**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**KOLKATA BENCH-I, KOLKATA**

**CP (IB) No.1905/KB/2019**
**and**
**CP (IB) No.1857/KB/2019**

*An application under section 7 of the Insolvency & Bankruptcy Code, 2016.*

*In the matter of*
**CP (IB) No.1905/KB/2019**

*In the matter of:*
**State Bank of India** ... Financial Creditor

*Versus*

**N. S. Engineering Projects Private Limited**
**[CIN: U29120WB2007PTC112967]** ... Corporate Debtor

And

*In the matter of*
**CP (IB) No.1857/KB/2019**

*In the matter of:*
**Punjab National Bank** ... Financial Creditor

*Versus*

**N. S. Engineering Projects Private Limited**
**[CIN: U29120WB2007PTC112967]** ... Corporate Debtor

Order reserved on: 19 May 2022

Order pronounced on: 28 June 2022

***Coram:***

| | | |
|---|---|---|
| Shri Rajasekhar V.K. | : | Member (Judicial) |
| Shri Balraj Joshi | : | Member (Technical) |

***Appearances:***

| | | |
|---|---|---|
| For the Financial Creditor | : | Mr Ratnanko Banerji, Senior Advocate<br>Mr Jishnu Chowdhury, Advocate<br>Ms Urmila Chakraborty, Advocate<br>Mr Debasish Chakrabarti, Advocate |
| For the Corporate Debtor | : | Mr Jishnu Saha, Senior Advocate<br>Mr Zeeshan Haque, Advocate<br>Mr Ishaan Saha, Advocate |

# COMMON ORDER

***Rajasekhar V.K., Member (Judicial)***

**1. *Prologue***

1.1. CP (IB) No.1905/KB/2019 is an application filed under section 7 of the Insolvency & Bankruptcy Code (IBC), 2016 by State Bank of India (SBI), a corporation constituted under the State Bank of India Act, 1955, and represented by Shri Subrata Barman, Chief Manager, Stressed Assets Management Branch, under a letter of authority dated 15 October 2019[1] in pursuance of the letter of authority dated 16 June 2017[2] issued by the Chairman, State Bank of India, on the strength of a Gazette Notification No.ORG/17405 dated 27 March 1987[3] issued by the Executive Committee of the Central Board of SBI, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against N. S. Engineering Projects Private Limited, the Corporate Debtor.

1.2. N. S. Engineering Projects Private Limited is a private company registered under the Companies Act, 1956, with Corporate Identification Number (CIN) U29120WB2007PTC112967 under the Registrar of Companies, West Bengal, Kolkata. Its registered office is at Dakshin Jhapardaha, ONGC Road, Domjur, Howrah 711 405, in the State of West Bengal. This Bench, therefore, has jurisdiction to deal with the application.

1.3. CP (IB) No.1857/KB/2019 is an application filed under section 7 of the Insolvency & Bankruptcy Code (IBC), 2016 by Punjab National Bank (PNB), a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and represented by Shri Saroj Kumar Hembrom, Senior Manager, Asset Recovery Management Branch, under the general Power of Attorney dated 05 March, 2002[4] in pursuance of the letter of

---

1 Page 38 of the CP

2 Page 39 of the CP

3 Page 40 of the CP

4 Page 21-27 of CP (IB) No.1857/KB/2019

authority dated 21 September, 2018[5] issued by issued by the Circle Office, Kolkata of the PNB, seeking to initiate CIRP against N. S. Engineering Projects Private Limited, the Corporate Debtor.

1.4. The issues involved in both the Company Petitions, *i.e.,* CP (IB) No.1905/KB/2021 and CP (IB) No.1857/KB/2019 are the same and concerns the same Corporate Debtor. Hence, both the Company Petitions are being dealt with in this common order.

1.5. For convenience, the parties are referred to as per their position in the main company petition in CP (IB) No.1905/KB/2021.

