

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH**

Company Petition (IB)No.349/ALD/2018

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

IN THE MATTER OF

BANK OF INDIA

.....Applicant/Financial Creditor

VERSUS

M/S B.B. FOOD PVT. LTD.

.....Respondent/Corporate Debtor

ORDER RESERVED ON :26.09.2019

ORDER DELIVERED ON : 22.10.2019

CORAM :

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

For the Applicant/ Operational Creditor: Sh. P.K Bajpai, Advocate

For the Respondent/ Corporate Debtor: Sh. Siddharth Singhal, Advocate

AS PER: Mr. Abni Ranjan Kumar Sinha, Member , Judicial.

Order

1. The present petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the petitioner/financial creditor *i.e. Bank of India* for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate debtor company *M/s B.B. Food Pvt. Ltd.*

The Applicant "*Bank of India*" is a Banking Institution and corporate body constituted under the Banking Companies (Acquisition and



PS

Transfer of Undertaking) Act, 1970. Having Identification No. as PAN No. AAACB0472C. **Mr. Raina Anil Kumar**, Assistant General Manager, Bank of India has been authorised to file this application on behalf of Financial Creditor (*The Power of Attorney is annexed as annexure A-1 of the Application*).

3. The Respondent *M/s B.B. Food Pvt. Ltd.*, incorporated on **22.05.2002** (*Having its Registered Office at, C-25, EPIP, Shastripuram, Agra, U.P; CIN U15499UP2002ETC026683*). The authorised share capital of respondent is Rs. 1,00,00,000/- (Rupee One Crore Only) and Issued Subscribed and Paid- Up share Capital is Rs. 99,00,000/- (Rupee Ninety Nine Lacs Only).

4. Brief facts related to petition are as follows:

- i. The learned counsel for the petitioner submitted that at the request of the Corporate Debtor, the bank has granted various credit limit of an aggregate amount of Rs.28,00,00,000/-. The various credit facilities granted by the financial creditor and the amount outstanding as on the date of notice are in form of term loan and WACFBL. Further submitted that as the corporate debtor defaulted in repayment of the dues to the applicant, the operational creditor declared the account of the corporate debtor as NPA on 29.01.2013 in accordance with the guidelines issued by RBI and the total amount claimed to be in default is Rs.40,33,04,620/- but thereafter the Corporate Debtor has executed the document on 13.04.2015 and by executing those



PS

document they acknowledged the debt and those documents are available at pages 345-359 as annexure A-40 of the Application.

- ii. Subsequently after filing the application on 28.09.2018, the applicant has also filed a letter dated 05.10.2018, written by the corporate debtor to the financial creditor for one Time Settlement and on the basis of that the financial creditor claim that the corporate debtor has acknowledged the debt.
- iii. Further stated that the demand Notice was issued by the Financial Creditor to the Corporate Debtor dated 06.03.2013 U/S 13(2) of the SARFAESI Act,2002.
- iv. In the counter affidavit filed by the Corporate Debtor it is stated that the application filed by the financial creditor is not maintainable as on the advice of financial creditor, the corporate debtor had already submitted onetime settlement proposal dated 05.10.2018 for an amount of Rs. 1,60,00,00 and deposited Rs. 1,60,00,000/- vide Demand Draft No. 607801 annexed as Annexure-B and the same has been duly realized as per the Certificate of realization of the demand draft issued by the Banker of the proposed Investor, annexed as Annexure-c and it has been informed that his proposal is under Consideration. It is also submitted by the learned counsel for that the present application is barred by limitation by virtue of Sec 238A of IBC and Article 137 of the Limitation Act will attracted in the present case which prescribes the limitation period of 3 years from the date of occurrence of the default so the period of limitation ends on 28.01.2016.



PS

- v. Further submitted that the present petition is not maintainable as the financial creditor has miserably failed to serve an advance copy of the present petition on the Corporate Debtor, hence in absence of the compliance of the procedure prescribed U/r 4(3) of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules 201, the Application is not maintainable.
- vi. It is further submitted that the financial creditor had published an auction notice for auction of secured assets and conducted the auction under SARFAESI Act, 2002 which was successful. The auction purchaser namely, Ms. Dawar Footwear Industries made bid for the part of the secured assets and deposited amount of Rs.4,93,10,000/- and there was no bid for plant and machinery. Further submitted that the financial creditor is desperate to sell/auction the secured assets of the Corporate Debtor at throw away prices to cause financial losses to corporate debtor.
- vii. It is further stated that the statement of account relied upon by the financial creditor is wrong and incorrect as well as it is also submitted that due to non-availability of the funds and non-cooperation a financial creditor, the potato French Fries Plant count not run as per the industry norms and was never in a condition for full functioning. The corporate debtor had been consistently requesting to the Financial Creditor for the release of the amounts but due to the stubborn attitude of the financial Creditor, entire money of the corporate debtor has been wasted besides the corporate debtor instead of establishing the business



PS

has been dragged in various frivolous litigations. And hence prayed that the present petition shall not be admitted.

