

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1456(PB)/2019

IN THE MATTER OF:

Syndicate Bank

.....Financial Creditor

v.

M/s. Incom Wires & Cables Private Limited

.....Corporate Debtor

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

JUDGMENT DELIVERED ON 03.01.2020

CORAM:

**CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT**

**DR. DEEPTI MUKESH
HON'BLE MEMBER (J)**

PRESENT:

For the Financial Creditor: Ms. Anju Jain. Mr. Hitesh Sachar & Ms.
Namita Jose, Advocates

For the Respondent: Mr. Tammay Mehta, Ms. Priyadarshini
Verma & Ms. Rukmani Mukherjee,
Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditor'-Syndicate Bank has filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of M/s. Incom Wires & Cables Private Limited.

2. The Corporate Debtor- M/s. Incom Wires & Cables Private Limited is a company registered under the provisions of the Companies Act, 1956 and was incorporated on 08.09.1992. The identification number of the Corporate Debtor is U74899DL1992PLC050243 and its registered office is situated at C-46, Mayapuri, Industrial Area, Phase-II, New Delhi-110064.

3. The Financial Creditor has proposed the name of Interim Resolution Professional, Mr. Rakesh Jindal with the address II, E-64, Nehru Nagar, Ghaziabad-201001 and email id - ca.rakeshjindal@gmail.com. His registration number is IBBI/IPA-001/IP00375/2017-18/10632. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

4. The details of financial debt advanced by the petitioner-Financial Creditor have been set out in Part-IV of the proforma. The total amount sanctioned in two different forms namely Facility-1 (SODH, BG, ILC/FLC/Buyers Credit) & Facility-2 (Term Loan) is claimed to be INR 15,85,00,000/-. It is stated that the Facility-1 was valid till 31.10.2015 and Facility-2 which was for setting up of new plant at

Sikandrabad and purchase of machinery, was repayable in 72 equal monthly instalments commencing after one year from the date of 1st disbursement.

5. The Respondent executed several documents for availing the aforesaid financial assistance from the Petitioner. True Copies of each one of those namely, Composite Hypothecation Agreement, Guarantee Agreement, Omnibus Guarantee Agreement, Letter of Indemnity, Power of Attorney executed by the Respondent for collection of Bills, Book Debt and other receivables have been placed on record (Annexure-4(colly)).

6. The details of the security held by, or created for the benefit of 'financial creditor'-Syndicate Bank alongwith a letter confirming deposit of title deeds (at pg. 78) dated 14.12.2015 with the Bank have also been placed on record.

7. The Petitioner-Financial creditor has asserted that the account of the Corporate Debtor was classified as NPA on 01.01.2018. In view of the repeated defaults on the part of the Corporate Debtor to comply with the schedule of repayment of the principal and interest dues, the Financial Creditor issued a notice dated 02.01.2018 (Annexure-5) under Section 13(2) of the Securitization and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 to the Borrower-Corporate Debtor and Sureties.

8. The petitioner has then placed reliance on an objection raised by the Corporate Debtor to the aforesaid legal notice, reply to the said objections sent by the Bank, subsequent notice dated 04.10.2018 sent by the Bank, representation/reply dated 18.10.2018 sent by the Respondent and another legal notice dated 20.03.2019 sent by the Bank (Annexure-6 to 10).

9. A certificate under Section 2A(b) of the Bankers Book Evidence Act have been filed by the Financial Creditor along with print out of account statements relating to the Corporate Debtor in which financial debt were transferred by the Financial Creditor. The said certificate further disclosed sufficient compliance with the provisions of Section 2A(b) of the Bankers' Book Evidence Act. It is stated by the officer that the statement of accounts filed by the financial creditor are true and correct copies of the bank records maintained by the Financial Creditor in its computer.

10. The precise case of the Petitioner thus is that the total amount in default due to the Petitioner by the Respondent-Corporate Debtor



as on 30.04.2019 is Rs. 17,46,60,574.34/- including interest, costs and other charges.

11. Learned counsel for the Corporate Debtor has advanced numerous arguments to oppose the admission of the petition which are as under: -

1. The petition has been filed by the petitioner Bank on the basis of a sanction letter dated 29.10.2014. The said facility was valid till 31.10.2015 as per the Bank's submission and thus the present proceedings are much beyond the period of limitation. In that regard reliance has been placed on a judgment of Hon'ble the Supreme Court rendered in the case of **Jignesh Shah & Anr. v. Union of India & Ors.** (Writ Petition (C) No. 455 of 2019 decided on 25.09.2019).
2. The Bank has failed to produce any documents or show any record on the basis of which they are alleging and attributing default. The Bank has not stated how the said account was continuing till 2018, when as per the aforesaid sanction letter, the said facility was only valid till 31.10.2015.



