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IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/203/2020

(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of ***M/s. Subhashri Bio Energies (P) Ltd.***

Indian Overseas Bank,
Specialised Asset Recovery Management Branch,
11/952, Crosscut Road,
Gandhipuram,
Coimbatore – 641 012.

... Financial Creditor

-Vs-

M/s. Subhashri Bio Energies (P) Ltd,
No.3/123, Senguttaikadu,
Manjanur Post,
Tiruchengode, Namakkal District – 637 403.

... Corporate Debtor

Order pronounced on 2nd September, 2021

CORAM :

R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Financial Creditor : Ananda Gomathy, Advocate
For Corporate Debtor : M. Devaraj, Advocate

ORDER

***Per:* R. SUCHARITHA, MEMBER (JUDICIAL)**

This is an Application filed by **Indian Overseas Bank,** Specialised Asset Recovery Management Branch, (hereinafter referred to as **"the Financial Creditor"**) against **M/s. Subhashri Bio Energies (P) Ltd** (hereinafter referred to as **"the Corporate**

Debtor") under Section 7 of the Insolvency & Bankruptcy Code, 2016, seeking thereof to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. From Part-I of the Application, it is seen that the Financial Creditor is a body corporate constituted under the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970. From Part-II of the Application, it is seen that the Corporate Debtor is a Private Limited Company incorporated on 17.05.2000 bearing CIN: U23101TZ2000PTC009339. The registered office address of the Corporate Debtor as per the Application is stated to be situated at No.3/123, Senguttaikadu, Manjanur Post, Tiruchengode, Namakkal District – 637 403. From Part-III of the Application, it is seen that the Financial Creditor has proposed the name of the Interim Resolution Professional (IRP) viz., **Mr. Palanigounder Eswaramoorthy,** Reg. No. IBBI/IPA/-002/IP-N00284/2017-18/10842; Email ID: swarfcs@gmail.com to act as the IRP.

3. From Part-IV of the Application, it is seen that the Financial Creditor has claimed a sum of Rs.137,58,62,899.74/- which is due and payable by the Corporate Debtor. Further, in order to prove the existence of the 'financial debt' and the mode in which the

loans were disbursed by the Financial Creditor to the Corporate Debtor are as follows;

SL. No	FACILITY	DATE	INT	LIMIT (₹)
A	Cash Credit-I	16.12.2005	9.50	49800000.00
B	Cash Credit-II	16.12.2005	9.50	126700000.00
C	Working Capital Term Loan	12.12.2011	7.50	80900000.00
	(from CC-II)			
D	Funded Interest Term Loan	28.01.2013	7.50	46600000.00
E	Term Loan-I	12.12.2011	9.50	57700000.00
F	Term Loan-Ii	28.01.2013	9.50	58600000.00
G	Term Loan-III	26.09.2013	11.75	1870000.00
H	Term Loan-IV	30.10.2014	9.50	75000000.00
I	Funded Term Loan (Power)	19.06.2014	7.50	149526796.00
J	Funded Interest Term Loan-I (Power)	31.03.2008	7.50	10694683.00
K	Funded Interest Term Loan-II (Power)	12.12.2011	7.50	32700000.00
L	Funded Term Loan (Bio-Manure)	16.12.2005	7.50	88269343.00
M	Funded Interest Term Loan-I (Bio-Manure)	31.03.2008	7.50	6822051.00
N	Funded Interest Term Loan-II (Bio-Manure)	12.12.2011	7.50	19400000.00
O	Funded Int TL (Power & Bio-Manure)	12.12.2011	7.50	97700000.00
P	Current Account		16.00	80756.00
				902363629.00

4. The Learned Counsel for the Financial Creditor submitted that the Corporate Debtor had availed the financial facilities from the Financial Creditor as early as on 19.06.2004 and thereafter the loan accounts of the Corporate Debtor were restructured and

certain fresh facilities were sanctioned until 23.10.2014. It was submitted by the Learned Counsel for the Financial Creditor that though the financial facilities were sanctioned upto October 2014 the date of NPA was back dated to 30.07.2005 to comply with the prudential norms of the Reserve Bank of India, due to irregularities that were crept in during the initial period.

5. The Learned Counsel for the Financial Creditor submitted that the Corporate Debtor has admitted and acknowledged its liabilities vide Revival Letters right from 18.04.2006, 27.11.2006 and 01.03.2007 and last of which was issued on 27.07.2016. Further, it was submitted that there are several correspondences by the Corporate Debtor in relation to various additional financial facilities requesting to be granted which expressly demonstrate the acknowledgement of liabilities. Under such circumstances, it was submitted by the Learned Counsel for the Financial Creditor that the Corporate Debtor has committed 'default' in repayment of the 'financial debt' and as such the present Application has been filed under Section 7 of the IBC, 2016 by the Financial Creditor which is requested to be allowed and consequently prayed to initiate the Corporate Insolvency Resolution Process as against the Corporate Debtor.

6. The Corporate Debtor has filed the Counter and it is averred in the Counter that the present Application is liable to be dismissed on the sole ground of latches, since the Financial Creditor has itself admitted that the account has become NPA as early as on 30.07.2005 and that the present application has been filed after lapse of 14 years. It is further averred in the Counter that the Financial Creditor has filed OA.No.668 of 2017 on the file of the Debts Recovery Tribunal (DRT), Madurai wherein the issue of default has been pleaded by the Financial Creditor and the same has been specifically denied in the reply statement filed by the Respondent. Further, it was also stated in the reply that the Respondent/Corporate Debtor has filed a counter claim in the said DRT proceedings as against the claim of the Financial Creditor and as such the question of 'default' as contemplated under the provisions of IBC, 2016 does not arise.

7. Further, it is averred in the Counter that as per Section 7 of IBC, 2016 the Financial Creditor is required to establish that the Corporate Debtor has committed 'default' and in the present case the Financial Creditor has not clearly alleged as to when the default has occurred and also the Financial Creditor has not clearly stated as to when the 'default' was committed on the part of the Corporate Debtor. However, on the other hand, the Financial

Creditor has only mentioned about the Demand Notice issued under the SARFAESI Act on 05.12.2006 followed by the filing of OA.No.668 of 2017.

8. It is further averred in the Counter that the credit facility was obtained as early as on 19.06.2004 and the last of the facility was obtained on 23.10.2014 and as such the entire limitation starts from October 2014 and ends in the month of October 2017 and by taking into consideration the said date, the Application as filed by the Financial Creditor is barred by limitation. Further, the Corporate Debtor relied upon the judgement of the Hon'ble Supreme Court reported in *AIR 2020 SC 4668* in **Babulal Vardharji Gururaj Gururaj -VS- Veer Gururaj Aluminium Industries Private Limited and Another** and also in *Civil Appeal No.7474 of 2019* in **M/s. Radha Exports (India) Private Ltd -VS- K.P.Jayaram and another** in order to say that the present Application as filed by the Financial Creditor is barred by limitation.

9. Heard the submissions made by the Learned Counsel for the Financial Creditor and also perused the Counter and the documents filed along with the counter. From the submissions made by the Learned Counsel for the Financial Creditor and also from the averments made in the Counter, the issue which arises for

consideration before this Tribunal as to whether the present Application filed by the Financial Creditor under Section 7 is barred by limitation. To answer the said issue, it is necessary to refer to the documents which have been filed along with the typed set.

10. From the table which is narrated *supra* in relation to Part-IV of the Application, it is seen that the Financial Creditor has granted various Term Loans, Cash Credit and Funded Term Loans to the Corporate Debtor starting from the year 16.12.2005 till 12.12.2011. It is also pertinent to note that the last of the credit facility as stated in the Counter by the Corporate Debtor was granted to the Corporate Debtor on 23.10.2014. The Respondent in the Counter has averred that they have not committed default in respect of loan which has been granted to the Corporate Debtor. However, in the letter dated 07.09.2018, issued by the Corporate Debtor it is seen that the Corporate Debtor has stated in para 2 as follows : -

> Some of the Prospective Private Funding Agencies, who understood the viability of our Project, have come forward to invest and see that this Valuable Project is put on wheels again. With that scope in mind only, we put up the following proposal to you in our letter dated 01.09.2018. "If we get funds to the tune of Rs.15.00 Crores from the Private Funders, we could be in a position to renovate and restart the Project in 6 Months' time and start repaying. <u>We shall be repaying the funds received from the Private Funders for restarting the Project first and then start repaying the liabilities to the Bank and liquidate the same within a period of 10 years thereafter as</u>

mentioned in our letter No.SBEL/IOB/K-157/2017-18 dated 09.10.2017."

(emphasis supplied)

11. Further it is to be noted that in the letter dated 06.02.2019 issued by the Corporate Debtor in para 4, the Corporate Debtor has acknowledged the liability to pay the monies due to the bank and also stated that they know about the status of the cases pending before the DRT.

12. Thus, the crux of the above two letters dated 07.09.2018 and 06.02.2019, would show that the Corporate Debtor has explicitly admitted its liability towards the repayment of the loan which had been granted to the Corporate Debtor. Thus, the debt which is due and payable by the Corporate Debtor and the default which has been committed on the part of the Corporate Debtor is proved by the Financial Creditor in the present case by referring to the above two documents.

13. Next, coming to the aspect of limitation, it is seen from the additional documents filed by the Financial Creditor that the Corporate Debtor has issued a Revival Letter dated 27.07.2015 in favour of the Financial Creditor. The said Revival Letter is duly affixed with a seal of the Corporate Debtor and signed by the Managing Director of the Corporate Debtor. The Corporate Debtor

in the Counter averred that they have specifically disputed the said revival letter. However, it is seen that only a mere statement has been made on the part of the Corporate Debtor and there is no documentary evidence or any substantial statement made in the counter in order to corroborate their stand as to why they are disputing the said Revival Letter. Hence the said defence taken by the Corporate Debtor is found to be only a mere statement not supported by any documentary evidence.

14. Further, the said Revival Letter would act as an acknowledgment under Section 18 of the Limitation Act, 1963 in and by which the period of limitation is being extended for another period of 3 years from the said date. It is also seen that on 09.10.2017 the Respondent by way of a letter as stated that once they had started the project by receiving the funds from the private investor, they would have started the payment of liabilities to the bank and liquidate the same within the period of 10 years and the said statement also amounts to the acknowledgement of the 'financial debt' on the part of the Corporate Debtor. Thus, if the said date is taken into consideration, then the present Application which has been filed before this Tribunal on 13.12.2019, falls very well within the period of limitation. Further, the recent decision of the Supreme Court in the matter of **Dena Bank (now Bank of**

Baroda) –Vs- C. Shivakumar Reddy and Anr. in Civil Appeal No. 1650 of 2020, it has been held in para 142 as follows;

> "142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years."

Therefore, the issue as regards the limitation, is decided in favour of the Financial Creditor and against the Corporate Debtor and resultantly this Tribunal comes to an irresistible conclusion that the present Application filed by the Financial Creditor under Section 7 of IBC, 2016 is not barred by limitation.

15. In view of the facts and finding given *supra* and also in view of the 'financial debt' which is proved by the Financial Creditor and the 'default' being committed on the part of the Corporate Debtor, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

16. The Financial Creditor has proposed the name of **Mr. Palanigounder Eswaramoorthy,** Reg. No. IBBI/IPA/-002/IP-N00284/2017-18/10842 *(email id:- swarfcs@gmail.com)* as the

Interim Resolution Professional (IRP) who has also filed his consent in Form – 2 and also the Authorization for Assignment is granted to the said IRP till 24.11.2021. The proposed IRP who is appointed shall take forward the process of Corporate Insolvency Resolution of the Corporate Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

17. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

18. However during the pendency of moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder;

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and mange the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such

Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

19. The duration of period of moratorium shall be as provided in Section 14(4) of the Code which is reproduced below for ready reference;

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

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 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.

20. Based on the above terms, the Petition stands **admitted** in terms of Section 7 of the Code and the Moratorium shall come into effect as of this date. A copy of the Order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above

named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named shall also be furnished with copy of this Order forthwith by the Registry, who will communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond