

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 437/MB/2022

[With IAs 1339/2022; 3369/2022 & 1955/2024]

*[Under Section 7 of the Insolvency and Bankruptcy Code, 2016
r/w Rule 4 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

OMKARA ASSETS RECONSTRUCTION PRIVATE LIMITED

[CIN: U67100TZ2014PTC020363]

Registered Office: No. 9, M.P. Nagar First Street

Kongu Nagar Extension, Tirupur

Coimbatore-641607, Tamil Nadu.

Corporate Office: C-515

Kanakia Zillion Junction of LBS Marg & CST Road

BKC Annexe Near Equinox, Kalina, Kurla (West)

Mumbai — 400070, Maharashtra.

...Financial Creditor

V/s

MARSHALL BREEDERS PRIVATE LIMITED

[CIN: U01222MH2000PTC124317]

Registered Office: C&M House, N.D. Patel Road

Nashik-422001, Maharashtra.

...Corporate Debtor

Pronounced: 15.05.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Financial Creditor: Sr. Adv. Prateek Seksaria a/w Adv. Supriya Majumdar, Adv. Nishant Chotani, Adv. Rohit Agarwal and Adv. Ibrahim Shaikh i/b Vaish Associates

Corporate Debtor: Adv. Ashish Pyasi a/w Adv. Karan Grover, Adv. Mukul Bhagtani and Adv. Princi Jaiswal i/b Dhir & Dhir Associates

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Company Petition bearing C.P. (IB) No. 437/MB/2022 (Application) was filed on 29.03.2022, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Omkara Assets Reconstruction Private Limited, the Financial Creditor (FC), through Ms. Yasmeen Nachan, Representative of the FC, authorised *vide* Board Resolution dated 24.07.2021, for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Marshall Breeders Private Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs.12,13,59,715/- (Twelve Crore Thirteen Lakh Fifty-Nine Thousand Seven Hundred Fifteen Rupees) including the principal amount of Rs. 1,58,87,382/- along with the interest of Rs.10,44,20,938/- calculated at the rate of 15 (Fifteen) per cent. per annum and penal interest of Rs.10,51,396/- calculated at the rate of

1(One) per cent. per annum from 30.09.2021 till 24.02.2022. It is based on default in repayment of the loan for Rs.2,20,00,000/- availed of by the CD from Janalaxmi Co-Op. Bank Limited (original lender/Assignor Bank).

1.3 The date of default as mentioned in Part IV of the Application is 30.04.2006, i.e., the date on which the CD's account was classified as Non-Performing Asset (NPA) by the Assignor Bank. However, the CD has been making part-payments and has acknowledged the liability owed to the Assignor Bank in various balance sheets from the year 2006 to 2021, the last time the acknowledgment was made on 31.03.2021. As the CD defaulted in payment of its outstanding dues, the FC prays that CIRP may be initiated in respect of the CD under Section 7 of the IBC.

1.4 The FC filed IA No. 1339/2022 dated 10.05.2022, praying for interim orders to restrain the CD from selling, alienating, encumbering or creating any third party rights on the assets of the CD till the adjudication of the present Application by exercising our inherent and discretionary powers under Section 60(5)(c) of the IBC read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules). It was followed by IA No. 3369/2022 dated 29.11.2022 preferred by the FC, for seeking interim order to restrain the CD from further creation of rights in respect of the shares held by the CD in its group companies, in favour of the daughters of the CD's promoters/directors. Yet another IA No. 1955/2024 is filed by the FC for seeking expeditious disposal of the present Application.

2. CONTENTIONS OF FC

2.1 It is submitted that the original lender is a co-operative bank registered under the Maharashtra Co-Operative Societies Act, 1960, while the CD is a private company, engaged in the business of poultry. For business purposes, the CD sought credit facilities from the original lender and obtained loan of Rs. 2,20,00,000/- (Two Crores Twenty Lakhs Rupees), and executed necessary documents for the same which are as follows:

- a) Letter of Lien and Set Off dated 24.04.2002;
- b) Guarantee Agreement dated 24.04.2002;
- c) Hypothecation Deed dated 29.04.2002;
- d) Demand Promissory Note dated 29.02.2002 in favour of the Original Lender;
- e) Letter of Continuity dated 29.02.2002 in furtherance of the Demand Promissory Note;
- f) Letter dated 13.07.2006 from the C&M Group to the original lender regarding deposit of title deeds of the mortgaged property; and
- g) Agreement for creation of Equitable Mortgage dated 13.07.2006.

