

IN THE NATIONAL COMPANY LAW TRIBUNAL.

KOLKATA BENCH,

KOLKATA

C.P (IB) No. 1674/KB/2019

In the matter of

An application under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016.

In the matter of:

PUNJAB NATIONAL BANK, a Body Corporate, constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having its Head Office at Plot No. 4, Sector-10 Dwarka, New Delhi-110075 and carrying on business, inter-alia, from its Branch Office at B.O. Keranitola, District-Medinipur-721101 And also at Asset Recovery Management Branch, Mezzanine Floor, 18 A Brabourne Road, Kolkata-700001 under P.S.-Hare Street.

.....FINANCIAL CREDITOR

-VERSUS-

M/S. BASUKINATH FOOD PROCESSORS LIMITED (CIN U51109WB2005PLC104406) a public company registered under the Companies Act, 1956 having its registered office at 4, BBD Bag, Stephen House, 5th Floor, Room 87 A, Kolkata-700001

.....CORPORATE DEBTOR

Date of hearing : 24/11/2021

Order of Pronounced on: 11/01/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

- | | | |
|---------------------------------------|---|------------------------|
| 1. Mr. Joy Saha, Sr. Advocate |] | For Financial Creditor |
| 2. Mr. Debasish Chakrabarti, Advocate |] | |
| 3. Ms. Trisha Mukherjee, Advocate |] | |
| | | |
| 1. Ms. Sweta Gandhi Murgai, Advocate |] | For Corporate Debtor |

ORDER

Per: Harish Chander Suri, Member (Technical)

1. This petition (C. P) (IB) No. 1674/KB/2019 has been filed by Punjab National Bank, a Body Corporate, through Mr. Saroj Kumar Hembrom, its Senior Manager authorized vide authorization letter dated 9th August 2019 and General power of Attorney executed on 5th March 2002, seeking Corporate Insolvency Resolution process (CIRP) in respect of M/S. Basukinath Food Processors Limited, a corporate entity having its registered office at, 4. BBD Bag, Stephen House 5th floor room No. 87-A, Kolkata 700001. It is submitted in the petition that the corporate debtor is a public company registered under the Companies Act 1956, and is engaged in the business of agricultural trading and food processing. It is further submitted that on 30th November 2010, the corporate debtor requested the financial creditor for sanction of cash credit facilities to the tune of Rs. 10,00,00,000/- to meet its working capital requirements. The Financial Creditor sanctioned cash credit limit of Rs. 10,00,00,000/- to the corporate debtor subject to the terms and conditions of sanction letter dated 23rd December 2010 in accordance with the terms and conditions therein. A copy of the sanction letter dated 23rd December 2010 is annexed as annexure 1-A to the petition.

2. It is submitted that in consideration of sanction of cash credit limit of Rs. 10,00,00,000/-, the corporate debtor executed a number of documents in favour of the Financial Creditor which are enumerated as under:-

- a. An agreement on hypothecation of goods and book debts to secure cash credit facility dated 24th December 2010.
- b. Letter of consent clause dated 24th December 2010.

c. Supplementary agreements dated 24.12.2010 to the agreement on hypothecation of goods and book debts to secure cash credit facility dated 24.12.2010. The aforesaid documents are annexed to the petition as annexure 1-B, 1-C and 1-D.

3. It is further submitted in the petition that to secure the cash credit facility, the financial creditor, corporate debtor and West Bengal Industrial Development Corporation Limited executed a tripartite inter se agreement dated 25/01/2012, wherein mortgage and/or hypothecation of the loan and building and other fixed assets including the plant and machinery etc. Of the corporate debtor's business, both present and future, comprised in the West Bengal Industrial Development Corporation Limited's securities fully described in Schedule B in favour of the financial creditor by way of second charge has been created. A copy of the tripartite agreement dated 25/01/2012 is annexed as annexure 1-E, and as regards the security documents created by the corporate debtor for cash credit limit of Rs. 10,00,00,000/-, the charge has been modified accordingly with the Registrar of Companies. A copy of form No. 8 is annexed as annexure 1-F. Subsequently as per the request of the corporate debtor the said cash credit facility was enhanced to Rs. 15,00,00,000/- from the original facility of Rs. 10,00,00,000/- vide sanction letter dated 04/05/2013 (Annexure 1-G). In respect of the aforesaid enhanced cash credit facility, the corporate debtor executed various documents in favor of the financial creditor.

