

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB)/ 280 (MB) 2023

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

ASREC (India) Limited

[Identification number:

U67100MH2003GOI143291]

... Applicant/Financial Creditor

Versus

M/s Barracks Retail India Pvt. Ltd.

[CIN: U74999MH2016PTC272362]

... Respondent/Corporate Debtor

Order Pronounced on : 09.01.2024

Coram:

Hon'ble Member (Judicial): Justice V. G. Bisht (Retd.)

Hon'ble Member (Technical): Sh. Prabhat Kumar

Appearances:

For the Financial Creditor : Mr. Sachin Daga, Advocate

For the Corporate Debtor : Mr. Sandeep Bajaj,
Advocate (through video conferencing)

ORDER

Per: Prabhat Kumar, Hon'ble Member (Technical)

1. This Company Petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (**"IBC/Code"**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **ASREC (India) Limited** ("hereinafter referred to as Applicant/ Financial Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s Barracks Retail India Pvt. Ltd.** ("hereinafter referred to as Respondent/Corporate Debtor").
2. The Corporate Debtor is a Private Limited company incorporated on 25.01.2016 under Companies Act, 1956 with the Registrar of Companies, Maharashtra, Mumbai. Its registered office being situated at Flat no.103, Building no.27, Evershine Millenium Paradise, Thakur Village, Kandivali East, Mumbai - 400101. Therefore, this Bench has jurisdiction to deal with this Petition. The Authorised share capital of the Corporate Debtor is Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lacs only) whereas the paid up capital is Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lacs only).
3. The Corporate Debtor is a company involved in the business of manufacturing, importing and exporting men's, women's and children's clothing and wearing apparel, etc.
4. The present Application was filed before this Adjudicating Authority on the ground that the Respondent has defaulted to repay total amount of Rs.21,37,94,606/- (Rupees Twenty-One

Crore Thirty-Seven Lacs Ninety-Four Thousand Six Hundred and Six only) as on 30.09.2022.

5. The date of Default was stated to be 31.10.2020, however, the date of default was changed to 02.08.2019 by the Applicant on 06.11.2023 after this Bench allowed the amendment of Application so as to state the correct date of default vide order dated 13.10.2023. The particulars of debt of the Applicant are detailed as under:
- i. The Corporate Debtor on 08.03.2017 had approached and requested Bharat Co-operative bank (Mumbai) Ltd. For availing the various financial facilities. Pursuant to the same the Bharat Co-operative Bank (Mumbai) Ltd sanctioned dated 21.03.2017 the below mentioned financial facilities to the Corporate Debtor vide following sanction letter (“said facilities”)

Facilities	Amount in Lacs	Sanction Letter
Term Loan - 1	1000	BCB/NSW/331/2017dated 21.03.2017
CC	800	

- ii. Further upon the request of the Corporate Debtor dated 08.06.2018 the Bharat Co-operative Bank (Mumbai) Ltd renewed the credit facilities on 14.08.2018 to the Corporate Debtor vide following sanction Letter (“said facilities”) as detailed below:

Facilities	Amount in Lacs	Sanction Letter
CC	800	BCB/NSW/218/2018 dated 18.08.2018
Term Loan	600	

- iii. Further upon the request of the Corporate Debtor dated 20.12.2019 the Bharat Co-operative Bank (Mumbai) Ltd

sanctioned the financial facilities on 11.03.2020 to the Corporate Debtor vide following sanction letter (“said facilities”) as detailed below:

Facilities	Amount in Lacs	Sanction Letter
Cash Credit	300	BCB/NSW/327/2020 dated 17.03.2020
WCTL-1	800	
FITL of WCTL-1	122.90	
WCTL-2	15.41	
FITL of WCTL-2	1.65	
Term loan	505.40	
FITL of existing term loan	74.65	
WCTL-3	19.97	
FITL of WCTL-3	2.13	

- iv. Upon the request of the Corporate Debtor in 2020, as per RBI guidelines, the Bharat Co- Operative Bank (Mumbai) Ltd agreed for deferment of interest for the period 01.03.2020 to 31.08.2020 for working capital facilities and to convert the accumulated interest during the deferment period into Funding Interest Term Loan (FITL) and thus sanctioned Rs. 9,49,531/- (Rupees Nine Lacs Forty-Nine Thousand Five Hundred and Thirty-One Only) vide Sanction Letter bearing reference number BCB/NSW/55/2020-21 dated 01.09.2020.
- v. The Corporate Debtor through its letter of acknowledgement of debts, documents and securities and consent of borrowers, joint borrowers

and sureties dated 01.09.2020 has acknowledged the availment of credit facilities.