**2. *Submissions of Mr Ratnanko Banerji, Ld Sr Counsel for the Financial Creditor in CP (IB) No.1905/KB/2019***

2.1. The brief particulars leading up to the present application are that the Corporate Debtor requested the Financial Creditor for sanction of certain credit facilities. Accordingly, the Financial Creditor sanctioned a Term Loan of ₹11 crore and bank guarantee of ₹1.00 crore on 02 November 2010 to enable the Corporate Debtor to carry on the business of manufacturing steel fabricated and galvanised items etc., in terms of the sanction letter dated 02 November 2010.[6] The bank guarantee was sanctioned towards power supply in favour of West Bengal State Electricity Distribution Company (WBSEDC) of ₹21 lakh and a further sum of ₹79 lakh to enable the Corporate Debtor to participate in Indian Railway tenders.[7]

2.2. The Corporate Debtor availed the facilities against hypothecation of all movable fixed assets and mortgage by deposit of title deeds of immovable properties of the Corporate Debtor.[8]

---

5 Page 28 of the CP (IB) No.1857/KB/2019

6 Page 53 of the CP

7 Page 61 of the CP

8 Page 12 of the CP

2.3. On 10 January 2012,[9] the Financial Creditor agreed to grant working capital facilities in the form of fresh Term Loan of ₹15 crore, and fresh Credit Exposure Limit (CEL) of ₹2.86 crore, with the existing term loan of ₹11 crore and bank guarantee of ₹1.00 crore continuing.

2.4. These limits were further enhanced from ₹28.26 crore to ₹36.40 crore on 11 April 2013,[10] consisting of Fund-Based Working Capital (FBWC) of ₹8.00 crore, Term Loan-I of ₹9.40 crore, Term Loan-II of ₹15.00 crore, Non-Fund Based Working Capital (NFBWC) Letter of Credit of ₹1.00 crore, and NFBWC Bank Guarantee of ₹3.00 crore.

2.5. On 30 December 2013, Punjab National Bank (PNB) and The South Indian Bank Limited (SIB) agreed to provide working capital facilities to the Corporate Debtor along with the Financial Creditor under a Working Capital Consortium Agreement.[11] The repayment period of the Term Loan-II limits was rephased on 20 March 2014.[12]

2.6. On 08 September 2014,[13] the Financial Creditor enhanced the credit facilities from ₹32.9 crore to ₹44.32 crore with the consortium lending also marking an increase from ₹52.90 crore to ₹100.32 crore. The Financial Creditor increased the limits from ₹44.32 crore to ₹51.15 crore on 26 February 2015.[14]

2.7. An inter-Creditor Agreement (ICA) was executed on 25 March 2015[15] between the Financial Creditor, PNB and SIB, paving the way for creation of a Joint Lenders Forum (JLF), which was empowered to lay down policies and

---

[9] Page 160 of the CP

[10] Page 196 of the CP

[11] Page 250 of the CP

[12] Page 328 of the CP

[13] Page 332 of the CP

[14] Page 387 of the CP

[15] Page 464 of the CP

guidelines for implementing the restructuring package or recovery options in respect of the Corporate Debtor.

2.8. On 29 September 2015,[16] a Master Restructuring Agreement (MRA) was executed, whereby a Corporate Debt Restructuring (CDR) package was approved by the consortium.

2.9. On 11 February 2016,[17] the Financial Creditor renewed the credit facilities. The Corporate Debtor issued a Balance Confirmation Letter at 31 March 2017,[18] acknowledging indebtedness to the tune of ₹37,28,20,668.36 with interest.

2.10. The Financial Creditor, *vide* its letter dated 23 June 2017,[19] put the Corporate Debtor on notice that the credit facilities were running irregular since 31 March 2017 due to non-servicing of interest and instalments, and that the account would turn NPA on 28 June 2017 unless regularised before that.

2.11. The Financial Creditor issued a Demand Notice on 20 September 2017,[20] demand immediate repayment of ₹39,46,03,964/- towards total outstanding dues with seven days from the date of receipt of the Notice.

2.12. The Financial Creditor has also annexed copies of the balance sheet of the Corporate Debtor as at 31 March 2017[21] and 31 March 2018.[22]

### 3. *Submissions of Mr Jishnu Saha, Ld Sr Counsel for the Corporate Debtor in CP (IB) No.1905/KB/2019*

3.1. Mr Jishnu Saha, Ld Sr Counsel appearing for the Corporate Debtor, premised his objections primarily on the well-established principles of contract law, that

[16] Page 478 of the CP

[17] Page 638 of the CP

[18] Page 659 of the CP

[19] Page 898 of the CP

[20] Page 899 of the CP

[21] Page 902 of the CP

[22] Page 932 of the CP

where a contract consists of reciprocal promises to be performed on both sides, and one party fails to do so, then not only is the other party not required to perform its obligations, but is also discharged and further entitled to compensation.

