



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court No.II)
KOLKATA**

**IA (IB) No.237/KB/2023
And
CP (IB) No.250/KB/2022**

***In the matter of:
DBS Bank India Limited***

... Financial Creditor

Versus

Manav Investment and Trading Company Limited
[CIN:U67120WB1988PLC043869] having its registered office at
9/1 R N Mukherjee Road, Kolkata – 700001

...Corporate Debtor

IA (IB) No.237/KB/2023

Manav Investment and Trading Company Limited
[CIN:U67120WB1988PLC043869] having its registered office at
9/1 R N Mukherjee Road, Kolkata – 700001

...Applicant

Versus

DBS Bank India Limited

...Respondent

**Order reserved on: 23 June, 2023
Order pronounced on : 28 August, 2023**

Coram:

Smt.Bidisha Banerjee : Member (Judicial)
Shri Balraj Joshi : Member (Technical)

Appearances (via videoconferencing/physical hearing):

For the Financial Creditor : Mr.Deepanjan Dutta Roy, Adv

For the Corporate Debtor : Mr.Mainak Bose, Adv.
Mr.VishwarupAcharyya, Adv.



ORDER

Per Bidisha Banerjee, Member (Judicial)

1. This court convened *via* hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Renosh Jacob, Senior Associate, DBS Bank India Limited (*'Financial Creditor'*), duly authorised *vide* Resolution passed by Authorization Committee of DBS Bank India Limited on 13 April, 2022¹, for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Manav Investment and Trading Company Limited (*'Corporate Debtor'*).
3. The present Petition was filed on 04 September, 2022 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted in payment of Rs.10,06,54,436/- (Rupees Ten Crore Six Lakh Fifty Four Thousand Four Hundred Thirty Six only).
4. Part – I of the Application contains the details of the Financial Creditor. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs. 7,25,00,000/- (Rupees Seven Crore Twenty Five Lakh only) with paid-up capital as Rs. 7,12,95,960/- (Rupees Seven Crore Twelve Lakh Ninety Five Thousand Nine Hundred Sixty only). Part – III of the Application contains the details of the Interim Resolution Professional to be appointed. The details of transactions are mentioned in part – IV of the application along with documents.

¹Page 459 - 460 of the Petition.


5. Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor.

- 5.1 A working capital (cash credit) facility (**'WC Facility'**) amounting to INR 50,00,00,000 (Indian Rupees Fifty Crore) was availed by Kesoram Industries Limited (**'KIL'**) from the erstwhile Lakshmi Vilas Bank (since then merged with the Financial Creditor) by way of a Seventh Supplemental Working Capital Consortium Agreement (**'WC Agreement'**).
- 5.2 The WC Agreement was executed on January 19, 2018 by KIL and State Bank of India, Axis Bank Limited, HDFC Bank Limited, ICICI Bank Limited, IndusInd Bank Limited, Kotak Mahindra Bank Limited, the erstwhile Lakshmi Vila Bank Limited, Punjab National Bank, The South Indian Bank Limited and Yes Bank Limited (**collectively the 'SBI Consortium'**).
- 5.3 The tyre business of KIL was demerged into a new entity, namely Birla Tyres Limited (**'BTL' or 'Borrower'**) vide scheme of arrangement sanctioned by thus Adjudicating Authority on November 08, 2019(**'Demerger'**).
- 5.4 Consequent to the said Demerger, the WC Facility extended by the erstwhile Lakshmi Vilas Bank (since merged with the Financial Creditor) to KIL came to be partly transferred to the Borrower.
- 5.5 The Corporate Debtor is the promoter holding company of Kerosam Group and the Corporate Debtor has shareholdings in Kerosam Industries Limited and Birla Tyres Limited.
- 5.6 Pursuant to the Demerger mentioned above, on December 19, 2020, KIL and the Borrower submitted two revival letters to the SBI Consortium for revival of several existing facilities, including the WC Facility. By way of its revival letter, the Borrower acknowledged the bifurcation of the WC Facility and the continued binding effect of the WC Agreement.

- 5.7 A separate undertaking was also executed by the Corporate Debtor in favour of the Financial Creditor dated February 15, 2021 (***Promoter Undertaking***), inter alia, providing that in the event of the filing of an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 against BTL within a period of one year from the date of execution of the Promoter Undertaking, i.e. February 15, 2021, the Financial Creditor shall have a right to (i) invoke and sell 31,75,000 equity shares of BTL held by the Corporate Debtor (Pledged Shares) or (ii) right to seek payment of the crystallized 'Release Amount' of INR 15,87,50,000 (Indian Rupees Fifteen Crores Eighty Seven Lakh Fifty Hundred) from the Corporate Debtor, being in the nature of a guarantee obligation.
- 5.8 On July 17, 2021, the Financial Creditor issued a notice of event of default to the Borrower recalling the WC Facility (***Recall Notice***). The Borrower had defaulted in payment of outstanding amount of IN 28,19,35,329 (Rupees Twenty-Eight Crores Nineteen Lacs Thirty Five Thousand Three Hundred Twenty Nine) under the WC Facility as on the date of notice.
- 5.9 On July 17, 2021 the Financial Creditor also issued a separate notice to the Corporate Debtor, for invocation and sale of the Pledged Shares pursuant to the Pledge Agreement read with the Promoter Undertaking.
- 5.10 On July 30, 2021, the Corporate Debtor instituted a suit being C.S. No. 138 of 2021 in the Hon 'ble High Court of Calcutta challenging the Recall Notice and the Invocation and Sale Notice. However, on February 16, 2022, the Hon'ble High Court at Calcutta disposed of applications in C.S. No. 138 of 2021, with directions to re-issue the Invocation and Sale Notice with certain modifications.
- 5.11 In pursuance to and in compliance with the said judgment dated February 16, 2022, the Financial Creditor issued a fresh invocation and sale notice in respect of the Pledged Shares to the Corporate Debtor on February 23, 2022. An

interim stay sought by the Corporate Debtor against the said notice was rejected by a single judge of the Hon'ble High Court of Calcutta on April 4, 2022, and by way of the order dated April 11, 2022, the division bench of the Hon'ble High Court of Calcutta also disposed the Corporate Debtor's appeal by substantially affirming the order dated April 4, 2022 and permitting the Financial Creditor to undertake sale of the Pledged Shares.

- 5.12 The Financial Creditor sold the Pledged Shares in the open market, in compliance with the directions in the orders of the Hon'ble High Court at Calcutta. Accordingly, pursuant to adjusting the realisation amount of IN 5,80,95,564 (Rupees Five Crore Eighty Lakh Ninety Five Thousand Five Hundred and Sixty Four) from the sale of the Pledged Shares against the guaranteed Release Amount, an amount of INR 10,06,54,436 (Indian Rupees Ten Crore Six Lakh Fifty Four Thousand Four Hundred Thirty Six) continues to remain due and payable by the Corporate Debtor in terms of its unequivocal guarantee obligation under the Promoter Undertaking.
- 5.13 The Financial Creditor therefore issued a notice dated May 7, 2022 calling upon the Corporate Debtor to pay the said balance Release Amount of INR 10,06,54,436 (Rupees Ten Crore Six Lakh Fifty Four Thousand Four Hundred Thirty Six) in its entirety in the manner specified under Clause 8 of the Promoter Undertaking by 5 p.m. on May 31, 2022.
- 5.14 The Corporate Debtor through its advocate vide its letter dated May 19, 2022, has responded to the abovementioned notice dated May 7, 2022 issued by the Financial Creditor, and has refused to make payment to the Financial Creditor of the balance Release Amount
- 6. Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor.**
- 6.1 The Corporate Debtor is a registered Non-Banking Financial Institution registered under Section 45(IA) of the Reserve Bank of India Act, 1934.

- 
-
- 6.2 As defined under Section 3(8) of the Code, Corporate Debtor means any corporate person who owes a debt to any person. Further, Section 3(7) of the Code, 2016 defines ‘Corporate Person’ and excludes any ‘financial service provider’ from its definition specifically.
- 6.3 The principal business of the Corporate Debtor is investment in shares in group companies. The definition of ‘financial service’ as defined in Sec. 3 (16) of the Code has been held not limited to the activities listed in Sec. 3(16). The definition of ‘financial service’ has been held to be inclusive meaning there are other services which come within the meaning of ‘financial service’.
- 6.4 On 09 February 2023, liberty was granted to the Corporate Debtor to file a supplementary affidavit. In terms of such liberty, the Corporate Debtor has filed a supplementary affidavit bringing on record, as follows;
- (i) Certificate of Registration issued by RBI under Section 451A of the RBI Act, 1934 (Annexure R-2 pages 7 and 8 thereof).
 - (ii) A statutory auditor certificate dated 14 October 2022 (Annexure R-3 pages 9 to 12 thereof).
 - (iii) A further statutory certificate under the 50:50 test in relation to non-banking financial company from which it is evident that the Corporate Debtor financial assets are more than 50 percent of its total assets and income from financial assets is more than 50 per cent of its gross income (see Annexure R-4, page 13 and Annexure -5, page 16)
 - (iv) A list as on 31 December 2022 published on 23 January 2023 by RBI demonstrating that the Corporate Debtor is registered as NBFC Non-Deposit Investment and Credit Company (Annexure - R6 page 18) and
 - (v) Balance sheet of the Corporate Debtor as on 31 March 2022 which shows Non Current Investment under the heading ‘Assets’ of Rs.93,73,791.46 and stock in trade under the heading ‘Current Assets’ at Rs.3,26,59,257.39 (see Annexure R-7, page 21 and also see page 33, 43 and 44).

6.5 The Hon'ble NCLAT' in the case of **Saumil A. Bhaunagri - vs- Nimit Builders Private Limited &Ors.**², by considering a similar point that arose in a prior judgment [*Housing Development Finance Corporation Ltd. -Vs- RHC Holding Private Ltd., Company Appeal (AT) (Insolvency) No. 26 of 2019*]¹ came to a conclusion that when a certificate issued by Reserve Bank of India is valid and subsisting, it is sufficient for the Adjudicating Authority to ascertain that a Sec 7 IBC, 2016, petition is not maintainable against an NBFC.

6.6 Considering the definition of 'Corporate Person' under Sec 3 (7) of IBC, 2016 the Hon'ble NCLAT has further held that it would not be in the realm of Adjudicating Authority to go into the details whether the conditions attached have been followed or not by NBFC. If there is any violation of conditions, the aggrieved person may bring it to the notice of RBI to investigate.

6.7 In view of the above submissions, it is therefore evident that the present company petition cannot be maintained against the Corporate Debtor.

7. IA (IB) No.237/KB/2023

7.1 This is an application filed by the Corporate Debtor *inter alia*, praying for the following relief;

- (a) Allow this instant Application and to take on record the Supplementary Affidavit;
- (b) Pass any such further or other orders.

Analysis and Findings

8. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Ld. Counsels appearing on behalf of the Corporate Debtor and perused the records.

9. Before going into the basic principle of 'debt' and 'default' as envisaged under section 7 of the Code. It is a settled law that an application under section 7 of the Code is not maintainable against a Non-Banking Financial

²Company Appeal (AT) (Ins) No.710 of 2019



Institution. It is evident from Annexure-B at page 20 of the Supplementary Affidavit that the Reserve Bank of India has issued a Certificate of Registration on 18 February, 1998 to the Corporate Debtor for carrying on the business of non-banking financial institution.

10. The Hon'ble NCLAT has also opined the same in catena of judgments. In *Nirmal Kumar Agarwal v. State Bank of India & Ors.*³, the Hon'ble NCLAT held as follows;

“ In order to appreciate the rival contentions, it would be relevant to refer to the definitions of Section 3(7), 3(8), 3(16), 3(17), 3(18), 5A, 227 & 239 (2) (zk) of the Code.

3(7) “corporate person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

3(8) “corporate debtor” means a corporate person who owes a debt to any person;

3(16) “financial service” includes any of the following services, namely:—

(a) accepting of deposits;

(b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;

(c) effecting contracts of insurance;

(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;

(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—

³Company Appeal (AT) (Ins.) No. 983 of 2019

(i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with a financial product or financial service;

(f) establishing or operating an investment scheme;

(g) maintaining or transferring records of ownership of a financial product;

(h) underwriting the issuance or subscription of a financial product; or

(i) selling, providing, or issuing stored value or payment instruments or providing payment services;

3(17) “financial service provider” means a person engaged in the business providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;

3(18) “financial sector regulator” means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;

(5A) “corporate guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor;

227. Power of Central Government to notify financial service providers, etc.

Notwithstanding anything to the contrary [contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.

[Explanation.—For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or

categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.]

239(2) Without prejudice to the generality of the provisions of sub-section (1), the Central Government following matters, namely:—

.....

(zk) the manner of conducting insolvency and liquidation proceedings under section 227

.....”

10. Section 3(7) defines corporate person - It categorically states that it will not include any financial service provider. Section 3(8) defines corporatedebtor, which means a corporate person. Meaning thereby in order to become corporate debtor entity has to be a corporate person but a financial service provider is not a corporate person. The financial service provider is defined in Section 3(17) which says that any person to whom registration is granted by a financial sector regulator. Section 3(18) defines financial sector regulator which includes the Reserve Bank of India. Financial service is defined under Section 3(16) which according to the decision of this court in the case of Housing Development Finance Corporation Ltd. (Supra) is inclusive and not limited to one which is provided in the said provision.”

(Emphasis Supplied)

- 11.** Further, on 15 November 2019 through notification No. G.S.R. 852(E), Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 it was notified that, the insolvency resolution and liquidation process of the financial service providers shall be undertaken if non-banking companies (which include housing finance companies) with asset size of Rs.500 crore or more, as per last audited balance sheet. However, as per the statutory auditor certificate attached to the supplementary affidavit, the total

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. II)

IA (IB) No.237/KB/2023

And

CP (IB) No.250/KB/2022

DBS Bank India Limited v. Manav Investment and Trading Company Limited

assets of the Corporate Debtor for the financial year ending 31 March 2022 (last audited balance sheet) is Rs.443,44,52,540/- [*Annexure-R3, at page 10 of the supplementary affidavit*].

- 12.** In view of the above, fact and circumstances, the prayer (a) in **IA (IB) No.237/KB/2023** is allowed, and accordingly ***disposed of***. Further, the petition being, **CP (IB) No.250/KB/2022** is hereby ***rejected***. The Petitioner is, however, at liberty to pursue other available means under the law.
- 13.** Copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The Order is pronounced on 28th day of August, 2023

SA/LRA