IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

T.P (IBC) No. 02/CB/2022
(*Earlier* C.P (IB) No. 209/KB/2021)

In the matter of:

An application under section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the matter of:

State Bank of India, Corporate Office: State Bank Bhavan, Madame Cama Road, Nariman Point, Mumbai, Maharashtra- 400021, Branch Office: Stressed Assets Resolution Group Commercial-III Branch, 112-115, 1st Floor, Tulsiani Chambers, Free Press Journal Marg, Nariman Point, Mumbai- 400021;

…Financial Creditor

-Versus-

Abhijeet Ferrotech Limited, CIN: U52322WB1996PLC076509 a company incorporated under the Companies Act, 1956 having its registered office at FE-83, Sector-III Salt Lake City, Ground Floor Kolkata 700 106.

…Corporate Debtor

Coram:

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

Appearances:

For the Applicant	:	Mr. Abhnajit Mitra, Sr. Adv. Mr. Jishnu Chowdhury, Adv. Ms. Riti Basu, Adv. Mr. Shashwat Rout, Adv.
For the Respondent	:	Mr. Jishnu Saha, Sr. Adv. Mr. Mainak Bose, Adv. Mr. Souritra Ganguly, Adv. Mr. Tanay Agarwal, Adv.

Order reserved on: 06.02.2023
Order pronounced on: 21.03.2023

ORDER

Per: P. Mohan Raj, Member, (Judicial)
Per: Satya Ranjan Prasad, Member (Technical)

1. This application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (‘**IBC, 2016’** for brevity) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, has been filed by **State Bank of India** *(Financial Creditor/ FC)*, through its Authorised Officer Mr. Ashwini Kumar, Chief Manager and Case Officer thereby seeking initiation of Corporate Insolvency Resolution Process ***(CIRP)*** in respect of **Abhijeet Ferrotech Limited** [CIN: U52322WB1996PLC076509], having its registered office at FE-83, Sector-III Salt Lake City, Ground Floor Kolkata 700106 *(hereinafter referred to as "**the Corporate Debtor/CD**")*.

2. This petition was originally filed in the Kolkata Bench bearing CP (IB) No./209/(KB)/2021. Thereafter *vide* office order dated 30th August, 2022 Hon’ble President, under Section 419 of the Companies Act, 2013 read with Rule 62 of the NCLT Rules, 2016 had transferred the matter to this Bench and henceforth, upon transferring of this matter to this bench, it is re-numbered as TP (IBC) No. 02/CB/2022.

Brief facts of the case as submitted by the petitioner side is as under.

3. The petitioner has stated that the Corporate Debtor approached the Financial Creditor to provide financial assistance for implementation of manufacture of Ferro- Manganese and Silico- Manganese at its plant in Achalpuram, Vishakhapatnam, Andhra Pradesh. On the said request the *erstwhile* State Bank of Travancore sanctioned the credit facilities *vide*

its sanction letter dated 17.03.2012 to the tune of Rs. 99,00,00,000/- (Rupees Ninety-Nine Crore Only). It is stated that the said sanction letter was duly accepted and acknowledged by the Corporate Debtor. Thereafter, the Corporate Debtor requested the Financial Creditor to renew the credit facilities granted to them and pursuant to the said request credit facility was renewed *vide* sanction letter dated 08.04.2013 for additional 12 months at the revised limit of Rs. 89,46,00,000/- (Rupees Eighty-Nine Crore Forty-Six Lakh Only).

4. The Corporate Debtor enjoyed the facility under the consortium arrangement since 30.09.2013. Subsequently, the Corporate Debtor requested the applicant and other consortium members for restructuring of the outstanding amounts of the existing facilities as the operation of the business of the Corporate Debtor had come under strain due to various reasons. As per the said request the applicant along with other consortium lenders entered into Master Restructuring Agreement dated 28.09.2013 and further pursuant to the said Agreement following documents were executed by the Corporate Debtor-

    a) Common Term Loan Agreement dated 30.09.2013;
    b) Working Capital Facility Agreement dated 30.09.2013;
    c) Security Trustee Agreement dated 3.09.2013;
    d) Trust and Retention Agreement dated 30.09.2013;
    e) Pledge Agreement dated 30.09.2013.

