



**NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

I.A. (IB) 1537/KB/2022
And
I.A. (IB) 317/KB/2023
And
C.P. (IB) 935/KB/2018

*A petition under **section 7** of the Insolvency and Bankruptcy Code, 2016, read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*

In the matter of:

State Bank of India, having its registered office at State Bank Bhavan, Corporate Centre, Madam Cama Road, Mumbai- 400021, Maharashtra.

..... Financial Creditor/ Petitioner

-versus-

Johal & Company (Wine Sales) Private Limited, a company within the meaning of Companies Act, 2013 having CIN U15520WB1979PTC031834 and having its registered office at Rajhans Building, 6 Hastings Park Road Room No. 11 & 12, Kolkata- 700027 IN.

..... Corporate Debtor/ Respondent

And

I.A. (IB) 1537/KB/2022

*An application under **section 60(5)** of the Insolvency and Bankruptcy Code, 2016, read with rule 11 of the National Company Law Tribunal Rules, 2016*

Johal & Company (Wine Sales) Private Limited

..... Corporate Debtor / Applicant

State Bank of India

..... Financial Creditor / Respondent

And



In the National Company Law Tribunal,
Kolkata Bench (Court- I)

State Bank of India vs. Johal & Company (Wine Sales) Pvt. Ltd.
I.A. (IB) 1537/KB/2022, I.A. (IB) 317/KB/2023 and C.P (IB) 935/KB/2018

I.A. (IB) 317/KB/2023

*An application under **section 60(5)** of the Insolvency and Bankruptcy Code, 2016, read with rule 11 of the National Company Law Tribunal Rules, 2016*

Johal & Company (Wine Sales) Private Limited

..... Corporate Debtor / Applicant

State Bank of India

..... Financial Creditor / Respondent

Date of Pronouncement of the order: 17th April 2023

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

For the Financial Creditor/Petitioner:

Ms. Urmila Chakraborty, Adv.

Mr. Debashish Chakraborti, Adv.

Mr. Snehasish Chakraborty, Adv.

For the Corporate Debtor/ Respondent:

Mr. Joy Saha, Sr. Adv.

Mr. D. Basu Ray, Adv.

Mr. D. Chakraborty, Adv.

Mr. S. Poddar, Adv.

Ms. S. Basu, Adv.

COMMON ORDER

Rohit Kapoor, Member (Judicial):

1. This Court convened through hybrid mode.



2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code”) by **State Bank of India**, hereinafter referred to as “*Financial Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Johal & Company (Wine Sales) Private Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 09.01.1979. The authorized share-capital of the company ₹5,00,00,000/- and the paid-up share capital of the company is ₹4,38,58,600/-.
4. The amount claimed to be in default by the Financial Creditor, is ₹68,03,18,652.66/-, inclusive of interest as on 31.03.2018 together with further interest @17.05% per annum from 01.04.2018 with monthly interests till realization. The date of default is 31.12.2015 which is also the declaration of the Corporate Debtor’s debt as Non Performing Assets (NPA).
5. The Financial Creditor has relied on the various documents in support of its claims, including:
 - a) Agreement of loan cum hypothecation dated 23.07.2009, annexed as Annexure “**I-C**”;
 - b) Supplementary Agreement of loan cum hypothecation dated 28.09.2011, annexed as Annexure “**1-Z**”;
 - c) Revival Letter dated 19.05.2014, annexed as Annexure “**1-LL**”;
 - d) Demand Notice dated 21.02.2017 issued by Ld. Advocate of Financial Creditor annexed as Annexure “**1-MM**”;
 - e) CIBIL Report, annexed as Annexure “**1-OO**”;

6. Submissions on behalf of the Financial Creditor:

- 6.1 The case of the Financial Creditor is that it sanctioned to the Corporate Debtor, a cash credit facility of ₹25,00,00,000/- on 21.07.2009. The



Corporate Debtor hypothecated various properties with the Financial Creditor as a consideration of the said sanction. Thereafter, at the request of the Corporate Debtor, the Financial Creditor on multiple occasions enhanced the said cash credit facility. The last such enhancement of cash credit facility was sanctioned by the Financial Creditor *vide* letter dated 28.09.2011.

6.2 Thereafter, the Corporate Debtor on 27.01.2014 held a board meeting wherein it was resolved that the said Corporate Debtor shall execute revival letter in favour of the Financial Creditor. Accordingly, the Corporate Debtor executed a revival letter dated 19.05.2014.

6.3 Due to continued failure on part of the Corporate Debtor in regularization of the loan account, the account of the Corporate Debtor was declared as Non- Performing Asset (NPA) on 31.12.2015.