4. It is further submitted in the petition that the corporate debtor although enjoyed the entire loan limit of Rs. 15,00,00,000/- but failed to serve interest in the loan account as per the terms of the sanction. In spite of several reminders requesting the corporate debtor to regularize the said account but in spite of that, the corporate debtor has failed to adhere to the said reminders. Therefore, the said account was classified as a Non-Performing Asset (NAP) with effect from 02/04/2014 as per RBI guidelines. In view of the irregular condition of the loan account, the financial creditor issued the Demand Notice (Annexure 1-J) through its advocate on 31/12/2015 calling upon the corporate debtor to pay the financial creditor an aggregate sum of Rs. 13,80,80,843.33/- within 10 days from the date of notice failing which the financial creditor would be constrained to take legal action against the corporate debtor, but in spite of the notice even, the corporate debtor failed to liquidate the dues payable to the financial creditor. It is further submitted that the corporate debtor has filed the balance sheet before the Registrar of Companies wherein the corporate debtor has acknowledged

that a sum of Rs. 32,43,10,832 is due and payable by the corporate debtor to the financial creditor on 31/03/2016. A copy of the balance sheet for the year 31/03/2017 is annexure 1-K to the petition. The financial creditor has further submitted that total outstanding as on 31/07/2019 is Rs. 31,72,88,544.47/-.

Which is inclusive of-

CASH CREDIT ACCOUNT NO. 0350008700003509

Ledger Balance as on 31.03.2014 Uncharged	Rs. 15,93,88,585.33/-
Interest from 01.04.2014 to 31.07.2019	Rs. 16,42,63,393.96/-
Penal Interest from 01.04.2014 to 31.07.2019	Rs. 1,47,64,374.18/-
Legal/Other Expenses	Rs. 1,79,930.00/-
Total Outstanding as on 31.07.2019	Rs. 31,72,88,544.47/-

The statement of Account containing details of computation of amount of default has been annexed as Annexure 1-L to the petition.

- i. On 02.04.2014. when the said account has been classified as non-performing asset (NPA)
 - II. In spite of issuing demand notice dated 31.12.2015 issued by the Financial Creditor through its Advocate, the Corporate Debtor failed to pay a sum of Rs. 13,80,80,843.33/- (Rupees Thirteen Crores Eighty Lacs Eighty Thousand Eight Hundred and Forty Three and Paise Thirty Three only), including interest as on 31.12.2015 along with further interest as contractual rate per annum from 01.01.2016 till realization.
5. It is submitted that the said account has been classified as Non-Performing Asset as on 02/04/2014. It is further submitted that the Financial Creditor thereafter filed O.A. No. 180 of 2016 under section 19 of the Recovery of Debts due to Bank and Financial Institutions Act, 1993 on 29.02.2016, and the same is still pending before the DRT-II Kolkata. And the corporate debtor has filed a SARFAESI application against the SARFAESI account taken by the

financial creditor. The financial creditor states that the pendency of the said applications are not a hindrance for admission of the present application.

6. The Financial Creditor has also proposed the name on Mr. Sanjay Kumar Agarwal, Address: "Draupadi Mansion"3rd Floor, 11, Braboure Road, Kolkata, Pin-700001, E-Mail address: sanjaycal@hotmail.com Registration No. IBBI/IPA-001/IP-P00062/2017-18/10140, to act as an Interim Resolution Professional a copy of the consent given by Sanjay Kumar Agarwal in form 2 and registration are also accentuated to the petition.

7. In reply to the petition, the corporate debtor filed an affidavit in reply sworn by Mr. Santosh Kumar Jha, duly authorized by the Corporate Debtor Basukinath Food Processors Limited, who submitted in the reply affidavit that each and every allegation made in this petition is denied and disputed and the said application is barred by the Laws of limitation.

23.12.2010	Credit limits sanctioned by the Financial Creditor
24.12.2010	Security documents executed by the Corporate Debtor
4.5.2013	Renewal cum enhancement made by the Financial Creditor
1.6.2013	Security documents executed for the renewal cum enhancement of the limits
23.04.2014	Notice issued under Section 13(2) of the SARFAESI Act
22.07.2014	Notice issued under section 13(4) of the SARFAESI Act
29.02.2016	Date of filing of the OA/180/2016 before the Debts Recovery Tribunal II, Kolkata
6.09.2019	Date of filing the instant application.

8. It is submitted in the reply affidavit that the present proceedings initiated by the financial creditor under section 7 of the Code is not maintainable in law and on facts and should be dismissed. The Corporate Debtor in its affidavit has given various dates which need to be considered from point of view of limitation. it is further submitted that the winding up application against the Corporate Debtor has been admitted by the Hon'ble High Court at Kolkata in CP No. 564 of 2014 and the said order dated 13/01/2019 is annexed with the petition and marked as P-I. It is submitted that no application under section 7 of the Code is maintainable against the corporate debtor as on date. The Corporate Debtor has

submitted that letter of authority does not authorise the officer of the Bank to file the present application and that the allegation made in part II, III and IV of the petition are denied. It is further submitted that the documents relied on by the financial creditor would clearly show that the claim of the bank is barred by the laws of limitation. It is submitted that the classification of the account as NPA is erroneous and the steps taken by the bank in classifying the account as NPA and filing of the instant suit is bad in law. It is submitted that the application should be dismissed in limine as it is not maintainable.

9. While dealing with the reply affidavit, the Financial Creditor in its rejoinder submitted that the Saroj Kumar Hembrom who is the Senior Manager of the Financial Creditor, was duly authorized and is competent to depose the present affidavit in reply on behalf of the petitioner. It is submitted that the Financial Creditor in its section 7 application has enclosed balance sheet for the year 2016-17 wherefrom it will be found that on running page 122 of the said section 7 application, the Corporate Debtor has admitted that the said corporate debtor is banking with two banks namely Axis Bank and Punjab National Bank. It is submitted that on page 123 of the said balance sheet, the Corporate Debtor admitted the long term and short term borrowing from the bank and the said loan account has turned NPA. On page 164, in the column of borrowings, the Corporate Debtor has stated in table of classification of borrowing that Rupee term loan from banks and working capital loans from bank, the Punjab National Bank therein which has given working capital in form of cash credit and the said corporate debtor has acknowledged the liability of Rs. 20,42,61,010/-. The financial creditor has in the case of **Jignesh Shah and another versus Union of India and another**, in paragraph No. 19 the Hon'ble Court stated as follows:-

"19. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which

the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding."

10. Therefore, as per the observation of the Hon'ble Court, Section 18 of the Limitation Act shall apply to extend the limitation period in proceedings initiated under the IB Code 2016. It is stated that as per section 18 of the Limitation Act the period of limitation has been extended till 30/03/2020 and the present Section 7 application has been filed on 12/09/2019, that is well within the period of limitation and therefore Section 7 petition is very much maintainable in law.

11. While summing up his arguments, Ld. Senior Counsel appearing for the Financial Creditor submitted that from the table on page 3 of the affidavit in reply, the Corporate Debtor has clearly and categorically admitted the debt outstanding and due to the Financial Creditor. It is further submitted that the Corporate Debtor has acknowledged the debt even in the balance-sheet of 31st march 2017 (Page 163 of the petition).

12. In this regard, the Ld. Counsel has relied on ***ASSET RECONSTRUCTION COMPANY (INDIA) Vs. BISHAL JAISWAL & ANR. 2021 SCC Online SC 321.***

13. In para 14 of the Judgment, the Hon'ble Court, referred to Section 18 of the Limitation Act, dealing with the effect of acknowledgement in writing. Section 18(1) envisages that where, before the expiration of the prescribed period for a suit or application in respect of any property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

14. The Hon'ble Court in Para 15 observed that in an illuminating discussion on the reach of Section 18 of the Limitation Act, including the reach of the Explanation to the said section, this Court in ***Khan Bahadur Shapoor Freedom Mazda v. Durga Prasad Chamaria*** referring to Section 19 of the Limitation Act, 1908, which corresponds Section 18 of the 1963 Act held as under:-

"6. It is thus clear that acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere

acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication”.

15. The Hon’ble Court observed in para 16 , which are as under:-

“ The next question that this Court must address is as to whether an entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability under Section 18 of the Limitation Act”.

Several judgments of this court have indicated that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act. Thus, in Mahabir Clod Storage Vs. SIT, SCC Page 409, Para 12.

“12. The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to M/s Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963 and extend the period of limitation for discharge of the liability as debt.”

16. The Ld. Counsel has further argued that the Corporate Debtor has taken the objection with regard to the present petition affirming the petition and is authority to do so.

17. In the supplementary affidavit para 3 would meet the aforesaid objection of the Corporate Debtor, which are as under:-

“ It is submitted that the Financial Creditor in the said Section 7 application has enclosed the Letter of Authority dated 09.08.2019 wherein the competent authority of the bank has authorized Mr. Saroj Kumar Hembram to execute the said section 7 application. It is submitted that the Financial Creditor in the section 7 application has also enclosed a General Power of Attorney wherein it has been mentioned that pursuant to board resolution dated 05.03.2002, Shri Saroj Hembram is competent to act on behalf of Punjab National Bank and to institute legal proceeding. The same shall appear at page 18 of the Section 7 application. As such pursuant to the said General Power of Attorney along with the board resolution dated 05.03.2002, the said Shri Saroj Hembram has been authorized to execute section 7 application, but the said Board Resolution dated 05.03.2002

inadvertently have not been annexed to the section 7 application, as such the extract of minutes of meeting dated 05.03.2002 along with letter of Regional Manager dated 03.08.2002 is annexed herewith and marked as Annexure-'X' and the same may kindly be treated as a part of the said section 7 application".

18. As regards the 3rd objection of the Corporate Debtor that a winding up petition (CP 564/2014) is pending before the Hon'ble High Court of Calcutta, for winding up of the Corporate Debtor, the Ld. Counsel for the Financial Creditor submitted that the copy enclosed with the reply by the Corporate Debtor itself would show that CP No. 564/2014 has been permanently stayed by the Hon'ble High Court of Calcutta. The relevant portion of the said order is extracted hereinbelow:-

" The Company is allowed to pay off the above dues of the petitioning creditor in eight instalments as mentioned below .

The company shall pay off the principal amount of Rs. 25,00,000/- to the petitioning creditor is seven equal monthly instalments of Rs.3,57,143/- each. The first of the said seven monthly instalments Rs.3,57,143/- each shall be paid by the company to the petitioning creditor within February 28,2019 and the balance instalments will be paid within the tenth day of each succeeding month.

So far as the eighth instalment for payment of the interest amount is concerned, the company will pay the same to the petitioning creditor within September 10,2019.

Subject to payment of all the above eight instalments by the Company to the petitioning creditor, the application being C.P NO. 564/2014 shall stand permanently stayed".

19. It is further submitted by the Ld. Counsel that the date of NPA is 2nd April,2014 (page 10 of the petition) and since the balancesheet dated 31st March 2017 acknowledges the debt, the only ground earlier available to the Corporate Debtor has become unavailable, and a far cry for the Corporate Debtor.

20. The Ld. Counsel appearing for the Corporate Debtor has more or less conceded that there is no defence available at present to the Corporate Debtor because the only ground earlier available to the Corporate Debtor with regard to the limitation is not available due to the judgment passed by the Hon'ble Supreme Court of India in the matter of ***ASSET RECONSTRUCTION COMPANY (INDIA) Vs. BISHAL JAISWAL& ANR. 2021 SCC Online SC 321***

21. Ld. Counsel for the Corporate Debtor submitted that since named IRP **Mr. Sanjay Kumar Agarwal** cannot be appointed in this matter because according to the Ld. Counsel, disciplinary proceedings are already pending against him and in view of the pre-requisite of the proceedings under section 7(3)(b) IBC, which are under:-

“Section 3- The Financial Creditor shall, along with the application furnish-

(a).....

(b)- the name of the resolution professional proposed to act as an interim resolution professional; and”

(c)

22. The name of the IRP shall be proposed by the Financial Creditor. Hence, the Financial Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, we appoint **Mr.Rajesh Lihala** , IRP having Reg. No. **IBBI/IPA-001/IP-P00525/2017-18/10950**, to act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

23. We have considered all the pleadings and documents placed on record by the parties, we are satisfied that this is a good case for admission of the petition because the Corporate Debtor has defaulted in payment of the outstanding amount of the Financial Creditors.

24. In view of the aforesaid facts, the case of the Financial Creditor seeking admission of the petition and for initiation of CIRP in respect of the Corporate Debtor is fully proved and after going through and considering all the record and pleadings, we admit the petition and pass the following orders:-

ORDERS

- i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits 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 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.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) 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 admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or

passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

- ix) **Mr.Rajesh Lihala , IRP** registered with Insolvency and Bankruptcy Board of India, having Registration **IBBI/IPA-001/IP-P00525/2017-18/10950**, Email lihalaco@gmail.com is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Financial Creditor/Applicant is directed to deposit **Rs. 3,00,000/- (Rupees Three Lakhs. only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.
- xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii) List the matter on 21/03/2022 for filing of the **progress report**.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 11th day of January, 2022

Kundan/PJ