

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. II)
KOLKATA**

C.P (IB) No. 1068/KB/2018

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:

Punjab National Bank

...Financial Creditor

Versus

Impex Ferro Tech Limited (CIN L27101WB1995PLC071996), a Company incorporated under the Companies Act, 1956 having its registered office at 35, C.R. Avenue, 4th Floor, Kolkata – 700012.

...Corporate Debtor

Date of Hearing: 06.09.2022

Date of pronouncing the order: 28.10.2022

Coram:

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

Appearances (through Video Conferencing/physical hearing)

For the Financial Creditor : Mr. Joy Saha , Sr.Adv.
: Mr. Debasish Chakraborty,Adv.
For the Corporate Debtor : Mr. Shaunak Mitra, Adv.
: Mr.V.V.Sastry,Adv.

ORDER

Rohit Kapoor, Member (Judicial)

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 Punjab National Bank (***‘Financial Creditor’***), by Mr. Achyut Banerjee Chief, Manager, duly authorised *vide* Authorization Letter dated 12 July, 2018 for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Impex Ferro Tech Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on 20 July, 2018 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted in payment of a sum of Rs.40,14,94,934.51 (Rupees Forty Crores Fourteen Lakh Ninety Four Thousand Nine Hundred Thirty Four and Fifty One Paisa only), advanced by the Financial Creditor to the Corporate Debtor as a Credit Facility (***‘Credit facility’ or ‘Loan’***), including interest @10.80% from 01 July, 2018.
4. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.95,00,00,000/- (Rupees Ninety Five Crores only) with paid up Capital as Rs.87,93,16,000/- (Rupees Eighty Seven Crore Ninety Three Lakh Sixteen Thousand only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor***
 - 5.1 The Financial Creditor was approached by the Corporate Debtor for several credit facilities for setting up a manufacturing unit of Ferro Alloys at Kadavita Dendua Road. Subsequently, the Financial Creditor sanctioned the Credit facility (*sanction letter dated 29 September, 1997*). However, the said credit facility was renewed from time to time. Except the Financial Creditor, the SBI and IDBI also extended financial assistance to the Corporate Debtor.

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5.2 Thereafter pursuant to the request of the Corporate Debtor, the account has been restructured on 16.10.2015 and accordingly the Corporate Debtor resolved the same in its Board resolution dated 16.01.2015 (*at Page 1162*). Pursuant to the said board resolution the Corporate Debtor has executed the following documents:

- i. Trust and Retention Agreement dated 16.01.2015
- ii. Master Restructuring Agreement dated 16.01.2015
- iii. Working Capital Consortium Agreement dated 16.04.2015
- iv. Joint Deed of Hypothecation dated 16.04.2015
- v. Joint Deed of Hypothecation for TL, WCTL and FITL dated 16.04.2015
- vi. Letter of mortgage by deposit of title deed affirmed on 16.04.2015.

5.3 Although the loan account has been declared as NPA on 30.04.2014 but pursuant to restructuring of the loan account, the Corporate Debtor has been allowed to operate the loan account .Further the said Corporate Debtor again committed default on date and account mentioned herein below:

<i>facility</i>	<i>Date of default</i>
CC	05.04.2016
TL	31.07.2016
TL	31.07.2016
TL	31.10.2016

5.4 It is submitted that due to default the restructuring has failed on again and as per clause 12.2.3 of the RBI Prudential norm 2014 the NPA roll back to original date i.e on 30.04.2014. As per the clause 12.2.3. of RBI Prudential norms, 2014 reproduced as follows: ***“Standard accounts classified as NP and NPA account retained in the same category on restructuring by the bank should be upgraded only when all the***

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outstanding loans/facilities in the account performed satisfactorily during the 'specific period' lie principal and interest on all facilities in the account are serviced as per terms of payment during that period.”

5.5 Thereafter the Corporate Debtor has executed the Revival letter on 14.12.2017 to survive the limitation under section 18 of the limitation Act. The said revival letter (*at Page 1541 of the section 7 application*). From the Revival letter the instant section 7 is filed within the period of limitation. The said section 7 has been filed on 20.07.2018. The Financial Creditor is relying upon the following judgements to establish that from the acknowledgment of debt ,the section 7 can be filed within 3 years:

- i. Dena Bank (Now Bank of Baroda) - versus- C. Shiva kumar Reddy and Another - 2021 SCC Online SC 543
- ii. Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd., (2021) 7 SCC 313

5.6 It is submitted that the company has filed balance sheet for the year ended at 2016-2017 before the ROC, Kolkata wherein the said company has acknowledged the liability with the Financial Creditor (*at Page 1554 to Page 1589 of section 7 application*). The said balance sheet showing acknowledgement can be relied upon as an existence of debt.

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

6.1 It is settled proposition in law that the law of limitation is applicable to the proceedings under the Code. However, in this application the Financial Creditor itself has stated that the date of purported default is 30 April, 2014. Being the date of purported default, the Financial Creditor should have initiated the proceedings under the Code before or on 01 December, 2016. Hence, the Application is barred by limitation.

6.2 As per the inter-se agreement entered into between the Financial Creditor and the State Bank of India being the lead banker of the Corporate Debtor was authorised by

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the Financial Creditor to take steps in order to resolve the purported stressed assets of the Corporate Debtor. All the Financial Creditors along with the lead banker being State Bank of India has an obligation under the Reserve Bank of India Circular dated 07 June 2019 to come with a resolution in respect of the Corporate Debtor within the stipulated time frame before initiating any action against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016. However, it is an admitted position that the Financial Creditors of the Corporate Debtor led by State Bank of India have failed and/or neglected to act in accordance with the mandate laid down under the Reserve Bank of India's circular dated 07 June 2019 and have failed to adopt any resolution in respect of the Corporate Debtor which is in complete breach of its obligations under the Reserve Bank of India circular.

- 6.3 Further, It is a settled proposition that the circulars and notifications issued by the Reserve Bank of India are binding upon all banks and banks should strictly act in accordance with the circulars and notifications
- 6.4 It is also important to mention that the negotiations with the Financial Creditor have been going on from time to time. By a letter dated 01 June, 2019, the Financial Creditor has approached the Corporate Debtor and requested to avail special OTS scheme (*Annexure B of the Reply*). The Corporate Debtor gave an offer OTS to the Financial Creditor through a letter dated 26 June, 2019. However, the said offer was not accepted by the Financial Creditor (*Page 8 of the Reply*).
- 6.5 The Financial Creditor has also filed proceedings against the Corporate Debtor being O.A. No. 218 of 2018 before the Ld. Debt Recovery Tribunal, Kolkata. Hence, the Financial Creditor cannot pursue simultaneous proceedings.
- 6.6 Further, a winding up petition has already been admitted and advertised in respect of the Corporate Debtor herein. The winding up petition was filed by Auroma Coke Limited against the Corporate Debtor before the Hon'ble High Court at Calcutta which was numbered as C. P. No. 613 of 2016. Further, the Hon'ble High Court at

Calcutta by an order dated 10 August, 2018, admitted the winding up application against the Corporate Debtor (*Annexure E of the Reply*).

- 6.7 Since, the Corporate Debtor had admittedly failed to pay the sum of money to the petitioning creditor in C. P. No. 613 of 2016 in accordance with the direction passed by the Hon'ble High Court at Calcutta, the winding up petition being C. P. No. 613 of 2016 was advertised in 'The Statesman' and in 'Bartaman' by the petitioning creditor of C. P. No. 613 of 2016 in accordance with the Company (Court) Rules and thus the winding up proceeding against the Corporate Debtor assumes. Hence, due to the pendency of the winding up proceeding before the Hon'ble High Court at Calcutta being C. P. No. 613 of 2016, this instant application filed by the Financial Creditor against the Corporate Debtor is not maintainable (*Annexure F of the Reply*). The jurisdiction solely lies with the Hon'ble High Court at Calcutta and the Financial Creditor cannot be permitted to proceed in parallel proceedings before this Adjudicating Authority.

Analysis and Findings

7. We have heard the Ld. Senior Counsel appearing on behalf of the Financial Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor.
8. With respect to the contention of the Corporate Debtor that the matter of winding up proceeding is pending before the Hon'ble High Court at Calcutta. It is pertinent to mention in the order dated 20 April, 2022 the Hon'ble High Court at Calcutta has held that "*In view of the aforesaid, CP/613/2016 stands transferred to the National Company Law Tribunal, Kolkata. The department will treat CP/613/2016 as disposed of in so far as the records of this Court are concerned. Needless to mention that all connected applications also stand transferred to the National Company Law Tribunal, Kolkata*". Hence, the said contention by the Corporate Debtor is not valid.

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9. Further, in the matter of *Rakesh Kumar Gupta v. Mahesh Bansal & Ors.*¹ the Hon'ble NCLAT has held that the pendency of actions under the SARFAESI Act or actions under RDB Act does not create obstruction for filing an Application under Section 7 of of the Code before this Adjudicating Authority, especially in view of Section 238 of the Code.
10. It is also apparent that the Corporate Debtor gave an offer OTS to the Financial Creditor through a letter dated 26 June, 2019. However, the said offer was not accepted by the Financial Creditor (*Page 8 of the Reply*). However, in this context it is pertinent to rely on the Judgment by the Hon'ble Supreme Court in *The Bijnor Urban Cooperative Bank Limited, Bijnor & others v. Meenal Agarwal & others*² has held that '11. *If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.*
11. Be that as it may, there is clear admission of debt by the Corporate Debtor in term of revival letter dated 14 December, 2017 as well as the Balance Sheet for the Financial Year ending on 2016-2017 filed with the Registrar of Companies, Kolkata [*Dena Bank (Now Bank of Baroda) - versus- C. Shiva kumar Reddy and Another - 2021 SCC Online SC 543*]. Hence, this would result in the extension of the limitation period from time to time.

¹ Company Appeal (AT) (Insolvency) No. 1408 of 2019 decided on 20 February, 2020

² Civil Appeal No. 7411 Of 2021 decided on 15 December, 2021

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- 12.** 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. 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.
- 13.** Accordingly, it is, hereby ordered as follows:-
- (a) The application bearing **CP (IB) No. 1068/KB/2018** filed by Punjab National 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 Impex Ferro Tech Limited, the Corporate Debtor, is **admitted**.
 - (b) There shall be a moratorium under section 14 of the IBC.
 - (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. Sanjay Kumar Agarwal**, registration number **IBBI/IPA-001/IP-P00062/2017-18/10140** email: **sanjaycal.hotmail@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

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- 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 by 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.4,00,000/- (Rupees Four 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.

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- 14.** CP (IB) No. 1068/KB/2018 to come up on *15 December, 2022* for filing the periodical report.
- 15.** 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 28th day of October, 2022

SA[LRA]