

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-VI**

CP (IB) No.354/2022

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

In the matter of:

Capri Global Capital Limited

[CIN: L65921MH1994PLC173469]

.....Financial Creditor/Applicant

Versus

Silver Jubilee Motors Limited

[CIN: U50110PN1935PLC002423]

.....Corporate Debtor/Respondent

Pronounced : 12.01.2024

Coram:

SANJIV DUTT

Hon'ble Member (Technical)

K. R. SAJI KUMAR

Hon'ble Member (Judicial)

Appearances: Hybrid

For the Applicant(s)

: Advocate Pranav Khatkul

For the Respondent(s)

: Advocate Rohan Agrawal

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

BACKGROUND:

1. This Application bearing C.P.(IB) No.354/2022 was filed by Capri Global Private Limited (hereinafter referred to as “the Financial Creditor”) on 26.11.2021 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Silver Jubilee Motors Limited (hereinafter referred to as “Corporate Debtor”).

2. AVERMENTS OF THE FINANCIAL CREDITOR:-

2.1 The Financial Creditor and the Corporate Debtor entered into a Facility Agreement dated 31.08.2015 for extending financial assistance of Rs.3,50,00,000/- to the Corporate Debtor. The said amount was disbursed through the bank account of the Corporate Debtor during the period from 31.08.2015 to 28.10.2015.

2.2 Subsequently, on 31.08.2016, another loan agreement was executed between the Financial Creditor and the Corporate Debtor sanctioning term loan of Rs.82,25,000/- to the Corporate Debtor against property by deposit of title deeds. The sanctioned loan amount was disbursed through the bank account of the Corporate Debtor on 06.09.2016.

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- 2.3 However, the Corporate Debtor defaulted in repayment of the debt owed to the Financial Creditor and, accordingly, the account of the Corporate Debtor was declared as Non-Performing Asset (NPA) on 05.12.2020.
- 2.4 On 24.05.2021, the Financial Creditor issued Demand Notice to the Corporate Debtor and Co-Borrowers under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. In terms of the Demand Notice, the Corporate Debtor was required to pay Rs.3,33,86,733/- within a period of 60 days from the date of receipt of the notice. The Demand Notice was delivered to the Corporate Debtor on 01.06.2021. Thus, the Corporate Debtor was required to make payment of the debt due latest by 31.07.2021. Since the Corporate Debtor failed to make payment of the said amount of financial debt within time, the Financial Creditor has taken 01.08.2021 as the date of default in Part-IV of the Application.
- 2.5 It is submitted that though classification of account as NPA is done in accordance with the relevant RBI guidelines, such classification is irrelevant for the purpose of initiation of CIRP under the Code. Reliance is placed on the judgment of Hon'ble NCLAT in the matter of **Abhay Narendra Lodha v. Bank of Baroda** [Company Appeal (AT)(Ins) No.997 of 2022] wherein it has been held that there is no such provision in the Code that the occurrence of default can be taken into account from the date of NPA. The word "default" is defined under Section 3(12) of the Code to mean "*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.” The Hon’ble Supreme Court in various judgments has categorically held that the trigger for initiation of CIRP by a Financial Creditor is the date of “default” on the part of the Corporate Debtor i.e. the actual non-payment of debt repayable by the Corporate Debtor when a debt has become due and payable and not the date of NPA. It is thus submitted that by issuing the Demand Notice dated 24.05.2021, the Financial Creditor had recalled the entire loan payable by the Corporate Debtor and hence 01.08.2021 has been considered as the date of default in the present case.

- 2.6 It is not mandatory for the Financial Creditor to file an application under Section 7 of the Code on the event of the first default. There is no bar under Section 7 of the Code which prevents the Financial Creditor from filing an application after the subsequent default occurs. Reliance is placed on the judgment of Hon’ble NCLAT in the case of ***Koncentric Investments Ltd. v. Standard Chartered Bank, London*** [Company Appeal (AT) (Insolvency) No. 911 of 2021]. It has been held by the Hon’ble NCLAT that there is no indication under Section 7 of the Code that unless an Application is filed on first default committed, no application can be filed when subsequent defaults are committed. Financial Creditor may await and give more time to Corporate Debtor to find out as to whether actually the Corporate Debtor has become insolvent and unable to repay the debt. In view of this, the Financial Creditor submits that it did not lose its right to file the present Petition under Section 7 of the Code, if it did not file the Petition after the occurrence of the first default.

