence the present Petition.

Reply of the Respondent

6. The Respondent has filed a reply controverting the allegations made in the Petition.
7. The Respondent in its reply has taken defence that the present cannot be termed as a 'Financial Debt' within the meaning of Section 5 (8) of the Code as the alleged debt due is in nature of services which have been rendered by the Petitioner. As the agreement mentions that the Petitioner is required to lease out equipment which includes internal programming which is integral to the functioning of the equipment. Therefore, the debt claimed by the Petitioner is not of a nature of 'Financial Debt'. The Respondent submits that the Petitioner has failed to place on record a letter dated 10.10.2019 (Exhibit-A to the Affidavit in Reply), wherein the Petitioner itself admitted that the present debt claimed is an Operational Debt.
8. The Respondent has also taken a defence that the present debt claimed by the Petitioner is barred by laws of limitations. For this purpose, the Petitioner has relied upon Exhibit G to the Petition. Wherein the Petitioner has mentioned that the amount became due and payable in August 2017, and the present Petition having been filed on 12.08.2021, which is beyond the period of limitation.

Rejoinder by the Petitioner

9. The Petitioner has filed an Affidavit in Rejoinder to address the defence raised by the Respondent. The Petitioner has denied the contentions raised by the Respondent. The Petitioner has stated that the debt claimed by it does fall within the meaning of 'Financial Debt' within a meaning of Section 5(8) of the Code. It is the Respondent's case that the amount claimed by the Petitioner arises out of the TLMA. However, the debt arises out of the MFA which can be seen from the Agreement itself.

10. The Petitioner submits that the present debt is well within limitation as the Petitioner had issued a Demand Notice dated 08.01.2019 for the amounts due by the respondent. The Petitioner has also placed its reliance upon an Order of Hon'ble Supreme Court in Suo Moto Writ Petition (Civil) (S) no. 3/2020 wherein the hon'ble Apex was pleased to suspend the limitation period from 23.03.2020 to 29.02.2022. Therefore, the present Petition is well within limitation.

Sur-Rejoinder by the Respondent

11. The Respondent has filed an affidavit in Sur-Rejoinder denying the contentions made against it by the Petitioner.

Findings

12. We have heard the counsel for the parties and gone through the records carefully.

13. By way of this petition, the Petitioner has claimed that a total amount of Rs.72.17 lakhs was outstanding against the Corporate Debtor which includes the principal amount of Rs.52.49 lakhs and interest of Rs.19.68 lakhs. Undisputedly, the present Petition was filed on 12th of August 2021. It can also not be disputed that vide Notification dated 24th March 2020, the threshold limit was enhanced from Rs.1,00,000 to Rs.1,00,00,000. That being so, in this case the Petitioner does not meet the threshold limit which is otherwise mandatory in view of the aforesaid notification dated 24th March 2020.

14. During the course of arguments, the counsel for the Petitioner has argued that the threshold limit of Rs.1,00,00,000 as per the notification dated 24th March 2020, cannot be applied to the instant case. In this regard, the counsel for the Petitioner has pointed out that the instant

Petition was supposed to be filed by the Petitioner much earlier to 24th March 2020, but due to COVID-19 conditions, the same could not be filed in the month of March 2020. The Petitioner has further pointed out that due to COVID-19 conditions, there are Orders of the Hon'ble High Court due to which the Court staff was not coming on duty regularly and further to that the Hon'ble Supreme Court in its Suo Moto Writ Petition No. 03/2020 has directed that the period from 23.03.2022 to 29.02.2022, is to be excluded from the period of limitation. The counsel for the Petitioner has further contended that taking into consideration all the circumstances and the judgement of the Hon'ble Supreme Court, the present petition cannot be said to have been hit by the notification dated 24th March 2020.

15. Having thoughtfully considered the contentions raised by the counsel for the Petitioner, we are of the considered view that this same are not tenable. It is a matter of common knowledge that even during the prevalence of COVID-19 conditions, the online filing of the case in the NCLT were never suspended. The notification regarding the enhancement of threshold limit was issued on 24 March 2020 whereas the instant Petition has been filed on 12.08.2021, i.e. after a period of about 18 months. Since the filing of the case was never closed, no period can be excluded to save the Petitioner from the rigours of the notification dated 24th March 2020, which clearly provided a cut-off date that after the issuance of the notification, no case under the threshold limit of one crore would be entertained under section 7,9 or 10 of the Code. So far as the law laid down by the Hon'ble Supreme Court in the Suo Moto case Supra relied upon by the counsel of the Petitioner is concerned, the same cannot be applied to the facts and circumstances of the present case as the question of limitation is not involved in the instant case.

16. As the result of the above brief discussion, we are of the considered view that the present case is liable to be dismissed considering the fact that

the amount claimed to be in default is less than one crore which violates the notification dated 24th March 2020, it is ordered accordingly.

17. In view of above, C.P. 43 of 2021 is **dismissed** being not maintainable.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)