

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III

C.P. No. (IB) 972/MB/C-III/2023

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

In the matter of

Micro Capitals Private Limited

Having registered office at:

Shop No. 35, Sonam Shopping Center
CHS Ltd, Old Golden Nest, Phase 6,
Mira – Bhayander, Dist: - Thane - 401105

...Financial Creditor/Petitioner

Versus

Alka India Limited

Having registered office at:

Unit No. 102, Morya Landmark – II, Opp.
Infinity Mall, New Link Road, Andheri (West),
Mumbai- 400053

...Corporate Debtor/Respondent

Order pronounced on: 18th December 2023

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

Appearances:

For the Financial Creditor: Adv. Tanmay Kelkar, Adv. Abhishek Rane

For the Corporate Debtor: Adv. S.A. Pathak

Per: Ms. Lakshmi Gurung, Member (Judicial)

1. This Petition has been filed by Micro Capital Private Limited (“**Petitioner/ Financial Creditor**”) to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against Alka India Limited (“**Respondent/Corporate Debtor**”) under **Section 7** of the Insolvency and Bankruptcy Code, 2016 (“**the Code**”) for the alleged default on part of the Respondent in repayment of debt of **Rs. 5,26,84,473/-** (Rupees Five Crore Twenty-Six Lakhs Eighty-Four Thousand Four Hundred and Seventy-Three Only).
2. The Financial Creditor has entered into a Loan Agreement dated 01.06.2022 with one K Sera Sera & Vikram Bhatt Studio Virtual World Private Limited (“**Borrower**”) pursuant to the Borrower’s Application made to the Financial Creditor for loan of an estimated amount of Rs. 5,50,00,000/- with interest at 14% for setting up a virtual studio. The Corporate Debtor, being the Guarantor, was also a part of the above-mentioned Loan Agreement.
3. In consonance with the said Loan Agreement, the Financial Creditor disbursed the loan amount of **Rs. 5,26,84,473/-** between 02.06.2022 to 26.09.2022. The repayment schedule was annexed as Schedule I in the Loan Agreement and according to it, the loan was to be repaid after a period of 7(seven) months from 01.06.2022. Thus, the Loan amount was due from 01.01.2023.
4. The Borrower failed to make the repayment at the stipulated time. Thereafter, the Financial Creditor issued a Request Letter dated 04.01.2023 to the Borrower for repayment of Loan. The Borrower vide letter dated 10.01.2023 expressed their inability to repay the loan due to financial constraints.

5. Consequently, the Financial Creditor issued a Notice dated 18.01.2023 of Occurrence of Event of Default to the Guarantor, the Corporate Debtor herein, invoking the Bank Guarantee and calling upon it to make the repayment of the loan amount with 14% interest till the date of repayment. In reply to the above issued Notice, the Corporate Debtor vide Letter dated 27.01.2023 requested a re-structuring of the repayment schedule of said loan in addition to a request for a 3-month extension period. The extension was granted, however, the Corporate Debtor failed to make the repayment.
6. On 02.05.2023, the Financial Creditor once again requested for repayment of loan to which the Corporate Debtor vide Letter dated 09.05.2023 requested for a further extension of 1(one) month. When the period of 1-month extension was over, the Financial Creditor again issued a Notice of Occurrence of Event of Default on 15.06.2023 requesting for repayment of loan within 7(seven) days. However, the Corporate Debtor did not make the payment.
7. Later, the Financial Creditor, through its Advocates, issued a Demand Notice on 30.06.2023 to the Corporate Debtor recalling the entire loan amount together with interest, overdue interest and other charges as per Clause 14(a) of the Loan Agreement. The Corporate Debtor replied on 03.07.2023 stating that the Corporate Debtor is going through certain financial hardships and requested for further extension of 6(six) months for repayment of loan amount. However, till date, the Corporate Debtor had not made any payment with respect to the loan amount.
8. The Financial creditor submits that in view of the facts and circumstances of the case, the debt is a Financial Debt as per Section 5(8) of the Code and therefore, the Financial Creditor is entitled to initiate insolvency proceedings against the Corporate Debtor under section 7 of the Code.

REPLY OF THE CORPORATE DEBTOR

9. The Corporate Debtor filed its Reply to the Company Petition on 08.11.2023 wherein the Corporate Debtor acknowledged the debt. The Corporate Debtor has also acknowledged the subsequent exchange of letters between the Financial Creditor and the Corporate Debtor. The default amount was also not disputed but the 'Event of Default' was denied by the Corporate Debtor. It was submitted that there was no 'Event of Default' at the Corporate Debtor's end as it had never denied to repay the loan and had only requested for extension of time due to existing financial issues. Therefore, there was no question of imposition of consequences of an event of default under Clause 14(a) of the Loan Agreement.
10. The Corporate Debtor further submits that the Financial Creditor did not give any heed to the Letter dated 03.07.2022 through which the Corporate Debtor requested a further extension of 6 months period and went ahead to file the present Petition. It is also submitted that the filing of Petition under the Code is in breach of Clause 20 of the Loan Agreement in which the parties have agreed to refer the matter to Arbitration in case of default.
11. The Corporate Debtor submits that as on date the Corporate Debtor is undergoing grave financial hardship and is not in a position to discharge its financial debt in default. However, the Corporate Debtor is ready to make the repayment in installments over a period of 3 years.

