

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

C.P. (IB)-4230/MB/2018

Under section 7 of the IBC, 2016

In the matter of:

Vistra (ITCL) India Limited
IL & FS Financial Centre, Plot No. C
22, G Block, Bandra Kurla Complex,
Bandra (East), Mumbai - 400051

...Petitioner

v/s.

Vaishno Devi Dairy Products Limited,
Gat No. 88/1/B, Nandur, Tal, Daund, Pune -
412202

.... Corporate Debtor

Order delivered on: 03.09.2019

Coram: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)
Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner: Faran Khan, Rishabh Dhanuka, Advocates
i/b Indus Law

For the Respondent: Ashish Pyasi a/w Umang Thakar i/ Dhir
and Dhir Associates for Corporate Debtor

Per: Bhaskara Pantula Mohan, Member (Judicial)

ORDER

1. This Company Petition is filed by Vistra ITCL (india) Limited (hereinafter called "Petitioner") against Vaishno Devi Dairy Products Limited (hereinafter called "Corporate Debtor") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor alleging that Corporate Debtor committed default in making payment to the extent of Rs. 52,50,00,000/- on account of default committed by the Corporate Debtor in relation to Financial Debt owed to the Petitioners vide 5,000 NCD's with face value of Rs. 1,00,000/- each, by invoking the provisions of Section 7 of I & B Code (hereinafter called "Code") read with Rule 4 of Insolvency & Bankruptcy (AAA) Rules, 2016.

Facts as per the Petition

2. The Petition reveals that the Petitioner has filed this Petition in relation to various defaults committed by the Corporate Debtor in repayment of unlisted, unrated, secured, non-convertible, redeemable, Debentures each having face value of Rs. 1,00,000/- each for an aggregate of Rs. 50,00,00,000/-, with a green shoe option for an amount of Rs. 25,00,00,000/-.
3. According to the Petitioner, the Corporate Debtor is a Private Limited Company named Vaishno Devi Dairy Products Private Limited (Formerly known as Vaishno Devi Dairy Products

Limited, Shubhi Agro Industries Private Limited and Shubhi Agro Industries Limited).

4. It is informed that, vide a private placement offer letter, the Corporate Debtor had launched a debt programme, pursuant to which the Corporate Debtor was to from time to time issue and allot unlisted, unrated, secured, non-convertible, redeemable, Debentures each having face value of Rs. 1,00,000/- each for an aggregate of Rs. 50,00,00,000/-, with a green shoe option for an amount of Rs. 25,00,00,000/-.
5. In order to monitor and channel the Cash flow of the Corporate Debtor, an Escrow Account Agreement dated 13.01.2014 was executed between the Petitioner, Corporate Debtor, Karvy and HDFC Bank. Herein the HDFC bank was appointed as 'Escrow Bank'.
6. According to the arrangement between the Parties, the Debentures were to be redeemed as per the Redemption Schedule; the Corporate Debtor has made no payment towards any such redemption and had been in default of its obligation to make payments since 01.01.2016.
7. The Applicant thereafter filed a Company Petition No. 600 of 2016 before the Hon'ble Bombay High Court, however the same was transferred to NCLT Mumbai vide order dated 10.09.2018 passed by the Hon'ble Bombay High Court.
8. It is also brought to our attention by the Petitioner that they had also issued notice under Section 138 of Negotiable Instrument Act dated 10.04.2016 and accordingly thereafter

they filed seven Complaints before the Metropolitan Magistrate Court in lieu of the cheques issued by the Corporate Debtor in favour of the Petitioner herein.

9. Pursuant to Annexure C Pg 18 of the Petitioner following is the particulars of claim of the Petitioners :

Principle Due	Rs. 52,50,00,000/-
Redemption Premium	Rs. 3,87,65,055/-
Interest as on 20 th November 2018	Rs. 23,40,73,973/-
TOTAL	Rs. 79,88,39,028/-

10. Since, the Corporate Debtor failed to repay the aforesaid dues several reminders; the Petitioners have jointly filed the current petition under Section 7 of the Code.

Contentions of the Corporate Debtor

11. The Corporate Debtor filed its reply and denied all the claims, submissions, allegations made by the Petitioner. The Corporate Debtor contends that the Petitioner has not come to court with clean hands and has not set out the true and correct facts in the matter. Furthermore, it is also submitted by the Corporate Debtor that the present Petition is false, frivolous, baseless, illegal, unwarranted and without and cogent evidence.

