

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH - V**

Company Petition (IB) No. 491/ND/2021

IA-5959/2021

IA-6022/2021

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

IN THE MATTER OF:

Axis Trustee Services Limited
(acting as Debenture Trustee)
Having its registered office at:
Axis House,
Bombay Dyeing Mills Compound,
Pandhurang Budhkar Marg, Worli,
Mumbai, Maharashtra, 400025.
Office also at:
2nd Floor, 25 - Pusa Road,
Karol Bagh, New Delhi-110005.

...Applicant/ Financial Creditor

VERSUS

Bluebird Software Private Limited
Having its registered office at:
2A, Avenue Cassia,
Westend Greens, Rajokri
New Delhi - 110 038

...Respondent/ Corporate Debtor

ORDER DELIVERED ON: 06.06.2022

CORAM:

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)

Sh. Hemant Kumar Sarangi, Hon'ble Member (Technical)

For the Applicant:

Mr. Arun Kathpalia, Sr. Adv., Mr.
Krishnendu Datta Sr. Adv. with Mr.
Prateek Kumar & Adv. Vaishnavi, Adv.
Madhav

IB-491/ND/2021

For the Respondent:

Mr. Abhijeet Sinha, Adv. A/w Kumar
Anurag Singh and Zain A. Khan Advs.

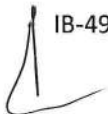
ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

The matter was heard and reserved for orders on 23.03.2022. We have heard the Ld. Counsels for the Applicant and the respondents and perused the averments made in the application.

2. The Ld. Counsel for the Respondent in the course of hearing has raised the preliminary objections on the point of filing of an application by the Applicant. Ld. Counsel for the Respondent submits that Rule 4 of the IBBI (Application to Adjudicating Authority) Rules, 2016 prescribed Form-1 to file an application u/s 7 of the IBC .He further submits that part-1, Form-1 is in respect of the particulars of the Financial Creditor, which needs to be filled up properly. He further submits that the application filed by the Applicant shows that in part-1, the name of the Financial Creditor appears as the Axis Trustee Services Ltd.(Acting as Debenture Trustee for the benefit of the debenture holders i.e Asia-Pacific Private Credit Opportunities 1 Singapore Pte Limited (“APCO 1”) SSG 2 Pte Ltd (“SSG 2”)

3. He further submits that date of incorporation and the identification no. as well as the address mentioned in column No. 2, 3 & 4 respectively are in respect of the Axis Trustee Services Ltd. and not about the Financial Creditor. He further submits that admittedly the **Axis Trustee Services Limited** is not the Financial Creditor. He further submits that the investment in the Respondent Company is not made by the Axis Trustee Services Ltd. rather by



1") SSG 2 Pte Ltd ("SSG 2"), but its name is not mentioned in part I of the application. Therefore, the present application is not maintainable. In support of his contention, the Applicant has placed reliance upon the decision of the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 30 of 2017). He also raised all the facts referred to the written submissions.

4. On the other hand, Ld. Counsel for the Applicant submits that the Debenture trustee has the power to file an application under Section 7 of the Code.

5. He further submits that Title of part I of FORM 1, makes it clear that it is the particulars of the applicant that have to be furnished in part-I.

6. He further submits that Form-1 application is filed by the debenture Trustee, acting on behalf of Financial Creditor, the details of debenture Trustee are to be furnished as stated in the title part I of FORM 1.

7. Apart from that, the ld. Counsel for the applicant has also raised all the facts as referred to in the written submissions, especially paragraph 2 response to the corporate debtor's case on this issue.

8. Therefore, at this juncture, we would also like to refer to the written submissions filed on behalf of both the parties.

9. The **scanned copy of the written submission filed by the Applicant is reproduced as under:**



1. The present submissions are being filed on behalf of Axis Trustee Services Limited (“Applicant”) pursuant to the directions of Hon’ble NCLT by and under order dated 22 March 2022 and 23 March 2022.
2. The present Application has been filed by the Applicant on behalf of the Debenture Holders i.e., Asia Pacific Credit Opportunities 1 Singapore Pte Ltd (“APCO 1”) and SSG 2 Pte Ltd (“SSG 2”) under section 7 of the Insolvency and Bankruptcy Code, 2016 (“the Code”) pursuant to default by the Corporate Debtor (“CD”) on 31 August 2021 in repayment of amounts due under Debenture Subscription Agreement dated 27 March 2019 (“DSA”) and Debenture Trust Deed dated 28 March 2019 (“DTD”).
3. Page references to relevant clauses of the DSA and DTD is attached herewith as Annexure A for ease of reference.

