

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Insolvency) No. 701 of 2022

[Arising out of Order dated 25.05.2022 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench - I in C.P. (I.B.) No. 1285/KB/2019]

IN THE MATTER OF:

Manas Sarkar,

Suspended Director of Mahakal
Agro Storage and Processing Unit
Private Limited,
son of Late Nihar Baran
Sarkar, working for gain at
Room No. 40, 4th Floor,
No. 121, Netaji Subhash Road,
Kolkata- 700001.

...Appellant

Versus

1. Indian Overseas Bank,

A banking company constituted under the
Banking Companies (Acquisition & Transfer
of Undertakings) Act, 1970, having its
registered office at
763, Anna Salai,
Chennai – 600002 and its Regional office at
Ojas Mall, 1st and 2nd Floor,
Station Feeder Road, Siliguri,
District – Darjeeling, PIN- 734005.

...Respondent No.1

2. Mr. Anil Anchalia,

Interim Resolution Professional of Mahakal
Agro Storage and Processing Unit Private
Limited having its office at 16 B, Robert
Street, 2nd Floor, Kolkata – 700012.

...Respondent No. 2

Present:

**For Appellant : Ms. Malvika Trivedi, Sr. Advocate along with
Ms. Ashish Choudhury & Mr. Anand Kamal,
Advocates.**

**For Respondents : Mr. Gautam Singhal & Mr. Rajat Chaudhary,
Advocate for R-1.**

J U D G M E N T

(02.05.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal is being filed by the ‘Appellant’ under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short ‘**Code**’) order dated 25.05.202 (in short ‘**impugned order**’) passed by the ‘Adjudicating Authority’ [National Company Law Tribunal, Kolkata Bench-I, Kolkata] in C.P. (I.B.) No. 1285/KB/2019, whereby the ‘Adjudicating Authority’ admitted an Application of the Indian Overseas Bank (Respondent No. 1)/ ‘Financial Creditor’ under Section 7 of the Code.

2. Being aggrieved by the ‘impugned order’ for initiation of the ‘Corporate Insolvency Resolution Process’ (in short ‘**CIRP**’) of the Mahakal Agro Storage and Processing Unit Private Limited / ‘Corporate Debtor’, Mr. Manas Sarkar, Suspended Director of the Corporate Debtor has filed the present appeal.

3. Heard the Counsel for the Parties and perused the records made available including cited judgments of the Hon’ble Supreme Court of India and earlier orders of this ‘Appellate Tribunal’.

4. The ‘Appellant’ submitted that he was engaged in the business of storing and preservation of potatoes, developing a cold storage etc., and to start the business a project report was prepared estimating fixed cost of Rs. 10.56 crores, in order to estimate the viability of the project including the funding required which was estimated after discussion and on assurance of the Respondent No. 1 herein. The ‘Appellant’ further submitted that the project report specified term loan requirement of Rs. 6.98

crores and working capital requirement of Rs. 18.79 lakhs. The 'Appellant' stated that the 'Respondent No. 1' herein orally gave the go by and thereafter on this assurance, the 'Appellant' borrowed from the market anticipating sanction of loan quickly. The 'Appellant' mentioned that against the assurance given by the 'Respondent No. 1', sanction of the loan was badly delayed and was communicated only after 6 months. Moreover, the loan was not sanctioned of full amount as orally assured earlier, during preparation of project report and was reduced from Rs. 6.98 crores as reflected in project report to Rs. 4.48 crores vide sanction letter dated 14.01.2009.

5. The 'Appellant' submitted that cold storage industry is a seasonal agriculture industry requiring huge funds at competitive rates to remain viable and their revenue is largely by way of rent receivables. In this background, working capital availability is fundamental to success of business which was denied by the 'Respondent' who sanctioned much less and much late vide sanction letter 07.07.2010, which came almost after half of the loading season was complete and thereby adversely impacting the business of the 'Corporate Debtor'.

6. The 'Appellant' mentioned that cold storage/ warehousing business is covered under definition of 'priority sector' and is regulated by Guidelines of Reserve Bank issued from time to time as per power conferred to RBI under Section 21 and Section 35(A) of the Banking Regulation Act, 1949, thereby, making the guidelines as statutory guidelines. The 'Appellant' submitted that the 'Respondents' sanctioned the credit facility @13% interest per

annum payable on monthly basis and with a margin of 25% which was against stipulated guidelines of RBI. The 'Appellant' further submitted that the Respondent No. 1 also levied interest on monthly basis, whereas, the RBI Guidelines specified interest to be charged on annual basis.

