

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1223(PB)/2019

IN THE MATTER OF:

Punjab National BankFinancial Creditor/Petitioner

v.

M/s. Fozal Power Private Limited ..Corporate Debtor/Respondent

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

JUDGMENT DELIVERED ON 21.10.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA

HON'BLE MEMBER (T)

PRESENT:

For the Petitioner: Mr. Manas Shukla, Mr. Shah Usman &
Mr. R.P. Vats, Advocates

For the Respondent: Mr. Pallav Saxena and Mr. Anuj
Dhingra, Advocates

M.M.KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditor'-Punjab National Bank has filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of M/s Fozal Power Private Limited-Corporate Debtor.

2. The Corporate Debtor-M/s. Fozal Power Private Limited is a company registered under the provisions of the Companies Act,

1956 and was incorporated on 28.11.2001. The identification number of the Corporate Debtor is U40101DL2001PTC113298 and its registered office is situated at 14th Floor, Ansal Tower, 38, Nehru Place, New Delhi-110019.

3. The Financial Creditor has proposed the name of Resolution Professional, Mr. Sunil Kumar with the address D-481, II Floor, Type II Qtrs., Mandir Marg, Opp. Mandir Marg Police Station, New Delhi - 110001 and email id - sunilcs9@gmail.com. His registration number is IBBI/IPA-002/IP-N00628/2018-19/11884. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

4. The details of financial debt advanced by the petitioner-Financial Creditor have been set out in Part-IV of the proforma. The total amount sanctioned is claimed to be INR 97.31 Crores which were in the form of Term Loan- I and Term Loan-II facilities. The amount claimed to be in default and the details of default have been given in sub para 2 of Part-IV and the same reads as under:

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH DEFAULT OCCURED	Total Amount claimed: Rs. 112,93,82,199.68 (RUPEES ONE HUNDRED TWELVE CRORES NINETY THREE LACS EIGHTY TWO THOUSAND ONE HUNDRED NINETY NINE AND PAISA SIXTY EIGHT ONLY) with interest up to 30.04.2019. Date of Default is 31.03.2018 i.e. the date of NPA w.e.f. 30.04.2016. Working sheet enclosed (Annexure-3) .
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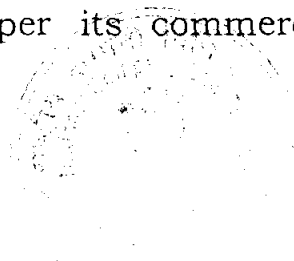
5. The Respondent executed several documents for availing the aforesaid financial assistance from the Petitioner. True Copies of each one of those namely, Facility Term Loan Agreement dated 24.07.2014, Deed of Hypothecation, Agreement of Hypothecation of Current Assets, Deed of Hypothecation, Agreement for Pledge of Shares have been placed on record (Annexure-5 to 9).

6. The details of the security held by, or created for the benefit of 'financial creditor'-Punjab National Bank along with the certificate of registration of charge issued by the Registrar of Companies have been placed on record which fulfils the requirements of Section 77 & 78 of Companies Act, 2013.

7. The Petitioner-Financial creditor has also asserted that the account of the Corporate Debtor was classified as NPA on 31.03.2018. In view of the repeated defaults on the part of the Corporate Debtor to comply with the schedule of repayment of the principal and interest dues, the Financial Creditor issued a notice dated 04.09.2018 (Annexure-14) under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Corporate Debtor.

8. A certificate under Section 2A(n) of the Bankers Book Evidence Act have been filed by the Financial Creditor along with print out of account statements relating to the Corporate Debtor in which financial debt was transferred by the Financial Creditor. The said certificate further disclosed sufficient compliance with the provisions of Section 2A(n) of the Bankers' Book Evidence Act. It is stated by the officer that the statement of accounts filed by the financial creditor are true and correct copies of the bank records maintained by the Financial Creditor in its computer.

9. A record of default is available with the Credit Information Bureau (India) Limited (CIBIL) as per its commercial credit



information report of the Corporate Debtor based on report dated 23.04.2019 (Annexure-12).