3.2. If these provisions are applied, then not only is there no default on the part of the Corporate Debtor, but the other side is obliged to fund the Corporate Debtor. When there is a Master Restructuring Agreement (MRA) and there is a breach of agreement from one side, that side cannot take advantage of its own wrong.

3.3. In the present application, non-performance of obligations will attract section 65[23] of the Code, since it has been filed for oblique purposes of recovery. This, in short, is the backbone of the legal argument regarding maintainability, Mr Jishnu Saha submitted.

3.4. Mr Jishnu Saha submitted that on 16 August 2017,[24]the Corporate Debtor had instituted a suit bearing CS No.188/2017 before the Hon'ble Calcutta High Court against the consortium lenders. The prayers as paraphrased from the suit are *inter alia* as follows:[25]

(a) A decree for a sum of ₹117.59 crore from the defendants therein.

(b) Interest on the said claim calculated at 18% per annum from 01.08.2017 till decree, with further interest @ 18% per annum from the date of decree until realisation of the decretal amount.

---

23 **65. Fraudulent or malicious initiation of proceedings.–**

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) * * *

24 Page 43 of the IA

25 Page 136 of the IA

(c) Declaration that the purported NPA status of the account of the plaintiff is bad, illegal and non-binding.

(d) Mandatory injunction directing the defendant No.1 to restore the plaintiff's account to the status prior to the purported declaration of NPA status.

(e) Declaration that the alleged default in repayment is attributable to the breaches of the defendant No.1 and that the defendant No.1 is not entitled to obtain any benefit therefrom.

(f) Decree for perpetual injunction restraining the defendant No.1 from either declaring the plaintiff's account as NPA.

3.5. SBI filed a written statement in the suit on 12 February 2018,[26] which consisted of bare denials. It filed an additional written statement on 10 April 2018.[27]Bare denials are no denials in law, they are covered by the doctrine of non-traverse. He relied on the judgment of the Hon'ble Supreme Court in ***M. Venkataramana Hebbar (dead) by LRs v M Rajagopal Hebbar & others***,[28] wherein it was held that if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the court was entitled to draw an inference that the same had been admitted.

3.6. PNB was given opportunities but did not file written statement at all. The right to file written statement was closed. PNB applied for leave to file written statement, which was dismissed right up to the Hon'ble Supreme Court. Issues have been framed and are awaiting trial.

3.7. Mr Jishnu Saha further submitted that if pursuant to the contract, the Bank did not disburse the amount and if there was any resultant default in payment on account thereof, that may be a defence open to the petitioners. In this context,

---

[26] Page 1230 of the reply affidavit

[27] Page 1249 of the reply affidavit

[28] (2007) 6 SCC 401 : 2007 SCC OnLine SC 470 decided on 05 April 2007 (para 13)

he relied on the judgment of the Hon'ble Supreme Court in ***Viswalakshmi Sasidharan & others v Branch Manager, Syndicate Bank, Belgaum.***[29]

3.8. The section 7 application filed by the Financial Creditor is with a view to frustrating the trial, so that the issues requiring adjudication by the civil court will no longer be considered. In view of the clear questions that the Corporate Debtor has raised in the suit and the bare denials in the written statement, the questions are – one, whether the Adjudicating Authority will undertake this exercise; and two, the premise on which the Adjudicating Authority will go into the question.

3.9. The fundamental principle is that when there is a contract, the parties are bound by it. If there is a promise, then the law is that one cannot resile from the promise. If there is a non-performance and there is loss, then consequences must follow. This was what was laid down by the Hon'ble Supreme Court in ***Gujarat State Financial Corporation v Lotus Hotels Pvt Ltd,***[30] where the Hon'ble Supreme Court held that in a case of arbitrary refusal to grant sanctioned loan by state financial corporation to an entrepreneur when the entrepreneur has acted on the basis of the sanction, and incurred expenditure and suffered liabilities, the principles of promissory estoppel can be invoked. The principles enunciated in ***Lotus Hotels*** have not received any adverse comment so far even after several decades.

