



**IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
COURT - IV**

**Item No. 102
IB/117/ND/2022**

IN THE MATTER OF:

Axis Bank Limited	...	Applicant
Versus		
Kafila Hospitality and Travels Private Limited	...	Respondent

Order under Section 7 of IBC, 2016.

Order pronounced on 17.10.2023

CORAM:

**MR. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)**

ORDER

Order pronounced in open Court vide separate sheets.

C.P.(IB)/117/ND/2022 stands dismissed.

Sd/-

**DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)**

Sd/-

**MANNI SANKARIAH SHANMUGA SUNDARAM
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

COMPANY PETITION NO. (IB) 117 OF 2022

[Order 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:

AXIS BANK LIMITED

...APPLICANT/FINANCIAL CREDITOR

VERSUS

KAFILA HOSPITALITY AND TRAVELS PRIVATE LIMITED

...RESPONDENT/CORPORATE DEBTOR

Order Delivered on:17.10.2023

CORAM:

**SHRI MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE
MEMBER (JUDICIAL)**

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

**PER: SH. MANNI SANKARIAH SHANMUGA SUNDARAM,
MEMBER (JUDICIAL)**

1. The instant application is filed by M/s. Axis Bank Limited ('Applicant') bearing CIN: L65110GJ1993PLC020769 having registered office at Trishul, 3rd Floor, Samartheshwar Temple, Law Garden, Elis Bridge, Ahmedabad -380006, Gujarat under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Kafila Hospitality and Travels Private Limited (Respondent Company), referred to as the Corporate Debtor.



2. The Respondent Company M/s. Kafila Hospitality and Travels Private Limited (CIN No. U47899DL1995PTC064578) is a private limited company having its registered office situated at Flat 1185-C, Arya Samaj Road, Karol Bagh New Delhi -110005. Since the registered office of the respondent Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of Respondent/Corporate Debtor under sub-section (1) of Section 60 of the Code.

AVERMENTS OF THE APPLICANT

3. Succinctly stated, the facts of the present case as averred by the applicant in the present application are that the Corporate Debtor is inter alia engaged in the business of hospitality and travel. The Corporate Debtor had approached the Applicant for availing loan of Rs. 40,00,00,000 (Rupees Forty Crores) ("Loan Facility") to meet the working capital requirements of the business and also to be utilised to pay off the debts and dues of the Existing Lender. The said Loan Facility was sanctioned in terms of the sanction letter dated July 19, 2017 ("Sanction Letter").
4. The Applicant submitted that post sanction of the said Loan Facility, Working Capital Loan Agreement dated July 24, 2017 ("Agreement") was entered into between the Applicant and the Corporate Debtor. The said Loan Facility was sanctioned for granting the overdraft credit facility to the Corporate Debtor to pay off the outstanding dues of the Existing Lender and to meet the working capital requirements of the business. The directors of the Corporate Debtor namely Mr. Pradeep Chadha, Mr. Ashish Chadha, Mr. Avinash Chadha, Ms. Madhu Chadha, Mr. Amit Chadha and Mr. Anil Kumar had given their irrevocable personal guarantee(s) by executing the Deed of Guarantee, dated July 24, 2017, ("Deed of Guarantee") for securing the said Loan Facility, in favour of the Applicant.
5. The Applicant vide its e-mail dated 29.07.2017 had intimated the Existing Lender regarding the disbursal of the amount of Rs.37,46,00,000/- (Rupees



Thirty-Seven Crore Forty-Six Thousand Only) for the adjustment and the settlement of the Corporate Debtor's loan account No. 307905010077589. Also, on account of transfer of funds by the Applicant, towards takeover of the cash credit facility extended by the Existing Lender, the Applicant had time and again requested the Existing Lender to release the property documents, issue the no dues certificate and expedite on the completion of the takeover formalities as per the terms stipulated in the takeover letter.

