

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP(IB) No. 1180/KB/2020

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:

State Bank of India, a public sector banking and financial services statutory body established under the State bank of India Act 1955, having its Stressed Assets Management Branch at Nagaland House, 8th Floor, 11 and 13, Shakespeare Sarani, Kolkata, West Bengal- 700001.

.....Financial Creditor

-Versus-

Kaushik Global Logistics Limited, a company incorporated under the Companies Act, 1956, being a Company within the meaning of the Companies Act, 2013 and having Corporate Identification No- U63090BR2004PLC099002 and its registered office at Diamond Chambers, 4, Chowringhee Lane Block I & II, 2nd Floor, Kolkata- 700016, in the state of West Bengal

.... Corporate Debtor

Date of Hearing : 25th April, 2022

Date of pronouncing the order: 10th June, 2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Appearances (via video conferencing/ Physical hearing):

For the Financial Creditor: 1. Mr. Reetobroto Kr. Mitra, Advocate
2. Mr. Joydip Mukherjee, Advocate
3. Mr. S Ray, Advocate

- For the Corporate Debtor :
1. Mr. Anuj Singh, Advocate
 2. Mr. Ashok Kumar Singh, Advocate
 3. Mr. Aman Agarwal, Advocate
 4. Ms. Niharika Singh, Advocate

ORDER

Per : Rohit Kapoor, Member (Judicial):

1. This Court convened through hybrid mode.
2. This Company Petition under section 7(1) 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 **State Bank of India** (hereinafter referred to as the Financial Creditor), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Kaushik Global Logistics Limited** (hereinafter referred to as the Corporate Debtor).
3. ***Submissions on behalf of Financial Creditor:***
 - 3.1 The case of the Financial Creditor is that it had granted loan and various credit facilities to the Corporate Debtor on the terms and conditions as contained in the sanction letter/ letter of arrangement and diverse loan agreements executed from time to time and the Corporate Debtor had been enjoying various credit facilities granted by the Financial Creditor since 3rd June, 2006. The Credit facilities were enhanced from time to time and the limits had been last sanctioned on 29th November, 2012 by the applicant at the request of the Corporate Debtor.
 - 3.2 However, the Corporate Debtor failed to repay the principal amount along with interest to the Financial Creditor. In the said circumstances, the applicant withdrew the credit facilities granted to the Corporate Debtor. Finally, a demand notice dated 7th November, 2013 was issued to the Corporate Debtor demanding the default amount along with interest as the account was classified as Non-Performing Asset (NPA) on 30th June, 2013.
 - 3.3 Subsequently, the Applicant proceeded with due course of law under the Recovery of Debts and Bankruptcy Act,1993, and preferred an Original Application being O.A. No.204 of 2014 before the Hon'ble Debts Recovery

Tribunal II, Kolkata. The said application was disposed off on 2nd May 2017 on submission and the proposal of One Time Settlement by the Corporate Debtor before the Hon'ble Tribunal dated 22nd August, 2016 for settling all the accounts on the payment of Rs.66,86,60,040.03 Crores along with interest @ 15% per annum from 1st February, 2014 within the stipulated time period of three years from the passing of the said order.

3.4 However, till date the Corporate Debtor has failed to honor the solemn order passed by the Hon'ble Debts Recovery Tribunal III, Kolkata and as such the One Term Settlement (OTS) has no more value in terms as the stipulated time period as framed by the Hon'ble Debts Recovery Tribunal III, Kolkata.

3.5 The principal amount due is of Rs. 56,17,56,449.28 as on 30.10.2020. The total amount outstanding including the interest is Rs. 1,74,90,29,794/- as on 30.09.2020. The date of NPA is 30.06.2013.

4. Documents in support of the application are as follows:

4.1 The computation of the amount has been annexed to the application as Exhibit: "D".

4.2 The Memorandum of Deposit of Title Deeds and Memorandum related to Deposit of Title Deeds for creation of charge for Term Loan/Overall Limit is annexed to the application as Exhibit: "E".