5. Thereafter, pursuant to various consortium meetings held with the Corporate Debtor the credit facilities were restructured *vide* sanction letter dated 14.02.2014 at new restructured limit of Rs. 89,46,00,000/- (Rupees Eighty-Nine Crore Forty-Six Lakhs only). The same was duly accepted and acknowledged by the Corporate Debtor. Pursuant to the said restructured limit the Corporate Debtor executed Deed of

Accession and Modification to the Master Restructuring Agreement dated 26.03.2014. Subsequently, on request of the Corporate Debtor the applicant has enhanced the credit facilities *vide* its sanction letter dated 23.12.2015 by Rs. 36,74,00,000/- (Rupees Thirty-Six Crore Seventy-Four Lakh and executed following documents: -

a) Agreement of Loan for overall Working Capital Limit dated 23.12.2015;

b) Agreement of Hypothecation of Goods and Assets dated 23.12.2015;

c) Letter regarding the grant of individual limit within the overall working capital limit dated 23.12.2015;

d) Agreement to Pledge Shares and Securities Agreement to Create Equitable Mortgage dated 23.12.2015.

On request of the Corporate Debtor the applicant *vide* its sanction letter dated 28.12.2015 once again enhanced the limit at Rs. 1,26,20,00,000/- (Rupees One Hundred Twenty-Six Crore Twenty Lakh Only) the same was accepted and acknowledged by the Corporate Debtor.

6. It is further stated that the FC had disbursed various amounts from time to time and the Corporate Debtor (CD) had utilised the same. But despite repeated requests and reminders the Corporate Debtor neglected to pay the outstanding dues.

7. The Original date of NPA was 31.03.2013. As stated above, the Company was restructured under CDR in Sep 2013 and subsequently it had failed and exited from CDR in Dec 2015. The accounts were accordingly classified as NPA on 30.09.2016 w.e.f. 31.03.2013 as per RBI Guidelines and Directives.

8. The financial creditors issued demand notice dated 18.05.2018 to pay a sum of Rs. 1,09,91,11,273/- (Rupees One Hundred and Nine Crore

Ninety-One Lakhs Eleven Thousand Two Hundred Seventy-Three Only) inclusive of interest in respect of loan accounts as on 30.04.2018.

9. On 17th February 2017, the financial creditor also initiated steps under section 13(2) of the SARFAESI Act, 2002. There has been no recovery under the SARFAESI Act. O.A. No. 742 of 2018 was subsequently filed by the financial creditor in the Debts Recovery Tribunal — Ill, Kolkata under the RDDB Act.

10. Thereafter, the Corporate Debtor through its letter dated 07.07.2021 proposed a One-Time Settlement ("OTS") offer to the financial creditor with reference to the acknowledged outstanding amount.

11. In view of the facts and circumstances stated above, the Financial Creditor submits that the Corporate Debtor is being unable to pay the debt amounting to Rs. 144,70,88,690/-(Rupees One Hundred Forty-Four Crore Seventy Lakhs Eighty-Eight Thousand Six Hundred Ninety Only) as on 19.07.2021 and there is default, therefore, it is just and equitable that the CIRP to be initiated against the corporate debtor under Section 7 of IBC, 2016. Hence, this petition.

The brief facts of the reply are as follows:

12. The corporate debtor states that there is no default that has occurred as alleged in the petition hence, the petition is liable to be dismissed. There is no cause of action to proceed against the respondent. There is no existence of debt as defined under section 3(11) and there is no default as defined under section 3(12) of IBC 2016. The petition is also barred by limitation. The Master Restructuring Agreement was executed on 30.09.2013. As per the MRA the lenders shall extend the renewed working capital facility. The corporate debtor after the execution of MRA, deed of Accession and the Trust and Retention Account

complied with all obligations under said agreements. The petitioner and other consortium members neglected to disburse, enhanced working capital facilities to the respondent. Due to the non-release of the sanctioned limits, caused severe problems to operations of the corporate debtor and due to non-availability of funds the corporate debtor was not in a position to operate the plant to the full extent. It came to the knowledge of the respondent in the month of December 2015 that the lenders without adhering to their assurance and without disbursing the sanctioned limit convened a meeting to invoke security of the pledged shares. The financial creditor did not disburse any amount, but simply proceeded to allege that despite repeated requests and reminders corporate debtor failed and neglected to pay the dues. The loan account was declared as NPA from 31.03.2013. The financial creditor and other consortium members acted in violation of their fundamental obligations under Master Restructuring Agreement proceeded to file this petition. The petitioner has by filing this petition attempted to take advantage of its own wrong which it clearly cannot do. When the financial creditor fails to disburse the loan quantum in spite of sanction thereof resulted in breach of obligation, which will result in novation of the entire arrangements thus precludes the financial creditor from maintaining the petition under section 7 of IBC, 2016. The petitioner is using the proceeding under section 7 of IBC, 2016 as debt recovery mechanism which is in contradiction to the very object of IBC. The petitioner classified the account of the respondent as NPA on 30.09.2016 and further referred the original date of NPA is 30.03. 2013.The reasons for such double classification of the account of respondent was restructured under the CDR in September 2013. The original date of classification as NPA is on 31.03.2013 so the petition filed in 2021 is barred by limitation. The petitioner deliberately breached the terms and conditions of Master Restructuring Agreement, the petitioner cannot hold the respondent to be in default of their part of obligation in terms of repayment. The petition is liable to be dismissed.