6. The Applicant further submitted that the Existing Lender of the Corporate Debtor had miserably failed to fulfil its obligations and did not fulfil the loan account closure formalities and neither release the property documents and issue no-objection certificate. Moreover, the Existing Lender had remitted the funds back to the Applicant stating that on account of non-compliance of the take-over formalities by the Applicant and also the non-compliance of the circular issued by the Reserve Bank of India pertaining to the take-over of the credit facilities from one bank to another, the said takeover could not be completed.
7. The Applicant vide its email dated 22.09.2017 had informed the Corporate Debtor that on account of failure in compliance of the takeover formalities, the said Loan Facility has been reversed and consequently the Corporate Debtor is liable to pay the penalty charges in relation to the said Loan Facility which will be debited from the overdraft facility account opened with the Applicant
8. Further, the Applicant had informed the Respondent vide e-mail dated 22.09.2017, that the following charges will be debited from the overdraft account / loan account of the Respondent as maintained with the Applicant as per the duly accepted sanction letter. The aforesaid applicable charges are as follows:
 - a) "Reverse takeover charge of 2% of the sanctioned limit i.e. Rs. 80,00,000/- (Rupees Eighty Lakhs Only) + Tax (please refer Clause 16(xviii) of the Terms Common to All Facilities as specified in the Sanction Letter, in event of failure of takeover or non-acceptance by



the existing bank, the penal interest @2% would be levied on the sanctioned amount):

- b) Difference of standard and concessional processing fee i.e. Rs. 20,00,000/- (Rupees Twenty Lakhs Only) + Tax (please refer Clause 1 and Clause 16(xvii) of the Terms Common to All Facilities as specified in the Sanction Letter, the borrower has been allowed concessional rate of interest and fee on the credit limits sanctioned by the bank. In the event of foreclosure of limits (said Loan Facility) by the Borrower, either by taking over by some other bank / financial institution or from own source, our Client .has been entitled to recover the differential between in the applicable ROI / Fee and sanctioned ROI/Fee for the interim period);
- c) Difference of concessional and standard ROI (please refer Clause 16(xvii) of the Terms Common to All Facilities as specified in the Sanction Letter as modified by the Modification Letters, the borrower has been allowed concessional ROI and fee on credit limits sanctioned by our Client. In the event of foreclosure of limits by the Borrower, either by taking over the said Loan Facility by some other bank/financial institution or from own source, our Client is entitled to recover the differential between in the applicable ROI / Fee and sanctioned ROI / Fee for the interim period);
- d) Pending Security charges (As per the clause of sanction letter "In the event of non-creation of security within stipulated timelines, penal interest for Fund based credit facilities will be applicable for the period of default.)"

9. It was submitted that the Applicant did not receive any amount towards the outstanding dues, hence, the Applicant had initiated proceedings before the Debt Recovery Tribunal, Delhi for the recovery of the outstanding dues amounting to Rs.1,58,56,813.08 /- (Rupees One Crore Fifty-Eight Lakh Fifty-Six Thousand Eight Hundred and Thirteen and Eight Paise) due as on December 31, 2017, against both the Respondent and its personal guarantors.

10. The Applicant had issued another legal notice dated May 26,2021 , through Fair and Just Legal Solutions LLP, to the Respondent and its Personal Guarantors for recovering the outstanding amount of Rs.2,21,13,137.08/- (Rupees Two Crore Twenty- One Lakh Thirteen Thousand One Hundred Thirty-Seven and Eight Paise) due as on April 30, 2021 , within 15 (Fifteen)



days from the date of receipt of this Legal Notice, failing which, the Applicant shall be filing an application before the National Company Law Tribunal (NCLT) against the Respondent and / or the Personal Guarantors in terms of the provisions of the Insolvency and Bankruptcy Code, 2016. Hence, the present Application.

REPLY OF THE CORPORATE DEBTOR

11. The Corporate Debtor had filed its reply and submitted that Corporate Debtor was having a cash credit limit with Union Bank of India ('Existing Lender'), Karol Bagh Branch, Delhi vide account bearing No. 30790501 0077589, which was proposed to be taken over by the Applicant. The said facility is continuing and the Corporate Debtor is not a defaulter therein.
12. Further, it was submitted that Union Bank of India vide its email of 15.09.2017 had refused transfer of the Facility to the Applicant on the ground of violation of RBI Norms by the Applicant. Thus, the Applicant had failed to takeover the Facility and there is no default attributable to the Corporate Debtor. Even otherwise, on whom the default is attributable is to be determined by the Civil Court.
13. The Corporate Debtor submitted that there is no financial debt under Section 5 (8) of the Code and there is no default of a financial debt under Section 3 (12) of the Code. The alleged default in Part-IV of the present application is failure of a takeover and penal charges as a consequence of that failure which have to be determined after determining the issue of failure or breach by a Civil Court. Thus, there is no default or debt i.e. crystallised amount. To support the contention, the Corporate Debtor placed reliance on Hon'ble Supreme Court's judgement in Indus Biotech Pvt Ltd vs. Kotak India Venture Fund & Ors [(2021) 6 SCC 436, paras 14, 15, 20, 21 and 22].

