

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

RCP(IB)/05/MB-IV/2023

Connected with

CP(IB)/1446/MB-IV/2020

Under Section 7 of the IBC, 2016

In the matter of

State Bank of India

[PAN No: AAACS8577K]

...Financial Creditor

v/s.

Kosas Industries Private Limited.

[CIN: U71300MH2009PTC197548]

...Corporate Debtor

Order Delivered on 29.02.2024.

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Financial Creditor:

Mr. Bidan Chandran a/w
Mr. Karan, Ld. Counsel.

For the Corporate Debtor: Mr. Arpit Singh, Ld.
Counsel .

ORDER

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by State Bank of India (“Financial Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Kosas Industries Private Limited., the Corporate Debtor by invoking the provisions of Section 7 of the Insolvency and Bankruptcy code, 2016 (hereinafter called "Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of an unresolved Financial Debt of Rs. 98,19,09,715.15/- (Rupees Ninety eight Crores Nineteen lakhs Nine Thousand Seven Hundred Fifteen and Paise Fifteen Only). The Petition is filed on 19.06.2023. The date of default as Specified in Part IV of the Petition is 28.12.2015 which is the date of NPA.
2. On 09.02.2023, the Adjudicating Authority by way of the Impugned Order, had rejected the Application primarily on the grounds of limitation. The present applicant therefore preferred a Company Appeal (AT) (Ins) No. 472 of 2023 against the impugned order dated 09.02.2023 before National Company Law Appellate Tribunal under section 61 of IBC Code, 2016. The same was allowed on 14.09.2023 and the

impugned order was set aside and the matter was remitted back to this tribunal. The relevant extract of the said order is reproduced below:

.....Since, the fact regarding the earlier Settlement of 2018 went unnoticed, we are of the opinion that impugned order dated 09.02.2023 can be set aside and matter is remitted back to the Adjudicating Authority to examine the application filed under Section 7 of the Code, without being influenced by the earlier order since it has already been admitted by the Respondent that Settlement had taken place on 14.03.2018 within three years from the date of declaring the account as NPA on 28.12.2015.

Ld. Adjudicating Authority without being influenced with this order may examine the application filed under Section 7 of the Code by the Appellant/Financial Creditor and pass order expeditiously in accordance with law. For abundant precaution the appellant is granted liberty to bring on record before the Adjudicating Authority Settlement Agreement dated 14.03.2018 in which the Respondent/Corporate Debtor had acknowledged the debt and agreed to pay Rs. 9,40,00,000/- (Rupees Nine Crores and Forty Lakhs Only)....”

3. In view of the Order passed by the Hon'ble NCLAT, the Applicant filed a Restoration Application No.35/2023 on

29.09.2023. Thereafter, the tribunal was pleased to restore the Company Petition re-numbering it as RCP/5/2023 on 06.11.2023. The said matter was listed on various occasions and on 30.01.2024 the matter was heard and Reserved for Orders.

Submissions on behalf of the Financial Creditor:

- a) The Financial Creditor had sanctioned certain debt facilities (including Term Loan, Fund Based Working Facility, Non-Fund Based Working Facilities, One Time Project LC and Forward Contract Limit) to the Corporate Debtor vide Sanction letter dated 07.05.2011 to the tune of Rs.49,04,00,000/-.
- b) The abovementioned facility was renewed and enhanced from time to time.
- c) While all other sanction facilities in the nature of working capital debts and were repayable on demand, the Term Loan facility had to be repaid by the Corporate Debtor in accordance with the agreed Repayment Schedule.
- d) The account of the Corporate Debtor was classified as NPA on 28.12.2015.

- e) To initiate the securitization process against the Corporate Debtor, the Financial Creditor moved before the Hon'ble DRT-II, Ahmedabad which was challenged by the Corporate Debtor vide S.A. No. 40 of 2018 on 15.02.2018.
- f) Thereafter, in S.A. No. 40 of 2018, the Corporate Debtor had filed an application dated 14.03.2018 before the Hon'ble DRT-II, Ahmedabad wherein, the Corporate Debtor, while acknowledging and admitting its liabilities towards the Financial Creditor, proposed to pay an amount of Rs. 9,40,00,000 (Indian Rupees Nine Crores and Forty Lacs Only) to the Appellant/Financial Creditor towards amicable settlement, and in exchange, sought release of certain immovable properties of the Corporate Debtor held as security by the Financial Creditor against the facility granted to the Corporate Debtor.
- g) Meanwhile, the Financial Creditor issued the Loan Demand Notice dated 10.05.2019 to the Corporate Debtor claiming a total amount of Rs.81,22,40,826/- (Rupees eighty-one crore twenty-two lakh forty thousand eight hundred twenty-six only) due as on 09.05.2019.

h) Thereafter, on 27.11.2020, the Financial Creditor filed the Application U/s 7 before the Adjudicating Authority for initiating CIRP against the Respondent/Corporate Debtor.

