

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(Arguments through web-based video conferencing platform)**

CP (IB) No.27/Chd/Hry/2019

Under Section 7 of the IBC 2016

In the matter of:

Bank of Baroda (erstwhile Dena Bank)

having its Head office at
Suraj Plaza 1, Sayaji Ganj,
Baroda 390005

Branch office of Bank of Baroda(Jind Branch)
SCF 25, Dewan Khanna Market,
Rani Talab, Jind, Haryana-126102

....Applicant-Financial Creditor

Vs.

M/s. JM Feed Pvt. Ltd.

through its Managing Director
having its Regd. Office at
Village Kendela, Jind,
Haryana-126102

....Respondent-Corporate Debtor

Judgment delivered on: 10.01.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present:

For the Petitioner/Financial Creditor : Mr. Ajay Pal Singh, Advocate

For the Respondent/Corporate Debtor : Mr. Diwan Sharma, Advocate

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

JUDGMENT

The present petition has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Bank of Baroda (erstwhile Dena Bank) (hereinafter referred to as 'Petitioner/Financial Creditor') to initiate the Corporate Insolvency Resolution Process ('CIRP') against JM Feed Mills Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Mr Sandeep Kumar-Chief Manager-Petitioner, the Financial Creditor and the affidavit verifying the contents of the petition is on pages 34-35 of the petition. The specific Authorization Letter in favour of Mr. Sandeep Kumar is attached as Annexure A-30 of the affidavit filed vide Diary No.1118 dated 07.03.2019.

2. The master data of the corporate debtor is stated to be filed as Annexure A-28 of the petition. The Corporate Debtor is stated to be incorporated on 24.02.2010. The company has its registered address at Village Kandela Jind HR 126102 IN. Therefore, the jurisdiction lies with this Bench of the Tribunal.

3. Brief facts raising to the present Company Petition which are necessary for the disposal of the same are narrated hereunder:

3.1 The Corporate Debtor approached the Financial Creditor in December 2011 and sought loan facilities. After due approvals a sanction letter dated 29.12.2011 was issued, whereby a CC limit of Rs. 9.8 Crores was sanctioned in favour of the corporate debtor. The corporate debtor duly executed various agreements/undertakings creating charges over various properties. The corporate debtor gradually failed to adhere to the loan

repayment schedule and was declared Non-Performing Asset on 31.12.2015 in terms of the RBI Regulations.

3.2 Prior to the said date, various requests and reminders were served upon the corporate debtor asking him to maintain the schedule of payments. The continuity letters dated December 31, 2011, December 30, 2014, and December 30, 2016, are being annexed by the financial creditor to show that the default has been a continuous cause of action and is not barred.

3.3 Lately, upon the request of the corporate debtor, a 'Restructure of the Loan' was sanctioned by the financial creditor on February 20, 2018, so as to enable the corporate debtor to conveniently repay the loan back. The corporate debtor never even turned up to comply with the restructured loan schedule, which only remained confined to the papers. As such, the 'Restructure of Loan' was actually never made operational since the borrower failed to turn up to accept the terms thereof and did not execute the documents in compliance with the 'Restructure of Loan' sanction letter.

4. In Part-III of Form No.1, Mr. Somnath Gupta, Registration No.IBBI/IPA-002/IP-N00042/2016-2017/10081 has been proposed as Interim Resolution Professional (IRP). Form No.2 dated 05.11.2018 is attached at Annexure-4 of the petition.

5. It is stated in Part-IV of Form No.1 that the financial creditor has provided a loan facility of Rs. 9.80 Crores and the total debt amount is Rs. 13.18 Crores. A true and correct copy of the continuity letter/acknowledgement of loan dated 31.12.2011 at Annexure A-14. A true and correct copy of the continuity letter/acknowledgement of loan dated 30.12.2014 at Annexure A-15. A true and

correct copy of the continuity letter/acknowledgement of loan dated 30.12.2016 along with Board Resolution of even date at Annexure A-16. A true and correct copy of the loan restructuring sanction letter dated 20.02.2018 at Annexure A-22.

6. The notice of this petition was issued to the respondent-corporate debtor on 12.03.2019 as to why this petition be not admitted. A reply on behalf of the respondent-corporate debtor is submitted stating that the account of the respondent was wrongly classified as NPA and the outstanding balance against the respondent-corporate debtor is false and not in consonance with the account maintained by the bank in its books in the ordinary course of business. It is further submitted that the bank has also initiated action under Section 13 (4) of the SARFAESI Act for taking possession of the secured assets of the guarantors/corporate debtor/directors and simultaneously filed the instant petition under Section 7 of the IBC, 2016 which is double jeopardy and an abuse of process of law.

7. The petitioner has filed a rejoinder vide Diary No. 5009 dated 15.10.2019, wherein the averments made by the corporate debtor have been denied. Further, the petitioner has stated that in so far as the figure of the outstanding sum or the default amount is concerned, it has been stated on behalf of the financial creditor that a sum of 20.4 lakhs being the unrealised interest was inadvertently not mentioned in the notice which was served under Section 13 (2) of the SARFAESI Act earlier on. However, the said mistake was bona fide and innocent and does not go to the root of the matter.

8. We have heard the learned counsels for the petitioner and the respondent-corporate debtor and have also perused the written submissions and records available carefully.

9. In so far as the invocation of the SARFAESI Act against the guarantors is concerned, reliance has been made on the judgment of **Rakesh Kumar Gupta v. Mahesh Bansal & Ors.**, where the Hon'ble NCLAT on 20.02.2020 has held that the pendency of actions under the SARFAESI Act or actions under RDB Act does not create an obstruction for filing an Application under Section 7 of IBC, especially in view of Section 238 of IBC. Further on 26.02.2020, in the matter of **Punjab National Bank v. Ms Vindhya Cereals Put. Ltd.**, the question that arose before the Hon'ble NCLAT was whether, subsequent to the initiation of proceedings under the SARFAESI Act, a financial creditor can be precluded from filing an application under Section 7 of the Code, as the Hon'ble NCLAT held such proceedings are fraudulent or malicious against the Corporate Debtor. To which the Hon'ble NCLAT held that simply because the financial creditor had initiated parallel proceedings against a corporate debtor under SARFAESI Act as well as under the Code, it could not be called malicious. The NCLAT further opined that Section 238 of the Code provides that the provisions of the Code shall have an effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Therefore, this non-obstante clause of the Code will prevail over any other law for the time being in force.

10. Another issue for consideration is whether the present application is filed within limitation. We are conscious of the decision in the matter of **B. Prashanth Hegde vs State Bank of India** on 14th October, 2020; *Company Appeal (AT) (Insolvency) No. 68 of 2019*, where Hon'ble NCLAT held that:

"21. Thus, it is clear that the Application filed by the Respondents under Section 7 of the Code in the present case is an effort to revive a dead debt.

The date of default is crucial to determine the date when the cause of action accrued. In this case, the Respondent has not mentioned the date of default. In the case of Gaurav Hargovindbhai Dave (supra), Hon'ble Supreme Court has considered that the date of default to be the date of NPA. Therefore, the date of default, in this case, is 31st January 2010.

The right to sue under IBC occurs when default occurs. If the default has occurred over three years period prior to the date of filing the Application, the Application would be time-barred given the law laid down by Hon'ble Supreme Court in B K Educational (supra). Company Appeal (AT) (Insolvency) No. 68 of 2019 9 of 11”.

22. Admittedly, in this case the Corporate Debtor was declared to be Non-performing Asset on 28th May 2014. The date was later changed to 31st January 2010. Therefore, if the position taken by the Financial Creditor Bank is taken as correct, 'Default' occurred on or before 31st January 2010. The period of Limitation for the same would expire on 30th January 2013. The Application for initiation is filed on 23rd July 2018. The contention of the Respondent that their right accrued only on 01st December 2016 is not consonant to the ratio of judgement in B K Educational Services (supra) wherein the Hon'ble Supreme Court has held that "It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the Application, the Application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such Application”.

11. It can be seen from the records that the account of the corporate debtor was declared a Non-Performing Asset on 31.12.2015, whereas the present petition has been filed vide Diary No. 4969 dated 18.12.2018. Therefore, the present petition is filed within limitation.

12. Another issue for consideration is whether there is a default in payment or not. As per Section 7 of IBC which is reproduced below:-

“Section 7 Initiation of corporate insolvency resolution process by financial creditor.

- (3) *The financial creditor shall, along with the application furnish—*
- (a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
 - (b) *the name of the resolution professional proposed to act as an interim resolution professional; and*
 - (c) *any other information as may be specified by the Board.*
- (5) *Where the Adjudicating Authority is satisfied that—*
- (a) *a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

13. It is observed from the record that in the present case, the occurrence of default is evidenced by a copy of the sanction letter dated 29.12.2011. A true and correct copy of the continuity letter/acknowledgement of loan dated 30.12.2016 along with Board Resolution of even date. A true and correct copy of the loan restructuring sanction letter dated 20.02.2018. Further, the amount advanced by the petitioner clearly falls under the definition of financial debt under Section 5(8) of the I&B Code. The same has been extracted hereinbelow:

5. In this Part, unless the context otherwise requires,—

*5(8) “**financial debt**” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

(a) money borrowed against the payment of interest;

14. In the given facts and circumstances, the present petition being complete and having established the default in payment of the Financial Debt for the default amount being above the threshold limit, the petition is admitted in terms of Section 7(5) of the IBC and accordingly, also direct moratorium in terms of sub-section (1) of Section 14 of the code to take effect as below:

- 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 Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002; and
- d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- e) It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period. The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any operational sector regulator and to a surety in a contract of guarantee to a corporate debtor.
- f) The order of moratorium shall have effect from the date of this order till 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 the corporate debtor under Section 33 as the case may be.

15. The Law Research Associate of this Tribunal has checked the credentials of Mr Somnath Gupta and his AFA valid till 20.11.2023, and there is nothing adverse against him. In view of the above, we appoint Mr Somnath Gupta, RegistrationNo.IBBI/IPA-002/IP-N00042/2016-2017/10081,Email:somgupta_62@rediffmail.com, Mobile No. 7082414848, the Interim Resolution Professional with the following directions: -

- i.) The term of appointment of Mr Somnath Gupta shall be in accordance with the provisions of Section 16(5) of the Code;
- ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended, and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor, etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of the inventory of assets of the Corporate Debtor;

- iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government, and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and morals;
- iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;
- v.) It is hereby directed that the Corporate Debtor, its Directors, personnel, and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vi.) The Suspended Board Of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information

regarding Maintaining the Backup and regarding Service Provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. The statutory auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest. In case of any non-cooperation by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for

government portals, for various compliances. The Interim Resolution Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

- vii.) The Interim Resolution Professional/ Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with a request for information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Interim Resolution Professional/Resolution Professional to enable him to conduct the CIR Proceedings as per law.

- viii.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of the constitution of the Committee; and

ix.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

16. We direct the financial creditor to deposit a sum of ₹1,00,000/- (Rupees One Lakh Only) with the Interim Resolution Professional to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

17. The petition is admitted accordingly.

18. A copy of the order shall be communicated to both parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

January 10, 2023

PB/ASH