DEBT AND DEFAULT

4. It is settled law that the only two factors that need to be considered by the Hon’ble Adjudicating Authority when deciding admission of an application under section 7 of the Code are: first, whether a debt has been disbursed, and second, whether corporate debtor defaulted in repayment of the debt. [*Innovative Industries Limited v. ICICI Bank and Anr, (2018) 1 SCC 407, Para 28, 30*]
5. It is an admitted position that under the DSA and DTD, the Debenture Holders disbursed an aggregate amount of INR 182,60,00,000 to the CD on 30 March 2019, and the CD allotted total of 1826 Debentures to the Debenture Holders - 913 debentures to APCO1 and 913 Debentures to SSG 2.
Document references for proof of disbursal of debt:

Sr. No.	Document	Annexure	Pg. No., Volume No.
1.	Letter dated 12 August 2021 from HSBC to APCO 1 certifying disbursal of amount of INR 91,30,00,000 to CD on 29 March 2019	Annexure P – 4	50, Volume I
2.	Letter dated 10 August 2021 from HSBC to SSG 2 certifying disbursal of amount of INR 91,30,00,000 to CD on 29 March 2019	Annexure P – 5	51-52, Volume I
3.	Email dated 30 March 2019 from the CD to Applicant and the Debenture Holders acknowledging receipt of total amount of INR 182,60,00,000	Annexure P – 6	53-54, Volume I
4.	DEMAT Statements of APCO 1 and SSG 2 showing allotment of 913 Debentures each by the CD	Annexure P – 7 colly	55-55B, Volume I
5.	Balance Sheet of CD as on 31 March 2020 [pg. 888 – “Long Term Liabilities”]	Annexure P - 38	876-900, Volume VI

6. In terms of clause 9.1 and 9.2 of the DSA, the CD was to pay/repay the amounts due under the DSA in accordance with the timelines set out in Schedule 10 (for Cash Coupon payment i.e., interest payment) and Schedule 11 (for principal repayment). However, the CD defaulted in making *inter alia* the following payments:
 - a. Second Scheduled Redemption payment (i.e., Principal payment) of INR 62,53,42,466 due on 30 March 2021 as required by clause 9.3 read with paragraph 1 of Schedule 11 of the DSA read with clause 6.1 and 6.3 of the DTD.
 - b. Cash Coupon amount (i.e., interest) of INR 5,40,93,788 due on 31 March 2021 as required by clause 9.2 read with paragraph 1 and 2 of Schedule 10 of the DSA read with clauses 6.1 and 6.3 of the DTD.
 - c. Cash Coupon amount of INR 7,41,24,378 due on 30 June 2021 as required by clause 9.2 and paragraph 1 and 2 of Schedule 10 of the DSA read with clauses 6.1 and 6.3 of the DTD.

7. On account of the CD's default, and in terms of clause 12.2 of the DSA and 13.1 of the DTD, the Applicant issued an Event of Default Notice dated 16 August 2021 ("EOD Notice") [Annexure P-8, pg. 56-66, Volume I of Application]. It is pertinent to note that as per clause 13.1 read with clause (b) of Schedule 1 of the DTD, there is no cure period provided for non-payment i.e., the amounts under the EOD Notice are payable on demand.
8. Since payments were not forthcoming, the Applicant issued an Acceleration Notice dated 24 August 2021 ("Acceleration Notice") [Annexure P-9, pg. 67-80, Volume I of Application] under clause 13.3 of the DTD *inter alia* accelerating all amounts and calling upon the Corporate Debtor to make payment of the following amounts within 2 business days from date of receipt of the Acceleration Notice:
 - a. Outstanding amount of INR 130,53,85,084 to APCO 1; and
 - b. Outstanding amount of INR INR 130,53,85,084 to SSG 2.
9. CD failed to make payment of the above amounts within 2 business days from date of receipt of the Acceleration Notice i.e., by 31 August 2021. CD is in default of INR 261,07,70,168 computed as on 24 August 2021.

