

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 1067/IBC/MB/2019

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

IDBI BANK LIMITED,

CIN: L65190MH2004GOII48838

Registered office at: NPA
Management Group, 7th Floor, IDBI
Tower, Cuffe Parade, Mumbai- 400
005.

.....FINANCIAL CREDITOR

Vs

**Osian's Connoisseurs of Art Pvt.
Ltd**

CIN:U51900MH2000PTC127339

Nariman Bhavan, Ground Floor,
Nariman Point, Mumbai- 400 021.

.....Corporate Debtor

Order delivered on: 09.12.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Petitioner: Adv A.K. Mishra a/w. S.M. Algaus,

For the Respondent: Adv. Rohit Gupta

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company petition is filed by IDBI Bank Limited (hereinafter called "Financial Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Osian's Connoisseurs of Art Private Limited (hereinafter called "Corporate Debtor") by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of a financial debt of Rs. 124,71,79,471.41/- .

BRIEF FACTS OF THE CASE ARE AS FOLLOWS:

2. The IDBI Bank vide Sanction Letters dated 15th June 2006, 4th May 2006 and 17th November-2008 granted the following Credit Facilities to the Corporate Debtor.

Sr. No.	Type of Facilities	Amount in Crores (Rs.)
1.	Rupee Term Loan	35.00
2.	Working Capital Facility	10.00
3.	Short Term Loan	15.00
	Total	60.00

- 2.1. The Corporate Debtor entered into a Rupee Term Loan Agreement with the Financial Creditor on 23rd June 2006.
- 2.2. The Corporate Debtor entered into a Working Capital Facility Agreement with the Financial Creditor on 12th May 2006.
- 2.3. The Corporate Debtor entered into a Loan Agreement with the Financial Creditor on 20th November 2008.

- 2.4. The Corporate Debtor provided various securities to the Financial Creditor such as Mortgage of all that piece and parcel of land along with tenements and theatre building known as Minerva theatre situated at Dr. Dadasaheb Bhadkamkar Marg, Mumbai – 400 007 together with movables, including movable machinery, machinery spares, tools and accessories including book debts via an Indenture of mortgage dated 06th July 2006.
- 2.5. The Corporate Debtor entered into an Agreement of Hypothecation of Goods and Assets on 12th May 2006 wherein all present and future goods, book debts and all other movable assets of the Corporate Debtor, bill, machinery, contracts, insurance policies, guarantees, investments, etc were hypothecated in favour of the Financial Creditor.
- 2.6. The Corporate Debtor entered into an Indenture of Mortgage with the Financial Creditor on 14th May 2007 whereby a mortgage was created on second charge basis on office premises situated at ground floor in Jolly Maker Chambers No. 1 now known as Nariman Bhavan, Nariman Point, Mumbai – 400 021. Further a mortgage on second charge basis was created on all plant and machinery, Fixtures, fittings, accessories, stores and other articles belonging to the Corporate Debtor.
- 2.7. The Corporate Debtor entered into a Deed of Hypothecation with the Financial Creditor on 20th November 2008 whereby movable assets of the Corporate Debtor like stock of raw material, semi finished and finished goods, stores and spares, book debts, bills, monies receivables, etc were hypothecated to the Financial Creditor.

- 2.8. The Corporate Debtor furnished a guarantee of Mr. Neville Tuli to the Financial Creditor on 23rd June 2006, 12th May 2006 and on 20th November, 2008 respectively.
- 2.9. The Financial Creditor has also informed CIBIL of the status of the Corporate Debtor.
- 2.10. The Financial Creditor issued two recall notices to the Corporate Debtor on 18th October 2010 and 25th February 2011 recalling the loan amount granted to the Corporate Debtor.
- 2.11. The Financial Creditor issued notice under Section 13(2) of the Securitisation Act, 2002 to the Corporate Debtor on 15th December 2011.
- 2.12. The Corporate Debtor vide Letters dated 23rd September 2013, 10th October 2014, 30th June 2016, 5th June 2018 and 26th July 2018 made offers for one time settlement of dues to the Financial Creditor.
- 2.13. The Financial Creditor vide letters dated 22nd November 2013, 2nd July 2016, 3rd August 2016 and 29th August 2018 rejected the different OTS proposals offered by the Corporate Debtor.
3. The Financial Creditor submits that Corporate Debtor defaulted in repaying the financial assistances which have been extensively described in the Company Petition. It is an admitted fact that the Respondent Company has availed and enjoyed Loan/credit facilities and have failed and neglected to re pay and there is default on part of the Corporate Debtor.

