

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I
KOLKATA**

CP (IB) No. 131/KB/2023

In the matter of:

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority).

In the matter of:

Indian Renewable Energy Development Agency Limited
[CIN: U40108DL1987GO1027265]

...Financial Creditor

Versus

J.H.V. Sugar Limited
[CIN: U15421WB1997PLC085863]

...Corporate Debtor

Order pronounced on: 02 February 2024

Coram:

Shri Rohit Kapoor : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances (through hybrid mode):

For the Financial Creditor : Ms. Soumana Mukherjee, Advocate
Mr. Damandeep Singh Bhalla, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") by Indian Renewable Energy Development Agency Limited, represented by its Chief Manager, Mr. Anudeep Yadav authorized through a Board Resolution dated 21 May 2004 seeking to initiate Corporate Insolvency Resolution Process ("**CIRP**") against J.H.V Sugar Limited ("**Corporate Debtor**").

3. The Corporate Debtor was incorporated on 11 November 1997, having CIN: U15421WB1997PLC085863. It's registered office is Kamlalaya Centre, 156-A, Lenin Sarani, Room No. 212, IInd Floor, Kolakta-700013. Therefore, this Bench has jurisdiction to deal with this petition.
4. The present petition was filed on 20 June 2023 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of 24,95,05,121/- (Rupees Twenty Four Crore Ninety Five Lakh Five Thousand One Hundred and Twenty One only) as on 31 March 2023. The date of default has been mentioned as 30 December 2015.
5. The petition was reserved on the grounds of whether the Company Petition is maintainable.

Submission of learned Counsel appearing for the Financial Creditor

6. The learned Counsel submitted that the Corporate Debtor had availed loan facilities *vide* sanction letter dated 26 July 2011 for Rs.5710.50Lakh . Thereafter the Corporate Debtor defaulted in its schedule of repayment. The Financial Creditor issued a demand notice on 16 December 2015. After receipt of the notice, the Corporate Debtor undertook to repay the loan but failed. The account of the Corporate Debtor was classified as Non- Performing Asset on 31 March 2017 and hence, another recall notice was sent to the Corporate Debtor on 11 August 2017.
7. The Financial Creditor filed a Company Petition under section 7 of the Code in 2018 which was registered and numbered as C.P. (IB) No. 153/KB/2018. Thereafter the Corporate Debtor approached the Financial Creditor for a One Time Settlement (“OTS”), which was executed between the Financial Creditor and the Corporate Debtor.
8. On the basis of the OTS, the Company Petition was withdrawn *vide* order dated 17 July 2019. The Corporate Debtor failed to adhere to the schedule of repayment as noted in the OTS, despite making promises to repay the same. The Financial Creditor granted several extensions to the OTS, the last extension was granted on 31 January 2022 which was accepted by the Corporate Debtor on 08

February 2022. Under the said extension the Corporate Debtor was obliged to pay the debt on or before 25 November 2022.

9. The Corporate Debtor failed to adhere to the repayment schedule, hence, the Financial Creditor was constrained to withdraw the OTS *vide* letter dated 12 December 2022.
10. The present Company Petition was filed by the Financial Creditor with respect to the financial facility availed by the Corporate Debtor *via* loan agreement dated 03 October 2011.
11. It is submitted that the dates of disbursement of loan facility from 19 December 2012 to 30 November 2015 to the Corporate Debtor. It is further submitted that the financial debt is on the basis on the sanction letter dated 26 July 2011, demand notice dated 16 December 2015, recall notice dated 11 August 2017. Hence, the financial debt amounting to Rs.24,95,05,121/-.
12. It is submitted that there is no bar on the admission of the Company Petition based on the existing financial debt. In support of this contention, the learned Counsel placed reliance on the judgment of the Hon'ble NCLAT in ***Priyal Kantilal Patel v. IREP Credit Capital Private Limited & Anr., C.A. (AT) (Ins.) No. 1423 of 2022*** (paras 11 and 12) which is reproduced hereinbelow:

“11. When we look into the Part-IV of Section 7 Application, in the Application the Financial Debt as was originally claimed in the earlier application has been claimed. The Application is not founded only on the default of the consent terms rather application is founded on the original financial debt which was extended by the financial creditor to the corporate debtor.

