

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH,
Court-VI
NEW DELHI

Company Petition no. (IB)- 3005(ND)/2019

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Syndicate BankApplicant

Versus

RS Builtwell Private Limited:Respondent

Judgment Delivered on:25.02.2021


CORAM:

SHRI ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

DR. V. K. SUBBURAJ, MEMBER (TECHNICAL)

For the petitioner: Mr. Arkit Juneja Advocate.

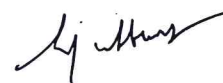
For the Respondent: None.



ORDER

Per: SHRI ABNI RANJAN KUMAR SINHA, MEMBER (J)

1. Syndicate Bank has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company RS Builtwell Private Limited referred to as the corporate debtor.
2. The Respondent Company RS Builtwell Private Limited against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 24.06.2003 having its registered office at G-74, First Floor, Right Side Shaheen Bagh, Abdul Fazak Enclave, Part-II, Jamia Nagar, New Delhi. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
3. It is appropriate to mention that the applicant Syndicate Bank, is a body corporate constituted under the the Banking Companies



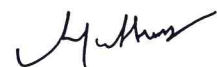
(Acquisition and Transfer of Undertakings) Act, 1970 having its Corporate Office at Manipal, Udupi, and amongst other branches, a branch office at Stressed Assets Management Branch, C-34, 3rd Floor, DDA Office cum shopping Complex, Opp. Moolchand Hospital, Lajpat Nagar, New Delhi-110024.

4. Mr. R.P Chandel, Chief Manager, Stressed Assets Management Branch, C-34, 3rd Floor, DDA Office cum Shopping Complex, Opp. Moolchand Hospital, Lajpat Nagar and authorized representative of the applicant bank, has preferred the present application on behalf of the applicant for initiation of corporate insolvency resolution process against the respondent corporate debtor in terms of the provisions of the Code.
5. It is seen from the case records that pursuant to notice to the respondent corporate debtor, no one has appeared on the behalf of the Corporate Debtor. One last opportunity was granted to the respondent on 09.01.2020 for filing reply. Despite several opportunities as reply was not filed by the respondent company, the defence of respondent was struck off and the respondents were proceeded *ex-parte* vide order dated 29.01.2020.
6. The applicant bank has filed the present application under Section 7 of the Code in the requisite FORM-1 to initiate Corporate Insolvency

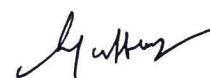


Resolution Process against the respondent Corporate Debtor under the Code.

7. The applicant has proposed the name of Mr. Arun Gajwani, for appointment as Interim Resolution Professional having registration number IBBI / IPA-002 / IP-00528/ 2017-18 / 11724 resident of B-572, Sainik Colony, Sector-49, Faridabad-121001 with email – id arungaj572@gmail.com. Mr. Arun Gajwani has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.
8. As per part IV of the application it is claimed that a sum of Rs.29,53,87,663/67 along with interest is due from the respondent company.
9. Applicant Bank has also filed the relevant statement of accounts along with certificate under Section 2A of the Banker's Books of Evidence Act, 1891.
10. The Pleaded case of the applicant is as:




- i. That in the year 2006, Corporate Debtor approached the Applicant Bank for Term Loan Facility. Accordingly, the Applicant bank vide sanction letter dated 26.12.2006 sanctioned short term loan of Rs. 940 Lacs for construction of 106 dwelling units in Singhapur Residency, Plot No. F-406, RHO-1, Sector-36, Greater Noida, which was repayable in 5 equal instalments of Rs. 188 Lacs commencing from 01.10.2007. The necessary documents were duly executed by the Corporate Debtor in favour of Applicant Bank on 16.01.2007.
- ii. That as there was default in repayment of said facilities, the account of Corporate Debtor has been declared as nn-Performing Asset with effect from 05.04.2008 in accordance with the directions or guidelines issued by the Reserve Bank Of India. That on 25.01.2008 the Corporate Debtor applied to structure the instalments and accordingly on 23.04.2008 Applicant Bank rephrased the repayment of the credit facility granted to the Corporate Debtor and the Corporate Debtor sent a letter accepting the repayment schedule as provided by the Applicant Bank.
- iii. Further, on 19.06.2009 the Corporate Debtor again sought for restructuring the payment instalments and on 30.06.2009 an agreement was executed between the Corporate Debtor and the



Applicant Bank. As there was default of repayment, on 28.10.2010, Applicant bank issued Notice under Section 13(2) of the SARFAESI Act, 2002 to the Corporate Debtor and demanded the entire outstanding amount i.e. Rs. 7,64,52,372.57 which includes Principal, Interest and other charges up to 30.09.2010. That on 24.02.2015 the Applicant Bank issued Possession Notice under Section 13 (4) of SARFAESI Act, 2002 to the Corporate Debtor regarding the Immovable Property bearing No. Plot No. F-406, RHO-1, Sector-36, District Gautam Budh Nagar, Greater Noida, UP which has been charged to the applicant bank on 16.01.2007 against the facilities availed and further, on 22.05.2015 the Notice of sale was issued to the Corporate debtor.

