

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

C.P (IB) No. 1712/KB/2019

A Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

IDBI Bank

...Financial Creditor

Versus

Dutta Agro Mills Private Limited (CIN U15142WB1995PTC073558), a Company incorporated under the Companies Act, 1956 having its registered office at Vill:- Dhunui, P.O.:- Paharhati, P.S.:- Memari Dist.- Burdwan, Dhunui, West Bengal.

...Corporate Debtor

Date of Hearing: 10.06.2022

Date of pronouncing the order: 04.07.2022

Coram:

Shri Rohit Kapoor

: Member (Judicial)

Shri Harish Chander Suri

: Member (Technical)

Appearances (through Video Conferencing/ physical hearing)

- | | | |
|-----------------------------------|---|------------------------|
| 1. Mr. Shaunak Mitra Advocate | } | For Financial Creditor |
| 2. Mr. Siddhant Makkar, Advocate | } | |
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| 1. Mr. Nimish Mishra, Advocate | } | For Corporate Debtor |
| 2. Mr. Debjit Mukherjee, Advocate | } | |

ORDER

Per Rohit Kapoor, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by IDBI Bank (***‘Financial Creditor’***), by Ms. Minky Pramanik, Deputy General Manager, duly authorised through Authorization Letter for initiation of Corporate Insolvency Resolution Process (“CIRP”) against Dutta Agro Mills Private Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on 24 September, 2019 before this Adjudicating Authority on the ground that the Financial Creditor had advanced several cash and credit facilities (***‘Credit facility’ or ‘Loan’***) to the Corporate Debtor.
4. The total amount to be claimed in default by the Financial Creditor is Rs.90,46,34,744.71/- (Rupees Ninety Crore Forty Six Lakh Thirty Four Thousand Seven Hundred Forty Four Hundred and Seventy One Paisa only) including interest as on 01 August, 2019.
5. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.5,00,00,000/- (Rupees Five Crores only) with paid up Capital as Rs.4,93,90,000/- (Rupees Four Crore Ninety Three Lakh Ninety Thousand only).

Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor

6. The Financial Creditor had granted several creditor and cash facilities to the Corporate Debtor and the Corporate Debtor defaulted in repayment of such

facilities. The debt amounting to Rupees 90,46,34,744.71/- (Ninety Crore Forty Six Lakh Thirty Four Thousand Seven Hundred Forty Four and Seventy One Paise only) as on 01/08/2019 for the accounts- '135655100000310', '7005671200000028', '7005631500000019', '7005631500000028', '7005631500000037', '7005631500000046', '7005631500000055', '7005631500000064' and '1526778000000295' being maintained in the name of the Corporate Debtor with the Financial Creditor Bank.

7. The first default occurred on **16 November, 2012** for the above mentioned accounts of the Corporate Debtor maintained with the Financial Creditor. The accounts of the Corporate Debtor were declared NPA by the Financial Creditor Bank on 31/03/2013.
8. Further, the Financial Creditor on 09/07/2013 issued a reminder for loan recall notice to the Corporate Debtor to repay the debts due to the Financial Creditor for financial assistance granted to the Corporate Debtor. Thereafter, the Financial Creditor issued notice dated 27/08/2013 invoking Personal Guarantee of the Directors of the Corporate Debtor, namely Shri Ramdas Dutta, Shri Debdas Dutta and Shri Biprodas Dutta.
9. Pursuant to the same, the Financial Creditor issued letter dated 16/09/2013 to the Corporate Debtor regarding redemption of Mortgage for the default committed by the name of the Corporate Debtor for the accounts maintained with the Financial Creditor Bank. However, the Financial Creditor finding no other alternative took recourse under the SARFAESI Act, 2002 and issued notice dated 05/10/2013 u/s 13(2) of the said Act for the accounts in the name of the Corporate Debtor maintained with the Financial Creditor Bank.

10. Subsequently, the Financial Creditor Bank issued notice dated 01/01/2014 u/s 13(4) of the SARFAESI Act, 2002 to the Corporate Debtor through its Directors for the default committed by Dutta Agro Mills Pvt. Ltd.
11. That the Financial Creditor finding no proper relief for recovery of credit facilities granted to the Corporate Debtor and having no further alternative for recovery of the amount due from the Corporate Debtor, the Financial Creditor Bank in consonance with the Corporate Debtor offered for an OTS (One Time Settlement) letter dated 30/08/2019 under the I-ARMY: 2018-2019 to the Corporate Debtor on the ground and event, that in case the Corporate Debtor is not able to pay the entire outstanding dues for the accounts maintained with the Financial Creditor Bank in the name of the Corporate Debtor. Further on request from the Corporate Debtor, the Financial Creditor issued letter dated 18/12/2019 intimating revised offer for One Time Settlement under the I-ARMY: 2018-2019 for the accounts maintained in the name of the Corporate Debtor with the Financial Creditor with extended Timelines.

Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor

12. As alleged by the Financial Creditor, the account of the Corporate Debtor was classified as NPA on 31 March, 2013 but there is no allegation of default in the application anywhere. Subsequently, by way of a supplementary affidavit, the Financial Creditor has alleged the default as on 16 November, 2012.
13. It is pertinent to mention that the default could not have taken place on 16 November, 2012 because as per the sanction letter dated 06 February, 2012 the loan account would be due for repayment before 24 January, 2013. There is no evidence to substantiate that the default was on 16 November, 2012.
14. For a statement of Accounts to be admissible before the Court, it has to be in accordance with the Bankers Book of Evidence Act, 1891. But the Financial

Creditor has failed to establish that the statements of accounts are in accordance with the Bankers Book of Evidence Act.

15. Reliance has been placed on *Sampuran Singh v. Niranjana Kaur* (AIR 1999 SC 1047), *Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Limited & Anr.* ((2019) 9 SCC 158) and *Gaurav Hargovindhbhai Dave v. Asset Reconstruction Company (India Limited) & Anr* ((2019) 10 SCC 572)
16. Further, the Auditor is a third party and does not have and authority to decide or to adjudicate an issue on 'default'. It is this Adjudicating Authority to adjudicate on default.

Analysis and Findings.

17. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor. The issue that arises before us is '***whether the Petition under section 7 of the Code is barred by limitation or not?***'
18. Upon perusal of the record it is apparent that transaction between the parties was purely financial in nature and there is an existence of Financial Debt. From the records it is apparent that the Corporate Debtor continued its operation but failed to service its interest on 31-01-2013, 28-02-2013 and 31-03-2013.
19. The Corporate Debtor also made the last part payments of the sanctioned loan amount with the Financial Creditor Bank on 04 mat, 2014. However, thereafter the Corporate Debtor has not made arrangements to pay the dues owed to the Financial Creditor.
20. Balance sheet for year ending 2011, 2012, 2013 & 2018 of the Corporate debtor reflects that CD has certain short term borrowings which is showing that there

exists cash credit facilities from the Bank. Further the Balance sheet also reflects secured term loans (Long term borrowings). A corresponding reading of the charges registered as available in the MCA portal expressly states that a charge has been created in favors of the Financial Creditor - IDBI Bank and the same remains to be satisfied. Thus it is evident that the Corporate Debtor is still acknowledging the debt due to the financial creditor being the Financial Creditor in the instant case.

21. Further, as per the Auditors' Report of the Corporate Debtor for financial year ending 31 March, 2018, it states that the Corporate Debtor has defaulted in the repayment of loans or borrowings to financial institutions, banks. *(Page 187 of the Supplementary Affidavit to section 7 application)*. Corporate Debtors own admission that part payments made towards the loan account was with a bona-fide intention of making payment of amounts which were legally due and payable to the Financial Creditor bank. *(Page 11 paragraph 11 of reply to supplementary affidavit as filed by CD)*
22. In ***Laxmi Pat Surana V. Union Bank of India & Anr, decided*** on March 21, 2021, the Hon'ble Supreme Court has held that.

"37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to

initiate action against such entity being a corporate debtor (corporate guarantor would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of PA but before the expiration of three years there from including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under section 7 of the Code.”

23. In ***Rajendra Narottamdas Sheth and Another v. Chandra Prakash Jain and Another***¹, the Hon’ble Supreme Court

“ 23. It is no more res integra that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the application under Section 7 is filed beyond the period of three years from the date of default and the financial creditor furnishes the required information relating to the

¹ 2021 SCC OnLine SC 843

acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences and the application can be entertained, if filed within this extended period.”

24. In light of the above facts and circumstances there has been continuous acknowledgement in the Balance Sheet of the Corporate Debtor for the Financial Balance sheet for year ending 2011, 2012, 2013 & 2018 of the Corporate Debtor, which would extend the limitation period from time to time.
25. The present petition filed by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.
26. Accordingly, it is, hereby ordered as follows:-
 - (a) The application bearing CP (IB) No. 1712/KB/2019 filed by IDBI Bank, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Dutta Agro Mills Private Limited, the Corporate Debtor, is **admitted**.
 - (b) There shall be a moratorium under section 14 of the IBC.
 - (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority 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.

- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) **Mr. Pankaj Kumar Tibrewal**, registration number **IBBI/IPA-001/IP-P-01577/2018-2019/12410**, email: **tibrewalpankaj@yahoo.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, 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 one week from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs.5,00,000/- (Rupees Five Lakh only)** with the IRP to meet the expenses arising out of issuing public

notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby 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) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a 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.

- 27. **CP (IB) No. 1712/KB/2019** to come up on **22.08.2022** for filing the periodical report
- 28. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

The Order is pronounced on 04 day of July, 2022

S, LRA