

**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH: GUWAHATI**

**C.P. (IB)/12/GB/2019**

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

In the matter of:

Prayag Polytech Pvt. Ltd. : Financial Creditor  
-Versus-  
Purbanchal Trade and Industries Ltd. : Corporate Debtor

**Coram:**

**Hon'ble Mr. Hari Venkata Subba Rao, Member (Judicial)**  
**Hon'ble Mr. Ashutosh Chandra, Member (Technical)**

For the Financial Creditor : Mr. Kakan Khanna, Advocate  
For the Corporate Debtor : Mr. Dhritiman Deka, Advocate

**ORDER**

**Date of Order: 27th August, 2019**

Per Shri Ashutosh Chandra, Member (Technical)

This petition is filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (in short Code of 2016) by M/s. Prayag Polytech Pvt. Ltd., Financial Creditor (FC) for initiation of Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Purbanchal Trade and Industries Ltd., Corporate Debtor (CD) which is stated to have failed to pay the due & payable financial debt (along with interest) amounting to Rs.2,78,51,288.00 (Rupees Two crore Seventy Eight lac Fifty One thousand Two

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hundred Eighty Eight only) as on 25<sup>th</sup> December, 2018. It has been stated that a notice dated 02-02-2019 to the CD to repay the said amount was not responded, and the amount was not repaid. It is further stated that the debt falls within the meaning of 'Financial Debt' in terms of Section 5 (8) of the Code of 2016 and the CD has defaulted in the repayment in terms of Section 3 (12) of the Code of 2016. Hence, the present petition.

2. As per the reply filed on behalf of the CD, M/s. Purbanchal Trade and Industries Ltd. to the above petition, it is submitted that the same was required to be rejected as it was not maintainable, even without going into the merits, qua the present CD who is a Non-Banking Financial Company (NBFC). For this reason, the provisions of IBC cannot be invoked against it. It is stated that the RBI is a financial sector regulator, as defined in Section 3 (18) of the Code of 2016 and it has issued a certificate, bearing No.00.0023, registering it as an NBFC and hence the present petition was not maintainable. To support its case reference has been made to the case of HDFC Vs M/s. RHC Holiday Pvt. Ltd. [CP No.(IB) -738 (PB)/2018] in which the appeal by HDFC was dismissed by the NCLAT. The decision in the case of Randhiraj Thakur Vs Jindal Saxena Financial Services and Anr. in CA No. (AT) Insolvency 32 & 50 of 2018 as decided by the Hon'ble NCLAT has also been referred to in this regard. In both these cases it was finally held that an NBFC could not be brought within the ambit of section 7 of the Code of 2016, being excluded from the definition of a CD.

3. As far as the debt per se is concerned, there is no dispute. There is also no dispute about the fact that an NBFC would fall outside the ambit of section 7 of the Code of 2016. However, before us it was argued by the petitioner that the CD's plea regarding non-maintainability should not be accepted as its main objects were not that of an NBFC, that it had not discharged various obligations such as filing of returns before the Registrar of Companies and that it was not actually carrying on the activities of NBFC etc., and hence was not eligible for any exclusion from the provisions of Section 7 of the Code of 2016. The decision of the Hon'ble Andhra Pradesh High Court in the case of Karvy Consultants Ltd. Vs Asstt. Commr. of Customs and C. Excise in WP No 1661 of 2005 dated

08.08.2005, was cited in support, to say that the certificate of registration of the RBI alone could not be relied upon without considering the conditions attached there to.

4. We have considered the above submissions. On an examination of the provisions contained in the Code of 2016, it is seen that as per Section 3 (8) of the Code of 2016, a CD means a corporate person who owes a debt to any person, and as per Section 3 (7), a corporate person is a company, a LLP or any other person, but shall not include any financial service provider. That is to say that since a financial service provider is excluded from the definition of "corporate person", it can also not be a CD. Further, since Part 2 of the IBC applies to "Insolvency Resolution and Liquidation for corporate persons", and since a financial service provider, including an NBFC, is excluded from the definition of a corporate person and CD, provisions of Part 2 of the IBC do not become applicable in the case of a financial service provider. Hence, no creditor can seek initiation of corporate insolvency resolution process against any financial service provider.

5. The above view was also taken by the Hon'ble Principal Bench of the NCLT New Delhi in the case of HDFC Ltd. Vs M/s. RHC Holding Pvt. Ltd., dated 6-12-2018, as has been referred to by the respondent, and was upheld by the Hon'ble NCLAT vide its order No.26 of 2019 dated 10-07-2019. Further, in Randhiraj Thakur Vs Jindal Saxena Financial Services & Anr., in CA No. (AT) Insolvency 32 & 50 of 2018, the Hon'ble NCLAT held as under:

"10. *If the entire scheme of the I & B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of 'corporate persons', 'partnership firms' and 'individual' in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganization and insolvency resolution. However, an exception has been carved out while enacting the Code that the 'financial service providers' have been kept outside the purview of the Code. Being a consolidating legislation only those acts are permitted which are mentioned in the Code and it cannot be made applicable to 'financial service providers' including 'non-banking*

***financial institutions' and MFI's banks, which have been kept outside the purview of the Code."***

6. Keeping the above legal position in mind, it is seen that the objects contained in the Memorandum and Articles of Association of the CD M/s. Purbanchal Trade and Industries Ltd. mention such financial activities as are carried on by NBFCs. Further, it is seen that the financial service regulator, within the meaning of Sec. 3(18) of the Code of 2016, namely the Reserve Bank of India, has issued a certificate (bearing No.08.0023) registering and entitling it to carry on the business as a Non-Banking Financial Institution (NBFI). The decision of the Hon'ble Andhra Pradesh High Court in Karvy Consultants referred to by the petitioner is not in the context of Section 7 of the IBC, but for the purpose of a taxing statute, who's intent and purpose is entirely different. In our context, it has to be understood that the withdrawal of such an exclusion and ordering a CIRP against a CD has grave implications for a going concern, such as a substantial reduction in its net worth and disruption of business. Hence, we would not like to step into the shoes of the RBI, or any other agency / institution, to examine the fulfilment of the obligations cast upon an entity, to be termed as an NBFI, or otherwise, as it is beyond the purview of the NCLT in an application made u/s 7 of the Code of 2016.

7. In view of foregoing, we are in agreement with the arguments presented by the respondent CD and consider it as a financial service provider and a Non-Banking Financial Institution, being registered as such by the RBI, and that for this reason it falls outside the purview of section 7 of the Code of 2016. Thus even though it owes a debt to the petitioner FC, the prayer of the FC for initiation of CIRP in respect of M/s. Purbanchal Trade and Industries Ltd. fails, and the petition is accordingly dismissed. No costs.

Sdf

Member (Technical)

Sdf

Member (Judicial)