[29] (1997) 10 SCC 173 decided on 13 February 1997 (para 2)

[30] (1983) 3 SCC 379 decided on 03 May 1983 (paras 9, 10, 12 and 13)

3.10. Mr Jishnu Saha submitted that the law is well settled, in that the provisions of sections 51,[31]52,[32] 53[33] and 54[34] of the Indian Contract Act, 1872, will apply

---

[31] **51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.–**When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

*Illustrations:*

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery. (a) A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery." B need not pay for the goods, unless A is ready and willing to deliver them on payment. B need not pay for the goods, unless A is ready and willing to deliver them on payment."

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery. (b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery." A need not deliver, unless B is ready and willing to pay the first instalment on delivery. A need not deliver, unless B is ready and willing to pay the first instalment on delivery." B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment. B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

[32] **52. Order of performance of reciprocal promises.–** Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. Illustrations (a) A and B contract that A shall build a house for B at a fixed price. As promise to build the house must be performed before B's promise to pay for it. (b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

[33] **53. Liability of party preventing event on which the contract is to take effect.–** When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract. Illustration: A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

[34] **54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.–**When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. Illustrations: (a) A hires B's ship to take in and convey, from Calcutta to Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract. (b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound

even in banking transactions. Under the agreement, the repayment was to commence only after fulfilment of the bank's obligations. Section 55[35] of the Indian Contract Act, 1872, would then apply in regard to the time obligation that the parties had agreed to adhere to.

3.11. Mr Jishnu Saha submitted that in banking transactions, time is of the essence. Moratorium is fixed, and on expiry interest becomes payable. In view of the position of dominance that banks have over industries, the Corporate Debtor could not have terminated the contract. The Corporate Debtor was obliged to wait for the banks to perform the obligations at their leisure. The Corporate Debtor was unjustly prevented from running its unit and performing its obligations because of the failure on the part of the banks to fund. These are very relevant considerations, Mr Saha reasoned.

3.12. Mr Jishnu Saha submitted that when the Corporate Debtor has filed a suit and asserted that there is loss caused to the Corporate Debtor because the banks have not performed their obligations on time, the Financial Creditor ought not be allowed to maintain the present section 7 application just to frustrate the suit.

---

to make compensation to A for any loss caused to him by the non-performance of the contract. (c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation. (d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

35 **55.Effect of failure to perform at fixed time, in contract in which time is essential.–**When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

**Effect of such failure when time is not essential.–**If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

**Effect of acceptance of performance at time other than that agreed upon.–**If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Amongst the issues that have been framed in the suit are whether there is a time schedule under banking laws for disbursement of the amount, and whether the SBI declared the account as NPA on the basis of RBI guidelines.[36]

3.13. On the principle of reciprocal obligations, Mr Jishnu Saha also relied on the decision of the Hon'ble NCLAT in ***Vipul Limited v Solitaire Buildmart Pvt Ltd,***[37]and in ***KS Sreenivasan v Landmark Housing Projects (India) Pvt Ltd,***[38]Hon'ble Patna High Court in ***Suraj Kana Pharmaceutical v Bihar State Financial Corporation & another.***[39]

3.14. On the proposition that mere existence of debt being due or payable in law is not enough to initiate CIRP, unless it is established that there was a default committed by the Corporate Debtor, Mr Jishnu Saha relied on the judgment of the Hon'ble NCLAT in ***Park Energy Pvt Ltd v Syndicate Bank & another.***[40]

3.15. Normally a breach will give rise only to a remedy for compensation, except when the breach is fundamental to the contract. If there is a reciprocal obligation on which the contract is dependent and if those obligations are not performed, then one can avoid the agreement. In the present case, the restructuring of loans took place because of the failure of the banks to perform their part of the bargain.