6.4 On 21.02.2017, the Financial Creditor issued a demand notice through its Learned Advocate calling upon the Corporate Debtor to repay a sum of ₹53,56,15,975.17 inclusive of interest up to 31.10.2016 along with further interest at contractual rate till realization. However, the Corporate Debtor still neglected to clear its dues.

7 Submissions on behalf of the Corporate Debtor:

7.1 The Corporate Debtor has contended that the instant proceeding is not maintainable since person who affirmed the affidavit did not file his authority along with the application.

7.2 It has further been submitted that the financial creditor has instituted the instant proceeding to bring a time barred debt into legal operation, and the same is not permissible in law.

7.3 Further, the instant proceeding is not only premature but is also not instituted in consonance with the legislative wisdom, as envisaged in the Code.



7.4 It is also submitted that the Financial Creditor, before filing this instant application, had already filed against the Corporate Debtor, a recovery suit being O.A. No.122 of 2017 before the Debts Recovery Tribunal (DRT). The said proceeding is still pending adjudication. The Financial Creditor deliberately suppressed the said facts before this Adjudicating Authority.

7.5 Furthermore, the provisions of the Code essentially are applicable for a sick and commercially insolvent company and cannot be made a tool to push a solvent and commercially stable company into a resolution process of winding up.

7 **Rejoinder on behalf of the Financial Creditor:**

7.1 The Financial Creditor has submitted that the last document has been executed by the Corporate Debtor on 19.05.2014 and it has filed section 19 application under Recovery of Debts Due To Banks And Financial Institutions Act, 1993 on 21.04.2017. As such as per the judgment of Hon'ble Supreme Court in the matter of ***B.K. Educational Services Private Limited Vs Parag Gupta And Associates***¹, the Financial Creditor has taken remedy under the existing law within three years from the date of the execution of last documents and as such is well within the period of limitation.

7.2 It has been submitted that the enactment of the Code first provides for resolution of the Corporate Debtor and only if the resolution not possible in spite of giving opportunity to the Corporate Debtor, the route of liquidation is to be taken. Further, it has been submitted that the continuous default on part of the Corporate Debtor and the

¹ MANU/SC/1160/2018



declaration of its account as NPA show that it is not solvent and commercially stable.

8 **Supplementary Affidavit on behalf of the Financial Creditor:**

The instant supplementary affidavit has been affirmed by the former Chief Manager and Case Lead Officer of the Financial Creditor who has retired since the filing of the petition, thereby bringing on record the Letter of Authority of the officer who filed the petition on behalf of the Financial Creditor.

9 **I.A. (IB) No. 1537/KB/2022 filed by the Corporate Debtor:**

9.1 This interlocutory application has been filed by the Corporate Debtor under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016, praying for the following reliefs:

- a. *To record that the respondent/financial creditor published web notice on November 28, 2022 for transfer of stressed loan exposers of the account of the petitioner/corporate debtor for sale of the account with underlying securities in the account of the petitioner/corporate debtor to the ARC by way of e-auction on December 27, 2022;*
- b. *To defer the final adjudication of CP(IB)941/(KB) 2018 for the further period of 45 days on and from the e-auction date to be held on December 27, 2022 and it is expected that within that period the said sale will be finalized by receiving the payments to discharge the liabilities of the respondent/financial creditor in the account of petitioner/corporate debtor by way of execution of assignment deed in favour of the ARC;*
- c. *Ad-interim order of prayer (a) and (b) above;*



d. Such further order, direction and/or directions be passed as this Adjudicating Authority may deem fit and proper.

9.2 The Applicant/ Corporate Debtor has submitted that the Respondent/ Financial Creditor after deciding on ARC sale and after fixation of reserve price for the ARC sale published web notice of ARC sale of the account of petitioner/corporate debtor on November 28, 2022, thereby fixing the e- auction of ARC sale on December 27, 2022. As such, the Applicant/Corporate Debtor has prayed that the final adjudication of CP(IB)941/(KB) 2018 be deferred for the further period of 45 days on and from the e-auction date to be held on December 27, 2022.

10 I.A. (IB) No. 317/KB/2023 filed by the Corporate Debtor:

10.1 The instant interlocutory application has been filed by the Corporate Debtor under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016, praying for the following reliefs:

- a) To record that the respondent/financial creditor already taken initiative to release the corporate guarantee of the petitioner/corporate debtor herein towards SBI's debt exposure to R.G. Shaw Pvt. Ltd. and Madhusala Drinks Pvt. Ltd. before the competent authority.*
- b) To defer the final adjudication of CP(IB) 941/(KB) 2018 for the further period of two months and it is expected that within that period the said sale will be finalized by receiving the payments to discharge the liabilities of the respondent/ financial creditor in the account of petitioner/corporate debtor by way of execution of assignment deed in favour of the ARC.*
- c) Ad-interim order of prayer (a) and (b) above.*



d) Such further order, direction and/or directions be passed as this Adjudicating Authority may deem fit and proper.

10.2 The Applicant/ Corporate Debtor has submitted that after deciding on ARC sale and after the fixation of reserve price for the ARC sale, the Respondent/ Financial Creditor published web notice of ARC sale of the account of petitioner/corporate debtor on November 28, 2022 and thereby fixed the e-auction of ARC sale on December, 2022. Thereafter, as per findings of the ARC, the Respondent/Financial Creditor took initiative towards release of the corporate guarantee of the Applicant/ Corporate Debtor towards SBI debt exposure to R.G. Shaw Pvt. Ltd. and Madhusala Drinks Pvt. Ltd. The said process is to be completed within the period of two months and it is expected by the Applicant/ Corporate Debtor that within the said period, the sale of the account of the Applicant/ Corporate Debtor will be finalized and liabilities of the Respondent/Financial Creditor will be assigned to the ARC by execution of necessary deed of assignment in favour of the ARC.

11 Analysis and Findings:

- 11.1 Heard the Ld. Counsel on behalf of the Financial Creditor and the Ld. Sr. Counsel for the Corporate Debtor and perused the records.
- 11.2 The instant petition was filed before this Adjudicating Authority and has been pending for adjudication since 17.07.2018. Way back on 5th August, 2019, it was recorded in the order issued by this tribunal, that the Corporate Debtor sought an adjournment in view of talks of settlement. The matter was adjourned to 22.08.2019 in presence of both sides either for hearing or for reporting settlement. During the subsequent hearings before this Adjudicating Authority, both sides submitted that there was a good chance for settlement and the matter was



adjourned repeatedly. This position was reiterated on 12.08.2021, wherein it was recorded that negotiations are continuing between the Financial Creditor and Corporate Debtor and that Phoenix ARC Private Limited was in process of taking over the debt of the Financial Creditor.

11.3 Thereafter, on 27.08.2021, it was stated by Ld. Counsel for the Financial Creditor that a proposal has been received from one Phoenix ARC intending to take over the debt of the Corporate Debtor. At request of the parties, the matter was adjourned to 20.10.2021. On 20.10.2021, Ld. Counsel for both sides submitted that a settlement proposal was being considered at the appropriate levels of the bank. Accordingly, the matter was adjourned and listed on 03.12.2021 for reporting of the outcome of the settlement proposal. Thereafter, in view of the settlement process, the instant matter was adjourned on multiple occasions and listed for hearing on 25.02.2022.

11.4 Further, *vide* order dated 25.02.2022, this Adjudicating Authority granted one last opportunity to the Financial Creditor to decide the matter of assignment within a reasonable time frame.

11.5 When the arguments started in the matter, a plea of limitation was raised by Corporate Debtor. Once again, on 28.10.2022, in IA (IB) No. 1321/KB/2022, Ld. Counsel for the Financial Creditor *i.e.* State Bank of India admitted that the process of settlement was underway and some stages have been completed. The State Bank of India placed on record an email dated 26th October 2022. However, this Adjudicating Authority sought an affidavit of a senior Officer of State Bank of India.

11.6 The said Affidavit was filed through its Assistant Manager that has been recorded in the order dated 04.11.2022. In order dated 04.11.2022, Para 10 of the said Affidavit was highlighted which states that after the completion by formalities mentioned therein as well as after completion



of the e-auction, the stressed assets shall be assigned to the Successful ARC purchaser and an Agreement will be executed accordingly. It was stated therein that the entire process required some time to complete.

11.7 However, this Adjudicating Authority, while dismissing IA (IB) No. 1321/KB/2022 recorded that this Adjudicating Authority is not required to wait for the outcome of the assignment process between the Financial Creditor, ARC and the Corporate Debtor. The said interlocutory application was rejected and the main Company Petition was directed to be listed for final hearing on 08.02.2023. The company petition was finally heard and Reserved for Orders on 10.02.2023.

11.8 In I.A. (IB) 1537/KB/2022 as well as in I.A. (IB) 317/KB/2023, it has been again prayed that the adjudication of the instant company petition be deferred further. In this regard, it is reiterated that the assignment of the debt of the Corporate Debtor to the successful ARC is an internal matter between the Financial Creditor, the said ARC and the Corporate Debtor and as such, this Adjudicating Authority is not required to wait for the outcome of the same, in order to adjudicate the instant petition. As such, the interlocutory applications being I.A. (IB) 1537/KB/2022 and I.A. (IB) 317/KB/2023 are **rejected**.

11.9 Coming to the merits of the petition, it is clear that apart from the documents produced by the Financial Creditor in order to establish debt and its default, the Corporate Debtor has also admitted to its liability on various occasions. Even in the Reply Affidavit, the Corporate Debtor has not denied the existence of the said debt. As such, the existence of debt stands established.

11.10 Regarding the issue of limitation, it is clear to us that the period of limitation needs to be computed from the date of default. In the instant matter a specific plea has been taken on Paragraph 31 on page 21 and 22



of the petition that the account of the Corporate Debtor was declared NPA on 31.12.2015. Further, in the demand notice dated 21.02.2017 issued by the Financial Creditor has again mentioned the said fact. The petition was filed on 17.07.2018.

11.11 The question before this Adjudicating Authority is whether the date of declaration of NPA can be taken as the date of default. In this regard, we would like to refer to the paragraphs 10 and 11 of the decision of the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the matter of **Jagdish Prasad Sarada vs. Allahabad Bank** ² wherein the following was held:

“...The view taken by the Hon'ble Apex Court in 'B.K. Educational Services Private Limited Vs. Parag Gupta and Associates' that the limitation period for application under Section 7 of the I&B Code is three years as provided by Article 137 of the Limitation Act, which commences from the date of default and is extendable only by application of Section 5 of The Limitation Act, 1963 if any case for condonation of delay is carved out, has again been reiterated in the latest pronouncement of Hon'ble Apex Court in 'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. (Civil Appeal No. 6347 of 2019) decided on 14th August, 2020. It is therefore manifestly clear that date of default will be the date of declaration of account as NPA and such date of default would not shift.

We are of the firm view that the determining factor is the three years period from date of default/NPA. This Appellate Tribunal has also observed in Rajendra Kumar Tekriwal Vs.

² MANU/NL/0324/2020



Bank of Baroda in Company Appeal(AT) (Ins) No. 225 of 2020 dated 13.08.2020 that the period of three years from the date of the Account of Corporate Debtor is classified as NPA then it becomes impermissible to proceed with Section 7 Application as observed in the para 11 of the Judgment.”

11.12 Further, the Hon’ble Supreme Court in the matter of **Laxmi Pat Surana V. Union Bank of India & Anr**³ has also decided in paragraph 37 that in ordinary cases, upon declaration of the loan account/debt as NPA, that date can be reckoned as the date of default to enable the Financial Creditor to initiate action under section 7 of the IBC. In light of the aforementioned decisions, it is clear that the date of declaration of NPA can indeed be taken as date of default.

11.13 It is noted that the Corporate Debtor, in the reply- affidavit has contended that the instant petition is defective as the person filing the petition has not filed his authority along with the application. However, in light of the supplementary affidavit dated 20.07.2021, filed by the Financial Creditor in order to bring to record the relevant authorization letters, the said defect stands cured and the instant petition is complete.

11.14 It is further the contention of the Financial Creditor that despite receiving the demand notice dated 06.02.2017 failed to repay its outstanding dues within 7 days and thus upon expiry of the said 7 day period on 15.02.2017, the failure to pay its dues by the Corporate Debtor will also amount to default in payment of its debt to the Financial Creditor.

11.15 In light of the above-mentioned facts and circumstances, this Adjudicating Authority is satisfied that a debt was due from the Corporate Debtor to the Financial Creditor and the Corporate Debtor has

³ MANU/SC/0221/2021



committed a default in the payment of the same. As such, the instant petition should be ***admitted***.

11.16 The particulars of Interim Resolution Professional (IRP) have been proposed in the petition. The petition is within the period of limitation. As such, the instant petition is complete in all respects.

11.17 It is, accordingly, hereby ordered as follows:-

- i) The application bearing **CP (IB) No. 935/KB/2018** filed by **State Bank of India** (*Financial Creditor*), under section 7 of the Code read with rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Johal & Company (Wine Sales) Private Limited** (CIN U15520WB1979PTC031834), the Corporate Debtor, is ***admitted***.
- ii) There shall be a moratorium under section 14 of the IBC.
- iii) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- iv) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v) **Mr. Jitendra Lohia**, having registration number **IBBI/IPA-001/IP-P00170/2017-18/10339**, email: **jitulohia@knjainco.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the



Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- vi) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- vii) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- viii) The Financial Creditor shall initially deposit a sum of ₹4,00,000/- (Rupees Four lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.
- ix) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed



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Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

- x) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

12. **I.A. (IB) 317/KB/2023** and **I.A. (IB) 1537/KB/2022** shall stand ***dismissed*** vide paragraph no. 11.8 (*supra*).
13. **CP (IB) No. 935/KB/2018** to come up on **15th May 2023** for filing the progress report.
14. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 17th day of April, 2023

SM(LRA)