

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P.(IB)No.165/BB/2018
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

M/s.Radico Khaitan Limited

Bareilly Road, Rampur,
Uttar Pradesh- 244 901.

- Petitioner/Operational Creditor

Versus

M/s.B.T. & F.C. Private Limited

15, 1st Phase, Peenya,
Bangalore – 560 058.

- Respondent/Corporate Debtor

Date of Order: 27th September, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Shri Udayarkar Rangarajan with
Shri Avinesh Balakrishna
For the Respondent : None

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB)No.165/BB/2018 is filed by M/s.Radico Khaitan Limited ('Petitioner/Operational Creditor') under Section 9 of the IBC, 2016 read with Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s.B.T. & F.C. Private Limited, on the ground that it has committed default for an amount of Rs.5,72,49,000/- (Rupees Five Crore Seventy Two Lakhs Forty Nine Thousand Only) and it is due and payable from 02.03.2016 apart from Rs.1,35,53,732/- (Rupees One Crore Thirty



Five Lakhs Fifty Three Thousand Seven Hundred and Thirty Two Only) @18% per annum from 02.03.2016.

2. Brief facts of the case, as mentioned in the Company Petition, are as follows:

(1) M/s.Radico Khaitan Limited (herein after referred to as Petitioner/Operational Creditor) is a company registered under the Companies Act, 1956, having CIN: L26941UP1983PLC027278. M/s. Radico Khaitan Limited has been merged with the M/s.Abhishek Cements Limited registered with RoC, Madhya Pradesh and Chhattisgarh, Gwalior. M/s.Abhishek Cements Limited changed to M/s.Radico Khaitan Limited by RoC, Gwalior and registered office of the said Company was also transferred to the State of Uttar Pradesh vide his certificate dated 20.02.2003. Accordingly, M/s.Radico Khaitan Limited is now registered with a new registration No.20-27278. The Operational Creditor engaged in the business of manufacturing, marketing and promotion of alcoholic beverages like India Made Foreign Liquor (IMFL), wine, spirit and liquor products etc.

(2) M/s.B.T. & F.C. Private Limited (herein after referred to as Respondent/Corporate Debtor) is a having CIN: U51109KA1952PTC000263 was incorporated on 07.08.1952, registered under the Companies Act, 1956. And its Authorised Share Capital is Rs.1,00,000,00/- and Paid-up Share Capital is Rs.1,00,000,00/-.

(3) It is stated that the Corporate Debtor approached the Operational Creditor for manufacturing IMFL products, and the parties entered into an agreement whereby the Corporate Debtor undertook to manufacture IMFL products of the Operational Creditor. The parties entered into agreement for the same, which was renewed from time to time and the last



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agreement was entered into on 01.07.2007. Various disputes arose between the parties in respect of the said transaction. Therefore, the Operational Creditor invoked the arbitration clause for resolution of disputes between the parties. The Operational Creditor appointed Justice Shri K. Ramamurthy, as its Nominee Arbitrator vide letter dated 22.05.2010. However, the Corporate Debtor failed and neglected to appoint its Nominee.

- (4) Therefore, the Operational Creditor approached the Hon'ble High Court of Delhi, under Section 11 of the Arbitration and Conciliation Act 1996 for appointment of the Arbitrator and the Hon'ble High Court of Delhi vide order dated 12.03.2012 appointed Shri Justice Shri A.P. Shah as a sole Arbitrator to adjudicate the dispute between the Operational Creditor and Corporate Debtor. However, Justice Shri A.P. Shah resigned as Arbitrator, and on the application of the Operational Creditor, the Hon'ble High Court of Delhi vide its order dated 29th May, 2014 appointed Justice Shri S.K. Mahajan as Sole Arbitrator. Justice Shri S.K. Mahajan vide his Award dated 02.03.2016 allowed the claims of the Operational Creditor and awarded a sum of Rs.5,72,49,000/- (Rupees Five Crore Seventy Two Lakhs Forty Nine Thousand Only) to the Operational Creditor. The Corporate Debtor has failed and neglected to pay the awarded amount. The Operational Creditor has filed an execution Petition before City Civil Judge at Bengaluru vide execution Petition No.1015/2017 and the Operational Creditor has not been able to realize the awarded amount from the Corporate Debtor. The Corporate Debtor is avoiding and evading the payment of legal dues and debt owed to the Operational Creditor which has crystalized into an award and it is an enforceable legal debt. The Corporate Debtor has defaulted in payment of operational debt to Operational Creditor.