13. When this petition is pending for adjudication the T.A.No.179 of 2020 (old No.O.A.No.742 of 2018) filed by the petitioner under section 19 of the Recovery of Debts and Bankruptcy Act 1993 before the Debt Recovery Tribunal II, Kolkata for recovery of the debt amount was dismissed by DRT II, Kolkata on merits after contest on 17.06.2022 holding that respondent has not committed any default. The subject matter i.e., the debt involved in this petition and T.A.No.179 of 2020 are one and same. The petitioner has preferred an appeal before the DRAT-Kolkata against the order passed in T.A.No.179 of 2020, the appeal is still pending. On the respondent side after referring the subsequent event of dismissal of T.A.No.179 of 2020, produced the copy of order and argued that since the competent court/Tribunal has already held that the respondent has not committed any default, accepting the said finding this petition is liable to be dismissed. In contra, on the petitioner side argued that the order passed in T.A.No.179 of 2020 is not reached finality, appeal is still pending hence, the principle of *'resjudicata'* does not applicable and this Adjudicating Authority has to decide this petition independently. In this regard, the petitioner side relies upon the following citations:

i. *Satyanarayan Prosad Gooptu -versus- Diana Engineering Company (55 CWN 509) @ paragraph 10*
ii. *Zodiac Investment Limited -versus – Durga Investment & Trading Co. & Anr. (92 CWN 1080) @ paragraph 16*
iii. *U. Nilan -versus- Kannayyan (Dead) through Lrs. {(1999) 8 SCC 511} @ paragraph 28,31,37*

iv. *State of Andhra Pradesh and Others -versus- B. Ranga Reddy (Deed) by Legal Representatives and Others {(2020) 15 SCC 681} @ paragraph 33,38,39*

v. *K. Muthuswami Gounder -versus- N. Palaniappa Gounder {(1998) 7 SCC 327} @ paragraph 12*

vi. *Sheodan Singh -versus- Daryap Kunwar (Smt) {AIR (1966) 15 SC 1332 } @ paragraph 14*

14. There is no pale of controversy, that once appeal is preferred and pending against the order of trial court the matter is under sub judice, and proceeding not attained finality, in consequence the principle of *resjudicata* does not apply.

After hearing both sides the following point is framed for determination:

1. Whether the proceeding of this petition is barred in view of the order passed by DRT-II, Kolkata in T.A.No.179 of 2020 dated 17.06.2022 and liable to be rejected?

Points No. 1:

15. The petitioner filed this petition alleging that the respondent has committed default on 30.09.2016 in payment of debt amount of Rs.144,70,88,690/- and prayed for initiation of CIRP against the respondent. On the respondent side admitted that there is a debt but denies that the respondent had committed any default. In fact, to admit the petition the petitioner has to prove that the respondent has committed default. The default is defined in section 3(12) of IBC 2016 as follows:

> *"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;*

16. The mere existence of debt is not enough, to attract default, the situation would have raised only when the person/debtor failed to pay whole or part of debt when the debt become due and payable and the person/debtor failed to pay the amount.

17. In this case, it is averred that the respondent availed credit facilities from the State Bank of Travancore (now the State Bank of India) on 17.03.2012 to the tune of Rs.99,00,00,000/-. The credit facility was renewed on 08.04.2013. The corporate debtor enjoyed the facility under the consortium arrangement since 30.09.2013. When the business of respondent was dull, at the request of respondent the petitioner and other consortium lenders entered into Master Restructuring Agreement dated 28.09.2013. In pursuance of MRA the respondent executed common term loan agreement dated 30.09.2013 and other agreements. In pursuance of consortium meetings, the lender/petitioner restructured the credit facilities in favour of the respondent and an amount of Rs.89,00,000/- was sanctioned on 14.02.2014. The petitioner sanctioned the credit limit to the respondent at Rs.36,74,00,000/- on 23.012.2015. The petitioner and members of consortium not disbursed the amount as agreed under the Master Restructuring Agreement. The petitioner mentioned in the petition the date of default is on 31.03.2013 but this default is waived by the petitioner and other consortium members as per the CDR scheme. The CDR scheme is accepted by the petitioner and consortium members, the same was not recalled but without any sufficient reason the petitioner and consortium members failed to disburse the amounts to the respondent in violation of RBI circular dated 26.02.2014. The petitioner without honouring its commitment under CDR scheme and Master Restructuring Agreement

filed this petition alleging that the respondent committed default in second time on 30.09.2016.