3. Again, the Bank fails to show how the account statements from 01.01.2017 to 30.04.2019 can be true when the said facility has ended on 31.10.2015 and no continuing facilities have been attached.
4. In the event that the company was allegedly NPA on 01.01.2018 then why has no action been pursued to mitigate the amount and ensure that the collateral securities so provided are utilized towards discharge of the loan.
5. No documents have been attached to show that in fact the Bank Guarantee for an amount of Rs. 2 crores or multiple Bank Guarantee's of the said amounts, have been invoked and were payable and thus recoverable. Further there is no explanation as to what has happened to the 10% margin money in the form of an FD which was retained each time as per the Letter of Credit issued by the Bank. As to whether the said margin money used towards satisfaction of debt or was appropriated only towards some ancillary and penal interest charges.



6. That, Bank needs to specify exactly what is the amount which is in default and when the said has arisen to be a valid petition under Section 7 of the Code.
7. The prospective buyer of the collateral securities mortgaged in the Bank and the Respondent had repeatedly written to the Bank requesting for a NOC for release of the property papers so that the sale may be registered immediately. However, the Bank did not issue any NOC for the same and thus appropriated the advance money given by prospective buyer.
8. There are various discrepancies in the amount on different documents. This itself shows that the Bank is only claiming amounts as per their own whims and fancies.
9. There is a discrepancy of the date in two occasions on which the account has been declared as NPA i.e. 01.01.2018 and 02.01.2018 firstly as per Notice sent u/s 13 (2) of the SARFAESI Act and secondly as per Notice dated 04.10.2018.



10. The petitioner is resorting to forum shopping firstly before DRT- Lucknow and secondly before this Tribunal which is not permissible under the law.
11. The Respondent is a registered entity under the MSME Act, 2006. As per the report of the Insolvency Law Committee, it was explicitly recognized by the Committee the protection had to be given to MSME's, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSME's.
12. Subsequently an application being C.A. No. 1606(PB)/2019 has been filed by the Corporate Debtor again reiterating the submissions made in the reply. A prayer has been made to disallow the petition in its current format as the same is inconsistent with the Code.
13. A rejoinder to the reply has been filed by the Financial Creditor reiterating the submissions made in the petition and controverting the assertions in the reply.
14. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor-Bank has succeeded in



establishing a case for triggering the Corporate Insolvency Resolution Process.

15. The objection of the respondent is that the account of the Corporate Debtor has been wrongly declared as NPA. While dealing with petition under Section 7 of the Code, it is immaterial for us to examine as to when the account was declared as NPA. Under Section 7 petition, the Adjudicating Authority has to consider whether there is a debt due in law and facts and whether there has been a default in paying the financial debt. Hon'ble National Company Law Appellate Tribunal in the case of *Ranjit Kapoor v. Asset Reconstruction Company (India) Limited, in Company Appeal (AT) (Insolvency) No. 410 of 2018* has held that "the provision of NPA relates to SARFAESI Act, 2002 and has nothing to do with Code". Therefore, the objection of the Respondent that the account of the Respondent has been wrongly declared as NPA, cannot be a ground to reject the petition preferred by Financial Creditor under Section 7 of the Code, there being default in payment of financial debt.

16. Another objection of the Corporate Debtor is that the petitioner is resorting to forum shopping firstly before Debts Recovery Tribunal and secondly before this Tribunal. Such an argument looks attractive

at the first blush but lacks substance because the pendency of any proceeding much less before the DRT would not create a bar for initiation of Corporate Insolvency Resolution Process against a Corporate Debtor. In that regard reliance may be placed on the observations made by Hon'ble the Supreme Court in the case of ***Innoventive Industries Ltd. v. ICICI Bank and Ors.*** (2018) 1 SCC 407. Referring to Section 238 of the Code it has been held that the non-obstante clause of the Parliamentary enactment would prevail over the limited non-obstante clause of any earlier enactment. Therefore, the pendency of proceeding under the provisions of the SARFAESI Act or DRT would not exclude the jurisdiction of the Tribunal under the Insolvency and Bankruptcy Code, 2016.