12. The Corporate Debtor submits that the Petitioner has not rectified the Petition within the prescribed time as specified under Section 7 (5) of the Code and in as per the order of this Court dated 13.11.2018. It is further argued that parties are bound by process as laid down by the Hon'ble Supreme court in *Surrender Trading Company Vs JK Jute mills Company Ltd and Anr (Civil Appeal No. 8400 of 2017)*, and therefore, the Corporate Debtor contends that the Petitioner is estopped and cannot even move to this court.
13. It is also contended that the Petitioner filed with delay is also incomplete since the column asking for the name of Insolvency Resolution professional is empty, which is in contravention to Section 7 (3) (b) of the Code.
14. The Corporate Debtor also urges to dismiss the Petition at the outset since according to him the Petitioner does not fall within the definition of Financial Creditor as provided in Section 5(7) of the Code.
15. It is further argued on behalf of the Counsel of the Corporate Debtor that the Petition has been filed without appropriate authority, i.e. Majority Resolution has not been obtained from the Debenture Holders. The said is argued for the reason that the authority letter relied on by the Petitioner is said to be defective itself.
16. The Corporate Debtor has argued that there have been various contravention to provisions of the Companies Act, 1956 and 2013, Debenture Trustee Agreement, Information memorandum by the Petitioner and Karvy Capital Limited.

17. It is also contended by the Corporate Debtor that Karvy made the alleged allotment without informing the Corporate Debtor and unltra-vires authorities was conferred on them. Therefore, no power can be derived by the Debenture Holders.
18. It is further argued that the Face value of the NCD's as per the pricing supplements is Rs. 1,00,000/-, however, the NCD's have been issued by KCL at different face values as low as Rs. 10,000/-. Therefore, KCL has grossly violated the provisions of the pricing supplements at the time of allotment and transfer of NCD's.
19. The Corporate Debtor submits that various attempts have been made by them to settle the matter with Petitioners; however, Karvy was not interested in cordial settlement and was only interested in closing down the business of the Corporate Debtor. They further inform that various proposals were made by them to make repayment to the debenture holders, out of which only one was placed for voting and the said proposal did not attain majority of votes of the Debenture Holders.
20. The Corporate Debtor informed that he planned to come up with an Initial Public Offer (IPO), for which proper due diligence was required. The Corporate Debtor however submits that Karvy did not provide them details about Debenture Holders that was sought by them. Further, they also submit that since the Securities of the Petitioner Company were not listed and short funding by KCL resulted into Financial Breakdown of the Corporate Debtor.

21. Another defence by the Corporate Debtor is that the Petitioner has wrongfully added the Early Redemption Premium in the amount claimed. Since in this case NCD's have not been redeemed at an early stage, the Corporate Debtor is not liable to pay early Redemption Premium to the Debenture Holder.
22. It is also submitted by the Corporate Debtor the Petitioner has not obtained consent from majority of debenture holders under section for filing Petition under section 7. This Petition has also been filed without passing any majority resolution from other debenture holders.
23. It is worth to mention the Written Submissions of the Corporate Debtor, wherein he has denied the claims and sought dismissal of the Petition on the following grounds:
- a. The Corporate Debtor has argued that the Financial Creditor as per Section 5 (7) of the IBC, Applicant is not a person whom debt is owed since Applicant is not the Creditor to the Corporate Debtor.
 - b. The Corporate Debtor has argued that since the debt assigned/transferred was illegal and contravening the provisions of Companies Act, 2013, also that the Debenture Holders have not established their status as Debenture Holders of the Company.
 - c. Finally the Corporate Debtor submits that insolvency petition is false, frivolous, baseless, illegal and without any cogent evidence and hence the same deserves to be dismissed.

Contentions raised by Petitioners vide Rejoinder and W.S.