7. The 'Appellant' mentioned that he has mortgaged his property in the name of the Respondent No. 1 as primary as well as collateral securities including Hypothecation of all existing and future plans of machinery to be purchased, acquired or installed by the 'Corporate Debtor'.

8. The 'Appellant' also alleged that the 'Respondent No. 1' debited his account of Rs. 30 lakhs from cash credit and adjusted towards term loan account without giving any notice to him or taking his consent and which was completely unauthorised. The 'Appellant' also stated that in order to develop business, he further requested for a loan of Rs. 4 crores as 'produced marketing loan' which was denied by the 'Respondent No. 1' on 01.12.2012, thereby, making difficult situation for the 'Appellant' to operate the business.

9. The 'Appellant' mentioned that his business was in stressed situation and therefore requested for renewal of existing limits to avoid getting his account as NPA which was sanctioned much later on 10.09.2013, however the 'Respondent No. 1' started sending several matters to regularise the account immediately. The 'Appellant' further submitted that he was shocked to know that on 28.04.2014, the 'Respondent No. 1' has classified his account as NPA w.e.f. 31.03.2014 and demanded payment of Rs. 94.35 lakhs to operate account to standard account. The 'Appellant' submitted

that on 02.06.2014, the 'Respondent No. 1' issued a notice under Section 13(2) of the SARFAESI Act, 2002 and claimed Rs. 7,54,82,000/- which was denied by the 'Appellant' and the 'Appellant' also challenged the same under Section 17 of SARFAESI Act, 2002 before DRT (Debt Recovery Tribunal). In the meanwhile, the 'Respondent No. 1' filed an attachment application before the DRT-II, Kolkata. The 'Appellant' submitted that the recovery suit before DRT is pending adjudication under the SARFAESI Act, 2002. During course of events the 'Respondent No. 1' also filed application under Section 7 of the Code claiming an alleged debt of Rs. 15,68,12,389.14/- as on 31.07.2019.

10. The 'Appellant' submitted that although the 'Respondent No. 1' classified his account as NPA as on 31.03.2014, however during hearing on 17.12.2021 before the 'Adjudicating Authority', the 'Respondent No. 1' sought leave to file a supplementary affidavit to bring on record the exact date of default along with the Balance-Sheets of the Appellant Company which was granted by the 'Adjudicating Authority' and thereafter supplementary affidavit was filed, stating that inadvertently in Section 7 Application date of default was not mentioned. As per the 'Respondent No. 1', the default actually occurred on 31.12.2013 and the account of the 'Corporate Debtor' was classified as NPA on 31.03.2014 as per RBI Prudential Norms and the same has been reflected in part - IV of the Section 7 Application.

11. The 'Appellant' denied that there was any default on 31.12.2013, however for argument's sake, even it is presumed that default occurred on

31.12.2013 as claimed by the 'Respondent No. 1', loan account was renewed on 25.02.2014, hence there could not be any default. The 'Appellant' further submitted that the Respondent No. 1 relied upon Balance-Sheets for the Financial Year 2012-13, 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18, whereas the Appellant has not accepted the outstanding dues but merely stipulated the credit facilities obtained.

12. The 'Appellant' claimed that the 'impugned order' dated 25.05.2022 is perverse and failed to consider the significant averments made by the 'Appellant' as well as the documentary evidence produced by him before the 'Adjudicating Authority'. Summing up the arguments, the 'Appellant' requested that the 'impugned order' needs to be set aside and the 'Appeal' be allowed.

13. Per-contra, the 'Respondent No. 1' denied all the averments of the 'Appellant' to be misleading, mischievous and without any basis with sole intention to derail the process of resolution of the 'Corporate Debtor'.

14. The 'Respondent No. 1' submitted that on 12.02.2008, the 'Corporate Debtor' filed an application for credit facilities in respect of term loan account of Rs. 6.98 crores and cash credit for working capital term loan of Rs. 18.79 lakhs and on 14.01.2009, the 'Respondent No. 1' sanctioned term loan of Rs. 4.48 crores on following broad terms and conditions :-

- I. Term loan of Rs. 4.48 crores were to be repaid in 28 total instalment of Rs. 16 lakhs each, commencing from 24 months from the date of first availment.

