

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

[Before Shri Madan B. Gosavi, Hon'ble Member (J)]

CP (IB) No. 148/KB/2018 alongwith CA(IB) No.243/KB/2018,
CA(IB) No.646/KB/2018 & CA(IB) No.1184/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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;

-And-

In the matter of:

State Bank of India has been constituted having under State Bank of India Act, 1955 having its registered office at State Bank Bhawan, 14th floor, Corporate Centre, Madame Cama Road, Nariman Point, Mumbai, Maharashtra-400021;

... **Financial Creditor**

-Versus-

In the matter of:

M/s. Tantia Constructions Limited, registered under the Companies Act, 1956 having its registered office at 25/27, N.S. Road, Kolkata- 700 016; , U23109WB2003PLC097375;

.... **Corporate Debtor/ Respondent**

Counsel appeared:

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|-------------------------------------|---|--------------------------|
| 1. Mr. Ajay Gaggar, Advocate |] | For State Bank of India |
| 2. Ms. Rakhi Purnima Paul, Advocate |] | |
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| 1. Mr. Swatarup Banerjee, Advocate |] | |
| 2. Mr. Avishek Guha, Advocate |] | For the Corporate Debtor |
| 3. Mr. S. Dasgupta, Advocate |] | |
| 4. Mr. Sk. Safirul Haque, Advocate |] | |

5. Mr. Sk. Shahrukh Raja, Advocate]
1. Mr. Debanjan Mukherjee, Advocate] For 26 workers
2. Ms. Suchita Sharma, Advocate]
1. Mr. Krishnendu Bhattacharjee] For 9 workers
2. Ms. Amrita Panja Moulick]

Date of Pronouncement of Order: 13.03.2019

ORDER

State Bank of India - the Financial Creditor filed this application under section 7 of the Insolvency & Bankruptcy Code, 2016 (in short, I&B Code) against **M/s. Tantia Constructions Limited** - the Corporate Debtor to start Corporate Insolvency Resolution Process (in short, "CIRP") of the Corporate Debtor as the Corporate Debtor committed default in paying the financial debt of Rs.213,90,70,549/-.

2. The following facts are not in dispute.

2.1 The bank guaranteed and disbursed the loan in form of various cash credit facilities to the corporate debtor. Such loan and credit facilities were revived and extended from time to time. The credit facilities were lastly extended on 30.03.2016. The corporate debtor committed default in paying the loan. Various creditors of the corporate debtor have filed winding up petition in the Hon'ble High Court at Calcutta. The first of such petition appears to have been filed in the year 2011 [(CP No.363/2011) road builders (M) SDN BHD-vs- Tantia Constructions Ltd.] and the last petition appears to have been filed in the year 2016 (Fairdeal Merchants Private Ltd. -vs- Tantia Constructions Ltd.). It is seen

from the record that there are 32 petitions for winding up of the corporate debtor are pending in the High Court filed by various creditors on the ground of the Corporate Debtor's inability to pay the debt. It is not in dispute that the State Bank of India has also appeared in those proceedings and filed its claim. State Bank of India opposed the proposal of winding up of the corporate debtor stating that there were chances of restructuring of the loan facilities and the corporate debtor may get benefit of RBI scheme of corporate debtor restructuring.

2.2 It is also not in dispute that the Hon'ble High Court passed various orders pending in the above company petitions. The relevant order for the purpose of the controversy involved herein passed by the Hon'ble High Court on 04.04.2016 in CP No.763 of 2015 whereby the High Court admitted the winding up petition. Advertisement was allowed to be published in newspaper on 06.04.2016. This authority had noted this fact in the daily proceeding order dated 02.08.2017 recorded in CP No.95/KB/2017 in case of Autos Infracom Private Ltd. -vs- Tantia Constructions Ltd. It was proceeding under section 9 of IBC. This Adjudicating Authority had considered the fact that the Hon'ble High Court seized with the proceeding of winding up of the corporate debtor. The following order is passed, ***"in this case, if this petition admitted under Insolvency & Bankruptcy Code, 2016 and any order passed, then indirectly it will be interference of the jurisdiction of the Hon'ble High Court, Calcutta, which is exercising jurisdiction into winding up petition against the same company. So, in the circumstances mentioned above, it is necessary to adjourn this proceeding and wait for the order of the Hon'ble High Court in winding up petition in CP No.366/2011"***.

3. On the basis of above admitted facts, now this authority has to see whether State Bank of India's this application under section 7 of IBC against the Corporate Debtor can be considered and admitted? The Corporate Debtor filed affidavit-in-reply. They also filed CA(IB) No.243/KB/18 challenging the maintainability of this proceeding under section 7 of IBC on the ground that the Hon'ble High Court already admitted winding up petition against the corporate debtor. That proceeding got the character of representative suit. Now this authority cannot proceed with this application.

4. Corporate Debtor also contended that this authority by order dated 02.08.2017 already held that since the Hon'ble High Court is dealing with the matter of winding up, it would not be proper to pass order of admission of the CIRP of the Corporate Debtor under the provisions of Insolvency & Bankruptcy Code, as it will be amounting to interference of jurisdiction of the Hon'ble High Court, Calcutta. That order is not challenged by the State Bank of India or any other creditor. Now this authority cannot admit the corporate debtor in the CIRP because this authority cannot sit in appeal against its own order passed above.

5. The Corporate Debtor pointed out that SBI did not disclose in the application under section 7 of IBC the particulars of pendency of winding up proceeding against the corporate debtor. They suppressed the material facts. It is nothing but amounting to seeking some orders from this authority playing fraud. Hence, their application under section 7 of IBC is not maintainable at all.

6. CA(IB) No.646/KB/2018 is Intervenor's application filed by one group of workers of the corporate debtor containing inter alia, that this application is not maintainable on the same ground as raised by the corporate debtor in their demurrer application bearing no. 243/KB/2018.

7. CA(IB) No.1184/KB/2018 is filed by another group of workmen of the corporate debtor challenging the maintainability of this proceeding on the same ground as have been raised by the corporate debtor. The applicant filed replies in both the applications. The parties also filed rejoinders.

8. I heard the Ld. Advocate, Mr. Gaggar for the applicant/SBI and I heard Mr. S. Banerjee for the corporate debtor. Both the Ld. Counsels relied on number of rulings and orders of which reference shall be made at relevant stage of this order.

9. This authority was of the view that Intervenors have no *locus standi* to appear and take part in this proceeding. Accordingly, the order was passed on 03.01.2019. However, intervenors challenged the order before the Hon'ble NCLAT. The Hon'ble Appellate Tribunal directed this authority to allow the intervenors to make submission on some relevant facts relating to winding up petition (order of NCLAT in CA No.44/2019 dated 14.01.2019). In pursuant thereto, I heard the Ld. Advocate appearing for one group of workers and Ld. Advocate appearing for another group of workers. In view of the facts of this case, evidence on record and submissions made by the Ld. Counsels at the Bar, the following points arise for my determination.

10. I record my finding herein with the reasons stated below:

Point No.1 - Whether in view of the fact that the Hon'ble High Court having admitting the winding up petition against the corporate debtor and it is pending for disposal, this authority can consider this application filed by State Bank of India under section 7 of IBC?

Point No.2 - Whether this authority having held in daily proceeding order dated 02.08.2017 in CP No.95/KB/2017 that it is not proper on the

part of this authority to pass any order against the corporate debtor in CIRP under IBC as it may amount to interference of jurisdiction of Hon'ble High Court. Whether this authority can still consider this application filed by SBI under section 7 of IBC?

Point No.3 - State Bank of India did not disclose pendency of winding up petition against the corporate debtor and the order of this authority dated 02.08.2017 in CP No.95/KB/2017. Whether it is amounting to suppression of material fact and playing fraud on this authority?

My answers to point nos. 1 and 2 are in the affirmative and point no.3 is in the negative.

Reasons: Point No.1:

(a) The core controversy as appears from the pleadings of the parties is that the Hon'ble High Court having admitted the winding up petition against the corporate debtor whether this authority can proceed with this application under section 7 of IBC?

(b) Ld. Counsel, Mr. Banerjee for the Corporate Debtor submitted that this authority cannot proceed with the hearing of this application because the winding up petition is already admitted against the corporate debtor by the Hon'ble High Court. To support his argument, Ld. Counsel relied on the order of NCLT (Principal Bench) at New Delhi in Group of Company Petitions bearing No.190/PB/2017.