SUBMISSIONS OF CORPORATE DEBTOR:

4. The Corporate Debtor filed affidavit in reply opposing the admission of the above Company Petition. The brief submissions of the Corporate Debtor are as follows:

- 4.1. The Corporate Debtor had availed financial facilities from IDBI, Axis Bank, HSBC, ICICI and Yes Bank. As far as HSBC, ICICI and Yes Bank are concerned the Corporate Debtor has completely paid the outstanding dues. As far as Axis Bank is concerned, substantial amount is already paid and the Corporate Debtor is making further payment. Axis Bank initially filed proceedings for liquidation of company which were subsequently withdrawn by Axis Bank.
- 4.2. The corporate debtor submits that the conduct of the Corporate Debtor is evident from its action. The Applicant herein initiated action under the provisions of SARFAESI Act, 2002. Though the Corporate Debtor could have adopted legal proceedings to stop such action, however no such proceedings were initiated. The Corporate Debtor, though was entitled to object to the sale of assets of the Corporate Debtor at throw away price, but never raised that objection. In the present case one of the most valuable property of the Corporate Debtor was sold and purchased by the Applicant herein. The Applicant herein by exercising provisions of SARFAESI Act, 2002 acquired the property of Corporate Debtor for a consideration of Rs. 55.08 Crore.
- 4.3. The Applicant herein under the earlier provisions of Companies Act, 1956 initiated insolvency proceedings against the present Corporate Debtor, by issuing notice dated 15th January 2015. The Corporate Debtor duly replied to the said notice by its letter dated 06th February 2015, followed by rejoinder dated 11th March 2015. After taking into due consideration, the Applicant herein consciously decided not to pursue the proceedings further. The Corporate Debtor now cannot be permitted to initiate proceedings on the basis of

same cause of action, which they decided not to pursue in past. These proceedings are therefore barred by resjudicata.

- 4.4. The Corporate Debtor is a going concern and functioning in the right spirit of meeting its obligations, hence the petitioner's action is unjustified and uncalled for.
- 4.5. The Corporate Debtor submits that the Application deserves to be dismissed inter alia for following reasons -
 - a. A resolution produced on record is not proper and in accordance with requirement under law.
 - b. The Loan Transaction for which the present proceedings are initiated pertains to sanction of the year 2006 and 2008 and therefore proceedings are barred by law of limitation.
 - c. As per the own admission of the Petitioner the Date of NPA is 31st March 2010 itself. This Petition is filed 9 years after the default and therefore same is not within the period of limitation and hence deserves to be dismissed.
 - d. The claim of the Corporate Debtor is not even mortgage debt and therefore same is barred by law of limitation.
 - e. Every loan account is separate and distinct, same is evident from sanction and documents executed between the parties. The applicant has also treated these accounts as separate and distinct accounts in their books and therefore separate accounts are made. As and when the applicant received any amount same has been appropriated under the respective account as per the understanding between the parties as well as discretion of the Applicant. Bare perusal of the accounts itself shows that the claim is barred by law of limitation. I shall now place on record Corporate Debtors comments on the basis of accounts produced by the Applicant.

