

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA
CP(IB) No. 128/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:

HDFC Bank Ltd., a company incorporated under the Companies Act, 1956, carrying on banking business under License granted by Reserve Bank of India and registered under the Banking Regulation Act, 1949, having its Registered Office at HDFC Bank House, Senapati Bapat Marg, Lower Parel (West), Mumbai 400013 and having its Branch office, inter-alia, at Jardine House, 1st Floor, 4, Clive Row, Ps- Hare Street, Kolkata, West Bengal- 700001.

.....Financial Creditor

-Versus-

Tamra Dhatu Udyog Private 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- U27209BR2006PTC109251 and its registered office at 2, N.C. Dutta Sarani, Sagar Estate, 7th Floor, Room No.709 Kolkata 700001 and also at PS Srijan Corporate Park, Tower – 1, Unit No. 901 Plot G- 2, GP Block, Sector V, Salt Lake City Kolkata- 700091, in the state of West Bengal

.... Corporate Debtor

Date of Hearing :1st April, 2022

Date of pronouncing the order : 25th May, 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. Joy Saha, Senior Advocate
2. Mr. PadamKhaitan, Advocate
3. Mr. Jishnu Chowdhury, Advocate
4. Mr. AnunoyBasu, Advocate
5. Srinjoy Bhattacharya, Advocate

For the Corporate Debtor :

- 1.** Ms. Urmila Chakraborty, Advocate
- 2.** Ms. PrithaBasu, 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 **HDFC Bank Limited**(hereinafter referred to as the Financial Creditor), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Tamra Dhatu Udyog Private Limited** (hereinafter referred to as the Corporate Debtor).
3. Part I of this application contains particulars of the Applicant being the Financial Creditor.

Part II of this application contains particulars of the Corporate Debtor. Part III of this application contains particulars of the Proposed Interim Resolution Professional. Part IV of this application contains particulars of the Financial Debt. Part V of this application contains particulars of the Financial Debt Documents, Records and Evidence of Default.
4. The Financial Creditor is a banking company within the meaning of Companies Act 1956, carrying on banking business under a license granted by the Reserve Bank of India (RBI) and is registered under the Banking Regulation Act, 1949. The Corporate Debtor is engaged in the business of trading of non-ferrous metals, manufacturing and selling of copper wire, strips, conductors both bare and paper insulated, wires and cables and tinned copper wires, etc.

5. The case of the Financial Creditor is that, in November 2014, the corporate debtor approached the applicant bank to avail certain credit facilities. Pursuant thereto, the financial creditor, by way of a sanction letter dated 25 November 2014, sanctioned said credit facilities to the corporate debtor, which are as follows:
 - i) Sale Invoice Financing facility with a limit of Rs. 5 Crores
 - ii) LC Discounting facility with a limit of Rs. 75 Crores
 - iii) FX PSR (Forex Pre-Settlement Risk) facility to the tune of Rs. 5 Crores.A copy of the said sanction letter dated 25 November 2014 is annexed to the application as Annexure 5.
6. Subsequent thereto, the board resolution was passed by the board of the corporate debtor on 29 November 2014 authorising it to avail the credit facilities extended by the applicant bank. A copy of the said Board Resolution is annexed to the application as Annexure 6.
7. Thereafter, by a letter dated 29 November 2014, the corporate debtor requested the applicant bank to release the invoice financing facility of Rs. 5crores sanctioned by it. Pursuant to the same, the applicant bank caused the corporate debtor to execute security documents and thereafter, it released the credit facilities under the sanction letter dated 25th November 2014.
8. Thereafter, in the year 2015, the Corporate Debtor approached the applicant bank for revision in terms of the credit facilities extended to it. Pursuant thereto, by way of a sanction letter dated 1 October 2015, the applicant bank, upon causing the Corporate Debtor to execute certain security documents, revised the terms of the credit facilities extended to the Coprorate Debtor.
9. Thereafter, by way of sanction letter dated 6 November 2015, the applicant bank revised the credit facilities extended by it to the corporate debtor. Pursuant thereto, the board of directors of the corporate debtor passed a board resolution dated 9 November 2015 authorising it to avail the credit facilities extended by the applicant bank.
10. Thereafter, the corporate debtor issued a letter dated 9 November 2015 to the applicant bank set up Invoice Finance Limit of Rs. 10 crores in its account. Pursuant thereto, the Financial Creditor caused the Corporate Debtor to release

certain security documents. Subsequently, the Financial Creditor duly released the credit facilities contemplated under the sanction letter dated 6 November 2015 sought by the Corporate Debtor.