- vi. The Financial facilities were maintained and availed by the Corporate Debtor through the following accounts in the books of Bharat Bank
- A/c No. 006233510000446-Term Loan
 - Conversion of Existing CC A/c No. 006213100000094 into A/c No. 006233510000455-WCTL
 - A/c No. 006234000000113-Term Loan
 - A/c No. 006234000000122-Term Loan
 - A/c No. 006234000000131-Term Loan
 - A/c No. 006234000000140 -Term Loan
 - A/c No. 006234010000051-FITL
 - A/c No. 006213100000108-CC
 - A/c No. 006233510000437 – WCTL
- vii. The Corporate Debtor was declared as NPA as on 31.10.2020 by Bharat Co-Operative Bank (Mumbai) Ltd. As on the date of the declaration of NPA ie. 31.10.2020 the aggregate principal outstanding amounts of the corporate debtor is Rs. 16,21,73,514/- (Rupees Sixteen Crores Twenty-One Lacs Seventy-Three Thousand Five Hundred and Fourteen Only)
- viii. Vide Assignment Agreement between Bharat Co-Operative Bank (Mumbai) Ltd ("Assignor") assigned all agreements, deeds and documents related thereto and all collateral and underlying Security Interests and/or Pledges created to secure and/ or guarantees issued in respect of, the repayment of loans, which the assignor is entitled effective 28.02.2021, in favour of Asrec (India) Limited (Financial Creditor) vide agreement dated 25.03.2021, the assignor.
- ix. As on 30.09.2022 the aggregate outstanding amount of the corporate debtor is as follows:

Nature of Limit	Principal O/S	Interest Re- ceivable	Total O/S
Term Loan	504.96	150.89	655.85
WTCL	800.57	220.85	1021.42
Cash Credit	278.47	91.57	370.04
WTCL	19.99	5.83	25.82
WTCL	15.41	4.43	19.84
FITL	2.34	0.71	3.05
Sub-total	1621.74	474.21	2096.02
Penal Interest			41.92
Grand Total			2137.94

Interest as calculated by the Financial Creditor is 13.9% p.a.

Submissions made by the Learned Counsel of the Applicant:

6. With regards to the change of date of default by the Applicant, the Applicant has relied upon the decision given in *Mr. Manmohan Singh Jain v. State Bank of India & others* wherein the NCLAT has held that omission to mention date of default in Col. 2 Part IV in form 1 is not fatal to the application. To substantiate that the Respondent defaulted prior to the Covid period exemption and is not eligible for Section 10A, the Applicant has relied upon this Tribunal judgment in *Central Bank of India v. Syntex Trading & Agency Private Limited* wherein it has been held that “*the initial date of default ceases to exist upon one-time restructuring of the debt and the cause of action will be the date of default of payment under the restructured obligations*”,

and the judgement given in the case of *SREI Equipment Finance Ltd. v. R.S. Kamthe Infrastructure Developers Pvt. Ltd.*, wherein it has been held that “*it is a well settled proposition of law that for the purpose of S.7 and S.9 of the code, the first default in repayment is to be taken into account for the purposes of initiating proceedings u/s 7 & 9 of the code, 2016. This proposition of law cannot be bypassed by claiming that the default is of continuing nature one.*”