(5) It is also stated that the Operational Creditor has initiated criminal proceedings, under Section 138 of the Negotiable Instrument Act, 1881 against the Corporate Debtor and its Directors for dishonor of cheques issued by them towards part of its total liability and the Id. Metropolitan magistrate after trying the accused vide his order dated 04.08.2017 convicted and sentenced the accused. The appeal of the accused person was also dismissed, however, the accused person moved the Hon'ble High Court of Delhi in Criminal revision basis settlement only confined to the case initiated U/s 138 of Negotiable Instrument Act, 1881, where under it was agreed that accused person/Corporate Debtor shall pay a sum of Rs.52 Lakhs towards settlement of said criminal case and the Corporate Debtor had paid a sum of Rs.36 Lakhs by way of demand draft and for the balance amount of Rs.16 Lakhs post-dated cheque has been tendered on behalf of Corporate Debtor to Operational Creditor, which is yet to be presented by the Operational Creditor. It was agreed between the parties that the amount of Rs.52 Lakhs, if fully paid, as per settlement shall be adjusted form the awarded amount. The amount of Rs.52 Lakhs as when fully paid shall adjusted by the Operational Creditor towards payment of interest on the awarded amount.

(6) It is stated that the Operational Creditor has issued notice dated 28.05.2018 in compliance of Section 8 of the IBC, 2016 in requisite form calling upon the Corporate Debtor to pay unpaid operational debt in full within 10 days of the receipt of the notice. However, the Corporate Debtor has neither replied to the said notice nor has paid the amount demanded in the notice. In compliance with Section 9(3) (C) of the Code, certificate from the bank of the Operational Creditor is taken on record evidencing non-payment of debt by the Corporate Debtor. The Operational Creditor has complied with all



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mandatory requirements of the Code. Further, the Corporate Debtor did not raise any dispute within 10 days of service of demand notice.

(7) It is further stated that the Operational Creditor has not filed any other proceedings pertaining to the subject matter before any other Court of Forum except Execution Petition No.1015/2017 before the Court of the City Civil Judge at Bengaluru for execution of the award dated 02.03.2016. The pendency of execution proceedings for execution of the award does not bar the Operational Creditor from availing the remedy under the Code.

3. The Company Petition is opposed by the Respondent by filing Statement of Objections dated 13.07.2019, by inter alia contending as follows:

(1) It is stated that the present application is devoid of merit and there is no cause of action in favour of the Petitioner to initiate proceedings U/s 7 of the Act. There is no crystal clear amount as financial debt on the part of the Financial Creditor. An amount awarded in arbitration proceedings is not a debt. A bare perusal of the 'working of computation of default' on the basis of which instant application is filed. The default of the said agreement was allegedly made during the financial year 2010-2011 and hence, the said debt cannot be given a fresh lease of life filing the instant application long after the prescribe limitation period under Section 137 of the Limitation Act has been over. Section 238 A of the IBC, 2016 will apply and thus, the application should be barred by limitation.

(2) It is also stated that a dispute has been raised by the Respondent Company even before the present application has been filed, in an arbitration proceeding by way of a counter-claim and the same is now sub-judice before the



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Hon'ble High Court at Delhi. Pendency of challenge to an arbitral award qualifies as 'pre-existing dispute' for the purpose of initiating CIRP by the Operational Creditor. Therefore, application for initiation of CIRP by the Operational Creditor is liable to be rejected in the presence of a 'pre-existing dispute' as to the debt. The Cause of action alleged in the application has been shown as crystallized into an 'Arbitral Award' and hence, it cannot be considered as a cause of action in itself. Therefore, that no cause of action arise.

4. Heard Shri Udayarkar Rangarajan along with Shri Avinash Balakrishna, learned Counsels for the Petitioner. We have carefully perused the pleadings of the party and the extant provisions of the Code and the law on the issue.
5. The case is listed for admission on various dates viz. 27.09.2018, 26.11.2018, 06.12.2018, 25.10.2018, 20.12.2018, 23.01.2019, 20.02.2019, 18.03.2019, 05.04.2019, 23.04.2019, 27.05.2019, 30.05.2019, 14.06.2019, 25.06.2019, 15.07.2019, 19.07.2019, 31.07.2019, 26.08.2019, 13.09.2019 & 27.09.2019. The case is adjourned on all these dates due to various reasons, at the request of the Petitioner/Respondent for compliance of office objections, serving the notice, to settle the issue etc. However, the Respondent failed to avail the opportunity given by the Adjudicating Authority to settle the issue and failed to place on record valid document to substantiate that the issue is sub-judice. Therefore, there is no other alternative for us except to adjudicate the matter on merits.
6. Shri Udayarkar Rangarajan, the learned Counsel for the Petitioner, while reiterating the above submissions, has further submitted that the Respondent filed an application before the Hon'ble Delhi High Court under Section 34 (2)(A)(IV), 34(2)(B)(II) of the Arbitration and Conciliation Act, 1996, R/w Section 151 of the Code of Civil Procedure vide Diary No.277553/2016 for setting aside the Arbitral



Award dated 02.03.2016 on 22.10.2016. The petition was not numbered and was returned under objections on 24.10.2016. Therefore, the Respondent failed to take any action.