- viii.* In reply to the counter affidavit, the learned counsel for the petitioner submitted that the offer made by corporate debtor was on the lower side, the financial creditor advises the corporate debtor to increase the offer and communicate within seven days. Further submitted that corporate debtor gave its consent for settlement of dues, as per settlement the entire dues was to be paid by 02.04.2019 which the corporate debtor failed to deposit within three months.
- ix.* Further submitted that the corporate debtor has moved a writ petition before the Hon'ble High Court, which was disposed off with the direction to the corporate debtor to deposit the balance amount on or before 30.09.2019 and in case of failure to do so it will be open to the bank to proceed against the corporate debtor in accordance with the law but no payment towards OTS has been made and corporate debtor has not complied with the order.
- x.* It is further submitted by the learned counsel for the applicant that the statement of account submitted by the financial creditor is absolutely correct and has been dully certified as per the provisions of Bankers' Book Evidence Act and the Corporate Debtor is liable for outstanding as shown in the statement of account. And lastly submitted that a number of opportunities was given by the financial creditor to settle the matter. However, all the time the corporate debtor made false promised and never deposited the amount towards OTS as per the



PS

schedule. Hence prayed that the present petition is filed under Section 7 of IBC is liable to be admitted.

5. The Learned Counsel for the Financial Creditor submitted that in order to prove the Existence of the Financial Debt; they have annexed following documents:

- i. The copy of letter of acknowledgement of debt/ Securities alongwith Board Resolution in favour of the financial creditors is annexed as *Annexures A-37 and A-40, of the Application.*
- ii. The Copy of Sanction letters are annexed as *Annexure 4 of the Application.*
- iii. *The copy of various Board Resolution is annexed as Annexure A-5 and Annexure A-34 of the application.*
- iv. *The agreement of term loan and hypothecation is annexed as Annexure A-6, A-7, A-10 of the application.*
- v. The certified copy of statements of Accounts maintained by the Financial Creditor under The Banker's Books Evidence Act, 1891 is annexed as *Annexure A-42 of the Application.*
- vi. The Copy of the Demand Notice dated 06.03.2013 sent to the Corporate Debtor, is annexed as *Annexure 9 of the Application.*

6. The Corporate Debtor filed the written submissions in which he claims that the petition filed by the applicant is barred by limitation and in support of that he placed reliance on several decisions, i.e.:

- i. B.K Educational Service (P) Ltd. vs Parag Gupta and Associates 2018 SCC Online SC 1912;



— PS —

- ii. Gaurav Hargovindbhai Dave v Asset Reconstruction Company (India) Ltd. 2019 SCC Online Sc 1239;
- iii. Jignesh Shah & Anr vs. Union Of India & Anr. Writ Petition (Civil) No. 455 of 2019.

7. Therefore, in the light of the said decisions now I would like to consider whether in view of Article 137 of the Limitaton Act, the claim of the petitioner is barred by limitation or not?

8. As I have already dicussed ,that case of the parties in the afoesaid mentioned paragraphs and on the basis of that it is admitted fact that the NPA was declared on 29.01.2013 but thereafter the corporate Debtor has executed the document on 13.04.2015 regarding acknowledgement of debt which are avaiable on pages 345-359 at Annexure A-40 of the application and on the basis of that documents the fresh limitation begins from the date of execution of that document i.e from 13.04.2015 and it comes to an end on 13.04.2018 and this application is filed on 29.09.2018. Therefore, on the date of filing of the application the period of three years has already been expired on 13.04.2018 but subsequently on 05.10.2018, One Time Proposal was sent along with Demand Draft dated 05.10.2018 of Rs. 1,60,00,000/- which is available on pages 359A- 359-F and therefore, during the pendency of this application ,again the corporate debtor has acknowledged the debt by filing one time proposal on 05.10.2018 and making part payment of an amount i.e Rs. 1,60,00,000/- . So, the fresh period of limiation begins from 05.10.2018 and from that date the present application is well within time, though filed prior to that.



PS

9. Now, as this Adjudicating Authority held that the application filed by the applicant is within time. Therefore, this adjudicating Authority would like to consider whether the Financial Creditor has fulfilled the conditions necessary to trigger the provision of Sec 7 IBC and before considering that I would like to refer Sec 7 which is as quoted below:

Section 7: Initiation of corporate insolvency resolution process by financial creditor:

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

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

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

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

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

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

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

10. Mere plain reading of the provision shows that in order to make an application under Section 7 (1) the financial creditor / petitioner is required to establish:

- a. Whether there is duly established financial debt.
- b. Whether there is default in payment by the corporate debtor.



PS

c. Whether the documents attached with the applicant shows that there is default in payment of debt and name of resolution professional is proposed to act as IRP and no disciplinary proceedings are pending against the proposed resolution professional.

