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IN THE NATIONAL COMPANY LAW TRIBUNAL BENGALURU BENCH

C.P.(IB)No.43/BB/2019
U/s 7 of IBC, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

In the matter of:

M/s.Sri Arumuga Sugars Limited
51, Appuswamy Layout, Red Fields,
Coimbatore - 641 045. - Petitioner/Financial Creditor

Versus

M/s.Badami Sugars Limited
Chalukya Nagar,
Badami Taluk,
Bagalkot - 587 201. - Respondent/Corporate Debtor

Date of Order: 27th September, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Shri R. Ashok Kumar
For the Respondent : None

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB)No.43/BB/2019 is filed by M/s.Sri Arumuga Sugars Limited (hereinafter referred to as 'Petitioner/Financial Creditor') U/s 7 of the IBC, 2016, R/w Rule 4 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s.Badami Sugars Limited, on the ground that it has committed default for total amount of Rs.22,84,07,970/- (Rupees Twenty Two Crores Eighty Four Lakhs Seven Thousand Nine Hundred and Seventy Only).



2. Brief facts of the case, as mentioned in the Company Petition, are as follows:

- (1) M/s.Sri Arumuga Sugars Limited ('Petitioner/Financial Creditor') was incorporated on 09.06.2008, having CIN: U15421TZ2008PLC014539, its registered office at 51, Appuswamy Layout, Red Fields, Coimbatore- 641 045.
- (2) M/s. Badami Sugars Limited ('Respondent/Corporate Debtor') was incorporated on 01.01.2002, having CIN: U15429KA2002PLC029955 and its Authorized Share Capital is Rs.2,00,00,000/- and Paid Up Capital of Rs.1,31,05,0070/-
- (3) It is stated that the amount is found due and payable vide Arbitration Award dated 18.05.2016 passed by Justice G. Patri Basavanna Goud and the said Award has become enforceable pursuant to Section 36 of the Arbitration & Conciliation Act, 1996 and there being no stay as against the enforcement of the Award. The amounts were advance towards acquisition of M/s.Badami Sugars Limited, free of encumbrances, vide MOU dated 24.02.2011 which acquisition did not fructify owing to breach by M/s.Badami Sugars Limited and held liable to be refunded vide the Arbitration Award.
- (4) It is also stated the Arbitration Award has specifically held that the sum of Rs.10,06,00,000/- was advanced by the Petitioner to the Respondent under the MOU, that such amounts were meant only for discharge of dues to the cane growers for cane supplied by them to the Respondent, that the Respondent utilized a sum of Rs.6,62,00,008/- for discharging liabilities to farmers, that the balance amount was wrongfully utilized by the Respondent, that applying the settled principle of law, the money advanced under the agreement is only an advance recoverable by the Petitioner.
- (5) It is stated that in terms of the award passed in favour of the Petitioner, the Respondent is liable for payment of



Rs.10,06,00,000/- being the principal with interest @18% per annum from 28.10.2011 till the date of realization of the said amount along with Rs.2,50,000/- being the cost imposed by the Arbitral Tribunal. The confirmation of the amount due and payable by the Respondent to the Petitioner by the Arbitral Tribunal, confers the right on the Petitioner to initiate appropriate proceedings as against the Respondent for recovery of the debts due including under the IBC, 2016.

3. The Respondent has filed Statement of Objections on 21.06.2019, by inter alia contending as follows:

(1) It is stated that the Petitioner had entered into an Agreement with the Respondent Company and its Shareholders on 24.02.2011, and not a 'Memorandum of Understanding' as stated in the Application, towards purchasing the entire shares of the Company i.e., M/s.Badami Sugar Limited, for a total consideration of Rs.100 Crores. Upon the transfer of this amount, the Company would transfer all its shares to the Petitioner, thereby entailing the Petitioner becoming 100% shareholder of the Company along with the underlying undertaking including the sugar factory, cogeneration capacity along with its movables and immovable together with all licences and permits in the name of the Factory including the cane area(s) as reserved/allotted to the factory by the Cane Commissioner, Government of Karnataka.