3.16. Mr Jishnu Saha further submitted in an application filed under section 7 of the Code, there must be a default. This is the settled position of law in terms of the judgment of the Hon'ble Supreme Court in ***Innoventive Industries Limited v***

[36] Page 1307 of the reply affidavit filed by the Corporate Debtor

[37] Company Appeal (AT) (Insolvency) No.550/2020 decided on 18 August 2020 (para 25 of the juris copy of the judgment)

[38] 2020 SCC OnLine NCLAT 1173 decided on 24 November 2020 (paras 4, 9, 15 and 18)

[39] 2009 SCC OnLine Pat 61 decided on 17 February 2009 (paras 8 to 13)

[40] 2020 SCC OnLine NCLAT 637 decided on 24 August 2020 (para 29)

***ICICI Bank Ltd & another.***[41]One proceeds not on the basis of debt, but on the basis of default.

3.17. Mr Saha also relied on the judgment of the Hon'ble Supreme Court in ***Babulal Vardharji Gurjar v Veer Gurjar Aluminium Industries Private Limited & another,***[42]wherein it was held that for admitting an application of the Financial Creditor, the Adjudicating Authority has to be satisfied that a "default" has occurred, and that the legislative policy now was to move away from the concept of *"inability to pay debts"* to *"determination of default."*

3.18. Mr Saha further relied on the judgment of the Hon'ble Supreme Court in ***Indus Biotech Private Limited v Kotak India Venture (Offshore) Fund & others,***[43]in support of his contention that to trigger an application under section 7 of the Code, there should be in existence four factors: (i) there should be a "Debt", (ii) "Default" should have occurred, (iii) debt should be due to "Financial Creditor", and (iv) such default which has occurred should be by a "Corporate Debtor."Further, the Corporate Debtor is entitled to point out that the default has not occurred and if it is found by the Adjudicating Authority that there is default, the process as contemplated under sub-section (5) of section 7 IBC is to be followed, or if there is no default, the adjudicating authority shall reject the application as provided under sub-section (5)(b) of section 7 IBC.

3.19. Going back to the principles enunciated in sections 51 to 54 of the Indian Contract Act, 1872, Mr Jishnu Saha submitted that the relevant question is what constitutes a fundamental breach of contract. He drew attention to the judgment of the Hon'ble Supreme Court in ***Maharashtra State Electricity Distribution Company Limited v Datar Switchgear Limited,***[44]wherein the court found that a fundamental breach was established on the part of the appellant therein in

[41] (2018) 1 SCC 407 decided on 31 August 2017 (paras 28, 29 and 30)

[42] (2020) 15 SCC 1 : 2020 SCC OnLine SC 647 decided on 14 August 2020 (para 21.2)

[43] (2021) 6 SCC 436 : 2021 SCC OnLine SC 268 decided on 26 March 2021 (para 28)

[44] (2018) 3 SCC 133 : 2018 SCC OnLine SC 20 decided on 18 January 2018 (paras27, 31 and 67)

carrying out its obligations, with no default of the respondent No.2 therein which had invested a whopping amount of ₹163 crore in that project. The Hon'ble Supreme Court also quoted with approval the dicta laid down in ***Suisse Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale,***[45]that once it is established that the party was justified in terminating the contract on account of fundamental breach thereof, then the said innocent party is entitled to claim damages for the entire contract.

3.20. Mr Jishnu Saha submitted that before being entitled to repayment, banks have an obligation to disburse in terms of the sanction letters. For this proposition, he relied on two judgments of the Hon'ble Supreme Court in ***Nathulal v Phoolchand,***[46] **and *Kusheshwar Prasad Singh v State of Bihar & others*.**[47]

3.21. Mr Jishnu Saha further submitted that having failed to fulfil its primary obligation of timely disbursements, banks cannot seek to take advantage of their own wrong. He relied on the latin maxim, *nullus commodum capere potest de injuria sua propria.*[48] In support of the proposition, Mr Jishnu Saha cited the judgment of the Hon'ble Supreme Court in ***Devendra Kumar v State of Uttaranchal & others.***[49]

3.22. Mr Jishnu Saha also relied on two judgments of the Hon'ble NCLAT – ***Phoenix ARC Pvt Ltd v Vishal M Poonater & another,***[50]**and *Sanjeev Azad & another v Punjab National Bank & another,***[51]to support his contention that the Adjudicating Authority must record its satisfaction that a default has occurred

[45] (1967) 1 AC 361 : (1966) 2 WLR 944 (HL) decided on 31 March 1966

[46] (1969) 3 SCC 120 decided on 16 October 1969 (para 12)