2.7 The Financial Creditor further submits that even if the date of classification of the account as NPA comes under the ambit of the bar imposed under provisions of Section 10A of the Code, the subsequent default by the Corporate Debtor in terms of the Demand Notice dated 24.05.2021 is not within the period of suspension as imposed under Section 10A of the Code. In this regard, the Financial Creditor relies on the judgment of the Hon'ble NCLAT in the case of ***Shapoorji Pallonji and Company Pvt. Ltd. v. Black Canyon SEZ Pvt. Ltd.*** [Company Appeal (AT) (Insolvency) No.1157/2022] wherein it was held that for any default which is committed prior to or subsequent to the prohibited period, an application under Section 7, 9 or 10 of the Code can be filed. Thus, it is submitted that the present Application falls out of the ambit of the bar imposed under the provisions of Section 10A of the Code and hence the same may be admitted and CIRP may be initiated in respect of the Corporate Debtor.

3. **CONTENTIONS OF CORPORATE DEBTOR:**

The Corporate Debtor has filed its Affidavit-in-Reply on 01.05.2023 wherein it has raised number of objections as to the maintainability as well as merits of the Application on the following grounds:-

3.1 The Financial Creditor has approached the Adjudicating Authority with unclean hands. It has suppressed vital information and not disclosed the true and correct facts in the present Application. It has cleverly manipulated facts to bring the Application to escape the bar imposed under the provisions of Section 10A of the Code.

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- 3.2 The Financial Creditor has incorrectly claimed that the alleged date of default is 01.08.2021. The Financial Creditor issued a Demand Notice dated 01.06.2021 to the Corporate Debtor under the provisions of Section 13(2) of the SARFAESI Act, 2002. The Financial Creditor has called upon the Corporate Debtor to make payment of the entire outstanding amount within a period of 60 days from the date of notice i.e. on or before 31.07.2021 and has accordingly devised the incorrect date of default as 01.08.2021 which is not in accordance with law. The Financial Creditor being cognizant of the fact that the present Application is barred by the provisions of Section 10A of the Code has deliberately devised the date of default to be 01.08.2021.
- 3.3 In the Demand Notice dated 01.06.2021, the Financial Creditor has categorically stated that the account of the Corporate Debtor was classified as NPA on 05.12.2020 in accordance with the directives and guidelines issued by the RBI. Hence, the date of default could only be 90 days prior to the date of declaration of account of the Corporate Debtor as NPA which will fall within the 10A period and, therefore, the present petition is clearly barred under the law. Being barred under Section 10A of the Code, the petition is not maintainable and deserves to be dismissed at the threshold.
- 3.4 The Corporate Debtor relies on the judgment of Hon'ble Supreme Court in ***Laxmi Pat Surana v. Union Bank of India & Anr. (2021) 8 SCC 481*** wherein it has been held that ordinarily, the date of NPA can be reckoned as the date of default to enable a Financial Creditor to file Application under Section 7 of the Code.

3.5 The Corporate Debtor has referred to the judgment of Hon'ble NCLAT dated 19.01.2020 in **Ramesh Kymal v. M/s. Siemens Gamesa Renewable Power Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 701/2020]** wherein it has been held that no Application shall ever be filed for a default arising after 25.03.2020. The Hon'ble Supreme Court has upheld the law laid down in the aforesaid Appeal in (2021) 3 SCC 224 and has held as under:-

“17. The financial distress caused by the outbreak of Covid-19 provides the backdrop to the insertion of Section 10A.....

