IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-104(PB)/2017

IN THE MATTER OF:

Bank of India .....**Financial Creditor**

v.

Tirupati Infraprojects Pvt. Ltd. .....**Corporate Debtor**

SECTION : Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 03.07.2017

Coram:

CHIEF JUSTICE M.M. KUMAR
Hon'ble President

Deepa Krishan
Hon'ble Member (T)

For the Financial Creditor(s) : **Shri Sanjay Bhatt, Advocate**
Shri Naveen Kumar, Advocate

For the Corporate Debtor(s) : **Shri Manoj Kumar Singh, Advocate**
Shri Vijay Kumar Singh, Advocate
Ms. Daizy Chawla, Advocate
Ms. Vijaya Singh, Advocate

JUDGMENT

CHIEF JUSTICE (RETD.) M.M.KUMAR, HON'BLE PRESIDENT

Bank of India being a lead Bank comprising the consortium of Bank of Baroda, Dena Bank (which has assigned its debt in favour of Phoenix ARC Pvt. Ltd. on March 23, 2016), Canara Bank, Uco Bank, Union Bank of India and Corporation Bank has approached this Tribunal under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity the 'Code') describing itself as 'Financial Creditor' with a prayer to initiate Corporate Insolvency Resolution Process against the 'Corporate Debtor'. The applicant has claimed that it is a 'Financial Creditor' and the respondent is a 'Corporate Debtor' within the meaning of the provisions of the Code.

2. Brief facts necessary for disposal of the controversy raised in this application are that Bank of India is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 with its head office at Mumbai. The 'Corporate Debtor'-Tirupati Infraprojects Pvt. Ltd. was incorporated under the Companies Act, 1956 on 05.01.2007 and is duly registered with the Registrar of Companies, NCT of

Delhi and Haryana. A certificate of its Incorporation alongwith Memorandum of Association and Articles of Association has been placed on record (Annexure A/1).

3. The 'Corporate Debtor' approached the 'Financial Creditor' for grant of term loan facility of Rs. 70 Crores out of its total term loan requirement of Rs. 300 Crores under multiple banking arrangement with a view to set up a five star hotel cum retail space at Plot No. D, Commercial District Centre, Paschim Vihar, New Delhi in area measuring 13158.71 sq. mtrs. It was represented that the 'Corporate Debtor' was a part of group of companies with diverse interest in real estate, public schools, shopping malls and hospitality township developments, etc. It was further disclosed that the 'Corporate Debtor' had acquired land measuring 3.25 acres from DDA and it has already paid a sum of Rs. 60.26 crores to DDA, which was 25% of the total bid value of the land i.e. Rs. 241 Crores. The 'Corporate Debtor' proposed to develop a hotel and shopping complex on the said plot. Accordingly, a letter dated 15.09.2008 was submitted with a request to grant term loan of Rs. 70 Crores.

4. The 'Financial Creditor' considered the request of the 'Corporate Debtor' and after obtaining necessary information sanctioned a term loan of Rs. 50 Crores to the 'Corporate Debtor' vide its sanction letter dated 19.01.2009 on the terms and conditions stated in that letter. It was duly accepted by the 'Corporate Debtor' and the summary of the terms and conditions is as under:-

(Rs. In Crore)

Facility	**Existing**	**Proposed**	**Margin**	**Effective ROI/Commission**
Fund based Limit	-	50	Margin for TL 44% Overall 45%	0.75% over BPLR presently 13.25% p.a. with monthly rest
Total Fund Based	-	50		
Non-Fund Based Limits	-	-		

5. The term loan of Rs. 50 Crores was repayable in 31 quarterly instalments of Rs. 160 lakhs each, and 32nd instalment worth Rs. 40 lakhs. The repayment EMI was to commence from March, 2011. The tenure of the term loan was 10 years and 3

months. The term loan was duly secured by securing personal guarantees of the promoters alongwith following:

"a. First Pari Passu Charge on the entire project assets including mortgage of Project land measuring 3.25 acres (13158.71 sq mtrs) with super structure thereon.

b. Hypothecation of all movable assets of the Project.

c. First Charge over all receivables and other current assets of the Project."

A copy of the sanction letter has been placed on record (Annexure A-3)

6. The terms and conditions indicated and incorporated in the sanction letter dated 19.01.2009 were duly accepted by the Board Resolution passed by the 'Corporate Debtor' on 21.01.2009. The total term loan sanctioned to the 'Corporate Debtor' by the Bank of India Consortium was Rs. 200 Crores apart from a non-fund based facility of Rs. 12.60 Crores sanctioned by Canara Bank. The 'Corporate Debtor' as per the resolution was to execute the necessary documents in favour of the Bank of India Consortium to avail the term loan. A copy of

the resolution dated 21.01.2009 has been placed on record (Annexure A-4). On 16.02.2009 the 'Corporate Debtor' executed various loan and security documents in pursuance of the terms and conditions incorporated in the sanction letter in favour of the Bank of India Consortium, including, the 'Financial Creditor'. It is appropriate to mention the details of the deed of hypothecation executed by the 'Corporate Debtor' which are as under:-

a. On 16.02.2009, the 'Corporate Debtor' executed the term loan facility agreement in favour of the Bank of India Consortium for due repayment of the term loan to the member Banks in accordance with the terms specified. The term loan of Rs. 50 Crores disbursed by the 'Financial Creditor' was to be repaid within a period of 10 years and 3 months in 31 equal quarterly instalments of Rs. 160 lakhs each and the last instalment of Rs. 40 lakhs being 32nd. The term loan repayment was to commence from March 2011 with interest @ 0.75% over BPLR minimum 13.25% per annum with monthly rests (Annexure A-5).

b. The 'Corporate Debtor' also executed on 16.02.2009 a joint deed of hypothecation in favour of the Bank of

India Consortium for creating first pari passu charge on all tangible moveable assets situated at the Project Property and/or in transit along with first pari passu charge on all present and future debts of the 'Corporate Debtor' (Annexure A-6).

The 'Financial Creditor' was appointed as a lead bank vide Inter Se Agreement dated 16.02.2009 (Annexure A-7). All approvals were duly obtained from the 'Financial Creditor' and three members of the Consortium. That earlier sanctioned term loan of Rs. 200 Crores was increased to Rs. 300.00 Crores as the Corporation Bank, Dena Bank and Bank of Baroda had joined the Consortium (Annexure A-8). Similar term loan facility agreement and joint deed of hypothecation were executed (Annexure A-9 & Annexure A-10). The petitioner has also given the details of the Inter Se Agreement dated 06.03.2009 (Annexure A-11) and the Escrow Agreement dated 01.05.2009 (Annexure A-12). The details of the mortgage, title deeds and the amount secured have also been specified which include the land with buildings, sheds and structures etc. As per the resolution of the Board of the 'Corporate Debtor' dated 27.11.2009 (Annexure A-13

& Annexure A-14) various other documents have also been placed on record.

7. It was observed in 2011 that the term loan account of the 'Corporate Debtor' was not in order due to non-servicing of interest for the months of March 2011 to May 2011, amounting to Rs. 2.02 Crores. On the request made by the 'Corporate Debtor' the first restructuring was made and the 'Corporate Debtor' was to make repayment of the loan in 36 instalments instead 32 EMIs in June 2011. The second rescheduling took place in 2013. The matter was referred to the Corporate Debt Restructuring Cell on 16.08.2012 the financial restructuring package on the request 'Corporate Debtor' was approved on 07.03.2013.

8. Despite efforts made by re-structuring the repayment schedule the default took place in 2014 as from August, 2014 onwards monthly interest levied in Funded Interest Term Loan account was not serviced. The statement of FITL account No. 605965610000006 has been placed on record (Annexure A-34). Despite written notices and constant follow up the 'Corporate

Debtor' failed and neglected to make payment to the 'Financial Creditor' in utter disregard and breach of the contractual obligations assumed under the agreement.

9. In para 3 of the reply dated 26.05.2017 filed by the respondent-'Corporate Debtor' has accepted the amount of term loan facility was availed by it for setting up a hotel cum retail space at a plot allotted by the DDA. It has also conceded that term loan of Rs. 50 Crores was sanctioned in January 2009 by the 'Financial Creditor'. The other material facts have not been controverted. It has been stated in the reply that for the reasons beyond the control of the 'Corporate Debtor' the hotel business did not pick up and the loan amount could not be repaid.

10. We have heard learned counsel for the parties.

11. The question which arises for consideration is whether the petitioner has been able to satisfy the requirement of Section 7 of the Code. According to Section 7 (1) of the Code an application by the 'Financial Creditor' either on its own behalf or jointly with the other financial creditor would be competent for initiating

Corporate Insolvency Resolution Process against a Corporate Debtor before the present Tribunal when a default has occurred. It is thus obvious that the lead bank like the petitioner is thus competent to file this application on its own behalf and other banks who are members of the Consortium.

12. In order to ascertain whether the default has occurred. it will be profitable to read Section 3 (12) of the Code which states that default means non-payment of debt when whole or any part of the instalment of the debt has become due & payable and the same has not been repaid by the 'Corporate Debtor'. In the present case, it has come on record that the default has occurred many a time when the restructuring had taken place in 2011 and 2013. In any case finally a default has occurred when the loan account of the 'Corporate Debtor' was classified as NPA on 30.09.2014 in accordance with the guidelines issued by the Reserve Bank of India. In that regard particulars of financial debt have been mentioned indicating that default occurred on 30.06.2014 when the first quarterly instalment of the term loan was due for payment (Annexure A-46). In part IV of Form-1 a sum of Rs. 86,79,49,061.33/- only as on 15.05.2017 has been

claimed to be a defaulted amount and the figure has been rectified by the affidavit filed on 07.06.2017. The total defaulted amount is claimed to be over Rs. 1,09,32,72,312.86/- as per para 9 of affidavit.

13. Learned counsel for the petitioner has argued that in the additional affidavit it has been adequately explained that the present petition has been instituted by Shri Rahulendu Singh who is working as Senior Manager, New Delhi Large Corporate Branch of Bank of India. According to the learned counsel he has been duly authorized by the General Manager S/Shri Ram Krishna Sinha and Mrityunjay Kumar Gupta. It has been pointed out there is a resolution concerning delegation of power to General Manager for granting Power of Attorney to other officers like Shri Rahulendu Singh. On 27.05.2016 a resolution by the Bank of India was passed with regard to delegation of powers to General Managers for granting Power of Attorney to other officers (Annexure A-1 with the additional affidavit). In the aforesaid meeting Memorandum No. HR/T&P/POA/ASC/16-17 dated 27.05.2016 was submitted by Human Resources Department for seeking approval for delegation of Powers to General Managers

for granting Power of Attorney to other officers and it was considered and resolved as under:

"**IT WAS RESOLVED THAT**

APPROVAL be and is hereby accorded for granting Comprehensive General Manager's Power of Attorney in favour of:

(i) Shri Nikhilesh Bhargava;

(ii) Shri Bhalchandra Vasudeo Upadhye;

(iii) Shri Prakash Kashinath Vartak;

(iv) Shri Ram Krishna Sinha;

(v) Shri Mrityunjay Kumar Gupta

for the reasons and as per the details as brought out in the memorandum."

Accordingly, the power of attorney dated 05.01.2017 (pages 761-762 Annexure A-44) duly shows that Shri Ram Krishna Sinha and Mrityunjay Kumar Gupta, the General Manager of the Bank of India have duly authorized and appointed Shri Rahulendu Singh to act as Senior Manager and in para 10 of the power of attorney he has been authorized to do all those acts

mentioned therein. Para 10 of the Power of Attorney reads as under:-

> "10. In respect of any person, firm, society, company, corporation, association, syndicate or body corporate to apply or petition for adjudication as insolvent or bankrupt or for winding up and prove any debt or claim in the bankruptcy or insolvency or winding up and to take any proceedings and appear or cause an appearance to be entered for the Bank in any proceeding for or in or after any such bankruptcy or insolvency or any winding up and to make, sign, verify, affirm, swear, declare and file any petition, affidavit, declaration, application or other claim or affidavit in proof of any debt due or claimed to be due to the Bank and to attend and Vote or to give a proxy to or authorise any employee or employees of the Bank or any other person to attend and vote at any meeting of creditors in any composition or in insolvency bankruptcy or winding up proceedings & to propose, second or

vote for or against any resolution or resolutions at any such meeting and to appear at any public examination or any application for discharge and to vote and/or to take part in appointment of any inspector, trustee or liquidator or receiver or committee and generally to act for the Bank in all insolvency or bankruptcy or winding up proceedings or authorise any employees of the Bank or any other person to so act in the premises."

The aforesaid narration of facts would show that the petition has been instituted by an authorized person namely Shri Rahulendu Singh and the objection raised by the 'Corporate Debtor' would not survive for consideration.

14. On behalf of 'Corporate Debtor' learned counsel has raised some other objections namely that there is mismatch of the defaulted amount given in Form-1 and the affidavit filed on 07.06.2017. On a closer scrutiny, we find that there is hardly any discrepancy. It is true that at various places, the amount mentioned has been Rs. 82,37,29,049.33/-. However, in para 9

of the affidavit filed on 07.06.2017 it has been explained that some discrepancy in calculation had occurred and the actual total amount is Rs. 1,09,32,72,312.86/-. We are not impressed with the objection raised by the learned counsel for the 'Corporate Debtor' for variety of reasons. Firstly, as an Adjudicating Authority we are not entrusted with any function to determine the amount of default. Once the default has occurred involving rupees one lac or more in terms of Section 4 of the Code one of the requirements is satisfied and secondly any objection with regard to amount would be maintainable before the Committee of Creditors. Once default in terms of Rule 3 (12) of the Code is established and all other requirements are fulfilled the Insolvency Resolution Process has to be triggered.