2.2 The said loan amount of Rs. 2,20,00,000/- was granted to the CD by the original lender *vide* Sanction Acceptance Letter dated 10.02.2004 sanctioning the credit facilities for Rs.2,20,00,000/-. However, due to default in repayment of the aforesaid loan by the CD, its loan account was declared as NPA on 30.09.2002. In the annual financial statements of the

CD from the year 2004 to 2021, the CD had duly acknowledged the debt and default due to the FC.

2.3 For seeking the repayment of Rs.10,09,90,484/- along with interest, the original lender issued demand notice dated 04.07.2016, under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the CD. Later, symbolic possession of the CD's mortgaged properties was taken by the original lender *vide* Possession Letter dated 06.09.2016.

2.4 It is further submitted that the CD had acknowledged the debt and sought settlement of dues through One Time Settlement (OTS) mechanism *vide* its letter dated 13.02.2006. Subsequently, the Assignor Bank issued demand notice on 04.07.2016 under Section 13(2) of the SARFAESI Act. The Ld. Sr. Counsel for the FC submits that the CD had not only made part-payments for repayment of the aforesaid credit facilities during the period of 2002-2015, but also the financial statements of the CD for the years 2006-2021, acknowledge the debt as well as the default. To substantiate this, the FC relied upon the copy of statement of account from 04.05.2002 to 30.10.2021, calculated by the original lender, statement of account from 01.11.2021 to 24.02.2022, calculated by the FC herein, as well as the financial statements of the CD for the years 2006-2021.

2.5 Apart from declaration of the CD's loan account as NPA, the original lender initiated action against the CD by filing Co-Operative Case No. 1491/2005 before the Ld. Co-Operative Court, Nashik, which adjudicated the matter in favour of the FC, including recovery of Rs.3,38,73,528/- along with

interest *vide* its order dated 15.02.2018, against the CD and its directors. Later, the loan account of the CD was assigned by the Assignor Bank, viz., Janalaxmi Co-Operative Bank Limited, in favour of the FC, *vide* Assignment Agreement dated 31.12.2021. It is further submitted that the record of default by the CD produced by the FC from the Information Utility (IU) as on 31.12.2021, mentions the date of default as 30.09.2002, which is the same as referred to in the Assignment Agreement dated 31.12.2021.

3. CONTENTIONS OF CD

- 3.1 It is submitted by the CD that the Application is not maintainable under Section 7 of the IBC, as the same is incomplete and defective. The FC has failed to produce the documents for proving existence of default along with Authorisation for Assignment (AFA) of the proposed IRP. Thus, the FC has failed to comply with Regulation 7A of the IBBI (Insolvency Professionals) Regulations, 2016 and Sections 2(8), 2A and 4 of the Bankers' Book Evidence Act, 1891.
- 3.2 The CD further submits that the Board Resolution dated 24.07.2021, relied upon by the FC does not give any authority to Ms. Yasmeen Nachan to file the Application under the IBC. There is no specific power of attorney or Board Resolution issued by the alleged FC authorising Ms. Yasmeen Nachan to file any such application. The certificate dated 18.08.2021, issued by Ms. Sujata Mukherjee certifying the Board Resolution dated 24.07.2021, is invalid in the absence of its original.

3.3 The FC has mentioned two default dates, viz., 30.04.2006 and 31.03.2021.

There cannot be two dates of default. This Application is barred by limitation and it is the FC's own case that the NPA date is as old as 30.09.2002. Further, for the purpose of computing limitation under the Limitation Act, 1963, the first date of default is to be considered and the same cannot be shifted. If the FC's claim is put to the limitation test, it becomes abundantly clear that the date of default in the instant case is prior to 30.09.2002 (when the default took place) or at the best 30.09.2002, when the account of the CD was declared as NPA by the Assignor Bank. The said date cannot be shifted by the FC as per its convenience. The claim of the FC is barred by limitation and hence, the FC is not entitled in law to claim the said amount by way of a Petition under Section 7 of the IBC.

3.4 In its reply dated 22.11.2022 to the I.A. No. 1339 of 2022, the CD contended that the FC had already filed M.A. No. 07/2022 before the Ld. Debts Recovery Tribunal--III, Mumbai, at Vashi, Navi Mumbai, for the alleged debt and obtained attachment before judgment, which is currently pending, and, therefore, the FC is indulging in forum shopping for harassing the CD.