- f. Accounts in respect of account ending with 0116 –
- i. The account clearly reflects that the principal amount disbursed is Rs. 8 Crore. However, the claim is made on the basis of principal amount being Rs. 10 Crore.
 - ii. There is no payment made or received after 31st December 2009. Therefore as per the case of Applicant the Corporate Debtor stopped making payment after December 2009.
 - iii. In these circumstances as far as this account is concerned the default occurred on 31st December 2009 and in any event on 31st January 2010.
 - iv. The claim under this account made in the year 2019 is clearly barred by law of limitation.
 - v. Accounts in respect of account ending with 1021 –
 - a. As far as this account is concerned the ledger starts from Pg. 64 wherein last entry of payment received/made is shown on Pg. 64 is of 31st December 2009.
 - b. There is no payment made or received after 31st December 2009. Therefore as per the case of Applicant the Corporate Debtor stopped making payment after December 2009.
 - c. In these circumstances as far as this account is concerned the default occurred on 31st December 2009 and in any event on 31st January 2010.
- g. Accounts in respect of account ending with 1595 –
- i. As far as this account statement is concerned same is incomplete. The Applicant has deliberately suppressed from this Hon'ble Tribunal, the account statement of relevant default period. As per the

Applicant the operational of the account commenced from 30th June 2006. The default took place in December 2009 or March 2010, whereas the accounts produced are only from March 2013.

- ii. The accounts seems to be further fudged or manipulated. The disbursement date in the Application is mentioned from 2006 to 2008, whereas the accounts shows first entry of 01st May 2012 as if it was the date when the amount was disbursed.
- iii. The account further on the very same date dhows interest debit of Rs. 13.60 Crore. At the same time in the same ledger if one sees first 10-15 entries it is evident that the amount of Rs. 33.66 Crore which was opening balance is inflated to Rs. 55.30 Crore, as outstanding as on 26th March 2013. Therefore in 10 months on Rs. 33.66 Crore interest of Rs. 22 Crore is charged on Rs. 33.66 Crore. This clearly shows that the accounts are not in sync with the Form filed, contractual document between the parties and not in accordance with law.
- iv. It is also evident from these entries that they are passed on the same day i.e. 22nd March 2013 whereas the entry relates to completely different dates. These entries are backdated entries.
- v. The account further reflect appropriation of sale proceeds on the same day i.e. 26th March 2013 of Rs. 55.08 Crore whereas the account is still not closed, though the receipt was much more than the outstanding.

- vi. The outstanding in this account was inflated. There would have been credit balance in the account after receipt of Rs. 55.08 Crore. In these circumstances the claim even in other accounts is bogus and inflated.
- vii. The payments made in the account from the year 2006 to 2012 are not even reflected in the ledger. On this ground itself the Application deserves to be dismissed.
- viii. In any case from the accounts it is evident no payment whatsoever was ever made by the Corporate Debtor from 2012 as per the accounts. Receipt of sale proceeds will not revive the period of limitation. As it is not received from the Corporate Debtor. Further the amount received on 12th May 2015 is also not received from Corporate Debtor.
- ix. As far as amount received on 12th May 2015 is concerned same is appropriated only in this account therefore assuming without admitting that such unilateral action revive limitation same can be only in respect of this account. Subsequent payment or acknowledgment revive limitation if the claim is not already time barred, if the claim is already barred by limitation then even subsequent payment will not revive limitation.
- h. There is inconsistency in the From filed before the Hon'ble Tribunal and therefore the Petition deserves to be dismissed on that ground as well. The consistency are set out herein below –
 - i. As far as current account ending with number 116 is concerned, the principal amount disbursed is shown

as Rs. 8 Crore at one place in the form, whereas in the same from principal amount outstanding shown is Rs. 10 Crore.

- ii. As per the provisions of Code, the Applicant is required to disclose the date of default. The date of default in the present Form is not disclosed by the Applicant. The Applicant has only mentioned the date of NPA, which has no bearing on the date of default. It is respectfully submitted that the default takes place as per the terms of the agreement whereas NPA is considered as per guidelines of RBI. The Corporate Debtor submits that declaration of NPA confirms the default however, default occurs much before the declaration of account as NPA. This is material disclosure and also essential for the purpose of adjudicating the issue of limitation as well.
- iii. The certificate produced at Page 192 is false and incorrect certificate. The certificate if compared with the actual ledger produced clearly demonstrate the same.
- iv. There is no bankers books evidence act certificate produced on record. Hence the petition deserves to be dismissed

4.6. The claim is not in accordance with law. The Hon'ble Apex Court and guidelines laid down by Reserve Bank of India, has categorically held that Penal Interest, though can be charged but not compounded. IDBI in the present case has charged and compounded penal interest. Therefore, the claim not being in accordance with law deserves to be rejected.