27. ... The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament adopt 25th March, 2020 as the cut-off date. The proviso to Section 10A stipulates that “no application shall ever be filed” for the initiation of the CIRP “for the said default occurring during the said period”. The expression “shall ever be filed” is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25.03.2020 for a period of six months, extendable up to one year as notified.”

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- 3.6 According to the Corporate Debtor, the present Application has been filed with fraudulent and malicious intent seeking initiation of CIRP for which the Applicant is to be penalised under the provisions of Section 65 of the Code.
- 3.7 In its written submissions furnished on 30.09.2023, the Corporate Debtor has reiterated that the Application is *ex facie* barred by the provisions of Section 10A of the Code. It is submitted that the effect of section 10A of the IBC is that no application can ever be filed under section 7, 9 and 10 of the Code in respect of any default alleged to have taken place between 25.03.2020 and 24.03.2021.

ANALYSIS AND FINDINGS:

4. Upon hearing the Counsel for both parties and having carefully gone through the materials available on record, our findings in the matter are as under:-

4.1 There are mainly two issues which arise for determination in the matter:-

- (i) whether the present Application filed by the Financial Creditor is hit by the provisions of Section 10A of the Code and is accordingly not maintainable and
- (ii) whether the Financial Creditor can bring an action under Section 7 of the Code against the Corporate Debtor on the basis of a default occurring subsequent to the prohibited period under Section 10A, even though the loan account of the Corporate Debtor was declared as NPA during the said prohibited period.

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- 4.2 The first issue owes its genesis to the notice under Section 13(2) of the SARFAESI Act, 2002 dated 24.05.2021 addressed by the Financial Creditor to the Corporate Debtor *vide* which it was, *inter alia*, stated that the Loan Account of the Corporate Debtor had been classified as NPA on 05.12.2020 in accordance with the directives and guidelines issued by the RBI. The Corporate Debtor has vehemently argued that the Financial Creditor having declared the account of the Corporate Debtor as NPA on 05.12.2020, the default in question falls within the period of suspension of CIRP under Section 10A of the Code and, hence, the present Application is barred under the law and is not maintainable. On the other hand, the Financial Creditor, relying on the jurisprudence as evolved, has submitted that classification of a loan account as NPA is irrelevant for the purpose of initiation of CIRP under the Code and that an Application under Section 7 can be filed on subsequent default occurring after the prohibited period under Section 10A.
- 4.3 It is seen that Section 10A of the Code imposes a bar against filing of Applications under Sections 7, 9 or 10 for initiation of CIRP in relation to defaults committed between 25.03.2020 and 24.03.2021. The date of 25.03.2020 coincides with the date on which the National Lockdown was declared due to the onset of the COVID-19 Pandemic which caused widespread distress and had serious repercussions on the financial health of the corporate enterprises. The proviso to Section 10A stipulates that no Application shall ever be filed for initiation of CIRP of a corporate debtor for the said default occurring during the said period. Explanation to Section 10A, however, clarifies that the provisions

of this Section shall not apply to any default committed under Sections 7, 9 and 10 before 25.03.2020. Similarly, the said Explanation has been interpreted to hold that the embargo of Section 10A shall not apply to any default committed under Sections 7, 9 and 10 after 24.03.2021. In the instant case, it is noticed that the default in respect of payment of entire outstanding amount of debt occurred not on 05.12.2020 but on 01.08.2021.

- 4.4 Now, let us consider the amount under default when the Loan Account of the Corporate Debtor was declared as NPA on 05.12.2020. The matter was listed on 09.01.2024 and clarification was sought from the Financial Creditor as to the two loans advanced by the Financial Creditor to the Corporate Debtor. It was clarified by the Financial Creditor that the initial date of default of certain EMIs was 31.08.2020 and that the amounts under default by the Corporate Debtor in the aforesaid two loan accounts as on 31.08.2020 were as under:-

Sr. No.	Loan Account No.	Default Amount (Rs.)
1.	Ending with 3052	27,21,153/-
2.	Ending with 4465	5,21,514/-
	Total	32,42,667/-