12. The judgement which has been relied by Learned Counsel for the Appellant “Amrit Kumar Agrawal” (supra) was a case where section 7 application was filed on the ground of default in payment of settlement agreement where the court held that default in payment of settlement agreement does not constitute a financial debt. The facts of the present case are clearly distinguishable. Present is not a case where Section 7 Application has been filed only on the ground of default in the settlement agreement rather section 7 application has been filed on the basis of

original financial debt which was extended by the Financial Creditor to the Corporate Debtor. The mere fact that in earlier company petition, consent terms was arrived, which consent terms was breached by the corporate debtor, the financial debt which was claimed by the financial creditor would not be wiped out nor the nature and character of financial debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving premium to the corporate debtor who breach the consent terms. Another judgement which has been relied on by Learned Counsel for the Appellant is “Dr. Gopal Krishnan MS”, (supra) which is also judgement relying on “Amrit Kumar Agrawal”. The court in the facts of the said case came to the conclusion that debt is not a financial debt. The above judgement is also clearly distinguishable.”

13. It is further submitted that the withdrawal of the first Company Petition was not a simplicitor withdrawal, the Adjudicating Authority was intimated that the matter was settled in the terms of the OTS.

14. The learned Counsel submitted that the Adjudicating Authority has held that even if specific leave has not been taken at the time of withdrawing a Petition for re-initiating CIRO, then the same cannot be a bar for filing another Petition on the breach of the same financial debt. The learned Counsel placed reliance on ***Jai Balaji Industries Limited v. BST Infratech Limited, C.P. (IB) No. 911/KB/2020*** (paragraph 33) which is reproduced hereunder:

“33. Having gone through the petition, reply and rejoinder including all the documents filed by the parties on record particularly the paper book relating to the previous C.P. (IB) No. 431/KB/2017 and the Settlement Agreement dated 11th October 2018, it is our considered view that even if specific permission has not been sought to re-file the proceedings on the cause of action having arisen in favour of the Operational Creditor, once the Corporate Debtor has failed to comply with the terms and conditions fixed in the settlement agreement, the right of the Operational Creditor still subsists and he has all the rights to file this petition for enforcing the settlement agreement dated 11th October 2018 having been entered into by the parties and admitted before this Adjudicating Authority”

15. The learned Counsel placed reliance on *Pawan Putra Securities Private Limited v. Wearit Global Limited, C.P. (IB) No. 1039/KB/2018* (paragraph 19)

”19. On perusal of the order dated 31 January, 2020, liberty was not sought to restore the Petition in case the settlement failed on the day the withdrawal was prayed for. The withdrawal had been allowed pursuant to a settlement agreement between the Applicant and the Respondent and in terms of the settlement agreement and not a withdrawal simpliciter. Allowing such a contention that a petition cannot be revived if no liberty/leave of the Court has been sought, would cause injustice to a creditor who has diligently exercised his rights and filed the Company Petition and thereafter this restoration petition.”

16. It is further submitted that in none of the judgments relied on by the Financial Creditor, have the consent terms been produced before the Adjudicating Authority at time of withdrawal.

17. The learned Counsel submitted that there is no impediment in proceeding with the present Company Petition and the Company Petition is maintainable in the eyes of law.

Analysis and Findings

18. Heard the learned Counsel appearing for the Financial Creditor and perused the record.

19. The petition was reserved on the grounds of whether the Company Petition is maintainable or not.

20. The learned Counsel has placed reliance on the judgment of the Hon’ble NCLAT in *Priyal Kanilal Patel (supra.)*, wherein the Hon’ble NCLAT the following has been observed at paragraph 9:

“9. There is no dispute between the parties that on the consent terms which was entered between the parties, the earlier company petitioner 45/2020 was withdrawn. The same was clearly stipulated in paragraph 1.1(e). One more clause which need to be noticed is clause 9 which is to the following effect:

“9. The Corporate Debtor undertakes to fully comply with the payment schedule set out in Annexure A and Annexure B and represents that it shall not commit any default in releasing of the amounts agreed under the present Consent Terms. It is agreed by the parties that in the event

of default of the terms of the present Consent Terms on the part of the Corporate Debtor, in addition to the consequences provided in clause 8(B)(a)(iv) above, the Financial Creditor shall be entitled to claim the entire amount outstanding and revive Company Petition 45 of 2020. In the event of default committed by the Corporate Debtor, the Financial Creditor shall be entitled to claim the entire amount as may be due on the date of the default in terms of the Transaction Documents.”