REJOINDER BY THE APPLICANT



14. The Applicant had filed its rejoinder wherein the submissions of the Corporate Debtor are rebutted and submitted that the Corporate Debtor is wrongly and frivolously attempting to portray the present dispute as being between Union Bank of India ("UBI") and the Applicant, which is far from the truth. The Applicant does not have any privity of contract with UBI and all the transaction documents executed, are between the Applicant and Corporate Debtor. In fact, it was solely and absolutely the responsibility of Corporate Debtor to get its account with UBI closed and to get the security documents (original title deeds of the mortgage documents) deposited with the Applicant, being a condition precedent agreed to between the two parties, which the Corporate Debtor failed to do.

15. The Applicant further submitted that the claim has been crystalized and does not require any further adjudication. The claimed amount is based wholly upon the agreement with the Corporate Debtor and is therefore a financial debt since it is born out of breach of contract committed by the Corporate Debtor. The Insolvency & Bankruptcy Code, 2016 provides for a claim to include the principal amount along with interest and other charges which accrue upon breach of a contract as per Section 74 and 75 of the Indian Contract Act. To support the contention, the applicant placed reliance on Hon'ble NCLAT's judgement in **Ferro Alloys Corporation Ltd. and Ors. v Rural Electrification Ltd. and Ors (Company Appeal (AT) (Ins. 92/ 2017) (date of judgment January 08, 2019; Para 35).**

ANALYSIS & FINDINGS

16. We have heard the Learned Counsel for the parties and perused the averments made in the Application, Reply, Rejoinder and Written submission filed by the parties.



17. Adverting to the facts of the present case, it is an admitted fact that the funds transferred to the Existing Lender, pursuant to the facility agreement had been remitted back to the Applicant on account of non-compliance of the circular issued by the Reserve Bank of India pertaining to the take-over of the credit facilities from one bank to another. The Applicant Bank in Part-IV of Form-5 of the present application had claimed amount of Rs.2,50,01,266.08/- [Rupees Two Crore Fifty Lakhs One Thousand Two Hundred and Sixty Six Only and Eight Paise only) as on 31.10.2021. The calculation sheet of the amount in default as on 31.10.2021annexed as Annexure-32 of the present application is extracted below:-

Calculation of Amount in default as on 31st Oct. 2021

Particulars	Amount (In Rs.)
Principal Outstanding Amount as on 31 th Dec. 2017	3461919.30 + 12394893.78 1,58,56,813.08
Interest Amount upon 31 st Oct 2021	91,44,453
Total	2,50,01,266.08



18. On perusal of the Applicant's e-mail dated 22.09.2017, 07.10.2017 and legal notice dated 26.05.2021 addressed to the Corporate Debtor, we find that the genesis of the Financial Debt as averred by the Applicant in Part-IV of the present Application, has espoused from the charges applicable to be paid by the Borrower on account of the transactions done on the instructions and requests of the Borrower, stood at Rs. 1,58,56,813.081 (Rupees One Crore Fifty-Eight Lakh Fifty-Six Thousand Eight Hundred Thirteen and Paise Eight Only) pending as on 31.12.2017 along with pendent lite and future interest, in accordance with the Agreement and Sanction Letter modified by the Modification Letters. The Part IV, Row 2 does not declare any date of default,



but mentions that the Respondent's account was declared as an NPA on December 29, 2017.

