

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT V**

C.P.(IB) No. 578 of 2021

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with Rule
4 of the Insolvency and Bankruptcy
(Application to Adjudication Authority)
Rule 2016)

In the matter of

Birla Cotsyn (India) Limited,

Through its Liquidator: Mr. Anil Goel,
E10S, Lower Ground Floor, Kailash
Colony, Greater Kailash- I, New Delhi-
110048

.....Financial Creditor/ Petitioner

Vs

**Godavari Corporation Private
Limited,**

(CIN:U51900MH1946PTC022398)

Industry House, 159, Church Gate
Reclamation, Mumbai-400020

.....Corporate Debtor/ Respondent

Order Pronounced on: 09.05.2023

Coram:

Hon'ble Sh. Kuldip Kumar Kareer, Member (Judicial)

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

Appearance of parties:

For the Petitioner: Mr. Dhananjaya Sud, Advocate

For the Corporate Debtor: Mr. Nausher Kohli, Advocate

Per: Kuldip Kumar Kareer (Judicial)

ORDER

1. This Company Petition is filed by Petitioner, namely Birla Cotsyn (India) Limited, (hereinafter called "**Financial Creditor**") through its liquidator, Mr. Anil Goel, seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Godavari Corporation Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Financial Debt of Rs. 26,24,63,262/-.

BRIEF FACTS OF THE CASE

2. The Financial Creditor is a Company incorporated on 24.09.1941 under the Companies Act, 1913. The Corporate Debtor is a private limited company incorporated on 13.02.1946 under the Companies Act, 1913.
3. Vide order dated 20.11.2018 in C.P. (IB) 579 of 2018 the CIRP proceedings were initiated against the Petitioner and Ms. Sujata Chattopadhyay was appointed as the Interim Resolution Professional of the Petitioner.

4. The CIRP period expired on 19.08.2019 and the liquidation process was initiated against the Petitioner vide order dated 24.09.2019 MA. No. 2929 of 2019 in CP. No. 579 of 2018 whereby Mr. Anil Goel (hereinafter referred to as "**Liquidator**") was appointed as the Liquidator of the Petitioner.
5. It has been submitted that Financial Creditor has granted a loan to the Corporate Debtor amounting to Rs. 21,82,27,495/- and the same is evident from the Balance Sheet of the Financial Creditor as on 31.03.2018. As per the Annual Report of the Financial Creditor as on 31.03.2018, it has been stated that the Financial Creditor had extended loans to the Corporate Debtor which have not been repaid till date.
6. It has further been submitted that the liquidator of the Petitioner Company issued an Email dated 19.02.2021 to the Corporate Debtor asking the refund of the said loan amount. The Financial Creditor has further stated that the Corporate Debtor vide Email dated 01.03.2021 requested for four weeks' time to examine the same.
7. It has been submitted by the Petitioner that Corporate Debtor wrote a letter dated 07.04.2021 to the Liquidator and admitted that the Corporate Debtor owed an amount of Rs. 21,82,27,495/- along with the interest of Rs. 4,42,35,767/- granted by the Financial Creditor.
8. It has further been submitted that the Corporate Debtor has committed a default of total sum of Rs. 26,24,63,262/- till the commencement of the CIRP of the Financial Creditor i.e. 20.11.2018. Since the Corporate Debtor has failed to make the repayment of the said amount, this necessitated the filing of the present petition.

REPLY FILED BY THE RESPONDENT

9. At the outset, the Respondent denied all the allegations made and contention raised by the Petitioner in the present Petition.

10. The Respondent, in its reply, has submitted that the Petition is not maintainable as per Section 11(d) of the Code, which stated that a Corporate Debtor under Liquidation is not allowed to file an application for the initiation of CIRP against any third party.
11. The Respondent has further submitted that the Petitioner has not obtained prior approval from this Hon'ble Tribunal for Initiation of CIRP against a third party, which is a mandatory compliance as per Section 33(5) of the Code.
12. The Respondent has further been submitted that at the relevant time, the Respondent was a Financial Service Provider and the Central Government has prescribed Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Services Providers and Application to Adjudicating Authority) Rules, 2019 ("**FSP RULES**"). As Per Rule 5 of the same, CIRP against a Financial Service Provider will be initiated only if the application is made by the Appropriate Regulator.
13. It has further been submitted by the Respondent that the Petitioner has not produced any material documents to substantiate its claim of a financial debt and therefore, only relying upon certain entries of ledger account, the fundamental requirement of Section 7 of the Code cannot be said to have been fulfilled. The Respondent has also submitted that the said monies were paid as Advance Rent to the Respondent and therefore, the same cannot be termed as Financial Debt.
14. The Respondent has submitted that the present Petition is barred by law of limitation. It was stated that the last payment was made on 29.03.2013, and therefore, the petition could have been filed only within the period of three years from 29.03.2013.
15. The Respondent has further submitted that orders of the Tribunal dated 20.11.2018 and 24.09.2019 admitting the above company petition and

directing the initiation of liquidation proceedings, were challenged by some of the shareholders before the Hon'ble Bombay High Court vide WP. No. 755 of 2020 filed under Article 226 of the Constitution of India. It has further been stated that the Hon'ble Bombay High Court has granted an interim reliefs vide its order dated 16.03.2020 pursuant to which the further auction of the assets of the Corporate Debtor was stayed and same is still in operation. The Respondent, therefore, has requested for stay until the final adjudication of the given Writ Petitions.

16. The Respondent has further submitted that the Petitioner herein has suppressed the significant facts while filing the petition. It has been stated that Petitioner Company had executed a Leave and License Agreement dated 01.01.2008 with one Nirved Traders Pvt. Ltd, for a period of twelve years i.e. from 01.01.2008 to 31.12.2019 for the use and occupy its Registered Office premises situated at Dalamal House, 1st Floor, Nariman Point, Jamnalal Bajaj Marg, Mumbai 400021 in consideration of License Fees. The said Nirved Traders Pvt. Ltd, by way of letter dated 05.01.2008 read with letter dated 10.01.2008, requested the Petitioner Company to remit the amount of License Fees to the Respondent herein. Therefore, the Petitioner Company has been remitting the License Fees to the Respondent.
17. The Respondent has stated that the entire amount of Rs. 21,82,27,495/- paid by the Petitioner Company has been utilised towards the License Fees for the purpose of using the office premises, which is till date under the possession of the Petitioner Company. The Respondent, therefore, submitted that the present Petition is not maintainable and deserved to be dismissed.

FINDINGS

18. We have heard the Counsel appearing for both the parties and perused the records.

19. The present Company Petition has been filed by the Financial Creditor through its liquidator, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor alleging that the Corporate Debtor has committed default in making aggregate payment of Rs. 26,24,63,262/-to the Financial Creditor.
20. Before going into the merits of the matter, the Bench would indicate that the Petitioner is itself a company under-going Liquidation and the present Petition has been filed by the Liquidator of Petitioner. The Petitioner Company went into liquidation vide order dated 24.09.2019. In this regard, reference can be made to the provisions of Section 33(5) of the Insolvency and Bankruptcy Code, 2016 which are being reproduced hereunder:

“(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

*Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, **with the prior approval of the Adjudicating Authority**”.*

21. It is further noteworthy that this Tribunal whilst passing the order of the liquidation dated 24.09.2019 categorically stipulated in para 14(f) as under:

*“Since this liquidation order has been passed, subject to Section 52 of the Code, **no suit or other legal proceedings shall be instituted by or against the Respondent**, in the event of initiation of a suit or legal proceeding by the liquidator on the Respondents behalf, **it may initiate such proceedings with prior approval of***

***this Adjudicating Authority** save and except as mentioned in sub-section 6 of Section 33 of the Code.”*

Upon plain reading of section 33(5) of the code, it can be construed that the Company under Liquidation is disbarred from initiating any legal proceedings without seeking the prior approval of the Adjudicating Authority. However, in this case, no such approval of the Adjudicating Authority is shown to have been obtained any time prior to the filing of the instant petition. Therefore, the Liquidator was not competent to initiate proceedings under Section 7 of the Code. The Bench is further of the view that the proviso under Section 33(5) of the is mandatory in nature. Therefore, the Bench is of the considered view that as the present Company Petition has been filed without obtaining the prior approval of the Adjudicating Authority, it **is not maintainable** and on this short ground merits dismissal.

22. Accordingly, this Company Petition C.P.(IB) No. 578 of 2021 is **“dismissed”** and **disposed of.**

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)