11. Thereafter, on 23 August 2016, the corporate debtor issued a letter dated 23 August 2016 to the applicant bank requesting it to set up the Letter of Credit (LC) Discounting facility of Rs. 5 crores contemplated in the sanction letter dated 6 November 2016. Pursuant thereto, a Board Resolution dated 10 August 2016 was passed by Board of Directors of the corporate debtor authorizing it avail such facility was also submitted to the applicant bank. The applicant bank, to this effect, caused the corporate debtor to execute certain security documents. Subsequently, the financial creditor duly released the credit facilities sought by the corporate debtor in its letter dated 23 August 2016.
12. On 17 January 2017, the applicant bank issued a letter to the corporate debtor intimating it of sanction of Credit Facility for Post Shipment-Foreign Bill Discounting facility with a limit of Rs. 5 crores. A Board Resolution was also passed to that effect. Pursuant thereto, the applicant bank caused the corporate debtor to execute a Continuing Agreement cum Indemnity for Export Credit dated 17 January 2017, and accordingly the applicant bank duly granted the credit facilities contemplated under the sanction letter dated 17 January 2017.
13. Thereafter, on or about 28 February 2017, the applicant bank issued sanction letter to the corporate debtor, amending the terms of the credit facilities extended to it.
14. Thereafter, vide another letter dated 7 March 2017, the applicant bank sanctioned a Post Shipment- Foreign Bill Discounting facility with a limit of Rs. 13 crores to the corporate debtor. Pursuant thereto, the Board of Directors of the corporate debtor passed a board resolution dated 7 March 2017 authorising it to avail the credit facilities sanctioned by the applicant bank vide sanction letters dated 28 February 2017 and 7 March 2017. Upon such Board Resolution being presented to the applicant bank, the applicant bank caused the corporate debtor to execute a Continuing Agreement Cum Indemnity for Export Credit dated 7 March 2017.
15. Thereafter, vide a letter dated letter dated 8 March 2017, the corporate debtor requested the applicant bank to issue the Post Shipment-Foreign Bill Discounting

- (Export Bill Discounting under LC on bank lines) facility for a sum of Rs. 13 crores (enhancement from Rs.5 crores to Rs.13 crores).
16. The applicant bank released all the facilities sanctioned by it vide sanction letters dated 28 February 2017 and 7 March 2017 and as sought for by the Corporate Debtor.
 17. Thereafter, vide the said sanction letter dated 16 September, 2017, the Applicant Bank sanctioned certain facilities. Pursuant thereto, the said Ram Kumar Singhee and Damodar Das Singhee executed a Letter of Continuing Guarantee dated 20 September 2017 in respect of the credit facilities availed by the corporate debtor from the applicant bank.
 18. It is stated that on 7 January 2019, the applicant bank issued a letter to the corporate debtor, revising the limit of the sales bill discounting facility extended to it to Rs. 5 crores. To that effect, the Corporate Debtor issued a letter dated 21 January 2019 to the Financial Creditor requesting it to release the credit facilities sanctioned by it by way of the letter dated 7 January 2019. Upon the Corporate Debtor executing certain security documents, the applicant bank released all the facility sanctioned by it vide sanction letter dated 21 January 2019 as sought for by the corporate debtor.
 19. The total amount claimed to be in default is Rs.18,49,91,155.19 paise as on 28 November 2019 plus interest @11.40% p.a. (rate of interest being 9% and penal interest being 2%) till date of payment of dues.
 20. The Financial Creditor states that the Corporate Debtor failed and neglected to service the loan and repay its dues in accordance with the terms and conditions of the various sanction letters. As a result, the Financial Creditor was constrained to classify the accounts of the Corporate Debtor as a Non-Performing Asset ("NPA") under the extant guidelines of the Reserve Bank of India on 5 November 2019.
 21. After being declared an NPA, the corporate debtor issued a cheque bearing no. 809219 dated 8 November 2019 to the tune of Rs. 19,50,95,971.73p drawn on Allahabad Bank, Industrial Finance Branch, Kolkata in favour of the applicant bank. However, upon being sent for collection on 13 November 2019, the cheques were returned unpaid on account of "Insufficiency of Funds".