18. On the respondent side submitted that the petitioner violated the contractual obligations of the Master Restructuring Agreement and not adhered to the CDR scheme in violation of RBI Guideline Circular dated 26.02.2014. When the petitioner did not honour its commitment as stated above, cannot expect or ask the respondent to perform reciprocal promise as envisaged under section 54 of Indian Contract 1872. From the above narration it is made clear that no liability arises to the respondent to pay the debt amount, when the liability to pay the debt does not arise, there is no default. If there is no default, petition under section 7 IBC, 2016 has to fail.

19. The petitioner even after filing of this petition for initiation of Corporate Insolvency Resolution process against the respondent, simultaneously proceeded with T.A.No.179 of 2020 before DRT II-Kolkata, for recovery of the said debt amount. Of course, pending of petition before DRT is no bar to proceed with petition under section 7 of IBC 2016. The facts alleged in this petition is almost similar to the averments made in petition T.A.No.179 of 2020. The DRT is the competent civil forum established for adjudication and recovery of debts due to banks and financial institutions. The petitioner and respondent are parties in T.A.No.179 of 2020. The order passed in T.A.No.179 of 2020 is now under appeal before the DRAT and not reached finality hence, the principal of *resjudicata* does not apply. However, the order passed in T.A.No.179 of 2020 is valid and existing order in force, hence we cannot simply ignore the said order and proceed with this petition. If this Adjudicating Authority proceed with this petition, there is a possibility of passing of inconsistent order on the same set of facts. This leads to chaos and confusion, this is against the judicial discipline. At this

juncture, we feel that the principle and analogy laid down in section 10 of Code of Civil Procedure 1908 is applicable. Section 10 of Code of Civil Procedure 1908 speaks about the stay of subsequently filed suit, where issue in previously instituted suit is substantially same of the subsequently filed suit. The appeal pending before the DRAT is in continuation of the previously filed Application T.A.No.179 of 2020. The subsequently filed petition shall stand stayed. T.A.No.179 of 2020 is earlier application filed prior to filing of this petition. T.A.No.179 of 2020 was dismissed on 17.06.2020. The appeal is now pending before DRAT-Kolkata. The point for consideration involves in this petition and appeal pending , before DRAT is directly and substantially same. In the circumstances, till the finality of the order passed in T.A.No.179 of 2020 reached, it is not prudent to proceed with this petition. When the suit is decreed, the causes of action on which the suit is instituted will vanish, the party to the suit cannot fall back upon the original cause of action and institute a fresh civil proceeding. Here, also the application filed before the DRT-Kolkata culminated into decree, now the petitioner cannot fall back upon the original cause of action, which was vanished and culminated into decree. In respect of petition under section 7 of IBC, 2016 the Apex court held in *Vidarbha Industries Power Limited vs Axis Bank Limited* in para 79 as follows:

> *The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid.*

20. In view of *supra* citation this Adjudicating Authority is inclined to invoke discretion, and in consequence this petition is liable to be rejected, with granting liberty. Thus, the point is answered.

21. The petitioner side further argued that the scope of Section 7 of IBC, 2016 is limited. There the plea of non-disbursement of further loan amount, would not be a defense. In this regard, it relies upon certain citations, but in view of answer arrived to the *supra* point that this petition cannot be proceeded with in view of order passed in T.A.No.179 of 2020, the said arguments and citation submitted in this regard are not discussed.

22. In the result, the petition is **Rejected** and liberty is granted to the petitioner to apply afresh for initiation of CIRP, after the order passed in T.A.No.179 of 2020 reached finality and if cause of action subsist. No cost.

23. 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 step.

24. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

25. File be consigned to the record.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD Date: 2023.03.21 14:32:00 +05'30'

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ Date: 2023.03.21 15:46:02 +05'30'

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj
Member (Judicial)

Signed on this, 21st day of March, 2023

Ravijeet _P.s_