24. In his Rejoinder, the Petitioner have pressed the argument that NCD's constitute a 'Financial Debt' within the provisions of Section 5 (8) of the Code. The Petitioner who is the Debenture Trustee has appropriate power under the Companies Act, 2013, SEBI Regulations, 1993, to take necessary actions to protect the interest of the Debenture Holders.
25. In his Rejoinder, the Petitioner argues that the arguments and grounds raised by the Corporate Debtor are merely technical, and bear no merits, are vague and ambiguous.
26. The Petitioners further argue that there has been no default on part of the Debenture Holders Representative in terms of the Information Memorandum (IM) or the Debenture Trustee Agreement (DTA) or with the provisions of the Companies Act, 2013. With this it is also argued that there have been no violations of the IM or DTA by the Petitioners.
27. It is also pressed by the Petitioners that the Corporate Debtor has neither denied the existence of debt owed, nor has he denied the existence of default committed by him. Therefore, since this Petition is in relation to a Financial Creditor under section 7 of the Code, the Tribunal only has to look at the conditions mentioned above and is not required to examine the existence of any alleged dispute.

Findings -

28. That, the objection raised by the Corporate Debtor with regards to Petitioner with regards to the Petitioner not re-filing

the Petition in accordance with Section 7 (5) of the Code is not tenable because the authority to dismiss or reject the Petition in case there is a delay of more than 7 days is a discretionary power, which lies with the Tribunal. The Corporate Debtor seems to have taken no objection earlier and this objection seems a mere after thought, further we find no merit in this argument of the Corporate Debtor.

29. Also the objection raised by the Corporate Debtor with regards to the Petitioner not having the right to file this petition isn't acceptable because vide letter dated 06.12.2018 (Exhibit A-1, Page 14, Petition) Karvy has authorized the Petitioner, who vide their Resolution dated 09.08.2018 have authorised the one Ms. Pragati Gupta, Assistant Manager to represent the Petitioner before the Court. Furthermore, vide the Debenture Trustee Agreement dated 12.01.2014 (Page 30 of Petition), Clause 6.1's proviso allows the Debenture Trustee to initiate action once Debenture Holder Representative is obtained.

30. The defence taken by the Corporate Debtor that the Petition has been filed without any authority because no Majority Resolution containing 75% votes was passed by the Debenture Holders. This arguments cannot be accepted due to the reason that Section 71 (9) and (10) of the Companies Act, 2013 allows the Debenture Trustee to approach the tribunal in case the Company is unable to pay the Debentures. Therefore, the abovementioned provisions override the agreement.

31. Another technical objection raised by the Corporate Debtor is that the Petition filed is incomplete because the name of the Insolvency Professional has not been provided, however, vide

the letter dated 20.12.2018, the Petitioner has filed Form II under Rule 9 has provided the name of the Insolvency Professional.

32. It has also been brought to our attention that the Petitioner through his counsel had also sent a notice dated 10.03.2016 before filing this Petition, for repayment of outstanding amount due and payable against Debentures by the Corporate Debtor.

33. We have carefully gone through the pleadings on record and pursued the submissions made by the counsels for both the sides. On careful perusal of the documents it is noticed that the Corporate Debtor seems to be continuously trying to evade the responsibility of making payments, this can be clearly observed by the documents enclosed by the Petitioner in his Petition and Rejoinder thereof, consisting of Notice dated 10.03.2016, which was not complied by the Corporate Debtor.

34. That, the Petitioner has vide his Petition and Rejoinder placed on record various documents and evidence such as Escrow Account Statement (Exhibit I) evidencing disbursement of facility, therefore, successfully substantiating the existence of debt.

35. It can therefore be transpired from the abovementioned facts that, the Corporate Debtor has defaulted in making payment of debt as per the repayment schedule and has acknowledged the existence of same. Henceforth, we find no logic in the various arguments thereafter, raised by the Corporate Debtor.

36. We have examined the other contentions that have been raised by the Corporate Debtor regarding the maintainability of the Petition and have not found any material on record therefore on verifying the legal position, this Petition deserves admission.

37. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in repaying the amount availed and also places the name of the Insolvency Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Petition under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:

- (I) (a) the institution of suits or continuation of pending suits or proceedings against the 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 (SARFAESI Act);

(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.

- (II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (IV) That the order of moratorium shall have effect from 30.08.2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.
- (V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (VI) That this Bench hereby appoints Mr. Vinay Kumar Aggarwal, having office at Shop No. 11 and 12, Krishna Kunj Building, Above HDFC Bank, 150 Feet Road, Bhayander (W), Mumbai - 401101, Email:- vimalpagarwal@refiffmail.com, having Registration No. IBBI/IPA-001/IP-P00741/2017-18/11247 as

Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

38. Accordingly, this Petition is admitted.

39. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Bhaskara Pantula Mohan
Member (Judicial)

(Prakhar Tandon)