Document references for proof of default:

Sr. No.	Document	Annexure	Pg. No., Volume No.
1.	Information Utility (IU) records filed with NeSL	Annexure A of Additional Affidavit dated 24 November 2021	5-11
2.	Letter dated 1 September 2021 from HSBC Bank to APCO 1 certifying that no payment has been received by APCO 1 since 15 April 2020 in respect of the defaulted amount	Annexure P – 10	80A-80C Volume I
3.	Letter dated 1 September 2021 from HSBC Bank to SSG 2 certifying that no payment has been received by SSG 2 since 15 April 2020 in respect of the defaulted amount	Annexure P – 11	80D-80E, Volume I

10. Hence, the present Application was filed by the Applicant on the instructions of the Debenture Holders.

Document references for authority issued to the Applicant to file the Application on behalf of the Debenture Holders:

Sr. No.	Document	Annexure	Pg. No.
1.	Instruction letter issued to Applicant by the Debenture Holders to initiate the present section 7 proceedings.	Annexure P-12	80F-80J, Volume I
2.	Board Resolution of APCO1.	Annexure C, Rejoinder filed by Applicant	41-45
3.	Board Resolution of SSG2.	Annexure D, Rejoinder filed by Applicant	46-50

RESPONSE TO CORPORATE DEBTOR'S CASE

1. Payment under the DSA was not dependent on sale of properties/profit from rental income

1.1. CD's Contention: Cash Coupon was payable only subject to the Respondent making a profit out of the lease rentals from occupancy of the premises. [para 13, Page 7 of the Reply]

Applicant Response: Clause 9.2 read with Schedule 10 of DSA shows payment of Cash Coupon is unconditional and not dependent on occupancy rates/profits.

1.2. CD'S Contention: Obligation of repayment of Principal was pre-conditional on sale of properties as mentioned in Schedule 11. [para 17, Page 11 of Reply; email at pg. 96 of Reply]

Applicant Response:

a. Obligation to repay the amounts under the DSA according to the timelines in Schedule 10 and Schedule 11 is absolute and unconditional. Sale of properties is not a pre-condition for repayment of debt. As per Schedule 11, the amounts disbursed by Debenture Holders were to be repaid either through sale of the specified properties or through any other means –

nowhere does the DSA or DTD state that the amounts would be repaid only through sale of properties or that the Corporate Debtor would be discharged of their payment obligations if they fail to sell the properties. [Ref: Para 12 – 13, pg. 7-8 of the Rejoinder]

- b. Email being referred to by the CD is being interpreted in isolation. When the email is read as a whole, it becomes clear that since the CD was unable to fulfill its payment obligations under the DSA, and the CD claimed they had no means to make the payment, the Debenture Holders suggested that the CD sell the Mortgaged Properties in order to repay the amounts under the DSA. However, the payment obligations under the DSA and DTD are clearly unconditional and absolute. They are not conditional on any sale of properties whatsoever. In any event, contents of the email cannot change the nature of the transaction between the parties
- c. Clause 17.2 of the DSA states that DSA along with other Transaction Documents constitutes the entire agreement between parties and revokes and supersedes all other written or oral communication between parties. Further, Clause 17.3 of the DSA provides that any amendment to the DSA has to be in writing, specifically referring to the DSA and signed by all parties.

1.3. CD's Contention: The obligation to sell the properties was shifted from the CD to the Debenture Holders by virtue of an authority letter issued by the CD, as mentioned in email dated 4 January 2021. [email at pg. 95 of the Reply]

Applicant Response:

- a. The CD never issued any authority letter as stated in the email.
- b. The Debenture Holders never took on the responsibility to sell the properties. In good faith, they merely connected the CD to people in the market to assist them.
- c. In any event, without prejudice to the above, an authority letter cannot change the obligations of the CD under the DSA. Clause 17.3 of the DSA provides that any amendment to the DSA has to be in writing, specifically referring to the DSA and signed by all parties.

