

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.187/7/HDB/2019

U/s 7 of IBC, 2016
R/w Rule 4 of I & B (AAA) Rules, 2016

In the matter of:

Axis Bank Limited
A Banking Company incorporated under Companies Act, 1956
And carrying on banking business under Banking Regulation
Act, 1949, having its registered office at
"Trishul", 3rd Floor, Opposite Samartheshwar Temple
Near Law Garden, Ellis Bridge
Ahmedabad - 380 006.
Corporate Office at Axis House
C-2, Wadia International Centre
PB Marg, Worli, Mumbai- 400 025.
One of its corporate banking branch at
First Floor, No.6-3-879/B
G. Pulla Reddy Building, Greenland
Begumpet, Hyderabad- 500016.

.. Petitioner/
Financial Creditor

VERSUS

Ind- Barath Powergencom Limited
A company registered under the provisions of
The Companies Act, 1956 and
Having registered office at: H. No.8-5-210/43
Plot No.44, Shiva Enclave
Old Bowenpall, Secunderabad.
Rangareddy, Telangana- 500 011.

.. Respondent/
Corporate Debtor

Date of order: 13.11.2019

Coram:

Hon'ble Shri Ratakonda Murali, Member (Judicial)
Hon'ble Shri Narendra Kumar Bhola, Member (Technical)

Parties / counsels present:

For the Petitioner : Shri B. Sri Ram Reddy, Advocate.
For the Respondent: Shri Yogesh Kumar Jagia, Advocate





acknowledged the debt owed by it to the financial creditor to the tune of **Rs.129,10,23,742.57** (Rupees one hundred twenty nine crore ten lakhs twenty three thousand seven hundred forty two and paise fifty seven only), vide its communication dated 03.03.2017 (page 694).

4. The respondent/corporate debtor filed reply. The objections raised in the counter, in brief, are as under:-

(i) The corporate debtor contended that the present petition is not maintainable in view of order dated 30.01.2019 (Annexure-1 to the counter) passed by the Hon'ble NCLAT, which inter alia, reads that:

"If any application of the 'financial creditor' or 'operational creditor' has been dismissed on the ground of these appeals, they may file a fresh application before the adjudicating authority, after notice to the 'corporate debtors' in view of the order passed by us."

The financial creditor-Axis Bank has filed company petition bearing CP (IB) No.300/7/ HDB /2018 and the same was dismissed by the Hon'ble Tribunal by order dated 14.11.2018 on account of commencement of CIRP in Company Petition being CP (IB) No.40/9/ HDB/ 2018 filed by one of the operational creditors, viz. M/s Gandhar Oil Refinery Ltd under section 9 of IBC. However, the same was set aside by the Hon'ble NCLAT by its order dated 30.01.2019 (supra). The corporate debtor contends that instead of issuing notice as directed by order dated 30.01.2019 by the Hon'ble NCLAT the financial creditor intimated decision to proceed for filing insolvency petition.

(ii) That the corporate debtor has availed financial facilities from the consortium of lenders and has submitted One Time Settlement (OTS) to the consortium of lenders on 01.08.2019 vide Annexure-2 to the counter. In view of the OTS, the corporate debtor prays to defer the proceedings.

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(iii) That the corporate debtor consented to settle the outstanding dues of all the operational creditors by entering into settlement agreements, except one M/s Trimex Industries Ltd in respect of which a petition under section 9 is pending before the Tribunal. The corporate debtor claims that such a settlement agreement indicates the bona fides of the corporate debtor and its intent to settle all the issues of outstanding amounts payable to all the financial creditors. The corporate debtor has disclosed the resources being made available to clear the agreed settlement amount in para 4 of its counter. It is submitted that pursuant to garnishee orders an amount of Rs.36.20 crores is lying before the Hon'ble Madras High Court in various civil suits filed by third parties, which are pending adjudication.

(iv) The corporate debtor in its reply prays that the financial creditor be directed to consider One Time Settlement (OTS) proposal submitted for consortium of lenders and till then to keep the present proceedings in abeyance.