Submissions on behalf of the Corporate Debtor:

- i. The present application is not maintainable as it has not been instituted by a person authorised by the Financial Creditor; the present application is not complete in all aspects and deserves to be rejected at the threshold; the present application is barred by limitation.
- ii. The Financial Creditor has clubbed several and distinct Financial Debts arising under different heads and agreements into a single application which is not permissible under law and amounts to misjoinder of cause of action.
- iii. The alleged outstanding amount has become time barred. The applicant has already filed proceedings before the Debt Recovery Tribunal. This clearly shows that the present application is just a coercive pressure tactic and the same is an abuse of the process of law.

Findings:

5. We have heard the arguments of Learned Counsel for Financial Creditor and the Corporate Debtor.

- a. This bench notes that the Financial Creditor has placed reliance on Authority letter dated 27.11.2020. Therefore, the plea raised by the Corporate Debtor stating no Board Resolution or letter of authority has been annexed by the Financial Creditor has no substance; the Corporate Debtor also states that the Financial Creditor has filed proceedings before the Debts Recovery Tribunal, however the Hon'ble Supreme Court in ***Civil Appeal No. 2348 of 2021 Tottempudi Salalith v/s. State Bank of India & Ors.*** held that “...*the doctrine of election cannot be applied to prevent the Financial Creditors from approaching the NCLT for initiation of CIRP...*”. Therefore the plea raised by the Corporate Debtor cannot be taken into consideration; the remaining contentions raised by the Corporate Debtor are devoid of merits.
- b. We take note of decision passed by Hon'ble NCLAT as stated in para 2 of the Order. Based on the documents placed on record by Financial Creditor in compliance of the NCLAT order dated 14.09.2023, it is clearly evident, that the Corporate Debtor has acknowledged its liability in respect of dues payable to the Financial Creditor by way settlement agreement dated 14.03.2018. The relevant extract of the same is reproduced below:
- “ *the above mentioned properties are alleged secured assets with the applicant bank, but to avoid multiplicity of litigation*

and to reduce the alleged liabilities with the help of friends and relatives are ready and willing to support the present application for release of properties and further ready to deposit the amount within specific time as mutually agreeable with the bank and accordingly from the date of order for release of the property as under:....”

Therefore, this bench is of the considered view that, the above plea raised by the Financial Creditor clearly states that there is an outstanding debt which is to be paid by the Corporate Debtor to the Financial Creditor and a fresh period of limitation computes from the date of such acknowledgement. The Financial Creditor in the application form-1 dated 27.11.2020 in part – IV column -2 with regard to date of default it is mentioned that the date of default is 28.12.2015 i.e. (the date of NPA) the date of default will be 90 days prior to the date of NPA i.e. 28.09.2015. The petition was supposed to be filed on or within 27.09.2018 however considering the abovementioned settlement agreement dated 14.03.2018 a fresh period of limitation i.e. 3 years computes from the date of such acknowledgement. The present petition is filed on 27.11.2020 which is within the period of limitation and it is a fit case for admission of the present Company Petition.

- c. The Tribunal, while adjudicating upon an application for admission into Resolution Process filed by a Financial Creditor, is mandated to ascertain the existence of the debt, and any default in payment of such debt. Further in the facts and circumstances as set out, it is clear that the Corporate Debtor is unable to pay off its debts arising in the usual and ordinary course of its business and is in default of the amount claimed in the petition.
6. Considering the facts placed before us and the fact that, the Corporate Debtor owes the Financial Debt in excess of Rs.1 Crore, which is in default, this bench is of the view that in such circumstances, it is imperative that the Corporate Insolvency Resolution Process to be initiated in the matter of the Corporate Debtor. The petition is complete in all aspect. Since, the debt and default exist, this bench is of the view, that the present case deserves to be admitted under Section 7 of the Insolvency and Bankruptcy Code, 2016.

ORDER

- (a) The Petition bearing RCP No. 05/2023 filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by by State Bank of India (“Financial Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Kosas Industries Private Limited., the Corporate Debtor is **Admitted**.

- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
- (i) 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;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium, -
- i. The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

- ii. That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) The bench hereby appoints **Mr. Jeetendra Rajpal Daryani**, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number **IBBI/IPA-001/IP-P00678/2017-2018/11146** and email- **nikhil564@yahoo.com**. He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.

- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor 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.
- (h) The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees Five lakh only) 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. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- (i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a

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compliance report in this regard to the Registry of this Court
within seven days from the date of receipt of a copy of this order.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
29.02.2024.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)