

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH: C- IV

CP(IB)-477MB-IV/2020

Under Section 7 of the I&B, 2016

In the matter of

Punjab National Bank (Intl.) Ltd.

Financial Creditor

Vs.

**Warana Dairy And Agro Industries
Ltd.**

Corporate Debtor

Order delivered on: 16.09.2021

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mrs. Suchitra Kanuparthi
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner:

Mr. Mithilesh Kumar Pandey,
Pradnesh Sabnish, Advocates

For the Corporate Debtor:

Mr. Ritesh Mahajan, Company Secretary
a/w Ms. Geeta Lundwani and Mr. Rohit
Gupta, Advocates

ORDER

Per: Suchitra Kanuparthi, Member (Judicial)

1. This is an application filed under Section 7 of the Insolvency and Bankruptcy (I&B) Code, 2016 by Punjab National Bank (Intl.) Ltd. (hereinafter called the 'Petitioner') seeking the Corporate Insolvency Resolution Process of Warana Dairy

- And Agro Industries Ltd. (hereinafter called the ‘Corporate Debtor’) on the ground that the Corporate Debtor committed breach by making default in repayment of the loan agreement and credit facilities entered into both the parties.
2. The Petitioner is a finance company incorporated and registered with the Registrar of Companies for England and Wales on 13.04.2006 bearing Company Number 05781326 and has filed this petition through its authorized person named Mr. Pramod Kumar.
 3. The Corporate Debtor is a company incorporated on 5.06.2008 bearing CIN U15203PN2008PLC132174 with Authorised Capital of Rs.74,00,00,000/- and a Paid-Up Share Capital of Rs.49,92,64,100/-.
 4. The Petitioner agreed to sanction a term loan facility of USD 5.00 Million (Rs.35,50,00,000/- Crore) vide terms and conditions as contained in Loan documents/Facility Agreement dated 14.01.2013. Various securities were provided by the Corporate Debtor including primary security (Property owned by the Borrower) First Charge on the Land and Building situated AT Kadoli, Paragaon, Amrutnagar, Warnanagar District Kolhapur owned by Shree Warana Agricultural Goods Processing Co-operative Society Ltd. As and by way of Collateral security, Simple Mortgage of the property being agricultural land bearing Gat No.728, 733, 734,736,737-A,737-A1, 737-A2 and 738-A-4 adm 0-40 R, 0-40R, 1-17R, 1-01R, 8-25-2 R, 2-40 R, 0-60 R and 0-50 R aggregating to 1473-2R lying and being at Mouje

- Pargaon, Taluka Hatanagle, Dist Kolhapur by Warana Agricultural Goods Processing Co-operative Society Ltd., Personal Guarantee of Mr. Chitrasen Nagnath Gulave. Further, Collateral as also created on the Corporate guarantees of Shree Warana Sahakari Dudh Utpadak Prakriya Sangh Ltd. and Shree Warana Agricultural Goods Processing Co-op Society Ltd.
5. The Borrower subsequently defaulted in repayment of the loans according to the repayment schedule. On 12.10.2018 a demand notice was issued to the borrower for repayment of the loan and to the Corporate guarantors.
 6. Further invocation notice of personal guarantees were issued on the Personal Guarantors on 12.10.2018 with due respect to the repayment of the facilities. However, the same were not adhered to and the facilities remained unpaid.
 7. The Respondent Company/Corporate Debtor did not adhere to the financial commitments made under the Loan Agreements and therefore the Corporate Debtor/Respondent Company is indebted to the Petitioner/Financial Creditor Company for a sum US\$5,725,994.06 (@71 (Rs. 40,65,45,578.00) Rupees Forty Crore Sixty-Five lac forty-five thousand five hundred seventy eight only) inclusive of the applicable interest and other charges.