- II. Margin of 40% on land civil construction cost and 29% on plant and machinery.
- III. Monthly interest @13%.
- IV. Respondent No. 1 was entitled to charge penal interest @2% over and above the interest rate in case of delay or default in submission of stock statements and renewal papers.
- V. Primary and collateral security as detailed therein.

15. The 'Respondent No. 1' stated that Shri Manas Sarkar- Appellant and Smt. Jayasree Sarkar executed guarantee agreements to pay Respondent No. 1 of the said amount in case of default by the 'Corporate Debtor'. The 'Respondent No. 1' further stated that the 'Corporate Debtor' filed with Registrar of Company on 14.01.2009 for creation of first charge of Rs. 4.48 crores regarding Hypothecation of property and assets in favour of the 'Respondent No. 1' which was deposited with Respondent No. 1 by the 'Appellant' on 17.03.2009.

16. The 'Respondent No. 1' stated that at the request of the 'Appellant', they agreed to renew original term loan of Rs. 4.48 crores and sanctioned fresh credit limit of Rs. 45 lakhs, thus total amount becoming as Rs. 4.93 crores as per terms and conditions mentioned in sanction letter dated 07.07.2010. The 'Respondent No. 1' also stated that the 'Appellant' made balance confirmation on 27.09.2010 outstanding dues of Rs. 4,82,56,363/-.

17. The 'Respondent No. 1' submitted that on or about 29.06.2011, the 'Corporate Debtor' was availing with the Respondent No. 1 by way of various credit facilities in respect of Term Loan Account limit Rs. 4.8 crores

(renewed and restructured), Cash Credit Account limit of Rs. 65 lakhs (from Rs. 45 lakhs), Funded Interest Term Loan Account No. 1 limit of Rs. 18 lakhs, Funded Interest Term Loan Account No. II limit of Rs. 25 lakhs and New Fresh Term Loan Account limit of Rs. 16 lakhs an aggregate sum of Rs. 5.72 crores in terms of the sanction letter dated 29.06.2011.

18. The 'Respondent No. 1' stated that the 'Corporate Debtor' herein vide Revival letter dated 29.06.2011 in respect of Term Loan Account of Rs. 4.48 crores dated 12.03.2009 and Cash Credit Account limit dated 02.07.2010, acknowledged the debt and all the liabilities towards the credit sanctioned along with the interest.

19. The 'Respondent No. 1' submitted that the 'Corporate Debtor' again filed an application dated 25.02.2013 to the 'Respondent No. 1' for seeking additional financial assistance in respect of various credit facilities viz renewal of Term Loan limit of Rs. 4.48 crores with further rephasing of instalments, enhancement in Cash Credit limit to Rs. 1 crore from Rs. 65 lakhs, conversion of Cash Credit limit of Rs. 2.5 crores to Term Loan, fresh Cash Credit PML limit of Rs. 2.5 crores, renewal of Existing limit of Rs. 6.18 lakhs and funded interest Term Loan Account limit of Rs. 25 lakhs etc.

20. The 'Respondent No. 1' emphasised that the 'Corporate Debtor' again made a loan application dated 03.02.2014 to the 'Respondent No. 1' for claiming further financial assistance involving restructuring of the entire existing credit facilities of term loan and cash credit accounts amounting Rs. 9 crores.

21. The 'Respondent No. 1' submitted that considering the request made by the 'Corporate Debtor' for sanction/ renewal of the credit facilities, the Respondent No. 1 issued 'Credit Sanction Advice' letter dated 25.02.2014 and it was an explicit condition in the said 'Credit Sanction Advice' Letter dated 25.02.2014 that the 'Corporate Debtor' will immediately regularize the overdues in the accounts over and above the sanctioned limits.

22. The 'Respondent No. 1' stated that the 'Corporate Debtor' wilfully and intentionally failed and neglected to regularize the accounts and acted contrary to the mandatory terms and conditions of the 'Credit Sanction Advice' Letter dated 25.02.2014. The 'Respondent No. 1' bank vide its letter dated 03.03.2014 requested the 'Corporate Debtor' to regularize the accounts to avoid the account slipping to NPA in March 2014 vide letter dated 03.03.2014.