[47] (2007) 11 SCC 447 : 2007 SCC OnLine SC 391 decided on 19 March 2007 (paras 15, 16, 18 and 20)

[48] No one can derive an advantage from one's own wrong

[49] (2013) 9 SCC 363 : 2013 SCC OnLine SC 675 decided on 29 July 2013 (para 25)

[50] 2019 SCC OnLine NCLAT 810 decided on 22 April 2019 (unnumbered third para from the bottom)

[51] 2019 SCC OnLine NCLAT 53 decided on 23 January 2019 (para 7)

and the Corporate Debtor is entitled to point out that a default has not occurred in the sense that the debt, which may also include a disputed claim, is not due.

3.23. Mr Jishnu Saha further submitted that the learned Debt Recovery Tribunal, Kolkata, after taking judicial notice of the pendency of the civil suit, passed an order on 28 December 2021 in IA No.2642/2021 in SA No.201/2021, restraining the Financial Creditor from taking any coercive measures against the Corporate Debtor.

3.24. Closing his submissions, Mr Jishnu Saha submitted that if the breach is fundamental to the contract, then notwithstanding the exclusion clause, damages can be claimed. The Indian Contract Act, 1872 is still very good law, since it is ultimately premised on common sense, commercial prudence and commercial exigencies. The guilty party cannot compel performance of reciprocal obligations.

3.25. In these circumstances, Mr Jishnu Saha urged dismissal of the section 7 application filed by the Financial Creditor.

**4. *Arguments in reply of Mr Ratnanko Banerji, Ld Sr Counsel for the Financial Creditor***

4.1. Responding to the arguments of Mr Jishnu Saha, Mr Ratnanko Banerji, Ld Sr Counsel for the Financial Creditor, submitted that on the face of it, there is no dispute at all. The debt is outstanding, and there is balance confirmation from the side of the Corporate Debtor. The only thing for the Adjudicating Authority to consider is whether there is a debt in respect of which there is a default or not. If there is a counterclaim, set-off etc., these will come in later. The idea of the IBC is to rescue the Corporate Debtor. It is also to free a Financial Creditor or Operational Creditor from pursuit. If the pendency of a suit is allowed to come in as a defence to a section 7 application, it will set a dangerous precedent.

4.2. Restructuring of facilities was done. Mr Banerji submitted that prayer (e) of the suit[52]was exactly what the IBC does not permit to be done. It isa pure counterclaim which is not so intrinsically connected to the claim in the section 7 application. In the plaint, the Financial Creditor is alleged to have refused the disbursement.[53] The Adjudicating Authority should not go into this at all. What was disbursed has to be paid back. Mr Banerji drew attention to paras 72 to 77 of the plaint,[54]wherein the entire focus is on the alleged loss suffered by the Corporate Debtor. He submitted that the entirety of the suit appears to be a claim for damages by way of a counterclaim. The damages are as yet unascertained and will have to be proved before it gets crystallised. That would not be within the zone of consideration of the Adjudicating Authority at all, as otherwise, the Adjudicating Authority will get converted into a civil court.

4.3. Mr Banerji relied on ***Innoventive (supra)***[55] ***and Swiss Ribbons Private Limited v Union of India,***[56]to submit that in so far as set-off and counterclaim is concerned, it is not to be considered by the Adjudicating Authority. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the Resolution Professional, his decision being subject to challenge before the adjudicating authority under section 60 of the Code.

4.4. Mr Banerji also relied on the decision of the Hon'ble Supreme Court in ***Indian Oil Corporation Limited v SPS Engineering Limited,***[57]and of the Hon'ble Calcutta High Court in ***International Seaports (Haldia) Pvt Ltd v Steel Authority of India Limited,***[58]for the proposition that exercise of the right of set-

---

[52] Page 129 of the reply affidavit

[53] Para 63 of the plaint, at page 100 of the reply affidavit.

[54] Pages 113 to 117 of the reply affidavit

[55] (2018) 1 SCC 407 : 2017 SCC OnLine SC 1025 decided on 31 August 2017 (paras 28, 29 and 30)

[56] (2019) 4 SCC 17 : 2019 SCC OnLine SC 73 decided on 25 January 2019 (paras 61, 63 to 65)

[57] (2011) 3 SCC 507 : 2011 SCC OnLine SC 286, decided on 03 February 2011 (para 26)

[58] 2016 SCC Online Cal 413 decided on 22 March 2016 (paras 25, 26 and 27)

off or counterclaim must be ultimately established in a court of law. He submitted that the case of the Corporate Debtor is unsustainable.