Thus, it is observed that the total amount of financial debt in default as on 31.08.2020 was only Rs.32,42,667/- for which no Application under Section 7 of the Code could have been filed by the Financial Creditor since the minimum threshold for making such Application was raised to one crore rupees *vide* Notification

bearing S.O. 1205(E) dated 24.03.2020. In view of this, the Financial Creditor cannot be faulted for not having preferred an Application under Section 7 of the Code by reckoning the date of default as the date of NPA being 05.12.2020 or an earlier date, i.e., a date 90 days prior thereto or even 31.08.2020. Nor can it be said that the Financial Creditor has deliberately or maliciously devised a different date of default so as to escape the rigour of Section 10A of the Code. In view of above discussion, we find that the Corporate Debtor's plea that the present Application is hit by the provisions of Section 10A is devoid of merit and **issue No.(i)** is decided accordingly and the instant Application is found to be maintainable in law.

4.5 We now propose to deal with **issue No.(ii)**. At the outset, it is pertinent to mention that Section 7 of the Code consciously uses the expression "default" and not the date of notifying the loan account of the corporate person/ debtor as NPA. The expression "default" has been defined in Section 3(12) to mean 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. Thus, a financial creditor has the option to file an Application under Section 7 of the Code under any of the following circumstances:-

- a. Non-payment of instalment/ EMIs/ periodic payments of debt; or
- b. Non-payment of any part of debt; or
- c. Non-payment of the whole amount of debt.

The date of default will be one when such installment/ part of debt/ whole debt becomes due and payable but is not paid by the corporate debtor. The prerogative of initiating action under Section 7 of the Code for default in any of the above events or circumstances lies with the financial creditor and the corporate debtor cannot dictate a certain date of default on its own terms. Of course, an informed choice will be made by the financial creditor depending upon fulfilment of the pre-requisites of an Application under Section 7 read with Section 4 of the Code.

- 4.6 In this background, we find merit in the plea taken up on behalf of the Financial Creditor that it is neither mandatory nor necessary that the Financial Creditor should rush to the Tribunal immediately on initial default. There is no bar under Section 7 of the Code which prevents the Financial Creditor from approaching the Adjudicating Authority after the occurrence of subsequent default. In the instant case, it is noticed that the Corporate Debtor had defaulted in payment of a few EMIs amounting to Rs.32,42,667/- when its loan accounts were declared as NPA on 05.12.2020. However, subsequently, the Financial Creditor issued notice under Section 13(2) of the SARFAESI Act to the Corporate Debtor on 24.05.2021 calling upon the latter to pay in full the entire outstanding amount of Rs.3,33,86,733/- with accrued interest within sixty days from the date of receipt of the notice. In these circumstances, it cannot be said that having chosen not to initiate CIRP at the time when some EMIs fell due in September, 2020 i.e. during CIRP prohibition period, the Financial Creditor had lost the right to file Application under Section 7 of the Code when default of the whole amount of debt became due on 31.07.2021

i.e. after CIRP prohibition period ended. There is nothing in Section 7 of the Code to indicate that unless an application is filed on the first default committed by the corporate debtor, an applicant forfeits its right to initiate CIRP under Section 7 when subsequent default occurs.

- 4.7 Coming to the judicial precedents cited on behalf of the Corporate Debtor, we find that the judgment of the Hon'ble Apex Court in the case of **Laxmi Pat Surana** (*supra*) is not applicable in this matter, as one of the issues in that case was whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as NPA was barred by limitation whereas no such question is involved in the present case. There is nothing in the Code to suggest that the date of declaration of loan account/ debt as NPA is mandatorily required to be treated as the date of default. Similarly, it is found that its reliance on the judgment of Hon'ble Supreme Court in the case of **Ramesh Kymal** (*supra*) does not help to advance the case of the Corporate Debtor. The Hon'ble Apex Court has nowhere laid down that in all cases where initial default occurred and loan account of corporate debtor was declared as NPA during the prohibited period (from 25.03.2020 to 24.03.2021), the embargo contained in Section 10A of the Code must be thrust upon the financial creditor. The Financial Creditor is legally entitled to approach the Adjudicating Authority by way of an Application under Section 7 of the Code in respect of any subsequent default arising after the end of the prohibited period. In view of this position, we find that since the default in question does not pertain to the prohibited period under Section 10A but is subsequent to the end of such prohibited

period on 24.03.2021, the present Application filed by the Financial Creditor for initiating CIRP in respect of the Corporate Debtor is legally maintainable and admissible and thus, the **issue No.(ii)** is decided accordingly.