23. The 'Respondent No. 1' emphasised that the 'Corporate Debtor' thereafter vide letter dated 10.03.2014 assured the respondent No. 1 to regularize the said accounts. The 'Respondent No. 1' further emphasised that the in spite of repeated requests of the 'Respondent No. 1, the 'Corporate Debtor' failed and neglected to maintain the aforesaid account regularly. The date of default in the loan account of the 'Corporate Debtor' is 31.12.2013 and the loan account was classified as NPA on 31.03.2014 as stated in the supplementary affidavit dated 17.12.2021.

24. The 'Respondent No. 1' submitted that he was constrained to issue Notice dated 02.06.2014 under Section 13(2) of the SARFAESI Act, 2002 to the 'Corporate Debtor' demanding a sum of Rs. 8,35,01,906/- with interest

calculated up to 01.06.2014 and further interest charges at the agreed rate from 02.06.2014 till the date of realization.

25. The 'Respondent No. 1' submitted that the 'Corporate Debtor' has continuously availed and utilized the credit facilities sanctioned and disbursed by the 'Respondent No. 1' but defaulted in payment of principal, interest and other charges. The 'Respondent No. 1' stated that the existence of debt and default has been continuous acknowledged by the 'Corporate Debtor' in its Balance Sheets along with the Statutory Auditor's Report for the period ending on 31.03.2013, 31.03.2014, 31.03.2015, 31.03.2016, 31.03.2017 and 31.03.2018.

26. This 'Appellate Tribunal' has gone through all averments as discussed in preceding paragraphs and seen various documents referred to and made available. It is the case of the 'Appellant' that the 'Respondent No. 1' has failed to keep his promise in handholding and rendering due support to the 'Appellant'. At the first stage, the amount orally promised was not sanctioned and more so the amount which was sanctioned was also sanctioned quite late. To bridge the time gap, the 'Appellant' had to borrow money from the market and all these activities effected the viability of the project of the 'Appellant'. The 'Appellant' emphasised that the agriculture business being cyclic, is dependent on several factors including the credit facilities available to it. Subsequently, during the course of the business, the 'Appellant' needed more resources, which were denied by the 'Respondent No. 1' and which aggravated the financial distress of the 'Corporate Debtor'.

27. It is also the case of the 'Appellant' that the 'Respondent No. 1' / bank violated the guidelines of RBI regarding primary sector lending and referred to 'Master Circular – RBI lending to priority sector' issued by the RBI on 02.07.2012 vide letter no. RBI/2012-13/108. The 'Appellant' alleged that the 'Respondent No. 1' breached in three manners i.e. charging exorbitant interest rate @13% against the stipulated rates of RBI, secondly, instead of charging interest on annual basis, the 'Respondent No. 1' charge interest on monthly basis and thirdly it kept huge margin money. The 'Appellant' submitted that due to violation of mandatory guidelines of RBI the 'Respondent No. 1' failed to meet the statutory requirements and therefore is not entitled for proceeding under Section 7 of the Code.

28. The 'Appellant' also alleged that there was no default in terms of Section 2(12) of the Code and this fact can be corroborated by taking into consideration that in the original application filed by the 'Respondent No. 1' before the 'Adjudicating Authority' under section 7 of the Code, no date of default was indicated and the 'Respondent No. 1' had to seek permission from the 'Adjudicating Authority' to file the supplementary affidavit wherein he indicated the date of default as 31.03.2013. According to the 'Appellant', the 'Adjudicating Authority' erred in admitting the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'.

29. The 'Appellant' stated that he never acknowledged the debt as outstanding as claimed by the 'Respondent No. 1' and in the various Balance-Sheets from 2012-13 to 2017-18, the 'Corporate Debtor' merely

stipulated the credit facilities obtained by the 'Appellant' and which cannot be treated as acknowledgment of debt.

30. It is further the case of the 'Appellant' that the 'Respondent No. 1' was always taking action unilaterally and in violation of the prevalent practices and/or agreements between both the parties in so much so that the 'Respondent No. 1' illegally debited interest from cash credit account to term loan account to show payment of interest. Further, the alleged default on 31.12.2013 was prior to the date of renewal of loan amount on 25.02.2014.

31. The 'Appellant' assailed the 'impugned order' being perverse and has been passed on the basis of erroneous assumptions, surmises and conjunctures.

