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

CP(IB) No. 1672/KB/2019

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:

Punjab National Bank, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having its head office at Corporate Office Plot No. 4, Sector – 10 Dwarka, New Delhi – 110075 and inter alia its branch at 44 Park Street, P.S. Park Street, Kolkata-700016 in the State of West Bengal.

.....Financial Creditor

-Versus-

M/s Swastik Commercial Private Limited, a company incorporated under the Companies Act, 1956 and being a Company within the meaning of the Companies Act, 2013, and having Corporate Identification No-U51109WB1994PTC064212 and its registered office at CF – 361, Salt Lake City, Sector I, Kolkata-700064 in the State of West Bengal.

.... Corporate Debtor/ Corporate Guarantor

Date of Hearing : 15th February, 2022

Date of pronouncing the order: 27th April, 2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Appearances (via video conferencing):

For the Financial Creditor: 1. Ms. Aparajita Rao, Advocate

For the Corporate Debtor : 1. Ms. Sapna Choubey, Advocate
2. Mr. Mohan Ram Goenka, PCS
3. Ms. Sneha Khaitan, PCS

ORDER

Per : Rohit Kapoor, Member (Judicial):

1. This Court convened through video conferencing.
2. This Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 , has been filed by **Punjab National Bank** (hereinafter referred to as the Financial Creditor), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s Swastik Commercial Private Limited** (hereinafter referred to as the Corporate Debtor).

Submissions of the Financial Creditor:

3. M/s Prithvi Ferro Alloys Pvt. Ltd., being the principal borrower, set up a project of an integrated steel complex at Chandrapur district, Maharashtra comprising of a Captive Power Plant (CPP) and a Ferro Alloy Plant (FAP). The total project cost was ₹ 127.77 Crores and the debt requirement was ₹ 87.32 Crores. The company had approached Bank of Baroda for a term loan of ₹ 42.32 Crores under consortium finance with the applicant. The Promoter's contribution was ₹ 40.45 Crores. The company decided to take up the CPP project first and the FAP project subsequently. Commercial Operation Date (COD) of the CPP unit was fixed at April 2012.
4. The Applicant Financial creditor, being the Lead banker sanctioned a term loan on 31.05.2011, consisting of ₹ 38.46 crore for the Power Project and ₹ 6.54 crores for the Ferro Alloys. M/s Swastik Commercial Pvt. Ltd. (hereinafter known as "Swastik"), being the Corporate

Guarantor, furnished corporate guarantee in consideration of grant of credit limits to Prithvi Ferro Alloys P. Ltd.

5. The principal Borrower failed to repay its dues to the bank, despite many attempts being made at debt restructuring and revival of the borrower company. Accordingly, Corporate Insolvency Resolution Process was initiated against the principal borrower in CP(IB) 40/KB/2019.

6. M/s. Swastik Commercial Pvt. Ltd. as the corporate guarantor is jointly and severally liable for the dues of M/s Prithvi Ferro Alloys Pvt. Ltd. The Financial Creditor is entitled to recover a sum of ₹71,40,41,278.90/- as on 08.08.2019 from the Corporate Debtor/Corporate Guarantor. The date of default is stated to be 30.11.2016

Submissions of the Corporate Debtor/ Corporate Guarantor:

7. The Corporate Debtor has denied and disputed that a sum of ₹71,40,41,278.90 is due for which corporate guarantee was executed as alleged or at all. It is further submitted no charge is registered against the Corporate Guarantor and also the same being Financial Service Provider- does come under the purview of IBC. The application is not maintainable at all under the same and cannot be initiated under section 7 of the IBC against Swastik. There is no default on the part of Swastik and, therefore, the instant application is liable to be dismissed in limini with exemplary costs.

8. It is submitted that the authorised representative Mr. Tarun Lal Gupta, is not specifically authorised by the financial creditor to file the instant application under IBC, as he holds only a general power of attorney, which was given to him in the year 2001 which was much prior to the enactment of the IBC. It is submitted that in the absence of any valid and specific authority given to the said Tarun Lal Gupta for filing an application under the provisions of Insolvency and Bankruptcy Code 2016 the said application can not be entertained at all by this Tribunal.