4.8 Considering the facts and circumstances of the case and the findings reached above, we are satisfied that there exists a “financial debt” as defined under Section 5(8) of the Code exceeding the prescribed monetary threshold of one crore rupees coupled with “default” thereof on part of the Corporate Debtor. The Application has been filed in the prescribed form and is complete in all respects. There is no disciplinary proceeding pending against the proposed Insolvency Resolution Professional. Hence, it is found to be a fit case for directing initiation of CIRP in respect of the Corporate Debtor. This Bench is, therefore, of the considered view that the present Application filed under Section 7 of the Code to initiate the CIRP in respect of the Corporate Debtor deserves to be **admitted**.

4.9 The Applicant has proposed the name of **Mr. Gaurav Srivastava**, a registered insolvency resolution professional having Registration Number IBB/IPA-003/IP-N00285/2020-2021/13253 and email address [srivastava.law@gmail.com] **as Interim Resolution Professional** to carry out the functions as mentioned under the Code and has also given his declaration in Form 2 dated 25.11.2021 stating that no disciplinary proceedings are pending against him.

ORDER

In view of aforesaid findings, this Application bearing **C.P. (IB) No.354/MB/2022** filed under Section 7 of the Code by **Capri Global Capital Limited**, the Financial Creditor for initiating CIRP in respect of **Silver Jubilee Motors Limited**, the Corporate Debtor, is “**Admitted**”.

We further declare moratorium under Section 14 of the Code with consequential directions as mentioned below:-

- I. That this Bench as a result of this prohibits:
 - a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - c) 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 and
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

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- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of CIRP or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 of the Code or passes an order for the liquidation of the Corporate Debtor under Section 33 of the Code, as the case may be.
- IV. That the public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016.
- V. That this Bench appoints **Mr. Gaurav Srivastava**, a registered insolvency resolution professional having Registration Number IBBI/IPA-003/IP-N00285/2020-2021/13253 and email address srivastava.law@gmail.com **as Interim Resolution Professional (IRP)** to carry out the functions as mentioned under the Code. The fee payable to IRP/RP shall be governed by the IBBI Regulations/Circulars/Directions issued in this regard. The IRP/RP shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take all necessary steps as specifically mandated under Sections 15, 17, 18, 20 and 21 of the Code read with extant provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.

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- VI. During the CIRP period, the management of the Corporate Debtor shall vest with the IRP/RP in terms of the provisions of the Code. The Corporate Debtor is directed to provide effective assistance and co-operation to the IRP/RP as and when demanded by them. The officers and Managers of the Corporate Debtor shall provide all documents and records in their possession and furnish any information in their knowledge to the IRP/RP within a period of one week from the date of receipt of this Order and shall not commit any offence punishable under Chapter VII of Part II of the Code. Any violation of the same will attract coercive action under the Code read with Rule 11 of the NCLT Rules, 2016.
- VII. The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost including expenses on issuing public notice and inviting claims. The expenses incurred by IRP out of this fund are subject to approval by the Committee of Creditors (CoC). The amount so deposited shall be interim finance and liable to be paid back to the Financial Creditor/ Applicant on priority upon funds from the CoC becoming available with IRP/RP.
- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.
- IX. The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email and WhatsApp.

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- X. Besides, a copy of this order shall also be forwarded by the Registry of this Tribunal to the IBBI for their record.

Sd/-

Sanjiv Dutt
Member (Technical)
//JNK//

Sd/-

K. R. Saji Kumar
Member (Judicial)