(c) As against this, Ld. Counsel, Mr. Gaggar for State Bank of India submitted that only because winding up petition is admitted and pending for

consideration of Hon'ble High Court is not enough to stay the proceeding under IBC. It has consistently been held by Other Benches of the NCLT (Principal Bench) NCLAT and the Hon'ble High Courts and even by the Hon'ble Apex Court. The Ld. Counsel relied on those orders and recent rulings to support his point of contention.

12. I have minutely gone through all such rulings and orders relied on by both the Ld. Counsels. I fail to understand as to how the order by Principal Bench at New Delhi could help the corporate debtor to support its contention. It has been held by the Principal Bench as under:

"...Thus there is no bar on NCLT to trigger an Insolvency Resolution Process on an application filed under sections 7,9 &10 if a winding up petition is pending unless an official liquidator has been appointed and a winding up order is passed..."

13. Apart from the above, the same view has been consistently taken in all other orders and rulings. In case of Unigreen Global Private Ltd. -vs- Punjab National Bank & Ors. [Company Appeal (AT)(Insolvency) No.81 of 2017], the Hon'ble NCLAT held in para 31 and 32 as follows:

"31. By aforesaid amendment, the legislatures have made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned in the I&B code.

32. In view of the provisions aforesaid, we hold that, if any winding up proceeding has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order

has been passed, in such case the application under section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10.”

14. The Hon'ble Apex Court in two rulings (i) Reported in 2018 SCC OnLine SC 2801 in case of Jaipur Metals and Electricals Employees Organization-vs-Jaipur Metals & Electricals Ltd., wherein it has been held that, ***“This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code.”***

(ii) Again in case of Forech India Ltd. -vs- Edelweiss Assets Reconstruction Co.Ltd., the ruling reported in 2019 SCC OnLine SC 87, wherein it has been held in para 22 that, ***“From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant.***

However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code."

15. In short, in all orders and ruling, one and the same principle of law is stated is that proceeding under Insolvency & Bankruptcy Code before NCLT is independent and separate proceeding than the proceeding of winding up pending before the Hon'ble High Court. Irrespective of the fact that any winding up petition is pending before the Hon'ble High Court, that does not *ipso facto* debar this Tribunal from proceeding with this application filed by the creditor under section 7 or 9 of IBC. However, once the order of winding up of the companies is passed and once the Official Liquidator is appointed, in such case, this Tribunal cannot proceed with hearing of any application under section 7,9 and 10 of IBC, in view of provisions of section 11 of I&B Code.

16. In view of above settled proposition of law, I hold that though the winding up petition against the corporate debtor is admitted by the Hon'ble High Court, this authority can proceed with hearing of this application filed by State Bank of India (in short, SBI) against the corporate debtor under section 7 of I&B Code. I also noted that SBI's stand before the Hon'ble High Court against the corporate debtor and before this authority is not inconsistent at all. In the High Court, SBI opposed winding up proposal and here in this case, SBI requested this authority to have a resolution of insolvency of the corporate debtor as a first instance and if not the consequences of liquidation may follow. In view of the facts of this case and the settled proposition of law, I hold that though the Hon'ble High Court admitted winding up petition against the corporate debtor, this authority

can proceed with hearing of this application and admit the corporate debtor in CIRP.

I answer Point No.1 in the affirmative.

Point No.(ii)

Next ground on which maintainability of this application is challenged by the corporate debtor is that this authority already held in its order dated 02.08.2017 in CP No.95/KB/2017 that, ***“in this case, if this petition is admitted under the Insolvency & Bankruptcy Code, 2016 and any order is passed, then indirectly it will be an interference of the jurisdiction of the Hon’ble Calcutta High Court, which is exercising its jurisdiction in winding up petition against the same company. So, in the circumstances mentioned above, it is necessary to adjourn this proceeding and wait for the order of the Hon’ble High Court in winding up petition I.e. CP(iB) No.363/2011”.***

17. Ld. Counsel for the corporate debtor submitted that this order is not challenged by the SBI. Now this authority cannot sit in the appeal against its own order and consider the SBI application under section 7 of IBC.