1.4. Applicant Response: The CD has previously acknowledged its defaults without raising these arguments that payment was dependent on sale of properties. [Ref: Compliance Certificates dated 29 August 2020, Annexure E colly., pg. 51-54 of the Rejoinder]

2. No defect in the Application

2.1 CD's Contention: The CD in its Reply dated 7 December 2021 and during arguments on 23 March 2022 did not dispute the position that by virtue of section 7 of the Code read with notification dated 27 February 2019 issued by the Ministry of Corporate Affairs, Government of India [pg. 28, Annexure A, Rejoinder dated 14 December 2021 filed by the Applicant; pg. 29, Annexure B, Rejoinder dated 14 December 2021 filed by the Applicant], Debenture Trustee has the power to file an application under section 7 of the Code before the Adjudicating Authority. The CD has instead merely raised a technical objection on maintainability of the instant Application on the ground that since the Applicant is not the financial creditor, the details in Part I of Form 1 filed under section 7 of the Code ought to be that of the financial creditors (i.e., the Debenture Holders) and not the details of the Applicant (i.e., the Debenture Trustee).

Applicant Response:

- A. The title of Part I of Form 1 makes it clear that it is the particulars of the Applicant that have to be furnished in Part I. The form assumes that the application shall be filed by a financial creditor, however when the Applicant is not a financial creditor but a debenture trustee who is acting on behalf of a financial creditor then details of such Applicant i.e., the debenture trustee are to be furnished, as stated in the title of Part I of Form 1. [pg. 13, Volume I, Application filed by Applicant under section 7 of the Code]
- B. Applicant has never misrepresented itself to the Financial Creditor – it has specifically mentioned in Part I that it is acting on behalf of the Debenture Holders.
- C. Debentures are instruments which are freely transferable from one holder to another. CD clearly understands this as it has issued a total of 1,824 of Debentures to APCO1 and SSG2. Further, a corporate debtor at any given time may have issued debentures to hundreds, or even thousands, of different debenture holders/subscribers. It is precisely for this reason that the Debenture Trustee is empowered to take action on behalf of the debenture holders and therefore, it is the details of the Debenture Trustee, being the Applicant before the Hon'ble Tribunal, that have to be furnished when filing an application under section 7 of the Code.
- D. Any person/company/entity approaching a court or tribunal is required to furnish certain basic details when initiating any sort of proceedings. If the CD's argument is accepted, then there is no provision in the form for the Applicant i.e., the Debenture Trustee to provide its details. Point no. 5 of Part I of Form 1 only requires details of the signatory authorized by the Applicant to sign the Form. If the CD's argument is accepted, there would be no provision to provide details of the Applicant company itself.
- E. In the matter of *Innovative Industries Limited v. ICICI Bank and Anr*, [(2018) 1 SCC 407, Para 28] the Hon'ble Supreme Court observed that under section 7(2) of the Code, an application is to

be made under sub-section (1) in such form and manner as is prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("Rules"). Under the said Rules, the application is made in Form 1 accompanied by documents and records required therein. The Hon'ble Supreme Court further observed "Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V." (emphasis supplied)

- F. The Hon'ble Supreme Court made a similar observation in *Dena Bank v. C. Shivakumar Reddy and Anr*, [(2021) 10 SCC 330, para 70] stating "The Statutory Form 1 under Rule 4(1) of the 2016 Adjudicating Authority Rules comprises Parts I to V, of which Part I pertains to particulars of the Applicant, Part II pertains to particulars of the Corporate Debtor and Part III pertains to particulars of the proposed Interim Resolution Professional." (emphasis supplied)
- G. In consonance of the view taken by the Hon'ble Supreme Court, the present Application is filed by the Debenture Trustee on behalf of the financial creditors and accordingly, the details of the Applicant i.e., the Debenture Trustee are furnished in Part I of Form 1.
- H. Even under the previous Companies Act 1956, debenture trustees were empowered to file winding up petitions on behalf of creditors and were deemed to be creditors for the purpose of filing the winding up petition. Section 439(2) of Companies Act 1956 states "a secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors." (emphasis supplied)
- I. In the matter of *Bank of New York Mellon v. JCT Limited* (2015) 190 Comp Cas 396, Punjab & Haryana High Court while dealing with a similar objection on maintainability of winding up petition on the ground that the Petitioner was not a creditor but a trustee held in Para 81 and 82 that the Petitioner i.e. debenture trustee has been the accorded status of deemed creditor by giving right to file winding up petition, therefore, there can be no objection on the maintainability of the petition.
- J. Without prejudice to the above, assuming without admitting that the Part I of the Application requires the details of the Financial Creditor, it is submitted that the details required under Part I i.e., the identification number and the registered address of the Financial Creditors i.e., APCO 1 and SSG 2 are already available in the documents filed by the Applicant:
 - a. Registered address of APCO 1 - pg. 476, Volume IV of the Application, DSA; pg. 43, Rejoinder filed by the Applicant, Board Resolution issued by APCO 1
 - b. Identification number of APCO 1 - pg. 43, Rejoinder filed by the Applicant, Board Resolution issued by APCO 1
 - c. Registered address of SSG 2 - pg. 476, Volume IV of the Application, DSA; pg. 48, Rejoinder filed by the Applicant, Board Resolution issued by SSG 2
 - d. Identification number of SSG 2 - pg. 48, Rejoinder filed by the Applicant, Board Resolution issued by SSG 2

