

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-V**

**CP (IB) No. 1243/MB-V/2022**

Under Section 7 of the I&B Code, 2016

In the matter of:

**Saraswat Co-operative Bank Limited**

...Financial Creditor/Applicant

**Vs**

**Makjai Laboratories Pvt Ltd**

[CIN: U24231MH1992PTC068840]

...Corporate Debtor/Respondent

**Order Dated: 21.07.2023**

*Coram:*

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

*Appearances (via videoconferencing):*

For the Petitioner(s) : Mr. Nikhil Rajani, Advocate.

For the Respondent(s) : None.

**ORDER**

***Per: Kuldip Kumar Kareer, Member (Judicial)***

1. This is an application bearing C.P. (IB) No. 1243/MB-V/2022 filed by **Saraswat Co-operative Bank Limited**, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (hereinafter called as “**Code**”) seeking initiation of Corporate Insolvency Resolution Process (hereinafter called as “**CIRP**”) against **Makjai Laboratories Pvt Ltd**, Corporate Debtor, claiming total default of Rs.6,72,10,022.75 (Rupees six crore seventy-two lakh ten thousand twenty two and seventy-two paise only) as on 14.10.2022.
2. The Dates of Default as mentioned in Part-IV of the Petition are 02.11.2020 and 13.07.2022. The Petition was filed on 11.11.2022. The account of the Corporate Debtor was classified NPA on 02.11.2020.
3. The case of the Financial Creditor is that:
  - a) In 2018, the Corporate Debtor approached the Financial Creditor for grant of financial facilities. The Financial Creditor sanctioned loan under its KWIK – LAP for sum of Rs. 430 lakh upon the terms and conditions mentioned in the Sanction Letter dated 27.12.2018.
  - b) The said facility was repayable with prime lending rate @ 14.40% p.a. on the given date of sanction. The repayment of the said facilities was secured by the Personal Guarantees of Mrs. Veena Mohan Mulherkar and Mr. Mohan Madhukar Mulherkar and by hypothecation of its tangible movables and mortgaged of plot of land and building situated at MIDC Kolhapur.

- c) On 04.01.2019, in lieu of the facilities availed, various documents were executed by the Corporate Debtor including Demand Promissory Note, Loan Agreement, Agreement of Hypothecation and Mortgage by deposit of title deeds in respect of plot of land and building situated at MIDC Kolhapur.
- d) At the request of the Corporate Debtor, the Financial Creditor conveyed certain modification in terms of original Sanction Letter dated 27.12.2018 and for disbursement of Term Loan Facility upon terms and condition as detailed in the Sanction Letter dated 17.09.2020.
- e) On 19.09.2020, in lieu of the facilities being availed, various documents were executed by the Corporate Debtor including Demand Promissory Note, Loan Agreement, Agreement of Hypothecation and Mortgage by Deposit of Title Deeds in respect of plot of land and building situated at MIDC Kolhapur.
4. As per sanction letter dated 27.12.2018 bearing Ref No. SCB/MBK/2018-19/ADV/LAP and sanction letter dated 17.09.2020 bearing Ref No. SCB/Zone VIII/SANCLET/2020-21/429 the Corporate Debtor was granted loan facilities of Rs. 4,30,00,000/- and Rs. 100,00,000/- respectively.
5. However, the Corporate Debtor committed default in repayment of loan amount on account of which the loan accounts under the facilities were classified as NPA w.e.f. 02.11.2020 in accordance with the directives and guidelines issued by Reserve Bank of India. The Financial Creditor issued Notice dated 15.05.2021, under section 13(2) of the SARFAESI Act, 2002 calling upon the Corporate Debtor and its Guarantor to pay the outstanding

amount of Rs. 5,60,79,840.27 due and payable as on 11.05.2021 with further interest at the contractual rate along with cost, charges and expense till payment or realisation.