3.5 The demand notice dated 04.07.2016, issued by the original lender under Section 13(2) of the SARFAESI Act is not only vague but also invalid on account of non-compliance of applicable rules. Moreover, the Assignment Agreement dated 31.12.2021, between the FC and the original lender is

bad in law, which has been challenged before the Ld. Extra Jt. Civil Judge, Senior Division, Nashik as well as the Hon'ble Bombay High Court.

3.6 It is further submitted that the FC has approached this Tribunal with unclean hands and suppressed material facts and, therefore, it is guilty of *suppressio veri suggestio falsi*. The FC has not only suppressed the material fact/documents but also knows the fact that a fraud has been played upon the CD by the FC.

3.7 The Ld. Counsel for the CD submitted that the conduct of the FC so far clearly displays its mala fide intentions to harass the CD by this Application for initiating CIRP under Section 7 of the IBC. The FC is using the insolvency proceedings under the IBC as an arm-twisting mechanism to put pressure on the CD for giving up more of its properties and making payments to the FC.

4. REJOINDER OF FC

4.1 The FC submitted that the CD resorted to frivolous litigation for prolonging the legal proceedings against it by filing a Special Civil Suit No. 442/2022 before the Ld. Extra Jt. Civil Judge, Senior Division, Nashik, challenging the Assignment Agreement dated 31.12.2021 between the FC and the Assignor Bank. However, the said Civil Suit was dismissed by the Ld. Civil Judge, Senior Division, Nashik *vide* order dated 01.03.2023. The appeal against the said judgment was dismissed by the Hon'ble Bombay High Court on 02.05.2023. Further, the aforesaid debt, being the subject matter of the present Application, was acquired by the

FC from the original lender/Assignor Bank through a transparent bidding process, which was already observed by the Hon'ble Bombay High Court by order dated 03.11.2021. Moreover, the pendency of DRT proceedings does not bear any adverse effect upon the CIRP under the IBC.

4.2 It is submitted that the Board Resolution dated 24.07.2021, authorising Ms. Yasmeen Nachan is valid for filing the present Application and there is no defect in issuing the certified true copy of the Board Resolution by Ms. Sujata Mukherjee as Key Managerial Personnel in terms of Section 2(51) of the Companies Act, 2013.

4.3 The FC further submits that the Application is not barred by limitation merely on ground of the date of NPA declared on 30.09.2002, since the CD had not only made part-payments during the period 2002-2015, but also acknowledged its liability to the original lender (Now FC *vide* the Assignment Agreement dated 31.12.2021), in its own financial statements for the period of 2006-2021, as well as in its letter dated 13.02.2006 addressed to the original lender for settling the dues through OTS.

4.4 The Assignment Agreement dated 31.12.2021 is valid in law as per the Guidelines on Sale of Financial Assets to Securitisation Company/Reconstruction Company (SC/RC) by Multi State Urban Co-Operative Banks dated 28.03.2014 and the Master Direction (Transfer of Loan Exposures) Directions, 2021 dated 24.09.2021. The Ld. Sr. Counsel for the FC relied upon the Hon'ble Supreme Court's decision in

Pandurang Ganpati Chaugule Vs. Vishwasrao Patil Murgud Sahakari Bank Limited, [(2020) 9 SCC, 215] to substantiate his argument.

5. ANALYSIS AND FINDINGS

5.1 We have perused all the documents and pleadings and heard the Ld. Sr. Counsel for the FC and the Ld. Counsel for the CD as also considered every aspect of the matter.

5.2 Upon scrutiny of the documents on record, it is found that the date of default is taken by the FC as the date of declaration of CD's account as NPA by the original lender/Assignor Bank, on 30.04.2006, in Part IV of the Application. However, the FC has stated in its rejoinder that 30.09.2002 is the date of declaring the account of the CD as NPA. The Ld. Sr. Counsel for the FC submitted that 30.04.2006 as mentioned in Part IV of the Application was only a typographic mistake but the actual date of NPA is 30.09.2002. According to the CD, if 30.09.2002 is taken as the date of NPA/date of default, the Application filed on 29.03.2022 is barred by limitation. However, on perusal of the IU information, it is found that the date of NPA is mentioned as 30.09.2002. Schedule I of the Assignment Agreement dated 31.12.2021 also makes mention of date of NPA as 30.09.2002. Further, the CD has not specifically challenged in its pleadings the typographic error of mentioning NPA date as 30.04.2006 in Part IV. We feel that 30.09.2002, being much earlier date to 30.04.2006 would have been helpful to the CD for a defence on the ground of limitation. As regards limitation, we perused the statement of account of the CD, which

shows that the CD has been making part-payments right from 21.11.2002 until 31.01.2015. On examination of the statement of account of the Assignor Bank from 2002 to 2015, it is seen that the CD made a part-payment of Rs. 900,000/- on 21.11.2002 and the last part-payment of Rs. 1,95,644/- was made on 31.01.2015. These part-payments have not been denied or disputed by the CD. Interestingly, the CD's financial statements from the financial years 2004-2005 until 2020-2021 continuously reflect debt due to the Assignor Bank. An amount of Rs.1,53,46,777/- as principal and Rs.15,37,68,911/- as interest is reflected in the annual financial statement of the CD due to the Assignor Bank as on 31.03.2021. It is well settled that part-payments made from time to time and acknowledgment of debt in the CD's annual financial statements have the effect of renewing /extending the period of limitation by another three years within the meaning of Section 18 of the Limitation Act, 1963. Considering these facts, the limitation period would be extended by three years from 31.03.2021. Therefore, it can be safely held that the present Application has been filed within the period of limitation.

5.3 Regarding the contention of the CD as to whether the original lender i.e. Janalaxmi Co-Operative Bank Limited (Assignor Bank) could have assigned the loan in favour of the FC/ARCs, it is seen that Section 5(1) of the SARFAESI Act provides that notwithstanding anything contained in any agreement or any other law for the time being in force, any asset reconstruction company (ARC) may acquire financial assets of any bank or financial institution. Section 5 (1) of SARFAESI Act was amended with

effect from 01.09.2016, to enable ARCs to acquire loans from banking companies. We notice that the expression “banking company” under Section 2(1)(d) of the SARFAESI Act is assigned the same meaning as in Section 5(c) of the Banking Regulation Act, 1949 (Banking Regulation Act). The Banking Regulation Act defines “banking company” as any company which transacts the business of banking. Further, as per the law laid down by the Hon’ble Supreme Court in *Pandurang Ganapati Chaugule Vs. Vishwasrao Patil Murgud Sahakari Bank Limited*, (supra), all co-operative banks under the State legislation and Multi-State Co-operative Banks are “banks” for applicability of SARFAESI Act. Therefore, we are convinced that the Assignor Bank is entitled to assign the debt to the ARC i.e. the FC herein.

5.4 When the issues regarding limitation and assignment of debt are proved in favour of the FC, as also the debt and default admitted by the CD by acknowledgment of debt in its financial statements dated 31.03.2021, we are of the considered view that this Application is only to be admitted. In the circumstances, we hold that there is no need to consider any other contention or rival contention raised by the parties. The Application is complete and satisfies all the necessary requirements for admission under Section 7 of the IBC.

5.5 The FC has proposed the name of Mr. Kamal Rajkumar Sharma, a registered Insolvency Professional having Registration Number-IBBI/IPA-001/IP-P01850/2019-2020/12870 as the Interim Resolution Professional (IRP), to carry out the functions as mentioned under the IBC. The proposed

IRP has given his written consent and the same is placed on record. He also possesses valid AFA as on date.

ORDER

This Application bearing C.P. (IB) No. 437/MB/2022 under Section 7 of the IBC, filed by Omkara Assets Reconstruction Private Limited, the FC, for initiating CIRP in respect of Marshall Breeders Private Limited, the CD, is **admitted**. This Tribunal *vide* order dated 23.12.2022 ordered to maintain *status quo* in respect of shares, as has been set out on Page 9 of IA No. 3369/2022. The said order shall continue until the IRP takes over the management of the CD and the shares are taken custody and control by the RP in terms of Sections 17 and 25 of the IBC respectively. In view of the above, all the IAs have become infructuous and are also hereby disposed of.

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

- I. We prohibit-
 - a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.
- II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.
- IV. That public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Kamal Rajkumar Sharma**, a registered Insolvency Professional having Registration Number- IBBI/IPA-001/IP-P01850/2019-2020/12870 and **e-mail- kamal.sharma@ajallp.com**, having valid AFA up to 30.06.2025 as the Interim Resolution Professional (IRP) to carry out the functions under the IBC. The fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.
- VI. During the CIRP Period, the management of the CD shall vest in the IRP or the RP in terms of Section 17 or Section 25, as the case may be, of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within

a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

- VII. In exercise of the powers under Rule 11 of the NCLT Rules, we order the FC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds becoming available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD.
- IX. The Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.
- X. The Registry is directed to communicate this order to the Insolvency and Bankruptcy Board of India forthwith for information and record.
- XI. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain//