IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- I
KOLKATA

C.P (IB) No. 1749/KB/2019

A Petition 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:

IDBI Bank

...Financial Creditor

Versus

Saraju Flour Mills Private Limited (CIN U15311WB2006PTC110151), a Company incorporated under the Companies Act, 1956 having its registered office at 146A, Cotton Street, Kolkata,West Bengal – 700007.

...Corporate Debtor

Date of Hearing: 20.07.2022
Date of pronouncing the order: 26.08.2022

Coram:

Shri Rohit Kapoor	***:***	***Member (Judicial)***
Shri Balraj Joshi	***:***	***Member (Technical)***

Appearances (through Video Conferencing/ physical hearing)

1. Mr. Shaunak Mitra Advocate	} For Financial Creditor
2. Mr. Siddhant Makkar, Advocate	}
1. Mr. Nimish Mishra, Advocate	} For Corporate Debtor
2. Mr. Debjit Mukherjee, Advocate	}

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.

2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by IDBI Bank ***('Financial Creditor')***, byMs. MinkyPramanik, Deputy General Manager, duly authorisedthroughAuthorization Letter for initiation of Corporate Insolvency Resolution Process***("CIRP")*** against Saraju Flour Mills Private Limited***('Corporate Debtor').***

3. The present Petition was filed on 18 October, 2019 before this Adjudicating Authority on the ground that the Financial Creditor had advanced several cash and credit facilities ***('Credit facility' or 'Loan')***to the Corporate Debtor.

4. The total amount to be claimed in default by the Financial Creditor is Rs.15,22,21,838.58/- (Rupees Fifteen Crore Twenty-Two Lakh Twenty-OneThousand Eight Hundred Thirty-Eight and Fifty-Eight Paisa only) including interest as on 01 August, 2019.

5. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.1,32,00,000/- (Rupees One Crore Thirty-Two only) with paid up Capital as Rs.1,31,33,390/- (Rupees One Crore Thirty-One Lakh Thirty Three Thousand Three Hundred Ninety only).

Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor

6. The Financial Creditor had granted several credit and cash facilities to the Corporate Debtor and the Corporate Debtor defaulted in repayment of such facilities. The Cast Credit limit sanctioned by the Financial Creditor was of Rs.8,50,000/- (Rupees Eight Lakh Fifty Thousand only) and later on enhanced to Rs.15,54,000/-

7. The total debt for the accounts- '259655100000107' and '1526778000000189' is Rs.15,22,21,838.58/- (Rupees Fifteen Crore Twenty-Two Lakh Twenty-One Thousand Eight Hundred Thirty-Eight and Fifty-Eight Paisa only) as on 01 August, 2019, being maintained in the name of the Corporate Debtor with the Financial Creditor Bank. The accounts of the Corporate Debtor were declared NPA by the Financial Creditor Bank on 31 March, 2014.

8. On 13 July, 2009, the Directors of the Corporate Debtor executed five separate Guarantee Agreements. Further, on 16 June, 2010, the Corporate Debtor also entered into a tripartite inter-se agreement with the Financial Creditor and West Bengal Industrial Development Corporation Limited ***('WBIDCL'),*** wherein WBIDCL confirmed the Corporate Debtor to create hypothecation of the plant and machinery both present and future in addition and collateral security for the facilities.

9. However, the Corporate Debtor failed to repay the Credit Facility and the Financial Creditor took recourse under the SARFAESI Act, 2002 and issued demand notice dated 27 September, 2014 u/s 13(2) of the said Act for the accounts in the name of the Corporate Debtor maintained with the Financial Creditor Bank.

10. Thereafter, on 23 October, 2018, the Financial Creditor offered for an OTS (One Time Settlement) under SARAL KARJ BHUGTAN YOJNA to the Corporate Debtor *vide* letter dated 23 October, 2018.[1] The offer was duly accepted by the Corporate Debtor by their letter dated 29 December, 2018. On 11 January, 2019, the Financial Creditor approved the OTS settlement amount.

11. However, the Corporate Debtor failed to honor the terms of repayment of the OTS (One Time Settlement) under SARAL KARJ BHUGTAN YOJNA, because of which the settlement stood revoked.

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[1] Annexure A – 17, pages – 259– 262.

Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor

12. This instant Petition is liable to be dismissed for non-joinder of parties. In terms of the Tripartite agreement dated 16 June, 2010 entered between the Corporate Debtor, the Financial Creditor and WBIDCL.

13. The Financial Creditor is bound by the provisions of the Banking Regulation Act, 1949 and the guidelines/circulars issued by the Reserve Bank of India. The Financial Creditor has violated all the RBI Circulares which were issued in terms ofsection 21, 35, 35A, 35AA and 35AB of the RBI Act.

14. Further, this Petition is barred by limitation because the Financial Creditor has itself stated that the default happened in 2014. While the instant proceeding was pending adjudication, the Hon'ble Supreme Court was pleased to lay down the law of the period of limitation based on which the Financial Creditor may file an application under Section 7 of the Code inter alia claiming its alleged financial debt.