6. The Financial Creditor further issued Recall Notice dated 13.07.2021 upon the Corporate Debtor claiming outstanding amount of Rs.6,48,14,280/-.
7. The Financial Creditor filed statement of Accounts of the Corporate Debtor for period from 17.09.2020 to 26.04.2021.

**Reply filed by the Corporate Debtor**

8. The Corporate Debtor has filed its Affidavit-in-reply dated 06.04.2023 and submits as under:
  - a) Corporate Debtor is a part of Makjai Group of Companies, an Indian Pharmaceutical conglomerate having a global footprint. The Corporate Debtor is an MSME registered entity and is governed by the provisions of Micro, Small and Medium Enterprise Development Act, 2006.
  - b) The Corporate Debtor submitted that, between 2019-2020, in order to fulfil the financial and commercial obligations, the Corporate Debtor availed credit facility in the nature of term loan and overdraft cash credit, from the Financial Creditor vide sanction letter dated 04.01.2019 and 17.09.2020 respectively. The Corporate Debtor executed various documents in favour of the Financial Creditor by hypothecating the stocks, debtors, goods and also executed registered mortgage of one immovable property.
  - c) Within a year loan disbursement, Pfizer announced the closure of its two major manufacturing plants in India that make generic injectables

lie penicillin as a response to falling demand. Over 1,700 employees were impacted by the closure of the two factories in the states of Tamil Nadu and Maharashtra. As a result, the Corporate Debtors business affiliation with Pfizer since the last 16 years was determined. This whole event not only grievously impacted the Corporate Debtor's source of income but also created a massive burden of fixed overheads on the Corporate Debtor's shoulders.

- d) In the meantime, certain dispute also arose between Pfizer and the Corporate Debtor which led to the closure of its manufacturing activities of Gelusil Tablet and Liquid. The said dispute is pending before the Hon'ble High Court.
- e) Eventually, during the period, the international and Indian economy was hit by the Covid-19 outbreak and a lockdown was declared by the Government of India in March 2020. The Corporate Debtor being the pharmaceutical processing unit ran at a decreased capacity and factory became underutilized after the workers walked back home. Furthermore, a disrupted supply chain hindered the availability of services such as raw materials and packaging resources.
- f) These two-unfortunate series of events disabled the Corporate Debtor financially. As a result, from 2020 onwards, the Corporate Debtor could not re-pay some of the instalments of the loans.
- g) Since the abrupt cessation of contract with Pfizer, the Corporate Debtor has so far spent Rs.2.7 crore on variable and recurring overheads such as maintenance of manufacturing unit including heating-ventilation-air conditioning, staff and labour cost, purified water system etc.

- h) Vide Loan Agreement dated 24.12.2018, a business term loan of Rs.4,30,00,000/- was granted to the Corporate Debtor by the Financial Creditor. In consideration of the said loan, the Corporate Debtor by way of security, agreed to create a Mortgage on Unit No. D-33 situated at Gokul Shirgoan MIDC, Kolhapur-416003.
- i) By way of further security, stock of the Corporate Debtor amounting to Rs.27,00,000/- was hypothecated, vide deed of hypothecation dated 04.01.2019.
- j) As per the Sanction Letter dated 27.12.2018, the re-payment of term loan was to be made not later than 120 months i.e. 10 years from the date of demand of re-payment of loan by the Financial Creditor. The Corporate Debtor has paid 15 instalments out of 24 instalments in the span of two years. Thereafter, the Corporate Debtor availed an overdraft facility of Rs.1,00,00,000/- vide Loan Agreement dated 19.09.2020.
- k) The aforesaid overdraft cash credit facility availed by the Corporate Debtor was secured against the immovable property situated at Unit No. D-33, Gokul Shirgoan MIDC, Kolhapur-416003 and further at the request of the Corporate Debtor, the Financial Creditor was pleased to carry out certain modifications in the original sanction letter dated 27.12.2018.
- l) As an additional security, the stock of the Corporate Debtor amounting to Rs.1,00,00,000/- was hypothecated to secure the overdraft credit facility vide hypothecation deed dated 19.09.2020.
- m) According to Section 77 of the Companies Act, 2013, all types of charges created by a Company are to be registered by the Registrar of

Companies, where they are non-complaint and are not filed with the Registrar of Companies for registration, it shall be void as against the liquidator and any other creditor of the Company. Therefore, the Financial creditor does not stand to benefit by initiating the process under the insolvency court but, in fact, will be put to a clear disadvantage.