4.3 The Sanction Letter for Commercial Advances sanction of credit facilities dated 3rd June, 2006 issued by the Financial Creditor in favour. of the Corporate Debtor is annexed to the application as Exhibit " H".

4.4 The Deed of Guarantee for Overall Limit dated 8th June. 2006 (Form C-4) executed by Mritunjay Singh in favour of State Bank of India is annexed hereto and marked as Exhibit : "I ".'

4.5 The Agreement of loan for overall limit (Form C-1) dated 22nd June 2006 executed by the Corporate Debtor in favour of the Financial Creditor is annexed to the application as Exhibit " J".

4.6 Copy of Agreement to Mortgage executed in the year 2006 between Kaushik Logistics Pvt. Ltd. and State Bank of India as the is annexed hereto and marked as Exhibit " K ".

- 4.7 Copy of Agreement of Hypothecation of Goods and Assets (Form C-2) dated 22nd June, 2006 executed by Kaushik Logistics Pvt. Ltd. in favour of State Bank of India is annexed hereto and marked as Exhibit: "L".
- 4.8 Copy of the Agreement of Pledge of Goods and Assets dated 22nd June, 2006 executed by Kaushik Logistics Pvt. Ltd. in favour of State Bank of India. is annexed hereto and marked as Exhibit : "M".
- 4.9 Copy of Deed of Guarantee for Overall Limit dated 22nd June, (Form C-4) executed by Ajnee Distributors. Pvt. Ltd. in favour of the Financial Creditor is Creditor is annexed to the application as Exhibit: "N".
- 4.10 Copy of Deed of Guarantee for Overall Limit dated 22nd June, 2006 (Form C-4) executed by Yathansh Commercial Ltd. in favour of State Bank of India is annexed hereto and marked as Exhibit : "O".
- 4.11 Copy of Deed of Guarantee for Overall Limit dated 22nd June, 2006 (Form C-4) executed by Sanjay Singh, Dhananjay Singh, Shivrati Singh, Birendra Kumar Singh and Ashok Kumar Singh in favour of State Bank of India is annexed hereto and marked as Exhibit : "P".
- 4.12 Copy of Deed of Guarantee For Overall Limit executed in the year 2006 (Form C-4) executed by Birendra Kumar Singh and Mrituniay Singh in favour of State Bank of India is annexed hereto and marked as Exhibit : "Q".
- 4.13 The CIBIL Report is annexed to the application as Exhibit "ZZ". The statement of Accounts of the Financial Creditor as on 30.09.2018 under the Information Technology Act is annexed to the application as Exhibit "AAA".
- 4.14 Copy of letter dated 29th December 2015 issued by the Corporate Debtor to the Financial Creditor regarding compromise settlement of the entire outstanding loan is annexed to the application as Exhibit "PPPP".
- 4.15 Copy of letter issued by the Corporate Debtor to the Financial Creditor regarding payment of outstanding dues is annexed to the application as Exhibit "VVVV".
- 4.16 Copy of letter dated 10th August 2020 issued by the Corporate Debtor to the Financial Creditor regarding One time Settlement is annexed to the application as Exhibit "YYYY".

5. Submissions on behalf of Corporate Debtor:

5.1 Reply affidavit has been filed by Corporate Debtor. In the reply affidavit it is stated;-

- i. Application under Section 7 has not been filed by the person authorized
- ii. Financial Creditor is not entitled to invoke Insolvency and Bankruptcy Code.

5.2 It is stated that the Application under Section 7 filed by the Financial Creditor is barred by laws of limitation as is evident from the date of default as mentioned in Form-1 filed by the Financial Creditor. Further, SARFAESI or DRT proceedings will not extend the period of limitation since those proceedings are independent proceedings.

5.3 The OTS was not accepted by the Financial Creditor and thus cannot be considered as an acknowledgement in view of Section 18 of limitation Act, 1963. Hence the Application under Section 7 was filed on 2nd of November, 2020 and it is barred by limitation as the right to sue accrued only on 30th of June, 2013 and 3 years limitation came to an end in 2016.