The Hon'ble Supreme Court in *Dena Bank case* noted that it is imperative that the provisions of the Code and the Rules and Regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute, and not be given a narrow, pedantic interpretation which defeats the purposes of the Code [para 86].

In the matter of *IDBI Trusteeship Services Limited v. Ornate Spaces Private Limited* [(CP No. 4469/IBC/MB/2019), para 18, 20], NCLT Mumbai dealt with the issue as to whether technicalities make a material change in summary proceedings under the Code. The NCLT Mumbai held that upon conjoint reading of section 7 of the Code and notification dated 27 February 2019 issued by the Ministry of Corporate Affairs, Government of India [pg. 28, Annexure A, Rejoinder dated 14 December 2021 filed by the Applicant], the rights of parties to seek corporate insolvency resolution process by financial creditor or operational creditor cannot be subjected to technicalities and formalities, and Debenture Trustee can file an application under section 7 of the Code on behalf of the Debenture Holders i.e., Financial Creditor. It was further held that the adjudicating authority in summary proceedings under the Code is not bound by civil procedure code and technicalities prescribed therein and thus a petition under Section 7 of the Code by the financial creditor can be admitted if there is a debt and default and the objection about material defects is untenable.

3. Trustee has the right to take recourse under section 7 of IBC

3.1. CD's Contention: Event of default under DSA and DTD are different. Under the DTD, in the absence of instructions from the Debenture Holders, the Trustee can only enforce DTD in terms of clause 14 i.e., enforcement of security. [para 24, pg. 16 of the Reply]

Applicant Response

- a. Clause 12.2 of the DSA provides that on occurrence of an event of default, if the debtor fails to make payment under the Default Notice, Secured Parties can inter alia take necessary steps in terms of the DTD.
- b. Powers of Debenture Trustee are wide and not limited to clause 14 of DTD. Further, without prejudice to the same, the right to file proceedings under the IBC is a statutory right and cannot be restricted by contract.

- c. Clause 14.1 of the DTD states that the Debenture Trustee can take action as per sub-clause (a) to (d) or "such other powers as may be available to it under Applicable Law, equity or otherwise". Therefore, powers of the Trustee are not restricted to enforcement of Transaction Security.
 - d. The Debenture Holders issued an instruction letter dated 01 September 2021 to the Debenture Trustee to initiate the present section 7 proceedings against the CD. [Annexure P-12, para 5(i), pg. 80F-80J, Volume I of Application]
- 3.2. **CD's Contention:** Trustee can only take action under section 71 of the Companies Act and not under section 7 of IBC. [para 25 and 26, Page 17,18 of the Reply]
- Applicant Response:**
- a. Remedy available under section 71 of Companies Act cannot preclude the Applicant from filing an application under section 7 of IBC against the CD in light of section 238 of IBC which states that the IBC has an overriding effect over existing laws or any other law or contract. [para 22-23, pg. 11-12 of the Rejoinder]
 - b. Availability of alternate remedy is not a bar on initiation on insolvency proceedings. [Ref: *Sodexo India Services Pvt Ltd v Chemizol Additives Pvt Ltd Comp App (AT) (Insolvency) No. 1094/2020, Para 4*]
4. "Disputes" between the parties irrelevant to section 7 Application
- 4.1. **CD's Contention:** Respondents have filed a Suit in Patiala House Court highlighting the breaches of the Debenture Holders.
- Applicant Response:**
- a. It is settled law that existence of a dispute is irrelevant to an application under section 7 of IBC – the Tribunal only has to determine if debt was disbursed and there was a default in repayment of the debt. [para 24, pg. 12-14 of Rejoinder; *Innovative Industries Limited v. ICICI Bank and Anr, (2018) 1 SCC 407, para 28, 30*]
 - b. In any case, allegations in the suit have nothing to do with the default and are frivolous. Suit was dismissed by judgment dated 18 November 2021 [Ref: **Annexure F of the Rejoinder**, pg. 55]. This fact was suppressed by CD in its original Reply. Review petition filed by the CD against judgment dated 18 November 2021 is pending before District Court, next date of hearing is 10 May 2022.