4.7. The Corporate Debtor submits that no adjudication is contemplated at the stage of admitting Petition under Section

7, however the Tribunal is required to be satisfied that the compliance as contemplated under the Code, are duly made. The Applicant has failed to comply with the requirement of Code. The accounts produced are not complete. The accounts produced are on of face of it false and fudged. The manipulation is evident from bare perusal of accounts. Due credit of the amount received is not given. The claim is also not in accordance with law. If these conditions are not satisfied, the Application deserves to be rejected.

- 4.8. It is in fact case of filing false case and making incorrect statement in form which attracts penal provisions. The Corporate Debtor submit that suitable action be taken against the Applicant. The Corporate Debtor further submits that Applicant cannot be permitted to amend and modify the existing form.
- 4.9. The corporate Debtor submits that the claim on face of it is barred by law of limitation. It is stale claim on the basis of which present proceedings are sought to be initiated. The claim deserves to be rejected.

FINDINGS

5. In the light of the above pleadings the only issue that needs to be determined is:
- i. *Whether the above company petition is within limitation ?*
6. Heard Mr. Ashok Kumar Mishra the Learned Senior counsel appearing for the Financial Creditor and Mr. Rohit Gupta, counsel appearing for the Corporate Debtor. Mr. Rohit Gupta counsel appearing for the Corporate Debtor initially tried to oppose the admission of the above company petition on the ground of limitation. However, after allowing the I.A. No. 2394/2020 filed by the petitioner for taking the additional

documents on record and after the judgment of the Hon'ble Supreme Court in Dena Bank V/s. C. Shivakumar Reddy and Anr. In Civil Appeal No.1650/2020 regarding the limitation Mr. Rohit Gupta, fairly conceded that he has no point on the limitation. However, Mr. Rohit Gupta, tried to convince this bench regarding the inaccuracy of the amount claimed by the Financial Creditor and the right of the Financial Creditor to charge penal interest etc. which are totally irrelevant and beyond the scope of an application filed under section 7 of the code.

7. It is important to mention here that the Corporate Debtor is not disputing the availment of the various loan facilities from the Financial Creditor. The Corporate Debtor also admits the default committed by them. The loan account of the Corporate Debtor was declared as NPA on 31.03.2010. The Corporate Debtor addressed letter dated 09.02.2011 in response to the recall notice given by the Financial Creditor where under they have clearly admitted the availment of loan facilities and requested time for regularizing the accounts. Subsequently the Corporate Debtor also addressed another letter dated 28.09.2013 offering a lumpsum amount of Rs. 5 Crores under OTS. Thereafter the Corporate Debtor addressed another letter dated 10.10.2014 giving another OTS offer. Again the Corporate Debtor addressed another letter dated 30.06.2016 offering an amount of 9 Crores under OTS. As per the law laid down by the Hon'ble Supreme Court in the above judgment the OTS letter, compromise proposal given by the Corporate Debtor also amounts to admission of liability. Therefore, the above company petition being filed on 13.03.2019 is within 3

years from the date of last OTS proposal dated 30.06.2016 and is within limitation.

8. As stated above there is no dispute with regard to the debt and default in this case and the above company petition is complete in all respects. The Financial Creditor has also suggested the name of proposed Interim Resolution Professional in the petition along with his consent letter in Form-2. Therefore, this bench is of the considered opinion that the above company petition satisfies all the legal requirements for admission and deserves to be admitted.
9. Accordingly, the above company petition is admitted by passing the following:

ORDER

- a. The above Company Petition No. (IB) -1067(MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against the corporate debtor i.e. M/s Osian's Connoisseurs of Art Private Limited.
- b. This Bench hereby appoints Mr. Girish Siriram Juneja, (junejagirish31@gmail.com), Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00999/2017-18/11646 as the Interim Resolution Professional (IRP) to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016
- c. The Financial Creditor shall deposit an amount of Rs. 5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement 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 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)