The corporate debtor had agreed to repay the term loan in 26 installments with first instalment falling due on 31.12.2013 and last on 31.03.2020. The repayment schedule as agreed is as under:

S.No.	Repayment Date	Amount of Foreign Currency
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1.	31.12.2013	0.1125
2.	31.03.2014	0.1125
3.	30.06.2014	0.1125
4.	30.09.2014	0.1125
5.	31.12.2014	0.1125
6.	31.03.2015	0.1125
7.	30.06.2015	0.1125
8.	30.09.2015	0.1125
9.	31.12.2015	0.1125
10.	31.03.2016	0.1125
11.	30.06.2016	0.1500
12.	30.09.2016	0.1500
13.	31.12.2016	0.1500
14.	31.03.2017	0.1500
15.	30.06.2017	0.1750
16.	30.09.2017	0.1750
17.	31.12.2017	0.2250
18.	31.03.2018	0.2250
19.	30.06.2018	0.2375
20.	30.09.2018	0.2375
21.	31.12.2018	0.3250
22.	31.03.2019	0.3250
23.	30.06.2019	0.3375
24.	30.09.2019	0.3375
25.	31.12.2019	0.3375
26.	31.03.2020	0.3375
	Total	5.0000

8. It is submitted that the Corporate Debtor failed to make payment of EMIs as per the respective loan schedule and thus the Financial Creditor was forced to recall the loan facility under the loan agreement. The Table giving details of the outstanding amount is as follows:

Loan No.56000893	Amount (in Rupees)
Amount financed	USD 5,000,000 (@71 Rs. 35,50,00000)
Principal Outstanding	USD 4,245,049.72 (@71 Rs.30,13,98,530)
Interest	USD 1,480,944.34 (@71 Rs.10,51,47,048)
Total Amount Payable	USD 5,725,994.06 (@71 Rs.40,65,45,758)

9. The counsel for the Petitioner has also submitted the relevant extracts from the ledger book maintained by the Financial Creditor dated 07.01.2020 along with the Certificate issued by the Financial Creditor under the Bankers Book Evidence Act, 1891 which has been annexed at Annexure A10 (Colly).
10. On 12.10.2018 a Loan Recall notice/demand notice was issued to the Corporate Debtor for repayment of the loan and to the Corporate guarantors wherein, the Petitioner informed the Corporate Debtor that due to non-payment of loan amount as agreed, the account has become irregular and was termed NPA as on 01.08.2015. The Petitioner further terminated the term loan account as on 15.09.2018 and sought of the refund of the outstanding amount of \$5105380.255 which is inclusive

interest till 30.09.2018 plus interest at the rate of 6 months LIBOR plus 5% interest per annum with monthly interest from 01.10.2018 till actual realization of money.

**SUBMISSIONS ON BEHALF OF THE RESPONDENT BY WAY OF
AFFIDAVIT IN REPLY**

11. The Corporate Debtor claimed that the Petition is not bonafide and doesn't disclose the date of default and amount claimed by the Financial Creditor.
12. The counsel of the Respondent further submits that there is no explanation for calculation of the total claim amount of the Financial Creditor amounting Rs.40,65,45,758/- including interest and legal charges. The Petitioner has not disbursed a loan of Rs.35 Crore as wrongly stated in the petition, the actual amount disbursed is approximately Rs.27 Crore and out of which Rs.10.39 Crore has been repaid to the Corporate Debtor.
13. The counsel of the Respondent further submits that after the moratorium period U/s 7 of IBC for the said term loan was completed, the Corporate Debtor/Respondent repaid loan upto March 2016 regularly.
14. The counsel of the Respondent further submits that there is irregular cash flow and drought situation in Maharashtra leading to the difficulty for Corporate Debtor to meet the requirements of the Financial Creditor. Though the Corporate Debtor created infrastructure for milk, milk products and tetra packaging facility; the Corporate Debtor could not utilize the full capacity of the production. Further change in rates

- of milk and products by various policies issued by Government of Maharashtra affected the production of milk.
15. The financial assistance was taken in anticipation of job work from the government for tetra package production. The contract was worth Rs.204 Crore for supplying flavoured milk in 200 ml package. The contract led to huge investment by the Corporate Debtor and required supply of 2 Lakh packages of milk to 1500 schools in Mumbai. However, in February 2011 the policy of government changed due to political reasons and the government abruptly stopped the milk supply. Due to cancellation the Corporate Debtor faced a liquidity crunch and huge loss as the milk and milk products are perishable in nature
 16. The counsel of the Respondent further submits that the loan was disbursed at the exchange rate of Rs.54.46/- and the Corporate Debtor has repaid over USD 16.49 Lacs to the Financial Creditor till date but due to the change in foreign exchange rate, the Corporate Debtor has borne exchange loss of Rs.1,40,09,000/-.
 17. The counsel of the Respondent further submits that the Corporate Debtor has vide letter bearing Reference no. WDAIL/2018-19 dated 7 March 2019, submitted an OTS proposal to the Financial Creditor explaining the present situation and a reasonable offer of payment of Rs.10 Crore was made by the Corporate Debtor towards the principal amount but the same was rejected by the Financial Creditor.
 18. The counsel of the Respondent further submits that Financial creditor has wrongly included Corporate Guarantees and Personal Guarantees and these guarantees cannot be invoked by way of this petition.

19. The counsel of the Respondent further submits that a global turndown has taken place by the Covid-19 pandemic and subsequent lockdown situation and CIRP would cause further huge losses to farmers whom the Corporate Debtor supplies milk who are banking on the Corporate Debtor for financial support at present.

SUBMISSIONS ON BEHALF OF THE PETITIONER BY WAY OF WRITTEN ARGUMENTS/REJOINDER

20. The counsel of the Petitioner submits that the last instalment was received by the Corporate Debtor in February 2017.
21. The Petitioner pointed out that it is a foreign bank and is a financial creditor under section 5(7) of the Code which includes any person to whom a financial debt is owed. The definition of “person” under Section 3(23) includes a person resident outside India and thus, the proceedings under Section 7 is maintainable as the registered office of the Corporate Debtor is in the jurisdiction of this tribunal.
22. With regard to the defence of limitation, the Petitioner has submitted:
- (a) That the sanction letter as well as the loan agreement shows that the loan was repayable in instalments up to March 2020. Thus, the credit facility was live up to March 2020.
 - (b) The last instalment was paid by the Corporate Debtor on 17th February 2017. The loan agreement was however in force as the payment schedule was up to March 2020.
 - (c) On account of failure to pay the instalments as per the agreed schedule, the Financial Creditor issued a recall notice demanding the full repayment on 12.10.2018 upon which the entire outstanding became

due and payable. The present application was filed on 31.01.2020 and is thus within limitation.

(d) The Corporate Debtor in the second Reply has not elaborated how and why the claim is barred by limitation and has only made a bald statement to this effect.

(e) The Corporate Debtor has issued several letters in which the liability has been clearly admitted and in view of this acknowledgement of debt, in any case the limitation will start running afresh from the date of each acknowledgement.

FINDINGS:

1. The issue arising for consideration is whether the Petitioner has granted loan to the Corporate Debtor and whether the Corporate Debtor has defaulted in repaying the said amount.
2. It is an undisputed fact that the Petitioner has granted a loan of USD 5 Millions @71 amounting to Rs.35.50 Crores as on 14.01.2013, the loan was disbursed on 15.01.2013. The repayment schedule as agreed by the parties required that the Corporate Debtor would disburse the last installment as on 31.03.2020. The payment of last tranche of installment by the Corporate Debtor 23.02.2017. The table of outstanding amount due and payable is as follows:

Loan No.56000893	Amount (in Rupees)
Amount financed	USD 5,000,000 (@71 Rs. 35,50,00000)
Principal Outstanding	USD 4,245,049.72 (@71 Rs.30,13,98,530)

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Interest	USD 1,480,944.34 (@71 Rs.10,51,47,048)
Total Amount Payable	USD 5,725,994.06 (@71 Rs.40,65,45,758)

3. The Corporate Debtor provided security as first charge and provided a personal guarantee of Mr. Chitrasen Nagnath Gulave. Further, a collateral was created on corporate guarantees of Shree Warana Sahakari Dudh Utpadak Prakriya Sangh Ltd. and Shree Warana agricultural Goods Processing Co-op Society Limited.

4. Due to the non-payment of monies in the loan account, the account was termed as NPA as on 01.08.2015 and the last tranche of installment was paid by the Corporate Debtor on 23.02.2017. The Petitioner issued a recall notice on 12.10.2018 and sought a refund of the outstanding amount of \$5105380.255 which is inclusive interest till 30.09.2018 plus interest at the rate of 6 months LIBOR plus 5% interest per annum with monthly interest from 01.10.2018 till actual realization of money.

5. The Petitioner has contended that the Respondent has clearly acknowledged the liability by email on 31.03.2019. The said letter contains an unambiguous and clear admission of liability on the part of the Corporate Debtor and the email is reproduced below:

“We are ready to settle the loan account with paying of Rs.10.00 Cr. outstanding amount as on 15.01.2019. Details as follows: -

<i>Loan Type</i>	<i>Loan Sanction</i>	<i>Sanction amount in USD</i>	<i>Principal Outstanding in USD</i>	<i>Interest Outstanding in USD</i>	<i>Total Outstanding</i>	<i>Settlement amount</i>
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<i>Term Loan</i>	<i>Jan 2013</i>	<i>USD 5.00 Million</i>	<i>USD 4.19 Million</i>	<i>USD 0.65 Million</i>	<i>USD 4.84 Million</i>	<i>Rs. 10 Crores</i>
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It is requested to go through the proposal sympathetically & sanction Rs. 10.00 Crores as final settlement amount. We will pay Rs. 1 Cr. as down payment after one month from the date of sanction and allow us to pay balance amount of the settlement by Rs. 1.00 Cr. per month thereafter.

Submitted for your kind approval.”

6. The Corporate Debtor filed a reply pointing out that the Petitioner has not disbursed 35 Crore but has disbursed 27 Crore, out of which 10.39 Crore were repaid to the Petitioner. Further, they further objected to the calculation of term loan of USD 5 Million @71, when the loan was sanctioned @ Rs.54.46. Further, the Corporate Debtor contended that they were facing severe liquidity crunch due to change in the government policy and cancellation of contract of supply of 2 Lakh packages of milk to 1500 schools in Mumbai. The Corporate Debtor admitted that the loan was disbursed at the exchange rate of Rs.54.46 and that the Corporate Debtor has repaid USD 16.49 Lakh to the Petitioner. The OTS proposal was sent by the Corporate Debtor on 07.03.2019 wherein they offered to pay sum of Rs.10 Crore. However, the said proposal was rejected.
7. The Petitioner has granted the loan under the term loan facility of USD 5 Million sanctioned on 30.10.2012 and the terms and conditions mentioned in sanction letter dated 30.10.2013. The said amounts were disbursed to the Corporate Debtor, the Corporate Debtor provided the guarantee and collateral guarantee securing the debt. The said amount was to be repaid from the instalment due on 31.12.2013 till 31.03.2020. The said loan was recalled on 12.10.2018 due to non-payment of

monies and the last instalment was paid by the Corporate Debtor 23.02.2017.

8. The Petitioner also provided the bank statements for the period from 14.01.2013 to 24.12.2019 to show the outstanding dues as payable by the Corporate Debtor. The statement of account was also certified under Banker's Book of Evidence Act.
9. The Petitioner further states that it being an international bank is not governed by the RBI regulations and hence the declaration of NPA and date of default has to be determined purely on the contractual terms.
10. The contentions of the Corporate Debtor that the petitioner is a foreign bank cannot file this petition is untenable as Sec3(23) of I & B Code includes a person includes any other entity established under a statute and includes a person resident outside India. Therefore, it can be said that the present petition is maintainable, and the debt disbursed under the loan agreement dated 14.01.2013 shows that the loan was repayable in instalments upto March, 2020. Thus the credit facility was live upto March 2020. The last installment was paid by the Corporate Debtor on 17th February, 2017. The present petition was filed on 31.01.2020 which is well within the three-year limitation period and there is an acknowledgement of debt vide an OTS proposal.
11. In view of the aforesaid paragraphs, this bench is of the considered opinion that the Petitioner has disbursed the amount of USD 5 Million to the Corporate Debtor and the Corporate Debtor has defaulted in the payment of the said amount and has admitted the liability vide email dated 31.03.2019. Hence, the petition is admitted.

12. In light of the **M/s Innoventive Industries Ltd. V/s ICICI Bank & Anr. (Civil Appeal No.8337-8383 of 2017) decided by the Apex Court**, it is observed that this petition fulfils all the requisite conditions to admit a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 and therefore, the petition deserves to be admitted.

13. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in repaying the loan availed. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Financial Creditor as a major constituent for admission of a petition under section 7 of the I&B Code. Therefore, the Application under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:
 - (l) (a) the situation of suits or 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);

- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor
- (II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (IV) That the order of moratorium shall have effect from 16.09.2021 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.
- (V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (VI) That this Bench hereby appoints, Mr. Rakesh Bothra having Registration Number: IBBI/IPA-001/IP-P01758/2019-2020/12675, Email Address: ip.rakeshbothra@gmail.com; as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

14. Accordingly, this Petition is admitted.

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15. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-
Rajesh Sharma
Member (Technical)
16.09.2021

Sd/-
Suchitra Kanuparthi
Member (Judicial)