(2) It is also stated that upon plain reading of the Agreement, which is in the nature of a Share Purchase Agreement, it is clear that there are there parties to the Agreement viz.

a. Group A referring to Mr. Balappa B. Chimmanakatti and his family entities, holdings and associates,



who together hold majority of share capital of the Company.

b. Group B referring to M/s.Badami Sugars Limited (the Respondent Company in this matter).

c. Group C referring to M/s.Sri Amumuga Sugars Private Limited, who are intending buyers of the shares of the Respondent Company.

(3) It is stated that the Agreement referred to above is towards purchase by the Petitioner (Group C), of the shares of the Respondent Company (Group B), from the party referred as Group A. The substratum of the agreement is between Group A and Group C. Group B, that is the Respondent Company is only signing in the capacity of a confirming party to the agreement. Any monetary transaction made by the Petitioner Company, arising out of this Agreement, is in discharge of the covenants of the said Agreement and is on account of sums payable to Group C of the Agreement. Therefore, the cause of action does not lie against Group B, which is the Respondent Company.

(4) It is further stated that the Petitioner is referring to an Arbitral Award dated 18th May, 2016 wherein the Respondents arrayed therein are ordered to pay the Petitioner the amounts stated therein. The Respondent Company refutes this and submits that the Arbitral Award was not upon itself, but upon the three parties listed therein. The Petitioner further claim an amount of Rs.22,84,07,970/- as the amount in default as per Section 5 (8) (f) of the IBC, 2016. The Respondents submits that, the amount received by it in pursuance of the Agreement referred above is neither raised by it nor has the effect of commercial borrowing, since it is the very part



consideration paid/payable for the purchase of the entire shares of the Respondent Company. Hence, in the present case, the Respondent Company never agreed to accept the funds in the nature of the loan or debt. In that senses, the Petitioner to this petition cannot be termed as 'Financial Creditor' the Respondent cannot be termed as 'Corporate Debtor' and as such, this petition may be dismissed on these grounds alone.

4. Heard Shri R. Ashok Kumar, learned Counsel for the Petitioner. We have carefully perused the pleadings of the party and the extant provisions of the Code and the law.
5. Shri R. Ashok Kumar, the learned Counsel for the Petitioner submits that the Award dated 18.05.2016 was passed by Hon'ble Justice G. Patri Basavanna Goud (Retd.) as Sole Arbitrator by inter alia declaring that the claimant is held entitled to recover from the Respondent a sum of Rs.10,06,00,000/-(Rupees Ten Crores Six Lakhs Only) with interest thereon at 18% per annum from 28.10.2011 till the date of realisation. Aggrieved by the said Award, the Corporate Debtor along with others have filed A.S.No.138/2016 before the Court of the XXX ADDL. City Civil & Sessions Judge, Bangalore City dated 24.04.2019, under Section 34 of the Arbitration and Conciliation Act, 1996 and the same was dismissed judgement dated 24th April, 2019 with costs. Therefore, the learned counsel urged the Tribunal to admit the case as Petition is filed in accordance with law and debt and default are not in question and also suggested a qualified Resolution Professional namely Mr. Madhugir Venkatarayappa Sudarshan, with Registration No. IBBI/IPA-002/IP-N00561/2017-18/11707.
6. The case is listed for admission on various dates viz. 18.01.2019, 23.01.2019, 13.03.2019, 27.03.2019, 03.04.2019, 26.04.2019, 30.05.2019, 24.06.2019, 12.07.2019, 15.07.2019, 17.07.2019, 25.07.2019, 13.08.2019, 26.08.2019, 24.09.2019 & 27.09.2019.



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The case is adjourned on all these dates due to various reasons, at the request of the Petitioner for compliance of office objections, serving the notice etc. to settle issue etc. However, the Respondent failed to avail the opportunity given by the Adjudicating Authority to settle the issue. Therefore, there is no other alternative for us except to adjudicate the matter as merits.

7. So far as the law with regard to initiation of CIRP is concerned, Hon'ble NCLAT vide order dated 15th May, 2017 passed in Company Appeal (AT) (Insolvency) No.1 & 2/2017 in the case of M/s.Innoventive Industries Limited vs. ICICI Bank & Anr. has dealt the issue of admission of a case filed under Section 7 of the Code, under Paras 55 to 58, which are extracted below:

"55. Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I&B Code. As per sub-section (1) of Section 7 of the I&B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including:

- i. "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;*
- ii. The name of the resolution professional proposed to act as an interim resolution professional; and*
- iii. Any other information as may be specified by the Board.*

56. The procedure once an application is filed by the financial creditor with the Adjudicating Authority is specified in sub-section (4) of Section 7 to sub-section (7) of Section 7 of the Code. As sub-section (4) of Section 7 of the I&B Code:

"(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or



on the basis of other evidence furnished by the financial creditor under sub-section (3).”

57. Sub-section (5) of Section 7 of the I&B Code provides for admission or rejection of application of a financial creditor. Where the Adjudicating Authority is satisfied that.....the documents are complete or incomplete.

58. The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority’s summary adjudication, though limited to ‘ascertainment’ and ‘satisfaction’.”

The Hon’ble Supreme Court has also upheld the above judgement in Civil Appeal Nos.8337-8338 of 2017 vide judgment dated 31st August, 2017. The Hon’ble Supreme Court has adverted to Section 7, at para 28, which reads as under:

“28. When it comes to financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the Corporate Debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the



adjudicating authority by registered post or speed post to the registered office of the Corporate Debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

8. As stated supra, the debt became final when an Award dated 18.05.2016 was passed by the Arbitral Tribunal vide C.M.P.No.55/2012. Therefore, there is no dispute with regard to the alleged amount. The contention that the Corporate Debtor is not responsible for payment of the Arbitral Award is not at all tenable. The award empowers the Financial Creditor to recover the Award amount from the Respondent. The Corporate Debtor is also given sufficient time for repayment in the light of the debt and default apparent on the facts of the record. However, the Corporate Debtor is failed to avail the opportunity. The instant Company Petition is filed in accordance with law and the debt and default admittedly are not in dispute and also suggested a suitable and qualified Resolution Professional namely Mr. Madhugiri Venkatarayappa Sudarshan, with Registration No. IBBI/IPA-002/IP-N00561/2017-18/11707, who has filed his Written Communication in Form 2 dated 08.10.2018 by inter alia declaring that no disciplinary proceedings



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pending against him with the Board or ICSI Institute Insolvency Professional and he is eligible to be appointed as a Resolution Professional in respect of the Corporate Debtor in accordance with provisions of the IBBI (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016. Therefore we are of the considered opinion, that the instant Company Petition is a fit case to admit by initiating CIRP appointing an IRP, and imposing moratorium etc. in respect of the Corporate Debtor.

9. In view of the above facts and circumstances of the case, by exercising powers conferred on this Adjudicating Authority, U/s 7(5)(a) and other extant provisions of the IBC, 2016, we hereby admitted C.P.(IB)No.43/BB/2019 by initiating Corporate Insolvency Resolution Process (CIRP) in respect of Respondent/Corporate Debtor with the following consequential directions:

- 1) **Mr.Madhugir Venkatarayappa Sudarshan**, bearing **Registration No.IBBI/IPA-002/IP-N00561/2017-18/11707**, who is qualified Resolution Professional, is hereby appointed as Interim Resolution Professional, in respect of the Respondent/Corporate Debtor namely M/s.Badami Sugars Limited to carry out the CIRP as mentioned under the Insolvency and Bankruptcy Code, 2016 and various rules issued by IBBI from time to time;
- 2) The following moratorium is declared prohibiting all of the following, namely:
 - a) the institution of suits or continuation of pending suits or proceedings against the Respondent/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;
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor;
- e) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;
- f) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
- g) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;
- 3) The IRP is directed to follow all extant provisions of the IBC, 2016 and all extant rules including fees rules as framed by IBBI from time to time. The IRP is hereby directed to file progress reports to the Adjudicating Authority from time to time.
- 4) The Board of Directors and all the staff of Respondent/ Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.
- 5) Post the case for report of IRP on **05.11.2019.**

*This order received
on 09/10/2019 @ 12.10 P.m
MV Sundha
IRP*

(Signature)
(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

Puja



(Signature)
(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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OF THE ORIGINAL**

(Signature)
Deputy/Registrar
National Company Law Tribunal
Bengaluru Bench

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