18. The Ld. Counsel relied on ruling of the Hon’ble Apex Court in case of Devendra Pal Singh-vs- State, NCT of Delhi & Anr.(2003) 2 Supreme Court Cases 501. I have gone through the rulings. The Apex Court was considering the point whether it can review its own judgment which reached at finality. It was not any interim order passed during adjournment proceeding. It was the case where judgment of acquittal of the accused for offence of murder was challenged in H.C.. The H.C. held him guilty. Death sentence was awarded. The

appeal was decided by the SC. It converted punishment of death in to punishment of life imprisonment and the SC was considering review petition filed against that judgment by the accused. The ruling is not applicable to facts of this case.

19. I have gone through the order relied on by the Ld. Counsel. It is to be made clear that the order dated 02.08.2017 was passed in daily proceeding under rule 92 of NCLT rules, 2016. By that order, this authority simply adjourned that matter to next date. It is not a final order passed in the proceeding. Moreover, that order was passed way back on 22.08.2017 when law relating to status of the proceeding under I&B Code vis-a-vis proceeding under winding up petition pending against same company was not clearly set out and explained. Now by virtue of orders of NCLAT in case of Unigreen Global Private Limited - vs- Punjab National Bank & Ors. and also in view of the rulings of the Hon'ble Apex Court in the case of Forech India Ltd.-vs-Edelweiss Assets Reconstruction Co.Ltd. Now it is crystal clear that proceeding under I&B Code being distinct and independent proceeding than the proceeding of winding up company, this Adjudicating Authority can proceed with the hearing of the application under section 7, 9 or 10 of I&B Code filed by the creditor or Corporate Person as the case may be. This authority has to take judicial notice of above judgment of the Hon'ble Apex Court as they are having binding precedent on this authority as per Article 141 of the Constitution of India. When this authority passed order dated 02.08.2017, this position of law was not clear.

20. The proceeding in which the above order was passed by this authority it is not pending before this authority. It has been disposed off. It is settled law once the main proceeding gets disposed off, all interim orders passed therein also come to an end. Now, this authority can proceed with hearing of this

application, irrespective of the fact that this authority passed order dated 02.08.2017 in CP No.95/KB/2017. If this authority proceeds with the hearing of this application and pass any order, it will not be amounting to interference of jurisdiction of Hon'ble High Court. In view of the rulings of the Hon'ble Apex Court as noted above, I hold that this authority can proceed with the hearing of this application. It cannot be said that this authority is sitting in appeal against its own order because order cited by the corporate debtor cannot be said to be final order passed by this authority. Hence, I answer point no.2 in the affirmative.

21. **Point No.(iii)** : The Corporate Debtor and Intervenors challenged maintainability of this proceeding on the ground that SBI suppressed material facts of pendency of winding up petition in the High Court. SBI had appeared in that matter. It has opposed the winding up proceeding, etc. Ld. Counsel for the corporate debtor and Ld. Counsel for the Intervenors submitted that it is a classic case of suppression of material facts by SBI. SBI is trying to seek some orders from this authority suppressing those facts. It is nothing but playing a fraud on this Judicial Tribunal. According to Ld. Counsels, such litigants have to be thrown out of the proceeding. They relied on rulings of the Hon'ble Apex Court in case of M.C.D.-vs- State of Delhi and Anr. in Appeal (criminal) 660 of 2005.

22. Ld. Counsel, Mr. Gaggar for the bank submitted that the pendency of winding up proceeding against the corporate debtor is not material fact. It is not that the bank sought some favourable orders from this authority by suppressing those facts. Hon'ble Supreme Court made it clear that if party sought favourable orders from the Courts suppressing some materials facts then it is amounting to playing fraud. In this case, SBI did not get any order from this authority. This authority is yet to pass order of admission of the corporate debtor in CIRP.

23. I have gone through the rulings, wherein it has been held at page 5 that, *"This apart, the respondent did not also disclose the fact in the criminal revision field before the High Court that he has also been convicted in another Criminal Case No.202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. Thus, the contesting respondent has come to the High Court with unclean hands and withholds a vital document in order to gain advantage on the other side. In our opinion, he would be guilty of playing fraud on the Court as well as on the opposite party. A person whose case is based on falsehood can be summarily thrown out at any stage of the litigation. We have no hesitation to say that a person whose case is based on falsehood has no right to approach the Court and he can be summarily thrown out at any stage of the litigation. In the instant case, non-production of the order and even non-mentioning of the conviction and sentence in the criminal case No. 202 of 1997 tantamounts to playing fraud on the Court. A litigant who approaches the Court is bound to produce all documents which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."*

24. I have gone through the rulings in that case. The accused sought benefit of bond of good behaviour upon his conviction by the Court. While doing so, the accused had suppressed the fact that he was convicted previously in another case against which he has filed appeal and it was pending. The Apex Court was of the opinion that accused suppressed material facts of his earlier conviction and sought benefit of bond of good behaviour. In those facts, it was held that such litigant should not be benefitted by the orders of the Court.

25. Here, in this case in Part-V para 2 of the application form, the SBI/Financial Creditor did not give particulars of an order of the Court, Tribunal or Arbitral Panel adjudicating default, if any. It is true that winding up petition pending against the corporate debtor in the High Court is the petition for adjudication of default by the corporate debtor. The real question before me is, by not disclosing that fact in the application, SBI sought any favourable order? My answer to this question is in the negative.

25.1 This authority did not pass any order in favour of the SBI. It is not a case wherein the SBI got some advantageous order being passed by this Adjudicating Authority because it did not disclose pendency of winding up petition against the corporate debtor. No doubt, SBI ought to have disclosed the same in all its fairness but only because SBI did not disclose those facts, is not enough to reject this application. SBI did not seek any order prejudicial to the interest of the corporate debtor. In fact, it is the say of SBI in this proceeding that as the corporate debtor is unable to pay huge debt, its insolvency resolution process may be started. I am not inclined to accept the submissions of the Ld. Counsel for the Corporate Debtor. Ld. Counsels for the Intervenors submitted that SBI by suppressing material facts played fraud on this authority. In my considered opinion, non-disclosure of pendency of winding up petition against the corporate debtor is not a relevant and material fact to decide this application. Hence, I answer point no.(iii) in the negative..

26. There is no dispute to the fact that the corporate debtor is liable to pay the bank the financial debt of more than Rs.213 crores. They committed default in paying the debt. This application is defect-free.

27. The financial creditor suggested the name of Mr. Kshitiz Chhawchharia (Mob.9830492324), C/o- B. Chhawchharia & Co., 8A & B Satyam Tower, 3, Alipore Road, Kolkata- 700 027 having Email id: kshitiz@bccoinia.com and registration no.IBBI/IPA-001/IP-P00358/2017-18/10616. A written communication dated 17.01.2018 of Mr. Kshitiz Chhawchharia, proposed IRP, mentions that there are no disciplinary proceedings pending against him with the Board or Indian Institute of Insolvency Professionals of ICAI. This application is defect-free. Hence, I admit the Corporate Debtor in CIRP by the following order:

ORDER

- (i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process in respect of **Tantia Constructions Limited**.
- (ii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any

- judgement, 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 Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- iv) 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.
- v) 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.
- vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease

to have effect from the date of such approval or liquidation order, as the case may be.

vii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the resolution professional upon receipt of the copy of this order.

(viii) As per the proposal by the Financial Creditor for the appointment of Interim Resolution Professional (IRP), Mr. Kshitiz Chhawchharia (Mob.9830492324), C/o- B. Chhawchharia & Co., 8A & B Satyam Tower, 3, Alipore Road, Kolkata- 700 027 having Email id: kshitiz@bccoindia.com and registration no.IBBI/IPA-001/IP-P00358/2017-18/10616 is appointed as the Interim Resolution Professional for Corporate Debtor for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

(ix) In view of admission of CIRP of the Corporate Debtor, CA(IB) No.243/KB/2018, CA(IB) No.646/KB/2018 and CA(IB) No.1184/KB/2018 stands rejected and disposed off.

(x) Financial Creditor to pay Rs.1,00,000/- as advance fees to the IRP as per Regulation 33(2) of IBBI (IRP for the Corporate Persons), 2016

(xi) IRP is directed to complete the CIRP process in time bound manner as stated in Regulation 40A of IBBI Regulations, 2016.

xii) Registry is hereby directed to communicate the order to the Financial Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post and also by email.

Let the certified copy of the order be issued upon compliance with requisite formalities

List the matter on **29.04.2019** for filing the progress report.

Sd/-
(Madan B. Gosavi)
Member (J)

Signed on this, the 13th day of March, 2019.