7. The Applicant has submitted that with regards to the defects in the details of form – 1, the Hon’ble Supreme Court has held in the case of *Dena Bank v. C. Shivakumar Reddy & Anr* that “*since there is no scope for elaborate pleadings while filing the application before Adjudicating Authority under S.7 of the IBC, such application cannot be judged by the same standards, as a plaint in a suit, or any other pleadings in a Court of law.*”
8. As far as the applicability of the *Vidharbha Judgment* as relied upon by the Respondent is concerned, the Applicant has submitted that in the decision of the review petition of the same case, the Apex Court has stated that the said judgment is limited to the facts of that case only.
9. The Applicant has relied upon the decision given in *Dena Bank v. C. Shivkumar Reddy & Anr.* for contesting the allegation of the Respondent that the present Application is a recovery application, which elaborates that the provisions of IBC are to enable the Corporate Debtor to improve its financial health and at the same time repay the dues of its creditors.
10. The Applicant has further submitted that it denies the allegation made by the Applicant that the Applicant has failed to honour its obligations of payments and has relied upon the decision given in *Innoventive Industries Judgment* wherein it has been held that “*the Adjudicating Authority only has to determine whether a default has*

occurred i.e. whether the debt (which may still be disputed) was due and remained unpaid. If the Adjudicating Authority is of the opinion that a default has occurred, it has to admit the application unless it is incomplete in which case it may give notice to the Applicant to rectify the defect.”

Submissions made by the Learned Counsel of the Respondent:

11. The learned Counsel of the Respondent took an objection with regard to the maintainability of the present company petition contending that the date of default is 31.10.2020 according to the Petitioner's own case and therefore the petition is not maintainable as it is hit under Section 10A of the code. It is to be noted that the date of default was changed to 02.08.2019 by the Applicant on 06.11.2023. The Applicant has also placed on record the corrected record of default maintained by NESL vide rejoinder filed on behalf of the Applicant.
12. The Respondent has contended that the present petition is required to be rejected being defective as the Applicant has failed to mention the estimated value of security held by the Applicant.
13. The Respondent had also filed an Interlocutory Application (IA) under Rule 11 of the National Company Law Tribunal Rules, 2016 which had a limited prayer of extending the period for filing Affidavit in Reply and to take the Affidavit in reply on record. After considering the submissions and upon perusal of the averments made in the said IA, we had allowed the said IA thereby condoning the delay in filing Affidavit in reply on record, subject to payment of cost to the tune of Rs. 25,000/- to be paid in Bharatkosh, vide order dated 21.08.2023. The same has been placed on record.
14. The Respondent has also objected the Applicant's Affidavit in rejoinder contending that the Applicant is attempting to modify its original case by way of Affidavit in Rejoinder.

15. Further, the Respondent has contended that Form -2 filed by the Applicant is defective since the registration certificate of the proposed IRP has not been placed on record, which is stated to have been filed along with rejoinder later on.
16. The Respondent further states that the Applicant has failed to incorporate Sr.no.6 of Part II of Form -1, viz. details of the Corporate Debtor as per the notification under section 55(2) of the code. However, the said details are required only if the Application is filed under Chapter IV of Part II of the IBC code. Hence, this contention of the Respondent is liable to be rejected.
17. As per Rule 6(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 it is mandatory for the Applicant to serve a copy of the Application to the IBBI and the Applicant has submitted IBBI's Acknowledgement under Form 1A vide Affidavit of Service dated 06.05.2023 only.
18. The next contention of the Respondent is that it is in good financial condition and cannot be declared as insolvent. It has relied upon the decision given by the Hon'ble Supreme Court in the case of *Vidarbha Industries Power Limited v. Axis Bank Limited*, [2022] 140 *taxmann.com* 252 (SC) wherein it has been held that this Tribunal has discretion to reject an application under Section 7 of the IBC code even if debt and default is established, provided, it is proved before this Tribunal that the Corporate Debtor is in a healthy and sound financial state.
19. The Respondent has submitted that substantial amount of the Applicant's debt will be repaid if the Respondent is permitted to continue with its operations and recover its trade receivables in ordinary course of business. The Respondent also states that it has work orders of more than 4 Crores and that it has been regularly paying salaries and wages of its workmen and employees.