- n) It is further stated that the Corporate Debtor has always been a self-sustained company and commercially solvent, although in the present circumstances, the Corporate Debtor would need a brief gestation period to re-gain its financial strength. On the sole premises that the Corporate Debtor could not repay few loan instalments, to perceive the Corporate Debtor as financially vulnerable, would be a travesty of justice and would militate against the very intent of the insolvency code. Also, the Micro, Small and Medium Enterprises contribute significantly to employment, entrepreneurship and growth in the economy.
- o) The Reserve Bank of India issued a circular to support the MSME entities during Covid-19, and also similar protective orders were passed by the Hon'ble Supreme Court:
  - i. The Hon'ble Supreme Court's order dated 03.09.2020 in **Gajendra Sharma Vs. Union of India & amp; Anr**, WP 825/2020 granted a stay on classification of any encounters NPA. The said order stated as under:

*“In view of the above, the accounts which were not declared NPA till 31.08.2020 shall not be declared NPA till further orders.”*

- ii. The above Petition was disposed off on November 2020, but there was no express vacation of the interim relief prohibiting NPA classification. The Hon'ble Supreme Court did so only vide its order dated 23.03.2021 in WP 476 of 2020 along with connected writ Petitions. Thus, there was an express prohibition for classification of any account as NPA till 23.03.2021.
- iii. As per the above judgment of the Hon'ble Supreme Court, the Financial Creditor cannot charge penal interest as mentioned in the recall notice dated 15.05.2021 and 13.07.2022.
- iv. The aforesaid judgment clearly states that since the stay against NPA has been vacated as on 23.03.2021, the banks shall accordingly start classification and reporting of the defaulted accounts as NPA, as per the applicable norms and guidelines for the asset classification.
- p) It is further stated that SARFAESI notice dated 15.05.2021 and 13.07.2022 are untenable in law, since the Corporate Debtor is secured by the RBI's circular. That, the downgrading of the loan account no Bearing SLPUB/312894, to a non-performing Asset on 02.11.2020 is erroneous and the calculations of the interest therein is not accurate.
- q) Vide email dated 05.12.2020, the Corporate Debtor had requested the financial Creditor to invoke the Automatic Collateral Free emergency credit scheme launched by the government and via the same mail the Corporate Debtor has also questioned the Financial Creditor as to why the Corporate Debtor was not given the said benefit.

**Findings/Observations:**

9. We have heard the Counsel for the parties and gone through the record.
10. During the course of arguments, the Counsel for the Applicant has argued that in this case, a clear-cut case of admission under Section 7 is made out as it stands proves on record that the Corporate Debtor was sanctioned credit facilities of Rs. 4.30 lacs vide sanction letter dated 27.12.2018. The Counsel for the Applicant has further referred to the letter dated 04.01.2019 whereby the Corporate Debtor accepted the terms and conditions incorporated in the sanction letter. The Counsel for the Applicant has further referred to letter dated 17.09.2020 (Exhibit-P) and to the letter of agreement (Exhibit-U) executed between the parties. It has also been pointed out that vide notice dated 15.05.2021 which was given under Section 13(2) of the SARFAESI Act. The loan facility was recalled. According to the Counsel for the Applicant, the date of default in this case is 13.07.2022 when the recall notice (Exhibit-U) was issued to the Corporate Debtor.
11. On the other hand, the Counsel for the Respondent/Corporate Debtor has argued that the Corporate Debtor is an MSME and has been hit hard due to certain circumstances under which the contract entered into between the Pfizer Limited and the Corporate Debtor fizzled out. In this regard, it has been pointed out by the Counsel for the Corporate Debtor that Pfizer announced closure of two its manufacturing plants in India. Apart from that, business was badly hit by Covid-19 break out and the lockdown. In addition to this, with the abrupt cessation of contract with Pfizer, the Corporate Debtor suffered losses as it had invested heavily in the wake of the contract with Pfizer.

