

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.893/MB/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

Bank of Baroda

[PAN: AAACB1534F]

...Financial Creditor/ Applicant

V/s

**SKS Power Generation (Chhattisgarh)
Limited**

[CIN: U40103MH2008PLC180231]

...Corporate Debtor/Respondent

Order Dated: 29.04.2022

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Gopal Jain, Sr. Advocate.

For the Respondent(s) : Mr. Vikram Nankani, Sr.
Advocate i/b Ms. Rhia
Marshall, Advocate and Ms.
Aditi Tiwari of Jerome
Merchant, Advocate

ORDER

Per: Rajesh Sharma, Member (Technical)

1. This is an application being CP (IB) No.893/MB/2021 filed by Bank of Baroda, the Financial Creditor/Applicant, under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) against SKS Power Generation (Chhattisgarh) Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP").
2. The Financial Creditor is a banking corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Acts, 1970 having its Head Office at Baroda House, Mandvi, Vadodara – 390006, Gujarat and acting through its Corporate Financial Services Branch, 3rd Floor, 10/12 Mumbai Samachar Marg, Fort, Mumbai – 400001, Maharashtra. This application is filed by Shri. Deepak Saini, Chief Manager of the Financial Creditor authorized vide its Board Resolution dated 30.06.2021 (annexed as 'Annexure A (Colly)' on Page.29 of the Petition), claiming a total amount in default of Rs.110,51,98,982.38/- (Rupees one hundred ten crore fifty-one lakh ninety-eight thousand nine hundred eighty-two and paise thirty-eight only) outstanding for the period from 31.03.2021 to 31.05.2021 which includes Principal Amount of Rs. 50,00,00,000.00 (Rupees fifty crore only) which was payable as an instalment on 31.03.2021 and Interest amount of Rs.60,51,98,982.38 (Rupees sixty crore fifty-one lakh ninety-eight thousand nine hundred eighty-two and paise thirty-eight only) outstanding as on 31.05.2021.

3. The Date of Default as mentioned in the Petition is 31.03.2021. The Petition has been filed on 04.09.2021.
4. The case of the Financial Creditor is as under:
 - a. While explaining the history of the transaction, the Financial Creditor submits that it had provided financial assistance to Entwickeln India Energy Private Limited (hereinafter referred to as "EIEPL") as the Borrower and SKS Power Generation (Chhattisgarh) Limited, the Corporate Debtor, as the Co-Obligor for an aggregate principal amount of Rs.1600,00,00,000 (Rupees one thousand six hundred crore only) vide a Rupee Term Loan Facility Agreement (hereinafter referred to as "RTL Facility Agreement") dated 11.03.2019 (annexed as 'Exhibit G (Colly)' on page 78 of the Petition) which was entered into amongst the Financial Creditor, the Corporate Debtor and EIEPL.
 - b. In addition to the above-mentioned facility, the Financial Creditor further submits that for the purpose of meeting working capital requirements, the Corporate Debtor and EIEPL availed financial assistance from the Financial Creditor by way of a Fund-Based Cash Credit Facility vide a Working Capital Facility Agreement (hereinafter referred to as "Working Capital Facility") dated 30.07.2019 (annexed as 'Exhibit G (Colly)' on page 330 of the Petition) for an amount of Rs.50,00,00,000/- (Rupees fifty crore only) which was entered into among the Financial Creditor, State Bank of India (hereinafter referred to as "SBI"), Corporate Debtor and EIEPL.

