IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-IV

(IB)-444(ND)/2020
&
I.A./1852/ND/2022

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

M/s. Intec Capital Limited.

... Applicant/Financial Creditor

Vs.

M/s. Delco Infrastructure Projects Ltd.

... Respondent/Corporate Debtor

Order delivered on: 20.06.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)

ORDER

MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)

The instant petition is filed 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 M/s. Delco Infrastructure Projects Ltd., referred to as the corporate debtor.

2. The present applicant Ms. Intec Capital Limited is a Non- Banking Financial Company having a certificate of registration issued by Reserve Bank of India on 04-11-2009 and office at 708, Manjusha Building 57, Nehru Place, New Delhi -110019.

3. The Respondent Company M/s. Delco Infrastructure Projects Ltd., (CIN: U45201DL1998PLC095562) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 14.08.2998 having its registered office situated at 158, Sec-9, Pocket-I, Dwarka, New Delhi – 110075. 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.

4. The details of transactions leading to the filing of this petition as averred by the applicant are as follows: -

   a) The applicant has provided loan facility to the respondent corporate debtor and entered into 3 loan agreements, details of which are given below–

Loan Agreement Account No.	Date of disbursement of loan amount	Loan Amount Disbursed (Rs.)	EMI Amount (Rs.)	Due date
LNPIT02215-160006539	04.03.2016	46,28,000	1,40,832	5th day of each calendar month starting from April, 2016
LNPIT02216-170006908	13.10.2016 17.10.2016	1,07,47,461	3,27,040	16th day of each calendar year starting from November, 2016.
LNPIT03416-170006972	06.12.2016	2,00,00,000	4,20,357	5th day of each calendar month starting from January, 2017

b) The respondent company failed to maintain adequate amount in the bank account and resultantly cheques / ACH Mandates were dishonored by the banker and the payments were not made to the Applicant as per the repayment schedule specified in the loan agreements.

c) The failure on part of the corporate debtor to honor its obligations constitutes 'events of defaults' as defined under clause 10 of the Loan Agreements and clause 11 which

-Sd-

specifies the consequences of default and rights available to the applicant which inter-alia provide for demand of immediate repayment of loan dues,

d) Consequently, the applicant sent separate notices dated 01.10.2019 to the corporate debtor for terminating the loan accounts LNPIT02215-160006539, LNPIT02216-170006908, LNPIT03416-170006972 respectively.

e) The applicant had filed case the negotiable Instruments Act, 1881 for dishonoring of cheques / ACH by the respondent company which is pending adjudication before Saket Court, New Delhi. Moreover, the corporate debtor had preferred arbitration proceedings against respondent company and its guarantors which are pending adjudication before Ld. Arbitrator.

f) The applicant in part IV of the application, has claimed that a sum of Rs. 3,25,82,107 is due and payable by the respondent company as on 30.11.2019.

g) The applicants have placed the following documents on record to prove the claims –

    i. Loan Agreements for the respective loan account no. LNPIT02215-160006539, LNPIT02216-170006908 and LNPIT03416-170006972.

ii. Sanction Letters dated 29.02.2016, 29.09.2016 and 28.11.2016 and the respective loan applications executed by the corporate debtor

iii. Notices for recall of Loan Agreements for the respective loan account no. LNPIT02215-160006539, LNPIT02216-170006908 and LNPIT03416-170006972

iv. Statement of accounts of all three loan accounts

v. Calculation of Default amount and Statement of Account of all 3 Loan Accounts as on 30.11.2019

5. The Corporate Debtor has filed its reply and has raised objection against the petition stating averments, which are listed here: -

i. Applicant has not mentioned the date of default and the date at which the accounts of the respondent company were allegedly declared as NPA. Further, the respondent company did not receive any intimation from the applicant that its account was declared as NPA.

ii. That the respondent company is a growing civil construction company in private sector having Railway & Highway Construction, Road, Bridge, Power substation and civil construction sector as the core competence areas.

iii. The present petition has been filed merely for recovery and not for the resolution of insolvency. Settlement talks have been regularly going on between the parties and that Rs. 25,00,000/- paid by the respondent towards initial amount for consideration of the settlement to resolve the matter has not been adjusted by the applicant in the present application.

iv. Due to anomalies of rate of interest being charged by the applicant, the respondent company demanded statement of account in question with respect to rate of interest being charged by the applicant. The applicant failed to provide the complete statement of accounts to the respondent company and therefore respondent company stopped payment of EMI's. Resultantly applicant has arbitrary declared the accounts in question as NPA.