15. The Hon'ble Apex Court was pleased to hold that for the purpose of filing an application the provision of Article 137 of the Limitation Act 1963 (hereinafter referred to as the said Act of 1963) that essentially means three years from the date on which the right to sue accrued. In the instant case the right to claim the alleged debt accrued on and after the loan account was alleged as Non Performing Asset (herein referred to as the said NPA, which is on and from 31 March 2014.

16. Further, the Financial Creditor hassubsequently issued a purported Notice under Section 13(2) ofthe SARFAESI Act 2002 dated 27.09.2014 claiming that thecorporate debtor had allegedly committed default in paymentof their outstanding dues. Therefore, it is evident that the Limitation period of three years has long expired.

17. Reliance has been placed on ***Sampuran Singh v. Niranjan Kaur*** (AIR 1999 SC 1047), ***Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Limited &Anr***.

((2019) 9 SCC 158) and ***Gaurav Hargovindhbhai Dave v. Asset Reconstruction Company (India Limited) &Anr*** ((2019) 10 SCC 572)

18. Further, the Auditor is a third party and does not have and authority to decide or to adjudicate an issue on 'default'. It is for this Adjudicating Authority to adjudicate on default.

19. Supplementary affidavit has been filed. In part 15 to 20 it has been stated;-

    i. There was OTS scheme which was accepted by the Corporate Debtor on 28 of December, 2018.

    ii. Further to this detailed OTS offer was issued to the applicant on 11 of January, 2019 and it was accepted by the CD on 21 of January, 2019. A Copy of which is enclosed as Annexure- E.

    Statement showing the series of events for the accounts of the Corporate Debtor maintained with the Applicant Bank is reproduced hereinafter;

SI. No.	***Particulars***	***Date***
1	Date of Default	31/08/2013
2	Date of NPA	31/03/2013
3	Date of representation u/s 13(3) of SARFAESI Act, 2002	21/11/2014
4	Payment received from the Corporate Debtor	29/03/2017
5	Payment received from the Corporate Debtor under OTS Offer SKBY	31/12/2018
6	Further payment received from the Corporate Debtor	22/01/2019
7	Further payment received from the Corporate Debtor	06/03/2019
8	Limitation period ending on	06/03/2022

***Analysis and Findings*.**

20. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor. The issue that arises before us is ***'whether the Petition under section 7 of the Code is barred by limitation or not?'***

21. Upon perusal of the record it is apparent that transaction between the parties was purely financial in nature and there is an existence of Financial Debt. From the above records it is apparent that the Financial Creditor under SARAL KARJ BHUGTAN YOJNA extended One Time Settlement offer to the Corporate Debtor and the same was accepted by the Corporate Debtor *[at page 260 of the Company Petition]*

22. Moreover, upon perusal of the records *at page 259 of the Petition*, it is apparent that the Corporate Debtor also made part payment of the OTS amount.[2] Further, the settlement proposal under the SARAL KARJ BHUGTAN YOJNA provided for the payment of the balance amount within 30 days from the date of Letter of Approval of OTS i.e.,11 January, 2019. Hence, this falls within the ambit of 'acknowledgement of debt due and payable'.

23. Balance sheet for year ending as on 2017 - 2018 of the Corporate debtor reflects that Corporate Debtor has certain short term borrowings which is showing that there exists cash credit facilities from the Bank. Further, as per the Auditors' Report of the Corporate Debtor for financial year ending as on 2017 – 2018 *(page 104 of the Supplementary Affidavit)*, it states that the Corporate Debtor has defaulted in the repayment of loans or borrowings to financial institutions, banks.

24. In ***Laxmi Pat Surana V. Union Bank of India & Anr, decided*** on March 21, 2021, the Hon'ble Supreme Court has held that. ***"***

[2]Annexure A of the Supplementary Affidavit filed by the Financial Creditor; Pages 17 – 26.

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. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of PA but before the expiration of three years there from including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. ***<u>Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures</u>***. ***<u>Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code</u>***. *Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under section 7 of the Code."*

25. In ***Rajendra Narottamdas Sheth and Another v. Chandra Prakash Jain and Another***[3], the Hon'ble Supreme Court

"23. It is no more res integra that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the application under Section 7 is filed beyond the period of three years from the date of default and ***the financial creditor furnishes the required information relating to the acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences*** and the application can be entertained, if filed within this extended period."

26. In light of the above facts and circumstances, the present petition filed by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.

27. Accordingly, it is, hereby ordered as follows:-

(a) The application bearing ***CP (IB) No. 1749/KB/2019*** filed by IDBI Bank, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Saraju Flour Mills Private Limited, the Corporate Debtor, is ***admitted***.

(b) There shall be a moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016, and moratorium prohibits the following:

[3] 2021 SCC OnLine SC 843

i. 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;

ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

iii. 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);

iv. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(e) ***Mr. Pankaj Kumar Tibrewal***, registration number ***IBBI/IPA-001/IP-P-01577/2018-2019/12410***, email: ***tibrewalpankaj@yahoo.com***,is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and

Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated in sections 15, 17, 18, 19, 20 and 21 of the Code.

(f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.

(g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

(h) The Financial Creditor shall deposit a sum of ***Rs.5,00,000/- (Rupees Five Lakh only)*** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

28. **CP (IB) No. 1749/KB/2019** to come up on ***31.10.2022*** for filing the periodical report

29. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The Order is pronounced on 26th day of August, 2022

S, LRA