4.5. Mr Banerji, therefore, urged the Adjudicating Authority to dismiss the interlocutory application and admit the section 7 application for initiating CIRP against the Corporate Debtor.

**5. *Analysis and findings***

5.1. We have heard Mr Ratnanko Banerji, Ld Sr Counsel appearing for the Financial Creditor and Mr Jishnu Saha, Ld Sr Counsel appearing for the Corporate Debtor and perused the records. Ms Aparajita Rao, Ld Counsel appearing for the Financial Creditor in CP (IB) No.1857/KB/2019, adopted the submissions of Mr Ratnanko Banerji.

5.2. The cardinal question that craves an answer at the outset is whether the Adjudicating Authority is bound to admit an application under section 7 of the Code when it is alleged that there is contributory negligence arising out of non-disbursement of the amount sanctioned by the Financial Creditor leading to the alleged default by the Corporate Debtor. Though there are judgments galore on the subject in the context of proceedings in a suit, this is a matter that is *res integra* as far as the Insolvency & Bankruptcy Code, 2016 is concerned.

5.3. The Corporate Debtor had filed a suit alleging non-performance of contractual obligations on the part of the Financial Creditor, way back on 16 August 2017. It is not anyone's case that the suit in question was filed in contemplation of an application under section 7 of the Code. Therefore, we do not find any merit in Mr Ratnanko Banerji's exposition that acceptance of the proposition advanced by Mr Jishnu Saha that the conduct of the parties and legal action taken by the Corporate Debtor against the Financial Creditor for breach of the contract, will lead to a dangerous precedent in a section 7 situation. On the other hand, we need to examine whether there is any contributory role in the alleged default on the part of the Corporate Debtor *qua* the Financial Creditor.

5.4. The Lender's Independent Engineer's Report (LIE Report),[59] commissioned by the Financial Creditor *vide* their letter dated 29 February 2012[60] in respect of the Corporate Debtor has been annexed to the reply affidavit of the Corporate Debtor. It is noted therein that the company has brought in their share in the project cost.[61] However, in view of the likely overrun in the project cost, they are required to bring in more funds.

5.5. The only contributory act of the Corporate Debtor's promoters, if we could call it that, to the cost escalation has been this sentence: ***"There has been substantial increase in building and other civil works resulting in overall increase in cost of ₹360.37 lac, part of which could have been saved had the company not gone for ambitious administrative building with additional floor and decorations."***[62]

5.6. It is noteworthy that the total project cost was estimated at ₹31.98 crore, to be funded in the debt-equity ratio of 0.52:1.[63] It notes in para 15.0[64] that the company has so far brought in ₹10.87 crore including unsecured loan of ₹99.66 lakh against a term loan of ₹11 crore as certified by the auditor.

5.7. Even the LIE Report commissioned by the Financial Creditor does not point to any failure on the part of the Corporate Debtor or its promoters to perform its obligations in terms of the sanction letter. Therefore, there was no reason whatsoever for the Financial Creditor not to disburse the amounts in terms of the sanction letters. There is no denial of the fact, either in the pleadings or

[59] Page 175 onwards of the reply affidavit

[60] As mentioned in clause 4.0 at page 179 of the reply affidavit

[61] Unnumbered first para at page 194 of the reply affidavit

[62] Page 191 of the reply affidavit, second bullet point below the heading, *"Remarks"*

[63] Para 1 of the LIE Report, at page 177 of the reply affidavit

[64] Page 197 of the reply affidavit

during arguments, that the Financial Creditor did not effect disbursements in terms of the sanction letters.