5.4 The Corporate Debtor has been engaged in the business of transportation. For modernization and expansion of business, the Corporate Debtor applied for cash credit, term loan, working facility which was enhanced from time to time between the periods 2008 to 2012. The Company's expansion and modification suffered at a large scale as the company could not infuse its own funds and the credit sanctioned dated November 29, 2012 had lapsed and the same was not re-validated by the Financial Creditor. The expansion and modernization product was delayed due to refusal of bank to enhance the existing facilities and the Corporate Debtor had faced huge financial crunch due to wrongful acts and omission of the Financial Creditor, as a result of which business could not run properly.

5.5 The Corporate Debtor received a notice under Section 13(2) of SARFAESI Act by a letter dated 20th September, 2015 and 7th November, 2016, the Corporate Debtor requested the Financial Creditor for a compromise. The

Corporate Debtor issued several reminders and offers for settling the dues to the Financial Creditor.

5.6 It is further stated that the Accounts of Corporate Debtor have been attached by Enforcement Directorate and due to which payments could not be made as contemplated between the parties.

5.7 Further, it is stated that the Financial Creditor in spite of repeated requests failed to provide the details of actual amount due and payable by the Corporate Debtor. The Corporate Debtor had the bona-fide intention to repay the loan amount however, the Financial Creditor in this regard have initiated proceedings before DRT. Financial Creditor has not given any regard to the difficulties faced by the Corporate Debtor. Further, the Financial Creditor had falsely taken the symbolic possession of the mortgage property and subsequently proceeded to file an application under Section 19 of RDDBI Act, 1993. Further, at the time of filing of this application 2 independent proceedings have been instituted by the petitioner against the Corporate Debtor in respect of the same transaction.

5.8 It is stated that the refusal of one time settlement and failure to file an application from when the right accrued, the Financial Creditor is stuck from moving an application under Section 9 of the Code. As per the existing RBI circulars, Financial Creditor was bound to honour the one time settlement. Further, there is no record from the information utility or other evidence to establish the default in terms of the Section 7(3)(a) of the Code. The application is without sufficient pleadings to support the plea of the applicant.

6 Analysis and Findings:

6.1 We have heard the Ld. Counsel for the Financial Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

6.2 Coming to the plea of limitation raised by the Corporate Debtor, we have perused the record and we find that;-

- i. Corporate Debtor was classified as NPA on 30th of June, 2013;

- ii. The applicant initiated proceedings before DRT through its application No. O.A 204 of 2014;
- iii. Vide order dated 17th of September, 2019 the proceedings before DRT were disposed of as settled in view of composite proposal for an amount of Rs. 66,86,60,040/- [Page 337 Vol II of the Application];
- iv. It also transpires from the record vide letter dated 29th of December, 2015 the Corporate Debtor reiterated its proposal for settlement. This letter also refers to date of NPA i.e. 7th of November, 2013 claiming that the amount of NPA is higher than what was sought by the bank on 18th of June, 2015. In this letter it is also apparent that the Corporate Debtor requested for approval of the resettlement plan purported to have been prodded by DRT in its order dated 16th of December, 2016. This communication was responded to by the bank on 2nd of January, 2016 whereby the bank asked to give clarifications for computation of outstanding amounts.
- v. Vide letter dated 7th of February, 2016 written by Corporate Debtor to the Financial Creditor, the Corporate Debtor reiterated its OTS Proposal and also asked for up to date bank settlements reflecting the periodical payment by the Corporate Debtor.
- vi. Vide letter dated 22nd of November, 2016 it transpires the Corporate Debtor made part payment of Rs. 10 lakh towards the OTS proposal. The contents of the said letter are reproduced herein below.
“We are hereby making payment of Rs. 10,00,000/- (Rupees Ten Lakh only) vide NEFT bearing UTR Number 000017823291 dated 22.11.2016 to the below mentioned SBI Account towards advance payment with respect to ‘OTS Proposal’.”
- vii. On 23rd of November, 2016 also an amount of Rs. 10 Lakh was paid towards an advance payment with respect to OTS Proposal.
- viii. On 25th of November, 2016 an amount of Rs. 10 Lakhs was paid an advance payment with respect to OTS.
- ix. On 26th of November, 2016, 28th of June, 2016 on each occasion an amount of Rs. 10 Lakh was paid by the Corporate Debtor towards the OTS Proposal.