5. Rejoinder is filed by the petitioner/ financial creditor, reiterating the averments made in the Petition and denying all the submissions made by the respondent/ corporate debtor in the counter. The petitioner has contended:

(i) That the present petition is not contrary to the direction issued by the Hon'ble NCLAT vide its order dated 30.10.2019. The direction requires the petitioner to file a fresh application under Insolvency and Bankruptcy Code, 2016 after issuance of notice to the corporate debtor. Such notice has been issued by the financial creditor on 05.02.2019 to the corporate debtor for fresh initiation of action under section 7 of the IBC, 2016, wherein it has categorically been mentioned that the notice is as per the NCLAT order dated 30.01.2019. The corporate debtor has received the said notice on 07.02.2019. The petitioner has

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dismissed the allegation of the corporate debtor that the said notice was intimation for proceeding for filing insolvency petition and it is not a notice as mandated by the Hon'ble NCLAT. The petitioner has dismissed such contention of the respondent-corporate debtor as wholly misconceived and contended that the petition is in accordance with the rules mandated under the Act.

(ii) The petitioner has contended that the One Time Settlement (OTS) offered by the corporate debtor was rejected by the financial creditor- Axis Bank vide letter dated 02.08.2019, after obtaining views of other lenders. Reasons for such rejection were also communicated to the corporate debtor.

(iii) The petitioner has questioned the bona fide of the corporate debtor to settle the dues of the financial creditor. The petitioner contended that the operational creditor, namely, M/s Gandhar Oil Refinery India Limited has filed a contempt petition before the Hon'ble NCLAT against the promoter of the corporate debtor for breach of order dated 30.01.2019 of the Hon'ble NCLAT. The petitioner submitted the acts of the corporate debtor as delay tactics with no intentions to settle the dues payable to the financial creditors.

(iv) An amount of Rs.36.20 crores is lying before the Hon'ble Madras High Court in various civil suits filed by third parties, which are pending adjudication. The financial creditor has filed an application in the said suits for impleadment claiming first charge on the receivables and said suits are pending for hearing.

6. The financial creditor has submitted that various opportunities were given to the corporate debtor for payment of dues which the corporate debtor could not avail. No acceptable proposal is submitted by the corporate debtor and that its proposals are nothing but delay tactics and avoidance of effective resolution. The petitioner relied on the decision of the Hon'ble

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Supreme Court in the case of **Innoventive Industries Vs. ICICI Bank** wherein it was held that,

“Adjudicating Authority has to ascertain the existence of a default on the basis of evidence furnished by the Financial Creditor and it is only then that the adjudicating authority may reject the application or otherwise.”

7. We have heard the counsel for financial creditor and the counsel for the corporate debtor. This is an application filed under section 7 of the IBC, 2016. The case of the applicant/ financial creditor is that it has extended various loan facilities to the corporate debtor from time to time. Details of facilities extended are stated supra. Detailed statement of account and certificate of Banker's Book of Evidence Act, 1891 are shown as Annexure-6 (Colly.). The financial creditor also filed necessary documents in support of evidence of extending loan facilities to the corporate debtor. They are shown as Annexures 8 to 26. Details of documents executed by the corporate debtor are furnished at Annexure-28 including details of mortgage.

8. The financial creditor also relied on the Annual Return filed by the corporate debtor before the Registrar of Companies shown at pages 94 to 131 of Paper Booklet, Volume-1. Statement of accounts is shown at pages 134 to 218 of Volume 1 and 2. The financial creditor also relied on acknowledgement of debt dated 02.04.2013 shown at pages 315 to 317 and also relied on balance confirmation letter dated 03.04.2013 which is shown at pages 318 to 320. Further, the learned counsel also relied on one more acknowledgement of debt dated 12.09.2014 shown at pages 406 to 409. The financial creditor thus, filed necessary documents to establish sanction of loan to the corporate debtor. One more acknowledgement of debt is also filed by the financial creditor dated 03.03.2017 shown at page 694 of the paper booklet. As the corporate debtor has committed default, the financial creditor issued Recall-cum-Demand Notice

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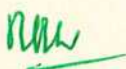
dated 06.02.2018. Annual returns of the corporate debtor for the year 2015-16, 2016-17 and 2017-18 are also filed. Thus, the financial creditor is able to establish sanction of loan and further the corporate debtor has committed default.

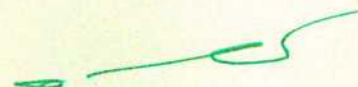
9. It is contended by the learned counsel for the corporate debtor that the petition cannot be admitted under section 7 of IB Code, 2016 since the financial creditor has not complied with the direction issued by the Hon'ble NCLAT in the common order passed in the Company Appeal No.552 of 2019 and 553 of 2019. The learned counsel has filed copy of order of the Hon'ble NCLAT dated 30.01.2019, which is shown as Annexure-4 to the supplementary affidavit filed on behalf of the financial creditor. It is shown at pages 84 to 90.

10. The contention of the learned counsel for the corporate debtor is that the Hon'ble NCLAT while disposing of the appeals directed the financial creditor or the operational creditor, whose petitions were dismissed on the ground of these appeals, can file fresh application before the adjudicating authority after notice to the corporate debtor.

11. The learned counsel for the corporate debtor would contend that this direction of the Hon'ble NCLAT was not complied with by the financial creditor and no prior notice was issued to the corporate debtor by the financial creditor and the financial creditor directly filed the application under section 7 of the Code. Thus, the learned counsel contended that the petition cannot be admitted as it is filed without complying with the direction issued by the NCLAT.

12. On the other hand the counsel for the financial creditor would contend that the application was filed after issuing notice to the corporate debtor. The counsel contended that the financial creditor issued intimating notice to the corporate debtor before



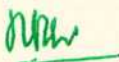


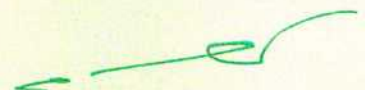
filing the application. The intimation disclosed that the financial creditor is to initiate proceeding against the corporate debtor under section of IB Code. This is in compliance with the directions of the Hon'ble NCLAT.

13. It is the case of the financial creditor that earlier the financial creditor has filed an application against the corporate debtor under section 7 of the IB Code being CP (IB) No.300/7/HDB/ 2018. The counsel contended that the said application was dismissed on the ground that the CIRP started against the corporate debtor in another case filed against it under section 9 of the IB Code bearing CP (IB) No.40/9/HDB/ 2018. The counsel contended that the appeal preferred against the order of admission was allowed by the Hon'ble NCLAT on the ground that there was a pre-existing dispute and as such a direction was given to the financial creditor or operational creditor to initiate action against the corporate debtor after issuing notice.

14. We have seen the order of the Hon'ble NCLAT in Company Appeals No.552 of 2019 and 553 of 2019 dated 30.01.2019. It is true that said appeals were allowed and the order of the Tribunal in admitting the petition against the corporate debtor and also against another company were set aside and the Hon'ble Appellate Authority directed the financial creditor or the operational creditor, whose applications are dismissed on the ground of these appeals, can file fresh application before the adjudicating authority after notice to the corporate debtor.

15. In this case, the financial creditor has issued notice before filing the application. It is dated 05.02.2019 placed at pages 1152-1153 in Volume No.4 of the paper booklet. It is clearly stated in this letter about the details of the order passed by the Hon'ble NCLAT in Company Appeal No.552 of 2019 and also the financial creditor proposes to initiate action under section 7 of





the IB Code against the corporate debtor. So, there is compliance with the direction issued by the Hon'ble NCLAT. There is no deviation from the order of the Hon'ble NCLAT. No merit in the contention of corporate debtor that the order of the Hon'ble NCLAT was not complied with.