10. The scanned copy of the written submission filed by the Corporate Debtor is reproduced as under:



The present submissions are being filled on behalf of Nimitaya Infotech Private Limited (Respondent/Corporate Debtor) pursuant to the direction of Hon'ble NCLT by and under order dated 23rd March, 2022.

QUESTION TO BE DECIDED IN THIS PETITION:

I. WHETHER PETITIONER IS A FINANCIAL CREDITOR?

- a. A creditor, under section 3(10) of the Code, means any person to whom a debt is owed and includes a Financial Creditor.
- b. At this juncture relevance of the Form needs to be accessed. Since the proceedings under the code and specifically under Section 7 is a summary in nature and therefore requires specific details in the form and manner prescribed. Part 1 of the Form 1 requires the details of the Financial Creditor(s). In this summary enquiry, and the Adjudicating Authority has to collect information from the Form filed, and it cannot enter into correctness of the Applicant of the Application under Section 7 to be a Financial Creditor.
- c. The name, date of incorporation, Corporate Identification address of the Financial Creditor is required to be provided. Also the form requires the details of the authorised representative, the one who is representing the Financial Creditor in a particular instance.
- d. A mere perusal of Part 1 of the FORM-1(@Page No.13 of the Application) filed by the Petitioner herein would indicate that the same is filed by one Axis Trustee Services Ltd.
 - o Part - I of the form, the name of 'Financial Creditor' is shown to be 'Axis Trustee Services Limited'.
 - o In Column 2 of Part I under the head 'date of incorporation of financial creditor', the same reflects as '16 May 2008' a perusal of master data of



- Axis Trustee Services Limited would show that the said date is the date of incorporation of Axis trustee Services Limited.
- o In Column 3 of Part I under the head Identification of Financial Creditor “U74999MH2008PLC182264”, the said CIN is belong to Axis Trustee Services Limited .
 - o In Column 4 of Part I under the head “Address of the registered office of the financial creditor”, the address is shown to be “Axis House, Bombay dyeing Mills Compound, Pandhurang Budhkar Marg, Worli, Mumbai, Maharashtra 400025.” The said address also is owned by the said ‘Axis Trustee Services limited’.
- e. Furthermore, case of the Applicant, whose status of being a Financial Creditor is being challenged, is not that the Applicant is obtained the status by an agreement of novation or by way of assignment.
- f. It shall be relevant here to revisit the following definitions under the code:
- o Section 5(7) - Financial Creditor under means a person to whom a ‘**financial debt is owed**’ and includes a person to ‘**whom such debt has been legally assigned or transferred to**’
 - o Section 3(10) – Creditor means any person to whom a debt is owed and includes a financial creditor, an operation creditor, a secured creditor, an unsecured creditor and a decree-holder.
- g. A bare perusal and combined reading of the said portions of FORM I would reveal that the said Applicant herein namely Axis Trustee Services Limited is representing itself to be the Financial Creditor. Undoubtedly, no debt is due to Axis Trustee Services Limited and cannot come in the shoes of the original Financial Creditor to which if any debt is due and payable. The Applicant herein is does not fit into the position of even a creditor as no debt is owed to it.
- h. A combined reading of the above-mentioned Definitions, Form 1 filed by the Petitioner and the Documents reflecting disbursement would show that the Petitioners herein/proposed financial creditors are not the financial creditors. The investment in the Respondent company is alleged to have been made by the said companies namely Asia-Pacific Private Creditor Opportunities I Singapore Pte. and SSG2 PTE. LTD who have not approached this Hon’ble Adjudicating Authority.
- i. The importance and/or relevance of FORM in IBC proceedings have time and again been highlighted by the Hon’ble Supreme Court as well as the Hon’ble Appellate Tribunal. The Hon’ble National Company Law Appellate Tribunal in Palogix Infrastructure Pvt. Ltd. Vs. ICICI Bank Limited CA(AT)(Ins) No. 30 of 2017 have been pleased to hold as under:

‘31. As per section 7 of the ‘I&B Code’ an application for initiation of ‘Corporate Insolvency Resolution Process’ requires to be filed by Financial Creditor’ itself. The

form and manner in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

That it is for the said reason that in sub-clause (a) of sub-clause (5) of Section 7 of the IBC, 2016, the word used is 'may'. Hence, a discretion has been given by the statute to the Ld. Adjudicating Authority to admit and/or reject such Petitions. The Non-applicant/Corporate Debtor has raised the preliminary objection of maintainability of the instant Application considering the applicant not being Financial Creditor. The Non-applicant/Corporate Debtor has not raised any ground or averment with respect to existence of any debt or default thereof. The Non-applicant/Corporate Debtor therefore reserves its right to raise and reply to the grounds raised at appropriate juncture.

11. Now in terms of the submissions and the averments made in the written submissions filed on behalf of the parties, at first, we would like to consider the point of maintainability of the application.

12. At this juncture, we would like to refer to the Form-1 prescribed under Rule 4 of **the IBBI (Application to Adjudicating Authority) Rules 2016 and the same is reproduced below:**



Form 1

(See sub-rule (1) of rule 4)

**⁵[APPLICATION BY FINANCIAL CREDITOR(S) TO INITIATE CORPORATE
INSOLVENCY RESOLUTION PROCESS *UNDER CHAPTER II OF PART II/UNDER
CHAPTER IV OF PART II OF THE CODE.**

[*strike out whichever is not applicable]]

(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)

[Date]

To,
The National Company Law Tribunal

[Address]

From,
[Names and addresses of the registered offices of the financial creditors]

In the matter of [name of the corporate debtor]

Subject: Application to initiate corporate insolvency resolution process in the matter of [name of
the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

[Names of the financial creditor(s)], hereby submit this application to initiate a corporate
insolvency resolution process in the matter of [name of corporate debtor]. The details for the
purpose of this application are set out below:

Part-I

PARTICULARS OF APPLICANT (PLEASE PROVIDE FOR EACH FINANCIAL CREDITOR MAKING THE APPLICATION)		
1.	NAME OF FINANCIAL CREDITOR	
2.	DATE OF INCORPORATION OF FINANCIAL CREDITOR	
3.	IDENTIFICATION NUMBER OF FINANCIAL CREDITOR	
4.	ADDRESS OF THE REGISTERED OFFICE OF THE FINANCIAL CREDITOR	
5.	NAME AND ADDRESS OF THE PERSON AUTHORISED TO SUBMIT APPLICATION ON ITS BEHALF (ENCLOSE AUTHORISATION)	
6.	NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF (ENCLOSE AUTHORISATION)	

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Part-II

PARTICULARS OF THE CORPORATE DEBTOR		
1.	NAME OF THE CORPORATE DEBTOR	
2.	IDENTIFICATION NUMBER OF CORPORATE DEBTOR	
3.	DATE OF INCORPORATION OF CORPORATE DEBTOR	
4.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)	
5.	ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	
6 [6.	DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION UNDER SECTION 55 (2) OF THE CODE- (i) ASSETS AND INCOME (ii) CLASS OF CREDITORS OR AMOUNT OF DEBT (iii) CATEGORY OF CORPORATE PERSON (WHERE APPLICATION IS UNDER CHAPTER IV OF PART II OF THE CODE)]	

Part-III

PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL		
1.	NAME ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL	

Part - IV

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	




Part-V

PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]	
1.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)
2.	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)
3.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)
4.	DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)
5.	THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)
6.	A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)
7.	COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)
8.	LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT

I, hereby certify that, to the best of my knowledge, [*name of proposed insolvency professional*], is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

⁷[[*Name of the financial creditor*] has paid the requisite fee for this application through [*state means of payment*] on [*date*] and served a copy of this application by registered post/speed post/by hand/electronic means to the registered office of the corporate debtor and to the Board.]