- c. The Financial Creditor submits that the Regional Director (Western Region) of the Ministry of Corporate Affairs approved the amalgamation of EIEPL into the Corporate Debtor under the relevant provisions of the Companies Act, 2013 vide Confirmation Order in Form No. CAA. 12 dated 31.01.2020 (i.e the “Amalgamation Order”) (annexed as ‘Exhibit C’ on page 36 of the Petition). In relation to this, the Financial Creditor further highlights that one of the provisions of the scheme of amalgamation clearly stated that all debts, liabilities, contingent liabilities, trade payables, loans, advances and other obligations would be transferred to the Corporate Debtor pursuant to Section 233 of the Companies Act, 2013.
- d. While explaining the default committed by the Corporate Debtor, the Financial Creditor submits that the Corporate Debtor had committed several breaches of its obligations under the various facility agreements (as mentioned in point 4(a) and 4(b) above), which included committing default in timely servicing of the principal repayments and interest payments starting from 31.03.2021 (referred to as Post-Zero Period). While the Financial Creditor acknowledged the existence of various defaults committed by the Corporate Debtor prior to 31.03.2021 which were arising on or after 25.03.2020 up to 25.03.2021 (referred to as Zero Period), the said defaults were not considered by the Financial Creditor for the purpose of initiating CIRP against the Corporate Debtor as the same were subject to a moratorium in terms of Section 10A pursuant to the enactment of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020.

- e. The Financial Creditor also submits that it had via letters dated December 5, 2020; January 5, 2021; February 5, 2021; February 12, 2021; March 5, 2021; March 22, 2021; March 26, 2021; March 30, 2021 and April 26, 2021 (collectively known as "Demand Notices" annexed as 'Exhibit K (Colly)' on page 719-734 of the Petition) called upon the Corporate Debtor to rectify the defaults committed and honour its obligations under the various Facility Agreements.
 - f. Additional Affidavit dated 12.01.2022 received on 02.03.2022 and Written Submission dated 16.03.2022 received on 16.03.2022 have duly been considered for the purpose of this petition.
 - g. The Financial Creditor in view of non-payment of dues (as stated in point 2 above) by the Corporate Debtor has filed the present Application under Section 7 of the Insolvency and Bankruptcy Code, 2016, for initiating CIRP against the Corporate Debtor.
5. The case of the Corporate Debtor is as under:
- a. The Corporate Debtor in its Affidavit in Reply dated 20.12.2021 submits that it is a closely held public company duly incorporated under the provisions of the Companies Act, 1956, in the State of Maharashtra on 18.03.2008. The Corporate Debtor denies the contents of the main Company Petition while stating that there is no default committed and that the said Petition was liable to be dismissed.

- b. While highlighting the impact of Covid-19 on the operations, it has been submitted that the Haryana Discoms had stopped taking power by declaring Force Majeure in April and May 2020 and the Noida Power Company Limited ('NPCL') stopped taking power in the month of March 2020 post imposition of nation-wide lockdown which eventually resulted in Corporate Debtor's plant to not function at full capacity leading to loss in revenue generation capabilities.
- c. While referring to the provisions of Section 10A of the I&B Code which was inserted vide the Insolvency and Bankruptcy (Second Amendment) Act, 2020, the Corporate Debtor stated that defaults committed between 25.03.2020 to 25.03.2021 (Zero Period) should not be considered for initiating CIRP.
- d. Highlighting the various communications between the Financial Creditor and the Corporate Debtor, a letter dated 26.04.2021 was referred to. In this letter, the Financial Creditor had given a break-up of overdue amounts to the Corporate Debtor wherein a total of Rs.128,10,00,000/- (Rupees One hundred and twenty-eight crore ten lakh only) was outstanding as on 26.04.2021.
- e. The Corporate Debtor submits that since the defaults considered by the Financial Creditor arose during the Zero Period (i.e from 25.03.2020 to 25.03.2021), there existed no default basis which CIRP could be initiated by the Financial Creditor. Therefore, the present Company Petition filed by the Financial Creditor was liable to be rejected.

Findings/Observations:

6. We have heard the submissions made by the counsel on both the sides and perused the records.
7. We have prudently gone through all the pleadings available on record.
8. It has been observed by the Bench that the Corporate Debtor nowhere in its various replies has disputed the claim amount nor denied the Loan Agreement entered between the parties.
9. The Corporate Debtor contented that the Financial Creditor had overdue amounts of a total of Rs.128,10,00,000/- (Rupees One hundred and twenty-eight crore ten lakh only) as on 26.04.2021 and that the defaults considered by the Corporate Debtor for the purpose of initiating CIRP arose during the Zero Period (i.e from 25.03.2020 to 25.03.2021), therefore, no default existed on basis of which CIRP could be initiated by the Financial Creditor. The Financial Creditor in its main Company Petition has clearly stated that even though various defaults existed prior to 31.03.2021 which were arising on or after 25.03.2020 up to 25.03.2021 (referred to as Zero Period), the said defaults were not considered by the Financial Creditor for the purpose of initiating CIRP and that default as on 31.03.2021 was considered for the present Company Petition. The Corporate Debtor in its Additional Affidavit in Reply dated 12.01.2022 clearly stated in Para 5(c) that for the period after 25.03.2021 an amount of Rs.415,22,00,000 (Rupees four hundred and fifteen crore twenty-two lakh only) remained outstanding (as set out in 'Exhibit D' on page 10 of the Additional Affidavit in Reply dated 12.01.2022) as on 31.12.2021. This clearly indicates that the Corporate Debtor affirms of there being an existence

of debt and default. The Financial Creditor however has claimed an amount in default in the Company Petition for Rs.110,51,98,982.38/- (Rupees one hundred ten crore fifty-one lakh ninety-eight thousand nine hundred eighty-two and paise thirty-eight only) for the period from 31.03.2021 to 31.05.2021 which is well above the threshold limit in terms of Section 4 of the I&B Code and pertains to defaults committed during the Post-Zero Period which therefore confirms that the present Company Petition is not barred by the provisions of Section 10A of the I&B Code.

10. Furthermore, the Corporate Debtor in its Affidavit in Reply dated 20.12.2021 clearly provided copies of letters issued (dated 30.09.2020, 18.11.2020 and 18.01.2021) to the Financial Creditor by the Corporate Debtor himself requesting for – Restructuring of Debt (Letter dated 30.09.2020); Invocation of One Time Restructuring Scheme under RBI guidelines (Letter dated 18.11.2020) and One-time waiver/relaxation (Letter dated 18.01.2021). These letters again clearly indicate an admission of existence of debt by the Corporate Debtor himself.
11. It is clear from the records that the Corporate Debtor has time and again acknowledged the debt which is due and payable to the Financial Creditor.
12. The Corporate Debtor has nowhere in its reply denied the liability nor denied the outstanding payable amount.
13. It is noticed from the Corporate Debtor's submissions that:
 - a. The Corporate Debtor had issued various letters requesting restructuring of debt/waiver of debt which in itself would be treated as an admission of liability on part of the Corporate

Debtor as provided in its Affidavit in Reply dated 20.12.2021;
and

- b. There is an unequivocal admission of liability on the part of the Corporate Debtor at Para 5(c) of its Additional Affidavit in Reply dated 12.01.22.

14. On perusal of the documents submitted by the Applicant Financial Creditor, it is clear that there exists a financial debt and the debt is in default and also the outstanding amount is more than the threshold limit of Rs.1,00,00,000/- (Rupees one crore only). Therefore, we find that it is a fit case for initiation of CIRP against the Corporate Debtor, and that the petition is filed within the limitation period. This Tribunal has jurisdiction to adjudicate the Company Petition filed by the Financial Creditor and that there is a Debt due & payable by the Corporate Debtor. Default has also been established herein. Therefore, the Application filed by the Financial Creditor is liable to be admitted.
15. The application is complete and has been filed under the proper form. The debt amount is more than Rupees One Crore and default of the Corporate Debtor has been established and the application deserves to be admitted.
16. The Applicant has proposed the name of Mr. Ashish Arjunkumar Rathi, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00568/2017-2018/11010] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him.

ORDER

This Application being **CP (IB) No.893/MB/2021** filed under Section 7 of I&B Code, 2016, presented by Bank of Baroda, Financial Creditor/Applicant against **SKS Power Generation (Chhattisgarh) Limited**, Corporate Debtor for initiating corporate insolvency resolution process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
 - 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to:
- a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
 - b) a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. 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).
- VI. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VII. That this Bench appoints Mr. Ashish Arjunker Rathi, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00568/2017-2018/11010] as an Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.
- IX. The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. Compliance report of the order by Designated Registrar is to be submitted today.

Sd/-
Kishore Vemulapalli
Member (Judicial)
29.04.2022

Sd/-
Rajesh Sharma
Member (Technical)