

IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT- 5, MUMBAI BENCH

C.P. No. 554/IB/MB/2021

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

Small Industries Development Bank of India,

.... Petitioner/Financial Creditor

V/s.

Kalra Overseas & Precision Engineering Ltd.

.... Corporate Debtor

Order Reserved On: 07.09.2022

Order Pronounced On: 10.10.2022

Coram:

Hon'ble Shri. H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (*Via Videoconferencing*):

For the Petitioner : Mr. Shavez Mukri (Advocate)

For the Respondent: Mr. Rohit Gupta (Advocate)

Per: Anuradha Sanjay Bhatia, Member (Technical)

ORDER

1. Small Industries Development Bank of India (hereinafter called '**Petitioner**') has sought the Corporate Insolvency Resolution Process against Kalra Overseas & Precision Engineering Limited (hereinafter called the '**Corporate Debtor**') on the ground that the Corporate Debtor has committed a default in the repayment of loan of Rs. 5,78,41,476/- including interest and penal interest. This Petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the '**Code**')

read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The particulars of Financial Debt are as follows:

Sr. No.	Principal outstanding (in Rs.)	Interest	Other Charges (Penal Interest)	Total Outstanding
1	64,53,000	24,99,167	9,34,845	98,87,012
2	2,38,92,216	88,42,502	28,58,785	3,55,93,503
3	37,50,000	13,15,482	4,56,778	55,22,260
4	25,38,000	9,98,790	4,12,870	39,49,660
5	1,93,259	47,496	16,259	2,57,014
6	5,01,047	1,21,257	35,880	6,58,184
7	15,37,173	3,54,624	82,046	19,73,843
Total	3,88,64,695	1,41,79,318	47,97,463	5,78,41,476

3. The following documents categorically demonstrate the financial debt due and payable by the Corporate Debtor to the Financial Creditor :-

- a. Deeds of Hypothecation dated 23.01.2013, 25.03.2014, 23.03.2015;
- b. Loan Agreement dated 23.01.2013;
- c. Subordinate Debt Agreements dated 23.01.201, 25.03.2014, 23.03.2015;
- d. Deed of Personal Guarantee dated 23.03.2015;
- e. Statement of Accounts as on 10.05.2021 under Bankers Book of Evidence Act, 1981;
- f. Loan Recall notice dated 25.11.2020;
- g. Demand Notice under sections 13(2) SARFAESI Act dated 16.02.2021;

h. Demand Notice under sections 13(4) SARFAESI Act dated 06.05.2021.

4. The Petitioner submits that, the Respondent had approached the Petitioner and requested to grant Financial Facilities. Subsequently, the Petitioner issued a Letter of Intent dated 26.12.2012, for Direct Credit Scheme & Risk Capital and thereafter entered into a Loan Agreement dated 23.01.2013 and Subordinate Debt Agreement dated 23.01.2013. Subsequently, a Modification letter was issued on 24.09.2013. Further the Corporate Debtor executed a Deed of Hypothecation dated 23.01.2013, thereby creating charge on its movable properties. That the said loans were sanctioned to the tune of Rs. 150 lakhs and 150 lakhs and the amounts came to be disbursed on 24.01.2013, 23.09.2013, 03.10.2013, 14.02.2014 respectively.

5. The Petitioner submits that, it had issued a Letter of Intent dated 24.03.2014, for Risk Capital Facility for and accordingly entered into a Subordinated Debt Agreement dated 25.03.2014. That the corporate debtor provided Deed of Guarantee, Copy of Undertaking for overrun, non-disposal of shareholdings & non-withdrawal of unsecured loans dated 25.03.2014 towards the said Loan. Further a mortgage came to be recorded under Entry No. 332 dated 26.03.2014 and Entry No. 341 dated 27.06.2014. Consequently, the said loan was sanctioned to the tune of Rs. 100 lakhs and the amount came to be disbursed on 28.03.2014.

6. The Petitioner submits that, it had issued a Letter of Intent dated 27.02.2015 and accordingly entered in to a Subordinate Debt Agreement dated 23.03.2015. The Petitioner further submits that, a Modification letter was issued on 19.03.2015. Thereby, the Respondent provided Deed of Personal Guarantee, Copy of Undertaking for overrun,

non-disposal of share holdings & non-withdrawal of unsecured loans, Power of Attorney, General conditions Rupee Loan, Declaration & Undertaking dated 23.03.2015 and 20.05.2015 towards the said Loan. Further a mortgage recorded dated 23.03.2015 and the Respondent executed a deed of hypothecation dated 23.03.2015, thereby creating charge on its movable properties, the said loan was sanctioned to the tune of Rs. 250 lakhs and the amount came to be disbursed on 26.03.2015, 15.04.2015 and 21.05.2015.

7. The Petitioner submits that, there was a Restructuring/ cure period (interest Funding) in respect of the Risk Capital loans by sanction of 3 loans viz. 6.28 lakh, 7.38 lakh and 18.59 lakh and a letter dated 01.12.2017, was issued for sanction for cure period interest. However due to liquidity crunch, the Respondent was given cure period in respect of risk capital assistance in 2017, which, however, could not revive the unit and the account of the Respondent became NPA on 09.12.2018.

8. The Petitioner submits that, in view of non-clearance of dues, a Section 7 application was filed before the NCLT Mumbai bearing C.P.(IB)-2520(MB)/2019 on 01.07.2019 by the Petitioner. However, before its final admission, the Respondent had submitted for a consent to clear the dues by way of an OTS, for an amount of 350 lakh by which,
 - (i) Part-advance of 5 lakhs towards OTS was made on 09.10.2019 with assurances;
 - (ii) to pay 10.0 Lakhs between November 2019 to March, 2020;
 - (iii) Balance payment of 3.35 crore to be paid by final takeover of the debt by the ARC by 31.03.2020.

Accordingly, Applicant filed consent terms before the NCLT and application came to be withdrawn vide order dated 09.12.2019.

9. The Petitioner submits that, despite repeated requests for a financial commitment to honour the OTS, the Corporate Debtor did not come forward to clear the dues. As a prudent measure, the Petitioner issued recall notice on 25.11.2020 and notice under sec 13(2) of SARFAESI act on 16.02.2021 and thereafter notice under sec 13(4) of SARFAESI act on 06.05.2021.

10. The Petitioner Submits that, in view of the above, outstanding dues by the Respondent can be determined and verified by the statement of accounts of the company as on 10.05.2021, along with the Certificate as per the Banker's Book of Evidence Act, 1981.

Reply Filed by the Corporate Debtor

11. The Respondent in its Reply has denied each and every allegation and contention raised by the Petitioner.

12. The Respondent submits that, the Petitioner had introduced a 'Non-discriminatory and Non-discretionary One Time Settlement Scheme' for settlement and recovery of non-performing assets of Micro, Small and Medium Scale Enterprises (MSMEs) ("**OTS scheme**"). The Petitioner accordingly, made an offer for onetime settlement under the said scheme to the Respondent, by way of a letter dated 23.11.2021, advising the Respondent that their alleged debt of Rs. 4,98,21,129/- is eligible for settlement under the said OTS Scheme for an OTS amount of Rs. 1,99,23,521.25/- whereby the entire amount was required to be paid on or before March 2022, in accordance with the repayment schedule under the OTS scheme.

13. The Respondent submits that, vide its letter dated 29.11.2021 accepted the OTS amount of Rs. 1.99 crores and paid 5% of the OTS amount i.e. 9.96 lakhs to the Petitioner, the Respondent further requested time till 30.06.2022 for the remaining 95% of OTS amount.
14. The Respondent submits that, the Petitioner vide an e-mail dated 30.11.2021 addressed to the Respondent informing that the OTS cannot be sanctioned as it is beyond the repayment schedule set out in the OTS offer which required the Respondent to make payment on or before 30.03.2022.
15. The Respondent submits that it addressed an e-mail dated 31.12.2021 to the Petitioner, in which the Respondent accepted to pay the OTS amount on or before 30.03.2022 as per the offer of the Petitioner in the OTS scheme. The Respondent in the said email requested the Petitioner to consider delay of a few months, if any amidst the situation of the pandemic, upon which the Petitioner addressed a letter dated 05.01.2022 to the Respondent again rejecting the Respondent's application for OTS on the ground that the repayment schedule under OTS proposal had to be strictly as per the OTS scheme and that there was no scope for any consideration as requested for by the Respondent.
16. The Respondent in its reply submits that, through an e-mail dated 06.01.2022 addressed to the Petitioner, the Respondent unequivocally accepted the terms of the OTS offer and fulfilling the obligations under the scheme by paying 5% of the OTs amount i.e. 9.96 lakhs to the Petitioner.
17. The Respondent in its OTS Application, had accepted all the Terms of the OTS scheme. However, The Petitioner delayed the formal communications to the Respondent. Thereafter, the Respondent addressed an email dated 25.01.2022 to the Respondent requesting for the formal communication upon which the Petitioner addressed an e-mail dated 27.01.2022 to the Respondent stating that the application of the Respondent is under

consideration for approval. It was further stated that the letter could be issued only after receipt of Credit Information Report (CIR) of the other lender, Assets Care & Reconstruction Enterprise Limited (ACRE) requesting the Respondent to arrange for the same. The Respondent submits that there was no such condition in the scheme. Consequently, the Petitioner addressed an e-mail dated 21.02.2022 to the Respondent stating that the NPA status of the Respondent with ACRE was unclear and therefore, the Petitioner refused to perform their obligation.

18. The Respondent in its reply submits that the Respondent made another proposal for OTS of a higher amount of Rs. 2.66 crores vide a letter dated 26.04.2022. Upon which, the Petitioner addressed a letter dated 28.04.2022 to the Respondent, refusing the OTS proposal of the Respondent, while acknowledging the receipt of the 9.96 Lakhs against the OTS scheme further the Petitioner appropriated the upfront payment made by the Respondent in the loan account of the Respondent. The Respondent further submits that the Petitioner had no right to appropriate the said amount in the manner they deemed fit furthermore the Petitioner cannot refuse to perform the obligation under the OTS.
19. The Respondent submits that, the Petitioner was legally bound to perform its obligations under the OTS scheme. Since the Petitioner defined the scheme as a non-discretionary scheme, therefore the Petitioner had no discretion to deviate from the terms. The Respondent further states that, as it had provided unequivocal consent to the Petitioner as regard to the OTS scheme there existed a binding contract between the Petitioner and the Respondent.
20. The Respondent submits that, the reason for committing breach and illegally withdrawing the benefit of the scheme is contravening to laws and fact since, the Petitioner refused to implement the scheme due to the sole reason of the NPA status of the Respondent with ACRE which was unclear.

In this regard the Respondent submits that, the framework of asset reconstruction companies is designed to acquire the stressed financial assets from the financial institutions, therefore the account with an asset reconstruction company is never, a standard account.

21. The Respondent further submits that, The Petitioner being a public financial institution is 'State' under the purview of Article 12 of Constitution of India, 1949. Hence, the Petitioner is bound by principles of equality under Article 14 of Constitution of India, 1949.

Findings:

22. Upon perusal of the petition, after hearing both the parties, it is an undisputed fact that both the parties with a view to settle the matter has entered into an OTS scheme vide letter dated 23.11.2021. Wherein the OTS amount shall be paid on or before 31.03.2022 by the Corporate Debtor. However, the Corporate Debtor vide letter dated 29.11.2021 to the Financial Creditor proposes the amount to be paid up to June, 2022 and the same was rejected by the Financial Creditor via Email dated 30.11.2021. The Corporate Debtor via letter dated 31.12.2021 has accepted to make the payment under the OTS scheme up to March 2022 which was rejected by the Petitioner, citing the Sanction Letter can be issued only after the receipt of Credit Information Report of the other lender ACRE. Vide letter dated 21.02.2022 the Petitioner has declined the OTS proposal under the NDND 2022 scheme, due to the absence of clarity regarding NPA status with the other lender ACRE. However, the Corporate Debtor vide letter dated 26.04.2022, proposes to settle the dues outstanding by One Time Settlement by offering the sum of Rs. 2.66 Crores towards the Principal Dues and committed to pay the OTS sum before 31.03.2023. The same was rejected by the Petitioner vide the letter dated 28.04.2022, stating that the OTS proposal is only towards principal dues and does not address interest, further interest, penal interest and other cost and charges and advised that the application is not received in prescribed format before the last date i.e. 31.12.2021.

23. It is to be noted that the settlement is derived between the parties only upon the acceptance by the parties, which is not in the present case. Hence, the Bench has come to a conclusion that the Corporate Debtor is liable and defaulted in making the payment to the Petitioner. Considering the above facts, the nature of Debt is a “**Financial Debt**” as defined under section 5 (8) of the Code. It has also been established that there is a “**Default**” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of ‘**debt**’ and ‘**default**’, for admission of a petition under section 7 of the I&B Code, have been met in this case. Besides, the Company Petition is well within the period of limitation.
24. Ongoing through the submissions made by the Learned Counsel for the Petitioner and on perusing the documents produced, which are placed on record, it is clear that the Corporate Debtor has defaulted in repayment of debt. Hence, owing to the inability of the Corporate Debtor to pay its dues, this is a fit case to be admitted u/s 7 of the I&B Code.
25. As a consequence, keeping the aforesaid facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves ‘Admission’.
26. Further that, we have also perused the Form – 2 i.e., written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.
27. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, **Mr. Gajesh Labhchand Jain**, having address

at -D-501, Clifton Society, Raviraj Oberoi Marg, Shastri Nagar, Andheri (West), Mumbai 400 053, and having registration No. IBBI/IPA-001/IP-P-01697/2019-2020/12588, having email id- gajeshjain@gmail.com is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

28. In view of the above, the Bench “**Allows**” the Company Petition No. 554/IB/MB/2021 u/s.7 initiating CIRP against the Corporate Debtor i.e. **Kalra Overseas & Precision Engineering Limited**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.

29. Accordingly, the above Petition is Admitted by passing the following:

ORDER

The above Company Petition No. 554/IBC/MB/2021 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Kalra Overseas & Precision Engineering Limited**.

- a. This Bench hereby appoints **Mr. Gajesh Labhchand Jain**, having address at D-501, Clifton Society, Raviraj Oberoi Marg, Shastri Nagar, Andheri (West), Mumbai 400 053, and having registration No. IBBI/IPA-001/IP-P-01697/2019-2020/12588, having email id- gajeshjain@gmail.com as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- b. The Petitioner shall deposit an amount of Rs.5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon

communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by CoC.

- c. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- d. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- e. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- f. That the order of moratorium shall have effect from the date of pronouncement of this order till the 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 corporate debtor under section 33, as the case may be.

- g. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- h. During the CIRP period, the management of the corporate debtor will vest in the IRP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP.
- i. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- j. Accordingly, C.P. No. 554/IBC/MB/2021 is **admitted**.
- k. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

Anuradha Sanjay Bhatia
Member (Technical)

Sd/-

H.V Subba Rao
Member (Judicial)