21. In the present case, in the letter dated 05 March 2019, the Applicant has stated in paragraph 9, which is reiterated hereunder:

“9) In case the borrower is not able, due to any reasons, to pay the entire agreed OTS amount within stipulated time as mentioned in para (i) and (ii) above, the aforesaid OTS proposal shall be treated/stand withdrawn and the entire outstanding amount as per the Books of IREDA as of 30.09.2018 along with further interest, additional interest and liquidated damages up to date of payment shall become due and payable by the borrower to IREDA under the consent decree and the decision of IREDA in this regard shall be binding on the borrower and also IREDA shall be at liberty to exercise its rights to take all action against the borrower including resumption of Civil and Criminal proceedings to recover entire outstanding from the borrower.”

22. Further, in a letter dated 31 January 2022, sent to the Corporate Debtor, the Financial Creditor has stated that in case of default on the OTS payment, the OTS sanctioned and extended shall be withdrawn by the Financial Creditor without further notice and the amount already paid shall be adjusted against the total dues of the Company and that the Financial Creditor shall be entitled to recover all the dues as of 30 September 2018. The extension of the OTS along with the terms therein was accepted by the Corporate Debtor *vide* email dated 08 February 2022. Part IV of C.P. (IB) No. 153/KB/2018 states that the total amount claimed is Rs.26,41,62,243/- and Part IV of the instant Company Petition stated that the amount claimed in default is Rs,24,95,05,121/-. Hence, it is clear that the amount received through the OTS has been adjusted with the default that arose.

23. Taking note of the observation made by the Hon'ble NCLAT and the terms of the OTS given in the letter dated 05 March 2019, it can be concluded that the word "including" is not exhaustive and hence we are of the view that the right to revive this petition falls within the OTS proposal.

24. Let us now consider whether the present petition is barred by the principle of res judicata. The Hon'ble Supreme Court in *Ebix Singapore Pvt. Ltd. v. CoC of Educomp Solutions Ltd. and Anr., (2021) ibclaw.in 153 SC* held that:

"171. Res judicata cannot apply solely because the issue has previously come up before the court. The doctrine will apply where the issue has been "heard and finally decided" on merits through a conscious adjudication by the court."

In the present matter, the Company Petition was dismissed as withdrawn and was not dismissed after hearing both the parties and considering the merits in C.P. (IB) No. 153/KB/2018, hence the instant petition was not heard and finally decided. Thus, the present Company Petition cannot be said to be hit by the doctrine of res judicata.

25. Now let us see if the present petition is hit by the period of limitation. The date of default has been submitted as 30 December 2015. C.P. (IB) No. 153/KB/2018 was filed in 2018, within the period of three years, hence the same was filed within the period of limitation. C.P (IB) No. 153/KB/2018 was withdrawn on 17 July 2019 after entering into a One Time Settlement with the Corporate Debtor. In accordance to the OTS, the Corporate Debtor made payments and extensions were taken with respect to the OTS till 2022, hence there is a continuous acknowledgement on the part of the Corporate Debtor.

26. The present C.P. has been filed on the basis of the original financial debt and not the settlement agreement. Hence, the C.P. is maintainable and not barred by the period of limitation.

27. Lastly, the Hon'ble NCALT in *Priyal Kanilal Patel (supra.)* has held that "*the mere fact that instead of reviving company petition, a fresh company petition*

has been filed under section 7 shall not be reason to reject the company petition and not to entertain the company petition”.

28. In view of the above judgment, it is clear that filing of a fresh petition instead of reviving the old petition is maintainable, hence, the Company Petition is maintainable.
29. In view of the above observations, it is seen that the C.P. is maintainable and hence shall be heard on merits.
30. The Registry is directed to issue notice to the Corporate Debtor by speed post and email and place tracking information on record.
31. **CP (IB) No. 131/KB/2023** to come up on **06 March 2024** for appearance of the Corporate Debtor and further consideration.
32. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 2nd day of February 2024.

GGRB_LRA