10. It is also pertinent to mention that the Corporate Debtor in its audited balance sheet for the financial year 2016-17 has acknowledged the following amounts as borrowed from the Bank for Term Loans in the shape of Long term borrowings as well as security given to the Bank:

"Note 4-Long Term Borrowings

Particulars	Figures as at the end of current reporting period, March 31, 2017	Figures as at the end of current reporting period, March 31, 2016
Secured		
Term Loans From Bank (Punjab National Bank)*	888,899,121	806,454,573
From Other** (Vehicle Loan)	434,213	1,476,457
Total	889,333,334	807,931,030

Security given to Banks

A) Term Loan facility of Rs. 97.31 Crores secured against first charge on all current assets of the company, both present and future, hypothecated of Plant and Machinery and Em/lien/lease on land and building of the project.

B) Personal guarantee of Shri K.L. Chugh and Shri Amit Chugh.

C) 30,00,030 Equity shares held by K L Chugh (Promoter) has been pledged by bank against loan facility granted to Company."

11. The petitioner has then placed on record two balance & security confirmation letters both dated 12.07.2017 issued by the

Corporate Debtor in favour of Financial Creditor with regard to as many as two different accounts. It is pertinent to notice that said letter has been duly signed on behalf of the Corporate Debtor and a seal has also been put by the Corporate Debtor, one of which reads as under:-

“Dear Sir/Madam

Reg: A/c of: FOZAL POWER PRIVATE LIMITED ::: No. 152900IC00187771

I/We hereby confirm the correctness of Debit balance of Rs. 601659125/- (Rupees Sixty Crore Sixteen Lakh Fifty Nine Thousand One Hundred Twenty Five Only) owing from me/us as borrower(s)/guarantor(s) in respect of the above accounts inclusive of interest at the rate of 13.5 percent per annum with monthly/quarterly/half yearly rest as on 31.03.2017 and acknowledge my/our liability for the same.

As security the Bank is having hypothecation/pledge of my/our stocks/goods/machinery vide agreement dated 24.07.2014 and/or registered mortgage/equitable mortgage of my/our property/ies.”

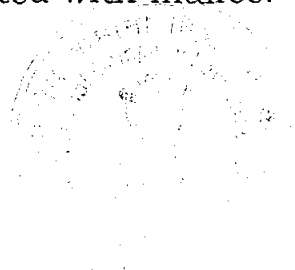
Copies of balance & security confirmation letters both dated 12.07.2017 have been placed on record (Annexure-11).

12. The precise case of the Petitioner thus is that the total amount in default due to the Petitioner by the Respondent-Corporate Debtor as on 30.04.2019 is Rs. 112,93,82,199.68/- inclusive of interest. A tabular chart depicting working out the amount in default is annexed (Annexure-3).

13. Learned counsel for the Corporate Debtor has made valiant attempt to resist the admission of the petition by arguing as under:-

1. Unforceable and uncontrollable delay on account of commissioning of sub station for transmission/evacuation of energy. The State Government of the Himachal Pradesh has revised the date of commissioning of the sub-station for 11 times between 31.10.2013 to 06.06.2016 which is patent from a perusal of minutes of the STU Meetings (Annexure-D). The parties had agreed and contemplated that the loan would be repaid out of the revenue to be generated from the project.
2. When the said substation for transmission/evacuation of energy was finally commissioned, the Respondent requested the Bank for release of funds for payment of construction works done at site into the said Project. However, the Bank refused to do the same and froze the accounts of the Respondent.

3. Reliance has been placed upon Reschedulement of repayment schedule from 31st Dec. 2017-30th Sept. 2026 to 30th Sept. 2020-30th June 2032 approved as per Bank's Project Appraisal Note dated 05.01.2018 (Annexure-1) and in Principal Sanction Letter dated 15.01.2018, clearly establishes that the revised date for repayment to begin has been rescheduled to be year 2020.
4. After the acceptance of proposal of the Respondent vide 'PNB Loan Application Acknowledgment Letter' dated 01.07.2016, the Bank took a time of almost 1.5 years to process the same, first delaying the Project and finally Rescheduled the repayment in December 2017/January 2018.
5. The Bank has consented vide its Certificate dated 28.02.2018 that the Accounts of the Respondent are standard in the books of the Bank as on date. No occasion has arisen for the Bank to declare the alleged default on the part of the Respondent and the present proceedings has been initiated with malice.



6. The Bank further wrecked the business of the Respondent by not extending the Bank Guarantee which resulted into loss of the power purchase agreement with the Tata Power.
7. When the Bank itself is alleging the date of NPA as date of default then it becomes material and absolute necessary to look into the aspect that the loan account of the Respondent has been declared NPA in terms of the RBI' prudential norms.
8. The amounts contained in the fundamental documents relied upon by the Bank viz. Balance confirmation Letters dated 12.07.2017 and Balance Sheet dated 25.08.2017, are itself disputed especially because the Respondent has a formidable counter claim against the Bank emanating from its culpable acts and omissions causing losses and injury to it.
9. Mr. Ravi Jhawar, Senior Manager of the Bank is not competent to file the present petition as the documents which are filed by the Bank with respect to the authority of Mr. Ravi Jhawar are incomplete. No document has

been placed on record by the Bank which shows that Mr. Ravi Jhawar has power to sanction a loan or has sanctioned the loan to the Respondent. Even the General Power of Attorney i.e. the authority of Mr. Ravi Jhawar, as relied upon by the Bank was executed prior to the commencement of the Code, 2016 and therefore, does not cast any power upon Mr. Ravi Jhawar to file present petition.

10. The statement of accounts filed by the Bank lacks a valid certificate under Section 2A(a) and (b) of the Banker Evidence Act for as much as three reasons (a) the name of person giving the certificate is not known; (b) the account of which the said statements of account are unknown and (c) the designation of the person giving the certificate is unknown.
11. The proposal of Restructuring of the loan accounts of the Respondent is pending consideration with the Bank and same is at a very advanced stage. The Bank has confirmed in the response letter dated 28.08.2019 [Annexure 5 (colly)] that it has duly appointed Credit

Rating agency as per the RBI Circular Guidelines 'Prudential Framework for Resolution of Stressed Assets' dated 07.06.2019, and that after receipt of the said report of the Bank shall decide on withdrawal of the present petition.

14. We have heard learned counsel for the parties and have also perused the record.

15. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor-Bank has succeeded in establishing a case for triggering the Corporate Insolvency Resolution Process.

16. There is a vital document placed on record namely General Power of Attorney (at pgs. 11-15 of the petition) dated 21.08.2015 signed and executed by Mr. Dilip Kumar Saha, Director of the Bank and further countersigned by Mr. M.C. Madan, Assistant General Manager in the presence of two witnesses Mr. Rishi Ram Dangwal, Manager and Mr. Ajit Kumar Meher, Sr. Manager establishing authority in favour of Mr. Ravi Jhawar, Senior Manager of the Bank to file the present application. Further letter of authority dated 13.05.2019 issued by Assistant General

Manager of the Bank in favour of Mr. Ravi Jhawar clearly authorized him to file the present petition against M/s Fozal Power Private Limited before this Tribunal or institute a suit, application, file reply, initiate any legal proceedings and defend the suit/petition/application/appeal against the Bank and to appear, present, depose on oath, file affidavits, applications on behalf of the Bank by virtue of aforesaid General Power of Attorney dated 21.08.2015. Even otherwise the General Power of Attorney is a widely worded document and it has various clauses empowering the attorney to file any proceedings before Courts or any other fora. Therefore, it is established that the petition has been filed by a person authorized in accordance with law. The affidavit and the vakalatnama have also been duly signed by the aforesaid officer. In view thereof, we do not find any substance in the objection raised on behalf of respondent.

17. The other argument has also failed to impress us that the proposal of Restructuring of the loan accounts of the Respondent is pending consideration with the Bank and it has confirmed in the response letter dated 28.08.2019 [Annexure 5 (colly)] that it has duly appointed Credit Rating agency as per the RBI Circular Guidelines 'Prudential Framework for Resolution of Stressed

Assets' dated 07.06.2019 as all such efforts are the part of external processes which are beyond the scope of the Insolvency and Bankruptcy Code. It is imperative to observe that Insolvency is not equivalent to winding up. This involves restructuring, re-planning and facilitation of evolving a resolution for the industry to survive. If the solution is well in sight then there would not be any difficulty for the Committee of Creditors with the assistance of the Corporate Insolvency Resolution Professional to adopt a resolution plan in a time bound disciplined manner under the IBC-a Parliamentary Act. It would be acceptable to all the stake holders. It is only on the failure of a resolution that the liquidation process may have to be initiated in accordance with the provisions of Section 33 of IBC.