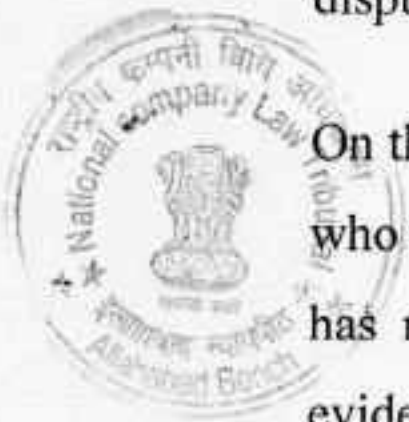
11. The Hon'ble Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank*, (2017)205 Comp Cas 57(SC) held :

“The scheme of Sec 7 stands in contrast with the scheme under Sec 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in sec 8(1) of the Code. Under Sec 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub Section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing –i.e., before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor goes out of the clutches of the Court.

On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is 'due', i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some further debt. It is only when this is prove to the satisfaction of the adjudicating authority may reject an application and not otherwise”.

12. In the case *of Ajay Agarwal vs. Central Bank of India* (2018) 208 Comp Cas 402 (NCLAT) Hon'ble NCLAT held:

“When in case a “Corporate Debtor” commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the “financial creditor” to satisfy itself that a default has occurred. Other



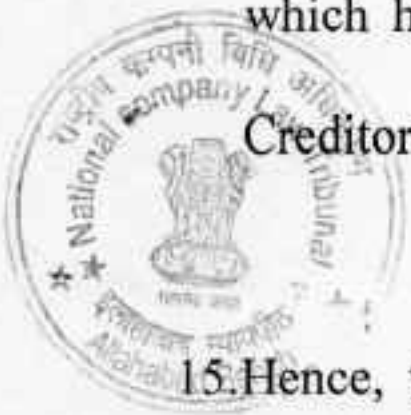
PS

considerations, such as the existence a dispute or discrepancy are irrelevant, so long it has not been disputed the same debt is due and is payable to the financial creditor and the corporate debtor has defaulted.”

13. Recently in the matter of *Karan Goel v. M/s Pashupati Jewellers & Anr. Company Appeal (AT) (Insolvency) No. 1021 of 2019 dated 01.10.2019* stated :

“..... it is clear that once the Adjudicating Authority is satisfied on the basis of records that the debt is payable and there is default, the Adjudicating Authority is required to admit the application.”

14. In the light of the aforesaid decisions, now this Adjudicating Authority shall consider the claim of the applicant and on the basis of the discussions made above, this Adjudicating authority is of the considered view that the Financial Creditor has succeeded to establish that there is financial debt which has been corroborated by the documents filed by the financial Creditor and the Corporate Debtor is on default of payment of that debt.



15. Hence, the application filed on behalf of financial creditor/Applicant under Section 7 of IBC is found complete and it is within limitation Therefore application filed U/S 7 of IBC deserves to be admitted.

16. The Financial Creditor has proposed the name of *Mr Pramod Kumar Sharma, Registration Number IBBI/PA-002/IP-N00110/2017-18/10258* for appointment as Interim Resolution Professional (IRP). Further IRP has filed a declaration in form 2 affirming that he is registered insolvency professional and no disciplinary proceedings are pending against him. *(Copy of Form -2 is annexed as Annexure-2 of the*

PS

Application) and there is default in the payment of the financial debt which is more than Rs One Lakh. Therefore, as per section 7(5)(a) of the code, the present application filed U/s 7 of the IB Code is admitted.

17. *Mr Pramod Kumar Sharma, Registration Number IBBI/IPA-002/IP-N00110/2017-18/10258* is appointed as Interim Resolution Professional (IRP). Further, a moratorium under the provision of section 13 & 14 of the Code is declared prohibiting the following:

- i. *The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- ii. *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- iii. *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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
- iv. *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.*

It is further directed that:

- (i) *The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period*



PS

- (ii) *The provision of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial sector regulator.*

18. The IRP shall comply with the Provision of Section 13(2), 15, 17 & 18 of the Code. Further, the Directors, Promoters or any person associated with the Management of the Corporate Debtor are directed to co-operate to the IRP as prescribed under Section 19 and for discharging his function under a provision of section 20 of the Code.



19. The Registry is further directed to communicate the copy of this order to Financial Creditor and Corporate Debtor and IRP through email and speed post.

20. List on **13.11.2019** for the filing of the progress report.

Date : 22.10.2019

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL

[Handwritten Signature]
23/10/19

S. A. MEHDI
DESIGNATED REGISTRAR
NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD U.P.

[Handwritten Signature]
22.10.19

Abni Ranjan Kumar Sinha
(Member Judicial)

Compared by Me
Mahesh Sahai
23/10/19

FREE OF COST COPY