v. Further it is stated that applicant has not filed complete set of statement of accounts which incapacitated the respondent company to point out unauthorized transactions. The statement of accounts submitted are not certified in accordance with the relevant provision of the Bankers Books of Evidence Act. Further, they show only single entry – accounts and does not mention the rate of interest in the accounts which is in contravention of the contract as well as RBI Circulars. The Statement of Accounts filed are against principles of natural justice and oppose to public and reliance has been placed by Respondent Company on judgement passed by the Supreme Court in the matter of Ravinder Singh Vs Central Bank of India.

vi. Further it is stated that no proper specific relief is prayed that the time of availing loan, the respondent company had deposited certain blank undated cheques to the applicant as security, a practice that is prevalent in the banking industry. The applicant filed in the amounts not legally recoverable by it and presented the cheques for payment. However, it is stated that the amount ought to be decided by the appropriate civil court first as alleged claim amount is disputed.

vii. Further, it is stated that the alleged contract of loan came into existence after the applicant filed in blank spaces in the standard printed forms of contract without the consent or knowledge of the borrower.

6. It is submitted by the applicant in the rejoinder that-

a. The account of Corporate Debtor was not NPA at the time of filing the present petition but was declared as NPA only on 31st March 2020. The pre requisite to file application under IBC is existence of debt and default as per section 7(1) of the Code. Further it was stated that that the date of default in the respective loan accounts, is when the Loan recall cum arbitration notice was issued by the applicant which in present case is 1st October 2019.

b. It was further stated that RBI in its master circular DBOD No. BP.BC/ 20/21/04/048 /2001-02 on 'Prudential Norms on Income Recognition, Asset Classification and Provisioning', duly defined the NPA norms and defined Non-performing assets, in provision 2 sub clause (2.1.2) as follows :

2.1.2 *An amount due under any credit facility is treated as "past due" when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with 'past due' concept, with effect from March 31, 2001. Accordingly, as from that date, a Non-performing Asset (NPA) shall be an advance where*

i. interest and/or instalment of principal remain overdue for a period of more than 180 days in respect of a Term Loan,

ii. the account remains 'out of order' for a period of more than 180 days, in respect of an Overdraft/Cash Credit (OD/CC),

iii. the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted,

-Sd-

iv. *interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and*

v. *any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.*

c. The corporate debtor became NPA on 31st March 2020 after 180 days from the date of Loan recall notice as it defaulted by not paying in response to it. It is further stated that default and debt due is the pre requisite in IBC unlike SARFAESI Act, 2002 wherein account of borrower has to become NPA before enforcement of security interest.

d. Further it is mentioned that IBC is a special law and self-contained law that is complete in itself and that it overrides other laws. So, neither provisions of SARFAESI Act, 2002 or RBI circular guidelines could override IBC which requires only default and debt due as a pre-requisite for filing an insolvency application.

e. It is further mentioned that respondent company is contradicting himself by admitting the default as it is stated in the reply submitted by the respondent that "*The respondent company has been trying to repay the loan amount*".

f. Further, it is stated that payment of Rs. 25,00,000 /- was made by the respondent company after the filing of the Section 7 petition and is miniscule in front of Financial Debt which is due and payable. Further, the respondent company is only to trying to delay the process by doing settlement talks.

g. It is stated that computation sheet showing details of payments and interest calculation along with all the figures of total financial debt and statement of accounts are enclosed in the application.

h. It is further stated that all the terms of loan agreement / sanction letter were duly agreed and counter signed by the respondent company. Further Form CHG-1 along with all the details of financial facility availed, mortgage deed and sanction letter was filed on 26th November 2016 with ROC. The same was signed by Mr. Hare Ram Singh, Director of Respondent Company.

i. It was stated that the respondent company contradicts its stand by mentioning that applicant has not filed complete statement of account while also stating that the statement of account upon which alleged claim has been based is prima facie wrong and contains unauthorized entries. It is further stated that respondent company on one hand submits that he is making part payments and wants to settle and on the other hand

-Sd-

challenging the sanctity of the documents and statement of accounts.

7. The applicant filed written submissions with brief synopsis before this tribunal wherein –

   a. Reliance was placed by the applicant on judgement passed by **Hon'ble Supreme Court in 'Laxmi Pat Surana v. Union Bank of India & Anr.' Civil Appeal No. 2734 of 2020 in which it was held:**

      "37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be......"

b. Further, reliance was placed by the applicant on the judgement passed by the **Hon'ble Supreme Court in the matter of 'Innoventive Industries Ltd. Vs ICICI Bank & Anr.' In Civil Appeal No 8337-8338 of 2017 deliverd on 31st August 2017 wherein the following para was referred,**

> *"28....... Where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, ..."*

c. It was stated that quantum of debt cannot be criteria for dismissing an insolvency application / petition as long as the amount in default is above the threshold.

8. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply, rejoinder and written submission filed by the parties. We observe that Section 7 (1) of the Code enables a financial creditor to file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred and the date on which

-Sd-

the default has occurred shall be provided by the financial creditor as required in Part IV. In Part V of Form 1, the financial creditor is required to furnish documents as listed therein as well as other documents that may be relevant to prove the existence of financial debt, the amount and the date of default. After completion of all other requirements, for admitting such an application of the financial creditor, we have to be satisfied that "default" has occurred and, that is to say, that the right to apply under the Code accrues on the date when default occurs. The default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable.

9. As per the facts of the case in our hand, we inferred that the date of default is 01.10.2019 i.e., date when notice of recall of loan amount sanctioned after adjusting the amount paid was recalled on account of failure to make payments of the installment due as per the repayment schedule and the corporate debtor defaulted in making the payment of the loan amount. We are further strengthened by the Judgement of **Hon'ble Supreme Court in 'Laxmi Pat Surana v. Union Bank of India & Anr.' Civil Appeal No. 2734 of 2020** in which it was observed that *Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA.*

-Sd-

10. As regard to the question of ascertaining the quantum of the default amount we are strengthen by the judgement in 'M/s. Innoventive Industries Ltd.' Vs. 'ICICI & Anr.', (2018) 1 SCC 407, wherein the hon'ble supreme court observed the definition of 'Claim' and held that even if right of payment is disputed, the Code gets triggered the moment, the default exceeds the threshold amount. At this juncture, it is relevant to reproduce paras 27, 28 & 30 of the 'M/s. Innoventive Industries Ltd.' (Supra) wherein the Hon'ble Supreme Court has observed as follows:

> *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes nonpayment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.*
>
> *28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the*

-Sd-

applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor.

30.On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

(Emphasis Supplied)

11. Needless to say, that an application under Section 7 of the Code is maintainable if the debt is proved to be due and there is default. In view of the Section 4 of the Code, the moment default is of Rupees One hundred lakhs or more, an application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

12. We are satisfied that the present application is complete in all respect. The applicant financial creditor is entitled to move the application against the corporate debtor in view of admitted outstanding financial debt and default of the same by the corporate debtor. The default in repayment of the financial debt is not refuted by the Corporate Debtor. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application ***is hereby admitted.***

13. The applicant in Part III of its application proposed the name of Mr. Arvind Mittal proposed Interim Resolution Professional, having Registration Number IBBI/IPA-001/IP-P01358/2018-2019/12081. Subsequently, the applicant filed an interlocutory application i.e., I.A/1852/ND/2022, for change of the name of proposed IRP from Mr. Arvind Mittal to Mr. Harish Taneja having Registration Number IBBI/IPA-002/IP-N00088/2017-19/10229 having e-mail id- harishtaneja78@gmail.com. The consent in Form-2 of the proposed IRP Mr. Harish Taneja is taken on record. Therefore, the I.A/1852/ND/2022 stands allowed, as to no order to cost.

14. Mr. Harish Taneja having Registration Number IBBI/IPA-002/IP-N00088/2017-19/10229 having e-mail id- harishtaneja78@gmail.com is hereby appointed as an Interim Resolution Professional for corporate debtor.

15. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of

-Sd-

the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

16. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs with the Interim Resolution Professional namely Mr. Harish Taneja to meet out the expenses to perform the functions assigned to him 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 said amount however is subject to adjustment towards Resolution Process cost as per applicable rules.

17. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any Judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

-Sd-

(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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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.

18. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

19. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as

-Sd-

may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex- directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing a appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

20. 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, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.

-Sd-

(SUMITA PURKAYASTHA)
MEMBER (T)

-Sd-

(DHARMINDER SINGH)
MEMBER (J)

Pronounced today under Rule 151 of the NCLT Rules, 2016 as the Hon'ble Member (Technical) Ms. Sumita Purkayastha is not holding the court today.

Vishal Rana
20-06-2022
Court Officer