18. The respondent has argued that the account of the Corporate Debtor has been wrongly declared as NPA. While dealing with application under Section 7 of the Code, it is immaterial for us to examine as to when the account was declared as NPA. In Section 7 application, the Adjudicating Authority has to consider whether there is a debt due in law and facts and whether there has been a default in paying the financial debt. Hon'ble National Company Law Appellate Tribunal in the case of *Ranjit Kapoor v. Asset Reconstruction Company (India) Limited, in Company Appeal (AT)*

(Insolvency) No. 410 of 2018 has held that “the provision of NPA relates to SARFAESI Act, 2002 and has nothing to do with Code”.

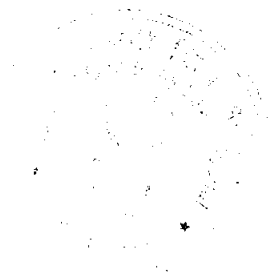
Therefore, the objection of the Respondent that the account of the Respondent has been wrongly declared as NPA, cannot be a ground to reject the application preferred by Financial Creditor under Section 7 of the Code, there being default in payment of financial debt.

19. Another objection raised by the Corporate Debtor during the course of argument is that the loan amount was to be repaid out of the revenue to be generated from the project. We are unable to find any such clause or any stipulation of this nature in the Facility Term Loan Agreement dated 24.07.2014 which may go to the extent of providing that the loan would be payable on the event of generation of funds from the project. Had it been so than the account would have never been declared NPA or any notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 would have been issued. The Respondent has placed reliance on the copies of the minutes of STU meetings [Annexure-D (colly)] with the reply. The Petitioner-Bank is not party to these meetings nor any such stipulation is noticeable from these documents. The argument on

the face of it is frivolous and we have no hesitation to reject the same.

20. The Financial Creditor has placed various documents in relation to the disbursement of loan to the Respondent Company. The materials on record and the loan documents clearly depicts that the loan was sanctioned, disbursed and the loan agreements were properly executed. Respondent company utilized and enjoyed the loan facilities. The Financial Creditor has relied upon the document namely 'Charges Registered' obtained from the website of Registrar of Companies confirming creation of mortgage over the properties in order to secure the loan.

21. In addition, the Financial Creditor has filed the relevant statement of accounts duly certified in accordance with Banker's Book Evidence Act, 1891 as per the requirement of Form 1 Part V Column 7 of the application. True copy of statement of accounts submitted by the Financial Creditor pertaining to loan facility, kept during the course of banking business, based on which the claim has been raised, can be termed as sufficient evidence of the financial debt.



22. Section 4 of the Bankers' Books Evidence Act, 1891 provide for mode of proof of entries in bankers' books and the same read as under:-

"Section 4. Mode of proof of entries in bankers'

books.- Subject to the provisions of this Act, a certified copy of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

23. A perusal of the aforesaid provision would show that a certified copy of entry in a banker's books is to be regarded as *prima facie* evidence in all legal proceedings with regard to the existence of such entry. It must be admitted as sufficient evidence of the matters, transactions and accounts therein recorded in every case.

24. The Corporate Debtor in its audited balance sheet for the financial year 2016-17 acknowledged the amounts as borrowed

from the Bank as Term Loan in the shape of Long Term borrowings as well as security given. A reference has already been made to the aforesaid fact in preceding para 10 of this order. Moreover, the amount claimed in Part-IV of the application is based on the statement of Accounts maintained by the Bank in its ordinary course of business and in accordance with the banking systems. In any case no serious dispute with regard to the amount payable could legally be raised before us.

25. The Tribunal is not an adjudicating authority to ascertain the quantum of amount of default or to pass decree as to how much amount is actually due to the Petitioner-Financial Creditor. Adjudicating Authority is not to decide a money claim or suit. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default if it amounts to rupees one lac or above (Section 4) before admitting the petition.

26. We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our order dated 27.11.2018 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt. Ltd. (IB- 1039(PB)/2018).

27. After a reading of Section 7 of the Code along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.

28. As a sequel to the above discussion, this petition is admitted and Mr. Sunil Kumar is appointed as an Interim Resolution Professional.

29. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code.

30. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other

supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

31. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to her 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 amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.

32. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

33. Before parting we must notice the complaint made against Financial Creditor in the form of discrepancies in the statement of

account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditor as it is only fair to do so.

34. 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, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.



(M.M. KUMAR)
PRESIDENT

(S.K. MOHAPATRA)
MEMBER (T)

21.10.2019
VINEET

21/10/19
Deputy Registrar
National Company Law Tribunal
ICC Complex, New Delhi-110002