16. The learned counsel further contended that OTS proposal is given to the financial creditor. In this connection the learned counsel for the corporate debtor relied on Annexure-5 which is filed along with supplementary affidavit shown at pages 91 to 95. This is one more OTS proposal again from the corporate debtor to the financial creditor that it is intending to go for OTS. Axis Bank- financial creditor has given reply which is at page 95. The financial creditor did not accept the OTS offer.

17. The corporate debtor relied on Annexure-6, which is a letter addressed to the financial creditor and also to other lenders, which is shown at page 96 of the Supplementary Affidavit filed by the corporate debtor. The case of the corporate debtor is that it had given OTS proposal dated 01.08.2019 to the financial creditor. The letter is shown as Annexure-2 at pages 17 to 21 of the Counter Affidavit. The contention of the corporate debtor is that notice proposal was submitted to the lenders including the financial creditor. The case of the financial creditor is that said proposal dated 01.08.2019 was rejected by communication dated 02.08.2019. The financial creditor relied on the letter of rejection dated 02.08.2019 filed with the rejoinder. Thus, OTS proposal of the corporate debtor was not accepted by the lenders including the financial creditor. It is for the financial creditor or the lenders to accept or reject any OTS proposal. Mere filing of OTS proposal with the lenders is not by itself a ground to reject the present application filed under section 7 of the IB Code, which is otherwise in order. It is not the case of the corporate debtor that there is any dispute with regard to the debt. The corporate debtor is not contending that

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there is no default. The main contention of the corporate debtor is that it is going to settle the claims of all the lenders including the financial creditor.

18. On 06.11.2019 the corporate debtor filed one more memo stating that it has filed an application bearing No.CA(CAA) 226/230/ HDB/ 2019 on the file of the Court Hall No.2, Hyderabad Bench for approval of the Scheme of Arrangement and the matter is reserved for orders. The contention of the learned counsel for the corporate debtor is that they are taking steps for settling the claims with the creditors by way of Scheme of Arrangement and filed application under section 230 of the Companies Act, 2013. Mere filing of an application for approval of Scheme of Arrangement is not by itself a ground for rejecting the application which is otherwise in order. It is for the lenders to decide whether to accept or not the Scheme of Arrangement proposed by the corporate debtor. Unless and until the Scheme of Arrangement proposed by the corporate debtor is approved by the creditors including the financial creditor mere filing of the said application is not itself a ground to reject the application on the ground that the creditors agreed for the Scheme of Arrangement. Thus, there are no valid grounds raised on behalf of the corporate debtor for not admitting the application filed by the financial creditor under section 7 of the IB Code.

19. The financial creditor has suggested the name of Interim Resolution Professional, namely, Rajesh Chillale, having address at B-421, Western Plaza, HS Darga, OU Colony, Hyderabad – 500008. E-Mail: chillalerajes@gmail.com Registration No.IBBI/IPA-001/IP- P00699/ 2017-18/11226, who has given affidavit of consent in Form-2. The financial creditor has established the debt and default through various documents filed along with the application. The application is, therefore, liable to be admitted.





20. In the result, the application is admitted and the following order is passed.

21. The Adjudicating Authority admits this Petition under Section 7 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

- (a) The Bench hereby prohibits 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; transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;
- (b) 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.
- (c) 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.
- (d) That the order of moratorium shall have effect from **13th November 2019** till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-

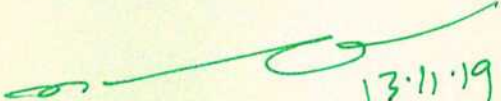




Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

- (e) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- (f) That this Bench hereby appoints Shri Rajesh Chillale, having address at B-421, Western Plaza, HS Darga, OU Colony, Hyderabad – 500008. E-Mail: chillaleraajesh@gmail.com Registration No. IBBI/IPA-001/IP- P00699/ 2017-18/11226, as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.
- (g) Accordingly, this Petition is admitted.


13.11.19
NARENDER KUMAR BHOLA
MEMBER (TECHNICAL)


13.11.19
RATAKONDA MURALI
MEMBER (JUDICIAL)

Karim