FINDINGS

12. Heard the Counsel and perused the documents placed on record.
13. As a matter of fact, the loan amount of **Rs. 5,26,84,473/-** (Rupees Five Crore Twenty-Six Lakh Eighty-Four Thousand Four Hundred and Seventy-Three Only) sanctioned by the Financial Creditor to the

Borrower in pursuant to the Loan Agreement dated 01.06.2022 is not disputed. The said Loan Agreement is signed by the Financial Creditor, the Borrower and the Corporate Debtor who gave a guarantee for repayment.

14. **Clause 7** of the Loan Agreement states that:

“7. In consideration of the Lender having granted/agreed to grant the Facilities to the Borrower, the Guarantor hereby unconditionally, absolutely and irrevocably guarantees to and agrees with the Lender to secure the repayment of the Guaranteed Obligations in accordance with the terms of the covenants herein contained.”

15. **Clause 12(d)** of the said Agreement specifically states that the liability of the Guarantor is as primary obligators and not merely as sureties. Thus, the liability of the Corporate Debtor in repayment of the said loan is well-established in the Loan Agreement.

16. As per Part IV of the Petition, the date of default is **01.01.2023**. Apart from the documents submitted evidencing the debt and default on part of the Corporate Debtor, the Financial Creditor has also filed the **National E- Governance Service Limited (NESL) Certificate** wherein the date of default has been recorded as **01.01.2023**.

17. The Financial Creditor invoked the Bank Guarantee and called upon the Corporate Debtor to make payment of the said loan amount vide letters dated 18.01.2023, 02.05.2023, 15.06.2023 and 30.06.2023.

18. The Corporate Debtor, in his Reply-in-affidavit, has not denied either the existence of debt or its liability but has merely expressed financial difficulty and sought further extension of time to make payment. Therefore, default is clearly made out and the Financial Creditor is entitled to initiate proceedings against the Corporate Debtor under section 7 of the Code. We are supported by the judgment of Hon'ble

Supreme Court in **Lakshmi Pat Surana vs. Union Bank of India** [Civil Appeal No. 2734 of 2020] wherein it was held that:

“27. In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor.”

19. The other plea taken by the Corporate Debtor is about the maintainability of the instant petition when there is an existing arbitration clause. Clause 20 of the Loan Agreement states that all disputes, differences and/or claims arising out of the Loan Agreement shall be settled by arbitration. In this context, this Tribunal is of the view that the existence of an arbitration clause is **no bar** to approach the Adjudicating Authority under the Code for initiation of insolvency proceedings. Reference shall be made to the observations of Hon'ble NCLAT, Chennai Bench, in **Mr. Shahi Md. Karim vs. M/s Kabamy India LLP & Anr. [Company Appeal (AT) (CH) (Ins.) No. 16 of 2023:**

“9. There is no embargo on the ‘Operational Creditor’, to file a Section 9 Petition, under I & B Code, 2016, even if there is an ‘Arbitration Clause’, in the ‘Agreement’. The scope and objective of the Code is ‘Resolution’, and not a ‘Recovery Mode / Forum’.”

20. As regards the Corporate Debtor's submissions that it is still willing to repay the loan amount over a period of 3 years, we are conscious that this Tribunal is not a recovery forum and settlement cannot be directed. Reference shall be made to the observations of Hon'ble Supreme Court in **E. S. Krishnamurthy & Ors vs. M/s Bharath Hi Tech Builders Pvt. Ltd. [Civil Appeal No. 3325 of 2020]:**

“27. The Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5).

The Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute.

29. *The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelises and circumscribes the ambit of such jurisdiction. Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity.*

(Emphasis Provided)

21. It is a well-settled position that the Adjudicating Authority has to determine whether there is debt and default and if it is satisfied that a default has occurred, then the application under section 7 of the Code must be admitted unless it lacks other necessities as mandated thereunder.
22. Upon perusal, this Tribunal is of considered opinion that the Corporate Debtor has defaulted in payment of the debt availed by the Borrower. The application made by the Financial Creditor is complete in all respects as mandated under the Code and the default amount is also in excess of the minimum amount stipulated in section 4(1) of the Code. The Petition is filed within the limitation period, and therefore we are satisfied that the present petition is maintainable.
23. Accordingly, the Company Petition bearing no. 972 of 2023 is **admitted** and ordered as follows:

ORDER

- i) The above Company Petition No. (IB) 972 (MB)/2023 is hereby **allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Alka India Limited**.
- ii) The Petitioner has proposed the name of **Mr. Dharmendra Dhelariya**, Registration No. IBBI/IPA-001/IP-00251/2017-

2018/10480), to be appointed as an Interim Resolution Professional (IRP) of the Corporate Debtor. The proposed IRP has filed his Written Communication dated 12.09.2023 in Form 2 as required under Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Written Communication is accompanied by AFA dated 01.03.2023. Accordingly, **we appoint Mr. Dharmendra Dhelariya (dhelariya@gmail.com) as the Interim Resolution Professional (IRP)** to carry out the functions as per the Insolvency & Bankruptcy Code, 2016.

- iii) The Financial Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional (IRP) appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by the Committee of Creditors.
- iv) There shall be a moratorium under section 14 of the Code prohibiting the following:
 - a) the institution 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;

- 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.

- v) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

- vi) 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.

- vii) The order of moratorium shall have effect from the date of pronouncement of this order 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.

- viii) The public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

- ix) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP in terms of section 17 of the Code. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- x) The Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

- xi) The Registry is further directed to communicate this order to the Financial Creditor, the Corporate Debtor and the IRP immediately.
- xii) The Registry is also directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (IBBI) for their record.
- xiii) A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
- xiv) In the result, Company Petition No. 972 of 2023 is **admitted**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

Sd/-

Lakshmi Gurung
Member (Judicial)

Uma, LRA