22. In these circumstances, the financial creditor was constrained to terminate the financial facilities being availed by the Corporate Debtor vide recall notice dated 2 December 2019 issued by its advocates. The Financial Creditor states that the Corporate Debtor has failed and neglected to service its dues and pay its debts till date.
23. In order to support its contentions and to prove the amount in default and the failure on part of the Corporate Debtor to discharge its obligations, the Financial Creditor has placed on record Annexures 5 to 46 in part IV of the Application. Particulars of the Financial debt, record and evidence of the default are contained at page 27 of the application as Annexures 49 to 52.
24. **According to the Corporate Debtor**, the present petition is not maintainable for the following reasons:
- i) The petition was filed on January 13, 2020. Prior to the filing of the petition, on December 10, 2019 pursuant to the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated June 7, 2019 (at page 17 of Reply), 6 out of 8 lenders of Corporate Debtor including the lead bank representing 92.33% by value and 75% by number (pages 8 & 9 of Reply) have entered into an Inter-Creditor Agreement dated December 10, 2019, inter alia, to set out an overall framework for revival and rehabilitation of Corporate Debtor and effectuating the implementation of a resolution plan. (at pages 43 of Reply)
 - ii) Clause 10 of the RBI Circular No. RBI/2018-19/203 dated June 7, 2019 provides that:

“In cases where RP is to be implemented, all lenders shall enter into an inter-creditor agreement (ICA), during the above said Review Period, to provide for ground rules for finalization and implementation of the RP in respect of borrowers with credit facilities from more than one lender. The ICA shall provide that any decision agreed by lenders representing 75% by value of total outstanding

credit facilities (fund based as well as non-fund based) and 60% of lenders by number shall be binding upon all the lenders.”

The RBI guidelines are statutory in nature and binding on the Financial Creditor.

- iii) As such, decision of the said six lenders and the resolution plan as stipulated in the ICA is binding upon all the other lenders including the non-signatory lenders, such as, the Financial Creditor herein.
 - iv) As on the date of filing of petition, Financial Creditor had no cause of action to file the petition by virtue of the RBI Circular. Hence, petition is bound to be dismissed. Reliance is placed on **Carona Ltd. vs. Parvathy Swaminathan and Sons** [(2007) 8 SCC 559 para 42].
 - v) Admittedly, Financial Creditor is an unsecured financial creditor having only 4.27% stake in the total credit exposure of above Rs. 450 crores of Corporate Debtor and that none of the other lenders participating in the JLM have filed any insolvency proceeding before this Hon'ble Tribunal.
25. The contention of the Corporate Debtor that 92.3% of the creditors had signed ICA on 10th December, 2019 while the CP was filed on 20th December, 2019 and therefore, CP is not maintainable. The Inter Creditor Agreement is binding on the petitioner and it is therefore precluded from proceeding with this petition.
26. In the **Rejoinder**, the following has been argued by Learned Senior Counsel for the Financial Creditor:-
- i. The debt and date of default are admitted by the Corporate Debtor.
 - ii. The reliance placed on the RBI Circular under the heading “Prudential Frame Work for Resolution of Stressed Assets dated 7th of June, 2019” by the Corporate Debtor is misplaced. The extracts of the RBI Circular No. RBI/2018-19/203 dated June 7, 2019 are produced herein under:

“Implementation of Resolution Plan

9. All lenders must put place Board-approved policies for resolution of stressed assets, including the timelines for resolution. Since default with any lender is a lagging indicator of financial stress faced by the

*borrower, it is expected that the lenders initiate the process of implementing a Resolution Plan (RP) even before a default. In any case, once a borrower is reported to be in default by any of the lenders mentioned at 3(a), 3(b) and 3(c), lenders shall undertake a prima facie review of the borrower account within thirty days from such default “**Review Period**”. During this Review Period of thirty days, lenders may decide on the resolution strategy, including the nature of the RP, the approach for implementation of the RP, etc. The lenders may also choose to initiate legal proceedings for insolvency or recovery.*

10. In cases where RP is to be implemented, all lenders shall enter into an inter-creditor agreement (ICA), during the above-said Review Period, to provide for ground rules for finalisation and implementation of the RP in respect of borrowers with credit facilities from more than one lender. The ICA shall provide that any decision agreed by lenders representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund based) and 60 per cent of lenders by number shall be binding upon all the lenders. Additionally, the ICA may, inter alia, provide for rights and duties of majority lenders, duties and protection of rights of dissenting lenders, treatment of lenders with priority in cash flows/differential security interest, etc. In particular, the RPs shall provide for payment not less than the liquidation value due to the dissenting lenders.

11. In respect of accounts with aggregate exposure above a threshold with the lenders, as indicated below, on or after the ‘reference date’, RP shall be implemented within 180 days from the end of Review Period. The Review Period shall commence not later than:

- i. The reference date, if in default as on reference date; or*
- ii. The date of first default after the reference date.”*

27. According to Ld. Counsel appearing for the Financial Creditor;

- i. The framing of Resolution Plan is *sine qua nonto* trigger a consensus to opt for restructuring in preference to Resolution/Recovery.
- ii. In the present case, *no Resolution Plan was ever framed*. Consequently, there could be no question of 92.33% of the lenders supporting the Resolution.
- iii. The essential issue is not the signing of an Inter Creditor Agreement but is with regard to the framing and implementation of a Resolution Plan.

28. **According to the Financial Creditor**, the said defense taken by the Corporate Debtor should be rejected since Paragraph 11 of the framework @ page 20 of reply mandates implementation within 180 days from the end of the Review period. This period has admittedly elapsed on 4th December, 2020. [minutes of meeting of Joint Lenders dated 4th December, 2020 @ page 81 of reply] Therefore, even if the petitioner was precluded earlier from proceeding against the Corporate Debtor, such bar does not survive. There is nothing in the circular which permits extension of this period.
29. Further, regarding the above defence taken by the Corporate Debtor, the Financial Creditor has relied on the judgment of **Amitabh Kumar Jha -v- Bank of India &Ors** [Company Appeal (AT) Insolvency No. 1392 of 2019] wherein it has been held by the Hon'ble NCLAT that the Inter Creditor Agreement is not binding on dissenting FC.
30. We have heard the Ld. Sr. Counsel on behalf of the Financial Creditor and the Ld. Counsel on behalf of the Corporate Debtor and perused through the record.
31. In the matter of **Amitabh Kumar Jha -v- Bank of India &Ors** [Company Appeal (AT) Insolvency No. 1392 of 2019], the Hon'ble NCLAT has held the following:

“10. The statutory right across the ambit of Section 7 of the ‘I&B Code’ cannot be curtailed or made subservient to any ‘Inter-Creditor Agreement’. The contractual rights, unless recognised by the statute as a permissible mode, would not override the statutory mechanism and right created and enforceable under statute.”

32. Therefore, an inter-Creditor Agreement does not in any manner curtail or limit the rights of a Financial Creditor in its individual capacity to enforce its rights against the Corporate Debtor in regard to the financial debt which is payable in law.

33. Further, Section 238 of the Code reads as under:

Section 238. Provisions of this Code to override other laws.-

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

34. Hence, even in cases where the contractual rights were recognized by the force of a statute, the provisions of the Insolvency and Bankruptcy Code, 2016, by the virtue of section 238 therein, will have overriding effect and the Intercreditor Agreement entered into between consortium members would not be a bar to the application being admitted under Section 7 of the Insolvency and Bankruptcy Code, 2016.

35. Further, the minutes of meeting of Joint Lenders of A/c Tamra Dhatu Udyog Pvt Ltd (TDUPL) held through Physical mode on 07th of March, 2022 have also been placed on record before this Adjudicating Authority. Paragraph 4 of the said minutes of the meeting dated 7th of March, 2022 are reproduced hereinafter:

“4. Corporate Insolvency Resolution Process

Lenders present in the meeting supported HDFC Bank’s move towards filing the application u/s 7 under IBC’2016 for putting the account into CIRP. Other lenders present in the meeting accorded in – principle approval for joining the CIRP once the account is getting admitted into NCLT. Apart from above, lenders decided to proceed with filing of Personal Insolvency application u/s 95 of IBC’ 2016 after receiving necessary mandate from all lenders in next JLM.”

Copies of the minutes of the said meeting dated 7th March, 2022 is annexed to the written notes of argument provided on behalf of the Financial Creditor and marked “A”.

36. Learned Counsel has argued on the basis of the above minutes of the meetings that all the lenders are ad idem and in favour of approaching learned Tribunal

instead of framing any restructuring plan under the RBI Prudential Framework dated 7th of March, 2019.

37. It is also the plea taken on behalf of the Financial Creditor that the applicant bank is not a signatory to this Inter-Creditor Agreement' and the same is evident at the last page of Inter-Creditor Agreement (page 66 of reply affidavit) the same has not been signed by the HDFC Bank or by the Axis Bank. Therefore, the Financial Creditor had never agreed to any Resolution of the Corporate Debtor. From the above record and the pleadings of parties the following is clear;-
- i. Applicant was not a signatory to the Inter-Creditor Agreement relied on by the Corporate Debtor.
 - ii. The joint lender forum of the Corporate Debtor ratified the decision of the Applicant bank to have filed the present application under Section 7. Other lenders present in the said meeting further accorded in-principal approval for joining the CIRP once the account got admitted by this Adjudicating Authority. Apart from this, the lenders also decided to proceed with filing of personal Insolvency application under Section 95 of IBC, 2016 after receiving necessary mandate.
38. The choice to initiate legal proceedings of the Insolvency Proceedings was always with the lender in terms of Prudential Framework for resolution of stressed assets dated 7th of June, 2019. Any decision agreed by the lenders in paragraph 10 of the above prudential framework of Resolution Plan of stressed assets has to refer to a Resolution Plan and not merely the Constitution of ICA (Inter-Creditor Agreement)
39. Thus framing of Resolution Plan was a *sine qua nonto* opt for restructuring in preference to Resolution/ recovery. However, in the present case, admittedly no Resolution Plan was framed and therefore, there is no question of 92.33% of lenders supporting the Resolution Plan. Rather, as is mentioned above, the lender ratified the decision of the applicant bank to initiate present proceedings under Section 7 of IBC.
40. In addition to the above, there is no provision in the RBI prudential framework for restraining any lender from instituting proceedings for recovering its dues and if

the claim of a lender was getting time barred by limitation, it could not wait for the decisions of the other lender or some of the lender.

41. It is, accordingly, hereby ordered as follows: -

- a) The application bearing **CP (IB) No. 128/KB/2020** filed by **HDFC Bank Limited**(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 **TamraDhatu Udyog Private Limited** , CIN: U27209BR2006PTC109251, 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) **Ms. Mamta Binani**, registration number **IBBI/IPA-002/IP-N00086/2017-18/10227**, email: **mamtabinani@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.

42. **CP (IB) No. 128/KB/2020** to come up on **12.07.2022** for filing the progress report.

43. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 25th day of May, 2022

SM[LRA]