32. As again, the 'Respondent No. 1' has taken all the efforts to demonstrate that the impugned order was strictly in light of the admitted facts and recording including acknowledgement by the 'Corporate Debtor' and in accordance with the law/ code. According to the 'Respondent No. 1', the 'Adjudicating Authority' is to verify whether the debt was outstanding and default took place and if so, the 'Adjudicating Authority' is simply required to admit the application for 'Corporate Insolvency Resolution Process'.

33. This 'Appellate Tribunal' has seen the averments of both the parties regarding higher interest rate, periodicity of interest charges and margins. It is noted that RBI Guidelines on priority sector lending is applicable to all bank including the 'Respondent No. 1' herein, however it is not for the 'Adjudicating Authority' to go into whether these guidelines were followed or

otherwise before examining the application filed under Section 7 of the Code. Section 7 of the Code reads as under :-

“7. Initiation of corporate insolvency resolution process by financial creditor.

(1) A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

[Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by

the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.]

Explanation. - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish -

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

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

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3):

[Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.]

(5) Where the Adjudicating Authority is satisfied that –

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate-

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of

admission or rejection of such application, as the case may be.”

(emphasis supplied)

34. From reading the above Section 7 of the Code, it is therefore clear that it lays down the procedure for initiation of the CIRP by a ‘Financial Creditor’ who can file an application before the ‘Adjudicating Authority’ along with proof of default and name of Resolution Professional proposed to act as ‘Interim Resolution Professional’. The ‘Adjudicating Authority’ is required to ascertain the existence of default within 14 days from the date of receipt of the application. It is further noted that once the ‘Adjudicating Authority’ is satisfied regarding existence of default and that the application is complete and no disciplinary proceeding is pending against the proposed ‘Interim Resolution Professional’, the ‘Adjudicating Authority’ is required to admit the application and is not required to look into any other criteria for the admission of the application. It is nobody’s case to cause delay in admission of CIRP on miscellaneous grounds.

35. This ‘Appellate Tribunal’ also notes that the Hon’ble Supreme Court of India as well as this ‘Appellate Tribunal’ itself has, held in catena of judgments that there is no scope for judicial interventions and over reach by the ‘Adjudicating Authority’ or the ‘Appellate Tribunal’ to interpret any further, if the existence of due and subsequent default is established.

36. In view of these provisions, the plea of the ‘Appellant’ regarding violation of the RBI Guidelines on ‘Priority Sector Landing’ cannot be allowed to affect the fate of the application filed under Section 7 of the Code. It is for

the 'Appellant' to seek necessary remedies, if any and if required against the 'Respondent No. 1' for violation of Master Circular of RBI regarding 'Priority Sector Lending' at appropriate forum in accordance with the law. Hence, on this account we do not find any error in the 'impugned order'.

37. As regards, the date of default, it has been observed that the 'Respondent No. 1' has been writing from time to time to the 'Appellant' to clear the dues in order to avoid his account to become NPA. The date of default has been clearly stipulated as 31.12.2013 and the date of NPA has been indicated as 31.03.2014 which has been accepted by the 'Adjudicating Authority' after examining the supplementary affidavit of the 'Respondent No. 1'. It is also noted that the 'Corporate Debtor' has acknowledge the debt time and again at various places including 6 consecutive Balance- Sheets. Hence, we do not find any error on the account of date of default based on which the application filed under Section 7 of the Code was admitted by the 'Adjudicating Authority'.

38. As regard, pending suit before the 'Debt Recovery Tribunal' for adjudication, it is settled law that such pending adjudication does not come in a way of deciding application filed under Section 7 of the Code.

39. As regards, the debiting the amount by the 'Respondent No. 1' from the cash credit and adjusted towards term loan without consent of the 'Appellant', this 'Appellate Tribunal' notes that this is matter of execution and monitoring of various credit facilities between the 'Financial Creditor' and the 'Corporate Debtor' and the same is supposed to be done as per

extent banking practices. Hence, this plea in no way effects the outcome of the application filed under Section 7 of the Code.

40. In view of forgoing detailed examination of various facts, law and record made available, this 'Appellate Tribunal' do not find any error in the 'impugned order'. This 'Appellate Tribunal' is also conscious of the fact that the Insolvency & Bankruptcy Code, 2016 is a self-contained 'Code' and its proceeding are summary in nature.

41. The 'Appeal' devoid of any merit is dismissed. No costs. Interlocutory Applications, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran/RR