15. On behalf of 'Corporate Debtor' still another objection has been raised which is based on a judgment of the National Company Law Appellate Tribunal rendered in the case of ***JK Jute Mills Company Limited v. M/s Surendra Trading Company,*** Company Appeal (AT) (Insolvency) No. 09 of 2017 decided on 01.05.2017. Placing reliance on para 51 of the judgment learned counsel has argued that seven additional days' time could be

granted to the 'Financial Creditor' for removing the defects and it is mandatory. On the aforesaid principles, it has been submitted that the defects were pointed out on 30.05.2017 and the affidavit removing the defect was filed on 07.06.2017. According to the learned counsel there is delay of one day in filing the objection whereas learned counsel for the petitioner has argued that the there is no delay if language of Section 7 of the Code is considered.

16. We have thoughtfully considered the rival submissions advanced by the learned counsel for the parties and are of the view that in order to arrive at the correct conclusion it would be necessary to examine the provisions of Section 7 (2) and 7 (5) of the Code which read as under:

> **"Initiation of corporate insolvency resolution process by financial creditor.**
>
> 7 (1) .....
>
> 7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner

and accompanied with such fee as may be prescribed.

7 (3) .....

7 (4) .....

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his

application within seven days of receipt of such notice from the Adjudicating Authority."

A conjoint perusal of the aforesaid provision would reveal that form and manner of the application has to be the one prescribed by the authorities. It is required to be accompanied by the prescribed fee. It is further evident that if the application is incomplete as per the requirement of Section 7 (2) of the Code then this Tribunal being the Adjudicating Authority may reject it. However, proviso to Section 7 (5) of the Code postulates that before rejecting the application on the ground that it is incomplete in terms of Section 7(2) of the Code the Tribunal is obliged to give notice to the applicant to rectify the defect in his application. The defect in the application needs to be removed within seven days from the date of receipt of notice.

17. In the present case, no notice contemplated by proviso to Section 7 (5) of the Code was issued by the registry of this Tribunal. In legal parlance expression notice has a definite connotation. It means an advance notification or warning. It shows there was no defect in terms of Section 7 (2) of the Code read with Rule 4 of the Insolvency and Bankruptcy (Application

to Adjudicating Authority) Rules, 2016 (for brevity 'Adjudicating Authority Rules'). On the basis of the order dated 30.05.2017 the argument has been carved out that seven days period commenced on 31.05.2017. Firstly, the order dated 30.05.2017 may not by itself be regarded as notice within the meaning of proviso to Section 7 (5) of the Code. Secondly it is highly doubtful whether the defect concerning power of attorney would be the one covered by Section 7 (2) of the Code. Section 7 (2) of the Code only provides that application has to be in the form and manner as may be prescribed. By virtue of Section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules' Form-1 has been prescribed as performa for presentation of the application by a 'Financial Creditor'. A perusal of Form-1 would reveal that there is no requirement specified in any part of that performa with regard to power of attorney. It would thus mean that there is no defect in terms of Section 7 (2) read with Section 7 (5) of the Code. It does not however lead to the conclusion that there is no requirement of filing a power of attorney. But then it is a different matter and would not be hit by the defect in the performa prescribed by Rule 4 of Adjudicating Authority Rules. It is not that every defect is hit by Section 7 (2) of the Code. Therefore, no

notice by the registry was issued. This is a hyper technical legal argument raised on the basis of order dated 30.05.2017. Taking clue from the order of that date this argument has been advanced. Therefore, we do not accept the submission. Going by that conclusion we find that affidavit has been filed on 07.06.2017 which has consumed seven days' time. Therefore, we do not find any substance in the aforesaid submission and reject the same.

18. For the reasons, aforementioned this petition is admitted. Shri Anil Kohli (Chartered Accountant, LLB) who is duly registered with Insolvency and Bankruptcy Board of India (IBBI/IPA-01/IP-00049/2016-17/1600) has been proposed as an Interim Resolution Professional. He has filed his certificate of registration with Insolvency and Bankruptcy Board of India. He has also filed his written communication dated 16.05.2017 in connection with the application to initiate Corporate Insolvency Resolution Process (pages 69-72). The disclosure has been made in the letter dated 16.05.2017.

19. In pursuance of Section 13 (2) of the Code we direct that public announcement shall be immediately made by the Interim Resolution Professional with regard to admission of this application under Section 7 of the Code. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d). Thus, the following prohibitions are imposed:

> "(a) 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;
>
> (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

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

20. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period.

21. The Interim Resolution Professional shall perform all his functions contemplated, interalia, by Sections 15, 17, 18, 19, 20 & 21 of the Code. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation the Interim

Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

22. The Petition is disposed of in the above terms.

Sd/-

(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

Sd/-

(DEEPA KRISHAN)
MEMBER(JUDICIAL)

03.07.2017
Vineet