19. It is a trite proposition that for claiming a 'Financial Debt' as defined under Section 5(8) of the Code, 2016, there must be a disbursement of fund by the Creditor to the Debtor purely in the form of release of fund as a "borrowing" and must have a "time value of money". The method may be different but the nature must be borrowing and in extended terminology even the liability in respect of guarantee is also covered. But, there must be a "Financial Debt" which is owed by the other side i.e. the Corporate Debtor. However, there is a clear and categorical difference between the levy of Penalty, liquidated damages or penal interest for breach of Contract, charges and the 'Financial Debt' as defined under Section 5(8) of the Code, per se.
20. The Hon'ble Supreme Court in **Pioneer Urban Land and Infrastructure Ltd. v. Union of India [(2019) 8 SCC 416]**, wherein the concept of 'financial debt' has been elaborately discussed in the light of several judgments including **Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SCC 407 and Swiss Ribbons (P) Ltd. v. Union of India (2019) 4 SCC 17**, held as extracted under:

"70. The definition of "financial debt" in Section 5(8) then goes **on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:** "1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". **In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money.** Thus far, it is clear that an allottee "disburses"



money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P. Fitch in which “time value for money” was defined thus: “present value : today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis.” That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. They are set out hereinbelow: “borrow.—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To put the ball uphill of the direct path to the hole : make sure you borrow enough.”

21. Thus, in Pioneer Urban (supra,) it has been held that any debt to be treated as financial debt, there must happen disbursement of money and the disbursement must be against consideration for time value of money. It is also held that it can include anything which is equivalent to the money that has been loaned as long as it has commercial effect of borrowing. Further in the matter of **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. Vs. Axis Bank Limited & Ors. (2020 8 SCC 401)**, the Hon'ble Supreme Court



articulated that the essential condition of financial debt is 'disbursement' against the consideration for time value of money.

22. At this juncture, it is pertinent to appreciate that in the general business parlance, interest on the disbursed amount is charged to compensate for the time value of money whereas the amount as claimed by the Applicant in the present Application are levied towards the charges admittedly on the breach of the Facility Agreement.
23. We are of the considered view that though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet the charges, compensation or penal interest, which is charged by way of penalty for non-adherence of the covenants of the Facility Agreement, cannot in any manner, whatsoever, be constituted as a debt having time value of money.
24. We have no doubt that the Applicant has itself pleaded that the Financial Debt claimed to be in default by the Applicant is in respect of damages from the failure of takeover of loan and penal charges. It is pertinent to note that a claim for damages arising out of a breach of contract, whether for general or liquidated damages, remains only a claim till its adjudication by the court and becomes a debt only after the court awards it. Till then and on the basis of the claim alone, the claimant is not entitled to present a winding up petition of the defendant company on the ground of its inability to pay debts. Liquidated damages cannot become debt until adjudicated.
25. As regards the applicant's reliance of the proposition, that where the IBC is silent, the provisions of Indian Contract Act, 1872 applies, it is pertinent to note that in a catena of judicial pronouncements with regard to crystallisation of debt under Section 74 and 75 of the Indian Contract Act, 1872, it has been held that damages cannot become debt unless adjudicated.



26. The Hon'ble High Court of Judicature at Bombay in **E-City Media Private Limited vs Sadhrta Retail Limited in CP No.367 of 2009**, has held that "The Petition for winding up cannot be maintained upon a claim for damages. Damages become payable only when they are crystallised upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. Damages require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallised."
27. Further, the Hon'ble Supreme Court in case of **Union of India vs Raman Iron Foundry (1974 AIR 1265, 1974 SCR (3) 556)**, has held that "the claim for un-liquidated damages does not give rise to a debt until the liability is adjudicated upon and damages assessed by an adjudicatory authority. When there is a breach of contract, the party who commits the breach does not instantly incur any pecuniary obligation nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach has is the right to sue for damages, and this is not an actionable claim."
28. Accordingly, in view of the aforesaid discussion and the judgements referred, this Adjudicating Authority is of the considered view that, since the claim of the applicant is solely based on the charges/penalty towards the failure of takeover of loan, it cannot be construed to have time value of money and therefore, does not qualify the parameters of the 'Financial Debt' as envisaged under Section 5(8) of the Code, 2016. Thus, neither there was any disbursement of the claimed amount nor the claimed amount can partake the nature of a 'Financial Debt' as defined under Section 5(8) of the Code, 2016.
29. Resultantly, the instant application i.e., C.P.(IB)117/2022 filed under Section 7 of the Code, 2016 being devoid of merit stands dismissed.

Sd/-

**(DR.BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)**