Yours sincerely,

Signature of person authorised to act on behalf of the financial creditor
Name in block letters
Position with or in relation to the financial creditor
Address of person signing

Instructions

Please attach the following to this application:

Annex I Copies of all documents referred to in this application.

Annex II Written communication by the proposed interim resolution professional as set out in Form 2.

Annex III Proof that the specified application fee has been paid.

Annex IV Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants.

⁸[Annex V Proofs of serving a copy of the application (a) to the corporate debtor, and (b) to the Board.]

13. On perusal of the Form-1, we observe that it is a fact that part I relates to the name and particulars of the Financial Creditor. Now we consider the submissions of the parties, in terms of part-I of the Form-1 as well as the part-I filled up by the applicant and we observe that admittedly the name of Financial Creditor and its details are lacking in part-I of FORM 1 and in place of the name and details of Financial Creditor, the name and details of the Axis Trustee Services Ltd. is mentioned in the Part I of the application submitted by the applicant and this facts are also admitted by the applicant in the course of hearing.

14. At this juncture, we would also like to refer to the argument of the Ld. Counsel for the Applicant, who in the course of argument submits that the details required under part 1 of the FORM 1, the documents regarding the name, identification no., registration and address of the Financial Creditor are already available on the record, therefore, the same may be taken into consideration. He further submits that only on technical ground, the right of the Operational Creditor/ Financial Creditor cannot be taken away and in support of this, he placed reliance upon the decision of Coordinate Bench of NCLT Mumbai in IDBI Trusteeship Services Ltd. Vs. Ornate Spaces Private Limited (CP-IB No.4469/IBC/MB/2019).

15. In terms of submissions, we again perused the Form 1 and on careful perusal of the same, we are unable to accept the contention of the applicant that if the documents regarding the details of the Financial Creditor are available on the record, in that case there is no need to mentioned the name and details of the Financial Creditor in Part I of the FORM 1. In our considered



view, in terms of Section 7(2) of the IBC, 2016 the Financial Creditor shall make an application under sub section 1 of Section 7 of the IBC, 2016 in such form and manner and accompanied with such fee as may be prescribed and Rule 4 of the IBBI (Application to Adjudicating Authority) Rules, 2016 prescribed Form-1. Since the word “shall” is referred to in sub section 2 of Section 7 of the IBC as well as under Rule 4 of the IBBI (Application to Adjudicating Authority) Rules, 2016 for filing an application in the prescribed form and manner. Therefore, in our considered view, if an act and rule both says that the Form I shall be filled up in particular manner then it must be filled up in the manner prescribed under the Act. As we have already observed that the applicant has not filled up the name and details of the Financial Creditor in Part I of the FORM 1 in terms of Section 7(2) of the IBC read with Rule 4 of the IBBI (Application to Adjudicating Authority) Rules, 2016, hence the present application is **defective and incomplete**.

16. So far the contention of the applicant that only on technical ground, the right of the Operational Creditor/ Financial Creditor cannot be taken away is concerned in our considered view that there is no quarrel that only on the ground of any defect in the application, the right of the Financial Creditor or the Operational Creditor can be curtailed or denied by the Adjudicating Authority without giving an opportunity to remove the same.

17. **At this juncture, we would like to refer to Section 7(5) of the IBC and the same is reproduced below:**

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



(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.”

16. A bare perusal of the provision shows that before admitting an application the Adjudicating Authority is required to consider under Section 7(5) (b) whether the application filed under sub-section 2 of Section 7 is complete or not. If it is incomplete then in terms of proviso of Section 7(5)(b) of the IBC, *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.”*



18. In our consider view unless this defect is cure by the applicant, we are unable to consider the other submissions of the parties. Therefore, in view of proviso of Section 7(5) clause (b), we hereby direct the Applicant to remove the defect, as referred to above and filled up the Part I of FORM 1 in the manner prescribed within 7 days from the date of order.

19. Accordingly, the matter is **dereserved**.

20. **List on 05.07.2022**

Sd/-

(HEMANT KUMAR SARANGI)
Member(T)

Sd/-

(ABNI RANJAN KUMAR SINHA)
Member(J)

06/06/2022