- iv. That as Corporate Debtor failed to make payments of the dues the Applicant left with no other option filed an O.A No. 461 of 2015 before the Debt Recovery Tribunal –I Delhi on 19.10.2015 and the same was adjudicated vide order dated 02.07.2019 whereby the Hon'ble Debt Recovery Tribunal-I directed the Corporate Debtor and the Guarantors to pay within a period of 30days a sum of Rs. 14,68,17,342.58/- along with pendentelite and future interest @17.95%P.A. compounded monthly till its realization. However, despite issuance of Recovery Certificate,

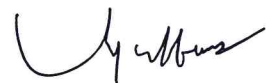


the corporate debtor failed to discharge its liabilities within 30 days in terms of the order/recovery certificate dated 02.07.2019.

v. The applicant has submitted that the Respondent corporate debtor failed to clear the outstanding dues and did not adhere to the terms and conditions of the loan agreement. The account of the corporate debtor was categorized as NPA on 05.04.2008. Consequently, applicant bank has initiated action against the corporate debtor under the provisions of SARFAESI Act, 2002 as well as under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

vi. The petitioner has placed on record the relevant statement of accounts duly certified as per Bankers' Books Evidence Act and has claimed that as on 30.09.2019 a sum of Rs.29,53,87,663.67 along with pendentlite interest and future interest @17.95% P.A. compounded monthly till its realization.

11. On the ground that huge amounts are outstanding, it is claimed that the respondent has become commercially insolvent and accordingly it is prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application.



12. It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

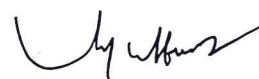
- a) Financial creditor
- b) Operational creditor, and
- c) Corporate debtor itself.

13. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the “Financial Creditor” is delineated under Section 7 of the Code, wherein only “Financial Creditor” / “Financial Creditors” can file an application. As per Section 7(1) of the Code, an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors.

14. The expressions “Financial Creditor” and “Financial debt” have been defined in Section 5 (7) and 5 (8) of the Code and precisely “Financial debt” is a debt along with interest, if any, which is disbursed against the consideration for time value of money.

15. *The Hon’ble NCLAT in the case of Ishrat Ali Vs. Cosmos Cooperative Bank Ltd. & Anr has observed that:*

- i. *“The date of coming into force of IBC Code does not and cannot form a trigger point of limitation*



for application filed under the Code. Equally, since "applications" are petitions, which are filed under the Code, it is Article 137 of the Limitation Act, 1963 which will apply to such applications.

ii. the date of default is the date for the purpose of computing the period of limitation of application under Section 7. The same principle is applicable in the present case. Mere filing of a suit for recovery or a decree passed by a Court cannot be held to be deferment of default. Therefore, we hold that a Judgment or a decree passed by a Court for recovery of money by Civil Court/ Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the 'I&B Code'.

iii. Also the action taken under Section 13(2) of the 'SARFAESI Act, 2002' cannot be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.

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iv. In an application under Section 7 relief is sought for resolution of a 'Corporate Debtor' or liquidation on failure. It is not a money claim or suit. Therefore, no benefit can be given to any person under Section 14(2), till it is shown that the application under Section 7 was prosecuted with due diligence in a court of first instance or of appeal or revision which has no jurisdiction."

16. In the light of the aforementioned decision passed by Hon'ble NCLAT when we shall consider the case in hand then we noticed that NPA was declared on 05.04.2008. Consequently, applicant bank has initiated action against the corporate debtor under the provisions of SARFAESI Act, 2002 as well as under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 on 19/10/2015 and case is registered as OA no. 461/2015 and on 02/07/2019 DRT passed the order and directed to pay the amount within 30 days from the date of order and on the basis of that petitioner claimed the date of default is on 02/08/2019. In our considered view, in view of the decision referred supra, action taken under SARFAESI Act cannot be counted for the period of exclusion u/s 14 of the limitation Act and since NPA was declared on 05/04/2008, therefore, the date of default is date of NPA .



And if we shall calculate the period of limitation from 05/04/2008, i.e date of NPA then the present application is filed in the year 2019, much after the period of limitation prescribed under Article 137 of Limitation Act, i.e, three years when right to apply accrue. Hence the present petition is barred by limitation.

17. For the reasons discussed above , we have no option but to dismiss the application on the point of Limitation.

Accordingly, same is DISMISSED as barred by limitation

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(DR. V.K.SUBBURAJ)
MEMBER (TECHNICAL)

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(SHRI ABNI RANJAN KUMAR SINHA)
MEMBER (JUDICIAL)