- All these letters are placed on record along with the application from Page 899 to 903.
- x. From letter dated 29th of November, 2016 written by Corporate Debtor to the Financial Creditor, it is once again clear the Corporate Debtor admitted its dues and stated they have deposited Rs. 2 Crore (Rs.1.00 Crore) as upfront fees and towards OTS Proposal and Rs. 1.00 Crore in 2 instalment of Rs. 50 Lakh each.
 - xi. Vide letter dated 10th of August, 2020 the Corporate Debtor in clear terms admitted its liability by agreeing for one time settlement up to Rs. 12.00 Crore as the full and final discharge. In this letter a reference has been made to the earlier communications dated 11th of April, 2019 and 28th of March, 2019.
 - xii. It was further mentioned in this letter that the Corporate Debtor was prepared to pay the one time settlement amount if the bank accepts their proposal. This communication dated 10th of August, 2020 is at page 911 as Annexure "YYYY".
 - xiii. The present application under Section 7 has been filed before this Adjudicating Authority on 4th of November, 2020.

6.3. On the basis of the above stated facts and the records we are clear that the present application has been filed within the period of limitation. While determining the plea of limitation we may refer and rely upon the law laid down by the Hon'ble Supreme Court of India in ***Laxmi Pat Surana V. Union Bank of India & Anr [Civil Appeal No. 2734 of 2020]***, decided on March 21, 2021, wherein it was held that:

"37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" not the date of notifying the loan account of the corporate person as NPA. Further, 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. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of PA but before the expiration of three years there from including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. **Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code.** Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under section 7 of the Code.”*

6.4 Further, in ***Rajendra Narottamdas Sheth and Another v. Chandra Prakash Jain and Another [2021 SCC OnLine SC 843]***, the Hon’ble Supreme Court “23. It is no more res integra that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the application under Section 7 is filed beyond the period of three years from the date of default and **the financial creditor furnishes the required information relating to the acknowledgement of debt, in writing by the**

corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences and the application can be entertained, if filed within this extended period.”

- 6.5 The other contentions of the applicant that the present application has not been filed by the person authorized, is also incorrect and the same is hereby rejected. The present petition has been filed by the person competent to file it.
- 6.6 The plea that the present application could not have been filed under IBC is also incorrect and the same is rejected. It is clear from the above that there is a debt that is due by the Corporate Debtor towards the Financial Creditor and Corporate Debtor has committed a default in the payment of the same. There is sufficient evidence in the shape of documents placed on record by the applicant to establish its dues/ debt payable by the Corporate Debtor. Further, the debt payable is above Rs. 1 Crore which is the threshold limit for filing an application under section 7.
7. It is, accordingly, hereby ordered as follows: -
- a) The application bearing **CP (IB) No. 1180/KB/2020** filed by **State Bank of India** (Financial Creditor), under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Kaushik Global Logistics Limited** , CIN: U63090BR2004PLC099002, the Corporate Debtor, is **admitted**.
 - b) There shall be a moratorium under section 14 of the IBC.
 - c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) **Mr. Ram Ratan Modi**, registration number **IBBI/IPA-001/IP-N00051/2017-18/10125**, email: **rrmodi@gmail.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Financial Creditor shall deposit a sum of ₹ 5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

- j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
8. **CP (IB) No. 1180/KB/2020** to come up on **29/07/2022** for filing the progress report.
9. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

HARISH
CHANDER
SURI

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Date: 2022.06.10
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Harish Chander Suri
Member (Technical)

ROHIT
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Rohit Kapoor
Member (Judicial)

Signed on this, the 10th day of June, 2022

Zia/ SM(LRA)