7. He has also further filed Written Submission dated 13.09.2019 by inter alia contending as follows:

(1) It is settled position of law that an unpaid amount awarded arbitration constitutes 'debts' under the Code. The Operational Creditor relies on the judgement of the Supreme Court in *K. Krishnan V. Vijay Nirman Company Private Limited*,¹ and the judgment of the NCLAT in *Annapurna Infrastructure Private Limited Vs. SORIL Infra Resources Limited*,²

(2) It is stated that the present petition is filed on the basis of the Arbitral Award dated 02.03.2016 which constitutes cause of action and not on the basis of the defaults of 2010-11. Therefore limitation will have to be calculated from the date of Award i.e., 02.03.2016. The present petition is filed on 06.08.2018. Therefore, the present petition is well within limitation.

(3) It is also stated that an application was filed before the Delhi High Court under Section 34 of the Arbitration and Conciliation Act vide Diary No.277553/2016 on 22.10.2016. The petition was not numbered and was returned under objections on 24.10.2016 and the same has still not been re-submitted after removing objections. The Operational Creditor has produced original communication dated 18.07.2019 issued by the Registrar General of the Delhi High Court in this regard.

Rule 3 of the Chapter IV of the Delhi High Court (Original Side) Rules, 2018 deals with 'Defective pleading/document'.

The Rule reads as under:

¹CA No.21824/2017

²Company Appeal (AT) (Insolvency) No.32/2017



3. Defective pleading/document- (a) if on scrutiny, the pleading/document is found defective, the Deputy Registrar/Assistant Registrar, In charge of the Filing Counter, shall specify the objections, a copy of which will kept for the Court Record, and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in aggregate.

(b) If the pleading/document is not taken back for amendment within the time allowed under sub-rule (a), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(c) If the pleading/document is filed beyond the time allowed under sub-rule (a) the pleading/document must be accompanied with an application for condonation of delay in re-filing of the said pleading/document.

(d) Any party aggrieved by any order made by the Registrar under this Rule may, within fifteen days of the making of such order, appeal against it to the Judge in Chambers.

From the above it is clear that the total time that is available for re-filing of pleading returned under objections is 30 days in aggregate. The Corporate Debtor has not re-filed the Section 34 petition till dated after it was returned under objections on 24.12.2016. Therefore, there is no petition pending on the file of the Delhi High Court against the award dated 02.03.2016.

8. As stated supra, the debt in question became final when Award dated 02.03.2016 was passed by the Arbitral Tribunal by directing the Respondent to pay a sum of Rs.5,72,49,000/- to the claimant and Respondent was liable to pay interest on the aforesaid amount from the date of the Award. The instant Company Petition is filed in accordance with law, and also suggested a qualified Resolution



(Signature)

Professional namely Shri Pankaj Srivastava, with Registration No. IBBI/IPA-001/IP-P00245/2017-18/10474, who has also filed written Consent in Form-2 dated 13.09.2019, by inter alia declaring that no disciplinary proceedings pending against him with the Board of Insolvency and Bankruptcy Board of India and he is eligible to be appointed as a Resolution Professional in respect of the Corporate Debtor in accordance with provisions of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The contention that an appeal filed and pending before Court, and thus the issue in question is sub-judice, as detailed supra, is not at all tenable and it is liable to be rejected. It is settled position of law that mere filing of case does not come to the rescue of a litigant unless judicial notice is taken by a Court, while issuing notice. Therefore, debt and default in question is not in dispute and mere filing of appeal/suit do not constitute dispute as rightly contended by the Respondent. Hence we are of considered opinion that the instant Company Petition is a fit case to admit by initiating CIRP appointing an IRP and imposing moratorium etc. in respect of the Corporate Debtor.

9. In view of the above facts and circumstances of the case and the law on the issue and by exercising powers conferred on this Adjudicating Authority, U/s 9 (5)(i) of the Code, the Company petition bearing C.P.(IB)No.165/BB/2018 is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of Respondent/Corporate Debtor with the following consequential directions:

- 1) **Shri Pankaj Srivastava**, bearing **Registration No. IBBI/IPA-001/IP-P00245/2017-18/10474**, who is qualified Resolution Professional, is hereby appointed as Interim Resolution Professional, in respect of the Petitioner/Corporate Applicant to carry out the functions as




- mentioned under the Insolvency and Bankruptcy Code, 2016 and various rules issued by IBBI from time to time;
- 2) The following moratorium is declared prohibiting all of the following, namely:
- a) the institution of suits or continuation of pending suits or proceedings against the Respondent/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;
 - 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;
 - e) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;
 - f) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - g) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;
 - h) The IRP should follow all extant provisions of IBC, 2016 and the rules including fees rules as framed by IBBI.



The IRP is hereby directed to file his report in the Tribunal from time to time.

- 3) The IRP is directed to follow all extant provisions of the IBC, 2016 and all extant rules including fees rules as framed by IBBI from time to time. The IRP is hereby directed to file progress reports to the Tribunal from time to time.
- 4) The Board of Directors and all the staff of Respondent/Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.
- 5) Post the case for report of IRP on 05.11.2019.



(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL


(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL


Deputy Registrar
National Company Law Tribunal
Bengaluru Bench