5.8. We also note the specific averment in the reply affidavit,[65] that the arrangement with the Financial Creditor failed since the Financial Creditor did not provide the sanction in terms of its appraisal note. Further, due to the continued breaches of the Financial Creditor, the repayment of the Term Loan for Phase II began even before the working capital for Phase II was sanctioned by the Financial Creditor. The debts of the corporate debtor had to be restructured by the Financial Creditor and other consortium members due to their failure to disburse the committed amounts of loan as per the JLF agreement and the assessment note prepared by the Financial Creditor.[66]

5.9. Further, the Corporate Debtor has referred to the consortium meeting of 03 March 2015,[67] where the member banks had confirmed that they had received the CAP/TEV study, stock audit report and appraisal note circulated by the Financial Creditor. The Dun & Bradstreet (D&B) representative explained that Phase-II is running at very low capacity due to the lack of funds, and that sanction of need-based working capital will allow the company to operate at optimum level, which will help the company to generate adequate cash flow to service the debt.

5.10. We further notice that in the balance sheet of the Corporate Debtor as at 31 March 2017, the auditors have categorically observed, in their report dated 01 September 2017, that the Corporate Debtor has ***<u>not</u>*** defaulted in the repayment of loans or borrowings to banks.[68] In the balance sheet as at 31 March 2018, while there is acknowledgement of a jural relationship,[69] there is no

[65] Para 17 at page 7 of the reply affidavit

[66] Para 18 at page 7 of the reply affidavit

[67] Para 56 at page 19 of the reply affidavit

[68] Page 905 of the CP

[69] Page 942 of the CP

acknowledgement of any default either in the auditor's report or in the directors' report.

5.11. The learned Debt Recovery Tribunal, Kolkata, after taking judicial notice of the pendency of the suit, has also restrained the Financial Creditor from taking any coercive measures against the Corporate Debtor ***(see para 3.23 above)***.

5.12. The adjudication of the suit by the Hon'ble Calcutta High Court will result in determination of the default, inasmuch as there will be an adjudication also on whether the Corporate Debtor is discharged from its obligations. We wonder why, after all the intervening years when the accounts were apparently declared as NPA with effect from 28 June 2017, the Financial Creditor waited for two more years before initiating the present proceedings We restrain ourselves on commenting on the reasons due to connected *lis pendens*.

5.13. However, we cannot hold ourselves back from observing that the whole gamut of the economics of an enterprise is dependent upon the lender and the borrower alike. They must work in unison to see that the enterprise is a successful venture based on the thorough techno-commercial appraisal undertaken before arriving at a decision to lend with the expectations of a reasoned rate of return. The Financial Creditor, on its part, has all the wherewithal at its command to undertake such studies, the cost of which is ultimately covered by way of enhanced returns. Therefore, rather than pleading innocence on either the failure or the below-par performance of a commercial endeavour and lay the entire blame at the door of the entrepreneur, the Financial Creditor has to look hard into the mirror.

5.14. Section 7(5)(a) of the Code stipulates that where the Adjudicating Authority is satisfied that a default has occurred, it ***may*** by order admit such application. It cannot be extended to a fact situation where the Financial Creditor, by its own acts of omission and commission, contributes to the default on the part of the Corporate Debtor. We are not convinced that this is a fit case for initiating

CIRP against the Corporate Debtor. The present proceedings initiated by the Financial Creditor seems to be for purposes other than insolvency resolution of the Corporate Debtor, and is, therefore, liable to be rejected.

5.15. Considering the totality of circumstances, CP (IB) No.1905/KB/2021 and CP (IB) No.1857/KB/2019 shall stand rejected. However, the petitioner is at liberty to pursue its remedies under any other law as may be available to it.

5.16. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

5.17. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities

5.18. File be consigned to record.

BALRAJ JOSHI
Digitally signed by BALRAJ JOSHI
Date: 2022.06.28 20:48:59 +05'30'

**Balraj Joshi**
**Member (Technical)**

Rajasekhar V K
Digitally signed by Rajasekhar V K
DN: c=IN, o=Personal, title=0605, pseudonym=490a45134c9adf68ed2365dbf55b7504ee43a6491c9e489ac8d67bacffde65cc, postalCode=600018, st=Tamil Nadu, serialNumber=f05120aee9b7978ef74f18a3ac75eb59d05e036c92d850593b5c6edc8a8c7396, cn=Rajasekhar V K
Date: 2022.06.28 18:40:11 +05'30'
Adobe Acrobat Reader version: 2022.001.20142

**Rajasekhar V.K.**
**Member (Judicial)**