12. The Counsel for the Corporate Debtor has further pointed out that the present application under 7 is hit by Section 10A of the Code, as admittedly, the date of default given in Part-IV of the application is 02.11.2020 as well as 13.07.2022 and the Petition is liable to be dismissed on this ground alone.
13. We have thoughtfully considered the above contentions raised by the Counsel for the Parties and have gone through the record.
14. In this case, as per Part-IV of the application under Section 7 of the Code, two dates of default are mentioned as 02.11.2020 and 13.07.2022. It has further been pleaded by the Applicant in Part-IV that first notice under Section 13(2) under the SARFAESI Act was issued on 15.05.2021 calling upon the Corporate Debtor and its Guarantors to pay the outstanding amount of Rs. 5.60 Crores. It has further been mentioned in Part-IV that subsequently, another notice under Section 13(2) of SARFAESI Act, 2002 was also issued on 13.07.2022. It is also mentioned in Part-IV itself that the account under the facilities was classified as NPA with effect from 02.11.2020. Even in the aforesaid notices dated 15.05.2021 and 13.07.2022 under the SARFAESI Act, it is specifically mentioned that the loan was classified as NPA as on 02.11.2020. That being so, practically, the default took place sometimes prior to 02.11.2020 as admittedly an account is declared NPA, as per the guidelines of RBI, either after 60 or 90 days from the date of default. Even in Part-IV of the Petition, the applicant has candidly admitted that the account was declared NPA on 02.11.2020. If the default took place within a period of 60 or 90 days prior to 02.11.2020, the date of default clearly falls within the period covered under Section 10A of the Code.
15. Once it is admitted that the account of the Corporate Debtor was declared NPA on 02.11.2020, it clearly means that the default took place in the 10A period. It is well settled that for the purpose of Section 7 or 9 of the Code, the

first date of default is to be taken into consideration for triggering the CIRP process. In Laxmi Pat Surana Vs. Union Bank of India and another 2021 ibclaw.in 53 SC, it was held that Section 7 comes into play when the Corporate Debtor commits default as Section 7 consciously uses the expression “default” and not the date of notifying the loan of the Corporate Debtor as NPA. It was further held that the expression “default” has been defined in Section 3(12) to mean non-payment of debt when whole or any part of instalment of the amount of debt has become due and payable and is not paid by the Debtor or the Corporate Debtor as the case may be. It is further well settled that the date of default cannot be shifted according to the convenience of the Applicant. It has been held by the Hon’ble Supreme Court in the case of Ramesh Kymal Vs. Seimens Gamesa Renewable Power Pvt. Ltd. 2021 ibclaw.in 08 that date of default cannot be changed.

16. In the light of the clear-cut admission made by the Applicant that the date of default was 02.11.2020 when the account of the Corporate Debtor was declared NPA or any time in the preceding months from 02.11.2020, it is clear that the date of default falls within Section 10A period i.e. from 25.03.2020 to 24.03.2021. That being so, as per Section 10A, no Petition under Section 7 can ever be filed under provisions of Section 10A IBC, if the default has taken place during the period covered under the said section. Therefore, in our considered view, the Petition deserves to be dismissed being barred under Section 10-A of the Code.

17. As a result of the above discussion, the above Petition is **dismissed**.

Sd/-  
ANURADHA SANJAY BHATIA  
MEMBER (TECHNICAL)

Sd/-  
KULDIP KUMAR KAREER  
MEMBER (JUDICIAL)