9. It is further submitted that although Swastik had provided its Corporate Guarantee for the loan granted to Prithvi Ferro Alloys Private Limited for a sum of Rs. 87.32 Crores on September 13th 2011, no charge has been created by the applicant Punjab National Bank against the Swastik for registering the Charge for the said Corporate Guarantee with Registrar of companies. The Copy of the Master Data of the Swastik on the MCA Portal of the Registrar of Companies West Bengal reflects that no charge had been created by the applicant Bank.
10. It is submitted that no corporate guarantee was ever invoked and only a notice was issued to Swastik under SARFESI Act by the applicant Bank. The CIRP proceedings against the main corporate debtor are still not completed as it is underway. In the said circumstances, the instant proceedings against Swastik is not maintainable in law and therefore be dismissed in limini.
11. It is submitted that in the present case Swastik is a Non-Banking Financial Institution and comes under the purview of financial service provider and is registered with the Reserve Bank of India since September 2003 and also carrying on the business of Non Banking Financial Company (NBFC). The Certificate fo Registration of the same has been annexed as 'Annexure R2' of the reply-affidavit.
12. It is further submitted that if the entire scheme of the IBC is seen, it will be evident that code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of "Corporate Person" in a time bound manner. It is a self-contained code which is exhaustive in nature when it comes to reorganisation and insolvency resolution. However, an exception had been carved out while enacting the code that the "financial services providers" have been kept outside the purview of the IBC. Being a consolidated legislation, only those acts are permitted which are mentioned in the Code and cannot be made applicable to financial service provider including Non-Banking Financial Institutions and

MFIs, Banks which have been kept outside the purview of the IBC. In the said circumstances, it is submitted that the instant petition on this ground only to be dismissed.

Analysis and Findings

13. Heard the learned Counsel for the Financial Creditor and learned Counsel for the Corporate Debtor and perused the record.

14. Sub-section (7) of section 3 of IBC defines "corporate person" as under:

"corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but ***shall not include any financial service provider****;*

Sub-section (16) of section 3 of the IBC defines "financial service", which reads as under:

"financial service" includes any of the following services, namely: –

(a) accepting of deposits;

(b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;

(c) effecting contracts of insurance;

(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;

(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—

i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with financial product or financial service;

(f) establishing or operating an investment scheme;

(g) maintaining or transferring records of ownership of a financial product;

(h) underwriting the issuance or subscription of a financial product; or

(i) selling, providing, or issuing stored value or payment instruments or providing payment services;

Sub-section (17) of section 3 of IBC defines "financial service provider" as under:

"financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator

15. Hence, it is clear that IBC excludes 'financial service provider' from the definition of 'corporate person'. As such, an entity engaging in providing 'financial services' cannot be made to undergo CIRP under the provisions of IBC.

16. In **Randhiraj Thakur, Director Mayfair Capital Private Limited v. Jindal Saxena Financial Services Private Limited** [Company Appeal (AT) (Insolvency) Nos. 32 & 50 of 2018], the Hon'ble NCLAT held the NBFC to be a financial service provider and thus exempted from being a debtor under the Code. In the instant matter, the following observations have been made by the Hon'ble NCLAT:

"If the entire scheme of the I&B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of 'corporate persons', 'partnership firms' and 'individual' in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganisation and insolvency resolution. However, an exception had been carved out while enacting the Code that the 'financial service providers' have been kept outside the purview of the Code. Being a consolidating legislation only those acts are

permitted which are mentioned in the Code and it cannot be made applicable to 'financial service providers' including 'non-banking financial institutions' and MFI's banks, which have been kept outside the purview of the Code."

17. The record before us reveals that the Corporate Guarantor in the instant Petition is a NBFC carrying on the business of a Non Banking Finance Institution and comes under the purview of 'financial service provider'. It is registered with the Reserve Bank of India under section 45-IA of the Reserve Bank of India Act, 1934 on 12th September 2003.

18. In light of the above-mentioned provisions and the laid down law, it is clear that the Corporate Guarantor/Corporate Debtor herein is not covered under the definition of a "corporate person". As such, the instant petition is not maintainable and is accordingly **dismissed**.

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

20. Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 27th day of April, 2022

Suman M(LRA)