20. The Respondent has claimed that the present Application has been filed with an intention to recover amounts from the Respondent. It has relied upon the decision given by Hon'ble NCLAT in the case of *Anita Jindal v. Jindal Buildtech (P.) Ltd.*, [2023] 148 taxmann.com 398 (NCLAT – New Delhi) wherein it has been held that an application under the code cannot be initiated with fraudulent and malicious intent of recovery.
21. Further, the Respondent has contended that M/s Bharat Co-operative Bank Limited itself is responsible for the present poor financial condition of the Corporate Debtor by citing various instances, against which the Corporate Debtor is in process of taking action.
22. The Respondent has proposed to move an application before NCLAT for the purpose of transferring this matter before the NCLT, Ahmedabad, since the Applicant has initiated CP (IB) 110/2023 against the sister concern of the Corporate Debtor viz. Touchwood Weaves Pvt. Ltd. and facts of both these Petitions are intrinsically connected.

Findings and Analysis:

23. Heard learned Counsel and perused the material available on record.
24. The Hon'ble NCLAT in the case of *Bank of India Vs. Coastal Oil Gas Infrastructure Pvt. Ltd (2020) ibclaw.in 283 NCLAT* at para 29 held that “In case there is any discrepancy found in the application relating to the date of default being wrongly pleaded by the financial creditors as contended by the Corporate Debtor, the Adjudicating Authority may ask the financial Creditors to rectify the same”. Accordingly, we find no merit in the contention of Corporate Debtor that the Applicant Financial Creditor could not have amended the date of default as permitted by this Tribunal.

25. The Applicant has pleaded in the amended petition that the Corporate Debtor's account was declared as Non Performing Asset (NPA) on 1.11.2019 by Bharat Co-operative Bank (Mumbai) Limited and the principal outstanding amounts as on that date was Rs. 16,21,73,514/- (Rupees Sixteen Crores Twenty-One Lacs Seventy-Three Thousand Five Hundred and Fourteen Only). It is further submitted that there was an inadvertent error in date of default mentioned in the record of default and in the application, which was rectified and an application was filed with NeSL to provide the rectified record of default. We find that Bharat Co-operative Bank (Mumbai) Limited had issued notice dated 19.3.2021 in terms of Section 13(2) of the SARSAESI Act, 2002 stating in para 6 thereof, that the Corporate Debtor's account was classified as NPA on 31.3.2020 in accordance with the directives/guidelines relating to assets classification issued by the Reserve Bank of India consequent to the default committed by it. An account is classified as NPA after 90 days of the default and the classification of accounts is after the default in the account. Though the RBI guidelines are mandatorily to be followed but the classification of the account as NPA on 31.3.2020 cannot eradicate the actual date of default which is claimed to be 2.8.2019. The period specified in Section 10A of the Code starts from 25th March, 2020, hence these dates would certainly be prior to the period stated in Section 10A. It is not disputed that the date of default has been corrected in the NeSL records as well.

26. As regards contention of Corporate Debtor that the credit facilities were restructured and there were subsequent disbursements, it is noted that the credit facilities granted to the Corporate Debtor were restructured in terms of sanction letter dated 17.3.2020 and fresh cash credit limit of Rs. 3.00 Crore was granted, besides converting

the existing cash credit limit into Working Capital Term Loan; accrued interest on Term Loan as well Cash Credit Loan into Funded Interest Term Loan; and restructuring the existing Term Loan. These restructured facilities were to be repaid in terms of sanction letter, which stipulated payment in monthly instalments, except in case of cash credit facility which was repayable on demand. Further, the Bank had retained the right to revoke the restructuring package in case of stated defaults. Thereafter, the Bank also granted the deferment of interest on working capital facilities and conversion of accumulated interest into Funded Interest Term loan in terms of COVID-19 fiscal incentives announced by the RBI on 1.9.2020. The Applicant had issued first notice to recall the facilities on 19.3.2021 under section 13(2) of SARFAESI Act, 2002 requiring the Corporate Debtor to pay all outstandings under all Credit facility accounts within 60 days from the date of receipt of said notice and no notice to recall the facilities was issued prior to that. Accordingly, the date of default stated in Part IV originally as 31.10.2020 could not have been actual date of default, hence, it was a mistake on part of the Applicant which has subsequently been rectified. In terms of recall notice dated 19.3.2021, the Corporate Debtor once again defaulted on 19.5.2020 (taking 48 hours delivery time) and the said date is also beyond the period specified in Section 10A of the Code. Accordingly, we are of considered view that the present application is not barred by the provisions of Section 10A of the Code.

27. It is also worth mentioning that the Corporate Debtor has acknowledged & admitted its liability towards the debt outstanding and payable to the Financial Creditor as evidenced from various sanction letter(s), latest being sanction of COVID-19 related relief

on 1.9.2020 and this application having been filed on 18.2.2023 is within the limitation period.

28. As regards reliance placed on the decision in case of Vidarbha Industries Limited (Supra), we find that the Hon'ble Supreme Court in the review petition namely *Axis Bank Limited v. Vidharbha Industries Power Limited, Review Petition (Civil) No. 1043 of 2023*, clarified that the decision in the case is limited to the facts of that case only. Nonetheless, the Hon'ble Supreme Court in its later decision in case of *M. Suresh Kumar Reddy v. Canara Bank & ors.*, Civil Appeal no. 7121 of 2022 has categorically stated at Para 10 that, "*Thus, once NCLT is satisfied that default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7*". Further, at Para 13 it was held that, "*Hence, the decision in the case of Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the case of Innoventive Industries and E.S. Krishnamurthy. The view taken in the case of Innoventive Industries still holds good.*"
29. As regards contention of Corporate Debtor that the present application is filed with an object of recovery, we do not find any force in the argument. Undisputed facts placed before records that the Corporate Debtor has failed to stand on its own feet despite restructuring of loan and thereafter grant of COVID-19 relief by the lending bank.
30. The request made by the Applicant to move an application before NCLAT for the purpose of transferring this matter before the NCLT, Ahmedabad where an application namely, CP (IB) 110/2023 against the sister concern of the Corporate Debtor viz. Touchwood Weaves Pvt. Ltd. is pending is not a relevant factor for consideration in the present proceedings, as the law does not

contemplate mandatory tagging of applications against group companies.

31. It is clearly evident from the records produced before this Tribunal that the financial debt amounting to more than Rs. 1,00,000 (Rupees One Lakh Only) is due & payable by the Corporate Debtor as on the date of filing the present Company Petition. Further, there is admission of default and outstanding liability by the Corporate Debtor in various correspondences annexed to the Company Petition.
32. The essential ingredients required to initiate Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor such as Financial Debt as defined u/s 5(8) & Default as defined u/s 3(12) of the Code are proved by the Financial Creditor beyond reasonable doubt in the present case.
33. The application made by the Financial Creditors is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view thereof, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.
34. The Financial Creditor has proposed the name of Mr. Ganesh Venkata Siva Rama Krishna Remani, Registration No. IBBI/IPA-001/IP-P01386/2018-19/12176, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
35. It is, accordingly, hereby ordered as follows: -

- (a) The petition bearing CP (IB) 280/(MB) 2023 filed by **ASREC (India) Limited**, the Financial Creditor, under section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **M/s Barracks Retail India Pvt. Ltd.** [CIN: U74999MH2016PTC272362], the Corporate Debtor, is **admitted**.
- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
- (i) 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;
 - (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 (SARFAESI) Act, 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.
- (c) Notwithstanding the above, during the period of moratorium:-
- (i) 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;

- (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) 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.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) **Mr. Ganesh Venkata Siva Rama Krishna Remani**, Registration No. **IBBI/IPA-001/IP-P01386/2018-19/12176**, having registered address at 302, Nahar Business Center Chandivali, Mumbai Suburban, Maharashtra - 400076 Email ID: **ganesh.remani@nliten.in** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/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 IBC.

- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP 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 a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Financial Creditor shall deposit a sum of Rs.3,00,000/- (Rupees Three Lakhs 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). The remuneration of the IRP shall be such as is fixed by the Applicant till constitution of CoC and thereafter the constituted CoC shall decide the remuneration payable to the IRP.
- (i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, 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.

Sd/-
Prabhat Kumar
Member (Technical)



Sd/-
Justice V. G. Bisht (Retd.)
Member (Judicial)