

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-208(PB)/2019

IN THE MATTER OF:

Oriental Bank of CommerceFinancial Creditor/Petitioner
v.

AVJ Infrastructure Private Limited
.....Corporate Debtor/Respondent

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

JUDGMENT DELIVERED ON 30.09.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

DR. DEEPTI MUKESH
HON'BLE MEMBER (J)

PRESENT:

For the Petitioner: Mr. S.K. Sharma, Mr. Kailash Sharma &
Mr. Sabhay Chaudhary, Advocates
For the Respondent: Ms. Nidhi Saini, Ms. Usha Singh, Mr.
Arnyak Saha, Mr. Sharukh Inam and Ms.
Chandini Sadana, Advocates

M.M.KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditor'-Oriental Bank of Commerce has filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of AVJ Infrastructure Private Limited.

2. The Corporate Debtor-AVJ Infrastructure Private Limited is a company registered under the provisions of the Companies Act,

1956 and was incorporated on 21.07.2008. The identification number of the Corporate Debtor is U45400DL2008PTC181118 and its registered office is situated at 897, Main Bawana Road, Pooth Khurd, Delhi-110039.

3. The Financial Creditor has proposed the name of Resolution Professional, Mr. Brijender Singh Deswal, with the address C-122, New Rajendra Nagar, New Delhi-110060 and email id – brijender@deswal.com. His registration number is IBBI/IPA-003/IP-N00002/2016-17/10021. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

4. It is the pleaded case of the petitioner that in the month of December, 2013 the Corporate Debtor had approached and requested the petitioner for grant of Term Loan facility aggregating to Rs. 10.00 Crores for participating in the auction for minor Mineral Blocks/Units in the different districts of Haryana. It acceded their request and sanctioned Term Loan of Rs. 10.00 crores vide sanction letter dated 17.12.2013. The said loan was to be repaid in 66 equal monthly instalments of Rs. 15.15 lac commencing from June, 2015.



The amount claimed to be in default and the details of default have been given in sub para 2 of Part-IV and the same reads as under:

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH DEFAULT OCCURED	Amount claimed Rs. 10,39,54,063/- (Rupees Ten Crore Thirty Nine Lac Fifty Four Thousand and Sixty Three only) as on 30.11.2016 <table border="1" data-bbox="614 667 1369 1086"> <thead> <tr> <th>MONTH</th><th>AMOUNT</th><th>TOTAL AMOUNT</th></tr> </thead> <tbody> <tr> <td>30.11.2016</td><td>15,15,000.00</td><td>15,15,000.00</td></tr> <tr> <td>31.12.2016</td><td>5,46,583.00</td><td>20,61,583.00</td></tr> <tr> <td>29.01.2017</td><td>15,13,173.00</td><td>35,74,756.00</td></tr> </tbody> </table> The default had occurred on 30.11.2016, 31.12.2016 & 29.01.2017	MONTH	AMOUNT	TOTAL AMOUNT	30.11.2016	15,15,000.00	15,15,000.00	31.12.2016	5,46,583.00	20,61,583.00	29.01.2017	15,13,173.00	35,74,756.00
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29.01.2017	15,13,173.00	35,74,756.00												

5. The Respondent executed several documents for availing the aforesaid financial assistance from the Petitioner. True Copies of each one of those namely, Doc-5 Agreement of Term Loan dated 17.12.2013 and Doc-38 Common Agreement dated 17.12.2013 have been placed on record (Annexure-I/G & I/4).

6. The details of the security held by, or created for the benefit of 'financial creditor'-Oriental Bank of Commerce along with the certificate of registration of charge issued by the Registrar of

Companies have been placed on record which fulfils the requirements of Section 78 of Companies Act, 2013.

7. It is also submitted by the Petitioner-Financial creditor that the account of the Corporate Debtor was classified as NPA on 29.01.2017. In view of the repeated defaults on the part of the Corporate Debtor to comply with the schedule of repayment of the principal and interest dues, the Financial Creditor issued a notice dated 15.03.2017 (Annexure-I/F) under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Corporate Debtor and its Directors. The Corporate Debtor replied the said notice vide letter dated 25.05.2017, which was duly replied by the petitioner vide letter dated 03.06.2017.

8. A certificate under Section 2A of the Bankers Book Evidence Act has been filed by the Financial Creditor along with print out of account statement which relate to the aforesaid account of the Corporate Debtor in which financial debt was transferred by the Financial Creditor. The said certificate along with the affidavit filed by the officer further disclosed sufficient compliance with the provisions of Section 2A of the Bankers' Book Evidence Act. It is deposed by the officer that the statement of accounts filed by the



financial creditor are true and correct copies of the bank records maintained by the Financial Creditor in its computer.

9. It has also placed on record balance and security confirmation letter dated 21.03.2018 (Annexure-I/L) duly signed by the respondent in acknowledgment of the debt.

10. The precise case of the Petitioner is that the total amount in default due to the Petitioner by the Respondent-Corporate Debtor as on 30.11.2016 is Rs. 10,39,54,063/-.

11. After service of notice when the matter came up for consideration on 12.03.2019 learned counsel for the respondent sought time to file reply. We granted ten days' time for filing reply and the matter was to be heard on 08.04.2019. However, on 08.04.2019 again time was sought and we had saddled the respondent with cost of Rs. 10000/- on account of non-filing of reply and further granted ten days' time for the said purpose and ordered listing of the matter for arguments on 29.04.2019. On 29.04.2019 the position remained the same and a further request for filing reply was made on the excuse that the talks for settlement are in progress, we had again granted a week time to the respondent for filing reply subject to payment of Rs. 25,000/- as cost. In the said order we had further made it clear that if the reply was not filed then the matter



would be heard on merit irrespective of anything else and ordered listing of the matter for arguments on 13.05.2019.

12. Thereafter on 13.05.2019 neither the cost was paid nor any reply was filed by the Corporate Debtor inspite of direction issued by us on various occasions. Accordingly, we closed the right of the Corporate Debtor for filing reply and ordered listing of the matter for arguments on 28.05.2019. On 28.05.2019 no one had appeared in support of the petition. Accordingly, we deferred the order to 03.06.2019. Thereafter on 03.06.2019 Learned counsel for the respondent appeared and stated that an OTS proposal was already sent by the Corporate Debtor and part payment was made. The said submission of the learned counsel for the Corporate Debtor was not controverted by the learned counsel for the petitioner, and, on joint request, we posted the matter for hearing on 11.07.2019. On 11.07.2019 after receiving instructions learned counsel for the petitioner stated that no amount was deposited by the Corporate Debtor in its account. Accordingly, we ordered listing of the matter for arguments on 15.07.2019, and thereafter the matter was listed for hearings on 15.07.2017, 29.07.2019 & 19.09.2019. Eventually, we heard the arguments today.



13. According to the learned counsel there is no resistance nor the claim of the Financial Creditor in respect of 'unpaid debt' has been controverted. It must therefore be considered to have been admitted.

14. Learned counsel for the petitioner has argued that all requirements of Section 7 for the initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the petition as prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 (2) of IBC is complete in all respects. He has further submitted that the details of default along with the dates have been stated in part IV and the additional documents have been submitted subsequently along with all the minute details. There is overwhelming evidence available to prove default and name of the resolution professional has been specified who does not suffer from any disqualification.

15. Under sub-section 5(a) of section 7 of the code, the application filed by the petitioner financial creditor has to be admitted on satisfaction that:

- (i) Default has occurred;
- (ii) Application is complete, and



(iii) No disciplinary proceeding against the proposed IRP is pending.

In view of the above no doubt is left that there was an advancement of loan and default on part of the respondent-corporate debtor is established. Even Otherwise there is overwhelming documentary evidence on record which support those findings.

16. We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in the case of ECL Finance Limited vs. Digamber Buildcon Pvt Ltd (IB-1039(PB)/2018).

17. After a conjoint reading of the aforesaid provision along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, as already recorded that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.

18. As a sequel to the above discussion, this petition is admitted and Mr. Brijender Singh Deswal is appointed as the Interim Resolution Professional.



19. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately (3 days) make public announcement with regard to admission of this application under Section 7 of the Code. The public announcement is required to be made in all territories/areas where the business have been transacted by the Corporate Debtor so that all stakeholders may have noticed of the fact that Corporate Insolvency Resolution Process has been triggered in respect of the Corporate Debtor.

21. Before parting we wish to observe about the delaying tactics adopted by the Corporate Debtor-Respondent. In that regard it would be appropriate to refer to the orders granting time to the



Corporate Debtor-Respondent for filing reply as well as the orders whereby the counsel appeared on its behalf had mislead this Tribunal by representing that OTS proposal is in queue and a handsome amount of Rs. 4 crores have been deposited by the Corporate Debtor. The aforesaid position would become evident from a series of orders dated 12.03.2019, 08.04.2019, 29.04.2019, 13.05.2019, 03.06.2019 & 11.07.2019 which are set out below:-

"Order dated 12.03.2019

A copy of the paper book shall be handed over to the counsel for the respondent during the course of the day.

Reply be filed within ten days with a copy in advance to the counsel opposite.

Rejoinder, if any, be filed within five days thereafter with a copy in advance to the counsel opposite.

List for arguments on 08.04.2019.

Order dated 08.04.2019

Despite the time of ten days' granted to file reply on 12.03.2019, reply has not been filed. Learned counsel for the respondent made further request to file reply within a week. We accept the request. Reply be filed within ten days with a copy in advance to the counsel for the petitioner. However, the same shall be subject to payment of Rs. 10,000/- as cost payable to the petitioner.



Rejoinder, if any be filed within five days with a copy in advance to the counsel for the respondent.

List for arguments on 29.04.2019.

Order dated 29.04.2019

On 08.04.2019, second time the period of ten days was granted after permitting ten days earlier on 12.03.2019 and a cost of Rs. 10,000 was imposed but the reply has not been filed. The excuse put forward is that the talks for settlement are in progress which have been denied by the counsel for the petitioner. In any case pendency of talks for settlement is no ground for non-filing of reply in these proceedings which have Timeline in the Statute. A further request for filing reply has been made.

Let the reply be now filed within a week with a copy in advance to the counsel for the petitioner subject to payment of Rs. 25,000/- as cost. If the cost is not paid and or the reply is not filed then the matter shall be heard on merit irrespective of anything else.

Rejoinder, if, any, be filed within five days with a copy in advance to the counsel for the respondent.

List for arguments on 13.05.2019.

Order dated 13.05.2019

Ld. Counsel for the petitioner states that the corporate debtor was directed vide order dated 08.04.2019 and 29.04.2019 to file reply subject to the cost. Till date both the orders have not been

complied with thereby neither reply has been filed nor cost has been paid. Today none appeared for the respondent. In view of the same, right to file reply is closed.

List for arguments on 28.05.2019.

Order dated 03.06.2019

Ld. Counsel for the respondent states that an OTS proposal is already sent by the corporate debtor and part payment is made. Ld. Counsel for the applicant confirmed that the OTS proposal is pending consideration before higher authorities. On the joint request made by the counsels for the parties hearing is deferred to 11.07.2019.

Order dated 11.07.2019

Earlier in the day the Ld. Counsel for the respondent made a statement that more than four crores have been deposited by the corporate debtor in the account of the petitioner bank. On receiving instructions Ld. Counsel for the petitioner-financial creditor states that as far as the present petition is concerned no amount has been deposited in the account under consideration.

List for arguments on 15.07.2019.”

The aforesaid details concerning the conduct of the Corporate Debtor-Respondent would reveal that a designed effort has been made to impede the insolvency proceedings by seeking time over and over again for filing reply and subsequently had mislead this Tribunal by representing that OTS proposal is in queue and a



handsome amount of Rs. 4 crores have been deposited by the Corporate Debtor. The leniency shown by the Bench has been misused. It was therefore, in these circumstances when cost of Rs.10000/- & Rs. 25000/- was imposed for filing reply and no reply having been filed there was no option except to proceed with hearing of the case. We are constrained to observe that in some of the cases the Corporate Debtor-Respondent has deliberately delayed the proceedings so as to avoid the initiation of Corporate Insolvency Resolution Process. This case thus is a classic example of contumacious conduct. We say no more on this issue.

22. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.



23. Before parting we must notice the complaint made against Financial Creditor in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditor as it is only fair to do so.

24. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(DR. DEEPTI MUKESH)
MEMBER (J)

30.09.2019
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