17. So far as the objection raised relating to inconsistent claims in different proceedings is concerned, the Petitioner-Bank in the rejoinder has categorically clarified that mentioning of grant of various credit facilities amounting to Rs. 134.70 crores and also mentioning of amount due as Rs. 124.06 crores in the Notice under Section 13(2) of the SARFAESI Act, 2002 was merely a typographical error. Subsequently the correct position was brought to the knowledge of the Respondent vide reply of the Bank dated 06.03.2018. In any case we



are not to determine the amount of unpaid debt (default) and it shall be open for determination by Committee of Creditors.

18. The petitioner in the rejoinder has unambiguously stated that validity of facility is with respect to issuance of Bank Guarantee, letter of credit etc. and is totally different from tenor of payout to be made by the Respondent. The tenor of repayment of Term Loan was 84 months i.e. 7 years with 1 year of moratorium from date of 1st disbursement. It has then submitted the document has to be read as a whole and terms of any contract/document cannot be read in isolation. The last credit in the CC limit was received on 12.03.2018 and in Term Loan was on 12.12.2017. Thus, from that very dates the period of limitation has to be counted.

19. The other objection is that the Bank has refused to issue 'NOC' for release of the property papers and due to which the sale could not take place. We find this objection wholly without substance because the charged/mortgage assets are secured assets and lifting of charge would mean complete loss of security of the financial institution. We do not find any merit in the objection. We are also unable to appreciate that how admission of the instant petition would result in violation of



the object of the Code. It is wholly frivolous argument. Therefore, all others objections are over-ruled.

20. It is imperative to observe that Insolvency is not equivalent to winding up. This involves restructuring, re-planning and facilitation of evolving a resolution for the industry to survive. If the solution is well in sight then there would not be any difficulty for the Committee of Creditors to adopt a resolution plan in a time bound disciplined manner under the IBC. It would be acceptable to all the stake holders. It is only on the failure of a resolution that the liquidation process may have to be initiated in accordance with the provisions of Section 33 of IBC.

21. The Financial Creditor has placed various documents in relation to the disbursement of loan to the Respondent Company. The materials on record and the loan documents clearly depicts that the loan was sanctioned, disbursed and the loan agreements were properly executed. Respondent company utilized and enjoyed the loan facilities.

22. In addition, the Financial Creditor has filed the relevant statement of accounts duly certified in accordance with Banker's Book Evidence Act, 1891 as per the requirement of Form 1 Part V Column

C.P. No. (IB)-1146(PB)/2019

Syndicate Bank v. M/s. Incom Wires & Cables Pvt. Limited



7 of the application. True copy of statement of accounts submitted by the Financial Creditor pertaining to loan facility, kept during the ordinary course of banking business, based on which the claim has been raised, can be termed as sufficient evidence of the financial debt.

23. Section 4 of the Bankers' Books Evidence Act, 1891 provide for mode of proof of entries in bankers' books and the same read as under:-

“Section 4. Mode of proof of entries in bankers' books.-

Subject to the provisions of this Act, a certified copy of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.”

24. A perusal of the aforesaid provision would show that a certified copy of entry in a banker's books is to be regarded as *prima facie* evidence in all legal proceedings with regard to the existence of such entry. It must be admitted as sufficient evidence of the matters, transactions and accounts therein recorded in every case.

25. The Tribunal is not an adjudicating authority to ascertain the quantum of amount of default or to pass decree as to how much amount is actually due to the Petitioner-Financial Creditor. Adjudicating Authority is not to decide a money claim or suit. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default if it amounts to rupees one lac or above (Section 4) before admitting the petition.

26. We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our order dated 27.11.2018 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt. Ltd. (IB- 1039(PB)/2018).

27. After a reading of Section 7 of the Code along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.

28. As a sequel to the above discussion, this petition is admitted and Mr. Rakesh Jindal is appointed as an Interim Resolution Professional.

C.P. No. (IB)-1146(PB)/2019

Syndicate Bank v. M/s. Incom Wires & Cables Pvt. Limited



29. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code.

30. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

31. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by



the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.

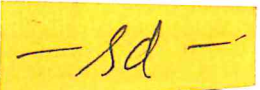
32. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

33. Before parting we must notice the complaint made against Financial Creditor in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditor as it is only fair to do so.

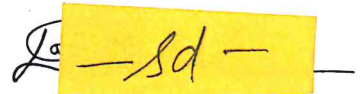
34. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of

Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

35. A copy of this order shall also be sent to the Secretary, Ministry of Corporate Affairs, New Delhi for compliance of directions issued in para 34 above.



**(M.M. KUMAR)
PRESIDENT**



**(DR. DEEPTI MUKESH)
MEMBER (J)**

03.01.2020
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